FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2019/2020

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

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ANNUAL REVIEW

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Simon Tolson
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It is my great pleasure to preface our 2019/20 Annual Review. This is the 23rd edition of our popular publication. The Annual Review has, like the firm, come a long way since 1996.

At the end of September 2019, the new Legal 500 rankings went live and to our delight we have maintained our ranking as a Tier 1 firm for Real Estate – Construction – Contentious. We have also received some of the best client testimonial comments yet, so a big thank-you to those who gave feedback.

We also again moved up the rankings in International Arbitration. As a business we are conducting more international arbitration than ever before. While fewer disputes are going to the High Court, international construction arbitration is a big hunk of what we do; it has been for many years a key area and it has got steadily larger. Over 50% of our fee income is now international. Our patronage of and participation in the growing new international arbitration centres expands. Several developing nations are either planning or have recently opened their own arbitration centres.

We are also investing significantly in legal technology, aka "legal tech", with the aim of improving services and reducing costs to clients. Fenwick Elliott has an existing relationship with Ayfie, a pioneering global software provider for search and text analytics solutions. We recently adopted Ayfie's Locator, a powerful and sophisticated natural language search engine, for our early case assessment, knowledge management and eDisclosure activities. Locator enables us to find relationships between people, matters and precedents across all digital assets in real time, and allows our lawyers to process large data sets faster and more efficiently, which in turn reduces costs for our clients.

Since 1 September 2019, one of our most senior Associates (dual qualified too), Dr Stacy Sinclair, became our Head of Technology and Innovation. Stacy's role is to research, review and advise on new technologies in the legal tech and construction tech markets, which will enhance productivity and efficiency across our services thereby reducing client costs.

Whilst Fenwick Elliott continues to grow in size and coverage, we take nothing for granted, and appreciate both our clients and the hard work and dedication of the whole team here and in Dubai and beyond.

Our staff retention rates remain second to none for our business; a number of my partners and I have worked together for 30 years, many for over 20, and a number of our employees have been with us over two decades. That stands for a lot in this day and age. We are proud of our synergy.

However, It it has not all been rosy outside the window. It is now pretty clear that main contractors who moved into FM and support services and blended their traditional contracting work with it have got into financial trouble. Then there is the Lutine bell rung on PFI. Fenwick Elliott undertake considerable work on PFI disputes on healthcare, education and infrastructure, chiefly via adjudication, but the beginning of the end for this project finance route was announced by then Chancellor Philip Hammond during his Budget speech last October, when he said: *"I have never signed off a PFI contract as Chancellor and I can confirm today that I never will"*.

The government abolished the use of PFI and PF2 for future projects. It will not, however, take back control of existing PFI contracts but will instead allow them to run their course. While no new PFI contracts will be signed, the lifespan of existing PFI concessions is long and we fully expect to be involved in more that fail (yes I know not all do) as the time comes closer to hand back these projects to the government, NHS Trusts etc. I firmly believe the cases we have been involved in have helped to sharpen up delivery by PFI concessionaires.

There have also been the major legislative changes arising from GDPR, which came into force last year. It saw many of our clients in the construction industry reviewing and changing the way they approach communications and data protection; a journey that has only just begun and will I suspect never end. The eye-watering maximum financial penalty for non-compliance with GDPR is up to €20m or 4% of global turnover (whichever is higher), a scary sanction and increasingly high profile.

The unfolding of the VAT Reverse Charge for Construction Services introduced by the government to tackle VAT fraud now comes into effect from October 2020 not 2019. It is a first; a customer within the construction industry receiving the supply of construction services will soon have to pay the VAT direct to HMRC rather than paying it to the supplier. The reverse charge mechanism moves the liability for accounting for output VAT from the supplier to the customer. This prevents the supplier from charging what purports to be VAT to the customer, but then doing a runner with the VAT element and not paying it over to HMRC. It will undoubtedly have cash flow implications for many of our clients.

Moving to the Middle East, I am delighted by the news that on 1 October 2019 Ahmed Ibrahim became our Managing Partner of our Dubai office. Ahmed's elevation marks the continued growth of the firm and the increasing demand for its services in the region. Ahmed has done an excellent job and been instrumental in our expansion in the Middle East.

Most recently and excitingly, we are pleased to announce the launch of an alliance with local lawyers Hammad & Al-Medhar in Saudi Arabia operating out of Riyadh and Jeddah, focusing on construction and energy matters. We have been working in the Kingdom already, but the creation of this alliance allows us to provide the wider Saudi market with expert knowledge of local laws and procedures, as well as renowned international expertise in construction and energy law. The combination of high-profile international construction and energy lawyers, working alongside lawyers qualified in Saudi and other international jurisdictions together with Arabic speakers, forms a formidable team.

Before I sign off, I want to thank all of you for the opportunities your legal problems and projects have given us to resolve this past year. Long may this continue and be to our common advantage. I hope you will peruse the following pages at leisure, it may also earn you a CPD point or two and help you on your quiz nights!

Welcome to the 23rd edition of our Annual Review. As always, our *Review* contains a round-up of some of the most important developments from the past 12 months including, from page 44, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *Construction Industry Law Letter.*

Jeremy Glover
Partner, Editor

This year's Review reflects the typically diverse range of issues we have found ourselves looking at over the past year. Increasingly this includes digital technology and the wide-ranging benefits it offers to the construction and legal industries. On pages 8-9 Stephanie Panzic looks at the use of drones, whilst on pages 6-7, Mark Pantry reviews the new practice note which provides guidance on using JCT contracts on projects where BIM is to be used.

Continuing with the JCT theme, on page 40, Jatinder Garcha discusses responsibility for compliance with statutory requirements.

Of course, even when using the new technologies you need to ensure that your contract is properly in place first, something Lucinda Robinson discusses on pages 4-5. And if you want to know more about implications of indemnities which are often the subject of much discussion during the pre-contract negotiations stage then Edward Colclough explains more on pages 41-43.

Simon in his introduction mentioned the latest developments in our Dubai office. Ahmed Ibrahim on pages 32-33 writes about multi-tiered dispute resolution clauses in the UAE, whilst James Cameron discusses the new Arbitration Law, Shariah principles and enforcement of awards in the Kingdom of Saudi Arabia on pages 30-31.

It is interesting to see the increased emphasis globally on dispute avoidance and with this in mind, on pages 27-29, Sana Mahmud, looks at the Singapore Mediation Convention which was created with the aim of raising the profile of the mediation in cross-border disputes.

When disputes do arise, the question of whether or not a party has complied with the notice provisions of the contract often becomes a keenly fought part of the process. As I discuss at pages 34-36, there have been a number of cases both at home and abroad recently where the courts have, with some reluctance it must be said, applied the strict notice requirements of the contract.

You also may need to serve a notice if a force majeure situation arises on your project. Ben Smith, at pages 37-39, provides some practical advice on what these clauses actually are all about. With international projects and arbitration in mind, Harrison Small on pages 25-26 looks at the potential liability of parent companies for the actions of foreign subsidiaries

In the UK, whilst the *Grove* case has settled which means that the Supreme Court will not get the chance to comment upon "smash and grab" claims, the widespread use of adjudication continues. On pages 19-20, George Boddy discusses two English cases where the courts have been asked to cut down decisions made by adjudicators, whilst on pages 21-22 Ciaran Williams explains the approach to enforcing an adjudicator's decision in Northern Ireland.

This year there have been a number of cases in the courts looking at issues arising out of completion. On pages 10-11, Jesse Way looks at the meaning of practical completion, whilst on pages 12-13, Martin Ewen discusses whether milestone payments are a sufficient mechanism for payment to comply with the Housing Grants Act and payment legislation. In addition, as Marc Wilkins explains on pages 14-16, the courts have also been looking at whether liquidated (or delay) damages clauses survive termination.

You may also recall that the Aldous Bill, which proposed a number of changes to the way retentions are dealt with was introduced to Parliament back in January 2018. It now appears to have fallen by the wayside, as it was not carried over to the new session of Parliament - a victim of the amount of debating time taken up by Brexit. On pages 17-18, Adele Parsons asks whether it is now time to release retentions as we have come to know them.

Less predictably, there were also a couple of cases this year where the question of the potential liability of approved inspectors, (private individuals or organisations that are appointed on construction projects by the client to verify that the construction work complies with Building Regulations) was explored. On pages 23-24 James Mullen explains more.

If you want to know more, our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. As always, I'd welcome any comments you may have on this year's Review: just send me a message, my contact details are below:

Email jgloverfenwickelliott.com or on **Twitter** @jeremyrglover.

Completing the contract first: does it matter?

It's not unusual for parties to start work without agreeing the formal contract terms first. That can cause a number of potential difficulties, as **Lucinda Robinson** explains.

Commercial drivers mean work must start. Never mind that terms are not agreed, and a contract has not been signed. How many times have we heard this at the outset of a project? When the parties trust each other, the energy levels are high and financial pressures require a quick start, the practical solution is to sort it out later, agree a letter of intent or make do with an exchange of emails. All will be fine, right?

Wrong. Fast forward a few months, or years, when the project is in delay or the building is defective, trust has broken down and the new commercial imperative is to preserve the intended return on investment or profit, or to minimise a loss, and suddenly everyone wants to understand their rights and obligations. The real issue, perhaps payment, defects or delay, cannot be untangled otherwise. The contract, or lack of one, takes the spotlight.

The first questions are: is there a contract and, if so, on what terms? A leading case on contract formation, *RTS Flexible Systems Limited v Molkerei Alois Muller GmbH* [2010] UKSC 14 v Muller, confirmed at Supreme Court level that the court will carry out an objective consideration of what the parties have agreed based on their words and conduct. Whilst the courts apply this principle, it remains difficult to ascertain the existence and content of a contract. Even in *RTS v Muller* it took 3 courts, 9 judges and 3 different decisions to determine there was a contract on MF/1 terms. Plus of course, each case is fact specific.

> "To decide if there is a contract and, if so, on what terms, the court will carry out an objective consideration of what the parties have agreed based on their words and conduct."

Courts have grappled with these questions in three cases recently, highlighting yet again the dangers of proceeding without an executed contract.

Williams Tarr Construction Ltd v Anthony Roylance Ltd & Anthony Roylance [2018] EWHC 2339 (TCC)

Williams Tarr Construction ("WTC") claimed against an engineer, Mr Roylance, who had provided some design services in relation to a defective retaining wall.

The court had to decide if Mr Roylance had contracted in his personal capacity or as Anthony Roylance Ltd, if he had designed the wall or just a drain and if the standard of care was reasonable skill and care or fitness for purpose. Contrary to Mr Roylance's belief that he had contracted through his company, it held that Mr Roylance had contracted as himself. None of the documents exchanged suggested that he was acting as a corporate. Fortunately for him, Mr Roylance was responsible only for the drain on a reasonable skill and care basis only. The wall was a global system and Mr Roylance, who had designed just one part, had not accepted responsibility for the whole or for achieving a higher standard.

WTC admitted the contract had been a "rushed job". There had been email exchanges but they did not adequately clarify the party, scope or standard of care. If they had, litigation may have been avoided.

Arcadis Consulting (UK) Ltd v AMEC (BCS) Ltd [2018] EWCA Civ 2222

AMEC (Buchan) claimed that Arcadis (Hyder) was responsible for the defective design of a car park and should pay £40m. Hyder denied liability and, alternately, argued its liability was capped at £610,000.

The court had to determine if there was a contract and on what terms. At first instance, the Judge found a simple contract existed (mainly because works had been performed), but it did not incorporate either party's terms or a cap, because too much was uncertain and not agreed. The Judge emphasised that the word "accept" had not been used in response to any proposed terms.

The Court of Appeal disagreed. There was a contract, and it incorporated terms including a cap. It distinguished between the agreed interim contract that the parties were working under and the final contract that would take over, which was still under negotiation.

Buchan's letter of intent dated 6 March 2002 was a request that Hyder start work on its terms, which included a cap by reference to another document. It was an "if" contract, under which Buchan promised to pay if Hyder performed. Hyder accepted the interim deal by (importantly) performing and, potentially, by another letter.

It was also recognised that during negotiations all exchanges had assumed Hyder's liability would be limited, so this decision reflected the commercial intent (although this was not the basis of the decision).

1. In Diamond Build Limited v Clapham Park Homes Limited [2008] EWHC 1439 (TCC) the Contractor was not awarded payment for sums incurred in excess of the limit in the letter of intent.

2. Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209.

Anchor 2020 Ltd v Midas Construction Ltd

Works began before a contract was agreed. A series of letters of intent culminated in one expressed to expire on 30 June 2014. That day came and went without a signed contract. When Anchor then sent Midas a JCT DBC 2011, Midas signed it and added a risk register excluding some parts of the scope. Anchor did not agree the exclusions, so did not countersign. Works continued.

When the final account was disputed, a preliminary issue was whether there was a contract and, if so, on what terms. Midas argued that there was no contract and sought payment based on quantum meruit. Anchor said there was a contract on the JCT terms.

The court agreed with Anchor. Even though Anchor had not countersigned, the contract was binding. The key terms were agreed at the point Anchor sent the contract to Midas who had insisted on a written contract, signed it signalling acceptance and (again, importantly) went on to perform the works. The inclusion of the risk register was not a counter-offer because the substance of the terms was not changed; or if it was, only in a manner consistent with a variation. The fact Anchor had not signed did not matter given the other circumstances.

What happens in practice?

These three cases are not extreme examples. Regularly disputes arise involving:

1. Contracts including inconsistent or incomplete terms and referenced documents;
2. Contracts that have not been signed at all or not signed correctly;
3. Battles of the forms, where a loss on this point could cost the defendant its defence, or limits, on liability;
4. Letters of intent that were not finalised, updated when their limits expired or replaced by formal contracts; and
5. Mid-contract “line in the sand” letters aiming to reset the scope, programme and price but failing to clarify those critical issues.

Most of these matters go unreported because they are resolved through negotiation, mediation or adjudication, but they are advised on often.

If a case gets to court then the parties may find themselves, as Midas and AMEC did, bound by terms that they had not intended to agree, especially if works have been performed. Ultimately, the rules that determine their entitlements will not be theirs to decide; by proceeding without a clear agreement they will have lost control.

How can parties protect themselves?

Preaching perfection is easy – close out the contract before works start. On occasion, contract negotiations do not always move at the required pace, in which case consider these points:

1. If getting the contract signed first really is impossible, finalise it quickly afterwards and nominate someone to take responsibility for doing so.
2. Procurement processes should allow a reasonable amount of time for negotiations, expecting a few rounds of discussions and drafting updates.
3. Double-check all details in the contract are clear and correct, including names, price, programme, technical documents and negotiated amendments, so the deal is captured accurately.
4. If a letter of intent, or interim contract, is to cover the period between works starting and a contract being finalised consider if:

   4.1 The issues preventing the formal contract being completed will need to be resolved for a letter of intent, then it may not be possible to agree that either, and a temporary fix may not be possible.

   4.2 It is to be binding in whole or part, or not at all, then ensure the words clarify the intended position precisely. The words “subject to contract” indicate a document is not intended to be binding, but they are not conclusive.

   4.3 It provides sufficient protection, considering it is likely to be shorter and less comprehensive than a full-blown contract.

   4.4 There should be a limit on the scope of work, time period covered, costs to be incurred and the contractor’s liability. Any limits require regular review, and perhaps extension, if a contract is not concluded quickly.[1]
5. Those relying on winning battles of the forms should ensure their terms are the “last shot”; i.e. the ones on the table at the point an offer is accepted.[2] They should ensure (1) their terms are up-to-date, (2) referred to or included on template documents for quotations, purchase orders, order acknowledgements, delivery notes, invoices, email footers and other relevant documents, (3) systems are in place to ensure these documents are issued correctly and at the right time, and (4) personnel are trained to implement those systems.
6. Risk, as well as value, should determine how carefully a contract is documented. In *Arcadis v AMEC* the contract sum was c.£56,000, but the sum in dispute was £40 million.

> *"If getting the contract signed first really is impossible, finalise it quickly afterwards and nominate someone to take responsibility for doing so."*

Final word

Contracts are the instruction manual for implementing projects, the building blocks of trade and the repair scheme for finding a solution when issues arise. Businesses rely on the promises set out within them being kept for the success of their endeavours. When this is forgotten, and care is not taken to put contracts in place correctly or at all, enforcing (for example) the right to be paid on time, or the recovery of the costs of remedial works, becomes much harder. Heeding only the commercial drivers of today, and ignoring those of tomorrow, has its own price.

Working with BIM and JCT contracts

In May 2019, JCT introduced a new Practice Note, *BIM and JCT Contracts*. JCT says that the aim of the Practice is to further the understanding of BIM related legal and contractual issues and suggest ways of approaching such issues in a collaborative and constructive way. **Mark Pantry** explores the extent to which JCT have achieved this.

The construction industry continues to make progress with the implementation of digital technology in construction projects. It is, however, widely accepted that the construction sector significantly lags behind other sectors in capitalising on the benefits of digital technology.

The construction industry's approach to digital technology has been dominated by Building Information Modelling ("BIM") and the implementation of BIM on projects looks to be increasing year on year.[1] While this yearly increase may be true in relation to the technical implementation of BIM it does not appear to have been matched by the contractual application, with some building contracts not accurately reflecting the BIM activities being undertaken in practice. This perceived gap in understanding of the legal and contractual implications of BIM is the focus of the Joint Contract Tribunal's ("JCT") new Practice Note – *BIM and JCT Contracts* (the "Practice Note").

JCT has previously published similar practice notes and supplements on the contractual integration of BIM into its contracts but the 2016 suite of contracts introduced standard (albeit optional) BIM drafting to coincide with the UK Government Construction Strategy of May 2011, which required a minimum level of BIM on all centrally procured public sector projects by 2016. Drafting was provided by the team at the UK BIM Alliance.

While the Practice Note assumes a base level of understanding of BIM, it is intended to be a practical guide, using the JCT's most popular contract, the JCT Design and Build Contract ("JCT DB"), as the basis for its discussion of the relevant clauses. However the guidance provided should be applicable to the other forms of JCT Contracts being used on a BIM - enabled Project.

The Practice Note is split into two parts. Part A is a detailed commentary on the provisions in the JCT DB that are, or could be, relevant where BIM is implemented on a project. The relevant clauses of the JCT DB which are discussed in Part A are provided as extracts in Appendix 3 to the Practice Note. Part B is a BIM Protocol checklist, suggesting a non-exhaustive list of main topics which may be covered by a BIM Protocol.

A similar list of topics for the drafting of the Exchange Information Requirements at pre-tender stage is set out at Appendix 1 to the Practice Note.

In an area dominated by acronyms and definitions (the meaning of some having been changed following the introduction of BS EN ISO 19650), Appendix 2 to the Practice Note contains a helpful glossary of BIM terms.

> *"The JCT hopes to promote further understanding of BIM-related legal and contractual issues and to suggest ways of approaching such issues in a collaborative and constructive way"*

The Practice Note's commentary raises some interesting points on the provisions of the JCT DB which may be impacted by BIM being used on a project:

- BIM Protocol – the BIM Protocol must be specifically identified in the contract particulars; it does not automatically apply where a BIM Protocol is included in the contract documents without reference in the contract particulars. JCT does not publish a form of BIM Protocol and the parties must agree the form of BIM Protocol to be used on a project during the pre-contract stage. The chosen BIM Protocol should be reviewed to ensure that, from both a technical and contractual perspective, it does not contradict the terms of the contract or the other contract documents. The checklist at Part B of the Practice Note is a useful tool for reviewing a BIM Protocol for use on a project.
- Precedence of Contract Documents – the BIM Protocol is a "Contract Document" under the JCT DB; if there is any conflict between the BIM Protocol and the contractual terms of the JCT DB then the contractual terms prevail. This contradicts some model BIM Protocols, including the Construction Industry Council's ("CIC") BIM Protocol, 2nd edition, which states that the protocol will prevail. When using the CIC BIM Protocol with the JCT DB, the parties should consider which document, the BIM Protocol or the JCT DB, should prevail where there is a conflict and amend the documents accordingly.
- Design Submission Procedure – it is often overlooked that a BIM Protocol replaces the design submission procedure set out in Schedule 1 of the JCT DB. The parties should make sure that the BIM Protocol sets out agreed

1. https://www.building.co.uk/focus/bim-survey-2018-the-rise-and-rise-of-bim/5096188.article

2. See our 2017/2018 Annual Review: https://www.fenwickelliott.com/research-insight/annual-review/2017/uk-bim-trant-mott-macdonald

procedures and timings for the submission and approval of designs. Most contractors will be comfortable with the procedure set out in Schedule 1 of the JCT DB (the Employer marking information A, B or C) and some BIM Protocols use similar digital processes.

- Access to the common data environment – following the decision in Trant v Mott MacDonald,[2] the parties should consider who has control of the common data environment ("CDE") and how access is monitored and facilitated. The parties should also consider in which circumstances access to the CDE could be restricted

- Relevant Events and Relevant Matters – the Relevant Events and Relevant Matters in the JCT DB make no reference to BIM but the parties should consider which, if any, BIM-related events should entitle the Contractor to an extension of time and/or loss and expense. For example, if the BIM Protocol was amended by the Employer during a project, would the Contractor be entitled to additional time? Similarly, if unauthorised persons uploaded data to the CDE incorrectly, will the Contractor be entitled to recover its time and costs in rectifying the CDE?

- Practical completion and defects – the BIM Protocol should set out what is to be provided prior to practical completion of works. The Employer's proposed use of the information should also be stated; if an Employer was intending to use the information to form an Asset Information Model ("AIM"), then the Employer's specific requirements in this regard should be clearly detailed in the BIM Protocol.

- Changes – the parties should consider how Changes are instructed and whether the instruction of any Changes will affect the operation of the BIM Protocol.

- Insurance – contractors should review their professional indemnity insurance policy or speak with their insurance brokers to determine whether their policy covers the delivery of BIM under a project. If a contractor is hosting a CDE that is the target of a cyber attack, does it have sufficient insurance in place?

- Termination – the BIM Protocol should include sufficient detail on the procedures following termination of the contract. The consequences of termination may depend on the reason for the termination but it is likely that both parties will require some access to the CDE following the contract being terminated.

"JCT Practice Note is the first to take BS EN ISO 16650 into account"

Conclusions

The increased use of BIM in construction projects is welcomed as part of the wider uptake in digital technology. With the technical and practical implementation of BIM increasing, the contractual position should not be forgotten and the parties to a contract should give sufficient consideration to the operation of BIM within the underlying contractual provisions.

With BIM and the JCT DB this is centred on the BIM Protocol, and the JCT's Practice Note is a helpful starting point for parties who want their contract to adequately incorporate what they have agreed on BIM for a particular project.

Drones: things to think about before taking flight

Drones are nothing new. In fact, they have arguably been around since 1849, when balloons carrying explosives were used in the blockade of the Republic of Venice. However, it is only recently that drone technology has seen an uptake in non-military sectors. Yet, as **Stephanie Panzic** explains, while commercial drones are only now entering their second decade, they are already projected to have an increasingly beneficial impact on the UK economy and society.

PWC recently predicted that, by 2030, there could be 76,000 drones operating in UK skies and 628,000 jobs related to drones, resulting in a £42 billion increase in the UK GDP and £16 billion in net cost savings to the UK economy.[1]

In the construction sector, it is easy to see how drones can help projects to be cheaper, quicker and more accurate. Common uses include:

- Initial site surveys;
- Progress monitoring;
- Site security and safety;
- Mapping and 3D modelling; and
- Transporting goods and reaching dangerous or difficult to access areas.

While we are still in the early stages of drone use, it has been clear from the outset that such use cannot be unlimited. One only needs to consider the Gatwick Airport drone incident of 19–21 December 2018, which affected around 140,000 passengers and 1,000 flights, to appreciate the danger and disruption that can be caused by such technology. It is therefore unsurprising that UK and EU legislation has been introduced, and is still being developed, which places tight restrictions on drone use.

> *"As most drone use will involve data capture and use (usually video footage and photographs), it will be important to ensure that such activities comply with the relevant privacy and data protection laws."*

The Air Navigation Order 2016

The primary source of restrictions on drone use in the UK is the Air Navigation Order 2016 ("the ANO 2016"), including the recent drone-specific amendments made by the Air Navigation (Amendment) Order 2018. EU regulations have also been developed, although the relevant implementing regulations covering drone use will only become applicable from June 2020 (subject to the UK's status in the EU).

What is a drone?

While "drone" is the most commonly understood term for the subject of this article, the ANO 2016 does not use this term. Instead, it uses the term "small unmanned aircraft" (SUA), which is defined as:

> *"any unmanned aircraft, other than a balloon or a kite, having a mass of not more than 20kg without its fuel but including any articles or equipment installed in or attached to the aircraft at the commencement of its flight".*

In this article, it is assumed that the drone in question is equipped to undertake some sort of surveillance or data acquisition (for example, it is equipped with a camera – whether that is being used or not). If the drone possesses no such equipment, fewer regulations apply. It is also assumed that the drone has a mass of 7kg or less. Drones of greater mass than this are subject to additional restrictions.[2]

Restrictions on use

Drones are currently subject to a specific set of conditions contained in articles 94, 94A, 94B, 94G and 95 of the ANO 2016.

Article 94G introduces two people with primary responsibility for safe drone use: The "SUA operator", who will usually be the owner of the drone (such as a construction company or a specific drone subcontractor) and the "remote pilot", who is the person actually flying the drone.

Numerous restrictions apply to such individuals, including:

- The remote pilot may only fly the drone if reasonably satisfied that the flight can safely be made (article 94(2)).
- The remote pilot must maintain direct, unaided visual contact with the aircraft sufficient to monitor its flight path in relation to other aircraft, persons, vehicles, vessels and structures for the purpose of avoiding collisions (article 94(3)). In the UK, the maximum distance normally accepted as possible with unaided visual contact is 500 metres horizontally from the remote pilot, provided the drone can still in fact be seen at this distance.
- Comprehensive restrictions apply on flights that are over or near aerodromes (article 94B).

The ANO 2016 also prohibits drone use in the following instances, unless permission is obtained from the Civil Aviation Authority ("CAA"):

- Flights for the purposes of commercial operations, which includes any flight

1. pwc.co.uk/dronesreport
2. For example, article 94(4) of the SNO 2016.
3. CAA Scheme of Charges (General Aviation) effective from 1 April 2019.
4. At the time of writing this article.
5. https://ico.org.uk/media/1542/cctv-code-of-practice.pdf

by a small unmanned aircraft performed under a contract between a SUA operator and a customer, where the customer has no control over the remote pilot (articles 7 and 94(5));

- Flights higher than 400ft from the surface (article 94A);
- Flights over or within 150 metres of any congested area or an organised open-air assembly of more than 1,000 persons (article 95(2)); and
- Flights within 50 metres of any person, vehicle, vessel or structure which is not under the control of the SUA operator or the remote pilot (article 95(2)).

