

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



Fenwick Elliott

The construction & energy law specialists

Annual Review 2015 / 2016

When is an interim payment application not an interim payment application?

BIM, design liability and exclusion clauses: recent developments

Is the future nuclear?

Time bars: just how effective are they really?

What do the new CDM regulations mean for you?

Contents

October 2015

Fenwick Elliott
Aldwych House
71–79 Aldwych
London WC2B 4HN

T +44 (0)20 7421 1986

www.fenwickelliott.com

Editor

Jeremy Glover, Partner
jglover@fenwickelliott.com

First word	02
In this issue	03
First Supreme Court decision on construction adjudication	04
Payment provisions in construction contracts	06
The future is nuclear?	10
Fitness for purpose	12
Descoping in construction contracts in the UAE	14
Time bars in an international context	17
Termination by the contractor	22
The Court of Appeal in <i>Persero II</i> : how to enforce "binding but non-final" Dispute Board decisions under the FIDIC form of contract	24
Unforeseeable ground conditions and proceeding regularly and diligently: the <i>Obrascon</i> case reaches the Court of Appeal	27
The SCL <i>Protocol</i> : time for change?	30
BIM: developments in 2015	33
Health and safety: the new CDM Regulations and misconceptions concerning the new role of principal designer	35
Exclusion and limitation clauses in construction contracts – recent developments	37
eDisclosure and harvesting the documents in construction cases	40
Case law update:	
Adjudication: Cases from <i>Dispatch</i>	42
Other cases: <i>Construction Industry Law Letter</i>	47

First word

Welcome! It is my great delight to introduce the 2015/16 edition of the Fenwick Elliott *Annual Review*.

It is always a challenge to attempt to squeeze into one journal the nadirs of the legal year. Our purpose is to set down a marker or two in key areas of the law and practice, which we hope are useful to your business whatever shape or size it comes in and wherever you may be. We recognise that while you need to make sure you avoid getting on the wrong side of the law and/or contract, keeping up with the latest “advances” and staying ahead is just one thing to cram in to your busy day.

The *Review* allows you to grab a macchiato, sit down and catch up: my intro is a metaphorical hop and skip through Fenwick Elliott’s highlights, and gives you a rundown of some of our news.



Simon Tolson
Senior partner

Well, hasn't it been an eventful year in many senses; there was the election, and a new Government hell bent on inducing spending on infrastructure – a Government which recognises that a more productive economy requires them to back competitiveness and prioritise investment in infrastructure. In terms of policy, what stuck out in my mind as good for construction was the plan to “increase energy security”. Well we can see that nuclear is one issue. At the start of September 2015, there was the suggestion that EDF might postpone indefinitely its Hinkley C nuclear plant, as a new IEA analysis showed that its power will cost UK energy users three times more than it should (£24.5bn!). Then two weeks later the Chancellor, George Osborne, secured investment by guaranteeing a £2bn deal whereby China will invest in Hinkley Point, and all is back on it seems. However, renewable energy subsidies are going, so it is little surprise that Drax has announced it is scrapping the notion of investing in carbon capture and a power station it was planning to use to contain its CO₂. Ministers must come clean on whether they are abandoning all efforts to secure investment in clean energy.

This Government has also committed to spending over £56 billion on transport infrastructure this Parliament, highways in particular. Forgive me for being cynical but I learnt not long ago that in the past 25 years, France has built 2,500 miles of motorway, while the UK has built 300. Boy, have we some catching up to do.

As for key milestones in the law, I will mention just two which we capture in this issue. First, the Supreme Court’s decision in *Aspect v Higgins* showed us what the time limit is for you to bring legal or arbitral proceedings to have a dispute finally determined in your favour if a construction adjudicator’s decision has gone against you, and you have had to pay out money in compliance with it.

Second, in one of our cases, *MT Højgaard A/S v E.ON Climate and Renewables UK/ Robin Rigg East Ltd & Anr*, the court was faced with contractual documents of multiple authorship, which contained much loose wording. Fitness for purpose was the heart of the issue and dispute over the correct standard of performance to be applied. Although the Court of Appeal found that there was no absolute warranty in the

contract, it did acknowledge that if a contract was worded with sufficient clarity, a contractor could be liable for failing to achieve a specific result even if it otherwise complied with the relevant standard. I say watch out where the contractor is required to comply with a particular industry standard and at the same time achieve a specific result!

As for news within Fenwick Elliott, London remains our “hub”, although we now have our new office in Dubai. We are also delighted to have made up two further partners this year from within, Andrew Davies and Jatinder Garcha. With Ahmed Ibrahim and Heba Osman in Dubai, we now have 17 partners, the most we have ever had. I am thrilled too that Marc Wilkins, Jonathan More and Robbie McCrea have joined our legal team this year. Our engine room is better stoked than ever.

We remain highly active in the energy sector in the Middle East. Many of our partners have experience of Dispute Adjudication Board Rules, particularly those found in the FIDIC standard form. At home, we continue to act on many of the biggest infrastructure and construction projects in the UK including Crossrail and London Gateway Port. We also act on some secret squirrel projects where “mum is the word”.

The work we do includes every aspect of the procurement and construction process within the transport and infrastructure sectors on projects around the world: off- and onshore wind turbine disputes and front-end project work, floating pontoon structures, cases on revetments, caissons, highways, iconic skyscrapers, airports, theme and amusement parks, tunnelling, gas fields and pipelines, waste to energy plants, subsea pipelines, water projects, claims on entire estates against the NHBC.

Our work continues to cover dispute avoidance strategy, litigation, international arbitration, adjudication, DRBs and all forms of ADR/mediation. Our projects team has grown significantly and is very busy, a sign that the market is buzzing in London and beyond.

All this would not be possible without you. I want to thank you all for the opportunities we have been privileged to work on this past year. We take nothing for granted.

In this issue

Welcome to the 19th edition of our *Annual Review*, which comes complete with a brand new design. As always, our *Review* contains a round-up of some of the most important developments from the past 12 months including, from page 42, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *Construction Industry Law Letter*.

As Simon has mentioned in his *First Word* introduction, we are opening a new office in Dubai, at Cluster I, Jumeirah Lake Towers (JLT) which will mean that we have a fully integrated specialist construction law and arbitration practice operating from the DMCC. This exciting development builds on our many years' experience advising clients in the region. It also allows us to offer our clients a team, headed by Nicholas Gould, which includes Arabic speakers with knowledge of local laws and practices, as well as international expertise in construction law. One of our partners there, Heba Osman, has written a helpful article on pages 14–16 about descopeing and termination in construction contracts in the UAE. My own article on time bars to be found at pages 17–21 also includes discussion on how time bars are approached under UAE law as well as under the common law back in the UK.

Of course, the FIDIC contract is well known for imposing condition precedents on the contractor's right to make a claim. Interestingly, recent case law, see pages 20–21, suggests that there may be a similar restriction placed on employers. Whilst we wait for FIDIC to issue updated versions of their Rainbow suite of contracts there have been a number of interesting developments both at home and abroad. Robbie McCrea provides an update on enforcing Dispute Board decisions and the Singapore case at pages 24–26, whilst we also review the English Court of Appeal's comments on unforeseeable ground conditions and failing to proceed with due diligence, at pages 27–29.

In last year's *Review*, we discussed design duties and focused on the distinctions between fitness for purpose and reasonable skill and care. Karen Gidwani explores this further at pages 12 and 13 in light of a recent Court of Appeal decision. Karen's article illustrates the danger of simply relying on a reference in the contract documents to define a particular purpose in the context of a fitness for purpose (or for that matter any) clause. If you want to impose obligations under any contract, the requirement for clear words can never be underestimated.

Claire King considers some of these issues at pages 10 and 11 when she asks whether or not the future is nuclear. As Claire says, for contractors, and subcontractors, ensuring that the risks associated with nuclear design and construction are properly understood and

that the contract acknowledges and deals with those risks adequately (and ideally reflects who has control of those risks) is key.

Parties sometimes try and restrict their obligations and potential exposure when negotiating contracts. As Philip Barnes notes at pages 37–39, these clauses must be clear and concise otherwise you may find they are deemed to be unfair and unenforceable.

As the Government's 2016 deadline for all centrally procured projects to utilise Building Information Modelling (BIM) draws ever nearer, on page 33 we look at the latest developments. These include the new cyber security standard as well as the Government's ambitious plans for Digital Built Britain. The use of BIM may also affect the way in which parties approach delay. The Society of Construction Law is currently undertaking a review of its *Delay and Disruption Protocol*. We discuss the first part of that review at pages 30–32.

BIM encourages early design involvement and, as Sarah Buckingham explains on pages 35 and 36, decisions made during the feasibility stage can fundamentally affect the health and safety of those who are involved in any project. Sarah explains the legal and practical implications of the Construction (Design and Management) Regulations 2015, which came into force on 6 April 2015.

Adjudication continues to feature prominently in the work of the TCC in the UK. Martin Ewen discusses on pages 4 and 5 the first adjudication case to reach the Supreme Court.

That said, there has been one clear trend in adjudication enforcement cases over the past 12 months. As Mr Justice Coulson noted, there has been a large (and he said "baleful") increase in the number of cases before adjudicators and the TCC in which the claimant contractor argues that the defendant employer has failed to serve its notices on time, with the consequence that there was an automatic right to payment in full of the sum claimed. Jonathan More distils what you need to know from these cases at pages 6–9.

If you want 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 by email to jglover@fenwickelliott.com or on twitter [@jeremyrglover](https://twitter.com/jeremyrglover).



Jeremy Glover
Partner Editor

First Supreme Court decision on construction adjudication

In *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*¹ the UK Supreme Court considered its first ever construction adjudication case. Specifically, it considered the interaction between the statutory adjudication provisions contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (*"the Scheme"*) and the statutory law of limitation.

As Martin Ewen explains, understanding the principles set out by the Supreme Court is important for all those who enter into construction contracts.

The facts

In March 2004 Higgins Construction Plc (*"Higgins"*) entered into a contract with Aspect Contracts (Asbestos) Limited (*"Aspect"*) for an asbestos survey and report on several blocks of maisonettes in Hounslow. Aspect carried out the survey during March 2004 and issued a report dated 27 April 2004.

During 2005, Higgins found asbestos containing materials in the blocks which had not been identified in the report and had to pay for its removal.

Aspect denied any negligence and in 2009 Higgins commenced adjudication under the Scheme claiming £822,482 damages plus interest. On 28 July 2009, the adjudicator issued a decision in favour of Higgins and ordered that Aspect pay to Higgins £490,627 in damages, £166,421.05 in interest and the adjudicator's fees of £8,750 plus VAT.

On 6 August 2009 Aspect paid the total sum of £658,017, a sum which included further interest from the date of the decision. The decision was not agreed as final and binding.

Higgins did not issue any further proceedings to recover the balance of its claim. The contractual limitation period expired on or about 27 April 2010 and the tortious limitation period in early 2011.

On 3 February 2012 Aspect commenced proceedings for recovery of the £658,017 paid in the adjudication on the grounds that no sum was due on a proper examination of the merits of Higgins' claim. Aspect's case relied upon an implied term that:

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

Aspect argued that it had six years from the date of payment to enforce this entitlement and in the alternative claimed in restitution.

Aspect also opposed Higgins' counterclaim for the balance of its original claim for £822,482 on the grounds that the contractual and

tortious limitation periods had expired, Aspect further argued that the court could only determine the dispute to the extent that the adjudicator had upheld Higgins' claim.

Decision at first instance

At first instance in the Technology and Construction Court Akenhead J held that there was no such implied term as alleged, that Aspect could have claimed a declaration of non-liability at any time within six years after performance of the contract, but that such a claim was now time-barred.

Aspect's claim in restitution also failed on the basis that a right to repayment was secondary, and could only arise if and when the court determined the dispute in Aspect's favour. Since the court found there was no implied term, no repayment was due and the restitutionary claim fell away.

Court of Appeal decision

The Court of Appeal reached an opposite conclusion to the Technology and Construction Court and found that the Scheme did imply that an overpayment could be recovered.

Higgins appealed to the Supreme Court.

Supreme Court decision

The key question for the Supreme Court was how far Aspect is entitled to disturb the provisional position established by an adjudicator's decision by itself commencing proceedings after the time had elapsed when Higgins could bring any claim founded on the original breach of contract or in tort?

Agreeing with the Court of Appeal, the Supreme Court held that it was a necessary legal consequence of the Scheme, as implied by the 1996 Act into the parties' contractual relationship, that the paying party should have a directly enforceable right to recover any overpayment made in consequence of the adjudicator's decision, once there had been a final determination of the dispute.

The Supreme Court characterised this right as a term arising by implication arising from the Scheme provisions that was underpinned by restitutionary considerations, so that the Court would also have the power to award interest on any overpayment subsequently found to have been made.

Where Aspect's claim arose out of the payment made on 6 August 2009 (and was for repayment only of this sum) the Supreme Court found that whether considered in implied contractual or restitutionary terms, Aspect's claim could be brought at any time within six years after 6 August 2009, given that an independent restitutionary claim was to be treated as a claim "*founded on simple contract*" within section 5 of the Limitation Act.

The Supreme Court concluded that the act of receiving payment on 6 August 2009 did not give rise to a fresh six-year period for Higgins to bring proceedings for the balance of its claim for £822,482. There was no legal basis upon which a payee could acquire by virtue of the receipt of a payment a fresh right to claim any further balance allegedly due.

Commentary

The Supreme Court's decision freed Aspect to pursue its claim, on the merits, for the £658,017 paid in the adjudication. However, due to the fact the limitation period for Higgins' claim had expired, the court would be unable to order Aspect to pay any more than that awarded by the adjudicator.

In this first adjudication dispute that it has been called upon to consider the Supreme Court has confirmed what many regarded as the unfair position reached by the Court of Appeal i.e. that if a party in receipt of a payment following a Scheme adjudication holds on to payment and allows the relevant limitation periods to expire, it could still be faced with proceedings for recovery of that sum six years after the date of payment, but will be unable to bring a counterclaim for the balance of any sum it was not awarded in the adjudication – what Higgins called "*a one-way throw*".

Practical tips

Following this decision, it may be possible for a party to seek repayment of sums paid pursuant to an adjudicator's decision which is up to six years old. A successful party in adjudication will therefore need to give careful consideration as to whether to seek a final determination of the dispute within the limitation period applicable to its own claim.

If a party in receipt of a payment in an adjudication simply holds on to payment and allows the limitation period for its claim to

expire it could still be faced with proceedings for recovery of that sum for six years from the date of the decision, by which time the limitation period in its own claim could have expired and it will be unable to bring a counterclaim for the balance of any sum it was not awarded in the adjudication.

Those entering into construction contracts may wish to do so under seal as this will extend the limitation period for the underlying dispute to 12 years thereby potentially avoiding completely the issue which arose in the present case.

Alternatively, try to agree that the adjudicator's decision is conclusive unless it is challenged in litigation or arbitral proceedings within a specific time frame, e.g. within 28 days.

"Following this decision, it may be possible for a party to seek repayment of sums paid pursuant to an adjudicator's decision which is up to six years old"

Payment provisions in construction contracts

When the amendments to the Housing Grants (Construction and Regeneration) Act 1996 (*"the Construction Act"*) were introduced by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 (*"the New Act"*) it was not entirely clear how the changes in the payment provisions section would impact on the behaviour of parties to construction contracts. In the year since our last *Annual Review* the first wave of case law relating to these amended provisions has been reported. The message appears relatively clear; employers, get the payless notice process wrong at your peril. However, as is so often the case when new law develops, even relatively clear legal principles often give rise to spin off issues, and questions.

Jonathan More provides a practical guide through the relevant cases.

The statutory requirements

First, a brief reminder of the relevant statutory provisions.

Payment notices

In its original form the Construction Act set out that the payer had to give notice specifying the amount of the payment made or proposed to be made, and the basis upon which the amount is calculated. There was no obvious consequence for failing to comply with this requirement, indeed, as it was only the employer who could issue such notices it seemed to duplicate the certification process common in most construction contracts, and was often simply ignored.

The New Act amendments require construction contracts to provide that a payment notice is issued for every payment provided for by the contract. The sum contained in a payment notice is *"the notified sum"*. The person whom issues the notice is dictated by the contract, and can be either the payer, a *"specified person"* as dictated by the contract (i.e. the Architect or Contract Administrator) or by the payee itself. The notice must specify:

- (i) the sum that the person giving the notice considers to be due or to have been due at the payment due date in respect of the payment; and
- (ii) the basis on which that sum is calculated.

Note the basis of the figure in the notice is what is considered to be due.

There is now a consequence for failure to issue a payment notice as required; the payee may issue a *"default"* payment notice stating the amount considered to be due and the basis for calculation. This amount is contained in the payment notice, or the *"default"* payment notice, is the notified sum.

These changes are important because the New Act requires that the payer is under an absolute obligation to pay the notified sum subject to whether or not a payless notice is issued. There is no language requiring this sum to be *"proper value"*, the sum simply has to be *"notified"*.

Payless notices

Previously there was a mechanism for a payer to avoid paying a sum due if there were

grounds to do so by issuing a notice of intention to withhold payment.

The New Act amendments mirror this very closely, the key change being the obligation on the payer to pay the *"notified sum"* if no payless notice is issued.

A payless notice must state the sum considered to be due on the date the notice is served and the basis on which that sum is calculated, and must be issued within the requisite time requirements in the contract.

The key legal principles from case law

As a result of the recent case law, reviewed in more detail below, the following principles will be applied to payment provisions in construction contracts:

- (i) In respect of interim payment applications, and absent fraud, where no valid payless notice has been issued, the contractor will be entitled to the amount applied for irrespective of the true value of the work carried out.
- (ii) An application for payment following termination of a contract, is distinguished from the above principle either:
 - on the basis that the contract provides for a proper valuation of work post-termination and not simply a notified sum, or
 - that, as a consequence of the contract termination, the next application for payment will be the final one, with no further interim applications or payments due.
- (iii) To qualify as a valid payment notice, an application for payment should:
 - be clearly stated as being a formal application for payment and put the payer on proper notice, and
 - comply with the contractual requirements and timetable for making an application for payment.
- (iv) Even in cases where a valid payless notice has not been issued there may be sufficient unusual circumstances which may restrict enforcement of an adjudication decision.

ISG Construction Ltd v Seevic College¹

The case which provides us with the first key principle is *ISG v Seevic*.

The facts

This application for summary judgement by ISG revolved around two adjudications. The first ("*Adjudication 1*") decided that Seevic required to pay the full amount of ISG's Application No. 13 for an interim certificate. Seevic had served neither a payment notice nor a payless notice. This sum in question was circa £1m. The second ("*Adjudication 2*"), before the same adjudicator, decided that the proper value of ISG's works as at the date of Application No. 13 was significantly lower, at £300,000.

Seevic did not comply with the decision in Adjudication 1, and simply paid the balance deemed due as the value of the works i.e. £300,000.

The application made by ISG was for (i) enforcement of the decision in Adjudication 1, and (ii) a declaration that the decision in Adjudication 2 was invalid for want of jurisdiction, as this dispute was the same or substantially the same as that decided upon in Adjudication 1.

The decision

In considering the issues Mr Justice Edwards-Stuart ruled that

"Absent fraud, in the absence of a payment or payless notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out. The employer can defend itself by serving the notices provided for by the contractual provisions."

In addition he found that any attempt to avoid the absence of a proper notice by going back over old ground and revisiting the amount in the relevant valuation in another adjudication was not permitted. The dispute relating to Application No. 13 had been dealt with in Adjudication 1.

In short the failure by the employer to serve a payless notice in time must be taken to be the employer agreeing the value stated in the application, right or wrong. Therefore, ISG was entitled to both enforcement of Adjudication

1, and also a declaration that Adjudication 2 was invalid for want of jurisdiction as it decided a question that, as between the parties, must be taken to have been decided by him in Adjudication 1.

Matthew Harding (t/a M J Harding Contractors) v Paice & Anr²

This general principle was distinguished in the case of *Harding v Paice*, heard again by the same judge (albeit that this case was heard before *ISG v Seevic*).

The facts

Paice were property developers who engaged Harding to carry out residential works to two properties in Surrey under the terms of a JCT Intermediate Building Contract 2011.

For various reasons Harding gave notice to terminate the contract part way through the works. The termination provisions provided that Harding was required to submit a final account in respect of the work it had carried out, including the total value of the work properly executed up to the date of termination. Paice was to pay the amount that was "*properly due*" in respect of the account within 28 days of submission of its final account.

Paice did not make payment, and failed to serve a valid payless notice. Harding adjudicated, in response to which Paice issued counter-adjudication proceedings in an attempt to revalue Harding's final account.

Harding then applied for an injunction to prevent the counter-adjudication from proceeding, arguing that the failure by Paice to serve a valid payless notice meant that the sum in its final account became the amount that was "*properly due*" under the contract. Harding further argued that the substance of its account had been already referred to adjudication and it could therefore not be revisited.

The decision

Mr Justice Edwards-Stuart noted that in the relevant contract the payment provisions following termination were different from the interim payment machinery in the contract, in that they did not require the employer to pay the amount stated (i.e. the notified sum). Instead, the employer was to pay the amount "*properly due*" in respect of the account,

in order to reflect the reckoning process that is inherent in final accounts.

The judge further noted that the adjudicator had concluded that in the absence of a valid payless notice Paice had to pay the amount stated in Harding's account.

Mr Justice Edwards-Stuart disagreed with the adjudicator's approach. Such a conclusion, he said, would deprive the employer forever of the right to challenge the contractor's account, and in some cases (for example, if the contractor had considerably overvalued its account), the contractor would be permitted to receive a windfall to which he would otherwise not be entitled, and which the employer could never recover.

In terms of the jurisdiction argument it was held that the adjudicator had not determined the amount "*properly due*" to Harding. He had decided that the absence of a valid payless notice automatically meant that the sum claimed in the final account was due and had to be paid, which was a different matter.

