FenwickElliott

Solicitors

Summer Review 2005

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1. INTRODUCTION

Welcome to our ever-popular Summer Review, which is now in its ninth year. In our last Review, I noted that change and expansion had marked the theme of the previous year as Fenwick Elliott LLP continues to grow and meet the needs and demands of our clients both at home and internationally. That growth has continued and has been complemented by our successful move to Aldwych House at the end of last year. We are now recognised as the largest specialist construction firm in the country as we continue to act across the board for all those involved in the industry domestically and internationally including employers, main contractors and specialist subcontractors.

Change is also in the air at the Technology & Construction Courts. This year's Review examines these reforms and also the considerable impact of Mr Justice Jackson, the new head Judge.

This is particularly important. The trend I mentioned last year, whereby we had noticed a slight increase in the number of cases going to trial and arbitration continues. That said, the Courts are continuing to emphasize the importance of ADR. The Courts will want to know why you consider a particular case is not suitable for mediation. Cases continue to be reported which confirm that there is a real costs risk if only lip service is paid to the ADR process.

Our international work continues to develop apace with a significant growth in the instructions we have received in the last 12 months from all parts of the world. I read with interest Nicholas Gould's article on the likely impact of the Lesotho case on developing London's role as a centre for international arbitration.

As you would all expect, adjudication remains a fast changing area of law and as has been the case with previous Reviews, this year's edition continues to feature the continuing impact of adjudication. As Jeremy Glover describes in section 2 of the Review, the current review of the Adjudication and Payment legislation continues and we have been heavily involved in the DTI consultation process. We await the results with interest.

We have now advised on well over 1,300 adjudications since the Housing Grants legislation was introduced. There is no typical dispute and we have found that the size of the sums at stake ranges from a few thousand to many million pounds. Slowly but surely a small band of Court of Appeal authorities is developing and recently, Fenwick Elliott acted in the Court of Appeal for the successful party in *Connex South Eastern Limited v MJ Building Services Group Plc*.

At the same time, the projects side of our practice continues to grow with two of the most significant areas of growth over the last twelve months being the education sector (primarily Universities) and social housing. One reason for this is our ability to formulate innovative procurement strategies tailored to the client's particular requirements. As Julian Critchlow describes in his article on partnering, the challenge is to devise a collaborative contractual structure which will both increase efficiency and reduce disputes.

Following the continued success of our Adjudication Update seminars which are now into double figures, we are committed to holding regular seminars for all our clients on topics of interest. We have already held one seminar for the education sector and another, chaired by Lord O'Neill will be held in November. This will not only cover procurement, project management and dispute resolution but will also include a paper on the Freedom of Information Act by Victoria Russell who has written on this subject for the Review. We have found this to be an area where our advice is increasingly being sought both by Public authority clients and main contractors.

Once again, we have had a productive and enjoyable year with an excellent team and we look forward to the next one. Thank you, our clients, for the opportunities you have given us.

Simon Tolson

2. ADJUDICATION

We continue to hold our regular Update Seminars at the Savoy. Our last seminar in May 2005, when we were fortunate to have Mr Justice Jackson as one of our guest speakers, was our most popular yet.

The previous October, one of our speakers was Graham Watts, Chief Executive of the Construction Industry Council (CIC). His presence was particularly topical, as Graham had chaired the Adjudication Working Group, which formed part of the Construction Act Review chaired by Sir Michael Latham.

That review reached its final stage in June 2005 with the submission of final comments on the Government Consultation Paper. At the time of finalising this Review, it is not known exactly what changes will be made to the adjudication legislation or when they might take place.

However, **Jeremy Glover**, in a paper given at the 11th Update Seminar outlines some of the issues up for discussion.

The paper followed a talk given by Jeremy the previous November to the King's College Construction Law Association entitled "What I should like to do the Housing Grants, Construction and Regeneration Act 1996". The premise behind the talk was the review into the Housing Grants, Construction and Regeneration Act (HGCRA) undertaken by Sir Michael Latham and his two teams, the Construction Umbrella Bodies Adjudication Task Group under Graham Watts and the Payment Working Group under Richard Harryott.

Among the topics considered in that paper were:

(i) Payment:

- Payment and withholding notices;
- What happens if you suspend work for non-payment? and
- Is it possible to withhold sums against an adjudicator's decision?

(ii) Adjudication:

- Agreements in writing; and
- The meaning of dispute.