In light of the above, it is likely that a person or company in the construction sector will require a permission from the CAA before they can use drones onsite. In many cases, the height and distance restrictions are simply not feasible for construction sites operating in occupied areas. The "commercial operation" restriction is less clear cut and could benefit from clearer definition, but has meant that some companies prefer to obtain CAA permission even when operating within the height and distance restrictions but arguably outside the "commercial operation" restriction.

An "exemption" from the CAA must be obtained for flights that fall outside any ANO 2016 requirements other than those for which a "permission" is required, such as the requirement to maintain direct, unaided visual contact.

Applications for permissions and exemptions

If the intended drone use falls outside the scope of permitted use provided by the ANO 2016, the SUA operator may apply to the CAA for a permission or an exemption. In many cases, such applications are very straightforward and relatively inexpensive. Applications are made using the application process on the Unmanned Aircraft System webpage of the CAA website.[3] Once obtained, a permission is valid for up to 12 months.

Available permissions fall into two categories:

- Standard permission – allows commercial operations and operations within a congested area. Requires evidence of pilot competence, evidence of appropriate insurance cover, and an operations manual detailing how the flights will be conducted. At the time of writing this article, an initial charge of £253 applied to such permissions.[4]
- Non-standard permission (or exemption) – all other types of flight. In addition to standard permission requirements, this requires an operating safety case to be submitted to the CAA. An initial charge of £1,771 is applied to such permissions.[4]

How new are drones? For example, in 1849 balloons carrying explosives were used in the blockade of the Republic of Venice.

New requirements

From 30 November 2019, articles 94D and 94F of the ANO 2016 will apply, introducing further requirements for SUA operators and remote pilots. The effect of these articles is that remote pilots and SUA operators will have to apply to the CAA and:

- Pass an online test to get a flyer ID (for remote pilots); and
- Register for an operator ID and label any drones with that operator ID (for SUA operators).

Notably, while remote pilots can be any age (although children under 13 can only apply to the CAA with a parent or guardian present), at present SUA operators must be aged 18 years or over.

Penalties

Failing to follow any of the above regulations carries the risk of a fine on summary conviction. The maximum fine will either be £1,000 (level 3 on the standard scale) or £2,500 (level 4 on the standard scale), depending on the article breached:[5]

- £1,000: Articles 94D or 94F (failing to follow registration requirements applicable from 30 November 2019).
- £2,500: Articles 94 (includes failing to maintain direct, unaided visual contact with the drone and flying a drone for commercial operations without permission), 94A (failing to fly within 400ft of the surface), 94B (aerodrome restrictions) or 95 (includes flying over or within 150m of a congested area or within 30m of a person).

While such fines are not insignificant, more serious penalties can apply if a drone is used to endanger a person, property or an aircraft. For example, article 241 (recklessly or negligently causing or permitting an aircraft to endanger any person or property), carries a fine and/or imprisonment for a term not exceeding two years. Criminal legislation could also apply, depending on the circumstances.

A final word: other considerations

While adherence to the ANO 2016 is of utmost importance to ensure the safe use of drones on construction sites, there are also a number of other matters to consider before flying a drone:

- Data Protection: As most drone use will involve data capture and use (usually video footage and photographs), it will be important to ensure that such activities comply with the relevant privacy and data protection laws. In many cases, the restrictions and requirements will mirror those applicable to CCTV, for which a useful Code of Practice has been published by the Information Commissioners Office.[7] However, the Code has not been updated since the General Data Protection Regulations and Data Protection Act 2018 came into force. These new enactments will also need to be considered by drone users, and an update to the CCTV Code of Practice is expected.
- Insurance: Drone operators must comply with Regulation (EC) 785/2004, which requires insurance coverage for drone flights unless the drone is being used for sport or recreational purposes only.
- Other regulations and restrictions: The ANO 2016 and the other enactments mentioned above may not be the only laws applying to a particular drone flight. For example, the Royal Parks Regulations prohibit the flying of a drone in the Royal Parks where a constable has asked a person to stop flying it or if a notice is displayed in a park stating that it is a prohibited act.

Material breach of contract and practical completion

In 1970, Viscount Dilhorne' in the case of *City of Westminster v Jarvis*, said that:

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

Almost 50 years later, Lord Justice Coulson was asked to consider again the meaning of practical completion. **Jesse Way** takes up the story.

Earlier this year, the Court of Appeal delivered its judgment in *Mears Limited v Costplan Services (South East) Limited & Ors* [2019] EWCA Civ 502 ("Mears"). In Mears, the Court of Appeal had to determine two issues.

The first was whether clause 6.2.1 of the agreement for lease ("AFL") between Mears Limited ("Mears") and Plymouth (Notte Street) Limited ("PNSL"), on its proper construction, deemed a breach of contract to be material so as to allow Mears to treat itself as discharged from its obligations under the AFL. Clause 6.2.1 provided:

> *"6.2 The Landlord shall not make any variations to the Landlord's Works or Building Documents which: 6.2.1 materially affect the size (and a reduction of more than 3% of the size of any distinct area shown upon the Building Documents shall be deemed material), layout or appearance of the Property; or..."*

The second issue was whether, on a proper construction of the AFL, practical completion could be certified when there were known material or substantial defects or breaches of contract.

Mears had appealed from the first instance decision in *Mears Limited v Costplan Services (South East) Limited & Ors* [2018] EWHC 3363 (TCC) in which a number of declarations sought by Mears were rejected.

Background

Mears was a provider of student accommodation. PNSL had engaged a builder to design and construct two blocks of student accommodation. Under the AFL, Mears was to execute a long lease over the property within five days of the issue of a certificate of practical completion. If a certificate of practical completion was not achieved by the relevant date, either party could terminate the AFL. Mears' ultimate objective was to be discharged from its obligations under the AFL.

Prior to completion of construction, it became apparent that a number of the rooms had been constructed more than 3% smaller than as specified in the Building Documents. Mears took issue with this and commenced proceedings.

At first instance, Mears sought five declarations. The effect of Declarations 1–3, if granted, would have been to prevent certification of practical completion. Declaration 4 related to the proper construction of clause 6.2.1 of the AFL and whether it meant a breach of that clause was a material or substantial breach of contract. Declaration 5 was to the effect that there were one or more rooms in the property which had been constructed more than 3% smaller than the sizes specified.

At first instance, Declarations 1–4 were not granted, however Declaration 5 was. It was the refusal of the trial judge to grant Declarations 1–4 which was the subject of the appeal. As it turned out, there were 56 rooms constructed more than 3% smaller than specified.

The Appeal

Issue 1: What was the proper construction of clause 6.2.1?

Mears argued that the failure to meet the 3% tolerance was a material breach and permitted it to treat itself as discharged from the obligations under the AFL. Additionally, Mears argued that if it was wrong in its interpretation of clause 6.2.1, then PNSL would be benefitting from its own wrong (i.e. the failure to build the rooms within tolerance).

PNSL argued that Mears' case was based on a misinterpretation of clause 6.2.1. PNSL accepted any failure to comply with the 3% tolerance was a breach of contract but not that it was a material or substantial breach of contract. In response to the argument that PNSL was benefitting from its own wrong, PNSL maintained it was not relying on its breaches for any purpose (e.g. to justify termination).

The Court held that the parties could agree that a breach of a particular clause amounted to a material or substantial breach of contract. However, the parties did not do that in this case. What the parties did do in clause 6.2.1 is agree that a breach of contract would occur if there was a reduction of more than 3%. The use of the words material and materially in clause 6.2.1 were directed to the size of the rooms, not the nature of the breach. The words of clause 6.2.1 did not support Mears' argument that the resulting breach of contract was material. Coulson LJ stated that if the parties were taken to have agreed that any failure to meet the 3% tolerance, no matter how trivial, amounted to a breach of contract, it would have led to an uncommercial result. It would have meant one trivial failure to meet the 3% tolerance allowed Mears to determine the AFL. Coulson LJ further stated that clear words would be necessary for such a draconian result and there were no such words in clause 6.2.1.

Coulson LJ agreed with PNSL in that it could not be said that PNSL were attempting to rely on its breaches to seek any advantage or gain. It was stated, however, that it would be a matter of factual assessment as to whether or not the breaches were material or substantial and whether they justify determination and/or should have led to a refusal of the certification of practical completion (bearing in mind there were 56 rooms constructed outside of tolerance).

> *"It is not the case that if a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied."*

Issue 2: Could practical completion be certified where there were known material or substantial defects or breaches of contract?

Mears argued that in certifying practical completion, the certifier was bound by clause 6.2.1 of the AFL and therefore bound to recognise that any failure to meet the 3% tolerance was a breach of contract. Furthermore, Mears argued that the certifier had to acknowledge that such a failure was a material breach of contract.

Alternatively, Mears argued that since the breaches (the 56 rooms out of tolerance) could not be remedied without knocking the property down and starting again, they were "*irremediable*" and prevented certification of practical completion.

PNSL's position was that practical completion was a matter of fact and degree, and it was a matter for the certifier as to whether or not the failure to achieve the 3% tolerance prevented practical completion. As to the "*irremediable*" point, PNSL said it did not matter, but what did matter was whether or not the outstanding works could be regarded as trifling. If they were trifling, practical completion could be certified. If they were not trifling, then practical completion could not be certified.

The Court of Appeal considered the authorities relating to practical completion and summarised the law on practical completion as follows:

1. *Practical completion is easier to recognise than define ... There are no hard and fast rules ...*

2. *The existence of latent defects cannot prevent practical completion ... In many ways that is self-evident: if the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.*

3. *In relation to patent defects, the cases show that there is no difference between an item of work that has yet to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.*

4. *Although one interpretation of Viscount Dilhorne in Jarvis and Lord Diplock in Kaye suggests that the very existence of patent defect prevents practical completion, that was emphatically not the view of Salmon LJ in Jarvis, and the practical approach developed by Judge Newey in William Press and Emson has been adopted in all the subsequent cases. As noted in Mariner, that can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.*

5. *Whether or not an item is trifling is a matter of fact and degree, to be measured against 'the purpose of allowing the employers to take possession of the works and to use them as intended' (see Salmon LJ in Jarvis). However, this should not be elevated into the proposition that if, say, a house is capable of being inhabited, or a hotel opened for business, the works must be regarded as practically complete, regardless of the nature and extent of the items of work which remain to be completed/remedied. Mariner is a good example of why such an approach is wrong. In consequence, I do not consider that paragraph [187] of the judgment in Bovis Lend Lease, with its emphasis on the employer's ability to take possession, should be regarded (without more) as an accurate statement of the law on practical completion.*

6. *Other than Ruxley, there is no authority which addresses the interplay between the concept of completion and the irremediable nature of any outstanding item of work. And even Ruxley is of limited use because that issue did not go beyond the first instance decision. But on any view, Ruxley does not support the proposition that the mere fact that the defect was irremediable meant that the works were not practically complete.*

The Court of Appeal then went on to consider the arguments raised by the parties. As the Court rejected the contention that any failure to meet the 3% tolerance automatically amounted to a material breach of contract, the Court decided it was inappropriate to grant the declarations sought by Mears. Furthermore, the Court held:

1. Parties can agree parameters to guide and control certifiers but they did not do that here.

2. Whether a departure from drawings is trifling or otherwise is a matter of fact and degree.

3. In the absence of any express contractual definition or control, practical completion is, at least in the first instance, a question for the certifier.

4. The fact that the property is habitable as student accommodation does not, by itself, mean it is practically complete.

5. The issue of whether or not a breach is remediable is irrelevant to the issue of practical completion. If there is a defect regarded as trifling then it cannot prevent the certificate of practical completion, whether it is capable of economic remedy or not. If the defect is more than trifling, it will prevent practical completion, regardless of whether or not it is capable of remedy.

For these reasons, the Court of Appeal held Waksman J was right to refuse Declarations 1–3.

Conclusion

For the reasons outlined above, the appeal was dismissed. The decision reinforces the principle that drafting in parties' contracts must be clear if a specific result is sought. The summary on the law of practical completion is comprehensive and of assistance to those in the construction industry. One of the key takeaways from the decision is that if parties intend to put parameters on certifiers, then such parameters must be stated in the agreement. Failing that, the decision in the first instance will be a matter for the certifier.

Are milestone payments a sufficient mechanism for payment in construction contracts?

In the recent case of Bennett (Construction) Limited v CIMC MBS *Limited (formerly Verbus Systems Limited)*[1] the Court of Appeal considered whether milestone payments in a construction contract constituted an adequate mechanism for payment in terms of the Housing Grants, Construction and Regeneration Act 1996, as amended ("the Act"). **Martin Ewen** explains more.

The facts

Bennett contracted to Verbus the design, supply and installation of 78 prefabricated modular bedroom units for a new hotel in London. The units were to be made in China and then shipped to Southampton. The contract price was just over £2 million. The contractual terms incorporated the standard form JCT contract. However, the standard JCT provisions for interim payments were deleted in their entirety and replaced by five bespoke "Milestone" provisions:

> Milestone 1: 20% deposit payable on execution of contract;
>
> Milestone 2: 30% on sign-off of prototype room in China;
>
> Milestone 3: 30% on sign-off of all snagging items in China;
>
> Milestone 4: 10% on sign-off of units in Southampton;
>
> Milestone 5: 10% on completion of installation and any snagging.

Importantly, the contract did not contain a specific definition of the term "sign-off".

Verbus produced a prototype of the unit in China but Bennett said it did not comply with the contract. Despite that dispute, Verbus went on to produce the 78 bedroom units in China. Before they left the factory, there was also a dispute as to whether or not these units complied with the contract. Bennett alleged that there were numerous defects. In consequence, there was no actual sign-off of either the prototype or the units themselves, nor any agreement that the prototype or the units had ever reached a stage of completion in which they could have been signed off. In the end, the whole contract came to an end following the liquidation of the developer and the units were scrapped.

The adjudication

A dispute as to payment arose. Bennett refused to pay for the units and relied on the lack of "sign-off", whereas Verbus complained that the "sign-off" requirement did not comply with the requirements of the Act. The decision in the adjudication went in Bennett's favour.

Decision at first instance

Verbus continued to complain that the Milestones, or at least Milestones 2, 3 and 4, did not comply with the requirements of the Act. The Court agreed with that proposition in respect of Milestones 2 and 3, although not of Milestone 4. The Court concluded that it was impossible to alter just Milestones 2 and 3 and that *"for reasons of workability and coherence the only approach on the facts was to incorporate Paragraphs 2, 4 and 5 of Part II of the Scheme for Construction Contracts to supplant Milestones 2 to 5 as a whole"*.

The commercial effect of the Court's conclusions was stark. Prior to the proceedings the principal dispute was whether or not the prototype units had been completed, in a condition in which they could have been signed off as complete. Verbus said they had while Bennett said they had not. On Bennett's case, until that was resolved Verbus was not entitled to payment of Milestones 2, 3 or 4 (or part thereof). However, following the Court's decision Verbus became entitled to interim payments by reference to the value of the work which they had carried out. Verbus became entitled to payment, regardless of whether or not the prototype or the units themselves had reached a stage of completion at which they could have been signed off.

Bennett appealed against both elements of the judge's conclusions.

The appeal

The Court of Appeal said that two particular issues arose. The first was whether a payment regime requiring payment of a percentage of the contract sum on "sign-off" of a particular stage of the works complies with the Act; the second, if it does not, concerns the mechanism by which the Act (and the Scheme for Construction Contracts, which it introduced) is incorporated into the contract in order to "save" the bargain which the parties made.

Issue 1: did Milestones 2 and 3 comply with the Act?

Section 110 of the Act requires every construction contract to contain "*an adequate mechanism for determining what payments become due under the contract and when*". Verbus contended (and the Court at first instance agreed) that the "sign-off" requirement envisaged an actual signing off of the works, and that due payment could be circumvented by a deliberate decision not to sign off or prevent others from signing off the prototype or the units. Verbus also argued that the contract offered no clear criteria for sign-off, because it envisaged the involvement of third parties with no status under the contract at all. For these

1. [2019] EWCA Civ 1515.

principal reasons, they contended that Milestones 2 and 3 did not comply with the Act.

Bennett contended that "sign-off," meant simply the date on which completion of the identified stage of the work (the prototype for Milestone 2 and the units from China for Milestone 3) was achieved (and so was capable of being "signed off"). Bennett argued that the trigger for payment was when the relevant work was completed in accordance with the contractual requirements. Bennett said that Milestones 2 and 3 complied with the Act.

Verbus did not, rightly in the Court's view, challenge Milestones 1 to 5 on the basis of section 109. This is because the contract complied with section 109. Verbus' challenge relied on section 110(1)(a), on the basis that there was no adequate mechanism for determining what payments became due and when. Verbus accepted that there was no difficulty about the amount of each instalment: that was each of Milestones 1–5, expressed as a percentage of the contract sum.

Issue 1 raised primarily a question of interpretation. Did the reference to "sign-off" in Milestones 2 and 3 mean the prototype and units being complete, in a condition in which they could be signed off, or did it mean the date on which they were actually signed off, thereby allowing Bennett to refuse to sign off the prototype or the units and deprive Verbus of payment? Was it a generic reference to the satisfactory completion of a particular stage, to be assessed objectively ("the objective interpretation), or was it a reference to the date on which the sign-off actually occurred ("the subjective interpretation")?

The Court found that "*it was plain, taking the contract as a whole, that the parties intended that, on completion of the relevant stage, the Milestone would be paid*". In other words, the objective interpretation was favoured. The Court noted that there was nothing in the contract that sought to tie in sign-off to the production of a certificate or record of any sort. Further, it noted that if actual sign-off was required, the contract would have said so.

The Court went on to say that even if it was wrong and the contract envisaged actual completion or certification of a signed off document, it would not alter the Court's view as to the adequacy of the payment mechanism. If a unit was in a state where it could be signed off, Bennett could not avoid liability to pay simply because the document had not actually been signed off. Accordingly, the Court could find no difficulties with the use of the word "sign-off" in Milestones 2 and 3. It denoted, in the Court's view, the objective state the prototype and then the units had to reach before the payment was due. It did not require actual signing-off. Even if it did, that could not affect Verbus' entitlement to be paid because, if the prototype or the units were in a state in which they were capable of sign-off, Verbus were entitled to be paid, and a failure to sign off the relevant documentation would not be a defence to Bennett.

The Court held that the Court at first instance was wrong to find that the contract did not contain an adequate payment mechanism for determining what payments became due under the contract, and when. The contract contained an adequate payment mechanism in accordance with section 110 of the Scheme.

Accordingly, the Court allowed the first ground of appeal.

Issue 2: if Milestones 2 and 3 did not comply with the Act, what was the correct mechanism of replacement?

While the appeal was allowed, because of its wider importance for the construction industry, the Court went on to consider what the correct payment mechanism would have been if Milestones 2 and 3 did not comply with the Act in terms of being an adequate payment mechanism.

Section 110(3) of the Act states that "*if or to the extent that a contract does not contain*" adequate mechanisms for payment, "*the relevant provisions of the Scheme for Construction Contracts apply*". These provisions can be found in Part II of the Scheme. This means that a piecemeal incorporation of these provisions is permitted. Therefore, where payment provisions do not comply with sections 109 or 110 of the Act, Part II of the Scheme applies, but only to the extent that such implication is necessary to achieve what is required by the Act.

The Court said that Part II of the Scheme was "*badly drafted*" but nonetheless it was possible "*to pilot a course through it in order to achieve a common sense result that, when applied to this case, does no significant violence to the parties' original agreement*".

The Court considered Milestone payments 2 and 3 to be based on completion of a particular stage of the works. Upon review of the relevant paragraphs in Part II, paragraph 7 ("*Any other payment under a construction contract shall become due on (a) the expiry of 7 days following the completion of the work to which the payment relates* ...") was deemed the only paragraph that could relate to Milestones 2 and 3. On that basis, if the payment mechanism is inadequate because there was no agreement as to timetable for payment, such a timetable is provided by paragraph 7 (7 days after completion).

Payment of Milestone 2 would be due 7 days after completion of the prototype, and payment of Milestone 3 would be due within 7 days of completion of the units.

The Court was of the view that this also resolved any concern about the sign-off provision because it provides for payment after the completion of the relevant work.

Commentary

Where standard payment terms, such as those in the JCT standard form, are replaced by bespoke amendments as to stage/milestone payments, it is imperative to ensure that they are properly drafted. When using stage/milestone payments, it is important to define the exact requirements of each stage. Vague, undefined terms such as "sign-off" should be avoided. Ensure that payment provisions comply with the Act.

Only in very rare circumstances will the payment provisions in Part II of the Scheme replace contractual provisions as to payment in their entirety. The courts will strive to make the original contract work, with terms of the Scheme implied only to the extent necessary to make the payment provisions achieve what is required by the Act. As the Court of Appeal noted in this case, this is not a straightforward task and there is little legal authority on the point. Properly drafted payment provisions will help avoid the need to resort to the Scheme to imply terms. It will also avoid potentially costly disputes.

Will your LADs survive termination?

Those involved with construction and engineering contracts recognise the benefits of agreeing a predetermined level of damages (LADs) which will be payable to the employer, and which will operate as an exclusive remedy in the event the works are delayed beyond the specified completion date. Within this framework, the question as to whether the LADs agreed at the outset will survive the termination of a contract in delay is an important one. Part of the answer is, of course, that it depends on what the contract says. However, as **Marc Wilkins** explains, the judgment handed down by the Court of Appeal in *Triple Point Technology Inc. v PTT Public Company Ltd*[1] earlier this year has prompted those involved in construction projects to look at the provisions relating to LADs.

Liquidated (or delay) damages clauses (LADs) provide certainty as to the consequences for the contractor in the event of breach. They operate as a limitation on the contractor's liability and, from the employer's perspective, dispense with the need to incur the time and cost of proving the actual losses in the event of a breach. When it comes to whether or not LADS survive termination three distinct approaches have emerged from the courts over the past 100 years or so in response to this question. They are: (1) yes, the LADs will survive termination — and will continue to accrue up until the point at which the works are completed by someone else; (2) yes, the LADs will survive termination, but will only apply up to the point at which the contract is terminated; and (3) no, the entitlement to LADs will fall away entirely on termination.

"for all new contracts, parties will need to consider carefully how they wish LADs to apply in the event the contractor's employment under a delayed contract is terminated."

Background

The *Triple Point* case concerned a contract entered into between PTT, a company which among other activities trades in oil, refined products and petrochemical, and Triple Point, a company that designs, develops and implements software for use in commodities trading. PTT had engaged Triple Point to design and install a new Commodities Trading, Risk Management and Vessel Chartering (CTRM) system, and then to develop that system to accommodate new types of trade. The works were to be carried out in phases and the parties had agreed that PTT would make payments against certain milestones within the phases.

The contract included a provision dealing with PTT's entitlement to damages in the event Triple Point failed to achieve the various milestones within the specified time for doing so. Article 5.3 provided that:

> *"CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day from the due date for delivery up to the date PTT accepts such work …"*

Whilst milestones 1 and 2 of phase 1 were delayed beyond the specified date for completion, they were ultimately completed and accepted by PTT. However, prior to Triple Point completing any subsequent milestones or phases, a dispute arose between the parties which resulted in the contract being terminated – the dispute concerned Triple Point's entitlement to further payments. PTT's refusal to make further payments pursuant to invoices issued by Triple Point (on the basis that the milestones/phases to which those payments related had not been achieved) resulted in Triple Point suspending its works. PTT considered the suspension to be unlawful and terminated the contract. That prompted Triple Point to commence proceedings seeking payment of all outstanding sums shown as due on its unpaid invoices. PTT defended that claim and counterclaimed for delay damages and damages due upon termination of the contract.

At first instance, Mrs Justice Jefford found in favour of PTT, dismissing Triple Point's claim in its entirety and awarding PTT US$4.5 million in respect of its counterclaim, of which US$3.46 million was in respect of LADs pursuant to Article 5.3, made up as follows:

(i) US$154,662 in respect of the delay to completion of milestones 1 and 2 of phase 1 (i.e. from 13 October 2013 to 19 March 2014, the date of completion); and

(ii) US$3,304,616.40 in respect of the delay to all other elements of the work from the specified completion dates to 15 February 2015, the date of termination.

Therefore the LADs provision was held to be applicable both where specified stages had been completed and accepted by PTT, and also where specified stages remained incomplete at the date of termination, albeit only up to the date of termination.

Triple Point appealed that decision. Unsurprisingly, one of its grounds of appeal was that LADs for delay were irrecoverable. Triple Point's reasoning for challenging the decision on PTT's entitlement to LADs was firstly that Article 5.3 was in fact a penalty clause which imposed a detriment that was *"out of all proportion to any legitimate interest of the innocent party"* and, secondly, that in any event Article 5.3 was not engaged as it applied only to work which was delayed but subsequently completed and accepted by PTT, but not to work that was never "accepted" by PTT. Therefore, Triple Point was essentially

1. [2019] EWCA Civ 230.

2. [2016] AC 1172.

arguing that by terminating the contract, PTT had lost its entitlement to LADs.

The decision of the Court of Appeal

In respect of the first ground for challenging the LADs awarded, Triple Point relied on the Court of Appeal's judgment in *Cavendish Square Holdings BV v Makdessi.*[2] The Court of Appeal held that despite Article 5.3 referring to a "*penalty*" and despite the contractual formula not being perfect, it did represent a genuine pre-estimate of the losses likely to flow from delay.

Of the second ground, the Court of Appeal said this:

> *"This is a formidable argument which raises questions of general principle concerning the operation of liquidated damages clauses in termination and abandonment cases ..."*

In dealing with this second ground, the Court of Appeal reviewed the authorities relevant to the application of LADs going back to the early 1900s and noted that three distinct approaches had emerged as to how the LADs provision is applied in circumstances where the contractor fails to complete and a second contractor steps in to complete the works. They are as follows:

(i) The LADs clause does not apply (the "*Glanzstoff*" approach);

(ii) The LADs clause applies up to termination of the first contract (the "Greenore" approach); and

(iii) The LADs clause continues to apply until the replacement contractor completes the work (the "*GPP and Hall*" approach).

On the wording of Article 5.3, and in particular the phrase "*up to the date PTT accepts such work*", the Court concluded that the "*Glanzstoff*" approach was the correct approach on the basis that this provision was "*focussed specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion*" and that it "*has no application in a situation where the contractor never hands over completed work to the employer*".

The "Glanzstoff" approach

This approach reflects the view that LADs provide a remedy for the employer in the event that the contractor completes the work late, but in the event the contractor does not complete the work due to the contract being terminated or abandoned, then the employer should be entitled to general damages. Of this approach, Sir Rupert Jackson said:

> *"I see much force in the House of Lords' reasoning in Glanzstoff. In some cases, the wording of the liquidated damages clause may be so close to the wording in Glanzstoff that the House of Lords' decision is binding. That is a decision of our highest court, which has never been disapproved."*

The "Greenore" approach

This approach is generally treated by the textbooks as the orthodox approach. It is based on the view that an employer's accrued rights under the contract should be preserved even if it wishes to terminate the contractor's employment, and that in addition, it should be entitled to claim general damages for any period of post-termination delay to the completion of the works.