Galliford Try Building Ltd v Estura Ltd³

Mr Justice Edwards-Stuart was being kept busy by such matters and a couple of months after these first two cases, another adjudication enforcement action – *Galliford v Estura* relating to the lack of a payless notice – called before him.

The facts

Very late in the construction programme Galliford issued its Interim Application for payment No. 60 ("*IA60*"). It was for a sizeable amount and included an anticipated Final Account. The value of the work in IA60 was only £4,000 short of the amount anticipated in the Final Account, which was just short of £4m. Estura served neither a payment notice nor a payless notice. Estura didn't pay, Galliford commenced adjudication proceedings, and the adjudicator awarded the full amount of the notice to Galliford.

What to dispute? In this case the dispute was less about payless and more about the enforcement process itself. Estura accepted Galliford was technically entitled to the sum stated in the application.

1 [2014] EWHC 4007 (TCC)
2 [2015] EWHC 661 (TCC)
3 [2015] EWHC 412 (TCC)

It submitted, however, that there were exceptional circumstances in this case which meant that it should not have to submit to summary judgement in respect of the sums awarded by the adjudicator, as Estura:

- (i) would not get an opportunity, by way of adjudication, to challenge a palpably wrong interim application as IA60 essentially covered Galliford's valuation of the job and there was no incentive for them to do any further work (either with regard to contractual process or in respect of physical works), and
- (ii) could not afford to pay the amount of the award and enforcement would lead to insolvency which would deprive it of its right to pursue correction of the decision.

The decision

Mr Justice Edwards-Stuart appeared to be quite vexed about the circumstances of this case. He agreed with both the above arguments raised by Estura that there were unusual circumstances in this case and that it would be unable to pay the adjudicator's award in full if ordered to do so.

The court had two options. First, to take a robust approach and refuse to grant a stay on the grounds that to do otherwise would be contrary to the policy of the court to enforce the decisions of adjudicators. Galliford could then either force insolvency or negotiate some sort of compromise. Or second, to stay enforcement of all or part of the amount of the judgement.

The decision in the end was that due to "*the very unusual circumstances of this case*" it would not be fair on Estura to refuse a stay. However, only a partial stay was granted with enforcement of £1.5m allowed. Such action by the court, it was stated, would be appropriate only in rare cases.

*Caledonian Modular Ltd v Mar City Developments Ltd*⁴

In *Caledonian v Mar City* some important housekeeping was done in respect of how to determine whether a valid application for payment has been made by a contractor.

The facts

Caledonian engaged Mar City to carry out construction works at Colindale in North London.

Caledonian issued an application no. 15 seeking a net payment £1.5m. Mar City issued a valid payless notice indicating a net payment of £6,317.07. Two weeks later, under cover of three e-mails, Caledonian issued some documents to Mar City ("*the Emailed Submission*") including a further copy of application no. 15 prefixed with the words "*Final Account*". In this the net payment claim increased by around £6,000. Caledonian did not substantially respond to Mar City's subsequent requests for clarification other than to describe the submission as an "*update*". Mar City took no action in respect of the Emailed Submission.

An application for payment, referenced as no. 16, was issued by Caledonian four weeks later, in response to which Mar City issued a valid payless notice.

Caledonian subsequently claimed that the Emailed Submission had in fact been application for payment no. 16 and that in the absence of a payless notice they were entitled to the sum claimed. The dispute was referred to adjudication. The adjudicator agreed with Caledonian.

In the following enforcement proceedings Mar City contended that the Emailed Submission was not a valid application for payment.

The two main issues to be decided were as follows:

- (i) Did Caledonian's Emailed Submission amount to an application for interim payment?
- (ii) In an enforcement application could the court decide a substantive issue that was before the adjudicator i.e. the status of the submission, or was the court restricted simply to either enforcing or not enforcing the second adjudication decision?

The decision

On the first issue, the Judge found that the Emailed Submission was not an application for payment or a valid payee's notice:

- (i) none of the emails or the documents sent stated that this was an application for interim payment;
- (ii) subsequent correspondence did not indicate that it had been an application for payment; and,

(iii) at the time Mar City repeatedly asked Caledonian what the documents were. In response Caledonian did not state that the documents were an application for payment.

The Judge disagreed that a contractor can “update” an application by a few thousand pounds when the overwhelming bulk of that application had already been the subject of a valid payless notice. He observed that this could lead to contractors regularly applying every few days with “updated” applications in the hope of gaining windfall through the employer slipping up by failing to serve a payless notice. It had to be clear, and the employer had to be on notice, that documents intended to be an application for payment were properly identifiable as such.

On the second issue, the Judge stated that at the enforcement stage the court could deal directly with an issue decided by the adjudicator, if as here, the issue was short, self-contained, and required no oral evidence or any other elaboration beyond what was capable of being provided during a short interlocutory hearing. Therefore the second issue could be decided by way of a declaration by the court.

*Henia Investments Inc v Beck Interiors Ltd*⁵

Finally, *Henia v Beck*, before Mr Justice Akenhead, in Part 8 proceedings for declaratory relief, gave further consideration to the issue of the timing of not only a payless notice but also applications for payment and the interim certificate.

The facts

Henia engaged Beck to carry out extensive fit out works to a property in Kensington using the JCT Standard Building Contract without Quantities 2011 (“the Contract”). The contract provided that the interim payment due date was the 29th of each month with interim applications to be made no later than 7 days before the due date. The contract Administrator (“CA”) was required to issue an Interim Certificate no later than 5 days after the due date. The final date for payment was 28 days after the due date and any payless notices were to be issued no later than 3 days before the final date.

On 28 April 2015 i.e. 6 days late, Beck submitted a document described as “*Interim Application for Payment No 18*”. The CA issued Interim Certificate No 18, one day late, on 6 May 2015.

Beck did not submit an interim application during May 2015 but at 00.03 am 4 June 2015 – i.e. one day late – the CA issued Interim Certificate No 19 certifying a payment to Beck of £18,893.53. On 17 June 2015, Henia issued a payless notice stating that Beck’s entitlement was nil.

Beck contended that the document submitted on 28 April 2015 comprised a valid interim application relating to the 29 May 2015 due date and that because the CA’s Interim Certificate was late, this meant that the amount claimed on 28 April was now due. Beck further argued that the payless notice issued by Henia on 17 June was invalid on grounds that in such a notice Henia could only apply cross-claims like liquidated damages and not otherwise challenge the CA’s valuation.

The decision

The Judge found that in order for there to be no question as to the validity of an interim application for payment, it needs to be clear and unambiguous. Beck’s 28 April 2015 document could not therefore be treated as a valid Interim Application in relation to the 29 May 2015 due date where: (i) there was a relevant due date on 29 April 2015, which would have been the 18th relevant due date under the contract; (ii) there was nothing in the 28 April document that suggested a due date of 29 May 2015; (iii) there was no indication in the 28 April document to suggest that the 29 April due date had been missed and that the document was intended to relate to the 29 May due date; and, (iv) the 28 April document was not in substance, form and intent an Interim Application relating to the 29 May 2015 due date.

Whilst acknowledging that it was now a superfluous issue, the judge decided that if the 28 April document did not relate to the 29 May 2015 due date there was nothing in the contract to prohibit the employer from challenging a valuation certified by the CA.

Finally it was found that any failure by the CA to operate the extension of time provisions

would not give rise to a condition precedent debarring Henia from claiming liquidated damages. Any potential short term unfairness to Beck could be resolved through the relevant contractual dispute resolution mechanisms. The Judge stressed that this finding was obiter where prior to judgment being handed down, in adjudication proceedings commenced by Beck, the Adjudicator had decided that no valid application for an extension of time had been submitted.

Commentary

Other than the focus on payment provisions themselves, a theme that was prevalent in these cases was that the intent of the Construction Act, and the regime it has put in place, should be preserved as much as is possible and practicable. The assumption might be that this philosophy will always favour the contractor, focused as it is on maintaining cashflow. Whilst this is crucial, what the cases of *Galliford v Estura* and *Caledonian v Mar* in particular show is that the situation is not one sided, and protection of employer/client interests, is just as important a consideration.

The cases this year leave some questions still on the table, however, there is a good solid framework against which employers and contractors alike can manage their risks around the payment provisions of their contracts.

“Absent fraud, in the absence of a payment or payless notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out. The employer can defend itself by serving the notices provided for by the contractual provisions”

5. [2015] EWHC 2433 (TCC)

The future is nuclear?

In August 2015 EDF Energy announced its preferred bidders for Hinkley Point C and the press were reporting that ministers are set to give the go ahead to the project once parliament returns in the Autumn. Since then the Government has announced a £2 billion guarantee to try and ensure the project goes ahead.¹

As Claire King explains, the project has already faced significant legal hurdles and may yet face further ones with Austria set to appeal the state-aid clearance granted to the project by the European Commission in the European Court of Justice. If it does go ahead, it will be the first civil nuclear new build in the UK since Sizewell B was commissioned in 1995.

The UK currently has 16 nuclear reactors across nine sites in the UK generating 19.8% of the country's electricity.² The nine operating power stations have three different types of reactors. These include:

- (i) Magnox, a first generation reactor the last operating one of which is situated at Wylfa in North Wales;
- (ii) the Advance Gas-cooled Reactors ("AGR") owned and operated by EDF Energy which were commissioned by between 1976 and 1988; and
- (iii) Pressurised Water Reactors ("PWR") situated at Sizewell B, the last nuclear power station in the UK to be commissioned and completed in 1995.

The nuclear industry in the UK as a whole is much wider, however, consisting of extensive de-commissioning activities (in the latter half of 2014 Sellafield Ltd announced that a joint venture comprising of Jacobs, AMEC and Balfour Beatty has been awarded a multi-million pound Engineering, Procurement, and Construction (EPC) framework for the Box Encapsulation Plant (BEP) project), various defence facilities (for example the Devonport Royal Dockyard which contains facilities for the refitting and refuelling of the Royal Navy's submarines, including the Vanguard class submarines and associated sites) as well as non-power producing nuclear facilities for producing and reprocessing nuclear fuel.

However, by 2028 all but one of the nuclear power stations currently operating in the UK is set to go off line. It is in this context that the UK's current nuclear strategy was set into motion in 2006 when a review of energy policy reversed the then Government's opposition to new nuclear power.

In July 2011 8 sites across the country were selected to allow plant construction to be expedited and in March 2013 the Government published a 90-page industrial document setting out its *"clear expectation that nuclear will play a significant role in the UK energy mix in the future"* and planning to establish the UK as a leading civil nuclear energy nation.

Nuclear, it is hoped:

"will play a vitally important role in providing reliable electricity supplies and a secure and diverse energy mix as

1 See "Hinkley Point new nuclear plant edges closer with £2 billion Government guarantee unveiled by George Osborne" in The Telegraph dated 25 September 2015.

2 See "A Guide to Nuclear Regulation in the UK" by the Office for Nuclear regulation.

3 See the "National Policy Statement for Nuclear Power Generation (EN-6)" Volume 1 of 2 dated July 2011 published by the Department of Energy and Climate Change.

4 The ONR also has some responsibility for naval sites under the control of the crown (via the MOD) in conjunction with the Defence Nuclear Safety Regulator (the "DNSR").

5 For a full list of the 36 Licence Conditions see page 18 or 32 of "A Guide to Nuclear Regulation in the UK" by the Office for Nuclear regulation. When assessing the adequacy of the licensee's safety case assessors will use the ONR's Safety Assessment Principles or "SAPs".

6 Ibid

7 See Reuter's "Update 2 – Finland's nuclear plants are delayed again"; TVO stated "– the delays have been blamed on "planning of the plant has taken needlessly long".

8 See the National Audit Report (Executive Summary) "Ministry of Defence: The Construction of Nuclear Submarine Facilities at Devonport" dated December 2002.

9 See World Nuclear News "Second Regulatory Issue raised with UK ABWR" dated 17 July 2015.

10 Early versions of the PCSR for Hinkley Point C have already been reviewed and commented on by the ONR.

the UK makes the transition to a low carbon economy.”³

To date the only nuclear plant close to getting off the ground is Hinkley Point C. The other reactor types have not yet completed the initial regulatory steps within the UK (as to which see below). Hinkley Point C will utilise a European Pressurised Reactor (“EPR”) developed by Areva. The project will cost as much as the combined bill for Crossrail, the London 2012 Olympics and the revamped Terminal 2 at Heathrow but should provide 25,000 jobs and provide 7% of the UK’s electricity when built.

As the construction industry gears up for Hinkley Point C project it is important that all members of the supply chain (not just those at the top) understand the unique regulatory environment that the nuclear industry sits within.

The Office for Nuclear Regulation (the “ONR”) regulates civil nuclear construction within the UK both before a site is even licensed and after.⁴ Once licensed the legal responsibility for the safety of a site rests with the Licensee who must create and implement “adequate arrangements” for compliance with 36 Licensing Conditions as well as some other more prescriptive requirements.⁵

It operates a goal-setting regime rather than a more prescriptive standards-based regime that is found in some other countries.⁶

Following Fukushima, for example, the safety cases of existing nuclear installations within the UK were reviewed. A report by Mike Weightman, the head of the ONR, dated October 2011 concluded there was no fundamental safety weakness in the UK’s nuclear industry but that lessons could be learned including: reliance on off-site infrastructure such as the electrical grid supply in extreme events, emergency response arrangements, layout of plant, risks associated with flooding, planning controls around nuclear facilities and prioritising safety reviews.

The requirement for a robust safety case (both before, during and after construction and commissioning) that ensures that any risks are kept as low as reasonably practicable (the ALARP principle) comes with the potential for extensive delays and costs before construction has even started.

The Finnish Nuclear New Build Olkiluoto 3 (which will utilise the same EPR generator as Hinkley Point C) is already the subject of a billion euro arbitration with the Finnish Radiation and Nuclear Safety Authority awaiting new paperwork for the safety case.⁷ Operations at the Finnish plant are now likely to start in late 2018 compared to an original target date of 2009.

Likewise the Devonport Dockyard also suffered from huge delays and costs involving a “number of technically challenging components whilst needing to meet exacting nuclear safety standards”⁸

The exacting requirements for nuclear reactor and facility design, as well as the process of Regulatory approval, can cause extensive delays and associated costs. These can occur before construction commences as comments on the design by regulators result in design changes or reassessment or during it if, for example, an industry standard changes and so has to be taken into account. For example, seismic standards have changed in the past during the construction of nuclear power stations in the UK involving reassessment of the design to ensure that the design remained sufficiently robust taking into account that new standard.

In order to try and reduce the risks of the licensing/regulatory process (and specifically the risk permission for construction will not in the end be given), the UK now has a two phase licensing process for nuclear reactors reflecting the two phase licensing process in the US. The first phase is known as the Generic Design Assessment process.

The benefits of this are supposed to include early involvement with the designers when the regulator and its advisors can have the biggest influence and assessing the environments, safety and security aspects of the reactor design before the construction of the reactor starts.

Currently only the European Pressurised Reactor (“EPR”) has completed the Generic Design Assessment or GDA process which was completed in 2012. That is the reactor which EDF will use at Hinkley Point C. The AP1000 reactors designed and developed by Westinghouse and the UK Advanced Boiling Water Reactor (“ABWR”) sponsored by Horizon Nuclear Power (which is wholly

owned subsidiary of Hitachi Limited) are still going through the process.

Indeed the ONR has recently asked Hitachi-GE to address a series of “shortfalls” in the probabilistic safety analysis of its ABWR saying the information provided to date does not provide the ONR with sufficient confidence it will, without further work, be able to “deliver a modern standard full-scope PSA” allowing the ONR “to carry out a meaningful assessment within the project timescales.”⁹ This is despite the fact the model is already licensed in Japan and the USA.

The idea behind the GDA process for new build was to give a degree of confidence that a permission is likely to be granted for a new nuclear reactor to be built. However, even when a reactor has been completed its GDA, this does not constitute permission to start construction for which a pre-construction safety report and permission will also be required from the ONR.¹⁰

It now looks likely that Hinkley Point C will go ahead creating the first new nuclear power plant since 1995. However, it remains to be seen whether the mistakes of other nuclear projects such as the Olkiluoto 3 can be avoided.

For contractors, and subcontractors, ensuring that the risks associated with nuclear design and construction are properly understood and that the contract acknowledges and deals with those risks adequately (and ideally reflecting who has control of those risks) is key.

Likewise adequate dispute resolution provisions, aimed at ensuring the resolution of disputes before the dispute, or the issues they relate to, snowball out of control, are vital.

Following Fukushima lessons that could be learnt include: reliance on off-site infrastructure such as the electrical grid supply in extreme events, emergency response arrangements, layout of plant, risks associated with flooding, planning controls around nuclear facilities and prioritising safety reviews

Fitness for purpose

As Karen Gidwani explains fitness for purpose is a phrase often used in everyday language in relation to a service or a product that is not working as expected or desired. In construction contracts, however, the concept of fitness for purpose has its own body of case law and analysis, and the effect of including a fitness for purpose clause in a construction contract can be draconian. As some standard forms of contract (in particular FIDIC) include such clauses it is important for contracting parties to be aware of the existence of such a clause and its potential effect.

Fitness for purpose – the starting point

Meaning

It is commonly understood that the effect of a fitness for purpose obligation is to impose a duty of result. Accordingly, if a warranty is given that particular works or design will be fit for its intended purpose then the contractor or designer (or design and build contractor) will be held to that obligation, regardless of the reason why the works or design does not meet its intended purpose. In other words, matters beyond the control of the contractor or the designer will not (in the absence of contract terms to the contrary) exculpate the contractor or designer from that obligation. In real terms, this takes the contractor or designer beyond the duty to exercise reasonable skill and care in the carrying out of the works and instead imposes an absolute obligation to produce a result. This is an onerous obligation and one that is uninsurable.

Implied term

The common law implies a term of fitness for purpose in the following circumstances:

Goods and materials

Unless expressly excluded by the parties, a warranty will be implied into a contract that goods and materials supplied by a contractor will be reasonably fit for the purpose for which they will be used.¹ Similarly, under s. 14 of the Sale of Goods Act 1979 a term will be implied into a contract for the sale of goods that the goods will be fit for purpose.²

Construction and engineering works

Unless expressly excluded, where the purpose for which the works are to be carried out are made clear, the work is of a kind that the contractor holds itself out to perform and the employer relies on the contractor's skill and judgment in that matter then a warranty will be implied that works when completed will be reasonably fit for their intended purpose.³ This implied term will also apply to a design and build contractor in respect of the design element of its work.

Express term

Express terms for fitness for purpose are often found in EPC contracts where the employer or owner is trying to mitigate its risk in relation to

1 *Young & Marten v McManus Childs* [1969] 1 AC 454, HL.

2 In particular, at s. 14(3), it is stated that: "Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known – (a) to the seller, or

... any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller..."

3 *Greaves v Baynham Meikle* [1975] 1 WLR 1095 at 1098, CA.

4 See, for example, clause 4.1 of the FIDIC Silver Book, 1999 edition.

5 *MT Højgaard a/s v E.ON Climate and Renewables UK Robin Rigg East Limited* [2015] EWCA Civ 407 and *E.ON Climate and Renewables UK Robin Rigg West Limited* [2014] EWHC 1088 (TCC).

complex or high value engineering projects where the end result in terms of performance is critical, for example in energy facilities.

In setting out the obligation, it is essential to define the purpose of the works or services to be provided. In the FIDIC forms, this is done by using the following language:

*"When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract."*⁴

When one considers the number of documents that might comprise an EPC contract for a complex engineering project and, further, the documents that might be incorporated by reference into such a contract, this type of clause is very wide and can lead to difficulty in construing exactly what the purpose of the works might be said to be. Whilst contractors will generally be advised not to include a clause of this type at all in their contracts, it is not always the case that such a clause will have the effect that the owner might think that it should have.

The MT Højgaard v E.ON case⁵

Fenwick Elliott acted for MT Højgaard a/s ("MTH") in a recent case that considered this issue.

The facts

In 2006, E.ON engaged MTH to design, fabricate and install 62 monopile foundations at the Robin Rigg offshore wind farm, situated in the Moray Firth. The design of the foundations was a monopile design, comprising a monopile foundation ("MP") over which a transition piece ("TP") was placed, with the two structures joined by a grouted connection ("the grouted connection"). The contract included a clause that the works as a whole would be "fit for its purpose as determined in accordance with the Specification using Good Industry Practice".

The Specification or Technical Requirements document ("TR") was attached to the contract. The TR stated in a number of places that the foundations were to have a design life of 20 years. However, there were also two paragraphs in the TR which stated that the design of the foundations "shall ensure a lifetime of 20 years ..." and another reference that the foundations should have a minimum service life of 20 years. The TR also stated,

amongst other things, that MTH should undertake the design of the foundations using the international DNV-OS-J101 ("the DNV Standard"). The DNV Standard included provisions with regard to the design of grouted connections.

The design and installation of the foundations was substantially completed by early 2009. In September 2009, DNV notified the offshore wind industry that there was a problem with the Standard. In particular, certain equations in the Standard overestimated the axial capacity of the grouted connection. The result was that the grouted connection was not sufficiently strong and the TPs could slip down over the MPs.

E.ON argued that MTH had warranted that the foundation structures would have a service life of 20 years. In essence this was a fitness for purpose warranty. MTH disputed this. E.ON also argued that MTH had been in breach of contract and/or negligent in its design.

The findings

The matter was heard at first instance in November 2013. The trial judge found that the cause of the problem with the grouted connections was the error in the DNV Standard and not any breach of contract or negligence on the part of MTH in designing the foundations. Notwithstanding, the trial judge held that MTH was still liable for breach of contract on the basis it had provided a warranty that the foundation structures would have a service life of 20 years.

MTH appealed the first instance decision on the warranty and E.ON cross-appealed, arguing that MTH had been in breach of contract in not conducting further testing or experimental verification when undertaking the design and that this was a cause of the problem with the grouted connections.