On 22 March 2005, the Construction Minister Nigel Griffiths and the Welsh Assembly Government Minister for Social Justice and Regeneration Edwina Hart launched a joint Consultation Paper based on that Latham Review entitled "Improving payment practices in the construction industry".[1]

The Consultation Paper was said to be an "*initial consultation*" and was aimed at improving the ability of parties to a construction contract to:

(i) Reach agreement on what should be paid and when, given the work done under the contract or, where they cannot agree, to make an informed referral to, or response at, adjudication;

(ii) Manage cash flow and enable completion of work on the project in the event of problems such as payment default or insolvencies elsewhere in the supply chain; and

(iii) Refer disputes to adjudication without disincentives such as avoidance, frustration or unnecessary challenge.

The aim of the Consultation was said to be:

> to build a general consensus on the way forward. Should clear support for changes to the legislation be identified, there will then be consultation on draft amendments.

It will be interesting to see whether there is clear support for those proposed changes. Nigel Griffiths acknowledged that there was a lack of consensus in the construction industry, particularly in respect of the payment provisions. He recognised that:

> the construction sector does not speak with one voice…. What constitutes fair payment is the subject of considerable debate and views differ depending where a firm may feature in the construction supply chain.

Sir Michael Latham has taken a positive view on the Consultation Paper and indeed congratulated the Government for being:

[1] This can be found on the DTI website at www.dti.gov.uk/construction/hgcra/hgcralead.htm.

> very bold in taking on matters where there was no consensus between industry sectors in original discussions. There were strong feelings on both sides of the debate, and the government has tried to reflect all views rather than ignoring them. It also goes further than I expected to address payment.

However, a number of some notable proposals and suggestions that were made during the initial review have not been pursued. As a starting point I would like to consider how the six points I referred to in my original talk fared.

The logical place to start is payment. Of the 14 proposals to be found in the Consultation Paper, 9 relate to this issue.

Payment and withholding notices

The problem as I saw it:

What was the point of section 110 of the HGCRA?

Section 110 states that every construction contract should provide an adequate mechanism for determining what payment became due and when - something that sounds straightforward enough. In addition, every construction contract should provide for the giving of a notice by a party not later than five days after the date on which the payment became due setting out the amount (if any) of the payment proposed to be made and the basis on which that amount was calculated. The notice should identify the amount due under the contract, assuming that the other party had carried out its obligations under that contract and ignoring set off or abatement in respect of other contracts.

However, the problem was really what happened if a notice of payment was not served. In most cases absolutely nothing. The HGCRA did not say what happens if a payment notice was not served. It made no provision or sanction for the failure to issue such a notice.

Some contracts did consider the consequences. Clauses 30.3.3 and 30.3.5 of the JCT with Contractor's Design 1998 provide that if the payment notice was not served, the amount claimed by the contractor became the amount due and must be paid in full accordingly (subject to any withholding notice).

This issue has, of course, been considered in a number of court cases[2], all of which conclude that where the employer fails to issue the requisite notices pursuant to the contract, then the contractor is entitled to be paid, even if the employer has grounds to withhold payment.

The solution I proposed:

There were three possible options:-

(i) Doing nothing;

(ii) Removing section 110; or

(iii) Giving section 110 some teeth and introducing some form of sanction.

I favoured the second suggestion. It was cleaner.

The Latham Review concluded that it would be better to remove section 110(2) and replace it with a definition of what constitutes an "adequate mechanism for determining what will be paid and when" in the contract, as required by section 110(1) of the Act.

That must be right. TeCSA suggested such a mechanism should include agreement of:

(i) What amounts are determined;

(ii) When this determination occurs;

(iii) How these amounts are to be calculated/assessed;

(iv) When the payment determined must be made (i.e. debt crystallisation). This date would be referred to as the Payment Date;

(v) The provision of information (who provides what, to whom and in what level of detail);

(vi) What happens in default of operation of the contractual mechanism; and

[2] E.g. *Watkin Jones & Son Limited v Lidl UK GMBH* [2002] CILL 1847 or *MJ Gleeson Group PLC v Devonshire Green Holding Limited* TCC, unreported, 19 March 2004.

(vii) How are entitlements (e.g. loss and expense and retention) to be determined and paid?

In New Zealand, a system has been developed which introduces a simple default mechanism into contracts for any failure to operate the payment mechanism. The amount claimed as due by the payee would become payable if no withholding notice were served. This has certain commercial logic and provides clarity about the status of an application in the legislation, a matter which, somewhat inconsistently up to now, has been left only to contract. Under some contracts at present, no application process is necessary.