However, Sir Rupert Jackson observed that this approach is "*not free from difficulty*", and expressed the view that the employer's right to apply LADs up to the date of termination (and possibly beyond) will depend on the specific wording of the clause. He noted that in circumstances where the LADs clause does provide for the situation where a contract is abandoned or terminated it may be artificial and inconsistent with the parties' agreement to categorise the employer's losses as being £x per week up to a specified date (the termination date) and then general damages thereafter.

The "GPP and Hall" approach

Under this approach, the contractor will be bound to pay LADs up to the point in time when any replacement contractor has achieved completion. The rationale for this approach appears to be that if the contractor was not bound to pay LADs it may benefit from its own default. Whilst conceptually, this approach would seem to have merit (and indeed has received judicial support), in that it seeks to uphold the terms of the bargain agreed by the parties, it does raise problems in that the period for which the original contractor may be liable for LADs will be entirely outside of its control, and may end up being prolonged by delays which are of the replacement contractor's making.

Recognising these problems, Sir Rupert Jackson expressed his doubts about this approach, noting that

> *"if they are correct, it means that the employer and the second contractor can control the period for which liquidated damages will run".*

Comment

As to which approach will be applicable, the Court of Appeal emphasised that much will turn on the precise wording of the LADs provision. However, whilst there remains no single definitive approach, the decision in Triple Point has confirmed that where a provision makes clear that LADs will be payable up to the date of completion (and it is worth noting that a number of contracts are drafted in this way, including JCT and FIDIC forms), termination or abandonment of the contract prior to completion will result in the entitlement to claim or deduct LADs falling away entirely.

However, as was indicated by Sir Rupert Jackson, this would not leave the employer without a remedy for non-completion. Rather, damages will be "at large", meaning the employer would be entitled to claim general damages incurred as a result of the delay. Therefore, in giving this judgment, the Court of Appeal has brought the approach adopted in a largely forgotten House of Lords' decision back into the spotlight, and cast a shadow over the other two accepted approaches.

> *"The correct approach focuses specifically on delay between the contracted completion date and the date completion was achieved. It has no application where the contractor never hands over the completed works."*

Where does this leave contractors and employers? In the event of termination, the contractor may find that the certainty provided by the predetermined level of damages (a risk for which it is likely to have provided) falls away only to be replaced by a potentially much greater liability for general damages. From the employer's perspective, whilst it may offer the potential for a higher level of recovery (in the event the actual damages are greater than the pre-agreed level of LADs), the employer will be faced with the burden of having to prove its entitlement to such damages which may be time consuming and costly. For both parties, the prospect of getting drawn in to potentially costly and protracted legal proceedings will be an unwelcome one.

Therefore parties would be well advised to give proper consideration to the meaning and effect of the LADs and termination provision in their contract, and the potential implications of termination on the ability to deduct or claim LADs, before any decision is taken to terminate or abandon a contract which has not achieved completion but where the contractual date for completion has passed.

As to the negotiation of new contracts, this case underlines the point that precise drafting of LADs (and termination) provisions is essential. Therefore, for all new contracts, parties will need to consider carefully how they wish LADs to apply in the event the contractor's employment under a delayed contract is terminated, and to ensure their intentions are accurately reflected in the written agreement.

Is it time to release retention as we know it?

Retentions have been a common feature in the construction industry for over 100 years, yet over the past two years there has been a growing shift in the construction industry's views on retentions and whether reform of retention as we know it is required. **Adele Parsons** discusses these recent developments further.

From the Government's initial consultation on retention payments in the construction industry in October 2017,[1] to the collapse of Carillion in early 2018 which left millions in unpaid retentions, and the ever increasing number of construction company insolvencies that followed,[2] it became apparent that the current retention system is weighted heavily in favour of those holding retentions, while offering little or no protection or regulation for those providing retentions.

In this article we discuss the apparent change in attitude towards common place cash retentions, the changes proposed and their practicality.

Retention as we know it

Retention is a percentage of payment held back typically by a client or main contractor under a construction contract to act as security, or an assurance that the project works will be completed and that defects which may subsequently develop are remedied. Typically, the first half of the retention is paid when the project is completed, whereas the second half is paid following the expiration of the defects liability period.

It is estimated that the total amount of retention held in the construction sector in England alone over the course of a given year is between £3.2 and £5.9 billion.[3]

At first glance the existing retention practice seems uncontroversial: for the client or main contractor it ensures that the contract works are defect free, whereas in theory the contractor/ subcontractor's money is protected and ultimately released following a contractually agreed specific event or circumstance.

The reality, however, is a very different story where those holding the retentions, i.e. clients and main contractors, are essentially given a carte blanche as to how they hold and use retention money. For example, it is not uncommon for clients and contractors to use retention money to support cash flow or protect project margins as, put simply, retention creates case flow advantages.

Conversely, it tends to be the case that those who are working with small cash reserves and tight margins, i.e. small business and SMEs, are put at risk under the current retention system, which with no statutory regulations or guidance provides no guarantee as to how their money is protected and ultimately held. Neither is there anything within the standard forms of contract that specifies where, or how, retention is to be held or treated by the parties. Those forms only concern the amount of retention and the timing of its release.

The above issues, amongst others, prompted the Government's Retention Consultation and the Department for Business, Energy and Industrial Strategy to appoint Pye Tait Consulting to conduct research into retentions in the construction industry ("the BEIS Report").[4]

The BEIS Report found that around 71% of the contractors surveyed had experienced delays in receiving retention monies.[5] Reasons for this can include: breaches of contract, an oversight by the party holding it, and contractors/subcontractors writing the retention off as a good will gesture or to encourage future work with a particular client or main contractor. However, one of the predominant reasons for the non-release of retention is insolvency higher up the contractual chain.

> *"In New Zealand retention money withheld under commercial contracts must be held on trust in the form of cash, or other liquidated assets unless a financial instrument is purchased."*

Insolvency

The BEIS Report found that 44% of contractors surveyed had experience of retentions not being paid at all within the past three years due to upstream insolvency.[6] In fact those contractors had experienced upstream insolvencies on average 4.2 times each.[7]

The average amount lost per contractor across all their contracts due to upstream insolvencies was £79,900, whereas the average amount lost per contract was £27,300.[8]

Current insolvency rules do not ring-fence retention monies when a company becomes insolvent. Consequently, retention is merely added to the creditor's pot and distributed to creditors in accordance with applicable insolvency rules.

1. Department for Business, Energy & Industrial Strategy (BEIS), Retention payments in the construction industry: a consultation on the practice of cash retention under construction contracts (24 October 2017).
2. The Guardian reported that insolvencies amongst construction firms spiked by 20% following the collapse of Carillion, and a total of 780 companies in the industry fell into insolvency in the first quarter of 2018 – a one-fifth rise on the same period the previous year (Guardian, 1 October 2018); https://www.theguardian.com/business/2018/oct/01/insolvencies-in-uk-building-firms-rise-20-after-carillion-collapse)
3. BEIS, Retention payments in the construction industry: a consultation on the practice of cash retention under construction contracts (24 October 2017), p. 20.
4. Department for Business, Energy and Industrial Strategy, Retentions in the Construction Industry, BEIS Research Paper no. 17 (October 2017).
5. Ibid., p. 102.
6. Ibid.
7. Ibid., p. 97.
8. Ibid.
9. Government Insolvency Service, Company Insolvency Statistics, Q2 April to June 2019 (30 July 2019), p. 9.
10. Department for Business, Energy and Industrial Strategy, Retentions in the Construction Industry, BEIS Research Paper no. 17 (October 2017), pp. 22–23.
11. Ibid., pp. 24–25.
12. New Builder's Lien Act 1997.
13. Construction Contracts Amendment Act 2015.
14. Department for Business, Energy and Industrial Strategy, Retentions in the Construction Industry, BEIS Research Paper no. 17 (October 2017), p. 25.

Carillion's collapse, while extreme, is not an isolated occurrence. Insolvency within the construction industry is continuing to rise. The Government's Insolvency Service reported that in 2018/2019, the construction industry lost more firms to insolvency than any other industry, with 3,100 firms becoming insolvent.[9]

The current state of the construction industry has created an ideal environment for delays in releasing retention, or its complete non-payment. The BEIS Report found that the impacts on the construction industry are:

- Higher business overheads incurred from pursuing unpaid or outstanding retentions.
- Weakened commercial relationships within the construction supply chain due to tensions arising from delays or non-payment.
- Weakened relationships between main contractors and their clients.
- Increased costs for projects as tender prices are increased to cater for the risks associated with retention monies. BEIS reported that 40% of those surveyed increased their tender prices to offset retention.
- Constrained business growth as a result of less readily available working capital.[10]

"in Canada, legislation requires retention to be held in a separate account."

Proposals for change

The above-mentioned issues have resulted in an industry-led roadmap to address the underlying problems caused by retention and to propose alternative mechanisms, such as project bank accounts; performance bonds; retention bonds; escrow stakeholder accounts; retentions held in trust funds; and parent company guarantees.

BEIS reports that most of the above would be suitable alternative mechanisms to retention in certain circumstances. However, those most suited to an industry-wide alternative are retention deposit schemes and retention bonds.[11]

Retention Deposit Scheme

In January 2018 Sir Michael Aldous introduced the Construction (Retention Deposit Schemes) Bill, or "Aldous Bill" as a Private Members' Bill. This Bill attempts to redress the imbalance and lack of protection smaller businesses face when it comes to retention by proposing the following:

- All cash retentions should be held within a government approved retention deposit scheme, whose operation would be determined by secondary legislation, and which would ring-fence retention from the other assets that a client or contractor may be holding so that in the case of any insolvency, the retention remains untouched.
- The money deposited in a retention scheme would be returned immediately upon handover of the works, and at the latest following the expiry of any defects liability period.
- Schemes would be expected to provide quick and inexpensive adjudication or mediation procedures to resolve any disputes regarding the release of the retention.
- The Bill also proposes that the Housing Grants, Construction and Regeneration Act 1996 ("Construction Act") is amended so that any clause in a construction contract enabling the deduction of cash retentions will be invalid unless retention monies are protected in a retention deposit scheme.

The Aldous Bill received its first reading in the House of Commons on 9 January 2018. 80 construction industry organisations and over 275 MPs supported the Bill, a strong indication that a change to the current retention system would be welcome. However the second reading of the Bill was delayed and was not carried over to the new session of Parliament which started in October 2019. Fresh legislation will thereforeneed to be introduced.

Any such change is not novel: the Aldous Bill reflected what other countries are already adopting in order to protect smaller companies from insolvency further up the line. For example in Canada, legislation requires retention to be held in a separate account.[12] In New South Wales, Australia, retention held on projects worth over $20m must be placed in a recognised deposit institution. In New Zealand legislation has been passed which states that retention money withheld under commercial contracts must be held on trust in the form of cash, or other liquidated assets readily converted into cash, unless a financial instrument is purchased.[13]

Retention bonds

The BEIS Report also proposed retention bonds as an appropriate industry-wide alternative. However, while a retention bond would offer the same level of protection as a retention deposit scheme, BEIS reports that the costs of setting up and implementing a retention bond could price out smaller contractors, i.e. those who require the most protection in terms of retention.[14]

The future of retentions

Whether the industry starts using alternatives to cash retentions, or even abolishes cash retentions, remains to be seen. However, the use of retentions is not universal across the construction sector as a whole, nor does it need to be. There are already sub-sectors within the construction industry that do not use retentions. For example, cash retentions are not typically used at all in the lift industry. Instead, lift sector organisations have developed their own Contract Guarantee Scheme, a conditional bond which gives clients protection in a similar way to retentions, both during the work prior to Practical Completion and during the Defects Liability Period. The key difference is that a sum only has to be paid if there is a contractual non-performance. This demonstrates that there are other workable alternatives to retention as we know it.

Further, events such as Carillion's collapse highlight that the current system is neither sustainable nor fair for smaller businesses, particularly in the current political and economic climate.

Overall it appears that the industry will favour retention deposit schemes as proposed by the Aldous Bill. That the Aldous Bill has significant support demonstrates that the industry is ready for change when it comes to retentions. However, further research and money will need to be spent on ascertaining how the proposed retention deposit schemes will operate in practice, in terms of both holding monies and resolving disputes regarding retention. There is also the issue of training those using the schemes to ensure retentions are managed properly.

Ultimately any change to retentions, particularly its ring-fencing, is going to require clear legislation and time.

Taking a knife to adjudicators' decisions

As readers may be aware, the courts are keen to enforce adjudicators' decisions, even if they contain errors. As Chadwick LJ put it back in 2006 in *Carillion Construction Ltd v Devonport Royal Dockyard*: *"the need to have the right answer has been subordinated to the need to have the answer quickly"*.

However, as **George Boddy** discusses, there are circumstances where the courts will refuse to enforce all or part of an adjudicator's decision.

Corebuild Ltd v Cleaver and Another

In *Corebuild*, the Court held that the adjudicator had gone off on a "frolic of his own" rendering his decision unenforceable because he had breached the rules of natural justice. *Corebuild* demonstrates that while the Court will enforce an adjudicator's decision if he or she gets the answer to the question wrong, it will refuse to enforce if he or she answers the wrong question entirely.

The Employers, Mr Cleaver and Ms Omolska, engaged Corebuild Limited to carry out works to a residential property. The Employers, via the Contract Administrator, had served the Contractor with notice that they would terminate the contract in 14 days if it continued to fail to progress the works regularly and diligently. When in the Contract Administrator's view the situation did not improve, he served a further notice after the expiry of the 14-day period purporting to terminate the contract.

In the adjudication that followed, the Contractor argued that the Employers' termination was wrongful and amounted to a repudiatory breach of contract. The adjudicator therefore had to decide (1) whether there had been a repudiatory breach; and (2) if so, what losses flowed from that. The Employers argued that as they had relied upon the expertise of the Contract Administrator in connection with the termination of the contract, the termination could not be repudiatory, even if it was wrongful. The Contractor did not dispute the Employers' reliance on the Contract Administrator but argued that this was not relevant to the question of repudiation.

> *"If the adjudicator has endeavoured generally to address the issues in dispute in order to answer the question posed, whether right or wrong, their decision is enforceable"*

However, the adjudicator determined the question on a completely different basis. He decided there had been no reliance by the Employers on the Contract Administrator; he expected the Employers had sanctioned the course of action that had been taken by the Contract Administrator. However, the question of the Employers' reliance on the Contract Administrator had not been in dispute.

Neither party had made submissions on this point or been canvassed by the adjudicator in relation to it. The adjudicator decided the outcome of the adjudication against the Employers on a basis not argued for by the Contractor.

The Court held that this was a clear breach of natural justice, falling within the principles in *Cantillon v Urvasco*. The breach was material, it related to a decisive issue and, in fact, it was one of the examples of a clear breach given by Akenhead J in *Cantillon*: the adjudicator decided the case on a basis not argued by either party.

The Court gave short shrift to Corebuild's contention that the breach of natural justice was immaterial because the adjudicator should have adopted its argument that Cleaver's reliance on the Contract Administrator was irrelevant. The Court noted that, per *ABB Ltd v BAM Nuttall*, it should be slow to speculate on what an adjudicator should have done if it had not embarked upon the frolic about which complaint is made.

Willow v MTD

In *Willow*, the Court found that the adjudicator made an error in relation to part of his decision but was able to sever the part that contained the error and enforce the remainder of the decision. In doing so, the Court applied the principles in *Hutton v Wilson*: if an adjudicator incorrectly decides a short self-contained issue that the losing party continues to contest, if it can be resolved in a short hearing with no oral evidence and if it would be unconscionable to ignore, then the CPR Part 8 procedure can be used to challenge the decision.

In 2015, Willow engaged MTD to design and build a hotel in Shoreditch. The Project was delayed and in June 2017 the parties agreed to formalise various matters including a revised date for practical completion of 28 July 2017 (the "June Agreement"). The June Agreement stated as follows:

1. clause 4 stated that the remaining areas were to be completed by 28 July 2017, save for those detailed in a schedule to the June Agreement;

2. paragraphs 2 to 4 of the schedule detailed the areas that would be completed after 28 July 2017; and

3. paragraph 5 of the schedule stated that practical completion was to be achieved by 28 July 2017 and that an agreed list of outstanding work would

However, the works were not completed until 13 October 2017 and there were various disputes concerning payment and delay.

MTD commenced an adjudication seeking sums claimed in its final application for payment. Willow had served a pay less notice alleging defects and an entitlement to liquidated damages ("LDs") due to MTD's delay. The adjudicator was required to construe the provisions in the June Agreement concerning practical completion.

MTD argued that the June Agreement required practical completion to be certified on 28 July 2017 provided that a list of outstanding works could be agreed. Willow argued that on a true construction of the June Agreement, it was not required to certify practical completion simply upon the agreement of a list of outstanding works; rather MTD was required to achieve practical completion by 28 July 2017.

The adjudicator preferred MTD's argument regarding the construction of the June Agreement and, since there was an agreed list of outstanding works, found that practical completion should have been certified on 28 July 2017, rejected Willow's claim for LDs and ordered it to pay MTD £1.2m.

Willow issued Part 8 proceedings seeking a declaration of the true meaning of the June Agreement. One of Willow's arguments was that MTD's interpretation did not make commercial sense as it would leave MTD with no incentive to finish the works before 28 July 2017. The Court agreed that this was an issue that could be dealt with using the Part 8 procedure and agreed with Willow that the adjudicator had interpreted the June Agreement incorrectly. In the view of the Court, the natural and ordinary meaning of clause 4 of the June Agreement and paragraph 5 of the schedule was that MTD was required to achieve practical completion by 28 July 2017 save for the items set out in the schedule. The requirement to agree a list of outstanding works did not mean that MTD was not obliged to reach practical completion by 28 July 2017.

Having found this part of the adjudicator's decision to be wrong, the question then arose as to whether the Court would enforce any of the decision. The Court approached this question by considering whether, once the part of the Decision containing the flawed reasoning had been disregarded, there was anything that remained that could safely be enforced. While the Court agreed that it can be difficult to separate a flaw in the decision from the rest of it in the context of a single dispute or difference, the Court decided that the effect of the adjudicator's error of law was limited to the dismissal of Willow's claim for liquidated damages and that the error did not infect or cross into the balance of the decision. It therefore severed the part of the decision that contained the error and enforced the remainder, which resulted in the success of Willow's claim for liquidated damages.

> *"It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator."*

Comment

At first glance, the Court's chopping down of the decision in *Willow* appears odd. While the adjudicator did make an error, he only answered the right question wrongly, rather than the wrong question altogether. He certainly did not go off on a frolic of his own as the adjudicator did in *Corebuild v Cleaver,* which the Court rightly took a knife to. Notwithstanding this, the Court refused to enforce all of the decision in *Willow*.

While the approach advocated by Chadwick LJ in *Carillion* will apply in *"99 cases out of 100"* (Coulson J in *Caledonian Modular Ltd v Mar City Developments Ltd* 2015), the Court in *Willow* considered that this was one of those 1 in 100 cases where the *Hutton* principles applied and so the Court was able to chop down the bad part of the decision and enforce the rest of it.

Whether it should have done so in the light of *Hutton,* however, is open to question. In *Hutton*, Coulson J gave some examples of the situations where he considered the Part 8 procedure could be used. One of these was if an adjudicator's construction of a contract clause is *"beyond any rational justification"*. This test does not appear to have been applied in *Willow* (if it had been, it may well have produced a different outcome because it is a very high threshold to meet). This perhaps indicates an erosion of the principles set out by Coulson in *Hutton,* which may open the door for more Part 8 challenges to adjudication enforcements in the future.

Enforcing an adjudicator's decision in Northern Ireland

As **Ciaran Williams** explains it has been over twenty years since the Construction Contracts (Northern Ireland) Order 1997 (the "Construction Order") introduced statutory adjudication in Northern Ireland and the Construction Order provides for an almost identical construction adjudication framework to the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") in England and Wales.

The Construction Order was amended by the Construction Contracts (Amendment) Act (Northern Ireland) 2011 which introduced changes to the payment procedures and removed the requirement for contracts to be in writing. These changes are similar to the amendments made to the HGCRA by Part 8 of the Local Democracy, Economic Development and Construction Act 2009.

The number of adjudications in Northern Ireland has steadily increased since the Construction Order came into force and there have been a number of enforcement cases before the Northern Irish Courts. This article discusses the steps to enforcement and some of the published decisions from the High Court of Justice in Northern Ireland.

Since 1999 there have been around ten published adjudication enforcement decisions in Northern Ireland and the courts' approach to enforcement has generally been consistent with that in England and Wales.

In Northern Ireland, construction disputes are heard in a commercial list in the Queen's Bench Division of the High Court of Justice Northern Ireland, whereas in England and Wales such cases are heard in the Technology and Construction Court.

Similar to England and Wales, there is no need to comply with any pre-action protocols provided that the enforcement concerns an adjudicator's decision that was referred pursuant to the Construction Order.

The steps to enforcement in Northern Ireland

The first step is to issue a writ of summons in the Queen's Bench Division of the High Court of Justice. The statement of claim should be endorsed onto the writ because an application for summary judgment cannot proceed unless the statement of claim has been served.

If the writ is served within the jurisdiction of Northern Ireland, the defendant has 14 days from the service of the writ to enter a memorandum of appearance (different rules apply if service is outside the jurisdiction).

The next stage is to apply for summary judgment in accordance with Order 14 of the Rules of the Court of Judicature (Northern Ireland) 1980 on the basis that the defendant has no defence to the claim. The application is made by a summons and supported by an affidavit verifying the facts.

The Court will then list the case for directions and a timetable will be set in terms of the filing of evidence and a hearing date. The case will be listed for hearing as soon as possible, the Court aiming to list the matter for hearing within 28 days. Some of the key decisions from the Northern Irish Courts are discussed below.

> *"The starting point for a court dealing with a request for enforcement of the award of an Adjudicator is that it should work on the assumption that the award ought to be enforced"*

Decisions from the High Court of Justice in Northern Ireland

Coleraine Skip Hire Ltd v Ecomesh Ltd [2008] NIQB 141 (27 October 2008)

This was the first application for summary judgment to enforce an adjudicator's decision in Northern Ireland. In this case, Ecomesh (the defendant) applied for summary judgment in its favour in the sum of £48,234.39.

Coleraine Skip Hire Ltd ("CSH") resisted the application on a number of grounds including jurisdiction and that the decision was issued outside the statutory 28-day time limit for an adjudicator's decision to be published in accordance with the Construction Order.

Mr Justice Weatherup decided that the adjudicator's decision was issued on time and that there was no issue as to jurisdiction. CSH had also applied for a stay on the grounds of Ecomesh's financial standing, but Mr Justice Weatherup decided that the financial position of the payee did not warrant a stay on this ground and that Ecomesh had an unanswerable claim for the sum of £48,234.39.

However, the Judge held that the application related to only one part of the claims that were in dispute and that the sum of £48,234.39 should only be paid following the conclusion of the trial which was ongoing. Exercising the discretion of the Court, Mr Justice Weatherup granted a stay pending the outcome of the trial on all of the matters in dispute between parties.

Following this case, there was some concern that adjudication might not be as successful in Northern Ireland because a stay was granted in circumstances where the payee's financial position was satisfactory. The ethos behind construction adjudication is *"pay now, argue later"* and it is designed to promote cash flow in the construction industry.

D G Williamson Ltd v Northern Ireland Prison Service [2009] NIQB 8 (27 January 2009)

The second application to enforce an adjudicator's award appeared before the Northern Irish Courts in a case between D G Williamson Ltd ("DGW") and the Northern Ireland Prison Service (the "Prison Service"). DGW applied to enforce an adjudicator's decision in its favour in the sum of £261,898.76.

The Prison Service put forward a number of grounds to resist the enforcement of the award including that the adjudicator did not have jurisdiction and that the contract was not in writing. Mr Justice McLaughlin rejected these grounds and then proceeded to consider the Prison Service's application to order a stay of the enforcement pursuant to Order 14 rule 3(2).

Mr Justice McLaughlin did not grant the stay and awarded judgment in favour of DGW. Mr Justice McLaughlin showed support for construction adjudication in Northern Ireland and stated:

"I am satisfied that the starting point for a court dealing with a request for enforcement of the award of an Adjudicator is that it should work on the assumption that the award ought to be enforced, on a summary basis if necessary. The purpose of the legislation is to ensure speedy payment by dint of a summary process."

This judgment was a welcome development and it set the ground rules for adjudication in Northern Ireland. Whilst there are certain circumstances where an adjudicator's decision will not be enforced, the Court showed a willingness to enforce adjudication decisions and the Judge referred to the importance of the legislation in terms of protecting cash flow in the construction industry.

Mel Davidson Construction v Northern Ireland Housing Executive [2014] NIQB 110

This was another key case and involved Mel Davidson Construction ("MDC") claiming summary judgment in relation to an adjudicator's decision of 14 February 2014, which awarded MDC £53,440.28. This was the second adjudication between the parties and it concerned interest on a sum that had been paid by the Northern Ireland Housing Executive ("NIHE") to MDC following the first adjudication decision of 15 March 2013.

NIHE resisted enforcement on two grounds. The first ground was that the dispute was the same or substantially the same as that which had previously been referred to adjudication. The second ground was that there was an estoppel because the interest claim should have been brought in the first adjudication.

In respect of the first ground, Mr Justice Weatherup considered a number of English cases including *Quietfield Limited v Vascroft Contractors Limited* (2006) EWCA Civ 1737 and concluded that:

"I see nothing in the nature of the Scheme which permits the Adjudicator, in such circumstances, to refuse to decide a matter referred for decision. The Scheme requires the Adjudicator to decide a claim if it is possible for him to do so. There are instances where an Adjudicator has been unable to make a decision, possibly because the material presented is not sufficient to permit the decision to be made. That is not this case."

In respect of the second ground, Mr Justice Weatherup commented that a delay in asserting a contractual right within time limits would not usually result in the loss of the right and that MDC's delayed response did not amount to a representation that results in estoppel. Accordingly, the Judge awarded judgment in favour of MDC for the sum of £53,440.28.

Conclusion

The construction industry is reliant on cash flow and the purpose of adjudication is to provide a quick and cost-effective dispute resolution mechanism to maintain cash flow in the construction industry. As part of this process, it is important that parties can enforce adjudicators' decisions quickly and the Northern Irish Courts have acted to promote the success of adjudication.

The Northern Irish Courts have developed a process so that adjudication cases are heard as quickly as possible and there is an assumption that adjudication awards ought to be enforced. The relatively low number of adjudication enforcement decisions published by the Northern Irish Courts is perhaps a sign that adjudication has been a success over the past twenty years.

Liability of approved inspectors

Approved Inspectors are private individuals or organisations that are appointed on construction projects by the client to verify that the construction work complies with Building Regulations. They provide advice to the client throughout the project and their role usually includes, amongst other things, ensuring that proposals and construction works comply with Building Regulations as the project progresses and issuing a final certificate to the client at the end of the project certifying Building Regulations compliance. There have been two recent cases which discuss the liability of Approved Inspectors. **James Mullen** explains further.