On the fitness for purpose point, giving the leading judgment, Jackson LJ summarised the relevant authorities on fitness for purpose and stated at paragraph 79:

"It is not unknown for construction contracts to require the contractor (a) to comply with particular specifications and standards and (b) to achieve a particular result. Such a contract, if worded with sufficient clarity, may impose a double obligation

upon the contractor. He must as a minimum comply with the relevant specifications and standards. He must also take such further steps as are necessary to ensure that he achieves the specified result. In other words he must ensure that the finished structure conforms with that which he has warranted..."

Whether such an obligation was imposed was a matter of contract interpretation. Following a consideration of the relevant contract documents, the Judge found that there was no warranty for a 20-year service life (which effectively would have amounted to a fitness for purpose obligation).

Jackson LJ commented that the contract was "diffuse" and loosely worded. Whilst there were some references in the Specification that E.ON could rely upon to be absolute in their nature, reading the contract as a whole and particularly taking into account the factual matrix, including the widespread use of the DNV Standard, the Court unanimously found in favour of MTH on the contract interpretation point.

On E.ON's cross-appeal, the Court of Appeal found that MTH should have undertaken testing and/or experimental verification but even if it had done so, it would not have changed its design. Therefore E.ON had failed to demonstrate causation and was only entitled to nominal damages of £10.

Conclusion

A party wishing to rely upon a particular obligation must demonstrate that the obligation exists. The *E.ON v MTH* case illustrates the danger of simply relying on a reference to the contract or contract documents to define a particular purpose in the context of a fitness for purpose clause. Jackson LJ made plain that obligations of this nature must be clear; the Court of Appeal did not find that to be the case.

It is noted that E.ON have applied to the Supreme Court for permission to appeal the decision of the Court of Appeal on the warranty point. At the time of publication the decision of the Supreme Court on the permission application had not yet been given.

Descoping in construction contracts in the UAE

As Heba Osman explains, in the aftermath of the 2008 global financial crisis, many employers in the UAE turned to descoping large parts of construction works as a quick exit strategy from uncompleted projects. Other employers resorted to termination.

Descoping is usually instructed by employers as a variation omitting large parts of the works. Many employers appear to believe that they are contractually entitled to descope, which in part is true. However, many employers instruct the omission of large parts of the works for one of the following reasons:

- (i) **Funding problems:** during the life of the project, the employer becomes unable to continue funding the project. The project has simply become too expensive for the employer.
- (ii) **Better deals:** the employer finds another contractor who can complete the remainder of the works in a faster or cheaper manner.
- (iii) **Contractor's incapability:** the employer has doubts as to the contractor's capabilities, whether financial or technical, to complete the works.
- (iv) **Poor performance:** the employer is not happy with the contractor's performance of the works.

Most standard construction contracts entitle the employer to issue variations to the works through omission. This means that an employer does not have to go through the argument of terminating the contract when it can simply descope.

Descoping is a non-confrontational method that employers appear to turn to when they do not wish to get into the difficult situation of terminating the contract. Typically termination, whether for convenience or fault, triggers a dispute between the employer and the contractor. Many employers wish to avoid such a situation by simply omitting all or parts of the work.

The majority of construction contracts in the Gulf region maintain the principal features of the FIDIC forms of contract, yet there are also many subtle changes. These changes tend to upset the balance of risk allocation between the parties. In the UAE, many contracts appear to be drafted in one-sided language biased towards the employer. The roots of these contracts appear to have come from the Dubai Municipality construction contract, which was initially drafted for the use of the Dubai Municipality as a Governmental entity but then found its way to many of the UAE employers. In this respect, such one-sided contracts are not generally suitable for private employers, and contractors should be very careful in signing such agreements. These are not FIDIC standard contracts and thus do not contain the proper risk allocation that should be expected.

Nevertheless, most construction contracts, whether standard forms or otherwise, contain variation clauses. Without such clauses and provisions, neither the employer nor the contractor is legally entitled to deviate from the agreed scope of works. If there is no variation provision, the contractor cannot be compelled, for example, to perform additional works and the employer cannot, without being in breach of the contract, omit any works that have been agreed.

Variation clauses introduce much needed flexibility into somewhat rigid rules that otherwise govern the parties' obligations arising under construction contracts. In other words, if there is no variation provision, the law requires the parties to the contract to perform exactly what they have agreed upon and any change to the scope of the works would have to be mutually agreed between the parties under a written amendment to the contract. The variation provisions entitle the employer unilaterally

to amend the scope of the works without the need to amend the contract itself.

Clause 51 of the Red Book fourth edition, being the most widely used standard form of contract in the Middle East, defines a variation as:

“any change in form, character, kind, quality, quantity, line, level, position, alignment, or dimension of existing work or any additional work that the Engineer finds necessary, appropriate or desirable to complete works.”

This clause 51 also entitles the employer, through the Engineer, to *“instruct an omission of the works, provided that the Employer does not carry out these omitted works by himself or through others”*.

Clause 51 clearly states that:

“The Engineer shall make any variations of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor and the Contractor shall do any of the following:

...

(b) omit any such work (but not if the omitted work is to be carried out by the Employer or another contractor).”

An engineer’s variation instruction by omission must meet the basic requirements of being in writing or given orally and subsequently confirmed in writing; be in respect of the form, quality or quantity of the works or any part of the works; and, in the engineer’s opinion, be necessary or otherwise appropriate.

Whenever variations are ordered omitting works under clause 51, and particularly if such omitted work is substantial, contractors often argue that they should be entitled to claim loss of the profit they would have earned on such works if carried out. In principle, if the variation omitting works is invalid (say, for not being in writing, or not necessary or appropriate) then this invalid omission may be construed as a breach of

contract entitling the contractor not only to loss of profit, but also to damages due to breach. Where the works have been omitted and given to others to carry out, it is clearly established that this is a breach of contract and not a valid variation order.

Similarly, if the employer himself or another contractor carries out the omitted work, loss of profit and damages can be claimed, unless it can be proved that the contractor is technically or financially incapable of carrying out such omitted work. However, in many of the bespoke construction contracts drafted in the UAE, employers retain the right to omit a part of the scope and get it done by another contractor under a separate contract. In such instance, the employer becomes immune to claims for loss of profit or damages as a result of such omission.

The existence of a variation clause does not give the employer a free hand in making large-scale or significant changes to the nature and scope of the works. Clause 52.3 of the FIDIC Red Book entitles the contractor to a fair valuation of variations that increase or decrease the Contract Price by more than 15%. Such excess variations are not valued in accordance with the Bills of Quantity as other variations but are to be agreed between the contractor and the employer; if no agreement is reached then such an amount is to be determined by the engineer, having due regard to the site status and general contractor overheads.

It is also worth considering the variation provision of the new Red Book, which is really no longer that new, being issued in 1999, which provides in clause 13 that variations may include: *“(d) omission of any work unless it is to be carried out by others.”*

The interesting part about this provision is that when compared with the old version of the FIDIC Red Book it does not refer to whether the employer would be entitled to carry out these omitted works by itself. In the UAE, there appears to be no court decisions in this respect as this form of contract, despite being in use for over 15 years, has not found its way to the UAE.

Descoping v termination

This begs the question: why do employers

turn to descoping instead of termination? As has been said, employers have a tendency to use descoping as a mechanism to avoid termination in situations where termination would be more appropriate. This is especially true when you consider that descoping may cause the employer to incur damages and immediate expenses compared with the use of termination.

As mentioned, employers tend to use descoping in one of four scenarios:

- (i) The project has become too expensive for the employer to fund.
- (ii) The employer wishes to escape a bad deal, especially when there are other contractors who can do the remaining works cheaper or faster.
- (iii) The employer has doubts as to the contractor’s capabilities to complete the works.
- (iv) The employer is dissatisfied with the contractor’s performance generally.

In the first scenario, if the project has become too expensive for the employer to fund, the employer has the right to descope as a matter of UAE law under Article 893 of the UAE Civil Code. This provision entitles both the employer and the contractor to terminate the contract *“if any cause arises preventing the performance of the contract or the completion of the performance thereof”*.

Of course termination or cancellation of a contract in the UAE would need to be agreed mutually or through the courts if there is no clear provision entitling the employer to unilaterally terminate. Employers are, therefore, advised to ensure that their contracts clearly give them the right to unilaterally terminate the agreement without the need for court intervention.

A clear provision entitling the employer to terminate for convenience is therefore quite important and it should mention in as much detail as possible the expenses or due amounts that the contractor would become entitled to in the event that the employer exercises his right to terminate for convenience.

Descoping construction contracts in the UAE

In the second scenario, if the employer realises it has entered into a bad deal with the contractor this is indeed a risk that the employer has to bear. However, in this scenario, the employer needs to assess the cost of termination versus the cost of descoping. If there is a termination for convenience provision, then the employer is best advised to use such a provision rather than descope and hire another contractor to complete the works. If the employer opts for descoping it opens itself up to the risk of being liable to the contractor for loss of profit and damages for breach. In the event of termination for convenience, the employer's liability will more likely be limited to loss of profit.

In the third and fourth scenarios, where there is a breach on the part of the contractor or the contractor's ability to complete the works is questionable, then the route that should be followed by the employer is termination for breach. The FIDIC Red Book entitles the employer to terminate the employment of the contractor in the event of the contractor's default. This is different from terminating the contract itself which continues to be valid. If the employer terminates the contractor's employment, the employer's liability to make any payments (if any) to the contractor does not begin until after the expiry of the defects liability period and after the engineer has assessed the cost of execution, remedy of defects, delay in execution and damages. On the other hand, in the event of descoping the works, the contractor's right to claim loss of profit is immediate.

Moreover, as a matter of UAE law, an employer is entitled under Article 877 of the UAE Civil Code, if he is not happy with the performance of the contractor and after giving notice to the contractor to remedy his default, to request the court to authorise him to hire another contractor to complete the works at the expense of the contractor. In the UAE, this is quite a fast procedure that allows the employer to move on and hire another contractor in a fast and efficient manner.

In any event, when assessing whether to terminate or descope, it is important to have regard to Article 895 of the UAE Civil Code, which provides that a *"party suffering harm*

by the cancellation may make a claim for compensation against the other party to the extent acknowledged by custom".

This means that essentially the assessment of damages incurred as a result of contract termination would be considered in accordance with the custom of the construction industry as may be evidenced through experts working in this field.

Conclusion

The conclusion that employers and contractors alike should take away is that a clear drafting of contracts is paramount, and the use of the contract provisions for what they were intended would in fact save them more money in the long run. Yes, descoping appears to be a simpler approach; however, when used as a substitute for termination it will prove more costly than termination.

"If there is no variation provision, the contractor cannot be compelled, to perform additional works and the employer cannot, without being in breach of the contract, omit any works that have been agreed"

Time bars in an international context

Under most formal contracts it is necessary for the contractor to give notice of various matters before becoming entitled to extensions of time and loss and expense. As **Jeremy Glover** discusses, depending on its terms, such a provision may be treated as a condition precedent which if not followed could mean you lose your right to make a claim.

It is fair to say that, increasingly notices clauses are expressed as conditions precedent. In other words, a failure to comply with the requirements of the clause will result in a party being prevented from making what might otherwise be a perfectly valid claim.

The traditional view at common law

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

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

Here, sub-clause 20.1 expressly makes it clear that:

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

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

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

1 *Temloc v Errill Properties* (1987) 39 BLR 30, CA per Croom LJ.
 2 [1978] 2 Lloyd's Rep. 113
 3 [2007] EWHC 447 (TCC). The Judge's words were endorsed in the Scottish case of *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] ScotCS CSOH 146 where Lord Glennie was wholly unsympathetic to the suggestion that allowance should be made for the fact that notices given in compliance with conditions precedent might have been drafted by businessmen rather than lawyers, noting that: "It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions. But even if that were not the case, there is nothing in clause 17.6.1 [of a Public Private Partnership or PPP Contract] that would not readily be understood by a businessman unversed in the law."

Time bars

The civil law approach

The position of time bars in construction contracts in civil law countries is different. Unlike common law, where non-adherence to a time bar provision may render a contractor's claim invalid, many, but not all, civil codes may, take a more lenient approach.

Primarily, parties are to perform their obligations under the contract. To take the example of the UAE, Article 243 (2) of the UAE Civil Code states:

"With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do."

Further Article 265 (1) of the UAE Civil Code deals with contract interpretation and states:

"If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties."

From the above and in the absence of any other circumstances, the contractor may be required to conform with any time bars in the construction contract. However, in circumstances where it appears that the strict interpretation and imposition of the time bars would seriously prejudice the contractor, the contractor may rely on certain provisions of the UAE Civil Code to argue a more lenient approach be adopted. These include:

Good faith obligation

Article 246 (1) states, *"The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."*

So for example, if an employer was made aware of the contractor's intention to claim in such manner, the employer could be seen as acting in bad faith if he later argues that the contractor did not meet the contractual timeframe. Alternatively, a time bar provision may not be relied upon by an employer in circumstances where he is in breach and was fully aware that his breach would cause delay to the project.

Unlawful exercise of rights

Article 106 provides that the exercise of a right shall be unlawful if it is disproportionate

to the harm suffered by the other party. In particular, Article 106 (1) states:

"A person shall be held liable for an unlawful exercise of his rights."

Further Article 106 (2) (c) provides:

"The exercise of a right shall be unlawful: (c) if the interests desired are disproportionate to the harm that will be suffered by others."

In view of the above and subject to the circumstances of the particular case, it may be unlawful for the contractor's otherwise meritorious claim to be disallowed on the basis of a purely technical breach. Therefore, the employer's reliance on the technical breach may be seen as an unlawful exercise of his rights.

Unjust enrichment

Articles 318 and 319 provide that unjust enrichment is unlawful. Particularly, Article 318 of the UAE Civil Code states:

"No person may take the property of another without lawful cause, and if he takes it he must return it."

Article 319 (1) provides:

"Any person who acquires the property of other person without any disposition vesting ownership must return it if that property still exists, or its like or the value thereof if it no longer exists, unless the law otherwise provides."

Therefore, an employer may be prevented from relying on a time bar provision to avoid payment to the contractor for works performed and for works from which the employer has benefitted particularly if the only reason for withholding payment is the lateness of the contractor's claim.

However, as with the common law, everything depends on the circumstances of the case. That said, courts in the UAE would be reluctant to uphold strict terms of the contract where it can be seen that either the requirement for a notice was complied with in a different form or that strict imposition of the time bar would be an unlawful exercise of the employer's rights or cause unjust enrichment.

As noted above, the position can vary from code to code. To take another example: article 2 of the Turkish Civil Code imposes an obligation of good faith, and Article 77 provides that unjust enrichment is unlawful. However, the Turkish Courts tend to take a strict view on time bars by virtue of Article 193 of the of Civil Code,⁴ which provides that a party may not initiate a claim in a manner which is not set down in the contract or which is against the manner set out in the contract.

Are there ways round the condition precedent?

Is there the possibility that a DAB or arbitral tribunal might decline to construe the time bar as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable Law?⁵ On the strict wording of the Contract, the answer is no and contractors should always try and work on this basis.

That said, it is often suggested that in civil code jurisdictions it can be possible to raise a successful challenge to time bars under the mandatory laws of that country on the basis of the time bar being contrary to the notion of good faith⁶ or some other similar legal principle. For example, it has been suggested that a German court might interpret the contractor's duty to give notice not as a condition precedent to give notice but an obligation (*"obliegenheit"*) of the contractor. This would mean that the contractor does not lose the right to make a claim but that the contractor must prove that his claims are valid and are not affected by his failure to meet his notice obligation in time.⁷

The general point being that it is wrong that a party who has genuinely suffered a loss might be prevented from bringing a claim in respect of that loss for a technical procedural breach. Remember Article 246(1) of the UAE Civil Code says that:

"The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

Indeed most civil codes contain a provision confirming the importance of what has actually been agreed between the parties.

The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*⁸ suggests that there may well be certain ways round the condition precedent. The core element of the dispute was whether or not the contractor was entitled to an extension of time of 11 weeks and consequently whether or not the employer was entitled to deduct LADs. Clause 13.8 (of the JCT form of Contract) contained a time bar clause, requiring the contractor to provide details of the estimated effect of an instruction within ten days.

However, the Scottish courts noted that the Architect and employer had the power, to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst the employer (in discussions with the contractor) and the Architect (by issuing delay notices) both made it clear that the contractor was not entitled to an extension of time, neither gave the failure to operate the condition precedent at clause 13.8 as a reason.

The point made by the Judge is that whilst clause 13.8 provided immunity, that immunity must be invoked or referred to. At a meeting between contractor and employer, the EOT claim was discussed at length. Given that the purpose of clause 13.8 was to ensure that any potential delay or cost consequences arising from an instruction was dealt with immediately, the Judge felt that it would be surprising if no mention was made of the clause unless the employer, or Architect, had decided not to invoke it. Significantly, the Judge held that both employer and Architect should be aware of all of the terms of the contract. Employers and certifiers alike should certainly therefore pay close attention to their conduct in administering contracts in order to avoid the potential consequences of this decision.

The Inner House agreed with Lord Osborne saying:

"silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case."

A new approach under common law?

In April 2014 Mr Justice Akenhead had to consider a case arising from disputes relating

to a project to build a tunnel at Gibraltar airport. The case, *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*,⁹ was unusual because the contract in question was in the FIDIC Form. Usually disputes under the FIDIC Form are heard in private, in arbitration proceedings. Needless to say the case raised a number of interesting issues, not least about the sub-clause 20.1 condition precedent.

Amongst a number of claims, OHL sought an extension of time of 474 days. The Judge decided that the contractor, OHL was entitled to no more than seven days extension of time (rock and weather). However, this was subject to compliance with sub-clause 20.1. It was accepted by OHL that sub-clause 20.1 imposed a condition precedent on the contractor to give notice of any claim. The Judge held that properly construed and in practice, the "event or circumstance giving rise to the claim" for extension must occur first and there must have been either awareness by the contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. Importantly Mr Justice Akenhead said that he could see:

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

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

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

Sub-clause 20.1 did not call for the notice to be in any particular form and it should be construed as allowing any claim provided that it is made by notice in writing to the engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension

4 Freedom of contract rules: Article 26 says that parties may freely determine the contents of a contract within the limits prescribed by law.

5 It is my own experience that a DAB is more likely of the two to try and find a way round the condition precedent. Of course, it would be dangerous to rely on this.

6 See for example the comments of Michael E. Schneider and Matthias Scherer (taken from the Switzerland Chapter of FIDIC – An Analysis of International Construction Contracts- www.lalive.ch/files/mes_msc_analysis_of_construction.pdf) who note that by the adoption of Article 2 of the Swiss Civil Code (Good Faith Rule) and the principle of "venire contra factum proprium" the employer could be deemed to have waived his right to insist on the 28-day rule if he has not clearly insisted on a strict adherence to the rule in a consistent manner.

7 FIDIC's clause 20.1 – a civil law view, Mauro Rubino-Sammartano, Construction Law International Volume 4 No 1 March 2009.

8 [2007] CSOH 190 and, on appeal, [2010] ScotCS CSIH 68. The dispute related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended.

9 [2014] EWHC 1028 (TCC). The case was considered by the Court of Appeal in 2015, but the appellate court made no comment on this part of Mr Justice Akenhead's decision, [2015] EWCA Civ 712.

(or for additional payment or both) under the contract or in connection with it. It must be recognisable as a “claim”. The onus of proof was on the employer if he should want to establish that the notice was given too late.

An Australian alternative

In Australia the situation might be slightly different. There was a High Court decision, *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, which although it related to the enforceability or otherwise of a banking overdraft facility, caused many commentators¹⁰ to suggest that it might signal a possible end to the use of time bars in construction contracts. At the moment, as far as I understand, it is something that has only been written about, rather than decided in the courts.

The key paragraphs of the decisions were 10 and 12. These stated as follows:

“10 In general terms, a stipulation prima facie imposes a penalty on a party (“the first party”) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

12 It should be noted that the primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money. Further, the penalty imposed upon the first party upon failure of the primary stipulation need not be a requirement to pay to the second party a sum of money.

In the ANZ bank case, the court said that a clause can still be a penalty even though there has been no actual breach to bring it into effect. So how does that apply to time

bars in construction contracts? Well it has not been to date. However the reasoning goes that, with such a short notification period – seven days – a contractor is very unlikely to be able to put together the necessary information to justify the entitlement or even show that the delay is on the critical path in time. Therefore it would be a penalty to enforce the strict condition precedent and deny the contractor’s right to additional time and potential compensation. It would be unfair, especially in circumstances where the actual loss caused by the alleged late notification would be minor in nature, especially in contrast with the delay damages the contractor might become liable for. In fact they may even be nil if the employer has caused the delay in any event.

And that actually brings us back to the *Obrascon* case and the words of Mr Justice Akenhead who, it will be recalled noted that he could see:

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

And what about the employer?

Under the FIDIC form, the employer is treated somewhat differently when it comes to bringing claims. Sub-clause 2.5 states that:

“If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract ... the Employer or the Engineer shall give notice and particulars to the Contractor. ...

The Notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. ... The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract.

The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against

¹⁰ See for example Philip Davenport, ‘Andrews v ANZ and Penalty Clauses’ (2012) 147 ACLN 32, 35.

the Contractor, in accordance with this Sub-Clause."

This in itself is unusual as most contracts do not impose similar restrictions on employers.

That said, there is no similar provision to sub-clause 20.1 which says that any claim to time or money will be lost if there is no notice within the specified time limit.

Therefore it had been considered that unlike with sub-clause 20.1, where a contractor has 28 days to give notice, there was no strict time limit within which an employer must make a claim, although any notice relating to the extension of the Defects Notification Period had of course to be made before the current end of that period. However, employers should take note of a 2015 Privy Council decision¹¹ where the court said that the purpose of sub-clause 2.5:

"is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served 'as soon as practicable'."

Although no definition of "as soon as practicable" was provided, this decision suggests that employers too might to subject to a time bar, under the FIDIC form at least. employers should further note that the case also highlights the requirement to provide particulars or other substantiation: again the absence of these could prove fatal to the right to assert a right of set-off.