What has been recommended?

The Consultation Paper proposes:

(i) that the requirement for the notice currently referred to in Section 110(2) should be removed; and

(ii) that the content of an adequate payment mechanism in section 110(1) be defined to include:

- terms on what amounts constitute the payment under the contract;
- when a payment is to be assessed under the contract;
- how the amounts are to be determined;
- the period of time that should elapse from the "assessment date" before the final date for payment; and
- what information is to be communicated between the parties.

What happens if you suspend work for non-payment?

The problem as I saw it:

Under section 112 of the HGCRA, the payee had the right to suspend performance of his obligations under the contract if a sum "due" under the contract was not paid in full by the final date for payment and no effective withholding notice had been given. That right could only be exercised if the party intending to suspend gave at least seven days' notice in writing, specifying the ground or grounds for suspension.

The problem was that the compensation to which the suspending party is entitled under the legislation in the event of a legitimate suspension was not generous. Subsection (4) simply confirmed that the suspending party was entitled to an extension of time for completion of the works covering the period during which performance was suspended. An extension did not necessarily extend to the seven day notice period prior to the right to suspend becoming operative, and did not apply to the time which it might take to re-mobilise following the suspension. This was important since the right to suspend ceased on payment of the amount "due" in full.

Some standard forms do deal with this point. A good example can be found in clauses 25.4.17 and 26.2.9 of the JCT with Contractor's Design 1998 where delay arising from a suspension is listed as a relevant event and the right to claim loss and expense incurred as a consequence is provided for, as long as the suspension is not frivolous or vexatious.

The solution I proposed:

Quite simply, I suggested that the approach of the JCT family of contracts should be adopted.

What has been recommended:

The Consultation Paper has recommended that the statutory right to suspend performance should be supplemented with a right to reclaim the reasonable costs of suspension and remobilisation, provided nothing has compromised the ability of a payer to reject a claim for such costs where a suspension was unjustified.

Slightly more controversially, it has been suggested that insofar as the Scheme for Construction Contracts is concerned, the reasonable costs of suspension and re-mobilisation should not exceed 5% of the value of the payments in default. An appropriate delay in re-mobilisation ought not to exceed seven days.

Withholding against an adjudicator's decision

The problem as I saw it:

Although Court of Appeal Decisions such as *Levolux v Ferson* had left the impression that the attempt to set off against sums awarded by adjudicators would fail, attempts were still being made to try and get round adjudicator's decisions by adopting set-offs or counterclaims.

To many this is contrary to the "pay now, argue later" public policy of the HGCRA.

The *Levolux* case was recently considered in the case of *Balfour Beatty v Serco Limited*[3]. Here, Serco engaged BB to design, supply and install variable message signs at locations on motorways. By an adjudication decision, BB were awarded an extension of time providing a revised completion date of 7 June 2004 and also the sum of £620,000 plus VAT. Serco refused to pay saying that as at 6 December 2004 the works were not practically complete. Thus it was entitled to levy liquidated and ascertained damages for the period after 7 June 2004. This sum exceeded the sum payable to BB.

Mr Justice Jackson noted:

39. In Ferson Contractors Ltd v Levolux AT Ltd [2003] BLR 118, there was a sub-contract in the GC/Works/Sub-Contract form. A dispute arose between the main contractor (Ferson) and the sub-contractor (Levolux) concerning the efficacy of a withholding notice served by Ferson. The adjudicator held that the withholding notice did not comply with s.111 of the Construction Act. Accordingly, he ordered Ferson to pay to Levolux the sum of £51,659 which was due on application for payment No 2. Ferson declined to pay this sum on the ground that it had determined the sub-contract. The ground for determination was that Levolux has suspended works as a result of non-payment. His Honour Judge Wilcox gave judgment enforcing the adjudicator's award, and that judgment was upheld by the Court of Appeal. The appeal proceeded on the basis that the sub-contract had been invalidly determined. Mantel LJ gave the leading judgment, with which the other two members of the court expressed agreement. At paragraph 30 Mantel LJ said this:

> But to my mind the answer to this appeal is the straight forward one provided by Judge Wilcox. The intended purpose of s. 108 is plain. It is explained in those cases to which I have referred in an earlier part of this judgment. If Mr Collings and His Honour Judge Thornton are right, that purpose would be defeated. The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. I would suggest that it can be done without the need to strike out any particular clause and that is by the means adopted by Judge Wilcox. Clauses 29.8 and 29.9 must be read as not applying to monies due by reason of an adjudicator's decision.