The scheme of the private Approved Inspector was introduced by the Building Act 1984 ("BA 1984"). Prior to the BA 1984, the role of ensuring that a project complied with Building Regulations was carried out by Local Authorities' building control departments. After the BA 1984, the role of ensuring compliance with Building Regulations could be carried out by either Local Authority inspectors or private Approved Inspectors depending on what the client decided.

To be 'Approved Inspectors', the private inspectors must apply to be placed on a register held by the Construction Industry Council.

Whether a client decides to appoint Approved Inspectors or use the Local Authority to verify compliance with Building Regulations will often depend on the client themselves and the project. However, unlike the building control department of a Local Authority, Approved Inspectors are appointed by the client contractually to provide their services and are required to maintain professional indemnity insurance to cover the economic loss arising out of negligence. This gives the client some protection should the Approved Inspector fail to carry out their role properly during the project and the client suffers loss as a result. Approved Inspectors are often appointed by the client for this reason instead of the Local Authority.

Further, many newbuild residential developments are now sold to their new owners with a 10-year defects insurance policy from insurers such as NHBC. Where such cover is being provided, it is not uncommon for a company related to the insurer to have been appointed as the Approved Inspector for the project. For example, in the Herons Court case discussed below, the new flats had the benefit of NHBC's Buildmark insurance cover against defects. On that project, the Approved Inspector was NHBC Building Control Services Ltd ("BCS"). I have recently been involved in a dispute concerning a block of flats constructed in 2004 where the position was the same: the flats had the benefit of NHBC's Buildmark cover and the Approved Inspector for the project had been BCS. In the *Zagora* case discussed below, Zurich Insurance PLC had issued its standard 10-year new homes structural defects policies to the long leaseholders of the new flats. The Approved Inspector was Zurich Building Control Services Ltd ("ZBC"). The reason for this may be not only commercial (the Approved Inspector is paid to carry out its role on a project after all) but also in circumstances where the insurer is providing insurance cover upon completion against defects, they may want the comfort of knowing that its related company has certified that the works have been carried out in compliance with Building Regulations (and so are less likely to contain defects).

The law

At the time the BA 1984 was introduced, the case of *Anns v Merton*[1] had established the principle that Local Authority inspectors did potentially owe a duty of care to householders for economic loss caused by negligence when carrying out their building control role.

However, the decision in *Anns* was overturned in 1990 by the House of Lords' decision in *Murphy v Brentwood*[2] which established that Local Authority building control inspectors did not owe a duty of care in respect of the economic loss caused by negligence (i.e. a failure to identify non-compliance with Building Regulations).

Whilst the decision in *Murphy v Brentwood* concerned the liability of Local Authority building control inspectors, the general view amongst legal practitioners appears to have been that the principle derived from *Murphy* was likely to also apply to private Approved Inspectors because there were very few cases post-1990 concerning the liability of Approved Inspectors for damage caused by a failure to carry out their role properly. In 2018–2019, however, there were two cases that considered this issue.

Lessees and Management Limited Company of Herons Court v Heronslea and others

Technology and Construction Court (October 2018)[3]

Herons Court is a block of flats in Radlett, Hertfordshire. The claimants were the lessees and the management company of the block. There were four defendants, one of whom was BCS who had been the Approved Inspector and who had certified that the relevant Building Regulations had been complied with. The claimants alleged that the flats were defective and did not comply with Building Regulations.

Perhaps recognising the difficulties with bringing a claim in the tort of negligence against Approved Inspectors following the decision in *Murphy v Brentwood*, the claimants' claim against BCS was brought under section 1(1) of the Defective Premises Act 1972 ("DPA 1972"). Section 1(1) of the DPA 1972 states:

"A person taking on work for or in connection with the provision of a

1. [1978] AC 728.
2. [1990] 2 WLR 944.
3. [2018] EWHC 3309 (TCC).
4. 2019] EWCA Civ 1423.
5. [2019] EWHC 140 (TCC).

*dwelling (*whether the dwelling is provided by the erection or by the conversion or enlargement of a building*) owes a duty –*

> *(a) if the dwelling is provided to the order of any person, to that person; and*
>
> *(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;*

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed."

The claimants argued that BCS had a duty under section 1(1) of the DPA 1972 as it had taken on work "*for or in connection with the provision of a dwelling*" and so it was required to ensure that the work it undertook was carried out in a workmanlike or professional manner with proper materials so that the dwelling would be fit for habitation when completed.

The court rejected the claimants' claim and held that BSC, as an Approved Inspector, did not owe a duty under section 1(1) of the DPA 1972. The court said that section 1(1) was targeted at architects and designers and other professionals who were contributing to the design and construction of the building. By contrast, an Approved Inspector's essential function was to certify whether that design or construction is lawful in a building sense.

The court also referred to the decision in *Murphy v Brentwood* which expressly rejected the proposition that the DPA 1972 imposed a liability on Local Authority building control. The court regarded Approved Inspectors as carrying out the same regulatory function as Local Authority building inspectors, notwithstanding that they work for profit, and so Approved Inspectors should be considered as the same as Local Authority inspectors when it came to the duty under section 1(1).

Court of Appeal (August 2019)[4]

The lessees and the management company appealed the TCC's decision and the matter went before the Court of Appeal ("CA").

The CA unanimously rejected the claimants' claim and upheld the TCC's decision. The CA held that Approved Inspectors have "*no statutory power to influence the design or construction of a building in any way, save to stipulate that it must comply with the law. In certifying, or refusing to certify, plans and works, the AI is not engaged in the positive role of the provision or creation of the relevant building, but performs the essentially negative regulatory role of checking for compliance against prescribed criteria*."

As to *Murphy*, the CA said "*The result, the reasoning and a number of the speeches in Murphy mean that it is highly persuasive authority that a local authority does not owe a duty under s.1 DPA 1972 in the exercise of its building control functions*." Noting the similarities between the statutory regimes governing both the Local Authorities and Approved Inspectors, the CA accepted that it was "*difficult to see how these activities amount to 'work for or in connection with the provision of a dwelling' when carried out by an AI, in circumstances where they do not when carried out by a local authority*".

> *"The circumstances in which property owners will be able to claim against Approved Inspectors for their failure to carry out their Building Regulations role properly are extremely limited."*

Zagora Management Ltd and Others v Zurich Insurance PLC and Others[5]

This case was heard in between the two Herons Court cases and concerned a development of two blocks of flats in Hulme, Manchester, which were said to be defective. The claimants were (1) the buildings' freehold owner (who was not the original freeholder but had acquired the freehold in 2013); and (2) the individual long leaseholders of the flats. One of the defendants was ZBC who had been the Approved Inspector for the project and had issued the certificates under Building Regulations.

Here the basis for the claimants' claim was not the DPA 1972 but deceit/fraudulent misrepresentation as the claimants alleged that the Approved Inspector knew the statements it made in the Building Regulations final certificates were not true, or knew that there were no reasonable grounds for believing the truth of statements or was reckless as to their truth. The claimants argued that they would not have acquired their property interests had they known the true position.
The court agreed that the Approved Inspector had made misrepresentations in the Building Regulations final certificates that he knew to be false yet he had signed off the certificates "*to get the job off his desk*". However, for their claim in deceit/fraudulent misrepresentation to succeed, the claimants had to prove a reliance on the final certificates.

The court decided that it was impossible to conclude that the Approved Inspector intended for the subsequent freeholder to rely on the certificates two to three years after they had been issued. As to the individual long leaseholders, the Approved Inspector accepted that it did anticipate that the leaseholders would rely on the certificates but there was no evidence that the leaseholders or their solicitors were provided with the certificates before either exchange or completion. Therefore, whilst the claimants were able to prove deceit on the part of the Approved Inspector, their claims failed on the basis that they were unable to demonstrate reliance.

Comment

There was already little scope for negligence claims for economic loss against Approved Inspectors following *Murphy v Brentwood*. The cases of *Herons Court* and *Zagora* have further reduced the scope of potential claims against Approved Inspectors, with the former confirming that a claim against Approved Inspectors under the DPA 1972 will not succeed, and the latter confirming that a claim for fraudulent misrepresentation may succeed but only if the claimants can prove both deceit by the Approved Inspector and reliance, the second limb being a high hurdle to pass.

As noted above, many flats in newbuild developments are now sold with the benefit of 10-year defects insurance cover from providers such as NHBC. Therefore, subject to the terms of the cover, flat owners may still have an ability to claim for defects against the insurer under their policies. However, the circumstances in which property owners will be able to claim against Approved Inspectors for their failure to carry out their Building Regulations role properly are extremely limited. Good news for Approved Inspectors and their PI insurers. A client who appointed an Approved Inspector would have a contractual route of recourse but other stakeholders such as a building's freeholder owner (if different from the client) or the flat owners themselves would not have a contractual right to claim against an Approved Inspector unless there were collateral warranties in place.

Duty of care – parent company liability for actions of foreign subsidiaries

There have been a number of cases in which individuals have sought to bring proceedings in tort in England, against an English parent company and its foreign subsidiary, in respect of certain events occurring in the foreign country, where that subsidiary carries out its operations. As **Harrison Small** discusses, on 10 April 2019, the Supreme Court handed down a much-anticipated judgment, in the case of *Lungowe v Vedanta Resources Plc*, holding that parent companies domiciled in England can be sued in the English courts for alleged torts committed overseas by their international subsidiaries.

Lungowe v Vedanta Resources Plc

In July 2015, 1,826 Zambian citizens ("Claimants") commenced a claim against two defendants: Konkola Copper Mines PLC ("KCM") and its ultimate parent company, Vedanta Resources PLC ("Vedanta"). The Claimants are poor members of the community who rely heavily on the watercourses for themselves, their livestock and irrigation for farming, and allege that the toxic matter from the mine has been repeatedly discharged and therefore both their health and farming activities have been significantly harmed since approximately 2005.[1] The appeal dealt solely with the issue of jurisdiction – that is, the ability of the English courts to hear the claims brought by the Claimants against Vedanta and KCM.

The following four key issues were considered in the judgment:

1. Would it be an abuse of EU law to permit the Claimants to sue Vedanta, as the anchor defendant?
2. Real issue to be tried against Vedanta: liability as a parent company?
3. Is England the "proper place" to hear the claims?
4. If the English courts do not accept jurisdiction, could the Claimants obtain substantial justice?

"If your organisation has subsidiaries operating overseas, this case serves as a useful reminder to review the wording and implementation of group-wide policies and training programmes."

The key question

The critical question, which will have practical importance to all UK-domiciled organisations that have subsidiary operations overseas, is whether Vedanta sufficiently intervened in the management of the mine, owned by its subsidiary KCM, to have incurred either a common law or statutory duty of care to the Claimants.

The question was a matter of fact, not law.

In this case, Vedanta had, amongst other things, the following:

- Sustainability Report – A report produced by Vedanta entitled "Embedding Sustainability", which identified that the oversight of all of Vedanta's subsidiaries rests with the Board of Vedanta. More importantly to the mine and issues identified above facing the Claimants, the report discussed problems with discharges of water and made express reference to the particular problem at the mine stating: "*we have a governance framework to ensure that surface and ground water do not get contaminated by our operations*".[2]
- Management/Shareholders Agreement – A management agreement, which covered a number of contractual obligations for Vedanta to provide to KCM, including undertaking or procuring feasibility studies into various large-scale mining projects in accordance with acceptable mining, metal treatment and environmental practices.[3]
- Witness statement – A witness statement from a former employee that gives evidence that Vedanta exercised control over KCM. Specifically, once Vedanta took over affairs, working practices changed significantly, and the existing management and operational policies became irrelevant.[4]
- Other – Other material evidence such as Health, Safety and Environmental training, Vedanta's financial support of KCM and various public statements made by Vedanta, including commitments to address environmental risks and technical shortcomings in KCM's mining infrastructure.[5]

This demonstrated a sufficient level of intervention by Vedanta, to bring a claim against Vedanta in the English courts.

Cases with a similar duty of care issue

The decision in the above judgment contrasts with two recent Court of Appeal judgments dealing with similar issues, and which both held that the English courts did not have jurisdiction:

1. AAA and others v Unilever PLC and Unilever Tea Kenya Limited [2018] EWCA Civ 1532

The first defendant, Unilever PLC ("Unilever"), is an English-domiciled holding company. The second defendant, Unilever Tea Kenya Limited ("UTKL") is a subsidiary of Unilever, which operated a tea plantation in the Republic of Kenya. The claimants/appellants were 218 Kenyan nationals who were all employees or residents of UTKL's plantation in Kenya. Following the 2007 presidential election,

1. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20, paragraph 1.
2. Lungowe & Ors v Vedanta Resources Plc & Anor [2017] EWCA Civ 1528, paragraph 84(1).
3. Ibid., paragraph 84(2).
4. Ibid., paragraph 84(5).
5. Ibid., paragraphs 84(3), 4 and (5).
6. Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1) [2018] EWCA Civ 191 (14 February 2018), paragraph 127.

there was widespread violence and disorder throughout Kenya. The violence and disorder spread onto UTKL's plantation where murders and other violent assaults were committed on employees or residents at UTKL.

The claimants/appellants tried to argue that a duty of care was established as the parent company had given relevant advice to its subsidiaries about how it should manage certain risks. However, in this case, the Court of Appeal dismissed the appeal as there was minimal proximity, finding Unilever had a high level set of policies that was applicable to all entities of the Unilever group and it was the responsibility of the national/regional management to ensure appropriate crisis management plans. Thus, subsidiaries of Unilever had their own crisis management policies. In addition, nothing like the event (attack on the plantation) had happened on the plantation in question before.

The UK Court of Appeal handed down its judgment, declaring that Unilever did not owe a duty of care in relation to the operations of UTKL. On 17 July 2019, the Supreme Court refused the claimants' application for permission to appeal the decision to the Court of Appeal.

2. *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191

The first defendant, Royal Dutch Shell ("RDS"), is a company incorporated in the United Kingdom and is the parent company of the Shell group of companies. Shell Petroleum Development Company ("SPDC") is an exploration and production company incorporated in Nigeria, and is a subsidiary of RDS. The claimants are citizens of Nigeria and their claim was brought on the basis that RDS owed the claimants a duty of care as RDS controlled the operations of the pipelines and infrastructure, and leaks from these pipelines and associated infrastructure caused serious, ongoing pollution and environmental damage.

Similar to the Unilever case, in Okpabi Simon LJ noted that the policies in question were mandatory across all of the parent company's subsidiaries, and were not drafted/implemented in any way to the subsidiary in question. In particular, the claimants did not demonstrate an arguable case that the parent company controlled the subsidiary's operations, or that it had direct responsibility for the failures, which are the subject of the claim. In addition, the Okpabi pipeline is owned by a joint venture, in which SPDC is only a minority stakeholder.[6]

In July 2019, the UK Supreme Court granted permission and will hear an appeal to allow the claimants to pursue their claim.

Cases compared

The Vedanta case differs from *Unilever and Okpabi* because of the level of control (witness statement and financial support in Vedanta case) and awareness of the issue at hand (Sustainability Report in Vedanta case). The Sustainability Report specifically discussed problems with the discharges of water, the issue affecting the Zambian citizens and the fact that they had a framework to ensure that this would not happen. Comparing this with the Unilever/Okpabi cases, the parent companies had a broad set of policies to ensure crisis management plans were implemented by subsidiaries.

How might this judgment affect your organisation?

There may be concerns for parent companies as the decisions above could potentially suggest taking a static approach when dealing with environmental and other risks of their subsidiaries in third world countries. However, parent companies must realise that the Supreme Court seemed reluctant to interfere with the lower court findings (Vedanta case) and thus the standard of proof was low at this time. Additionally, parent companies should understand that the legal risks associated with not implementing policies far exceed the risk of potentially owing a duty of care.

The success of proceedings will depend on the facts of each case and the level of control established by the parent company over the relevant subsidiary. If your organisation has subsidiaries operating overseas, particularly in countries which may not offer sufficient access to justice, this judgment serves as a useful reminder to review the wording and implementation of group-wide policies and training programmes. It will also pay to be mindful as to whether statements, inadvertently or otherwise, convey an assumption of responsibility for the actions of subsidiaries.

The Singapore Mediation Convention: raising the profile of mediation in cross-border disputes

On 7 August 2019, 46 countries signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation. As **Sana Mahmud** explains, it is hoped that the Convention will raise the profile of mediation globally as an additional dispute resolution choice to litigation and arbitration for settling cross-border disputes.

1. ICC, "Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration", https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf
2. "Belt and Road Economics: Opportunities and Risks of Transport Corridors", 2019, found at: https://openknowledge.worldbank.org/bitstream/handle/10986/31878/9781464813924.pdf
3. Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576.
4. [2019] EWHC 2246 (TCC).
5. Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC), Paragraphs 58-59.
6. Directive 2008/52/EC.
7. [2018] UKFTT 535 (TC).

Introduction

Countries including the US, China, India, South Korea, Saudi Arabia and Qatar are now signatories. The United Kingdom and other EU countries, however, are yet to sign because the EU has not determined internally whether it should join as a bloc, or whether it is a matter for individual countries.

The application of the Convention, once ratified by the signatories, should be of interest to international contractors, particularly those looking to carry out works on infrastructure contracts under China's Belt and Road Initiative ("BRI").

Key features of the Convention

> *"One of the primary objectives of the Convention is to give parties confidence in the mediation process, particularly where mediation is not currently a widely accepted method of resolving disputes"*

The Convention provides parties who have agreed a mediated settlement with a uniform and efficient mechanism to enforce the terms of that agreement in other jurisdictions, in the way that the New York Convention does for international arbitral awards. Without this mechanism, a party wanting to enforce the terms of a mediated settlement must bring an action for breach of contract and then seek to have the subsequent judgment enforced, potentially in a different jurisdiction.

Where a country has signed and ratified the Convention, a mediated settlement agreement can be enforced in that state, provided the settlement falls within the scope of the Convention. It can also be invoked as a defence to a claim that concerns a matter already decided by the agreement. Arbitration awards, court judgments and settlement agreements under which one party acts as a consumer, or where the subject matter concerns family, inheritance or employment law, are specifically excluded from the Convention's scope.

The Convention applies to international settlement agreements resulting from mediation that have been concluded in writing and which resolve a commercial dispute. A settlement agreement will be classed as "international" under the Convention if the parties are based in different states or the dispute relates to works performed in a different country from where the parties are based.
A party seeking to enforce a settlement agreement under the Convention will have to show that it resulted from mediation. The Convention sets out a number of ways parties can do this, including having the mediator sign the agreement, providing a document signed by the mediator indicating a mediation was carried out, or an attestation by the institution that administered the mediation. In the absence of this, parties can provide any other evidence acceptable to the court or other competent authority enforcing the agreement.

If a party can show that the settlement agreement falls within the scope set out above, a relevant court or other competent authority in a signatory country has limited grounds for refusing enforcement.

Mediation and BRI disputes

Mediation is arguably becoming a preferred method of dispute resolution in Asia, driven primarily by China and the BRI. The vast scale of China's infrastructure programme, which extends from the southern pacific to Europe, Africa and South America, means that disputes are likely to be cross-border and must be settled as efficiently as possible. A combination of mediation and arbitration provides an approach that in the first instance is less adversarial, reflecting a preference in China for consensus-based methods of resolving disputes that preserve the commercial relationship as far as possible.

Prior to the signing of the Convention, in January 2019, the Singapore International Mediation Centre and the China Council for the Promotion of International Trade entered into a memorandum of understanding which established an international panel of mediators to resolve disputes arising out of BRI projects. The ultimate aim of these two bodies is to develop a set of rules for case management and the enforcement of mediation settlement agreements arising out of BRI disputes. Other dispute resolution service providers have also recognised this trend and encouraged the use of mediation in BRI disputes with reference to their own rules and services. For example, the ICC recently published guidance which suggests adopting a tiered approach of mediation followed by arbitration in BRI contracts.[1] The Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre have also set up initiatives specifically focused on resolving BRI disputes.

Given the geographical reach of the BRI, which the World Bank estimates at over 70 countries,[2] the use of mediation to settle complex commercial cross-border disputes is likely to increase significantly. International construction contracts on BRI projects will likely contain dispute resolution clauses that in the first instance call for mediation, followed by arbitration. A contractor will be able to enforce any resulting mediated settlement agreement in the same way it could an arbitral award, provided of course that the country in which it wants to enforce the award has signed and ratified the Convention.

Mediation in an English context

Mediation is widely used in construction disputes in England and the law surrounding it is relatively well established. Whilst a court cannot compel parties to resolve their disputes through mediation,[3] the process is actively encouraged by the Civil Procedure Rules, Technology and Construction Court Guide and Pre-Action Protocol for Construction and Engineering Disputes. The overriding objective also states that the courts must deal with cases justly and at proportionate cost. Parties that refuse to participate in mediation or other forms of ADR unreasonably risk serious cost sanctions that can be imposed by the court.

Where a contract includes a dispute resolution clause containing an escalation and mediation procedure that acts as a condition precedent to litigation, the English courts may stay the proceedings pending referral of the dispute to mediation. This was confirmed in the recent case of *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd,*[4] where the court used its discretion to order a stay to proceedings until the parties had followed the steps set out in their contract's ADR clause. Regarding the use of the court's discretion, Mrs Justice O'Farrell stated in her judgment that:

> *"There is a clear and strong policy in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.*
>
> *The Court must consider the interests of justice in enforcing the agreed machinery under the Agreement. However, it must also take into account the overriding objective in the Civil Procedure Rules when considering the appropriate order to make."*[5]

In a European context, currently the UK has the benefit of the Mediation Directive[6] which allows the enforcement of cross-border mediated settlement agreements through the national courts of other Member States. If the UK leaves the EU, it may lose access to this regime.

As mentioned above, the UK has not signed the Convention yet because it is still part of the EU; however, this does not mean that mediated settlement agreements signed in the UK will escape its scope. The Convention is not reciprocal, so it is possible to have a scenario where a settlement agreement signed in the UK can be enforced in another jurisdiction, if that state is a signatory and the project or a party's assets are based there.

> *"A combination of mediation and arbitration provides an approach that in the first instance is less adversarial, reflecting a preference in China for consensus-based methods of resolving disputes that preserve the commercial relationship as far as possible."*

Criticisms of the Convention regime

Is it necessary?

One of the main criticisms of the Convention is that it is unnecessary because parties to a mediation arrive at a negotiated commercial settlement by mutual consensus. The process itself is voluntary, and the terms of any settlement agreement are agreed between the parties. Where parties have chosen to go through this process and have come to an agreement, it is unlikely that one party would not hold up its side of the bargain. The argument many commentators have made is that in practice, there is rarely a need for enforcement.

Reservations under Article 8

Additionally, the Convention contains reservation provisions that signatories can choose to apply, which would have the effect of significantly diluting the effectiveness of any cross-border enforcement regime.

The first reservation allows a signatory state to declare that the Convention will not apply to settlement agreements that it is party to, or that its government agencies are a party to. In the context of the BRI, and international infrastructure contracts generally, such a declaration may be problematic. In many large infrastructure contract disputes at least one party is often a government or public entity. In BRI cases involving Chinese state-owned contractors there may be a government entity on both sides. In a situation where one party must enforce the terms of a settlement agreement in a state that is also party to the settlement agreement, such a declaration by that state would prevent enforcement under the Convention. The use of this reservation by states party to international infrastructure contracts poses significant risks to the potential enforceability of any mediated settlement.

The second reservation allows a state to declare that it will only apply the Convention if all parties to the settlement agreement have agreed that it should apply. Again, this is potentially another obstacle to enforcement in jurisdictions that mandate an opt-in requirement. In order to avoid a situation where a party is unable to enforce an agreement, all parties must agree that the Convention will apply in advance of a dispute or the mediation process.

Declarations can be made at any time, so it remains to be seen if any of the current signatories apply the reservations in Article 8.

Other practical considerations

Another potential issue is the uncertainty that may arise if there is no administering institution and a mediator refuses to sign the settlement agreement or other document certifying that the mediation took place.

A recent English case provides an example of what can happen if a mediator is called to give evidence in litigation proceedings. In *The Serpentine Trust Limited v HMRC*,[7] a mediator provided a witness statement in a tax dispute and was cross-examined on a note that he produced at the end of the day of the mediation. In this case, questions about the note were raised and the judge found the mediator's evidence to be unreliable. Many mediators want to avoid the risk of being forced to give witness evidence in court in this way and, consequently, often refuse to sign agreements or documents. Another reason frequently cited is confidentiality.

In the absence of an administering institution or a signed document from the mediator, the party seeking to enforce the agreement must provide evidence acceptable to the relevant court or authority. These requirements could vary depending on the applicable law or procedure of the country in which enforcement is sought. It is therefore important to know prior to a mediation process whether a mediator appointed by the parties is willing to sign a settlement agreement or other document confirming that a mediation took place.

Conclusions

The issues identified above are potentially challenging. Whilst there are currently 46 signatories to the Convention, it remains to be seen how many will go on to ratify it. Those that do may also make declarations under Article 8 that could hinder enforcement of mediated settlement agreements to which governments or government agencies are party.

That said, one of the primary objectives of the Convention is to give parties confidence in the mediation process. This is particularly so in relation to parties from jurisdictions where mediation is not currently a widely accepted method of resolving disputes and where relevant national laws are less developed. There are obvious benefits of having parties adopt mediation as their preferred dispute resolution mechanism in cross-border disputes. A successful mediation can be more time and cost efficient than arbitration or court proceedings, and its non-adversarial approach is more likely to preserve the parties' commercial relationship.

It is hoped that the Singapore Convention will do for mediation what the New York Convention has done for international arbitration. The adoption of mediation as the preferred method of dispute resolution in BRI contracts means that its use will undoubtedly proliferate globally as China's vast infrastructure programme takes hold. If the countries that have so far signed the Convention go on to ratify it, international contractors should think seriously about including dispute resolution clauses in their contracts which include mandatory mediation provisions.

Arbitration in the Kingdom of Saudi Arabia: the New Arbitration Law, shariah principles and enforcement of awards in the Kingdom

Arbitration as a means of resolving disputes has deep roots in the Islamic legal traditions. The shariah definition of arbitration is identical to that in the West ("*two parties choosing a judge to resolve their dispute and their claim*") and the duty under the shariah to reconcile ('sulh') underpins an ancient tradition of seeking to resolve disputes by way of consensual mechanisms such as conciliation and arbitration. **James Cameron** explains more about how arbitration is viewed in the Kingdom of Saudi Arabia.

Notwithstanding its deep roots, arbitration has had a somewhat chequered history in the Kingdom in the modern era, with local courts having significant powers to intervene in the arbitral process and reopen the merits of disputes in the context of enforcement proceedings. However, a suite of new laws and the introduction of a modern, international arbitration centre in recent years have made it clear that the Kingdom intends to be more "arbitration-friendly" and encourage international organisations to feel confident in the process.