Conclusion

There are a number of steps parties can take to avoid the adverse effects of time bars. They include the following:

- (i) Parties should take care when concluding contracts to check any time bar clauses governing claims they might make;
- (ii) Parties should appreciate the risks they then run of not making a claim (even if to maintain goodwill) unless the other party agrees to relax the requirements or clearly waives them. This is perhaps especially the case where time bar clauses, if cautiously operated, may generate a proliferation of claims;
- (iii) Remember that the courts see the benefits of time bar provisions and support their operation. A tribunal might bar an entire claim for what seems like a technical reason by which time it will usually be too late to make a new, compliant claim; and
- (iv) Indeed even where the contract contains a clause such as sub-clause 20.1(a) of the FIDIC Gold Book 2008, potential claimants should not necessarily rely upon the other party already having the information they are required to provide.

Equally those considering making claims, should consider the following:

- (i) When is notice required?
- (ii) Who has to give notices?
- (iii) To whom should notice be given?
- (iv) In what form must the notice be given?
- (v) What information must be provided with the notice?
- (vi) What are the response times?
- (vii) Are there any continuing notice obligations?
- (viii) Is there an agreement in place not to serve notices?
- (ix) What happens if you fail to serve a notice?

The purpose of sub-clause 2.5:

"is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'"

Termination by the contractor

The decision in the case of *NH International (Caribbean) Ltd v National Insurance Property Development Company Limited (Trinidad and Tobago)*¹ was an interesting one for a number of reasons.

We have already discussed this case in the context of time bars on pages 20 and 21 of this *Review*. However, the case has a number of important lessons for employers and in particular in terms of the importance of diligent contract administration.

The case was a decision of the Privy Council in London. The Privy Council is made up of members of the UK Supreme Court and is the final court of appeal for many Commonwealth countries. The appeal in question here came from Trinidad and Tobago and arose out of two interim arbitration awards.

In 2003, the National Insurance Property Development Company Ltd ("*NIPDEC*") engaged NH International (Caribbean) Ltd ("*NHIC*") to construct the new Scarborough Hospital in Tobago. The Contract was based on the 1999 FIDIC Red Book. Following disagreements between the parties, NHIC suspended work on the project in September 2005, and, in November 2006, it purported to exercise its right to determine the Agreement.

The key provisions of the Agreement were as follows:

- (i) Clause 2.4 provided that the employer, NIPDEC, "*shall submit within 28 days after receiving any request from the Contractor [NHIC], reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price ... in accordance with clause 14.*"
- (ii) Clause 14 set out the contract price and procedure for payment, including provisions for interim certificates and a final certificate, referred to as "*Payment Certificates*".
- (iii) Clause 16.1 entitled the contractor, after giving 21 days' prior notice to the employer, to "*suspend work (or reduce the rate of work) unless and until [it] has received the ... reasonable evidence*". Clause 16.2 entitled the contractor to terminate the Agreement if, within 42 days of giving notice under clause 16.1, it had not received the reasonable evidence required by clause 2.4.

Employer's financial arrangements

Clause 2.4 was an entirely new provision inserted into the 1999 FIDIC Rainbow suite of contracts. It provides a mechanism whereby the contractor can obtain confirmation that sufficient funding arrangements are in place to enable him to be paid. This is something which may be of particular importance if

¹ [2015] UKPC 37

the employer is a company which has been specifically set up to carry out the project in question and this is therefore typically backed by loan finance. It may also be important if the employer orders a significant variation midway through the project. It is also a clause that typically the employer will seek to delete. Here, on 3 September 2004, NHIC issued a request to NIPDEC under clause 2.4. NIPDEC responded on 29 December 2004, enclosing a letter from the Project Administration Unit of the Ministry of Health (*“the Ministry”*), which advised that the Cabinet had approved additional funding for the project in the sum of US\$59.1m. On 28 April 2005, NHIC sent a further request under clause 2.4, which was answered on 5 July 2005 by the Permanent Secretary at the Ministry, Reynold Cooper. Having referred to the fact that the estimated final cost was \$286,992,070, Mr Cooper stated that the Ministry *“advise without prejudice that funds are available in [this] sum to meet the estimated final cost to completion”*.

NHIC then wrote on 8 July 2005, expressing concern about the words *“without prejudice”* and asking whether there had been Cabinet approval for payment of sums due under the Agreement. No response was received to this request. NHIC then suspended work under the Agreement on 23 September 2005 (having already reduced its rate of work on 23 June 2005).

On 19 October 2006, over a year later, NHIC received a letter from the new Permanent Secretary, Sandra Jones, dated 6 October 2006. After referring to the previous correspondence, Ms Jones stated that the Government *“confirm[ed]”* that (i) completion of the project *“is of the highest priority”*, (ii) the current estimate for the work was US\$224,129,801.99, (iii) *“these funds are available from the consolidated fund for disbursement to NIPDEC for onward payment to NHIC or for direct payment to NHIC”*, (iv) *“moneys certified or found due to NHIC ... will be paid by the Government”*, and (v) *“the Government stands fully behind the project ... and will meet the contractual financial requirements for completion of the project”*.

On 27 October 2006, NHIC wrote to NIPDEC requesting confirmation that the Cabinet had approved the funds. No such confirmation was forthcoming and on 3 November 2006, NHIC issued a notice of termination pursuant

to clause 16.2. Around this time, the Cabinet accepted a recommendation from Ms Jones that the funds referred to in the letter of 6 October 2006 be provided for completion of the project, and this decision was formally recorded in a note prepared by the Cabinet Secretary on 16 November 2006.

The arbitrator’s decision

In the arbitration, the arbitrator decided that the letters of 29 December 2004, 5 July 2005 and 6 October 2006, whether taken together or separately, did not amount to such *“reasonable evidence”* that *“financial arrangements”* had been *“made and maintained”*. Accordingly, he concluded that NHIC had been entitled to terminate the Agreement as it had purported to do on 3 November 2006.

The arbitrator said that clause 2.4 required more than showing that *“the employer is able to pay”*, let alone that it was enthusiastic about the project. What was required was evidence of *“positive steps”* on the part of the employer which showed that *“financial arrangements”* had been made to pay sums due under the Agreement.

Although the arbitrator accepted that the evidence before him showed that, as at 3 October 2006, ministerial and prime ministerial consents to the payment of any money due under the Agreement would be approved by Cabinet, he noted that this had not been communicated to NHIC. The arbitrator accordingly held that NHIC was entitled to terminate the Agreement.

The Privy Council agreed with the arbitrator, for example citing the arbitrator’s views that *“the mere fact that an employer is wealthy is inadequate for the purposes of sub-clause 2.4”* and that *“the mere fact that an Employer has good reasons for wanting a project completed does not itself mean that he has made and maintained the necessary financial arrangements”*. Accordingly the termination was valid.

The employer’s cross-claims

As we have noted on page 20 and 21 of the *Review*, the Privy Council found that the employer was not entitled to set off any of its claims against the contractor. Under sub-clause 2.5, if the employer wished to raise such a claim, it must do so promptly and in

a particularised form. Where the employer has failed to raise a claim as required by the earlier part of the clause:

“the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim”.

There was one limited exception. Clause 2.5 did not prevent the employer from raising an abatement argument – for example that the work for which the contractor is seeking a payment was carried out so poorly that it does not justify any payment, or that it was carried out defectively so that it is worth significantly less than the contractor is claiming.

Conclusions

Whilst both clauses 2.4 and 2.5 of the FIDIC form are perhaps unusual in that they place specific requirements on the employer, the Trinidad case provides an important lesson for any employer, whatever contract they are operating under. Both problems could have been avoided through more diligent contract management. If the employer had submitted timely claims as required under the contract, it could have set these off against the contractor’s claim.

If the employer had responded more promptly to the contractor’s requests for details of the employer’s financial arrangements, particularly when the contractor had exercised its right of suspension, then the contractor would not have been entitled to terminate.

Put another way, if the employer had maintained better lines of communication with the contractor, it may never have found itself in these difficulties at all.

“the mere fact that an employer is wealthy is inadequate for the purposes of sub-clause 2.4” and that an Employer has good reasons for wanting a project completed does not itself mean that he has made and maintained the necessary financial arrangements”

The Court of Appeal in *Persero II*: how to enforce “binding but non-final” Dispute Board decisions under the FIDIC form of contract

There are very few reported cases under the FIDIC form of contract. The main reason for this is that they tend to incorporate arbitration clauses. However, as we report in this year’s *Review*, a small handful of cases have seen the light of day over the past years. One of these cases has achieved such a degree of notoriety that it is no longer known by its name but as the “Singapore Case”.

Robbie McCrea sets out the latest developments.

*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*¹

Introduction

The 1999 FIDIC Suite of Contracts² includes a dispute resolution mechanism that was designed to give the parties quick, cost-effective, and immediately binding awards through the Dispute Adjudication Board (“DAB”) mechanism at clause 20 of the Conditions of Contract.

However, an apparent oversight in the drafting of Clause 20 has left many parties with an entirely different experience to that intended by the FIDIC drafters, and even today there is no settled pathway to enforce a DAB decision where the non-complying party has prevented the decision from becoming “final”.³

A DAB decision will become final if neither party provides written notification of their dissatisfaction with the decision within 28 days of receiving it (pursuant to Sub-clause 20.4). It is therefore a straightforward matter for either party to ensure a DAB decision remains “non-final”.

Both “final” and “non-final” DAB decisions are immediately binding on the parties. However, final decisions cannot be appealed, and if a party fails to comply with a final decision Sub-clause 20.7 expressly allows the other party to refer to arbitration the discrete issue of non-compliance in order to enable the DAB decision to be enforced as an arbitral award.

Although the FIDIC drafters have stated that their intention was that non-compliance with “non-final” DAB decisions be enforceable in the same manner as “final” decision,⁴ there is no express provision in the Conditions of Contract to allow it. This has led to debate as to how to enforce a binding but non-final DAB decision.

The issue has been dealt with in a multitude of ways by DABs, arbitral tribunals, and legal commentators. However, because DABs and arbitration are private, there has been very little guidance from the courts.

For this reason there has been widespread interest in a series of cases involving this issue in Singapore, the *Persero* series,

1 [2015] SGCA 30

2 The Red Book, the Yellow Book, and the Silver Book.

3 Either party can prevent a DAB decision from becoming final by giving written notification of their dissatisfaction with the decision within 28 days of receiving it (pursuant to Sub-clause 20.4).

4 The FIDIC Contracts Committee issued a Guidance Memorandum on 1 April 2013 in which they sought to clarify that in the event of non-compliance with non-final DAB decisions, “the failure itself should be capable of being referred to arbitration under Sub-clause 20.6”.

5 *PT Perusahaan Gas Negara (Persero) TBK (“PGN”) v CRW Joint Operation (Indonesia) (“CRW”)* [2014] SGHC 146.

6 At paragraph 57.

(otherwise known as the “Singapore Case”) which culminated in the decision of the Singapore Court of Appeal of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30, the reserved judgment being issued on 27 May 2015.

In a split decision, the majority of the Court of Appeal found that binding but *non-final* DAB decisions could be submitted directly to arbitration on the discrete question of non-compliance.

While the majority’s decision is on face value a victory for contractors seeking the protection of a security of payment regime, the result is bittersweet. Interim enforcement of the DAB decision was obtained only after going through two sets of arbitration, High Court, and Court of Appeal proceedings, and over a period of six years. A decision on the merits of the underlying dispute is still to be decided.

Furthermore, the pathway to interim relief laid down by the majority differs from all previous judgments in the *Persero* series, whereas the minority judgment held that the Conditions of Contract provide no scope for expedited relief by enforcing non-final DAB decisions whatsoever.

Parties would therefore be well advised to proceed carefully when pursuing the enforcement of non-final DAB decisions under the FIDIC Conditions of Contract.

Background

The *Persero* series involves a dispute between parties to a contract based on the FIDIC Red Book, and which is governed by the law of Indonesia. A DAB was established and subsequently ordered that the employer (“PGN”) pay the contractor (“CRW”) in excess of USD 17 million (the “DAB Decision”). PGN accordingly issued a Notice of Dissatisfaction (“NOD”) pursuant to Sub-clause 20.4 and refused to comply with the DAB Decision. The *Persero* series is based upon CRW seeking expedited enforcement of the DAB Decision.

CRW first attempted to enforce the DAB Decision by proceeding to arbitration in 2009 under Sub-clause 20.6 on the discrete question of whether CRW was required to comply with the DAB Decision. The arbitral tribunal found in CRW’s favour and held in a final award that PGN had an obligation

to make immediate payment of the sum awarded in the DAB Decision. This is consistent with the stated intention of the contract drafters.

The 2009 tribunal’s award was subsequently set aside by the High Court of Singapore. The High Court reasoned that the tribunal could not convert the non-final DAB Decision into a final award without determining the merits of the underlying dispute. However, the Court opined that if CRW were to obtain a second DAB decision on the discrete question of non-compliance with the first DAB Decision, it could then submit the second DAB decision to arbitration where the tribunal could decide the issue as it would be hearing the issue referred on its merits. This is known as the “two dispute” approach.

The High Court decision was appealed to the Court of Appeal who confirmed that the 2009 Arbitral Award should be set aside. However, the Court of Appeal did not endorse the “two dispute” approach. Instead, the Court considered that the tribunal would have been able to enforce the DAB Decision by way of interim relief, if CRW had also submitted the underlying dispute to the tribunal as part of the same referral. Under this approach the tribunal could first give an interim award on the issue of non-compliance with the DAB Decision, and then go on to hear the substantive dispute on its merits. This is known as the “one-dispute” approach.

CRW subsequently commenced a new arbitration under the “one-dispute” approach. By majority, the 2011 Tribunal issued an interim award compelling PGN to give prompt effect to the DAB Decision (the “Interim Award”) pending the Tribunal’s final determination of the underlying dispute.

The Interim Award and the “one-dispute” approach were upheld by the High Court in *Persero II*⁵ in its decision of July 2014, which found that Clause 20 of the Conditions of Contract establishes a “security of payment regime”, the principal purpose of which is to facilitate the cash flow of contractors by requiring the employer to pay immediately, while preserving its right to argue later the substantive merits of the dispute in arbitration (i.e. “pay now, argue later”). Accordingly, the arbitral tribunal was entitled to grant a final and binding award that the DAB Decision be

complied with immediately, albeit as the first step of the primary dispute being finally decided in due course.

PGN appealed *Persero II* to the Court of Appeal.

The Court of Appeal in *Persero II*

The 2015 Court of Appeal by majority ruled in favour of CRW and upheld the Interim Award. However, the Court found that neither the “one-dispute” approach nor the “two dispute” approach were strictly correct. Instead, it considered that binding but non-final DAB decisions should be enforceable by way of interim awards in and of themselves, that is, without referring the secondary dispute back to the DAB and without the need to also submit the underlying dispute to arbitration.

The majority judgment

As a preliminary matter the Majority considered the DAB’s powers under Sub-clause 20.4 and set out the following three propositions:⁶

- (a) “A DAB decision is immediately binding once it is made. ...
- (b) *The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award.*
- (c) *The fact that a DAB decision is immediately binding once it is made and unless it is revised by either an amicable settlement or arbitral award is significant. ... the issuance of an NOD [notice of dissatisfaction] self-evidently does not and cannot displace the binding nature of a DAB decision or the parties’ concomitant obligation to promptly give effect to and implement it.”*

The issuing of a notice of dissatisfaction “does not and cannot” displace the binding nature of a DAB decision

FIDIC: Dispute Boards

The majority then considered the “two dispute” approach that was preferred by the High Court in *Persero I* and rejected it on the basis that, in light of the above three propositions, “any requirement to refer a question as to the immediate binding effect of a binding but non-final DAB decision back to the DAB seems to us not only wholly superfluous, but also contrary to the express words of cl 20.4[4]”⁷

In respect of the “one dispute” approach that was preferred by the Court of Appeal in *Persero I* and the High Court in *Persero II*, the majority rejected the notion that all differences between the parties would need to be settled in a single arbitration. The majority instead found that a “paying party’s failure to comply with a binding but not final DAB decision is itself capable of being directly referred to a separate arbitration under cl 20.6”⁸

In practice, however, the Majority’s decision may be less of a departure from the “one-dispute” approach than a first glance would suggest. This is because the Majority also found that the non-complying party could, by filing a counterclaim, require that the underlying dispute also be heard as part of the same arbitration, albeit after the tribunal had first made a final award in respect of non-compliance with the DAB decision.⁹

The minority judgment

In a 95 page dissenting judgment, Senior Judge Chan Sek Keong found the opposite. His Honour’s opinion was that, unlike final decisions under Sub-clause 20.7, there is no scope in Sub-clause 20.6 or elsewhere in the Conditions of Contract for interim enforcement of non-final DAB decisions.

His Honour considered that the Interim Award should be set aside on one or more of the following three grounds:

- (i) Failure to comply with the non-final DAB Decision did not fall within the scope of “dispute” in Sub-clause 20.4, or anywhere in the arbitration agreement, and therefore it could not be the subject of an arbitral award.
- (ii) The 2011 majority arbitrators had no mandate under GCC 20.6 to issue the Interim Award pending the final adjudication of the Underlying Dispute.

- (iii) Even if the 2011 majority arbitrators did have the mandate under GCC 20.6 to issue the Interim Award, the Interim Award was, and was intended to be, in substance a provisional award outside the ambit of “award” in s2 of the Singapore International Arbitration Act (“IAA”) and was not enforceable under s19 of the IAA as a judgment.

Accordingly, His Honour considered that in order to enforce the DAB Decision CRW would need to go outside the contractual machinery, for instance by seeking summary judgment in a court of competent jurisdiction.

Conclusion

Far from providing the much needed clarity that was hoped for (by contractors at least), the *Persero* series has concluded by adding yet more interpretations of the disputes mechanism at Clause 20. Prospective claimants must now consider the four potential approaches endorsed in the *Persero* series when considering enforcement of a non-final DAB decision, namely:

- (i) submit the issue of non-compliance with the DAB decision directly to arbitration.
- (ii) obtain a second DAB decision in relation to non-compliance and refer that second DAB decision to arbitration (the “two dispute” approach).
- (iii) submit the entire substantive dispute to arbitration, seeking in the first instance an interim award that the DAB decision be complied with immediately, on the basis that the substantive dispute will be heard on its merits in due course as part of the same referral (the “one dispute” approach).
- (iv) seek to enforce the DAB decision outside the contractual machinery, for instance by seeking summary judgment in a court of competent jurisdiction.

A “paying party’s failure to comply with a binding but not final DAB decision is itself capable of being directly referred to a separate arbitration under cl 20.6”

It should be noted that the *Persero* series were decided in Singapore under Indonesian law, and the judgments included consideration of a number of factual and jurisdiction-specific matters. These should be considered carefully before placing reliance on the *Persero* decisions in relation to other jurisdictions and cases.

⁷ At paragraph 66. The Majority’s principal rationale behind this finding was that while PGN’s NOD only expressly covered its dissatisfaction with the DAB Decision, by PGN choosing not to comply with the DAB Decision its NOD also implicitly expressed dissatisfaction with the requirement that the DAB Decision be complied with, and therefore the dispute over non-compliance was already encompassed in the NOD. This logic is perhaps unlikely to appeal to everybody.

⁸ At paragraph 83.

⁹ The Court’s position was summarised at paragraph 88.

Unforeseeable ground conditions and proceeding regularly and diligently: the *Obrascon* case reaches the Court of Appeal

The decision of Mr Justice Akenhead in the *Obrascon* case featured prominently in last year's *Review*, where we reviewed the implications of the judgment in relation to termination by the employer and serving contractual notices.

As Jeremy Glover explains the case has now reached the Court of Appeal,¹ where Lord Justice Jackson considered certain discrete elements of the original judgment.

To recap, *Obrascon* ("OHL"), a Spanish civil engineering contractor, was engaged, under an amended FIDIC Yellow Book, to construct a road around Gibraltar Airport. Mr Justice Akenhead held that, amongst other things, the employer had effectively terminated the contract under clause 15 of the contract. The issues on appeal primarily related to the following conclusions of Mr Justice Akenhead:

- (i) The amount of contaminated soil which OHL encountered was not more than an experienced contractor should have foreseen. Therefore OHL was not entitled to an extension of time or additional payment under clause 4.12 of the Conditions in respect of contamination.
- (ii) OHL, in breach of clause 8.1, failed to proceed with due expedition and without delay.
- (iii) The employer validly terminated the contract pursuant to clause 15.2.

Unforeseeable ground conditions

Under the basic scheme of clause 4.12, if a contractor encounters adverse physical conditions which he considers to have been unforeseeable, then the contractor must give notice to the engineer as soon as practicable.

Physical conditions are defined as meaning:

"natural physical conditions and man-made other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions."

By clause 1.1.6.8, "unforeseeable" means:

"not reasonably foreseeable by an experienced contractor by the date for submission of the Tender."

Here, there was ground contamination which arose from the military activities on the site over previous centuries and from the use of the site as an airfield in the twentieth century. Airfield activities generated further contamination, for example aircraft fuel and substances used for de-icing runways. All these matters were clearly spelt out in the desk study provided to tenderers in 2008. The study included a plan showing a rifle

range at the north-east corner of the isthmus, where the tunnel was due to be built. Most of the contamination was confined to the made ground, although some of the hydrocarbons penetrated deeper. In the tunnel area (where the most significant excavation was required) the depth of made ground varied between 1 metre and 5.4 metres, with an average depth of 2.5 metres.

The borehole logs showed that the made ground was not uniformly contaminated. Some areas were free from contamination, while other areas were contaminated at a high level.