40. I derive two principles of law from the authorities, which are relevant for present purposes.

(1) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice (insofar as required).

(2) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

41. In the present case, for the reasons set out in paragraph 5 of this judgment, the adjudicator has not reached any definitive conclusion as to the total extension of time which is due to Balfour Beatty. No specific entitlement to liquidated and ascertained damages follows logically from the adjudicator's decision. It is strongly disputed between the parties whether any liquidated and

[3] 21 December 2004.

> ascertained damages are due and payable. Paragraph 10 of Appendix A to Schedule 23 of the Contract requires both parties to give effect forthwith to the adjudicator's decision. The effect of paragraph 13 of Appendix A is that Balfour Beatty is entitled to the relief and remedies set out in the adjudicator's decision and, moreover, is entitled to summary enforcement of such relief and remedies. These contractual provisions are consistent with the provisions of Part 2 of the Construction Act and with the Parliamentary intention referred to in the authorities.

Accordingly, Serco was not entitled to set-off against an adjudicator's decision.

The solution I proposed:

Amend the HGCRA to prohibit a party from withholding or setting off against an adjudicator's decision.

What has been recommended:

Nothing.

This may well be because the case law is quite clear on this point. However, the outcome in a particular case may largely depend on the specific contract terms. For example in *Shimizu Europe Ltd* v *LBJ Fabrications Ltd,*[4] the contractual payment machinery required the issue of an invoice in order to trigger a period of time leading to the final date for payment. Thus, it was held possible by the TCC to serve a valid withholding notice before the final date for payment which will be effective against the adjudicator's decision.

However, the review has proposed prohibiting the right of cross-contract set-off, albeit keeping the right to equitable set-off where "a close relationship exists between the dealings and transactions which gave rise to the respective claims".

Payment – the other issues

The other recommendations of the Consultation Paper are as follows:

(i) Payment framework:

- Redefining the content of withholding notices under Section 111 so that they give details of the amounts (if any) remaining to be paid.
- Restricting the use of pay-when-certified clauses.

(ii) Other payment proposals:

- Making pay-when-paid clauses ineffective in cases of upstream consultancy proceedings.
- Allowing stage payments under the Scheme for Construction Contracts to be made from materials in advance of their arrival on site.

Moving on to adjudication issues.

Agreements in Writing

The problem as I saw it:

The key here is the Court of Appeal decision on the meaning of section 107 of the HGCRA in *RJT Consulting Engineers Limited v DM Engineering (NI) Limited*[5]. Section 107 says that for that contract to fall within the adjudication decision of the HGCRA, must be evidenced in writing.

The Court of Appeal held that all the terms of the contract must be evidenced in writing.

However, it was not entirely clear which terms they had in mind. According to Lord Justice Walker it is all the terms, according to Lord Justice Ward it is all but the trivial terms, whilst according to Lord Justice Auld it is the terms in dispute.

The Court of Appeal decision understandably has largely been followed. For example, HHJ Bowsher QC[6] said that an adjudicator did not have jurisdiction to consider a dispute about an oral variation to a contract that was in writing.

More recently, the Court of Appeal judgment was clarified by Mr Justice Jackson in the

[4] CILL 2003 2015.

[5] (2002) CILL 1841.

[6] *Carillion Construction Ltd* v *Devonport Royal Dockyard Ltd* – (2003) CILL 1976

case of *Trustees of the Stratfield Saye Estate v AHL Construction Limited* [7].

Here the Trustees sought a declaration that an adjudicator did not have jurisdiction because there was no agreed scope of works in writing. The contract had been agreed on a "cost plus" basis because the exact work content could not be fully identified. Shortly after AHL had commenced work, the Trustees cancelled the contract and AHL claimed for loss of profit on the cancelled work. In the adjudication, AHL were awarded £75,000 but the Trustees refused to pay.

Mr Justice Jackson held that all the express terms of a construction contract had to be in writing if the HGCRA was to apply. He said that "the reasoning of Auld LJ, attractive though it is, does not form part of the ratio of *RJT*". However, it was not all good news for the Trustees as the Judge found on the facts that the contract and the scope of works were sufficiently evidenced in writing by letters, drawings and minutes of a meeting.