Western arbitration practitioners should be mindful though of some unique elements of arbitrating in the Kingdom, and should bear in mind the following tips:

1. ensure the arbitration process is shariah compliant, even when seated outside the Kingdom and subject to international institutions' rules, if enforcement is to take place within the Kingdom;
2. ensure any award is shariah compliant. In particular, beware of issues such as interest, liquidated damages, loss of chance and consequential losses, recovery for which is not shariah compliant; and
3. when dealing with government authorities, ensure proper authority has been obtained to enter into an arbitration agreement.

it is therefore important for parties who are arbitrating and/or potentially looking to enforce an award in the Kingdom to engage counsel familiar with the shariah throughout the arbitration process, even if the arbitration is subject to non-shariah rules and governed by non-shariah law.

However, the new arbitration regime does appear to be having the desired effect. In 2016, the Enforcement Court in Riyadh confirmed a US$18.5m ICC award that had been rendered in London against a Saudi entity, the first reported case under the new regime. By May 2018, the Saudi Ministry of Justice reported that over 400 applications had been made for enforcement of foreign awards/judgments under the New Enforcement Law, and that more than SAR 13bn (~US$3.4bn) had been recovered pursuant to such awards/judgments. This is encouraging news for those entering into arbitration agreements with Saudi-domiciled entities, and/or seeking to enforce foreign awards in the Kingdom.

The New Arbitration Law

Arbitration in the Kingdom was significantly reformed in 2012 with the enactment of Royal Decree No M/34 (16 April 2012) (the "New Arbitration Law").

The New Arbitration Law, by contrast to the previous regime, is based on the UNCITRAL Model Law, and is viewed as being more "arbitration-friendly" than the law which it replaces. The New Arbitration Law has many features that will be familiar to those practising in other jurisdictions that have adopted – or adapted – the UNCITRAL Model Law.

In particular, the New Arbitration Law:

1. applies to arbitrations conducted in the Kingdom, but can also apply by agreement of the parties to arbitrations conducted outside the Kingdom (Article 2);
2. obliges a local court with competent jurisdiction to decline to hear a dispute to which an arbitration agreement applies, where the defendant requests referral to arbitration prior to making any claim or defence (Article 11);
3. allows the competent court to appoint arbitrators where: (i) the parties fail to agree a sole arbitrator; (ii) the parties fail to appoint their respective arbitrator (where the tribunal consists of three arbitrators) within the time allowed; or (iii) the party-appointed arbitrators fail to choose a president within the time allowed (Article 15);
4. enacts the "competence-competence" principle, whereby arbitral tribunals can decide questions related to their own jurisdiction (Article 20(1));
5. recognises the severability of the arbitration agreement, protecting the arbitration agreement from any deficiency or defect in the underlying agreement (Article 21);
6. allows the parties to choose the rules that will govern their dispute, which can include the rules of arbitration centres outside the Kingdom, e.g. the International Chamber of Commerce (Article 25); and
7. allows the parties to choose a governing law other than the laws of the Kingdom, provided the application of such governing law does not contravene shariah principles (Article 38).

There are, however, elements of the New Arbitration Law that are worth bearing in mind, as they differ from the UNCITRAL Model Law, in particular:

1. governmental authorities cannot agree to arbitration without the approval of the Prime Minister or explicit provision in legislation (Article 10(2));

2. for arbitrations seated in the Kingdom, a sole arbitrator (or president in the case of a tribunal consisting of more than one arbitrator) must hold at least a university degree in shariah law (Article 14);

3. the rules adopted by the parties (for example, the rules of the relevant international arbitral institution) only apply insofar as they do not violate shariah principles (Article 25); and

4. a competent court may invalidate an arbitration award if: (i) the award includes provisions that violate shariah principles or the public policy of the Kingdom (which in practice are one and the same thing); (ii) it contravenes the agreement of the parties; or (iii) it relates to subject matter which is not permitted to be arbitrated (such as family or criminal matters) (Article 50(2)).

The Saudi Centre for Commercial Arbitration

As part of the push to make arbitrating in the Kingdom more attractive, the Saudi Centre for Commercial Arbitration (the "SCCA") was also established by Cabinet Decree number 257 (15 March 2014) and opened in Riyadh in 2016. The SCCA administers commercial arbitration and mediation procedures, and its arbitration rules (which became effective on 15 October 2018) are based on the UNCITRAL Arbitration Rules and would therefore be familiar to international arbitration practitioners.

Challenge and Enforcement of Awards

The New Arbitration Law was complemented by a new enforcement law, enacted by Royal Decree No. M/53 (30 August 2012) (the "New Enforcement Law"), which came into force on 27 February 2013.

The Enforcement Court, established by the New Enforcement Law, replaces the Board of Grievances as the authority charged with enforcing awards. This is of significant assistance to those seeking to enforce awards in the Kingdom, as the Board of Grievances has a very broad role in the Kingdom, which meant that the process of enforcing through the Board of Grievances was often a long and arduous one. By contrast, the Enforcement Court is seen as a more streamlined and efficient avenue to enforcement.

The key features of the new enforcement regime brought about by the New Arbitration Law and the New Enforcement Law are as follows:

1. unless otherwise agreed between the parties, the arbitral tribunal shall deliver its award within 12 months of the proceedings commencing (Article 40 of the New Arbitration Law);

2. arbitration awards are not subject to appeal, except as set out in the New Arbitration Law (Article 49 of the New Arbitration Law);

3. in any proceedings to set aside an award, the competent court is precluded from re-examining the merits of the case (Article 50(4) of the New Arbitration Law);

4. a final award has the authority of a judicial ruling (Article 52 of the New Arbitration Law);

5. an order to enforce the award may only be made once the court is satisfied that: (i) the award does not conflict with a decision issued by a court or other authority that has jurisdiction on the dispute in the Kingdom; (ii) the award is not contrary to principles of shariah or public policy in the Kingdom (if part of the award is offending, an order in respect of the non-offending part may be issued); and (iii) the award debtor has been properly notified (Article 55(2) of the New Arbitration Law);

6. an Enforcement Judge has authority to enforce an award, provided the following are satisfied:

    a. the country in which the award was rendered would reciprocate and enforce awards rendered in the Kingdom;

    b. the local courts do not have jurisdiction over the dispute;

    c. the arbitration proceedings leading to the award were conducted with due process;

    d. the award is final (according to the law of the seat);

    e. the law does not contravene a decision on the same subject matter issued by a court or other authority that has jurisdiction in the Kingdom;

    f. the award does not contain anything that contravened the principles of shariah or public policy in the Kingdom (Article 11 of the New Enforcement Law).

Conclusion

You will see that it is important for parties who are arbitrating and/or potentially looking to enforce an award in the Kingdom to engage counsel familiar with the shariah throughout the arbitration process, even if the arbitration is subject to non-shariah rules and governed by non-shariah law. With this in mind we have recently launched an alliance with local lawyers Hammad & Al-Medhar in Saudi Arabia operating out of Riyadh, Jeddah and Khobar. Please contact Toby Randle for more information.

Multi-tiered dispute resolution clauses in the UAE

As **Ahmed Ibrahim** discusses, multi-tiered dispute resolution clauses are a common feature of construction contracts. These clauses require the parties to exhaust one or more stages of alternative dispute resolution mechanisms before they are permitted to invoke the "ultimate" dispute resolution process, generally arbitration or litigation. The typical pre-arbitration (or litigation) steps called for include a period of amicable settlement, referral to a committee comprising the senior management of both parties, and adjudication before independent third parties which may be binding or non-binding.

Commonly used forms in the Middle East

Perhaps the best-known international examples of multi-tiered dispute resolution clauses are clause 67 of the FIDIC 1987 Red Book and clause 20 of its 1999 Rainbow Suite of Contracts, both of which are familiar to arbitrators and other legal practitioners in the MENA region being the most commonly used standard forms in that region[1].

Under clause 67 of the 1987 FIDIC Red Book, all disputes are to be referred to the Engineer in the first instance for a decision, which is final and binding upon the parties unless and until the dissatisfied party proceeds to arbitration. The 1999 FIDIC Suite kept the Engineer, but then added a dedicated, impartial, Dispute Adjudication Board ("DAB") under clause 20, which could be standing or ad hoc - appointed only when a dispute arose.

The result is that there is a distinction between the referral of disputes to the Engineer under the 1987 edition and seeking the Engineer's determination of claims for extension of time or additional payment as required under sub-clause 20.1 of the 1999 edition.

Under the FIDIC 1987, it is only after the Engineer has made a decision on the dispute under clause 67 that it could it be referred to an outside dispute resolver for amicable settlement or arbitration. This has been changed in the FIDIC version of 1999, where the DAB and Amicable Settlement are the stated precondition to any reference to arbitration. Sub-clause 20.1 of the 1999 FIDIC which deals with referring claims to the Engineer is a completely different territory. First, it is about claims (not disputes), and secondly, it is limited to two types of claims, namely extension of time and additional payment where the Engineer is required to make a determination pursuant to sub-clause 3.5.

Benefits

The advantage of this multi-tier process is to give the parties a genuine chance to have their disputes resolved without the need for lengthy, costly and complicated legal proceedings, either in arbitration or court litigation. It also allows those involved in the project from day one, e.g. the contract administrator or standing DAB members, the opportunity to have a say in the dispute. This plays a significant role in improving the prospects of achieving an early settlement of what might be a major complex dispute. Even if the parties fail to settle their dispute entirely, the process may result in a narrowing down of the issues to be arbitrated or litigated.

Failure to comply

Contractually, the referral of a dispute to the Engineer/DAB should be treated as a condition precedent to the right of recourse to arbitration. This includes, for example, the requirement to notify the other party of the intention to commence arbitration under the FIDIC Red Book 1987.

But what if one party chooses to "skip" any of these mandatory referrals and commences arbitration straightaway? Aside from (rightfully) complaining of a breach of contract, in practical terms, what can the other party do?

In general, courts in the MENA region will enforce multi-tiered dispute resolution clauses, and, in particular, expect parties to comply with any preconditions to arbitration they have agreed upon. On many occasions, the UAE courts have nullified an arbitral award in circumstances where the claimant has failed to satisfy pre-arbitration requirements. This is particularly so where the wording of the dispute resolution clause is clear that the pre-arbitration steps constitute jurisdictional conditions precedent.

In the Court of Cassation, decision number 124/2008 Commercial, the Court stated that:

> *"it is established in this court that according to the general principles of contracts; the parties to it may stipulate any condition that they find appropriate as far as it is not against public policy. The parties may agree conditions precedent that must be followed before recourse to arbitration. If the condition precedent is not satisfied the request for arbitration should be inadmissible."*

However, it should not always be taken as a given rule that the local courts will regard *every* pre-arbitral step or process as being a condition precedent to arbitration or, at least, mandatory. For instance, the steps or processes should be clearly defined in terms of what the parties are expected to do and possibly be subject to some sort of time limit. If the courts find the pre-litigation or arbitration step(s) insufficiently described in the contract (perhaps due to vague or poor drafting), they may be minded to decline its enforcement on grounds of uncertainty.

In the context of a contract based on the 1999 FIDIC Forms, if a DAB is in place, then a respondent should have little difficulty convincing a tribunal that arbitration is premature and, consequently, the tribunal would be without jurisdiction. Failing that,

1. It is only recently that the 1999 FIDIC Form started to be used in the UAE. It may be a while before users turn to the 2017 2nd Edition.

2. See, generally, Taner Dedezade, Can a party ignore FIDIC's DAB and refer its dispute directly to arbitration? 2014.

3. Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC).

4. Swiss Federal Supreme Court Case dated 7 July 2014 (4A-124/2014) [2].

5. Court of Appeal Case 795/2018.

courts in the region would be unlikely to hesitate in setting aside arbitral awards rendered under these circumstances.

If, on the other hand, a DAB is not in place, the position is arguably less clear.[2] A FIDIC DAB process (or similar adjudication procedure) may become difficult or impossible to implement when a dispute arises for a variety of reasons, for example if the parties are unable to agree on the adjudicator/DAB members, there are disagreements as to the adjudicator/DAB members' remuneration, or if one party is simply intransigent and refuses to sign the agreement appointing the adjudicator/DAB (known in FIDIC terminology as the "DAA").

This last possibility – one party refusing to sign the DAA – can be especially troublesome, given the nature of clause 20 of the FIDIC 1999 Forms. However, sub-clause 20.8 of which potentially provides an uncooperative party with an "escape" clause and a route straight to arbitration.

The English[3] and Swiss[4] courts have recently had to deal with the issues set out in the previous paragraph; both courts confirmed the centrality of the DAB to the FIDIC dispute resolution process and that reference to the DAB was indeed mandatory. Importantly however, the Swiss courts also recognised that a party could not use this as an excuse to frustrate the DAB process and then say that an arbitration referral was invalid because of a failure to follow that process. This was contrary to the principles of good faith – an approach likely to be followed in the UAE.

In a recent decision, the Dubai Court of Appeal upheld the agreement to refer a dispute to a DAB as a condition precedent.[5] In that case, the court rejected the appointment of an arbitrator before the parties had exhausted the contractual DAB process.

In the meantime, however, what are the options available to arbitrators confronted with one party's failure to comply with a mandatory pre-arbitration step? In general, the safest course of action would be for the tribunal simply to dismiss the claim for inadmissibility or lack of jurisdiction, whichever the case may be, i.e. the arbitration would in this case be filed prematurely. However, this may seem harsh, particularly in circumstances where the defaulting party's conduct was unintentional.

To address this, an emerging trend is for arbitrators to order the suspension of the proceedings pending the fulfilment of any pre-arbitration steps, rather than dismissing the claim outright. This has the advantage of saving time and costs for the parties, as the tribunal would still be in place.

This trend is in line with common law approaches. In a recent case before the *TCC, Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*, Mrs Justice O'Farrell noted a "*'clear and strong policy' in favour of enforcing alternative dispute resolution provisions and in encouraging parties to attempt to resolve disputes prior to litigation. Where a contract contains valid machinery for resolving potential disputes between the parties, it will usually be necessary for the parties to follow that machinery, and the court will not permit an action to be brought in breach of such agreement.*" On that basis, the court found it appropriate to stay the proceedings to enable a mediation to take place.

However, arbitrators sitting in the Middle East should consider whether they have the power to do so under the applicable procedural law and/or relevant institutional rules, as, in many MENA jurisdictions, there is no express statutory provision which entitles arbitrators to suspend proceedings in these circumstances.

> "The parties may agree conditions that must be followed before any referral to arbitration if they are not followed, any request to arbitration, should be inadmissible!"

Conclusions

Parties to construction contracts should understand how the dispute resolution mechanism under their contract works. In the case of express wording that certain steps should be concluded as a jurisdictional condition precedent, the party who wishes to initiate arbitration must make sure that they follow the multi-tiered process. Failure to do so might result in the claim being dismissed for lack of jurisdiction. There might be cases where the arbitral tribunal finds it necessary, upon the request of either party, to suspend the arbitration proceedings pending the satisfaction of pre-arbitration requirements.

Notices: another year, yet more cautionary tales

Under most formal contracts it is necessary for the contractor (and, under FIDIC at least, the employer) to give notice of various matters as part of the process of seeking extensions of time and loss and expense. Generally, in the UK, the JCT form imposes a condition that such notices must be given within a reasonable time. However, increasingly, notice clauses are expressed as conditions precedent. In other words, a failure to comply with the requirements of the clause will result in a party being prevented from making what might otherwise be a perfectly valid claim. Sometimes, there may be time limits on when a party can refer a dispute to adjudication. However, it is not just standard forms which contain notice provisions; sometimes carefully negotiated agreements will contain provisions requiring specific notices to be served by a particular date.

Given the potential consequences, as **Jeremy Glover** highlights, care is needed to comply with any notice provision, as the following two examples from the courts in England and Hong Kong demonstrate:

1. (1985) 32 B.L.R. 97.
2. [2019] EWCA Civ 1376.
3. [1997] AC 749.
4. [2018] EWCA Civ 2448.
5. [2003] EWHC 2540 (Comm).
6. [2014] EWHC 1028 (TCC)
7. [2019] HKCFI 916.

Do your notices comply with the contract requirements?

In *Stobart Group Ltd & Anor v Stobart & Anor*, Simon LJ had to consider whether a notice served was a compliant notice for the purpose of giving notice of claims under a Share Purchase Agreement dated 7 March 2008 (the "SPA"). Paragraph 6.3 of the SPA provided that:

> *"The Vendors shall not be liable in respect of a Tax Claim unless the Purchaser has given the Vendors written notice of such Tax Claim (stating in reasonable detail the nature of such Tax Claim and, if practicable, the amount claimed) on or before the seventh anniversary of Completion in respect of such Tax Claim unless a Tax Authority is [un]able to assess the Company in respect of the Liability to Taxation or other liability giving rise to the relevant Tax Claim because of fraudulent conduct."*

This meant that the vendors were discharged from liability unless a written notice of a Tax Claim was served before 4 April 2015, the seventh anniversary of completion. It was said that the claim before the court could not succeed because SGL had not given notice under paragraph 6.3 of schedule 4 by 4 April 2015. SGL said that their letter of 24 March 2015 did comply. At first instance the Judge decided that on its proper construction the 24 March letter was not an effective notice under paragraph 6.3. Instead it was a notice under paragraph 7.1 in respect of a potential claim by HMRC against SGL.

The letter of 24 March 2015 included:

> *"We refer to the agreement relating to the sale and purchase of the entire issued share capital of WA Developments Limited entered into on the 7 March 2008 (SPA) ...*
>
> *We hereby give you formal notice pursuant to the SPA of a potential Liability to Taxation under the Tax Covenant contained in Schedule 4 of the SPA ...*
>
> *We would be grateful if you would confirm pursuant to paragraph 7 of Part 4 of Schedule 4 as to whether you wish to have continued conduct of discussions with HMRC in relation to the Claim.*
>
> *We have recently sought from BDO an update of the likely estimate of the quantum of the Claim and they presently believe it is circa £3,267,092 (as per the attached sheet) inclusive of interest but exclusive of penalties ..."*

Simon LJ referred to the words of Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* (a case concerning a tenant's notice exercising a break clause in a lease) where he said:

> *"The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene."*

Mannai was also referred to by the courts in the *S & T (UK) Ltd v Grove Developments Ltd* adjudication/litigation about the interrelationship between "smash and grab" adjudications, pay less notices and the entitlement of the employer to commence an adjudication to establish the true sum due in respect of interim applications. Here Jackson LJ had said that the construction of pay less notices must be approached objectively. The question was how a reasonable recipient would have understood the notice.

Simon LJ accepted that if it is clear that the parties have a common understanding as to the effect of a contractual term, the court should construe the contract in accordance with that understanding. He gave as an example a situation where a party has misnamed a property when giving a contractual notice in relation to it, or where a party has simply misstated the relevant contractual provision by one numeral (say paragraph 6.2 for 6.3) but where otherwise the intent is clear.

Here, SGL's case relied on what was said to be the understanding of the recipients when they received the letter: namely, that it was a compliant notice under paragraph 6.3 regardless of its terms. However, there was no evidence of this. So far as subsequent conduct was concerned, it could not provide relevant contractual context for the interpretation of the notice nor assist in its construction. Simon LJ also noted the observation of Cooke J in *Laminates Acquisition Co v BTR Australia Ltd* :

> *"Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe*

their terms can rarely be dismissed as a technicality."

Simon LJ noted that here:

(i) The letter of 24 March 2015 was "plainly" drafted by a lawyer and expressly adopted the definitions set out in the SPA.

(ii) The starting point was the consideration of the language of the notice: it made no reference to a Tax Claim, nor did it refer to a claim being made by SGL under paragraph 6.3.

(iii) The letter gave notice in terms of a contingency: "a potential Liability to Taxation", and a "potential claim". There is a difference between saying a claim is being pursued and indicating the possibility that a claim may yet be made.

The Judge considered that a person receiving the 24 March letter with knowledge of the terms of the SPA would have understood it to be a notice under paragraph 7. It was not a defective paragraph 6.3 notice; it was, as it said on its face, a compliant paragraph 7 notice.

If it looks like a claim....

In the case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar,* Mr Justice Akenhead noted that under the FIDIC Red and Yellow Books 1999, sub-clause 20.1 says that a claim should:

(i) be made by notice in writing to the Engineer;

(ii) describe the event or circumstance relied on; and

(iii) be recognisable as a claim for an extension of time or additional payment (or both) under the contract or in connection with it.

Notices in Hong Kong

In *Maeda Corporation & Anr v Bauer Hong Kong Ltd,* the Hon. Mimmie Chan J had to consider whether Bauer had complied with the condition precedents to give notice under clauses 21.1 and 21.2 of the subcontract. Bauer had been employed as a subcontractor to carry out diaphragm wall works on the Guangzhou Express Rail Link tunnel works in Hong Kong.

Clause 21 of the subcontract included:

"21.1 If the Sub-Contractor intends to claim any additional payment or loss and expense pursuant due to:

21.1.1 any circumstances or occurrence as a consequence of which the Contractor is entitled to additional payment or loss and expense under the Main Contract;

...

21.1.6 any Variation of Sub-Contract Variation."

Clause 21.2 of the subcontract continued:

"21.2 If the Sub-Contractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Sub-Contractor shall as a condition precedent to any entitlement, within twenty eight (28) Days after giving of notice under Clause 21.1, submit in writing to the Contractor:

21.2.1 the contractual basis together with full and detailed particulars and the evaluation of the claim;

21.2.2 where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine whether the effect of an event, occurrence or matter will be continuing, such that it is not practicable for the Sub-Contractor to submit full and detailed particulars and the evaluation in accordance with Clause 21.2.1, a statement to that effect with reasons together with interim written particulars ...

21.2.3 details of the documents and any contemporary records that will be maintained to support such claim; and

21.2.4 details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim."

"however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served"

Further, clause 21.3 continued by stating that the Defendant "shall have no right" to any additional or extra payment, loss and expense, under any clause of the subcontract or at common law unless clauses 21.1 and 21.2 have been strictly complied with.

Following the discovery of unforeseen ground conditions, Bauer sent the following letters to Maeda:

(i) 1 August 2011:

"We confirm the issuance of said design information/founding levels are causing a substantial increase in the quantity and quality of rock we are required to excavate compared to what was allowed for in our Sub-Contract. Please be advised that these additional quantities and change in quality represent variations to our Sub-Contract Works under Clause 17.1 of our Sub-Contract Agreement which shall be valued under Clause 19 and for which we are entitled to and will claim an extension of time in accordance with Clause 14.3.3 and additional costs as provided for under Clause 21.1.6."

(ii) 2 August 2011:

"As notified in the above correspondence and meetings held with your goodselves the quantity and quality of rock excavation we have been instructed to excavate below rockhead level have increased substantially from those provided under the Sub-Contract and these amount to a variation of our Sub-Contract Works ...

In accordance with the Sub-Contract Agreement we are entitled to claim additional costs under Clause 21.1.6 in respect of the instructed variations and resultant extension of time to our Sub-Contract Works which is a course we will follow ..."

However, the Arbitrator did not consider that Bauer was entitled to a Variation simply because there was a change in the conditions which could have been foreseen and that this had an effect on the work. An essential part of the variation mechanism was that there had to be an instruction by the Engineer and/or by the Employer. Where in carrying out the diaphragm wall work, Bauer encountered unanticipated ground conditions, it was still obliged to carry out the same work in terms of the volume of material which had to be excavated and there was no change to the scope of the work. In the absence of an instruction, the changed ground conditions did not, in themselves, give rise to payment as a Variation or Sub-Contract Variation, in the absence of an instruction. However, the Arbitrator did consider that Bauer had established the right to claim for additional rock excavation caused by the inclination of the rock and by instructions to deepen founding levels.

Follow the contract requirements

The problem for Bauer was that the right to make such a claim arose under sub-clause 21.1.1 not 21.1.6. Having encountered difficulties with the ground conditions, Bauer did not obtain an instruction but proceeded with the extra work required. Strictly, no notice had been given. The Arbitrator said this:

> *"I consider that both as a matter of sympathy and as a matter of construction, the contractual basis of the claim stated in the Clause 21.2 notice does not have to be the contractual basis on which the party in the end succeeds in an arbitration. First, to expect a party to finalize its legal case within the relatively short period and be tied to that case through to the end of an arbitration is unrealistic. Secondly, what is important from the point of view of the Contractor is to know the factual basis for the claim so that it can assess it and decide what to do."*

The Hon. Mimmie Chan J disagreed. Clause 21.2 expressly provided that:

> *"as a condition precedent to any entitlement", if the Defendant wanted to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Defendant "shall" within 28 days after giving notice under Clause 21.1 submit in writing (under clause 21.2.1) "the contractual basis together with full and detailed particulars and the evaluation of the claim …*
>
> *there can be no dispute, and no ambiguity, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to in Clause 21.1 and 21.2 are conditions precedent, must be 'strictly' complied with, and failure to comply with these conditions will have the effect that the Defendant will have 'no entitlement' and 'no right' to any additional or extra payment, loss and expense [emphasis added by the Judge]."*

In their August letters Bauer had simply given notice of the ground conditions encountered at the site, and the additional quantities and quality of the rock that needed to be excavated. At best these formed the factual basis for what may or may not give rise to a claim. However, those facts may result in different consequences and give rise to different rights and entitlements. Clause 21.1 envisaged a number of different bases for claims of additional payment or loss and expense. Clause 21.2 required Bauer, as a condition precedent, to submit "the contractual basis", together with the detailed particulars and evaluation of the claim which Bauer wished to pursue after the service of the clause 21.1 notice. The sub-clause referred not only to the submission of the detailed factual particulars, but "the contractual basis" together with the full detailed particulars. What was required was the basis upon which Bauer claimed to be entitled under the subcontract to maintain and pursue its claim. There may be one or more contractual bases, which can be stated in the clause 21.2 notice, but the "contractual basis" under clause 21.1 was one or more of the different causes or events set out in clause 21.1.1 to clause 21.1.6 as giving rise to a claim. The Judge was clear that:

> *"however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language such as 'if practicable', or 'in so far as the sub-contractor is able'".*

The notices only referred to clause 21.1.6 and not 21.1.1 and so in the absence of a timely notice, given the wording of the subcontract, the claim had to fail.

Conclusion

The effect of Judge Chan's decision certainly seems harsh, particularly as Bauer had continued to carry out the works when the unforeseen ground conditions were encountered. One might question whether Maeda would have acted any differently if the August letters had also made reference to sub-clause 21.1.6. However, the Judge noted that there was "*commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified*".

Both these decisions highlight the importance of understanding the language used in your contract when it comes to the service of notices. They also represent further examples of courts emphasising the importance of complying strictly with notice provisions.

Recent developments in Force Majeure

Force majeure clauses are nearly always included in commercial contracts, particularly in the infrastructure, energy and construction sectors. However, how many parties can honestly say they pay these clauses any attention until they attempt to rely upon them? **Ben Smith** suggests that very few parties consider such clauses and as a result in the current political and social climate it seems a suitable time to reconsider them.

What is a "force majeure"?

In English law, there is no defined meaning or legal doctrine of force majeure.

Rather, it is generally used to describe those contractual terms which provide relief to a party from performance of the contract following the occurrence of certain events. The underlying principle of force majeure is that the occurrence of certain events is outside a party's control and therefore that party is either excused from performing all or part of its obligations, entitled to suspend performance of all or part of its obligations, or entitled to cancel the contract (although this is rare).