The depth to which OHL initially stripped the site was a matter for their choice. They chose to strip the top layer of the whole site to a depth of 2 metres. After that the principal area of excavation was the tunnel and the ramps leading down to the tunnel at both ends. OHL prepared a Construction Environmental Management Plan (CEMP), which stated that there would be "correct separation of wastes" and that contaminated materials would be "removed off site, stored and dispersed to a licensed site". However, OHL did not adhere to the CEMP and they stockpiled all excavated materials indiscriminately, without any attempt to differentiate between contaminated and inert materials. Inevitably there was cross-contamination. The result was that all the stockpiled excavation materials were progressively being exported to landfill sites in Spain.

This made it difficult for the experts instructed by the parties to estimate the actual quantity of contamination on the site. The preferred report calculated the total volume of contaminated soils to be 15,243m³; this was higher than the figure of 10,000m³ shown in the Environmental Statement.

What contamination would therefore be "reasonably foreseeable by an experienced contractor" at the date of tender (the test under clauses 1.1.6.8 and 4.12 of the Conditions)? The approach of the expert accepted by Mr Justice Akenhead lead was to suggest a figure of 15,000m³. The basic reasoning was that an experienced contractor would not "slavishly" accept the figure. Instead an experienced contractor would make its own assessment of all available data.

¹ *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2015] EWCA Civ 712.

Lord Justice Jackson in the Court of Appeal agreed. The FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information:

"The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable."

The Court of Appeal also noted that Mr Justice Akenhead had approached the expert evidence critically. He also made his own assessment of all the information that was available. The Court of Appeal said that this was:

"entirely appropriate. The Technology and Construction Court is a specialist court with long experience of cases such as this one. The judges are not prisoners of the expert evidence."

The Court of Appeal also noted that the historical material provided to the contractor made it clear that very extensive contamination was foreseeable across the site. The contractor needed to make provision for a possible worst case scenario; the contractor should have made allowance for a proper investigation and removal of all contaminated material. The estimate of 10,000m³ of contaminated materials contained in the Environmental Statement was one person's interpretation of the data. Tenderers were bound to take that assessment into account, but they remained under a duty to make their own independent assessment of the physical conditions likely to be encountered.

What the Court of Appeal was saying was that under the contract, OHL was required to make its own independent assessment during then tender stage of all the available information. OHL then had to use its own expertise and experience to make an assessment of the likely physical conditions it would encounter. What OHL could not do here was do nothing and simply rely on the interpretation of the data and survey information carried out by another and argue that anything else was unforeseeable. This was especially the case

where the data in question within the environmental statement, namely on the extent of ground contamination was clearly stated to be an estimate and when clause 4.10 of the FIDIC Yellow book notes that OHL *"shall be responsible for interpreting all such data"*.

Accordingly, OHL's claim for unforeseeable ground conditions under clause 4.12 of the FIDIC conditions failed.

Termination: the view of Mr Justice Akenhead

At first instance, Mr Justice Akenhead had made a number of interesting comments about termination. The relevant clauses under the Yellow Book are:

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

Clause 15.2: *"The Employer shall be entitled to terminate the Contract if the Contractor:*

- (a) *fails to comply... with a notice under Sub-Clause 15.1...*
- (b) *...plainly demonstrates the intention not to continue performance of his obligations under the Contract,*
- (c) *without reasonable excuse fails:*
 - (i) *to proceed with the Works in accordance with Clause 8...or;*
 - (ii) *to comply with a notice issued under Sub-Clause 7.5..."*

The judge considered that clause 15.1 related only to *"more than insignificant"* contractual failures by a contractor. These could be a health and safety failure, bad work, serious delay on aspects of the work or the like. However it was important to establish a failure to comply with the Contract. For example, something may have not yet become a failure; for instance the delivery to site of the wrong type of cement may not become a failure until the cement is or is about to be used. The specified time for compliance with the clause 15.1 notice must be reasonable in all the circumstances prevailing at the time of the notice. What is reasonable is a question of fact sensitive. Again for example, if 90% of the

workforce had gone down with cholera at that time, the period given for compliance would need reasonably to take that into account, even if that problem was the contractor's risk. It may also be relevant to take into account whether the clause 15.1 notice came "out of the blue" or if the subject matter has been raised before and the contractor has chosen to ignore what it has been told.

Clause 15.1 was therefore designed to give the contractor an opportunity and a right to put right its previous and identified contractual failure. However, given the potentially serious consequence of non-compliance, clause 15.1 notices must to be construed strictly albeit they can be construed against the surrounding facts. The Judge further noted that, generally in relation to termination for fault clauses, courts will construe them "in a commercial way so as to exclude reliance on trivial breaches". Again, the Judge gave some examples of trivial breaches: one day's culpable delay on a 730 day contract or 1m² of defective paintwork out of 10,000m² good paintwork. As you would expect, what is trivial and what is significant or serious will depend on the facts.

Mr Justice Akenhead concluded that:

*"Clauses 15.1 and 15.2(c) must as a matter of common sense pre-suppose that the Contractor is given the opportunity by the Employer actually to remedy the failure of which it is given notice under Clause 15.1. In that context, termination could not legally occur if the Contractor has been prevented or hindered from remedying the failure within the specified reasonable time. This stems from a necessarily implied term that the Employer shall not prevent or hinder the Contractor from performing its contractual obligations; there is also almost invariably an implied term of mutual co-operation. If therefore the Engineer has served a Clause 15.1 notice to remedy a breach of contract, and to the extent that the Employer hinders or prevents the Contractor from remedying the breach, the Employer could not rely on the Contractor's failure in order to terminate the Contract. This is because the Employer should not be entitled to rely on its own breach to benefit by terminating (see for instance *Alghussein Establishment v Eton College* [1988] 1 WLR*

587). An example might be the Employer who, following the service of Clause 15.1 notice, denies site access to the Contractor to enable it to put right the notified failure."

There was no challenge in the Court of Appeal to these findings.

Failure to proceed with due diligence

Under clause 8.1 of the FIDIC Conditions the contractor is obliged to: "proceed with the Works with due expedition and without delay".

However, as the Court of Appeal noted, this clause is not directed at every task on the contractor's to-do list. It is principally directed at activities which are or may become critical. Here Lord Justice Jackson referred to the reasoning of Mr Stuart-Smith in *Sabic UK Petrochemicals Ltd (formerly Huntsman Petrochemicals (UK) Ltd) v Punj Lloyd Ltd* (a company incorporated in India) [2013] EWHC 2916 (TCC) where he said this:

"However, when looking at the other individual elements, two points should be made. First, it is in my judgment most important to look at how SCL reacted to those elements that were thought to be critical during the Warning Period since those were, or should have been, the ones to which SCL should have been giving primacy at the time. A failure to exercise due diligence in relation to the works that were perceived to be critical would tend to support a conclusion that SCL was not exercising due diligence overall. Second, the mere fact that an element was not critical (or not thought to be critical) at a particular moment does not render SCL's performance on that element uninformative when assessing its attempts to comply with its contractual obligation of due diligence. This is because there were a number of elements at any given time which could have become critical if they had slipped into delay. It is to be remembered that SCL's obligation to secure EID covered the whole of the works (apart, of course, from category 3 defects, which were those that could be left until after EID)." [emphasis added]

Here, OHL submitted that the critical activity in the period May to July 2011 was obtaining the category 3 check certificate and final

approval of the re-design from the Engineer. Therefore other delays, in particular delays on tunnel works, were immaterial. The Court of Appeal did not agree. The tunnel was on the critical path of the whole project. The next stage of work on the tunnel was the PEE excavation, together with cropping and repairing of the diaphragm walls. These tasks were very much on the critical path.

Termination: Court of Appeal

In the view of the Court of Appeal, OHL's lack of significant activity on site between 21 January and 28 July 2011 was a failure "to proceed with the works with due expedition and without delay". It was a serious breach of clause 8.1 of the Conditions. That was not the end of the matter as the Court of Appeal went on to consider whether there was "reasonable excuse" for OHL's failure to proceed with the works. This was a question of fact and having gone through the six issues put forward by OHL in their defence, the Court of Appeal concluded that OHL's failure over many months to proceed with the works (a failure which continued in defiance of a notice to correct dated 16 May 2011) did "plainly demonstrate" an intention not to continue performance of their contractual obligations. This meant that the employer was entitled to terminate the contract as it did under clause 15.2.

Time bars

It should be noted that the Court of Appeal did not address every aspect of Mr Justice Akenhead's earlier judgment. In particular this means that the Judge's interesting comments on time bars have been left untouched. We deal with time bars in more detail in a previous article on pages 17–21.

"In the view of the Court of Appeal, OHL's lack of significant activity on site was a failure "to proceed with the works with due expedition and without delay". It was a serious breach of clause 8.1 of the Conditions"

The SCL Protocol: time for change?

The Society of Construction Law's (SCL) *Delay and Disruption Protocol*¹ was first published in 2002. It provides, in short, a scheme whereby delay may be much better controlled and managed during the construction process. The SCL says that overall, the *Protocol* aims to set out good practice (rather than best practice). Although the *Protocol* has no force of law (unless it is adopted into a contract) what it does provide is a previously absent consensus of expertise as to what is sound and what is unsound in the area of delay analysis.

The stated aim of the *Protocol* is that: "in time, most contracts will adopt the Protocol's guidance as the best way to deal with delay and disruption issues". Despite this, it is probably fair to say that whilst its suggestions are frequently adopted in debate about the best or right way to record and present delay, the *Protocol* has not been widely adopted or implemented by way of contract drafting and contract procedure. This may be one reason why the *Protocol* is currently being revised.

The origins of the review can be found in a SCL meeting held in April 2013, chaired by Lord Justice Jackson, to mark the 10th anniversary of the *Protocol*. The consensus at that meeting was that it was time for a review of the *Protocol* and the SCL set up a committee to do just that.

The SCL has noted that the review was held against a background of:

- (i) developments in the law and construction industry practices since 2002;
- (ii) feedback on the uptake of the *Protocol* since that time;
- (iii) developments in technology since 2002;
- (iv) an increase in the scale of large projects, leading to a wider divergence between small-scale and large-scale projects;
- (v) anecdotal evidence that the *Protocol* is being used for international projects as well as domestic UK projects.

There were eight specific terms of reference:

- (i) whether the expressed preference should remain for time impact analysis as a programming methodology where the effects of delay events are known;
- (ii) the menu and descriptions of delay methodologies for after the event analysis;
- (iii) whether the *Protocol* should identify case law (UK and international) that has referenced the *Protocol*;
- (iv) record keeping;
- (v) global claims and concurrent delay;
- (vi) approach to consideration of claims (prolongation/disruption – time and money) during currency of project;
- (vii) model clauses; and
- (viii) disruption.

On 1 July 2015, the SCL issued the first fruits of the review, Rider 1, which covers the first two items set out above.

What has not changed?

The original approach of the *Protocol* was that extensions of time should be dealt with at or

¹ Further details can be found on the SCL website: www.scl.org.uk

² As Rider 1 also notes, when it comes to financial losses the opposite approach is considered to be usually correct, with compensation being usually awarded only from a retrospective perspective, based on the actual costs incurred.

soon after the time of the delaying event, so that the parties know where they stand. The prevailing rationale was that having clarity was of greater value for all parties than a wait and see approach. This approach has been maintained. The authors of Rider 1 say this:

“the contemporaneous submission and assessment of EOT claims² is elevated to a core principle. This allows appropriate mitigation measures to be considered by the project participants so as to limit the impact of the delay event. It also provides the Employer and the Contractor with clarity around the completion date so that they can understand their risks and obligations and act accordingly. These objectives cannot be met if the Contractor does not submit timely notices, particulars and appropriate substantiation for its EOT claims, or if the CA does not assess those claims contemporaneously. These are key issues for minimising time related disputes.”

This is undoubtedly a sensible starting point from the point of view of good commercial practice. It does mean that extensions would have to be granted, not on the test of what actually caused delay, but on the test of what looked likely to cause delay at the time of the delaying event. This can sometimes mean that:

- (i) delay is inevitably to be analysed on a “first cause” basis, not an “ultimately critical” basis;
- (ii) the programme in currency at the time of the delaying event will take precedence over the actuality; and
- (iii) any subsequent forensic examination of what extensions of time ought to have been granted should properly look at, not what actually happened, but the much more subjective question of what the parties ought to have expected would happen.

What has changed?

The original *Protocol* recommended that one particular form of delay analysis, namely the time-impact form of delay analysis methodology, be used wherever the circumstances permitted “both for prospective and (where the necessary information is available) retrospective delay analysis”.

The time-impact form of analysis involves introducing delay events into the most contemporaneous programme and then updating the programme by impacting onto it the assumed effect of the delay event in question. By doing this, you take account of the status of the works at the time and then introduce the delay event into the programme and establish the likely effect or impact on the completion date.

This was not universally supported and was one of the main reasons why the meeting in 2013 had pressed for a review. One particular issue with the time-impact analysis can be its reliance upon theoretical modelling and not the actual sequence of events. This was recognised by the *Review Committee* who noted in Rider 1 that “there was a strong argument” put forward that contemporaneously submitting and assessing an EOT application and awarding an EOT on a prospective basis (i.e. the use of a time-impact analysis):

“can sometimes lead to unrealistic results if it subsequently transpires that the EOT claimed is significantly more than the delay attributable to the Employer Risk Event”.

At the same time, the original *Protocol* made no mention of the “windows” form of delay analysis which, over the past 10 years, has certainly become one of the most used forms of delay analysis, arguably because it is considered to be one of the most reliable.

Whilst Rider 1 still favours the time-impact approach, where there is a prompt evaluation of the delay during the project. Now, no one form of delay analysis is preferred, where that analysis is carried out some time after the delay event or its effect. Instead Rider 1 sets out the factors that need to be taken into account in selecting the most appropriate form of delay analysis as well as providing a helpful explanation of many of the delay analysis methodologies currently in common use.

Further, Rider 1 recognises that crucial factors in determining the most appropriate methodology (namely, the Contract terms, the circumstances of the project, nature of the relevant or causative events, the claim or dispute, the value of the project, the time available and the available project records)

will vary between projects. As Rider 1 notes:

“fundamentally the conclusions of the delay analysis must be sound from a common sense perspective in light of the facts that actually transpired on the project. This is because a theoretical delay analysis which is divorced from the facts and common sense is unhelpful in ascertaining whether in fact the relevant delay event caused critical delay to the completion date and the amount of that delay.”

This application of sound common sense is encouraging. Indeed, it is backed up by noting that critical path analysis is not necessarily limited to the use of specialist programming software. Rider 1 notes that such software can be “a powerful analytical tool” but also reminds those preparing an extension of time claim that sometimes the critical path to completion can be more reliably established through a:

“practical analysis of the relevant facts or by analysis of production and/or resource data”.

A view from the TCC

This is an approach which has been endorsed by the English courts.

For example Mr Justice Akenhead, in 2012 in the case of *Walter Lilly v Giles Patrick MacKay*,³ carried out a comprehensive review of the authorities and provided guidance on a number of important issues including the correct approach for a court of tribunal in calculating extensions of time. Indeed, the Judge noted that the approach of both experts:

“involved in reality doing the exercise that the Court must do which is essentially a factual analysis as to what probably delayed the Works overall”.

Mr Justice Akenhead’s view can be summarised as follows:

- (i) It is first necessary to consider what the contract between the parties requires in relation to the fixing of an appropriate extension of time.
- (ii) Whilst the architect prior to the actual practical completion can grant a prospective extension of time, which is

effectively a best assessment of what the likely future delay will be as a result of the relevant events in question, a court or arbitrator has the advantage, when reviewing what extensions were due, of knowing what actually happened.

- (iii) The court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such relevant events as have been found to exist. How the court or arbitrator makes that decision must be based on the evidence, both actual and expert.
- (iv) The extension must relate to the extent to which *"completion of the works is likely to be delayed"* by the relevant event or events.
- (v) Mr Justice Akenhead endorsed the view of Mr Justice Colman in the *Chestermount* case, where he said: *"Fundamental to this exercise is an assessment of whether the relevant event occurring during a period of culpable delay has caused delay to the completion of the Works and, if so, how much delay."*
- (vi) In the context of this contractual-based approach to extensions of time, one cannot therefore carry out a purely retrospective exercise. What one cannot do is to identify the last of a number of events which delayed completion and then say that it was that last event at the end which caused the overall delay to the works.
- (vii) In the assessment of what events caused what overall or critical delay, one needs also to bear in mind that it is not necessarily the item or area of work that is finished last which causes delay. It is what delays that final operation, which in itself takes no longer than it was always going to take, that must be assessed.
- (viii) If there is an excessive amount of snagging and therefore more time has to be expended than would otherwise have been reasonably necessary to perform the de-snagging exercise, it can potentially be a cause of delay in itself.
- (ix) The court should be very cautious about giving significant weight to the supposedly contemporaneous views of persons who did not give evidence.

Mr Justice Akenhead's judgement also referred to concurrency which he thought only come into play where at least one of the causes of delay is a relevant event and the other is not. It will be interesting to see the extent to which the next stage of the review agrees with his conclusions that where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time, the contractor is entitled to a full extension not a reasonably apportioned part of the concurrently caused delay.

The approach to notices

We have written elsewhere in this *Review* about the importance of complying with project notice procedures and time bars. This is, unsurprisingly, endorsed by Rider 1 which stresses that:

"The parties and the CA should comply with the contractual procedural requirements relating to notices, particulars, substantiation and assessment in relation to delay events. Applications for EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application."

Conclusion

The review on the remaining six issues is ongoing and it is understood that a draft second edition of the *Protocol*, which will incorporate Rider 1, will be available for consultation towards the end of 2015.

Rider 1 notes that the expressed aim of the second edition of the *Protocol* will be to provide :

"Practical and principled guidance on proportionate measures that can be applied in relation to all projects, regardless of complexity or scale, to avoid disputes and, where disputes are unavoidable, to limit the costs of those disputes".

This is a wholly laudable aim, and it is to be hoped that the final second edition builds on the common sense approach adopted in Rider 1 as it seeks to achieve this. Whether or not that will lead parties to expressly incorporate the revised protocol into their contracts remains to be seen.

"fundamentally the conclusions of the delay analysis must be sound from a common sense perspective in light of the facts that actually transpired on the project. This is because a theoretical delay analysis which is divorced from the facts and common sense is unhelpful in ascertaining whether in fact the relevant delay event caused critical delay to the completion date and the amount of that delay"

BIM: developments in 2015

Most readers of this Review will be very well aware of the Government's deadline, set out as part of the 2011 Government Construction Strategy, requiring the use of a "fully collaborative 3D BIM (with project and asset information, documentation and data being electronic) as a minimum by 2016" for all centrally procured Government projects in the UK. What then has been going on over the past few months and will it assist the Government's aims?

Current use and awareness of BIM

There is only anecdotal evidence about how successful the Government's strategy will be, although it is only fair to say that there is much scepticism around how well the Government's plans of implementing BIM by April 2016 will turn out.

The most recent survey carried out by the NBS¹ confirms that those who have already adopted BIM have seen a number of benefits including improved cost efficiencies, client outcomes, coordination, speed of delivery and better information retrieval. NBS believes that 92% of people in the construction industry will be using BIM within three years.

However, statistics show that only a small majority of 54% agree that the Government is on the right track with BIM and even less, 25%, believe the UK to be a world leader in BIM. Having said this, there is a general agreement across the industry (95%) that in five years' time use of BIM will be the norm. Statistics further indicate that the industry's attitude towards BIM looks positive as some 77% agree that BIM is indeed the future of project information.²

Understandably, the move of the industry towards Level 2 BIM will be a gradual one. The Government recognises this and in collaboration with industry has already committed to the Level 2 BIM programme as a result of the 2013/14 saving which amounted to a significant £840 million.³

No doubt this is why the Government has released a new, more ambitious strategy.

Digital Built Britain

The Digital Built Britain (DBB)⁴ Level 3 strategy builds on the achievements of the Level 2 BIM programme. It puts forward projects such as Crossrail and the 2012 Olympics as examples of the significant learning and savings that can be made through the use of digital technologies such as BIM.

The Government believes that the current approach to designing and procuring infrastructure and assets not only adds significantly to transaction and delivery costs, but also creates artificial scarcities of key services, resources and components through duplication of activity. In order to

alleviate this, DBB aims to encompass the cross-sector collaboration whilst taking the opportunity to rethink how we procure, deliver and operate our built environment going forward to ensure the industry meets its fiscal, functional, sustainability and growth objectives. Furthermore, it will combine data analytics and the digital economy to enable planning new infrastructure more effectively, building it at lower cost and operating and maintaining it more efficiently.

The future under the DBB strategy will enable asset owners to use technologies and techniques to create transparent collaborative relationships with their suppliers. The teams enabled by DBB will be encouraged to cooperate in developing solutions to problems which will be digitally prototyped ahead of a commitment to significant capital expenditure. However, given the breadth of the DBB strategy, including asset operation and asset performance, it is clear that the market opportunities that arise from deploying DBB cannot arrive all at the same time. In the first instance DBB will be deployed within sectors using the existing business models as an extension of Level 2 BIM.

The Government aims to make fully computerised construction the norm and ensure that the benefits of these technologies are felt across the UK and support the export of technologies and the services based upon them. As a result, the Government's ambition is to be operating at Level 3 by 2017 and by doing so sell the UK's expertise and cutting-edge technologies across the world and seize a share of the US\$15 trillion global construction market forecast by 2025.

However, to meet these ambitions the Government will surely need to address some of the issues raised in the NBS Survey 2015 which found that three-quarters of the industry (74%) claim that a lack of in-house expertise is a barrier, and two-thirds (67%) stated that a lack of training stands in the way.

Cyber security guidance for BIM – PAS 1192-5

Underpinning the BIM project documents are a series of British Standards and Publicly Available Specifications (PASs) which detail the BIM process. Completing the PAS suite is PAS 1192-5 which was issued in May this year.

1 National Building Specification, NBS National BIM Report 2015.

2 *Ibid*

3 *Ibid*

4 HM Government, Digital Built Britain: Level 3 Building Information Modelling – Strategic Plan, 2015

This provides a specification for security-minded building information modelling, digital built environments and smart asset management.