The problem

The problem therefore is a simple one. It is well known that the industry rarely records all the terms of a contract in writing, let alone the material ones. In part this is because the parties are concentrating on getting the job done. However, this decision did potentially open the door to a flood of jurisdictional challenges. Lord Justice Ward in *RJT* recognised this. He acknowledged that it would be: "…a pity if too much 'jurisdictional wrangling' were to limit the opportunities for expeditious adjudication…" and he hoped that "adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense".

The solution I proposed:

Encourage parties to evidence their contracts in writing. Lord Justice Walker is right to say:

> Writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.

There are three alternatives put forward by the Latham review about how to tackle this issue:

(i) Endorse the first instance *RJT* decision of HHJ MacKay. The HGCRA should only apply to contracts where all the terms are in writing or evidenced in writing;

(ii) Endorse the purposive approach and allow the HGCRA to apply to contracts which are evidenced partly orally and partly in writing;

(iii) Follow the Australian and New Zealand approach and extend the HGCRA to wholly oral contracts.

All three possibilities have their own problems.

In relation to the first, there is still a large body of construction contracts to which the HGCRA will not apply, because they have not been reduced in writing. That was not the approach of Parliament. It is also possible, as HHJ Bowsher QC suggested, for a contract which was once part of the HGCRA to be taken out of the ambit of the Act because of an oral variation to its terms.

The third, though in many ways the simplest, is probably a step too far. As HHJ Bowsher QC said in *Grovedeck* v *Capital Demolition Limited*[8],

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

My preferred approach is to adopt the approach of HHJ Mackay.

What has been recommended?

Nothing.

For the time being at least, I suspect the *Serco* decision will be seen as clarifying where the law stands.

[7] 6 December 2004.

[8] CILL April 2000.

What is a dispute?

The problem as I saw it:

How can you tell if a dispute has arisen?

Section 108 states that:

(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

In *Beck Peppiatt Ltd. v Norwest Holst Construction Ltd* the then head of the TCC Forbes J had to consider this issue. He took the middle way saying:

> In my view the law is satisfactorily stated by His Honour Judge Lloyd QC in his unreported decision of *Sindall v Solland* dated June 2001, in which he said:
>
> For there to be a dispute for the purposes of exercising the statutory right to adjudication it must be clear that a point has emerged from the process of discussion or negotiation that has ended and that there is something which needs to be decided.
>
> As it seems to me, that is a statement of principle which is easily understood and is not in conflict with the approach of the Court of Appeal in Halki. I would have been very surprised if it was. It has to be borne in mind that, as observed in Halki, "dispute" is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which can be said to amount to a dispute. Each case will have to be determined on its own facts and attempts to provide an exhaustive definition of "dispute" by reference to a number of specified criteria are, in my view, best avoided. I therefore reject the suggestion that the word "dispute" should be given some form of specialised meaning for the purposes of adjudication.

What I did not like was the use of the stringent test, used by Lord Saville in *Hayter* v *Nelson* [1990] 2 LLoyds Rep 265, where the Judge refused to give summary judgment and stayed a matter to arbitration because of the existence of an arbitration clause. Lord Saville said that the word "dispute" should be given its ordinary meaning and went on to set out what some would say the infamous "boat race" definition of a dispute, effectively any form of disagreement would suffice:

> …to have an argument over who won the university boat race in a particular year. In ordinary language they have a dispute whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that one is right and the other is wrong, does not and cannot mean that the dispute does not in fact exist, because a man can be said to be in dispute if he is right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them…

Whilst this, of course, has the advantage of certainty, you can hear the complaints from a mile off. How much easier it would be for a party to (using a phrase beloved by opponents of adjudication) ambush another.

The solution I proposed:

To me the *Halki* test is too narrow and uncommercial. However, in many ways the solution has now largely been neatly set out by the Courts.

First, in October 2004, in *CIB Properties Ltd v Birse Construction Ltd*, HHJ Toulmin CMG QC, in considering whether there was a dispute, said that:

> the test is whether, taking a common sense approach, the dispute has crystallised. Even after it has crystallised, the parties may wish to have further discussions in order to resolve it. Whether or not it has, in fact, crystallised will depend on the facts ... including whether or not the parties are in continuing and genuine discussions ... to try to resolve the dispute.

Then, Mr Justice Jackson in the recent case of *Amec* v *The Secretary of State for Transport*[9], in the context of an arbitration, had to consider whether a dispute had arisen. He proposed the following steps:

(i) The word dispute should be given its normal meaning;

[9] 11 October 2004.