In that sense, force majeure can be differentiated from the legal doctrine of Frustration which applies when an event occurs that makes it impossible to fulfil the contract. If such an event occurs the parties are automatically released from their obligations and the contract discharged. However, force majeure events rarely result in the discharge or cancellation of the contract; instead the contract usually sets out the result of a force majeure event.

A force majeure clause is also not regarded as an exemption or exception clause, even though the practical effect of a force majeure clause may be to relieve a party of liability for failure to perform, as exception/exemption clauses are typically concerned with relief from damages due to a particular event (a secondary obligation) rather than relief from a party's primary obligation to perform the contract.

An example of a force majeure clause is:

> *"If either Party is rendered wholly or partly unable to perform its obligations under the Contract because of: a) an act of God, fire, flood, drought, earthquake, windstorm or other natural disaster; (b) an act of any sovereign including war (c) acts of terrorism; (d) civil emergency (whether an emergency be declared or not); (e) fire or explosion (other than, in each case, one caused by breach of contract by (f) adverse weather conditions; (g) nationalisation, requisition, destruction or damage to property by or under the order of any government or public or local authority; (h) embargo, blockade, imposition of sanctions or breaking off of diplomatic relations or similar actions; (i) radioactive, nuclear, chemical or biological contamination or (j) labour dispute including, but not limited to, strikes, industrial action, lockouts or boycott; it shall not be liable for its failure to perform its obligations affected by said event."*

Establishing an event of force majeure

So, if you are (un)lucky enough to find yourself in a position of having to rely on a force majeure clause what considerations should you be aware of?

1. **Burden of proof**

   The burden of proof is on the party seeking to rely on the force majeure clause. Therefore it is for that party to demonstrate that an event of force majeure occurred, which had the effect of preventing it from performing its obligations under the contract. The burden of proof is often prescribed in the terms of the contract.

2. **Contractual interpretation**

   Like all contractual clauses the precise meaning and effect of a force majeure clause will depend on the specific wording of the clause and its interpretation. This means that the reading of the clause will be subject to the usual principles of contractual interpretation, for example:

   - What is the natural meaning of the words used?
   - What information was available to the parties when they entered into the contract?
   - What is the context of the clause within the wording of the contract as a whole?

3. **Defining the event of force majeure**

   As noted above, there is no accepted definition of force majeure. Therefore force majeure clauses typically include a list of examples of events that will constitute force majeure events and sometimes also include a list of events that will not constitute a force majeure event, or will simply define a set of criteria which an event must meet to be considered a force majeure event. However, some force majeure clauses do not mention force majeure at all.

"in order to constitute a force majeure event the force majeure must be the sole operative cause of the failure of the affected party to perform its obligations, unless there are express words to the contrary"

List of events

It is important to note whether the list is a list of exclusive events which may constitute a force majeure, or is instead a list of examples, or expressed to be "without limitation", or includes some form of catch-all language.

Commonly listed events of force majeure include:

- Acts of God (including earthquakes, volcanic eruptions, landslides)
- Natural catastrophes
- Plague or epidemic
- Wars, invasion, armed conflict
- Blockades, embargoes
- Sabotage
- Nationwide strikes.

The contract may also list events which the parties have agreed do not constitute a force majeure. For example, we have seen contracts which make reference to:

- Economic hardship
- Shortages of manpower
- Delay, default or failure to perform by a subcontractor
- Unavailability or late delivery of plant, materials or equipment.

Criteria for an event of force majeure

Lastly, a contract may simply list a set of criteria the event must meet, or cause, in order to be considered an event of force majeure. This approach is sometimes taken in conjunction with a list of events which either do or do not constitute a force majeure. While the interpretation of such criteria will necessarily turn on the facts of each specific case, in some circumstances case law also offers guidance. Examples of the types of criteria we have seen include:

- The event prevents the affected party from performing its obligations under the contract.

The meaning of the word "prevent" was considered by the courts in *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* [1917] AC 495 and it was concluded that if a force majeure clause provides that the relevant triggering event must "prevent" performance, the relevant party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable.

In contrast, the words "hindered" or "delayed" naturally have a wider scope and therefore will only be satisfied where performance of its obligations on the part of the affected party becomes substantially more onerous as a result of the event. For example, in *Reardon Smith Line v Ministry of Agriculture, Fisheries and Food* [1961] 2 All ER 577 the courts took the view that the event would have to be so severe as to place the affected party in a position where they could not perform their contractual obligations unless they broke other contracts.

- The event is beyond the reasonable control of the affected party.

The courts have also considered the interpretation of a clause which refers to an event being "beyond the control" of a party. In *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 the Court of Appeal said that any clause which included language referring to events "beyond the control of the relevant party" could only be relied on if that party had taken all reasonable steps to avoid its operation or mitigate its results.

The duty to mitigate an event which is a potential event of default may also be enshrined in the contract.

4. Causation

It will be rare for a force majeure clause not to require that the force majeure event must have an impact on the performance of the contract.

The judgment in *Seadrill Ghana Offshore Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm) illustrates that in order to constitute a force majeure event the force majeure must be the sole operative cause of the failure of the affected party to perform its obligations, unless there are express words to the contrary in the force majeure clause.

There has also been recent judicial commentary in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102 on whether or not the "but for" test of causation applies where an affected party is attempting to rely on a force majeure clause.

This case centred on two issues:

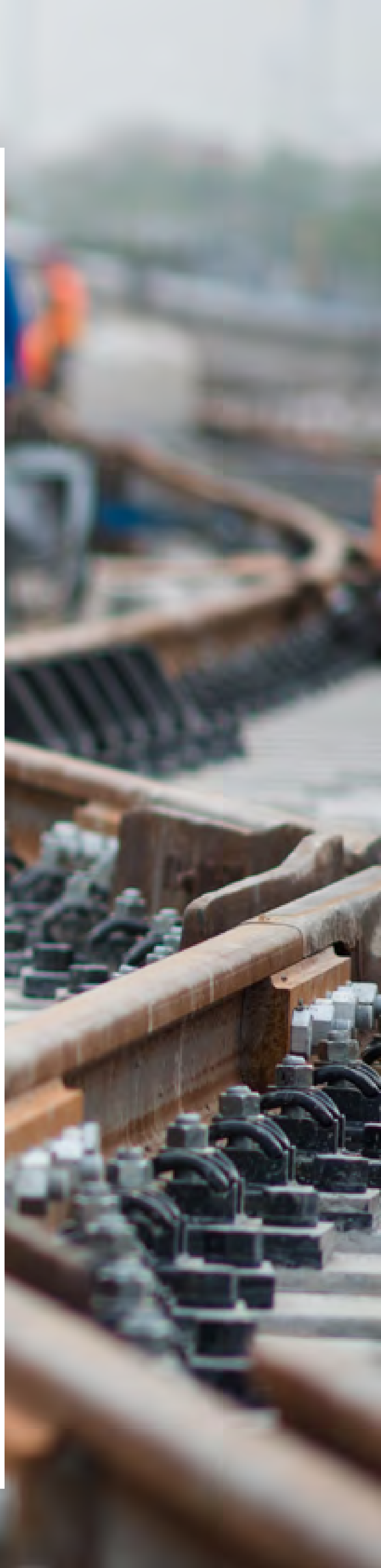
1. The proper construction of an exception clause, which excluded loss or damage, including for failure to deliver cargo, arising as a result of certain events.

2. The proper measure of damages if the exception clause did not apply.

On the facts Limbungan contended that it had been unable to charter delivery of cargo due to a flood at one of the mines which supplied the cargo. The parties agreed that the flood fell within the exception clause but disagreed about the effect of the exception clause:

- Limbungan claimed that (i) the exception clause was in fact a force majeure clause and therefore it was not required to prove causation as all its primary obligations to deliver the cargo had been cancelled on the occurrence of the force majeure event, or (ii) if the exception clause was not a force majeure clause it was still able to rely on the exception as a defence to Classic Maritime's claim for damages.

- Classic Maritime disputed this on the basis that (i) the clause was not a force majeure clause and (ii) on the facts, while Limbungan was unable to charter delivery of cargo due to a flood at one of the mines which supplied the cargo, the other mine from which Limbungan sourced the cargo had refused to supply the cargo to Limbungan for unrelated reasons. Therefore the flood at the first mine was not causative of Limbungan's failure and it could not rely on the exception clause.



5. **What type of clause are you dealing with?**

The court held that the exception clause was (i) to be construed as an exception clause, rather than a force majeure clause, and therefore it only operated as a defence to the defaulting party's liability for damages, i.e. it related to a secondary obligation; and (ii) did not affect that party's primary obligations under the contract, i.e. to deliver the cargo. Therefore, in order to take advantage of the exception clause Limbungan had to demonstrate that "but for" the flood at the mine it would have been able to deliver the cargo. It was unable to do this and therefore the exception clause did not apply and it was liable to Classic Maritime for damages.

It is important to note that while the decision in this case does not change the prevailing case law in relation to force majeure clauses and exception clauses, it does give rise to two important considerations:

1. That there could be cases where a force majeure provision could introduce a "but for" test depending on its precise wording.

2. The importance of taking care when drafting and interpreting force majeure provisions.

6. **Other points to consider**

Finally, it is important to consider whether the contract requires the affected party to take any other steps in order to be able to rely on the force majeure clause, for example:

- Does the force majeure clause include any other provisions which the affected party has to meet or demonstrate, for example in relation to the timing or impact of the potential force majeure event?

- Does the force majeure clause require notice of the potential force majeure event to be given to the other party? If so, is there a specific time limit or format for the notice and does the notice need to include any specific information?

- Does the affected party need to give the other party any other notices, for example, in order to preserve any entitlement to additional time or money?

It is important to remember that if the contract contains any of the above requirements and they are, on a proper construction, conditions precedent to the affected party's entitlement to rely on the force majeure clause, or claim relief from the impact of the force majeure, the affected party will not be excused from performance where it has failed to comply with such requirements.

A note on Brexit

On 23 June 2016, the UK voted to leave the EU and on 29 March 2017, the UK government gave formal notice of the UK's intention to leave under Article 50(2) of the Treaty on the European Union. The UK's departure was scheduled to take place on 29 March 2019 but, as at the time of writing, this has been delayed and it is unclear precisely when the UK will leave the EU.

Against this background, perhaps surprisingly, there have been no reported cases in which parties seek to rely on Brexit, or the consequences of Brexit, as constituting an event of force majeure. However, as recently as February 2019 the High Court was unwilling to find that Brexit consequences were sufficient to frustrate a contract (see *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)).

Insofar as it is possible that Brexit could negatively affect a party's ability to perform their contractual obligations it is feasible that parties will seek to rely on force majeure provisions as a result of Brexit, or the consequences of Brexit. The extent to which any such claims are successful will, of course, depend on whether Brexit falls within the precise definition of force majeure and whether it is Brexit or something else which has caused the affected party to fail to perform its obligations under the contract.

JCT Design and Build contracts and statutory requirements - a trap for contractors?

As **Jatinder Garcha**[1] explains a common amendment to the published form of JCT Design and Build Contract is the passing to the contractor the responsibility for errors, ambiguities and inadequacies in the Employer's Requirements. This amendment is made as part of a wider suite of changes which make the contractor the single point of design responsibility for the Works and, accordingly, most design and build contractors within the industry generally expect and accept the amendment. In circumstances where this amendment is not made (for example, where the parties contract on the unamended published form of JCT Design and Build Contract), contractors should be aware that they are still responsible for the Employer's Requirements meeting Statutory Requirements in certain circumstances.

In the published form of JCT Design and Build Contract, clause 2.11 states that "Subject to clause 2.15, the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the adequacy of any design contained in them." It is therefore not unreasonable for a contractor to assume that the Employer is the party responsible for errors, ambiguities and inadequacies in the Employer's Requirements.

As a result, the general principle on cost would appear to be simple: costs are borne by the party responsible for the document in question. If there is any discrepancy within the Contractor's Proposals and/or Contractor's Design Documents then the Contractor is responsible for the cost of rectification. Where there is any discrepancy within the Employer's Requirements (or in designs contained in them) which is not dealt with in the Contractor's Proposals, the Employer is responsible for the cost of rectification; the Employer decides how the discrepancy is dealt with and such decision is treated as a Change.

The above general principle is, however, subject to a major exception in relation to Statutory Requirements. Clause 2.15.1 of the published JCT Design and Build Contract states that if either party to the contract becomes aware of a divergence between the Statutory Requirements and the Employer's Requirements (including where the Employer's Requirements have been amended by any Change) they shall immediately notify the other party. The Contractor is to provide a proposal for removing the divergence, and then must complete any design and construction in accordance with the agreed proposal.

Given that the divergence is found in the Employer's Requirements it would be reasonable to assume that the proposal agreed by the Employer would also be treated as a Change and therefore be at the Employer's cost. That is not the case. Clause 2.15 states that the required amendment is to be carried out entirely at the contractor's cost unless one of the following three exceptions applies:

1. The divergence arises from a change in Statutory Requirements after the Base Date and that such change necessitates an alteration to the Works; or

2. If an amendment to the Contractor's Proposals is necessitated by the terms of any Development Control Requirement or approval issued after the Base Date; or

3. If there is any necessary change to any part of the Employer's Requirements which is expressly stated to comply with the Statutory Requirements.

Points for contractors to consider when reviewing these provisions:

1. The Contractor is under no express obligation to search for any divergence from Statutory Requirements in the Employer's Requirements but if it fails to find a divergence and the resulting Works do not comply with Statutory Requirements, then the Contractor will be in breach of compliance with clause 2.1.1, notwithstanding that the error lay in the Employer's Requirements. Contractors therefore need to check that the Employer's Requirements and any Employer's instructions do comply with the Statutory Requirements in the same way that they must check that their own design documents comply.

2. The only exception to the Contractor's general obligation to carry out and complete the Works in compliance with Statutory Requirements is set out in clause 2.1.2, under which the Contractor's obligation to comply with the Statutory Requirements do not apply to the extent that the relevant part of the Employer's Requirements state specifically that the Employer's Requirements comply with the Statutory Requirements. The Contractor is relieved of its duty only when the Employer's Requirements make a positive assertion of compliance. If an amendment becomes necessary because a part of the Employer's Requirements which specifically states that it complies with Statutory Requirements does not, in fact, comply, then the Employer must issue an instruction under clause 3.9 effecting a Change (clause 2.15.2.3). In reality this exclusion is likely to offer little protection, as it is unlikely that the Employer would include such express statements in the Employer's Requirements.

3. The risk associated with divergences in the Employer's Requirements will depend on the level of detail included within the Employer's Requirements. The greater the level of detail the greater the risk. It is the JCT's intention that the Employer's Requirements should not contain detailed design. In practice they often do and the Contractor has to "spot the needle in the haystack" in terms of compliance with Statutory Requirements.

1. With thanks to Mark Pantry for his practical insights.

The use (and misuse) of indemnities in construction contracts

Meeting agendas often give good notice of the topics that will get negotiations heated. Watch out for: limitations on liability, rights to terminate for convenience, exclusions of loss of profit, time bar clauses to claims, and, not to be forgotten, liability for Brexit. Frequently, indemnities fall within this category.

Having watched indemnities bounce backwards and forwards in contract negotiations, **Edward Colclough** has often wondered if parties are fully aware of the implications that the much sought after "indemnity" brings with it.

Aside from securing the trophy of an "indemnity" in your construction contract, what extra does an indemnity get you and is it worth the fight?

Back to basics

Why are indemnities so desired? In short, they are a promise to pay money on the occurrence of a specified event.

Properly used, an indemnity allows the parties to a contract to allocate the risk of an event occurring and the losses that flow from it (which can be a fixed sum or an amount of damages to be determined). The indemnified event may be triggered by Party A (the indemnitor) either:

- breaching a term of the contract (e.g. a confidentiality undertaking); or
- taking on responsibility for a specified event occurring (e.g. a change in VAT law).

The trigger event can therefore be either "fault based" or neutral. If, however, Party A would already be responsible at law for a fault-based breach of the contract, what additional reward does the indemnity get Party B (as the indemnitee)?

Advantages of indemnities?

Full recovery of loss. The true intent behind an indemnity is normally that Party B wants 100% recovery from Party A for any losses it incurs as a result of the trigger event occurring. The aim is to fully apportion the risk of the trigger event onto Party A.

Party B will argue that any losses it incurs as a result must be covered by Party A, and should not be subject to the usual legal hurdles of remoteness, foreseeability or reasonableness which can whittle down what it can recover. The goal is for Party A, as the indemnitor, to pick up the tab for whatever losses arise. This is seldom the case. Lord Justice Staughton[1] identifies two classes an indemnity can fall within in a contract:

> *"The word 'indemnity' is ... used in two senses. It may mean simply damages awarded for tort or breach of contract. ... Alternatively the word 'indemnity' may refer to all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties. There is precious little authority to support such a meaning, but I do not doubt that the word is often used in that sense."*

As can be seen, the courts are cautious to depart from the well-established approach of not awarding unforeseeable or not properly mitigated losses, especially in the context of a breach of contract claim. There is little authority to support such an interpretation of an indemnity.

Therefore persuading a court to interpret an indemnity to allow recovery of any and all losses incurred will be an uphill task and would need to rely on express wording in the indemnity showing a very clear evidence that this is the true intention of the parties.[2]

Legal costs. Linked to 100% recovery is the belief that Party A will pay in full for all of Party B's legal costs. Again, this is unlikely to be the case.[3]

The starting point of the English courts is to award reasonable costs to the winning party. While the courts will generally look to uphold terms freely negotiated in contracts, the Court of Appeal has held that it would offend public policy to allow 100% recovery of legal costs where unreasonable costs have been incurred or in instances where the successful party is required to pay the losing parties' costs.

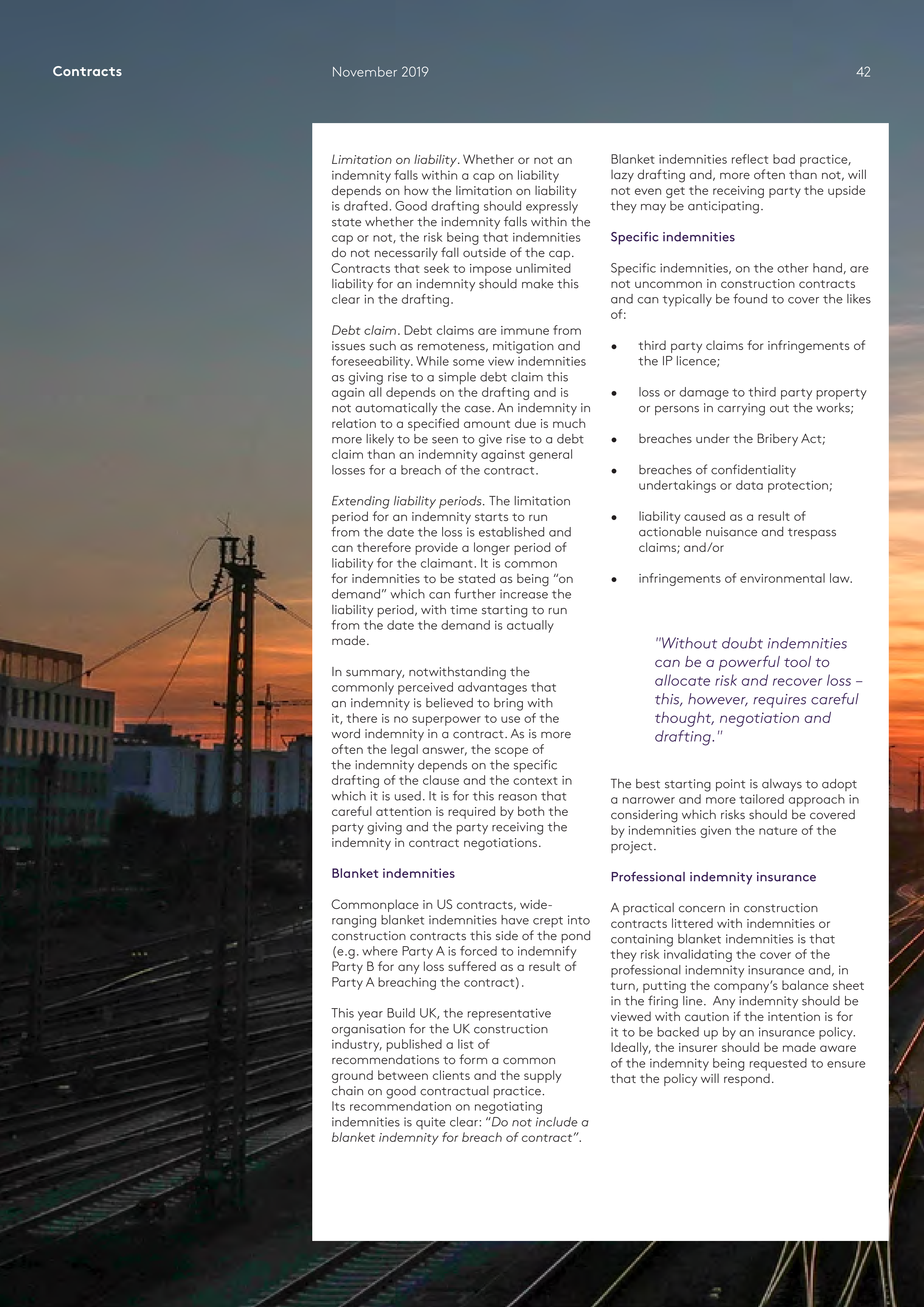
In contrast, indemnities covering legal costs incurred by way of third party claims can, and have managed to, obtain full recovery. The courts themselves do distinguish between the ability to recover legal costs on a "standard basis" and "indemnity basis". CPR 44.3(3) states:

> *"Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party."*

On a standard basis any doubt falls in favour of the paying party. In addition, on an indemnity basis the court may disregard whether costs have been proportionately and reasonably incurred or whether they are proportionate and reasonable in amount. It must, however, still consider whether the costs have been unreasonably incurred or are unreasonable in amount.[4]

In adjudications under the Construction Act,[5] parties to a construction contract are prohibited from pre-allocating liability for litigation costs of the adjudication, unless such agreement is made in writing after the giving of the notice of intention to refer the dispute to adjudication.[6]

1. Total Transport Corporation v Arcadia Petroleum Ltd, ("the Eurus") [1998] Lloyds Rep 351
2. Church Commissioners v Ibrahim [1997] 1 EGLR 13.
3. Woodford v AIG Europe Ltd [2018] EWHC 358 (QB).
4. CPR 44.4.
5. Housing Grants, Construction and Regeneration Act 1996 (as amended).
6. Section 108A(2).
7. David Thomas QC, Keating on NEC3: Clause by Clause Commentary on the Engineering and Construction Contract, Sweet & Maxwell, 2012, 9-003.



Limitation on liability. Whether or not an indemnity falls within a cap on liability depends on how the limitation on liability is drafted. Good drafting should expressly state whether the indemnity falls within the cap or not, the risk being that indemnities do not necessarily fall outside of the cap. Contracts that seek to impose unlimited liability for an indemnity should make this clear in the drafting.

Debt claim. Debt claims are immune from issues such as remoteness, mitigation and foreseeability. While some view indemnities as giving rise to a simple debt claim this again all depends on the drafting and is not automatically the case. An indemnity in relation to a specified amount due is much more likely to be seen to give rise to a debt claim than an indemnity against general losses for a breach of the contract.

Extending liability periods. The limitation period for an indemnity starts to run from the date the loss is established and can therefore provide a longer period of liability for the claimant. It is common for indemnities to be stated as being “on demand” which can further increase the liability period, with time starting to run from the date the demand is actually made.

In summary, notwithstanding the commonly perceived advantages that an indemnity is believed to bring with it, there is no superpower to use of the word indemnity in a contract. As is more often the legal answer, the scope of the indemnity depends on the specific drafting of the clause and the context in which it is used. It is for this reason that careful attention is required by both the party giving and the party receiving the indemnity in contract negotiations.

Blanket indemnities

Commonplace in US contracts, wide-ranging blanket indemnities have crept into construction contracts this side of the pond (e.g. where Party A is forced to indemnify Party B for any loss suffered as a result of Party A breaching the contract).

This year Build UK, the representative organisation for the UK construction industry, published a list of recommendations to form a common ground between clients and the supply chain on good contractual practice. Its recommendation on negotiating indemnities is quite clear: “*Do not include a blanket indemnity for breach of contract*”.

Blanket indemnities reflect bad practice, lazy drafting and, more often than not, will not even get the receiving party the upside they may be anticipating.

Specific indemnities

Specific indemnities, on the other hand, are not uncommon in construction contracts and can typically be found to cover the likes of:

- third party claims for infringements of the IP licence;
- loss or damage to third party property or persons in carrying out the works;
- breaches under the Bribery Act;
- breaches of confidentiality undertakings or data protection;
- liability caused as a result of actionable nuisance and trespass claims; and/or
- infringements of environmental law.

> *"Without doubt indemnities can be a powerful tool to allocate risk and recover loss – this, however, requires careful thought, negotiation and drafting."*

The best starting point is always to adopt a narrower and more tailored approach in considering which risks should be covered by indemnities given the nature of the project.

Professional indemnity insurance

A practical concern in construction contracts littered with indemnities or containing blanket indemnities is that they risk invalidating the cover of the professional indemnity insurance and, in turn, putting the company’s balance sheet in the firing line. Any indemnity should be viewed with caution if the intention is for it to be backed up by an insurance policy. Ideally, the insurer should be made aware of the indemnity being requested to ensure that the policy will respond.

Standard form contracts

The standard form construction contracts contain indemnities.

JCT. The JCT Design and Build 2016 edition contains the usual Contractor-specific indemnities for:

- intellectual property infringement (clause 2.19); and
- injury or damage to property or persons in carrying out the Works due to negligence, breach of statutory duty omission or default of the Contractor or Contractor's Persons (clause 6.2).

NEC. The position under the NEC contracts has not always been clear for contractors. Clause 83.1 of the NEC3 contained a reciprocal indemnity whereby: *"Each party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk*." The problem was that Contractor's risks were very widely defined as all "*risks which are not carried by the Employer*".

On a plain reading of clause 83.1 the indemnity appears to be extremely wide and commentators have noted that an "uncommercial" reading could suggest that "*because not all compensation events are Employer's risks some of them may be Contractor's risks with the result that there may be an increase in the prices under clause 60 which the Employer then recovers under his indemnity under clause 83.1*".[7]

Fortunately, this ambiguity has been clarified under the new NEC4 editions where Contractor's liabilities (previously called *Contractor's risks*) are now listed in clause 81, rather than being defined by exception as done in the NEC3. These indemnified liabilities now relate to specific risks for which the Contractor is responsible:

- claims from Others in connection with providing the works;
- loss or damage to the works, Plant, Materials, Equipment;
- loss or damage to property owned or occupied by the Client other than the works which arise in connection to the works; and
- death or bodily injury to the employees of the Contractor.