As BIM involves data sharing, its transparent nature presents a potential opportunity for hostile forces. In response the entire construction and operations supply chain needs to employ a security-minded approach and communicate in a cyber-security conscious way which both enables business function and minimises the value of information being shared for hostile reconnaissance purposes.

This new PAS goes beyond BIM and looks forward towards developments in the digital built environment that have been foreshadowed in the *Digital Built Britain* report. Essentially, this PAS will provide guidance on how to keep BIM models and the buildings they represent safe from cyber threats and assist not only in reducing the risk of loss or disclosure of sensitive information, which could impact safety and security, but also the loss, theft or disclosure of commercial information and intellectual property.

Central to the PAS are sections 4 and 5. The former sets out the security context and the latter deals with understanding the overall security threat and recommends the use of what is known as a “security triage process” to assist in determining the security requirements for the specific built asset in question and whether or not it is “sensitive”. The triage process is well thought through and demonstrates that this document is not out to scare employers into employing additional consultants or commissioning lengthy and costly additional reviews and protocols. If the project has a certain level of sensitivity then certain protocols should be put in place; if it does not, then they are not required. However, what is needed, and it relates to what most companies already have, is a security manager or, in this context, a built asset security manager (BASM) who is envisaged to facilitate these processes.

The PAS provides a foundation to support the evolution of future digital built environments and is an answer to the hacks and security breaches we (or our IT departments) encounter on an ever-increasing basis. The more we advance towards the DBB envisaged

by the Government, the more likely it is that this security-minded approach will become an absolute necessity.

Revisions to PAS 1192-2

The PAS 1192-2 (Specification for information management for the capital/delivery phase of construction projects using building information modelling) and the BS1192:2007 (Collaborative production of architectural, engineering and construction information – code of practice) are being revised to update wording and reduce conflicts between the two standards. Given that PAS 1192-2, one of the core constituents of Level 2 BIM, was originally released in 2013, while BS1192 was last updated in 2008, this seems to be a sensible action. The consultation period on the drafts ended on 31 August 2015.

It appears from the drafts that there are only limited changes and these are largely due to the need for clarification or to avoid contradictions. One change which did cause some comment related to the definition of the Project Information Model (or PIM.) The revised PAS says this:

*“3.34 project information model (PIM)
information model developed during the
design and construction phase of a project*

*NOTE The PIM is developed firstly as
a design intent model, showing the
architectural and engineering intentions of
the design suppliers. Then, when ownership
has been transferred to the construction
suppliers, the PIM is developed into a virtual
construction model containing all the
objects to be manufactured, installed or
constructed. The contractor’s model will be
by replacement rather than a modification
of the design model to avoid any legal
problems of responsibility.”*

The new words introduced by the update are underlined. Some questions have been asked about this. Does this mean that contractors are now being required to remodel the whole design? Will this lead to extra costs and delays?

We think not. PAS 1192-2 already says that when ownership has been transferred, the PIM will be redeveloped. The proposed new sentence does not change this. All the

new sentence seems to do is define (in reality, clarify) a line in the sand where liability is transferred, thereby generating greater certainty, which is fully in line with the reasons for the proposed update.

Conclusion

As we have said, there is a certain scepticism about whether, or not the Government’s targets for BIM in 2016 will be met. However, there is no doubt whatsoever that the Government will continue to champion the use of BIM because of the undoubted benefits and costs savings that it should bring to public projects. Equally, it is certain that technological advances will continue apace and as Level 3 BIM (and beyond) is introduced more widely, then there is likely to be further developments in project contracts and documentation, something we will keep an eye on for next year’s *Review*.

Health and safety: the new CDM Regulations and misconceptions concerning the new role of principal designer

The Construction (Design and Management) Regulations 2015, which came into force on 6 April 2015 replacing CDM 2007, are still in their infancy and, at the time of writing, the six-month transitional period is just about to expire, 6 October 2015. Although the Health and Safety Executive has published some Guidance on the Regulations,¹ the Approved Code of Practice (ACOP) which provided supporting guidance on CDM 2007 was withdrawn and has not so far been replaced.

Sarah Buckingham explains the legal and practical implications of the new Regulations.

The new Regulations abolish the role of CDM co-ordinator and the responsibilities for health and safety are now split between the client, the principal contractor and the newly created role of principal designer. Design takes place very early on in a project and decisions made during the concept and feasibility stage can fundamentally affect the health and safety of those who will construct, maintain, repair, clean, refurbish and eventually demolish a building.² Therefore, the intention of the Regulations is clear – design and health and safety should go hand in hand, hence why these responsibilities are now given to a principal “designer”. A key issue which has led to much debate, however, concerns who is the most appropriate person to be appointed as principal designer and when is this appointment to take place.

Regulation 5 provides that the client must appoint “a designer with control over the pre-construction phase as principal designer”³ The HSE Guidance provides a non-exhaustive list of “designers”, which includes architects, consulting engineers, quantity surveyors, interior designers, temporary work engineers, chartered surveyors, technicians or anyone who specifies or alters a design.⁴ Some commentators suggest, however, that it is not clear who should perform the principal designer role and that it would be helpful if the Regulations or the HSE Guidance identified a particular party (such as the architect or the structural engineer) in order to eliminate this uncertainty. In our view, however, it is only right that the Regulations are drafted broadly. They cannot specify by discipline who should assume the principal designer role in any given situation as that would simply lead to more confusion because of the numerous ways construction projects are procured (e.g. single stage, 2-stage, fully traditional, traditional with contractor design portion, etc.).

Following on from this debate, it has been suggested that a contractor can only take on the principal designer role if he has been appointed at an early enough stage in the project. We can see where the confusion comes from – the principal designer is to have “control over the pre-construction phase”⁵ and its appointment “must be made as soon as is practicable, and, in any event, before the construction phase begins”⁶

- 1 “Managing health and safety in construction, Construction (Design and Management) Regulations 2015, Guidance on Regulations” L153 Published 2015, HSE Books.
- 2 See paragraph 75 of the HSE Guidance.
- 3 Regulation 5(1)(a), The Construction (Design and Management) Regulations 2015.
- 4 See paragraph 72 of the HSE Guidance.
- 5 Regulation 5(1)(a), The Construction (Design and Management) Regulations 2015.
- 6 Regulation 5(2), The Construction (Design and Management) Regulations 2015.

The new CDM Regulations

This has caused alarm bells to ring amongst contractors. Many in the industry have interpreted the Regulations as drawing a very clear distinction between the pre-construction phase and the construction phase. On a design and build project for example, many regard the pre-construction phase as being the period up to the point when the contractor is appointed and only at this time does the construction phase begin. On this interpretation, it would therefore seem impossible for the contractor to have been involved in that pre-construction phase let alone to have had “control” of it.

However, the Regulations do not draw a clear line between these phases of a project, in fact quite the contrary. The “pre-construction phase” is defined in Regulation 2 as:

“any period of time during which design or preparatory work is carried out for a project and may continue during the construction phase.”⁷

An overlap is clearly envisaged and the test for whether or not a project is still in the pre-construction phase is whether design is being carried out, not whether construction has started. The Regulations recognise that design may be carried out right through the course of a project and, in practice, this is often the case (e.g. when dealing with variations). This explains how a contractor can be involved in the pre-construction phase that is on-going, but what about the requirement for the principal designer to be appointed “as soon as reasonably practicable” and to have “control” over the pre-construction phase? The use of the word “any” in the above-mentioned definition seems to be significant – i.e. it envisages some fluidity to the pre-construction phase rather than a single defined period.

Therefore, in our view, “control” over the pre-construction phase means control over the design being carried out during a particular period in that phase. The Regulations do not expressly say that the principal designer role must be carried out by the same person from the beginning of the project right through to the end (although neither do they expressly refer to replacement principal designers). In practice, an individual’s involvement in a project can never be guaranteed and there would be a

fundamental flaw in the Regulations if they intended such continuity. Instead, the Regulations simply say what must happen if the principal designer’s appointment ends. In short, the role reverts to the client himself⁸ and if a principal designer is no longer required then the health and safety file must be passed to the principal contractor.⁹

In the early stages of a design and build project the person in control of the design at that time is most likely to be the architect or engineer (it could not be the contractor if that contractor has not yet been appointed). The “control” then may shift to the contractor once appointed and so the contractor is then best suited to take on the role of principal designer. The reference to “control” over the design and the appointment of the principal designer early on in the project is simply recognising that the design process can have a significant influence on health and safety which is the whole intention behind the Regulations.

This view is supported by the approach JCT has taken. Its amendments dealing with CDM 2015 acknowledge that the contractor may be the principal designer or that where the principal designer is “client side” that the client can appoint a replacement principal designer. It must be implicit, therefore, that the contractor or any replacement principal designer would not have had control of the design earlier on – it can only be in control of the design for the duration of its appointment.

Designers (including principal designers) “must have the skills, knowledge and experience [and] organisational capability necessary to fulfil the role that they are appointed to undertake”.¹⁰ They are also under a duty to not accept an appointment unless they satisfy these conditions.¹¹ As long as these criteria can be met by the person who in reality has control over the design being carried out at the particular point in time, we suggest that in most situations it should not be difficult to identify who is best placed to assume the role of principal designer.

A key issue which has led to much debate, however, concerns who is the most appropriate person to be appointed as principal designer and when is this appointment to take place

7 Regulation 2(1), The Construction (Design and Management) Regulations 2015.
8 Regulation 5(3), The Construction (Design and Management) Regulations 2015.
9 Regulation 12(8), The Construction (Design and Management) Regulations 2015.
10 Regulation 8(1), The Construction (Design and Management) Regulations 2015.
11 Regulation 8(2), The Construction (Design and Management) Regulations 2015.

Exclusion and limitation clauses in construction contracts – recent developments

As Philip Barnes explains, consultants and contractors, as well as suppliers, are increasingly seeking to limit their potential exposure to clients (and others) in the construction contracts they agree. From their point of view this has the advantage that they can try to contain not only the types of loss which they may face should their work or advice be faulty, but also the total quantum of that potential loss. However as recent case law shows, these clauses must be clear and concise otherwise you may find they are deemed to be unfair and unenforceable.

“In considering whether to limit your liability you may be better off setting a reasonable limit on your liability and specifying precisely the type of loss you are prepared to accept”

Where one or other party puts forward its standard conditions, then substantial parts of those conditions may be written standard terms of business which fail to satisfy the requirement of reasonableness under the terms of the Unfair Contract Terms Act 1977. Section 3 provides as follows:

“(1) This section applies as between contracting parties where one of them deals as consumer or on the other’s written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term – (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; except insofar as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.”

The reasonableness test is set out at section 11(1):

“In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made ...”

Further, the presumption is that exclusion clauses are not reasonable; s. 11(5) provides that:

“It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.”

Section 13(1) of the Act provides:

“To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents – (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; (c) excluding or restricting rules of evidence or procedure; and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.”

It is not necessary, for the Act to bite, for the whole of the contract terms to be standard.¹ Further, in the case of *Yuanda (UK) Co. Ltd v WW Gear Construction Ltd*,² Mr Justice

¹ *Pegler v Wang* [2000] BLR 218
² [2010] EWHC 720 (TCC)

Exclusion and limitation clauses

Edwards-Stuart said that to be standard, the terms have to be terms which the company uses for all (or nearly all) of its contracts of a particular type without alteration. The terms in question were not standard here because while Gear had offered the same terms to all of the trade contractors, few, if any, had contracted on the same terms.

Exclusion and limitation clauses

As well as needing to be clear and concise, exclusion clauses are subject to the "reasonable" test imposed by the Unfair Contract Terms Act 1977 ("UCTA").³ UCTA also imposes a blanket ban on certain types of exclusion clauses – you cannot exclude liability for personal injury or death,⁴ and any attempt to exclude liability for one's own fraud will always be unreasonable.

Subject to those constraints, and excluding legislation particular to "consumers" only, the general approach of English law is to allow the parties to decide for themselves what the terms of their contract are to be. If the parties agree that the liability of one (or both) should be limited in a specific way then the courts tend not to interfere. As a result construction law cases which involve consideration of whether contract terms are "unfair", in the context of UCTA, are relatively rare.

Recent case law

*Saint Gobain Building Distribution Ltd (T/A International Decorative Surfaces) v Hillmead Joinery (Swindon) Ltd.*⁵

Here the court considered the question of whether the express exclusion by a party's standard terms and conditions of contract of the otherwise implied term of "satisfactory quality" of goods supplied, and its attempt to limit its liability to the value of the goods concerned, was reasonable. The case also serves to show that the particular circumstances of each case will affect the conclusion a court will come to in deciding if contract terms are "unfair".

Saint Gobain (trading as International Decorative Surfaces ("IDS")) supplied laminate sheets to Hillmead who bonded these sheets to MDF to make bonded panels which they then supplied to a shopfitter. The shopfitter used them in fitting out a number of Primark stores. There were alleged to be problems with the goods.

IDS had not been paid for sheets they had

supplied to Hillmead, so they issued a claim. The claim was admitted but was met by a counterclaim of over £367,000 for different goods supplied to Hillmead by IDS. In the counterclaim Hillmead alleged that IDS's laminate sheets were not of "satisfactory quality",⁶ as Statute required.

IDS's primary defence to this was that the statutorily implied term that their goods were of "satisfactory quality" had been excluded by their express standard terms and conditions which had been incorporated into the contract between the parties. In particular, IDS's standard terms and conditions included the following clauses:-

"8.9: Save as set out in the foregoing sub-clauses no other terms, whether conditions warranties or innominate terms, express or implied, statutory or otherwise shall form part of this contract (except where the customer deals as a consumer within section 12 of the Unfair Contract Terms Act 1977 ...)."

"8.10: "The company shall not be liable for any loss of profit, loss of business, loss of goodwill, loss of savings, increased costs, claims by third parties, punitive damages, indirect loss or consequential loss whatsoever and howsoever caused ... suffered by the customer or any third party in relation to this contract ..."

"8.11: "Except for death or personal injury directly attributable to the negligence of the company or in the case of fraudulent misrepresentation in no circumstances whatsoever shall the company's liability (in contract, tort or otherwise) to the customer arising under, out of or in connection with this contract or the goods supplied hereunder exceed the invoice price of the particular goods concerned."

If this argument was correct, and IDS's terms and conditions applied to the contract, then IDS had a good defence to the claim for £367,000.

Did these exclusion and limitation clauses apply?

Hillmead said that these terms did not apply because they were in breach of the Unfair Contract Terms Act.

In addressing the question of unfair contract terms the court considered (amongst other matters):-

- (i) What were the terms of the contract between IDS and Hillmead? In particular:
 - were IDS' standard terms and conditions incorporated into the contract; and/or
 - did the contract have the usual implied terms as to satisfactory quality and/or fitness for purpose as Hillmead alleges?
- (ii) If IDS' standard terms and conditions were incorporated into the contract, did they (whether all or individually) satisfy the statutory test of reasonableness?

Were IDS in a position to impose their terms and conditions because they were in a significantly stronger position than Hillmead? If there was that inequality of bargaining power then that, coupled with other aspects of the conditions, may mean that IDS's standard terms and conditions did not satisfy the statutory test of reasonableness and so would not be incorporated into the contract.

In the UK there are only two suppliers of the laminate sheets, and IDS supplies 75% of the UK sales. They therefore have a dominant position in the market.

IDS's turnover was about £111 million while Hillmead's was about £2m.

The court concluded that IDS were in a stronger bargaining position than Hillmead.

The court considered IDS' terms and conditions, in particular applying (amongst others) the following tests:

- (i) whether it is reasonable to exclude implied terms as to satisfactory quality and/or fitness for purpose, as provided for in clause 8.9;
- (ii) whether it is reasonable to confine any remedy to replacement of the goods, alternatively to limit financial liability to the invoice price of the goods, as provided for in clauses 6.2 and 8.11;
- (iii) whether it is reasonable to exclude any liability for consequential loss etc, as provided for in clause 8.10.

The court considered a key issue in deciding whether clause 8.11 was reasonable was that the direct loss which a defect in the laminate panel would cause to Hillmead would be

much greater than the cost of the laminate panel itself, and both parties knew this at the time of the contract. Clause 8.11 did not therefore satisfy the statutory test of reasonableness.

The court concluded that the key issues in considering whether clause 8.10 satisfied the statutory test of reasonableness were the following:

- (i) the parties were not of equal bargaining power;
- (ii) the term was not negotiated;
- (iii) the term seeks to exclude all liability for consequential loss, rather than seeks to limit such liability;
- (iv) if the provision with less serious consequences to the buyer (namely the combined effect of clauses 6.2 and 8.11) does not satisfy the statutory test of reasonableness, that is a strong indication that the clause with more serious consequences to the buyer (namely the effect of clause 8.10) also does not satisfy the statutory test of reasonableness; and
- (v) it was in the contemplation of the parties that any direct loss to the buyer would be greater than merely the cost of replacing the goods.

Was the reasonableness test satisfied?

For all these reasons the court concluded that clause 8.10 also did not satisfy the statutory test of reasonableness.

The parties were not of equal bargaining power, IDS could not by their standard terms and conditions exclude implied terms as to satisfactory quality and fitness for purpose, IDS could not exclude liability (except personal injury or death) to the invoice price for the goods and IDS could not exclude liability for consequential loss.

As none of IDS's particular terms and conditions satisfied the test of reasonableness as required by S.6 (3) of UCTA, Section 14 of the Sale of Goods Act 1979 which imposes an implied term as to satisfactory quality was not ousted by the IDS exclusion clauses.

The judge then went on to find that IDS were not in breach of contract because the bonded

panels were of satisfactory quality in the circumstances.

However, the case can be contrasted with an earlier decision from 2007.

*Shepherd Homes Ltd v Encia Remediation Ltd and Green Piling (2007)*⁷

In that case Green Piling were subcontractors to Encia. Shepherd were developing a site for 94 homes on poor ground. Piling was needed to improve foundations and Encia, the civil engineering contractor, employed Green Piling to carry out the piling work.

Encia were a subsidiary of AIG Engineering Group, part of the American International Group of companies, one of the largest insurance groups in the world. Green Piling had an annual turnover of a little over £336,000 at the time. This contract value was £100,000 net, possibly rising to a maximum of £250,000 for the following phase.

Green Piling carried out works and after six months some properties showed signs of settlement. Shepherd sued Encia who in turn sued Green Piling. The potential liability was £10m, possibly more.

Are limitation and exclusion clauses likely to fail the reasonableness test?

The contract between Green Piling and Encia contained the following condition:

"4.3. Our maximum total liability is limited to the Contract Price; whether in contract or in tort, for any damage or loss whatsoever, including all direct or consequential loss."

The contract also required Green Piling to carry £1m insurance.

In that case the court, having considered UCTA, concluded that clause 4.3 was incorporated into the contract, it was not unreasonable, there was no inconsistency between the cap on liability imposed by clause 4.3 and the requirement to carry £1m insurance, and that Encia had superior bargaining power – they had other tenders to do the work (which also included limitations on liability), but chose Green Piling.

Therefore clause 4.3 limiting Green Piling's liability to Encia succeeded.

Conclusion

Important factors in deciding whether limitation of liability clauses will be successful are:-

- (i) how those clauses come to be incorporated in the contract;
- (ii) the respective bargaining power of the parties; and
- (iii) the objective reasonableness of the clause itself.

In considering whether to limit your liability you may be better off setting a reasonable limit on your liability and specifying precisely the type of loss you are prepared to accept rather than trying to exclude your liability altogether.

"If there was that inequality of bargaining power then that, coupled with other aspects of the conditions, may mean that IDS's standard terms and conditions did not satisfy the statutory test of reasonableness and so would not be incorporated into the contract"

3 S.2(2) UCTA and S.3(2) UCTA

4 S.2(1) UCTA

5 [2015] EWHC B7 (TCC)

6 Sale of Goods Act 1979 S.14

7 [2007] BLR 135

eDisclosure and harvesting the documents in construction cases

eDisclosure is the process of identifying, preserving, collecting, filtering, reviewing and disclosing electronically stored information (ESI). This includes information stored on personal computers, iPads/mobile devices/PDAs, mobile phones and USB memory sticks, as well as email, documents and calendar files.

Simon Tolson explains how the use of technology may assist in reducing the cost of litigation by expediting and improving the process of disclosure of documents¹.

The problem

The sheer volume of ESI can be problematic, and Lord Justice Jackson captured this predicament in a speech in November 2011 while giving the seventh lecture in the programme for implementation of his reforms as recommended in his *Civil Litigation Costs Review Final Report*:²

"The problem: Even in medium sized actions where all the documents are in paper form, disclosure can be a major exercise which generates disproportionate costs. It can also result in a formidable bundle, most of which is never looked at during the trial. In larger actions where the relevant documents are electronic, the problem is multiplied many times over."

Harvesting

For the disclosing party, the steps involved in a possible eDisclosure exercise include: considering how to preserve and use documents; a scoping exercise to assess which documents are involved; considering what to disclose; whether special software is required; identifying software/vendors; and discussion with the other party.

The first step in eDisclosure terms is "harvesting" the documents; namely identifying and collecting the data. This can be a mammoth task. Around 18 years ago, increasing numbers of businesses and individuals went over to creating, exchanging and storing their documentation and communicating with each other entirely by electronic means. The end product is that a colossal volume of information is now created, exchanged and stored only electronically. Email communication, documents, spreadsheets, programs, modelling (whether financial, engineering (BIM) or risk management), accounting, QA, drawing registers, and ever-increasing other forms of ESI now form the bulk of the documentation held by companies, other enterprises and individuals who become involved in litigation and arbitration.

Electronic disclosure in civil cases was introduced by the practice direction to the Civil Procedure Rules (CPR 31 – Disclosure and Inspection of documents) in October 2010. From then on, in any instance where documents relevant to a case are stored

electronically, the parties have to consider and discuss how disclosure should be carried out at an early stage, and all relevant documents must be preserved from the time when court action was first contemplated.