FIDIC. FIDIC has recently had to revisit its approach to indemnities. The early pre-release of the Yellow Book Second Edition 2017 created a stir amongst contractors when the new clause 17 (now called "Care of the Works and Indemnites") contained an indemnity from the Contractor to the Employer in relation to any breach of its design obligations that results in the Works not being fit for the purpose identified. This indemnity was drafted to sit outside of the limitation of liability.

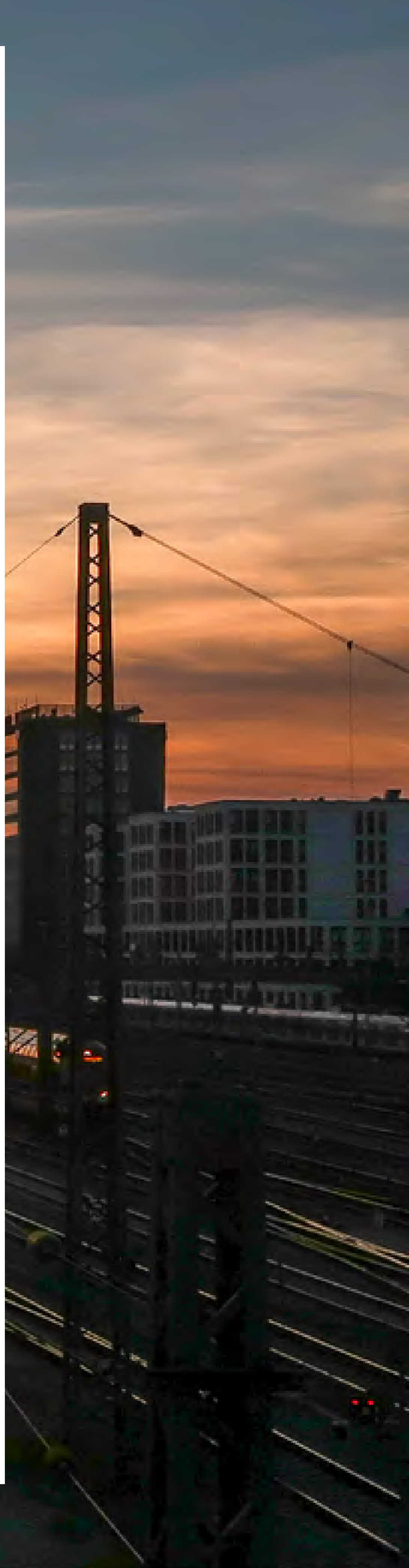
Although the design-related fitness for purpose indemnity remains in the new edition, it is now included within the reciprocal limitation of liability at clause 1.15.

The usual FIDIC indemnities remain in the new 2017 editions in relation to intellectual and industrial property infringement; bodily injury, sickness, disease or death; and damage or loss to any property (other than the Works).

When negotiating any standard form contract parties should look out for bespoke amendments seeking to incorporate additional and/or enhanced indemnities.

A way forward?

Indemnites should remain a red flag on the page. That said, they are likely to be one of the most misunderstood terms used in construction contracts. Without doubt indemnities can be a powerful tool to allocate risk and recover loss – this, however, requires careful thought, negotiation and drafting. Any hope that the word "indemnity" provides for a straightforward and easy case is wrong as the case may well focus on what the indemnity actually means.



Case law update

Our usual case round-up comes from two different sources. As always, we highlight here some of the more important cases which may not be covered in detail elsewhere in the Review. First, there is the *Construction Industry Law Letter* (CILL), edited by Fenwick Elliott's Karen Gidwani. CILL is published by Informa Professional. For further information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0)20 7017 7974 or by email: kate.clifton@informa.com.

Second, there is our long-running monthly bulletin entitled *Dispatch*. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.com. If you would like to receive a copy every month, please contact Jeremy Glover or sign up online http://www.fenwickelliott.com/research-insight/newsletters/dispatch. We begin by setting out some of the most important adjudication cases as taken from *Dispatch*.

Adjudication: cases from Dispatch

Claims by companies in insolvent liquidation

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27

The first instance decision had dealt with the interplay between the adjudication process and the insolvency regime. Now the CA had to consider the issue of whether an adjudicator can ever have the jurisdiction to deal with a claim by a company in insolvent liquidation. But, as LJ Coulson noted, there was also a related issue, concerning whether (assuming that the adjudicator had the necessary jurisdiction) such an adjudication could ever have any utility and, if not, whether an injunction preventing the continuation of what would be a futile exercise was justified in any event.

Here, over three years after going into liquidation, Bresco started an adjudication, saying that Lonsdale had wrongfully repudiated a sub-sub-contract and made claims for some £220k. Mr Justice Fraser granted a declaration that:

"A company in liquidation cannot refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of any claim for further sums said to be due to the referring party from the respondent party."

Bresco appealed. Lonsdale had said that the right to refer a dispute to adjudication had been lost when Bresco went into liquidation. At that point, there ceased to be any claim under the contract, because it was replaced with the single right, under Rule 14.25 of the Insolvency Rules, to claim the balance (if any), arising out of the mutual dealings and set-off between the parties.

Bresco questioned why adjudication should be treated any differently to arbitration? If a party, could refer a claim to arbitration, why not to adjudication? LJ Coulson agreed that he could see no reason why, purely as a matter of jurisdiction (as opposed to utility), a reference to adjudication should be treated any differently to a reference to arbitration. If the contractual right to refer the claim to arbitration is not extinguished by the liquidation, then the underlying claim must continue to exist. That a reference to adjudication may not result in a final, binding decision could not mean that the underlying claim was somehow extinguished.

The reference to "utility" led to consideration of a second issue. What is the utility (if any) to be derived from the adjudicator's theoretical jurisdiction, when the claiming company is in insolvent liquidation and the responding party has a cross-claim? LJ Coulson referred to the "basic incompatibility between adjudication and the insolvency regime. Adjudication is a method of obtaining an improved cash flow quickly and cheaply; the insolvency regime is "an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors". Reviewing the existing authorities, the Judge noted that a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. Judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there was a cross-claim, would only be granted in an "exceptional" case:

"a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore "an exercise in futility".

It would only be in exceptional circumstances that a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution. Thus, in the ordinary case, even though the adjudicator may technically have the necessary jurisdiction, it was not a jurisdiction that could lead to a meaningful result.

"A company in liquidation cannot refer a dispute to adjudication when that dispute includes any claim for further sums said to be due to the referring party from the respondent party."

There was nothing on the facts of the Bresco case that took the case out of the ordinary, or which demonstrated that it was just or convenient for the underlying adjudication to continue. Bresco had been in insolvent liquidation for over three years before they referred their claim to adjudication. There was no evidence that Bresco would ever be able to trade again. By the time Bresco made their claim, they had already been sent a copy of Lonsdale's own claim, making this a classic case of claim and cross-claim. Lonsdale had not pursued Bresco, doubtless because of Bresco's insolvency. There was no good reason to make Lonsdale now incur the costs of defending a claim in adjudication which could not be enforced. Accordingly, although LJ Coulson considered that Mr Justice Fraser was wrong to find that the adjudicator had no jurisdiction to consider this claim, he agreed that Lonsdale were entitled to an injunction to prevent the adjudication continuing. In other words, whilst in theory, it is possible for companies in liquidation to start an adjudication, it may well be the case that there will be good grounds to obtain an injunction to restrain or stop that adjudication.

Staying the enforcement of an adjudicator's decision

Gosvenor London Ltd v Aygun Aluminium UK [2018] EWHC 3166 (TCC)

At first instance, Mr Justice Fraser extended the lists of circumstances set out in the *Wimbledon v Vago* case, where a stay of execution might be granted on an application to enforce an adjudicator's decision to include the following:

"(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

Mr Justice Fraser imposed a stay and Gosvenor appealed. LJ Coulson began by endorsing the principle identified above. He also agreed with Mr Justice Fraser that the number of cases where the new addition will be relevant to the granting of a stay of execution is likely to be small, and the number where there may be an overlap between the evidence that was or could have been deployed in the adjudication, and the evidence justifying a stay on the grounds of risk of dissipation, will be fewer still. The CA then went on to consider if the new principle had been properly applied. It had. Mr Justice Fraser had been entitled to come to the view that he did and, in the exercise of his discretion, to grant a stay of execution of the adjudicator's decision.

> *"If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would justify the grant of a stay."*

"Smash & grab" vs "true value" adjudications

M Davenport Builders Ltd v Greer & Anr [2019] EWHC 318 (TCC)

The CA in the case of *S&T (UK) Ltd v Grove Developments Ltd* confirmed that, where there has been a "smash and grab" adjudication, an employer can bring an adjudication to consider the true value of the works. That is, provided the employer has paid the sums awarded in the first adjudication. This very issue cropped up here, where there was a final account dispute between Davenport and Mr and Mrs Greer. The adjudication and payment provisions of the Scheme applied. Davenport made a payment application for the final account on 22 June 2018 for £106,160.84. The due date for payment was 25 June 2018 and the final date for payment was 12 July 2018. The Greers failed to submit a Payment Notice or a Pay Less Notice within the required time frames. Davenport therefore issued a Payee's Default Notice, which adjusted the final date for payment from 12 July 2018 to 18 July 2018. The Greers failed to pay, and Davenport commenced adjudication proceedings ("Adjudication One").

On 24 October 2018, in Adjudication One, Davenport was awarded the full amount claimed in its final account application plus interest. Again, the Greers did not pay. Instead, on 30 October 2018 they commenced a new adjudication ("Adjudication Two") challenging the valuation of the final account. The Greers were looking to set-off or counterclaim against the amount awarded in Adjudication One. In Adjudication Two, the adjudicator decided that as a result of the revaluation, no sum was due to Davenport.

Davenport commenced enforcement proceedings. The Greers sought to rely on the award made in Adjudication Two. The key question in this case was whether they could rely upon the decision in Adjudication Two, considering that they had not paid the amount awarded in Adjudication One.

Here, as well as considering Grove, Mr Justice Stuart-Smith considered the case of *Harding v Paice* [2016] 1 WLR 4068, where, Paice had failed to pay the award ordered from an adjudication following their failure to submit a Payment Notice or a Pay Less Notice. Harding commenced enforcement proceedings. Paice commenced a subsequent "true value" adjudication before the hearing of the enforcement proceedings. Despite the fact Paice did not pay the sum before launching the subsequent adjudication, Paice was not prevented from proceeding with or relying on the result of the later adjudication in the enforcement proceedings. However, before the CA made its decision in the enforcement proceedings and before the adjudicator gave their decision in the "true value" adjudication, Paice had paid the sums ordered by the initial adjudication.

However on the facts here, the Judge concluded that before the Greers could rely on the decision made in Adjudication Two, they were required to discharge their immediate payment obligation from Adjudication One. The Judge held:

"In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication."

In Mr Justice Stuart-Smith's view, it was clear that the immediate payment obligation had not been discharged in this case and as a consequence, the Greers were not entitled to rely upon the decision made in Adjudication Two. As a result, the Greers were ordered to pay £106,160.84 plus interest and the costs of the enforcement proceedings.

Mr Justice Stuart-Smith also considered the difference between final and interim applications and whether the difference was of any importance here. He came to the view that there was nothing in the provisions of the HGCRA or the Scheme which suggested that different policy considerations should apply. Payments at

the end of a particular contract may be vital to enable the contractor to continue to operate going forward; quite apart from the need to fund the continuing obligation to make good or complete works under the contract in question. In the view of the Judge, the deprivation of cash flow may have a serious adverse influence on a contractor, whether it occurs during or at the end of the works.

However, the Judge also said this:

"That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation: see the decision of the Court of Appeal in Harding. It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so."

> *"An employer, subject to an obligation to discharge an adjudicator's order based upon "the failure to serve either a Payment Notice must discharge that obligation before being able to rely upon a subsequent decision in a true value adjudication."*

Tantalisingly, the Judge did not provide any examples or circumstances; he did, however, say this of the Harding case earlier in the judgment:

"The decision of the Court of Appeal implies that it is not an essential prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged before launching the later true value adjudication. Paice did not pay its immediate obligation under the third adjudication before launching the fourth, and they were not precluded from proceeding with or relying upon the fourth adjudication for that reason. This suggests that the critical time will be the time when the Court is deciding whether to enforce the immediate obligation."

No payment had been made by the Greers and despite the suggestion made by the Judge that there may be circumstances when payment by an employer is not a prerequisite to relying upon a subsequent true value adjudication, the prudent course in most cases would appear to be that the employer should pay first and argue later.

Did allegations of fraud affect the enforcement of an adjudicator's decision? *PBS Energo AS v Bester Generacion UK Ltd [2019] EWHC 996 (TCC)*

PBS sought the summary enforcement of an adjudication decision in the sum of £1.8 million. Bester resisted on the basis that the decision had been procured by fraud. Bester had entered into a subcontract with PBS for the engineering, procurement, construction and commissioning of a biomass-fired energy-generating plant. Disputes arose, and proceedings were issued in the TCC arising out of an alleged termination. The full hearing is currently listed for July 2019. In the interim, PBS commenced an adjudication where the adjudicator decided that PBS had validly terminated the subcontract. He also ordered that Bester should repay the performance security of £2.7 million. PBS had to enforce this decision, with the Judge commenting that it was not: *"unfair to characterise Bester's conduct as adopting every and any device to stave off the evil moment of payment."*

PBS started a second adjudication seeking the valuation and payment of certain claims. Issues included the value of the equipment that had been manufactured at the time of termination of the contract. The adjudicator here found that Bester was liable to pay £1.8 million. Bester had claimed that PBS was required to mitigate against its loss by selling on or using the items of plant on some other facility. The adjudicator disagreed, noting that there was evidence that Bester had caused PBS to manufacture the plant items which were now stored at factories in the Czech Republic.

Mr Justice Pepperall having reviewed the existing authorities, *including Gosvenor London Ltd v Aygun Aluminium UK,* noted that where the alleged fraud has been adjudicated upon, then the adjudicator's decision should, without more, be enforced. Further, an adjudicator's decision should usually be enforced where the allegation of fraud should reasonably have been taken before the adjudicator. The Judge continued that there was an:

"important distinction between cases in which the fraud was, or should have been, put in issue in the adjudication and cases in which the adjudication decision was itself procured through fraud that was reasonably discovered after the adjudication was over."

Further, whilst the temporary finality of an adjudication decision was important, and the courts must be "robust" not to allow such policy to be undermined simply by the assertion of fraud, that policy consideration must:

"yield to the well-established principle that the court will not allow its procedures to be used as a vehicle to facilitate fraud. Where, exceptionally, it is properly arguable on credible evidence that the adjudication decision was itself procured by a fraud that was reasonably discovered after the adjudication, the court is unlikely to grant summary judgment".

Bester said that PBS told the adjudicator that equipment manufactured for the project was stored to Bester's order and would be available to Bester upon payment of the sums found to be due. However, this was "simply untrue" in relation to the water-cooled grate and other items. Bester alleged that PBS knew or must have known that these statements were false. Alternatively, PBS was, at the very least, reckless as to the truth of its statements. These false statements influenced the second adjudicator's decision.

PBS accepted that its evidence in the adjudication was mistaken as to the location of the water-cooled grate. PBS also agreed that Bester would not be able to obtain all of the equipment and that no credit had in fact been offered for the equipment that was no longer available. However, there was no fraud. Throughout, it had been PBS, and not Bester, that had driven the proper resolution of this dispute. Even if some credit should have been given for the water-cooled grate, which had a value of around £400k, or any other equipment no longer available to Bester, PBS had a claim in the main action for in excess of £3.9 million in addition to the sums claimed here. There was also evidence of Bester's weak financial position. By contrast, PBS was a solvent and established business.

> *"None of this is, however, an answer to the short point that, by this application, PBS seeks to enforce an adjudication decision which was arguably procured by fraud."*

On reviewing the evidence, the Judge considered that it was "properly arguable" that a number of representations made in the adjudication were false. For example, the grate had been installed in Poland in September 2018, before the representations to the contrary were made to the adjudicator some two months later. It was also "properly arguable", that PBS had made false representations to the adjudicator knowing them to be false, without belief in their truth or, at the very least, recklessly. Accordingly, there was an arguable case of fraud. And given that it was clear that the adjudicator had rejected Bester's argument that credit should be given for the value of undelivered parts and equipment on the basis that these were bespoke items that had been manufactured to Bester's order and which PBS had, up to that point, been unable to resell or use in other projects, it was "properly arguable" that the alleged false representations were intended to, and did, influence the adjudicator and that PBS thereby obtained a material advantage in the adjudication proceedings.

The information came to light during the disclosure process in the TCC claim, there being some 57,000 documents of which 17,000 were disclosed in Czech or Slovak without an English translation. PBS were not able to point to any documents which would have allowed Bester to establish the facts now relied upon, during the adjudication. Hence, the Judge was satisfied that Bester could not reasonably have been expected to have argued its fraud allegation in the adjudication.

The Judge concluded that it was "properly arguable on credible evidence" that PBS had obtained some advantage in the adjudication and that the adjudication decision was obtained by fraud. The Judge made clear his views about this:

"It appears that PBS thinks that this was fair game. That Bester was in the wrong for cancelling the sub-contract and that it was doing no more than doing its best to mitigate its losses...Further, there are real questions over Bester's solvency, there appears to have been no merit in its defence to earlier adjudication enforcement proceedings and PBS might be right that there remains a further significant liability arising from the Wrexham project. Further, it may be that the fraud argument is something of a windfall for an insolvent party that was always going to seek to avoid payment in any event...None of this is, however, an answer to the short point that, by this application, PBS seeks to enforce an adjudication decision which was arguably procured by fraud."

The Judge was further satisfied that Bester could not reasonably have discovered the alleged fraud before the conclusion of the adjudication. Therefore, this was "one of those rare adjudication cases" where there was a properly arguable defence that the decision, was obtained by fraud. It was not for the court to seek to "re-engineer" the decision or sever part of the decision for example to give credit for the value of the water-cooled grate, and to identify what, if any, sum might have been ordered to be paid in the event that there had been no arguable fraud. The application for summary judgment was dismissed.

Failing to consider witness evidence

J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd [2019] EWHC 1152 (TCC)

RLD sought to resist enforcement of an adjudicator's decision in the sum of £1.7 million on the basis that the decision had been reached in breach of natural justice. Mrs Justice Jefford reminded the parties that when alleging that a breach of natural justice has occurred, it is necessary to establish that the breach is more than peripheral: it must be material. To resist enforcement, RLD had to establish:

(i) that there was some plain breach of the rules of natural justice;

(ii) that that breach was material to the outcome of the adjudication; and

(iii) that that material breach was such that it would be unfair to enforce the decision.

The decision included the comment that the adjudicator had "*carefully considered all the evidence and submissions although not specifically referred to in this Decision*". There was no dispute that this appeared to be a "pro forma" paragraph in the adjudicator's decision. However, the Judge noted that the fact that a paragraph is a standard paragraph does not mean that it is not true and accurate.

In making a decision about whether or not an agreement had been reached, the adjudicator referred to statements from four people who had attended a key meeting but made no reference to another statement on the same issue. As a result of overlooking that statement, it was said that the adjudicator had failed to deal in its entirety with a key defence, namely that there was no intention to create legal relations at the meeting in question.

"Had the adjudicator failed, inadvertently, to address a key defence to the extent that that amounted to a breach of natural justice?"

The Judge said that she was prepared to accept that RLD would have a real prospect of success on the argument that the adjudicator overlooked the statement on this issue. However, that was not the relevant issue. Rather, the question was whether there was a real prospect of defending the claim to enforce the adjudicator's decision and that turned on whether the adjudicator had failed, inadvertently in this case, to address a key defence to the extent that that amounts to a breach of natural justice. The apparent omission of any consideration of the statement was only relevant in so far as it went to whether there was a real prospect of success on the argument that the adjudicator had failed to address a key defence.

The Judge did not consider that this was the case here. For example, the evidence in question added nothing to other evidence which was referred to. The "overlooked" evidence was "not in any sense crucial".

Was the adjudication commenced in time?

Sitol Ltd v Finegold & Anr [2018] EWHC 3969 (TCC)

This was an application by Sitol, a specialist tiling and ceramic company, to enforce an adjudication decision in the sum of £45k plus the adjudicator's fees of £42k. One of the arguments raised by the Finegolds was that the dispute was referred to the adjudicator too late by reference to specific notification provisions in the relevant contract. At clause 93.3 of the contract, it said:

"A party may refer a dispute to the adjudicator if the party notified the other party of the dispute within four weeks of becoming aware of it."

In this case, the relevant notification was not earlier than 25 April, and it may have been 30 April, being the dates of the notice of adjudication and the referral. However, the Finegolds said that a dispute had arisen by 19 February and Sitol was aware of the dispute by 19 February, so the clock started ticking then. If that was correct then the latest date for notification was 19 March and Sitol missed that and were out of time. Sitol said that the clock did not start running until 4 April because it was only by then that there was a dispute of which it was aware.

"this adjudication was started too late. It may be regarded as a technical point, but I have to apply the law, I am afraid. The analysis and the correspondence here only points one way."

When it came to defining dispute, Mr Justice Waksman referred to the first four of Mr Justice Jackson's seven propositions in the case of *Amec Civil Engineering Ltd v Secretary of State for Transport*:

"1) The word 'dispute' is to be given its normal meaning.

2) Despite the simple meaning of 'dispute', there is no hard-edged legal rule as to what was or was not a dispute, but the accumulating judicial decisions have produced helpful guidance.

3) The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4) The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted ... The respondent may simply remain silent for a period of time, thus giving rise to the same inference."

Here, on 17 January, Sitol sent an invoice for unpaid fees to the Finegolds. It was delivered on 23 January. Sitol sent a chaser on 6 February and an email on 20 February. However, on 19 February solicitors for the Finegolds, DLA, wrote challenging whether Sitol had entered into a contract with the Finegolds or in fact the main contractor. On 9 March, Sitol wrote back, saying that they had still not been paid.

On 16 March there was a reply, maintaining that there was no obligation to pay Sitol. In response to comments that no contract had been provided, Sitol duly sent copies of what they said was the contract. That made no difference and a further letter came from the solicitors concluding that the claim was without merit. Mr Justice Waksman said that this was not a case of silence:

"It is not a case where it is suggested the dispute has arisen simply because an invoice has been rendered that has not been paid. This is not even a case of an implied rejection. This is, on any analysis, a case of an express rejection of the claim. So, the difficulties that one finds in some 'notification of dispute' cases simply does not arise here. In my judgment, the dispute had crystallised once DLA had written its letter of 19 February. It made plain its contention that whatever Sitol might have said or got, there was no contract between the Finegolds and Sitol. That is made plain in the whole of the body of the letter of 19 February. There is nothing more to be said about that dispute."

Further, the fact that in the course of a dispute which has arisen one party says, "Show us what you have", or, "Can you not do any better?" or "We will be interested to see what evidence you have", does not indicate that the dispute has not arisen. It just means that it is possible that the dispute might be resolved, for example, without litigation, depending on what is produced. So, on any view, for the purposes of this notification clause, a dispute had most clearly arisen by 19 February. Here, the dispute had been objectively brought to Sitol's attention the moment they got the letters because they happened to be the other party to the letters. Accordingly the Judge noted that he had:

"come to the conclusion (with no great enthusiasm, I should add), that this adjudication was started too late. It may be regarded as a technical point, but I have to apply the law, I am afraid. The analysis and the correspondence here I am afraid only points one way."

TeCSA Low Value Disputes

On 21 June 2019 TeCSA launched a low value disputes (LVD) adjudication service, which is being run on a pilot basis until November 2019. The aim is to give parties who wish to refer disputes for fixed amounts of up to £100,000 (excluding VAT and interest) to adjudication, certainty as to the costs. The LVD Service only limits the fees which the adjudicator can charge, which means that it is not necessary to get the opposing party to agree to the use of the LVD Service. The party seeking the nomination can simply apply to TeCSA for the nomination of an adjudicator using the specified form. The values of the amount being claimed and the adjudicator's fee caps are:

Up to £10,000	£2,000
£10,001 to £25,000	£2,500
£25,001 to £50,000	£3,500
£50,001 to £75,000	£4,500
£75,001 to £100,000	£5,000

The LVD Service only applies to claims for a specified amount, i.e. a liquidated sum, as between two parties. Whilst there is no restriction on the type of financial claims which could be made (e.g. the claim could be for retention, sums certified under a contract, damages and loss and expense), the LVD Service does not apply to claims where the amount sought has not been quantified, e.g. damages or loss and expense to be assessed.

TeCSA has noted that whilst adjudicators will issue decisions with reasons in accordance with existing TeCSA guidelines, users can expect adjudicators to be quite robust in limiting the number and length of submissions made and to try to deal with the matter within 28 days of it being referred to the adjudicator. That said, TeCSA has made it clear that it expects adjudicators to continue to comply with the TeCSA guidance in terms of the quality of their decisions and they will be expected to follow the rules of natural justice.

Further details can be found on the TeCSA website at http://www.tecsa.org.uk/

Other cases: *Construction Industry Law Letter*

Relational contracts – implied term of good faith *Alan Bates and Others v Post Office Ltd*

Queen's Bench Division;
Before Mr Justice Fraser;
judgment delivered 15 March 2019

The facts

This was the judgment in the Common Issues trial of the Post Office Group Litigation.

In the litigation there is a group of approximately 550 claimants ("the Claimants"), most of whom were sub-postmasters who had contracts of employment with Post Office Ltd ("the Post Office"). All of the Claimants had been responsible for running branch post offices.

In about 1999/2000, the Post Office introduced a new computerised system for the accounting function both in the branches and between the branches and itself. The accounting system was called Horizon and all of the Claimants had been required by the Post Office to use the Horizon system.

The Claimants claimed that the Horizon system contained, or must have contained, a large number of software coding errors, bugs and defects and as a result this threw up apparent shortfalls and discrepancies in the accounting of different branches. The Claimants claimed that alleged shortfalls in the Claimants' financial accounting with the Post Office were caused by the problems with the way in which the Horizon system operated, the training that was provided to use it, and also a general failure of the Horizon helpline.

When the accounting shortfalls came to the notice of the Post Office, it adopted the stance that the Claimants were responsible for the shortfalls and the shortfalls represented actual amounts of money missing from the Claimants' accounting. Accordingly, when the shortfalls occurred, the Post Office demanded that each individual sub-postmaster pay to the Post Office the sums in question. Some Claimants paid those amounts to the Post Office, while others were convicted in the criminal courts of false accounting, fraud, theft or other offences and some were imprisoned. Some Claimants were made bankrupt.

Subsequently the Claimants commenced the Group Litigation against the Post Office claiming damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment. There is also a Criminal Cases Review Commission review underway in respect of the convictions of a number of the Claimants. The Post Office disputes the whole basis of the Claimants' case.

Following the making of a Group Litigation Order, the court had ordered case management that would result in a number of trials. The first full trial was to be on the Common Issues, the next trial was to be on what was called the Horizon Issues and then there would be a "Round 3 litigation" being the full trials of some of the Lead Claimants' cases.

At the Common Issues trial, the intention had been to choose a sufficient number of contractual issues that had the widest potential application to as many of the Claimants as possible so that all the claims could proceed to the next stage with binding findings having been made on the Common Issues.

The parties agreed a lengthy list of Common Issues. This report is concerned with the first Common Issue, namely whether the contractual relationship between the Post Office and the sub-postmasters was a relational contract such that the Post Office was subject to duties of good faith, fair dealing, transparency, cooperation and trust and confidence.

Issues and findings

Was the contractual relationship between the Post Office and the sub-postmasters a relational contract?

Yes.

Commentary

The key findings in this lengthy judgment for construction practitioners concern the existence of relational contracts, when such contracts will arise and the terms that will be implied as a result.

In the first instance, lest there be any doubt, Fraser J confirmed that the concept of relational contracts is established English law. The judge placed most emphasis on the case of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] BLR 147, but also cited Jackson LJ in *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264, [2018] BLR 225, who stated in that judgment that a PFI contract intended to run for 25 years could be classified as a relational contract.

At para 725 of the judgment, Fraser J set out a non-exhaustive list of the characteristics that are relevant in order to determine whether a contract between commercial parties ought to be considered a relational contract. The only characteristic that was described as determinative was that the contract must have no specific express terms that prevent a duty of good faith being implied into the contract.

The result of finding that a contract is a relational contract is to imply a duty of good faith between the parties. Fraser J considered in detail what this duty amounted to and summarised the position at para 738 of the judgment, namely, that both parties are to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Fraser J went on to say that transparency, cooperation, trust and confidence are themselves implicit in the implied obligation of good faith.

In considering the parties' submissions, Fraser J considered the submission that English law rejects a legal requirement of good faith; a principle that many lawyers will recognise and on which Chitty was quoted by the Post Office. Fraser J considered the authorities and found that whilst such a duty will not be routinely applied to all commercial contracts, such a duty could be implied in the case of relational contracts.

"Transparency, cooperation, trust and confidence are themselves implicit in the implied obligation of good faith."

Whilst the concept of relational contracts has been considered by the courts previously, this judgment consolidates the authorities and sets out principles to apply to such contracts. There are a number of types of long-term construction contract and those drafting and entering into them should ensure that they are familiar with these principles.

Adjudication business – Multiplicity of proceedings – Strike out for abuse of process

Amey LG Ltd v Amey Birmingham Highways Ltd

Technology and Construction Court; Before Mr Justice Fraser; judgment delivered 30 January 2019

The facts

Birmingham City Council ("Birmingham CC") engaged Amey Birmingham Highways Ltd ("Amey Birmingham") under a private finance initiative ("PFI") contract in relation to the roads and highways of Birmingham. Amey Birmingham engaged Amey LG Ltd ("ALG") as its subcontractor.

A dispute arose between Birmingham CC and Amey Birmingham in respect of the PFI contract. This led to an adjudication and then to court proceedings ("the first action"), culminating in a Court of Appeal decision which effectively reinstated the decision of the adjudicator. Birmingham CC took the view that the effect of the Court of Appeal decision was to require Amey Birmingham to repay approximately £62m to Birmingham CC.

Amey Birmingham disagreed and argued that the actual order of the Court of Appeal did not include a paragraph ordering repayment. Birmingham CC adjudicated upon this issue and was successful in that adjudication. Birmingham CC then issued court proceedings ("the second action") seeking firstly to enforce the adjudicator's decision, and secondly to obtain final resolution on the questions of interpretation decided by the adjudicator by way of an application for summary judgment.

On 24 August 2018, Amey Birmingham issued Pt 20 proceedings in the second action against ALG. ALG challenged the jurisdiction of the court in the Pt 20 proceedings but participated in a directions hearing in September 2018 without prejudice to its position on jurisdiction. At the directions hearing, ALG argued that the Pt 20 claim should be case managed and heard separately from the main proceedings on the basis that the Pt 20 proceedings were essentially separate and distinct. In particular the PFI contract and the subcontract were not on "back-to-back" terms, and the issues between Birmingham CC and Amey Birmingham in the main action were different from the issues between Amey Birmingham and ALG.

The judge agreed and ordered that the Pt 20 claim should be dealt with separately from the main action.

The dispute between Birmingham CC and Amey Birmingham in the second action was heard in October 2018, when the judge granted summary judgment in favour of Birmingham CC in relation to the enforcement of the adjudicator's decision. The judge reserved his judgment on the final determination of the interpretation of the PFI contract, issuing that judgment in November 2018 in Birmingham CC's favour, meaning that Birmingham CC had acquired an order of the court in its favour respect of the payment of the £62m.

In parallel with the court actions referred to above, ALG commenced two adjudications against Amey Birmingham. The adjudicator in both adjudications was Mr Matthew Molloy. The first adjudication decision ("Molloy 1") was issued on 8 June 2018, and the second decision ("Molloy 2") was issued on 17 October 2018. In both adjudications, ALG sought payments from Amey Birmingham and was awarded zero.

On 31 October 2018, ALG issued Pt 8 proceedings against Amey Birmingham ("the third action"). ALG's solicitors in the third action were different to those in the second action. The proceedings were not served and no notice of them was given to Amey Birmingham.

ALG then applied to the court for Pt 8 directions in the third action as though the Pt 8 proceedings were an adjudication enforcement. As the third action did not seek to enforce either Molloy 1 or Molloy 2, the matter was referred to the judge in charge of the Technology and Construction Court and representations were requested from the parties.

> *"Just because a Part 8 claim involves matters considered in adjudication, that does not make it an adjudication enforcement action or automatically qualify the action for abridged time and expedited directions."*

On 9 November 2018, a consent order was provided to the court, signed by both parties' solicitors in the second action staying the Pt 20 proceedings in the second action until 9 May 2019 or sooner if either party served notice on the other lifting the stay.

On the same day, ALG's solicitors in the third action responded to the enquiries of the court. Amey Birmingham was still unaware of the commencement of the third action. The court then listed the third action for a hearing on 30 November 2018, and shortly before that date, ALG served the Pt 8 proceedings on Amey Birmingham. Subsequently, Amey Birmingham sought an order that the third action be struck out as an abuse of process. In this regard Amey Birmingham relied firstly on the fact that there were existing proceedings (the second action) between the same parties arising from the same contact and secondly on the conduct of ALG in November 2018.

Issues and findings

Should the third action be struck out as an abuse of process?

Whilst the court did not find Amey LG's behaviour to be satisfactory, the third action would not be struck out. A key consideration, however, was to avoid multiplicity of proceedings and therefore the court imposed a stay on the Pt 20 proceedings in the second action which could not be lifted without the consent of the court.

Commentary

No light is shed in this judgment on the reasons behind the slightly bizarre procedural behaviour of ALG which gave rise to this judgment confirming the approach of the court to Pt 8 proceedings relating to adjudication. The judge stated in terms that where a party seeks to obtain declarations in respect of matters that have been adjudicated upon then this is a consensual process and the guidance given at paras 14 to 17 of *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344 must be followed. Here, ALG commenced Pt 8 proceedings with no notice to Amey Birmingham and this was directly contrary to that consensual approach.

The other point made by the judge is that just because a Pt 8 claim involves matters considered in adjudication, that does not make it an adjudication enforcement action or automatically qualify the action for abridged time and expedited directions.

Notwithstanding the procedural points made with regard to adjudication business, the primary concern for the judge in this case was to avoid multiplicity of legal proceedings, a matter that is the subject of statutory provision under the Senior Courts Act 1981. The judge did not go further than refer to the statute, but there is also a body of case law on this subject. There may be exceptions to this rule, particularly in construction cases, and whilst this was recognised by the judge, he made it clear that the parties were not free to ignore the requirements against multiplicity of legal proceedings.

In spite of the above, the judge did not strike out ALG's case as he considered that to be disproportionate; instead he put in place steps to manage the second and third actions in light of the relevant rules.

Force Majeure and exception clauses – "but for" test – damages – compensatory principle *Classic Maritime Inc v (1) Limbungan Makmur SDN BHD (2) Lion Diversified Holdings BHD*

Court of Appeal;
Before Lord Justice Haddon-Cave, Lord Justice Males and Lady Justice Rose; judgment delivered 27 June 2019

The facts

In June 2009, Classic Maritime Inc ("Classic"), a shipowner, entered into a long-term contract of affreightment ("COA") for the carriage of iron ore pellets from Brazil to Malaysia. Limbungan Makmur SDN BHD ("Limbungan") was the charterer under the COA. Limbungan is a wholly owned subsidiary of Lion DRI SDN BHD ("Lion DRI") which in turn is a wholly owned subsidiary of Lion Diversified Holdings BHD ("Lion Diversified"). Lion Diversified provided a guarantee to Classic in respect of Limbungan's performance.

Clause 32 of the COA was headed "Exceptions" and stated:

> *"Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God,… floods… accidents at the mine or Production facility…or any other causes beyond the Owners' Charters' Shippers' or Receivers' control; always provided that such events directly affect the performance or either party under this Charter Party."*

The iron pellets to be shipped were to be supplied by either Samarco Minercao SA ("Samarco") from Ponta Ubu in Brazil or by Vale SA ("Vale"), from Tubarao, in Brazil. Whilst Limbungan was the charterer under the COA, the long-term sales and purchase and supply contracts with Samarco and Vale were with Lion DRI and another Lion group company, Antara Steel Mills SDN BHD ("Antara"). From August 2011, Samarco was the sole supplier of iron ore pellets shipped under the COA.

On 5 November 2015, the Fundao dam in Germano, Brazil, where iron ore is mined, burst, stopping production at Samarco's iron ore mine. Operations at Vale were unaffected by the dam collapse but Vale was unable or unwilling to supply iron ore pellets to the Lion group.

Limbungan claimed that the dam burst was a force majeure event which, under cl 32 of the COA, excused it from liability for failing to provide five shipments of iron ore pellets from Brazil to Malaysia. The parties agreed that the burst dam fell within the description of "accidents at the mine".

However, Classic did not accept that Limbungan was entitled to rely upon clause 32. Classic argued that the collapse of the dam had no causative effect as Limbungan was not able and willing to perform the five shipments even if the dam had not burst.

Limbungan argued that if it was unable to rely on cl 32 then, in any event, Classic was not entitled to substantial damages. Limbungan argued that had it been able and willing to ship the cargoes but for the dam burst, and once the dam burst occurred, this would have prevented Limbungan from shipping any iron ore pellets.

At first instance the trial judge held that Limbungan was not entitled to rely upon cl 32 of the COA as Limbungan could not establish that, but for the dam burst, it would have supplied and shipped the five cargoes of iron ore pellets. However the judge went on to find that Classic was not entitled to substantial damages for breach of the COA as had Limbungan been willing to ship the five cargoes then it would have been prevented from doing so by the dam burst and to allow substantial damages in such a case would be contrary to the compensatory principle. Classic was therefore awarded nominal damages of $1 for each shipment.

Classic appealed the finding as to the award of substantial damages and Limbungan cross-appealed on the issue of liability.

Issues and findings

Was Limbungan entitled to rely upon cl 32 of the COA as a defence to the claim by Classic?

No. The Court of Appeal upheld the trial judge's findings.

Was Classic entitled to substantial damages for breach of the COA?

Yes. The trial judge had erred in his application of the compensatory principle. On a proper application of that principle, Classic was entitled to substantial damages.

Commentary

The Court of Appeal upheld the trial judge's finding in relation to whether Limbungan could rely upon cl 32 to avoid liability to Classic. Having decided that Limbungan could not do this, the Court of Appeal re-visited the question of the damages to which Classic was entitled for breach of contract.

The trial judge had concluded that because Limbungan was willing to carry out the shipments but would not have been able to do so due to the burst dam incident, Classic should not be entitled to anything more than nominal damages. The Court of Appeal disagreed, noting that the trial judge had made the wrong comparison. Instead of asking what would have happened if the contract had been performed, he had asked what would have happened if Limbungan had been ready and willing to perform the contract, leading to the conclusion that Limbungan would have had a defence under cl 32. This was a paradoxical result in that it meant that whilst cl 32 did not provide Limbungan with a defence to Classic's claim, it also meant that Limbungan was not obliged to pay damages for failure to perform the contract.

In analysing the case law, the Court of Appeal considered the distinction between cases of anticipatory breach and cases of actual breach. The Court of Appeal held that Limbungan was in actual breach of contract in failing to supply the cargo and that was the relevant obligation to consider, not whether Limbungan was willing to supply the cargo. Accordingly, it would offend the compensatory principle not to award substantial damages for an existing breach. In coming to this conclusion, the court applied the dicta of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] and found that there had been a failure by Limbungan to perform its primary obligation to supply the cargo and therefore a secondary obligation had arisen to pay damages.

Practical completion

Mears Ltd v (1) Costplan Services (South East) Ltd (2) Plymouth (Notte Street) Ltd (3) JR Pickstock Ltd

Court of Appeal;
Before Lord Justice Lewison, Lord Justice Newey and Lord Justice Coulson;
judgment delivered 29 March 2019

The facts

By a building contract dated 27 May 2016, Plymouth (Notte Street) Ltd ("PNSL") engaged JR Pickstock Ltd to design and build two blocks of student accommodation at Notte Street, Plymouth.

On 20 May 2016, PNSL entered into an Agreement for Lease ("AFL") with Mears Ltd ("Mears") pursuant to which Mears would take a long lease of the student accommodation following completion. Costplan Services (South East) Ltd ("Costplan") was the Employer's Agent under the AFL.

Clause 6.2.1 of the AFL prohibited PSNL from making any variations to the building works which materially affected the size of the rooms. There was a 3% tolerance stated in relation to room sizes but the rooms when built were more than 3% smaller than the sizes shown on the relevant drawings.

Mears argued that pursuant to the AFL, any failure to meet the 3% tolerance was, without more, a material and substantial breach of the AFL, the existence of which automatically meant that (a) Mears was entitled to determine the AFL; and (b) the Employer's Agent could not validly certify practical completion.

> *"Just because a building is habitable, this does not automatically mean that practical completion has occurred."*

Issues and findings

Was the fact that the rooms were more than 3% smaller than the sizes on the drawings a material breach of the AFL?

No. On a proper construction of the relevant provisions of the AFL, the breach was not a material breach.

In the circumstances, could practical completion be certified?

Yes.

Commentary

The Court of Appeal upheld the judgment of the trial judge and dismissed Mears' appeal. On a true construction of the terms of the AFL, the breach of contract in relation to room sizes was not considered to be a material breach.

Practitioners will be interested in the court's analysis of practical completion. Coulson LJ reviewed the case law and commentaries on this issue and summarised the position in a series of propositions at paragraph 74 of the judgment. In particular, it was noted that practical completion is easier to recognise than to define. The existence of patent defects is not fatal to practical completion however such defects should be "trifling". As to whether or not a defect is "trifling" this will be a matter of fact and degree to be measured against "the purpose of allowing the employers to take possession of the works and to use them intended". That said, just because a building is habitable, this does not automatically mean that practical completion has occurred.

In the course of argument, submission was made as to the relevance of *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 in a situation where a defect was irremediable. The Court held that Ruxley did not support the proposition that the mere fact that a defect was irremediable meant that the works were not practically complete.

Liquidated damages – Termination

Triple Point Technology Inc v PTT Public Company Ltd

Court of Appeal;
Before the Lord Justice Lewison, Lord Justice Floyd and Sir Rupert Jackson;
judgment delivered 5 March 2019

The facts

Triple Point Technology Inc ("Triple Point") is a company which designs, develops and implements software for use in commodities trading. PTT Public Company Ltd ("PTT") is a company that, amongst other things, undertakes commodities trading.

In December 2012, PTT engaged Triple Point to provide a Commodities Trading Risk Management and Vessel Chartering System ("CTRM system"). The works were to be carried out in two phases, each with nine stages, and payment was to be made against milestones. During the course of the project three further order forms were issued, subject to the terms of the main contract, for licence fees to be paid by PTT to Triple Point on certain dates.

The contract between the parties provided that if Triple Point failed to deliver the work within the time specified in the contract and the delay was not caused by PTT then Triple Point was liable for liquidated damages at the rate of 0.1% of undelivered work per day of delay from the due date up to the date that the work was accepted by PTT.

The work proceeded slowly. On 19 March 2014, Triple Point achieved completion of Stages 1 and 2 of Phase 1, 149 days late. Triple Point submitted an invoice in respect of this work which PTT duly paid.

Triple Point then asked PTT to pay further invoices in respect of other work that had not yet been completed, relying on the dates for payment in the three additional order forms that had been issued.

PTT refused to make any further payments, relying on the contract terms which stated that payment would be made against milestones. PTT argued that Triple Point had not achieved any of the milestones except the completion of Stages 1 and 2 of Phase 1.

On 27 May 2014, Triple Point suspended work and left the site. PTT maintained that Triple Point had wrongfully suspended work and terminated, or purported to terminate, the contract.

On 25 February 2015, Triple Point commenced court proceedings seeking the sums claimed under the invoices. PTT responded by way of defence and counterclaim, claiming damages for delay and damages due upon termination of the contract.

The trial took place in the TCC in late 2016. Judgment was handed down in August 2017. The judge dismissed Triple Point's claim and awarded PTT US $4,497,278.40. There were a number of issues between the parties. Reported in this publication is the treatment of liquidated damages liability following termination, however readers should consider the full judgment including the discussion on caps on liability.

At first instance the judge held that PTT was entitled to recover (a) the costs of procuring an alternative system; (b) wasted costs; and (c) liquidated damages for delay, totalling US $3,459,278.40.

Triple Point appealed on a number of counts. In relation to liquidated damages, Triple Point argued that the Trial Judge had erred and that there was no liquidated damages liability. In particular, Triple Point argued that the liquidated damages provision was only engaged when work was delayed and subsequently completed and accepted and did not apply in respect of work which the employer had never accepted.

"Are liquidated damages recoverable when the works were not completed by the original contractor?"

Issues and findings

Can a party recover liquidated damages after termination in respect of delay to works which have not been completed?

The answer will depend on the precise wording of the liquidated damages clause in question. However, there is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss. In this case, the Court of Appeal decided that the liquidated damages provision was not applicable where the contractor did not hand over the work.

Commentary

The question of whether or not liquidated damages could be recovered after termination was described by the judge as "formidable". The established view, certainly over the last 15-20 years, has been that liquidated damages are recoverable and there are a number of authorities to that effect. This decision is likely to be controversial as it departs quite substantially from what has considered to be the norm for a number of years.

The judge considered a line of mainly Scottish authority, stemming from the House of Lords case of *British Glanzstoff Manufacturing Co Ltd v General Accident Fire and Life Assurance Co Ltd* (1913) SC (HL) 1. These cases appear to have been largely overlooked in the modern case law and they are cases in which it had been decided that liquidated damages were not recoverable when the works were not completed by the original contractor.

Sir Rupert Jackson, giving the leading judgment in the Court of Appeal, did state that each case will depend on the actual provisions of the contract. Further, that the remedy for the employer will be general damages in any event. However no detailed guidance was given on what type of clause would or would not fall within the Glanzstoff principle.

Contract construction – practical completion *University of Warwick v Balfour Beatty Group Ltd*

Technology and Construction Court; Before His Honour Judge McKenna; judgment delivered 11 December 2018

The facts

The University of Warwick ("UoW") engaged Balfour Beatty Group Ltd ("Balfour Beatty") to design and build the National Automotive Innovation Centre ("NAIC") on UoW's campus. The contract was in the form of a JCT 2011 Design and Build Contract with bespoke amendments ("the Contract").

The contract particulars provided for the works to be divided into four sections. The date for possession of each section was 20 April 2015 and the date of completion for sections 1 to 3 was 10 April 2017 and section 4 was 5 July 2017. Different liquidated damages figures were stated to apply to each section.

As an amendment to the standard form "practical completion" was the subject of a lengthy definition, the core of which was that practical completion would be "*a stage of completeness of the Works or a Section which allows the Property to be occupied or used*". "Property" was defined as "*the property comprised of the completed Works*".

The Contract provided for certification of practical completion of sections and the works and the employer's requirements set out provisions in relation to sectional completion.

Balfour Beatty argued that on a proper construction of the relevant provisions of the Contract, it was not possible to achieve completion of a section of the works prior to the completion of the whole of the Works. As a result, it was argued that the liquidated damages provisions of the Contract were inoperable. UoW disagreed.

On 19 March 2018, Balfour Beatty referred the dispute to adjudication. On 2 May 2018 the adjudicator issued his decision finding in Balfour Beatty's favour. The adjudicator held that the only time when the property comprised of the completed NAIC could be occupied and used was when all sections had achieved practical completion. He therefore concluded that it was not possible to achieve practical completion of any section in isolation from the other sections.

UoW commenced proceedings in the Technology and Construction Court seeking a declaration in favour of its construction of the Contract.

Issues and findings

Did the Contract provide for practical completion in sections?

Yes. The interpretation contended for on behalf of Balfour Beatty and accepted by the adjudicator did not accord with the ordinary meaning of the words used.

Commentary

In this case the provisions in the standard form relating to practical completion had been substantially amended. Unfortunately the definition of "property" did not sit well with the overall definition of "practical completion". However, it was clear from the remaining provisions of the Contract that the parties had contemplated that there would be sectional completion and what those sections would be.

The court concluded that reading the Contract as a whole and applying business common sense, the sectional completion provisions should take effect and Balfour Beatty's argument that the liquidated damages clause was no longer effective therefore fell away.

The question of construction centred on whether the whole of the works needed to be complete in order for each section to be complete. In this regard, factors such as different completion dates for the sections and the whole of the works were relevant. This can be contrasted where the work to be the subject of a section has not been properly defined, in such a case it has successfully argued that the completion mechanism in the Contract is inoperable (see *Taylor Woodrow Holdings Ltd & Another v Barnes & Elliott Ltd* [2004] EWHC 3319 (TCC)).

The Fenwick Elliott Blog

The Fenwick Elliott blog, headed by Andrew Davies can be found at https://www.fenwickelliott.com/blog.

The aim of our blogs is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects and to engage with you and share thoughts and ideas on these various matters through the comments facility. Your comments are very welcome.

In July 2019, Lucinda Robinson wrote:

Football Fever: On the pitch and in the court!

A striking coincidence? On 24 June 2019: England beat Norway to secure a place in a World Cup semi-final and on 24 June 2018 England beat Panama 6-1 in the World Cup group stages, on route to a World Cup semi-final.

Brilliant moments bookending a year of football that has reinvigorated the passion and pride that playing for (or cheering on) your team or country should foster, encouraged youngsters (multiplying numbers of girls as well as boys) to play football (or any sport for that matter) and brightened up a Brexit-bumbling Blighty for ordinary people needing a good news story. These teams and their managers (both ex-players who suffered World Cup set-backs and have gone on to be great leaders) have taught us many lessons this year.

Football clubs have given us plenty to think about in the construction law arena too in the last year. Swansea, West Ham and Nottingham Forest have all been in action in the courts and the results have clarified some rules of the construction litigation game. Here are the highlights.

1) If the full-time whistle has blown, it is too late to have a shot at goal.

Swansea Stadium Management Company Ltd v. (1) City and County of Swansea and (2) Interserve Construction Ltd 2018

Practical completion was certified on 31 March 2005 and Interserve had 12 months to put right any known defects. Interserve failed to do that, but the Employer's Agent issued a Notice of Making Good Defects on 14 April 2011 anyway, confirming defects were rectified. In fact, there were still defects. The tenant, Swansea Stadium Management (SSM), had the benefit of a collateral warranty enabling it to sue Interserve for defects, so it took a shot.

No goal - the full-time whistle had already been blown. The collateral warranty contained a "no greater liability clause" (which every provider of a collateral warranty should take care to include), meaning that Interserve's liability to the tenant could not be any more extensive than its liability to the Employer. The effect of this was that the same limitation period applied to claims under the building contract and the collateral warranty, (generally 12 years from PC if the contract has been executed as a deed). In this case (by just 4 days), time was up.

SSM tried to get around the decision on limitation in a second set of proceedings by arguing that Interserve breached its defects obligations post-PC, so limitation had not yet expired. The TCC cried foul. Interserve's failure to put the defects right did not give rise to a cause of action that survived the Notice of Making Good Defects. Such notices mean that defects are deemed rectified, even if they are not. The remedy for defects is a claim under the building contract or collateral warranty, but only if the clock has not already stopped.

2) Documents recording match strategy will be for team ears and eyes only, provided that their dominant purpose is the conduct of that match.

WH Holding Limited (1) and West Ham United Football Club Limited (2) v. E20 Stadium LLP 2018

West Ham and E20 fell out over West Ham's use of the London Stadium. During the case, West Ham wanted to see 6 emails between E20 board members relating to settlement strategy. E20 refused to release them, arguing that the emails were protected by litigation privilege (as opposed to legal advice privilege). The Judge at first instance agreed with E20. West Ham appealed and won. The Court of Appeal's decision clarified the test for litigation privilege:

Litigation privilege:

1) applies only if litigation is in reasonable contemplation;
2) covers communications between parties, their solicitors and third parties provided its dominant purpose is obtaining information or advice relating to the conduct of the litigation;
3) conducting litigation includes deciding whether to litigate and to settle;
4) if information in the relevant documents cannot be separated from, or would reveal, privileged information or advice, then the document is privileged;
5) a party's internal communications will not be privileged unless they meet this test.

E20 scored an own goal. Its emails did not pass point 2 of the test. Litigation was contemplated, and settlement strategy can be covered by privilege, but the "dominant purpose" of E20's emails was not "obtaining information or advice relating to the conduct" of the litigation. More careful drafting, or a verbal discussion, might have protected E20's position better.

3) Decisions can be reversed following an appeal to the Video Assistant Referee (VAR).

Al-Hasawi v. Nottingham Forest Football Club Ltd & Ors 2018

VAR has caused some controversy during the 2019 World Cup, influencing results in some matches. In the courts, we have seen how West Ham's result benefitted from a second look and Nottingham Forest was another beneficiary.

NF Football Investments Limited (the Purchaser) purchased shares from NFFC Group Holdings Limited (owned by Mr Al-Hasawi). The Purchaser relied on a representation that the club's debt was £6.5m. It wasn't, it was £10m. The Purchaser took a shot at a misrepresentation claim. Al-Hasawi made a save at first instance by relying on an entire agreement clause. Nottingham Forest appealed and the Court of Appeal took another look at the shot.

Interpreting the language of the JCT entire agreement clause narrowly, the Court of Appeal held that misrepresentation claims were not excluded after all, so the Purchaser's misrepresentation claim stood. Parties wanting to exclude such claims must spell that out expressly in clear words.

Looking ahead to the 2019/2020 season, Tottenham Hotspur could challenge its contractors over the late opening of its new stadium. Fulham and Brentford, amongst others, are building new stadia – let's hope they've picked the right teams and no contractors need to be sent off. The commercial wrangle between Cardiff City and Nantes over a transfer fee may need a referee.

Back on the pitch, the 2018 and 2019 World Cups are over for England – but their Euro and Olympic preparations are underway.

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