Go reap

So, at the starting grid of eDisclosure, where do you find "the papers" – the ESI – to harvest? There are numerous other sources of documents to consider when deciding where to look for documents. It should be borne in mind that some custodians (senior employees, engineers, planners, project managers, architects and decision makers) are more important than others and their communications and inboxes may require much closer scrutiny.

The original file structure should wherever possible be retained when electronic material is being investigated or collated and there must be an understanding of what document management systems were in use at the time, how they were updated, and where they exist now (company acquisitions and mergers complicate matters). It will not suffice merely to look at paper files or email account inboxes. It is also vitally important to investigate data migration, and make proactive enquiry of the IT department, professional staff and HR department. Consider also the data retention policy, and for example what happened to any laptops that are no longer used.

It is important that diverse material is considered and if one party can demonstrate that the material is or is likely to be of relevance on a certain platform to the issues in question in the action they should take steps to ensure it is collected.

Paragraph 4.1 of the TeCSA eDisclosure protocol requires each party to keep a detailed record of each process applied to its documentation from identification and collection onwards so as to provide a suitable audit trail for what process has been applied to each category of document, including a detailed record of the methodology and logic used to remove any documents from the collection.

Appendix 1 to the TeCSA eDisclosure protocol provides this helpful reference point for locating and identifying the nature of documents and key custodians:

¹ This is an edited version of an article which was first published in the Chartered Institution of Civil Engineering Surveyors (ICES) *Construction Law Review* 2015.

² January 2010.

- *[Identify **locations** of categories of documents and key custodians of documents]*
- *[Identify any categories of documents which are **located outside the jurisdiction of England and Wales]***
- *[Identify any categories of documents which are **not reasonably accessible]***
- *[Identify any categories of documents which may no longer exist]*
- *[Identify any categories of documents in native format which were created **using relatively unusual software** (e.g. Primavera, Micro station, Microsoft Projects, AutoCAD, the BIM software or any bespoke software)]*
- *[Identify any documents that **cannot be collected in native format]***
- *[Identify any **documents/locations/custodians** which have not been collected but which are **subject to further investigation]*** *[emphasis added]*

Limiting the flood

Initial harvesting of documents by reference to users, date ranges and keywords is a common approach and filters can be used to (i) exclude irrelevant documents or (ii) help identify disclosable documentation within the wider pool of documentation extracted. Keyword searches can help to reduce the disclosure to manageable amounts for human review where that is appropriate.

The purpose of keywords in the field of eDisclosure is to assist the document review; first, by narrowing down the dataset to be reviewed, and second, to find the specific piece of information sought. There is nothing “wrong” with keyword searches as such. Used as a tool to locate relevant material, they are readily comprehensible, transparent and efficient to implement. However, they are a rather blunt tool. If the keyword list is focused too narrowly, highly relevant, disclosable documents will fall through the net; if the list is drawn too widely, then searches will pick up acres of irrelevant material.

The loss of native structures

One of the other things that must be understood is that the eyes may see but the brain may not deduce what it should because of the way eDisclosure presents the data from the harvest to a reviewer.

Documents rarely exist in a vacuum on their own; they almost always belong to some sort of group. Group membership may be intrinsic to the documents themselves (e.g. a set of board minutes; a chain of email correspondence; weekly progress reports); alternatively, it may exist only in the context in which the documents are saved (e.g. a central archive of project documentation). In either case, the context can give the document meaning; conversely, in the absence of the context, it can be difficult or even impossible to understand the significance of an individual document. A receiving party reviewing the other side’s disclosure will almost certainly want to review board minutes as a series, email correspondence in chains, and project documents as a set. Unfortunately, with electronic disclosure, this is often impractical and sometimes impossible, so if possible try and agree a protocol where meeting minutes classes are grouped.

However, if the reviewer is looking for a specific “needle in a haystack” among the dataset, the keywords used should be very specific and narrow, and can include, for example, the custodian’s name, specific date and the subject matter of an email. This technique can be employed in the later stages of the investigation, when the document set has already been narrowed down.

Custodians

A disclosing party (and sometimes a receiving party) will often wish to limit for relevancy reasons the custodians (the keepers of pertinent electronic documents) whose ESI is disclosed to the main players who received 95% of the relevant traffic. There are certain people whose inboxes and outboxes are more likely to contain significant emails than others. Drawing up a list of “Super Custodians” (i.e. the top 10–12 people) on a major project will invariably capture all the important traffic, even where 200 people were on the job. It is good practice to have sketched out a preliminary list of custodians well before the first Case Management Conference.

Date ranges

The purpose of a date range is to capture data only within a set temporal parameter. So unless the file falls outside a date range of say three years from x, and x is agreed, it is a safe backstop.

Summary

eDisclosure can be enormously painful if not handled properly. There is a lot to be learnt about how best to manage the practical and technical complexities of the process consistent with best practice. Information technology is such a central part of commercial life that all parties to litigation need to embrace the requirements it imposes upon the effective conduct of disputes.

“The TeCSA eDisclosure Protocol Pack provides valuable and practical guidance to the issues highlighted. Go to www.tesca.org.uk/e-disclosure”

Case law update

Our usual case round up comes from two different sources. First, there is the *Construction Industry Law Letter* (CILL), edited by Karen Gidwani. CILL is published by Informa Professional. For further information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0) 20 7017 7974 or by email: kate.clifton@informa.com.

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

Adjudication: Cases from *Dispatch*

Errors by the adjudicator

*Broughton Brickwork Ltd v F Parkinson Ltd*¹

This was an application to enforce a decision of an adjudicator, who decided that Parkinson should pay BBL £96k. Enforcement was resisted on the grounds there had been a real and a serious breach of natural justice. One of the issues was that the adjudicator had inadvertently failed, to address a particular document which had been placed before him and which, had he considered it, would have led to his reaching a different conclusion.

HHJ Davies QC said that he was satisfied that BBL had made an error during the adjudication which caused, or at least materially contributed to, the problem that subsequently emerged. That error was threefold: (i) the failure specifically to assert in the body of the response that payless notice 14 was, in fact, served by email as opposed to any other means; (ii) the failure in the body of the response specifically to draw to the adjudicator's attention the existence or relevance of the email; (iii) the misnumbering of the page references, so that if the adjudicator was looking for himself for evidence in relation to service of payless notice 14 they would naturally look at page 184 onwards rather than to page 183.

On receipt of that decision BBL's solicitors communicated their concern about the failure to refer to the email to the adjudicator. He replied that, having checked the hard copy documents in his possession, he found that page 183 was loosely adhered to the preceding page 182. He had not seen it when making his decision, since he used the hard copy documents rather than the electronic versions with which he had also been supplied. The Adjudicator considered that he had no jurisdiction to correct that error, and he went on to say that:

"Had I seen document 183 then Broughton's claim would have failed because a subsequent valid payless notice had been served, but it appears to me that I do not have the power to correct the reasoning in

1 [2014] EWHC 4525 (TCC)

2 [2015] EWHC 667 (TCC)

3 [2014] NICA 46

my decision thereby resulting in a different outcome."

As the Judge said, an adjudicator is entitled to make mistakes, whether of fact or law, even ones which are fundamental, without rendering his decision unenforceable, so long as he acted within his jurisdiction. The Judge considered that in principle an inadvertent error might suffice to do this, if it was sufficiently serious. However, that said, the question as to why the breach occurred will usually be a material consideration. If it was deliberate that might justify a conclusion that there was a breach, whereas if it was inadvertent then that might be less likely to produce that result.

The Judge accepted that the failure to have regard to the email at page 183 could properly be categorised as a procedural error, in the sense that it was a document put before the Adjudicator which he did not consider. However it was plainly not a deliberate decision on his part to disregard it. The Judge also felt that it was difficult to be critical of the adjudicator. It was, in the Judge's view substantially Parkinson's fault that it had not drawn the existence or the importance of this document to the Adjudicator's attention. Thus he could not be criticised for not "trawling" through the totality of the documents before him to decide whether or not payless notice 14 had been served on time.

Therefore the Judge did not consider that the Adjudicator's approach was one which amounted to a serious breach of the rules of natural justice, or rendered the adjudication process obviously unfair. It was from BBL's point of view a decision which was wrong, due to an inadvertent procedural error caused or substantially contributed to by the defendant itself. The Judge concluded:

"I accept that this may leave the defendant with a sense of injustice but that, I am afraid, is part of the rough and ready nature of the adjudication process. It is an interim remedy, it provides and it is intended to provide a decision in relation to cash flow which can, of course, if wrong be put right in later legal proceedings so as to put right any real injustice."

Adjudicator appointment process

CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd²

In this adjudication enforcement case, a number of defences were unsuccessfully raised. One of these was that the appointment was invalid. Mr Justice Coulson noted that the Eurocom decision had "*shaken public confidence in the adjudication process*". Here, the adjudicator was appointed by CEDR. The application to CEDR for the appointment, made by the claimant's representatives, included the sentence: "*It is preferred that any of the adjudicators in the attached list are not appointed.*" The evidence before the court was that that sentence was included in error, and the Judge suggested that it may be that it came from a template that those representatives habitually used. However, the important thing was that there was no attached list. Therefore, not only was that sentence included in error, but also no list of "*preferred adjudicators not to be appointed*" was ever completed or attached. In those circumstances, therefore, the situation is entirely different to that in Eurocom. There was no false statement because there was no list and, since there was no statement, it could not have had any effect.

NEC3: disputing a decision

Fermanagh District Council v Gibson (Banbridge) Ltd³

Fermanagh entered into a contract with Gibson for the construction of a waste management facility. The form of the contract was the NEC2 Engineering and Target Contract. On 23 October 2012 the adjudicator decided that Fermanagh should pay Gibson £2,126,390.29 plus VAT and interest. Fermanagh believed the amount truly due was £302,156.61 plus VAT and declined to pay the amount the adjudicator assessed as due.

By a decision on 4 February 2013 Weatherup J rejected Fermanagh's challenges to the adjudicator's jurisdiction. As you would expect with an NEC Contract, it provided for a reference of a dispute to arbitration within four weeks of the adjudicator's decision. On 5 February 2013 Fermanagh served a notice described as a notice of arbitration. An arbitrator was appointed. A time bar point

having been taken, the arbitrator stayed proceedings pending an application to the court to extend time. By an application dated 22 April 2013 Fermanagh applied under section 12 of the Arbitration Act 1996 for an extension of time to refer to arbitration the dispute which had arisen under the contract.

At first instance, a Judge held that where the jurisdiction of the adjudicator was in issue and the question of the adjudicator's jurisdiction was to be considered by the court before the substantive dispute was considered by an arbitrator, the parties would have contemplated that the time provision might not apply. Here, the overall process anticipated that ultimately there would be a substantive assessment of the final value of the contract, whether achieved by arbitration or something else. A substantive hearing had not occurred in respect of the disputed value of the final work. It was therefore just to extend the time to allow the substance of the matter to be considered by arbitration. Gibson appealed.

On appeal the court noted that when the adjudicator gave his decision it was clear to Fermanagh that the adjudicator had reached a decision with which it did not agree. It considered that a very much smaller sum was due to Gibson. There was thus clearly a serious dispute between the parties. If the adjudicator was acting within jurisdiction, the contract provided only one way to challenge its effect: by giving notice of an intention to refer the matter disputed to a tribunal.

Having decided to reject the adjudicator's decision on the ground that he had no jurisdiction, Fermanagh adopted a high-risk strategy of ignoring the adjudicator's assessment, contesting Gibson's claim to enforce the adjudicator's decision and not serving a notice of intention to refer to arbitration, notwithstanding that the contract clearly said that an adjudicator's decision stands as binding unless taken to arbitration. All this is known to or should reasonably be appreciated by parties when they enter into the NEC contract.

Accordingly it should reasonably have been in contemplation of the parties that a situation might arise where one party's claim might be upheld by an adjudicator in circumstances disputed by the other, both as to quantum

and as to whether the adjudicator should proceed to adjudicate in the circumstances and the appeal was allowed.

Liquidated damages

*Henia Investments Inc v Beck Interiors Ltd*⁴

Mr Justice Akenhead also had to consider whether Henia (or any employer) could rely on the Certificate of Non-Completion even though the CA had failed to make a decision on a contractor's claim for an extension of time. Here the Judge looked at the wording of the principal liquidated damages provision, clause 2.32, which was not cast in a way that suggested that the obligation on the part of the CA to operate the extension of time provisions was a condition precedent to an entitlement to deduct liquidated damages. In contrast, it did expressly seek to impose two other conditions precedent, namely the need for the CA to have issued a Non-Completion Certificate for the Works and for the employer to have notified the contractor before the date of the Final Certificate that he may require payment of, or may withhold or deduct, liquidated damages. It therefore seemed "odd" to the Judge, if there was to be a condition precedent, that no liquidated damages should be payable or allowable unless the extension of time clauses had been operated properly, when it was not spelt out as such.

Mr Justice Akenhead also noted that a contractor is not left without a remedy both in the short term through adjudication and in the long-term final dispute resolution processes; it can challenge the refusal to grant an extension and/or the deduction of liquidated damages and, in the case of adjudication, secure relief if it can convince the adjudicator that it is right and that the employer and the CA are wrong in whole or in part. The Judge noted that it may seem unfair on a contractor to have liquidated damages deducted at a time when the CA has failed to deliver the process of considering extension of time claims. There were two answers to this: the ready availability of short- and long-term remedies and the fact that there are numerous potential defaults on the part of both employer and contractor which can give rise to serious financial consequences for the other, and merely because unfairness can happen in the short term it does not

necessarily or obviously lead to the need to construe clauses as conditions precedent to the ability of one party to secure such financial advantage in that short term.

Therefore, a failure on the part of the CA to operate the extension of time provisions did not debar Henia from deducting liquidated damages where the other expressed conditions precedent in the relevant JCT clauses had been complied with.

Service of Response

*ISG Construction Ltd v Seevic College*⁵

Mr Justice Edwards-Stuart, the Judge was asked to give guidance on what was alleged to be a practice by which the responding party serves its response to the referral later than the deadline directed by the adjudicator and, therefore, much closer to the deadline for the adjudicator's decision. Although reluctant to do this, the Judge did agree that whilst the right to be heard was important, it was also a right to a reasonable opportunity to be heard and he repeated the words of Mr Justice Akenhead in the case of *CJP Builders Ltd v William Verry Ltd*, namely:

"It is [of] course open to any adjudicator in setting his or her procedure under Clause 38A to impose "unless order" type arrangements, provided that the parties are given the right first to argue whether that is appropriate. It is sometimes said by some commentators that adjudication is or can be "rough justice". There is no need to make it even rougher by construing provisions such as those contained in Clause 38A as circumscribing a party's basic right to be heard."

Contact with adjudicators

*Paice & Anr v MJ Harding (t/a MJ Harding Contractors)*⁶

In *Makers UK v Camden*, Mr Justice Akenhead said:

"(1) It is better for all concerned if parties limit their unilateral contacts with adjudicators both before, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent."

4 [2015] EWHC 2433 (TCC)

5 [2014] EWHC 4007 (TCC)

6 [2015] EWHC 661 (TCC)

7 [2015] EWHC 33 (TCC)

(2) If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication.

(3) Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions."

Here, there had already been three adjudications. This case was an attempt to enforce the decision in adjudication four. The adjudicator in adjudication four had previously been appointed in two of the first three adjudications. Some two months before the fourth adjudication, an hour-long telephone call had taken place between the claimants and the adjudicator's office manager. The evidence showed that whilst there was some discussion about procedural matters, the call went further, with the claimants noting how dissatisfied they were with their previous advisors, discussing issues related to the first two adjudications as well as the final account which was to be the subject of adjudication four. No file note was made. The adjudicator knew about this conversation but did not disclose details of it either at the time of his appointment or later on when specifically asked about it during adjudication four.

The first question for the Judge was whether the adjudicator should have written to the parties, disclosing the conversations, and asking if they had any objections to his continuing to act. Mr Justice Coulson thought that it was "*self-evident*" that those conversations should have been disclosed.

They were material conversations, which included discussion about the final account with one party, and fairness required that the existence of those conversations should have been disclosed once the adjudicator learnt of his appointment. It did not matter that the call was with the practice manager. Nor did it matter that there was a two-month gap between the call and adjudication. What mattered was not the timing, but what the conversation was about. Finally, the adjudicator had had a second opportunity to reconsider and disclose the conversation but did not do so. This led the Judge to conclude

that a fair-minded observer would consider that there was a real possibility that the adjudicator was biased. Accordingly, the claimants' claim for summary judgment failed.

Meaning of "construction operations"

Savoie and Savoie Ltd v Spicers Ltd

Spicers engaged Savoie (a French company) and Savoie Ltd (a related British company), together "*Savoie*", to design, supply, supervise and commission a new automated conveyor system at its existing factory in the West Midlands to fulfil orders for office products. The system comprised conveyors and other equipment for the packing of the products and the printing of labels. The conveyors were attached to the ground floor concrete slab by some 2,000 bolts but the other substantial and/or important pieces of equipment were not all mechanically attached to the floor.

Savoie completed the installation towards the end of 2013; however, disputes arose between the parties regarding payment to Savoie and the quality and performance of the installation. Ultimately Savoie gave notice of adjudication. Spicers objected to the jurisdiction of the adjudicator on the basis that the works were not "*construction operations*" within the meaning of section 105 of the HGCR. The adjudicator's non-binding opinion was that he had jurisdiction and proceeded to find that Spicers should pay Savoie approximately £828,000 plus VAT, interest and his fees.

When Spicers failed to pay, Savoie commenced enforcement proceedings in September 2014. However, Mr Justice Akenhead refused the application for summary enforcement on the basis that there were triable factual issues and because he felt that a site visit was necessary. The expedited trial still took place promptly on 3 December 2014.

There were two issues that the Judge had to consider. First, was the conveyor system sufficiently attached to the floors so as to give rise to a proper conclusion that it was "*forming, or to form, part of the land*" for the purposes of section 105 of the HGCR? Second was section 105(1) engaged in that the installation of the conveyor system represented "*construction operations*"?

Mr Justice Akenhead's decision is, of course, very specific to the facts of the case and the construction and purpose of the conveyor system in question. Nevertheless, it provides useful guidance on the definition of "*construction operations*" and the meaning of "*forming, or to form, part of the land*" for the purposes of section 105 of the HGCR and highlights that section 105(1)(b) includes the provision of industrial plant within the definition.

In addition, the Judge noted that section 105 mentions "*forming, or to form, part of the land*" as a part of the definition of "*construction operations*". He formed the view that whilst the law relating to fixtures in the context of the law of real property casts useful light on whether the item of work forms part of the land, it is not a pre-condition for the purposes of section 105:

"Whether something forms part of the land is a question of fact and this involves fact and degree ... [it] is informed by but not circumscribed by principles to be found in the law of real property and fixtures ..."

Furthermore, in relation to the object or installation forming part of the land, one should have regard to the purpose of the object or installation in question.

Where machinery or equipment is installed on land or within buildings, particularly if it is all part of one system, regard should be had to the installation as a whole, rather than each individual element on its own. Simply because something is installed in a building does not necessarily mean that it is automatically a fixture or part of the land.

The evidence, in the view of the Judge was clear that the conveyor system was attached to the concrete floor slab on the ground floor and the raised and rising conveyors to the steelwork forming part of the mezzanine; in addition, at the mezzanine level, it was attached by bolts to the floor. The real question was whether the conveyor system taken as a whole was sufficiently attached to the floors and underside of the mezzanine floor as to give rise to a proper conclusion that it was forming or intended to form part of the land. Mr Justice Akenhead held that the conveyor system did form part of the land for the purposes of section 105:

"a) There were extensive and substantial fixings (by bolts) of the system to the body of the building... There were large numbers (in the thousands) of bolts drilled into the floors...;

b) The conveyor system is very substantial and large. It covers a large section of the ground floor and a significant part of the mezzanine floor...;

c) The conveyor system was clearly intended, both subjectively and objectively, to be relatively permanent and to perform a key role in the warehouse...;

d) ...

e) The fact that some of the elements comprising the system ... were not as such mechanically attached to the floor does not undermine the conclusion...;

f) The fact that parts of the system are relatively easily removable does not itself weigh particularly heavily against the conclusion which I have reached..."

The Judge found that it follows from the above that section 105(1) of the HGCRA was engaged and that the installation of the conveyor system did represent "construction operations". Mr Justice Akenhead accordingly held that the adjudicator had jurisdiction to decide the dispute and enforced the decision.

Restricting or "pruning" the issues in dispute

*St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd*⁸

St Austell relied on two grounds in support of their case that the adjudicator did not have the necessary jurisdiction. The first was the "well-worn suggestion" (the words of Mr Justice Coulson) that the dispute had not crystallised between the parties at the time of the notice of adjudication. The second was the "rather more novel" submission that, because the claim that was referred to adjudication related only to a part of Dawnus' original interim application, and expressly excluded other elements of that application, the Adjudicator was not empowered to order the payment of any sums which he found due.

The Judge noted that the crystallisation argument is almost never successful and this point was promptly dismissed. For example, the Judge noted that here the detail of Dawnus' outstanding claims had been the subject of discussion before they were formally advanced in application 19, which was the subject of the adjudication.

The Judge also noted that it was not uncommon for employers to say that no dispute has arisen because there were elements of the contractor's claim that required further particularisation or explanation. He referred to the case of *Gibson (Banbridge) Ltd v Fermanagh District Council* (Issue 173) where Weatherup J had said that it was clear that the claim should have been assessed long before it eventually was, and that if supporting documentation was missing, that would no doubt be reflected in any subsequent assessment by the employer or his agent.

The second jurisdictional objection was that the Adjudicator did not have the power to order St Austell to make any payment, because the dispute that was referred was strictly limited to just one part of interim application 19. Here the Judge referred to the 2000 decision of HHJ Thornton QC in *Fastrack Contractors Ltd v Morrison Construction Ltd* where the Judge referred to the "pruning" that may be made by the referring party of any existing claim before it was referred to the adjudicator and said this:

"21. Fastrack suggested that the reference that I am concerned with consisted of a number of disputes, each of which was one of the individual heads of claim that had been referred. Fastrack also suggested that the dispute that could be referred to an adjudication pursuant to the HGCRA need not be identical to the pre-existing dispute, it need be no more than a dispute which was substantially the same as that pre-existing dispute.

22. Neither of these contentions of Fastrack is sustainable. The statutory language is clear. A "dispute", and nothing but a "dispute", may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference. It would then be for the relevant adjudicator nominating body to decide whether it was

appropriate to appoint the same adjudicator or different adjudicators to deal with each reference. Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute."

23. In some cases, a referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute. So long as that exercise does not transform the pre-existing dispute into a different dispute, such a pruning exercise is clearly permissible. However, a party cannot unilaterally tag onto the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute."

Following *Fastrack*, the Judge considered that a referring party is entitled to prune his original claim for the purposes of his reference to adjudication. So if his interim application for payment is for measured work and loss and expense, he may decide that, because the loss and expense claim could be difficult to present in an adjudication, he will instead focus in those proceedings on just the straightforward claim for measured work. Indeed, Mr Justice Coulson said:

"That is not only permissible, but it is a process that is to be encouraged. Claims advanced in adjudication should be those claims which the referring party is confident of presenting properly within the confines of that particular jurisdiction. What if, in my example, the claim for loss and expense is recognised by the referring party as being very difficult to sustain. What if he in fact decides that he no longer intends to pursue it? It would be a nonsense if he had to include such a claim in his notice of adjudication merely because that claim formed part of his original interim application."

Further, the adjudicator's decision will therefore be a decision reflecting St Austell's existing liability to pay. It manifestly does not create a liability to pay when none existed before.

The Judge also gave the following example. First one should assume, in St Austell's favour,

⁸ [2015] EWHC 96 (TCC)

⁹ [2015] EWHC 481 (TCC)

that they had some sort of cross-claim, whether by reference to a claim for overpayment, or a claim for liquidated damages, or a claim for damages for defects which arose for assessment at the same time as interim application 19. Second, assume that the cross-claim would have reduced or even extinguished the sum due by reference to the measured work element of the 115 changes. In the view of the Judge, the mere fact that Dawnus had limited their own claim to the measured work value of the 115 changes, did not and would not in any way limit or prevent St Austell from defending that claim, and raising their own cross-claim by way of set-off: *"That would have been an entirely legitimate defence to the claim in the adjudication, whatever the notice of adjudication or the referral might have said."*

Other cases: Construction Industry Law Letter

Costs management orders – appropriate order where party has incurred costs to the limit of its overall budget

*CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others*⁹

Technology and Construction Court; before Mr Justice Coulson; judgment delivered 5 March 2015.

The facts

CIP Properties (AIPT) Limited (*"the Claimant"*) owned a large development in Birmingham. The Claimant engaged Galliford Try Infrastructure Limited (*"the Defendant"*) to carry out works at the development. Subsequently, the Claimant claimed that there were defects in the works carried out and issued court proceedings against the Defendant. Four further parties (*"the additional parties"*) were joined to the litigation by the Defendant.

In accordance with Part 3 of the Civil Procedure Rules, the parties were obliged to produce costs budgets for the purposes of costs management. Prior to the first case

management conference in February 2014, the Claimant filed its costs budget showing that it had spent approximately £1.5 million in costs to date and estimating that its overall costs would be approximately £3.4 million.

In February 2015, the Claimant sought to revise its costs budget; a matter which was disputed by the other parties to the litigation.

The Claimant's revised costs budget indicated that by February 2015 it had incurred costs of approximately £4 million and that its estimated overall costs would be approximately £8.9 million to £9.5 million. It also attached a Schedule of Assumptions listing 65 assumptions or exclusions that should apply to the budget.

By contrast the Defendant had incurred costs of just under £1.5 million with estimated future costs of approximately £3 million. The additional parties' incurred and estimated future costs totalled approximately £4.5 million. Accordingly, the Claimant's costs were equivalent to the costs of all the other parties combined.

Whilst the defects claim totalled £18 million, the majority of this sum could be attributed to six alleged defects. The Court determined that this was a relatively straightforward defects claim which would be determined by expert evidence. Further, it was the Court's view that the main burden in the case fell on the Defendant who not only had to defend the claim by the Claimant but, to the extent that claim was made out, pass it down to the various additional parties.

The question arose as to whether the Claimant's costs budget was unreliable and unreasonable and, if so, what costs order should be made.

Issues and findings

Was the Claimant's costs budget unreliable and unreasonable?

Yes. In particular, there had been no proper explanation of the increase in expended costs or future costs. This was clear evidence of unreliability. The Claimant's incurred and estimated costs were unreasonable and an appropriate overall costs budget for the Claimant was in the region of £4.28 million.

What was the appropriate costs management order?

The Claimant had incurred approximately £4 million in costs already, and still had to complete disclosure, witness statements, expert reports and prepare for and attend trial.

Whilst there were a number of options open to the Court, the appropriate order in this case was to set costs budgets for each phase of the litigation, both retrospectively and prospectively, but subject to adjustment to try to ensure that the overall costs budget of £4.28 million was not exceeded.

Commentary

There can be no doubt that when faced with a costs budget that lacked explanation and equated to the total of the budgets of the Defendant and all the additional parties the Court would not accept the budget as reasonable. Further, whilst parties are allowed to cite assumptions upon which the costs budget is based, there appears to have been an attempt on the part of the Claimant to draw those assumptions so widely that the costs budget itself had little meaning.

The Judge came to the conclusion that the Claimant's overall costs budget for the entire case should be in the region of the amount already incurred by the Claimant. This was at a point where there was still substantial work to be carried out by the parties to prepare the case for trial. The Judge's deliberations on the appropriate form of costs management order in such a situation are instructive.

Four options were identified, three of which the Judge rejected. The fourth option was to set individual budgets for each phase of work to be carried out on the case. However, the Judge's concern was that by doing this, he would be simply commenting on the costs incurred, and then undertaking a budgeting exercise for the prospective costs, which would result in arriving at an overall figure far in excess of the amount he considered to be reasonable and proportionate as a whole. The Judge therefore modified the approach and made a costs order on a phase by phase basis but with the proviso at most phases that if the Claimant were to recover at assessment more for that phase than indicated then this should be reflected by a deduction at a later phase.

The Judge's order in this case demonstrates the wide discretion of the Court on such matters. This case is also a salutary reminder that parties need to give clear explanations and demonstrate reasonableness in their costs budgets.

Jurisdiction – correct adjudication procedure

*Ecovision Ltd v Vinci Construction UK Ltd*¹⁰
Bristol District Registry, Technology and Construction Court; before His Honour Judge Havelock-Allan QC; judgment delivered 11 March 2015.

The facts

Vinci Construction UK Limited ("*Vinci*") engaged Ecovision Limited ("*Ecovision*") to carry out the design, supply and installation of a ground source heating and cooling system for an office development called Vanguard House in Cheshire. Vinci was the main contractor for the development under a contract with the Northwest Development Agency ("*the Employer*") dated 19 February 2010 ("*the Main Contract*").

The Main Contract was based on the NEC3 form of contract, June 2005 with amendments June 2006, Option C. The Subcontract was based upon the corresponding NEC3 subcontract.

Part One of the Subcontract Data stated that the Adjudicator in the subcontract was the President of the RICS and that the Adjudicator nominating body ("*ANB*") was named at Appendix 6 to the Subcontract.

In fact, Appendix 6 did not name an ANB and instead stated that the Adjudicator was to be the president (or if he was unable to act, any vicepresident) of the RICS.

The Subcontract contained the standard EC3 adjudication clause, used both in the form of main contract and subcontract, Option W2. Option W2 states that if the adjudicator is not identified in the (Sub) contract Data then the parties may choose an adjudicator jointly or a party may ask the ANB to choose an adjudicator.

The additional conditions of the Subcontract (the Z clauses) purported to incorporate by reference the first 50 pages of the Main Contract, including an amendment that

deleted large parts of Option W2 and provided instead that the contract was subject to English law and that adjudication should take place in accordance with the TeCSA Rules.

Therefore the Subcontract contained 3 slightly different sets of terms under which a party could request adjudication: (i) Option W2 of the Subcontract; (ii) Option W2 of the Main Contract, as amended; and (iii) if neither of the first two was operable or applicable, the Scheme for Construction Contracts ("*the Scheme*").

In or around March 2011, Ecovision completed the Subcontract works. In December 2012 an operational failure of the ground source heating and cooling system at Vanguard House occurred and Ecovision and Vinci fell into dispute with regard to the adequacy of the design of the system. In June 2014 Vinci decided to refer the issue of liability only to adjudication.

On 11 June 2014, Vinci served its Notice of Adjudication on Ecovision. With regard to the appointment of the adjudicator, Vinci's solicitors ("*Systech*") inquired whether the President or any Vice-President of the RICS was free to act and, on being told that they were not, filed a request for the nomination of an adjudicator with the RICS. The RICS nominated an adjudicator, Mr Jensen, on 16 June 2014. Vinci then served its Referral Notice on 18 June 2014.

On 23 June 2014, Ecovision's solicitors ("*RPC*") wrote to the adjudicator challenging his jurisdiction on the basis that the dispute had not been properly notified or referred to adjudication. In particular, RPC requested clarity as to the adjudication procedure being followed. There then followed correspondence between RPC, Systech and the adjudicator in which RPC continued to challenge the jurisdiction of the adjudicator and on 2 July 2014 RPC notified the adjudicator that Ecovision would not be participating in the adjudication. The adjudicator maintained that he had jurisdiction and issued his decision on 17 July 2014, granting Vinci a declaration as to liability and directing that Ecovision pay his fees.

Ecovision applied to the court for a declaration that the adjudicator's decision was

of no effect and Ecovision was not obliged to comply with it.

Issues and findings

Had the correct adjudication procedure been followed?

No. Accordingly the adjudicator did not have jurisdiction, his decision had no effect and Ecovision was not obliged to comply with it.

Commentary

The Judge's comments with regard to the ability of an adjudicator to decide his own jurisdiction are worth noting. In particular, the Judge stated that even where it is common ground that a construction contract exists under which there is a right to claim adjudication, the adjudicator has no power to determine what rules of adjudication apply if there is a dispute about those rules and the dispute affects (ie makes a material difference as to) the procedure for appointment, the procedure to be followed in the adjudication or the status of the decision.

Beyond ensuring clear drafting from the outset, the referring party in a situation such as existed in this case will always be in a difficult position unless it can obtain agreement from its opponent as to the correct procedure to follow, which may not be easy against a background of a dispute between the parties. For absolute certainty a declaration as to the correct interpretation of the contract is an option, but involves the time and cost of making the relevant application to court.

Contempt of court – permission to bring committal proceedings – statements of truth

*GB Minerals Holdings Ltd v Michael Short*¹¹
Technology and Construction Court; before Mr Justice Coulson; judgment delivered 22 May 2015

The facts

By a contract made in January 2010, GB Mineral Holdings Limited (*"the applicant"*) engaged GBM Minerals Engineering Consultants Limited (*"GBMMEC"*) to carry out a full feasibility study of the Farim Phosphate Project in Guinea-Bissau in Africa. The estimated contract sum was approximately

£1.9 million, with services to be performed on a cost reimbursable basis.

GBMMEC claimed that between January 2010 and October 2012 the scope of the contract works was significantly varied and altered such that an increase in the contract price to approximately £10.8m, which had been invoiced by reference to 17 Variation Orders, was justified and agreed.

In addition to the 17 Variation Orders, a further three Variation Orders were produced in 2013 by GBMMEC but were not agreed by the applicant. As a result, in 2014, GBMMEC issued proceedings against the applicant claiming approximately £500,000. The applicant counterclaimed for the sum of approximately £4 million on the basis that GBMMEC had been significantly overpaid for the work carried out and was liable to pay damages for failure to perform all the work.

On the face of the particulars of claim, GBMMEC's principal support for the large increase in costs rested on the 17 Variation Orders alleged to have been agreed. GBMMEC's representative, Mr Michael Short, and the applicant's representative, Mr Glenn Laing. The applicant did not have copies of the Variation Orders and requested copies from GBMMEC's solicitors.

These were provided in April 2014. The applicant immediately took issue with the authenticity of the documents but no further information was provided by GBMMEC or its solicitors.

In May 2014, GBMMEC served its Reply and Defence to Counterclaim, supported by a statement of truth signed by GBMMEC's solicitor at that time, relying upon the authenticity of the Variation Orders. The Reply and Defence to Counterclaim had been reviewed by Mr Short and he had confirmed the accuracy of what had been said.

Following standard disclosure in March 2015, it became clear that the Variation Orders had not been signed on the dates previously indicated by GBMMEC and that the Variation Orders had not even existed on those dates but had been created some time afterwards.

As a result, on 24 March 2015, the applicant issued an application for permission to bring contempt proceedings against GBMMEC's

representative, Mr Michael Short, arising out of the statements of truth attached to GBMMEC's pleadings.

Issues and findings

Should permission be granted to bring committal proceedings against Mr Short?

Yes. However, those proceedings should be heard either at the trial, or after the trial, at the discretion of the trial judge. They would not be heard in advance of the trial.

Commentary

This case concerned the statement of truth attached to the Reply and Defence to the Counterclaim.

However, in a footnote to this judgment, the Judge noted with regard to the Particulars of Claim, which made similar statements to those held to be false in the Reply and Defence to Counterclaim, that there was a suggestion that it had been served without Mr Short's approval. The Judge was critical that the solicitors involved could *"still take a statement of truth so lightly"*.

From a public policy point of view the Judge was keen to emphasise in general terms the danger of making false statements but also stated that there was a more specific public interest: that the conduct of UK companies seeking to undertake work abroad should be of the highest standard.

It is rare to see a case where a party makes an application for permission to bring committal proceedings and this case is a reminder of how important the statement of truth is and what such a statement represents.

Settlement agreements – agreement by exchange of email – no reservation of subject to contract

*Raymond Bieber and others v Teathers Ltd (in liquidation)*¹²

Chancery Division; before His Honour Judge Pelling QC (sitting as a judge of the High Court); judgment delivered 11 December 2014.

The facts

Raymond Bieber and others (*"the Claimants"*) had brought court proceedings against the

Teathers Limited (*"the Defendant"*) in respect of failed film and television production investments (*"Take partnerships"*) made by the Claimants with the Defendant.

At the time that litigation was commenced the Defendant was in insolvent liquidation. The Defendant's available estate was valued at just under £19 million against unsecured creditor claims (excluding the Claimants' claims) totalling more than £30 million. The Claimants' claims were valued in excess of £20 million and the Defendant held an insurance policy which covered claims up to the sum of £10 million but inclusive of the Defendant's costs. Therefore there was a sum available to settle the Claimants' claims although this sum was far below the amount claimed and would be eroded by costs.

In July 2013, directions were given that would lead to a trial in 2014. In particular it was directed that trial bundles were to be lodged by 26 June 2014, that skeleton arguments were to be exchanged by 11 July 2014 and that the trial was to take place over a period of 15 days between 21 July 2014 and 7 August 2014.

On 21 May 2014, a mediation took place between the parties. No settlement was reached but following the mediation, on 27 May 2014, the Defendant's solicitors wrote a letter to the Claimants' solicitors offering a monetary settlement *"subject to the agreement of final terms"*. On 28 May 2014 that offer was rejected.

On 18 June 2014, just over a week before the trial bundle was due to be lodged and 3 weeks before skeleton arguments were due (both of which steps would lead to significant cost), the Claimants' solicitor, Mr Parker, telephoned the Defendant's solicitor, Mr Warren-Smith, and made clear that the Claimants were open to settlement.

On 20 June 2014, and following further discussions, the Claimants' solicitor wrote a letter to the Defendant's solicitor setting out a monetary offer of settlement *"payable within 28 days"*. No mention was made in the letter of agreeing further settlement terms. Instead the letter stated: *"the offer requires a cash sum to be paid which will be in full and final settlement of all claims arising from each of the five actions comprising the Take litigation, including any*

claims for costs and counterclaims. Our clients leave it to your clients what proportions should be borne by the liquidator and the insurers and deliberately do not specify the sum they propose should be paid from the liquidation or at what rate...

If the offer is in principle acceptable, we will produce a Tomlin Order, which will record and break down the amounts payable to each claimant...

On 23 June 2014, the Defendant's solicitors responded by letter, rejecting the offer and making a monetary counter-offer *"in full and final settlement of this matter, payable in 28 days"*. Again there was no mention of agreeing further settlement terms.

On the same day, the Claimants' solicitors rejected the Defendant's offer and made a further counter-offer to accept a monetary sum *"payable on the terms set out in our letter of 20 June 2014"*.

Between 24 and 26 June 2014 there were further telephone conversations between the parties' solicitors and further counter-offers made between the parties, focusing exclusively on the sum to be paid to the Claimants.

On 26 June 2014, an offer was made by the Defendant's solicitors to pay a monetary sum to the Claimants.

On 27 June 2014, a Friday, the Claimants' solicitor emailed the Defendant's solicitor with regard to the offer and he responded by email stating that the offer was *"take it or leave it"*. The Claimants' solicitor replied by email indicating the Claimants' displeasure at the offer and asking the Defendant's solicitor to take instructions.

The Defendant's solicitor emailed the Claimants' solicitor later that day saying that the Defendant was to incur the next tranche of brief fees on the following Monday and therefore that he did not expect the offer to last beyond then.

On Sunday 29 June 2014, the Claimants' solicitor emailed the Defendant's solicitor in response to that email and stated that in the circumstances the Claimants would accept the offer and that he would send round a draft consent order in the morning.

The Defendant's solicitor responded by email stating "Noted, with thanks".

A consent order in the usual Tomlin form was sent to the Defendant's solicitors and they responded by sending back a long form settlement agreement for the parties to agree. Negotiations ensued but agreement could not be reached on the terms proposed, including an indemnity that was sought from the Claimants against claims that might be brought against the Defendant by third parties.

The Claimants claimed that a binding agreement had been reached on 29 June 2014 and that longer settlement terms were not necessary. The Defendant disagreed and argued that the parties reached agreement on the understanding that longer settlement terms would have to be agreed.

Issues and findings

Had a binding settlement agreement been reached by exchange of emails on 29 June 2014?

Yes.

Commentary

This judgment helpfully sets out the principles to take into account when considering whether a settlement agreement has been made.

When making an offer to settle, it is imperative that the terms of that settlement are made clear, including whether the settlement offer is subject to the agreement of detailed terms between the parties. This is usually achieved by stating that terms are to be agreed and that the offer is "subject to contract".

In this case, despite the understanding of the Defendant's solicitor, an express reservation was not made and on an objective analysis of the email exchange between solicitors it was held that a binding agreement came into effect between the parties simply by way of the email exchange between the parties' solicitors.

Relief under s.68(3) of the Arbitration Act 1996 – whether to remit or set aside arbitral award

*Secretary of State for the Home Department v Raytheon Systems Ltd*¹³

Technology and Construction Court; before Mr Justice Akenhead; judgment delivered 17 February 2015.

The facts

Under a contract ("*the Contract*") the Secretary of State for the Home Department ("Y") engaged Raytheon Systems Limited ("Z") to design, develop substantial technology systems. The value of the Contract was a nine figure sum.

The Contract was purportedly terminated in July 2010 by Y. Issues arose with regard to the responsibility for such termination and Y instituted arbitration proceedings. A panel of three arbitrators ("*the Tribunal*") was constituted.

A lengthy Partial Final Award was issued on 4 August 2014. In broad terms the Tribunal held that Y had unlawfully terminated the Contract, that Y had repudiated the Contract and that Z had accepted the repudiation. The Tribunal awarded damages to Z which included £126,013,801 for a claim known as claim A4 – Transfer of Assets. Other sums awarded amounted to £59,581,658 plus interest.

By proceedings issued in 2014, pursuant to s.68(2)(d) of the Arbitration Act 1996 ("*the 1996 Act*") Y sought to have the Partial Final Award set aside and declared to be of no effect. Y claimed that there had been "*serious irregularity*" on the part of the Tribunal in failing to deal with all the issues that were put to it, in particular important parts of Y's case on liability and quantum in relation to Claim A4.

In a judgment delivered in December 2014, the Judge held that there had been serious irregularity on the part of the Tribunal. He held over the question of relief to a separate hearing.

With regard to relief, Y argued that the Partial Award should be set aside. Z argued that it should be remitted to the Tribunal.

Issues and findings

Should the Partial Award be set aside or remitted?

Whilst remission is the default option, given the circumstances it would be inappropriate to remit in this case. The Partial Award should be set aside in total and the matter resolved by a different tribunal.

Commentary

An order to set aside an arbitral award is rare, as the Judge pointed out in the course of his judgment. This was a substantial international arbitration, with large legal teams and 42 hearing days taking place over six months. To re-run such an arbitration would be a significant undertaking.

The Judge made clear that what the Court needs to do in deciding whether to remit or set aside is to "*consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either*". In essence, this is a "*pragmatic consideration of all the circumstances and relevant facts to determine what it is best to do but it necessarily covers the interests of justice as between the parties*".

Here, the Judge considered the irregularity to be very serious; that there could be problems with justice being seen to be done if the matter was remitted to the Tribunal; that there should not be any significant re-drawing of the issues in the arbitration should it be re-heard; that much of the factual and expert evidence could be re-deployed and possibly rationalised; and, that in any event if the matter was remitted to the Tribunal by the time the arbitrators heard the matter they were unlikely to have a significant recall of the evidence. Accordingly, the Judge decided that this was a case suitable for bring set aside and then re-heard.

About Fenwick Elliott

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

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

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



Fenwick Elliott

The construction & energy law specialists

Fenwick Elliott LLP
Aldwych House
71-79 Aldwych
London WC2B 4HN
T +44 (0)20 7421 1986
www.fenwickelliott.com