(ii) Despite the number of cases, there are no hard-edged legal rules as to what is and what is not a dispute. The accumulating judicial decisions have merely produced helpful guidance;

(iii) The mere fact that one party notifies the other of a claim does not automatically and immediately give rise to dispute. A dispute does not arise until it emerges that the claim is not admitted;

(iv) There are many circumstances from which it may emerge that a claim is not admitted. There may be an express rejection, there may be discussions from which objectively it can be said that the claim is not admitted, or a party may prevaricate thus giving rise to the suggestion that it does not and omit the claim. Silence may well also give rise to the same inference;

(v) The period of time for which a party may remain silent depends upon the facts of the case and the contract. Where the gist of the claim is well known, a short period may suffice. Where the claim is notified to an agent of a respondent who has an independent duty to consider the claim, a longer period of time may be required;

(vi) If a party imposes a deadline for responding to the claim, the deadline does not have the automatic effect of curtailing what otherwise would be a reasonable time for responding. However, it is something for a court to consider;

(vii) If the claim as presented is so nebulous and ill-defined that a party cannot sensibly respond to it, neither silence, nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

Judge Kirkham in the case of *Orange EBS Ltd v ABB Ltd*[10] has been criticised for deciding that a dispute arose between early December and early January. Here, applying these tests led to the conclusion that a five-day deadline given in a letter to respond was a reasonable one. The deadline was imposed for a good reason, namely that the limitation period was about to end. In addition, as a result of previous deadlines it was clear that the deadline would not cause Amec any further difficulty. It was self-evident that Amec would not be prepared to admit liability for massively expensive defects on a viaduct. This solution may not be ideal, since there is always scope to apply the facts of any situation. However, it seems to be a fair and reasonable approach to take.

The *Amec* decision went to the Court of Appeal who in March of this year confirmed their agreement to the steps put forward by Mr Justice Jackson.

Mr Justice Jackson's propositions had previously been endorsed by Lord Justice Clarke in the Court of Appeal as being *"broadly correct"* [11] Lord Justice Clarke in particular endorsed the general approach that:

> while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted.

Lord Justice Clarke agreed that Mr Justice Jackson was right not to agree with the suggestion in some of the case law that a dispute can only arise once negotiation or discussion had concluded and stated that it appeared to him that:

> negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute.

Adjudication – the other issues

The Consultation Paper also made the following recommendations:

(i) Preventing the use of trustee stakeholder accounts to suspend an adjudicator's award pending litigation other than when the recipient is involved in insolvency proceedings.

(ii) Providing the adjudicator with the power to rule on certain aspects of his own jurisdiction and providing a right to payment in cases where the

[10] (2003) BLR 323.

[11] *Collins (Contractors) Limited v Baltic Quay Management (1994) Limited* – 7 December 2004.

adjudicator stands down due to lack of jurisdiction.

(iii) Providing the adjudicator with the right to overturn final and conclusive decisions where these are of substance to interim payments only.

(iv) Extending the adjudicator's immunity under the HGCRA to claims by third parties.

(v) Applying provisions on adjudicator independence in the Scheme to all adjudications under section 108 of the HGCRA.

Adjudication - costs

The Consultation Paper also noted that government legislation is intended to deal with certain aspects regarding the costs of the adjudication process, namely:

(i) Parties to an adjudication should bear their own legal and other costs while the costs of the process are referred to the adjudicator to be decided as part of his decision of the dispute;

(ii) Outlaw contractual provisions which have any other effect – i.e. as in the *Tolent* case; and

(iii) Provide that, once a dispute has been referred to an adjudicator, if both parties also wish to refer the legal costs they incur in the process, then the adjudicator should also award these as part of his decision of the dispute.

Matters not dealt with by the Consultation Paper

Of the various issues in the Latham Review of September 2004, there were a number which were not referred to at all in the Consultation Paper. These include:

(i) Introducing a single adjudication procedure for all adjudications. This, in particular, must be a missed opportunity;

(ii) The widening of the scope of the HGCRA to apply to all residential buildings contracts, PFI contracts and contracts for operations-related process-plant[12];

(iii) As mentioned above, widening the meaning of section 107 of the HGCRA in relation to "contracts evidenced in writing";

(iv) Setting up any statutory limit on payment period lengths; and

(v) Providing a right to redirect payments owed to insolvent contractors to their creditor sub-contractors and suppliers.

Conclusion

As indicated above, we still await final details of what, if any, the changes to the HGCRA will be. However, it is more likely than not that any changes to the HGCRA will be minor.

3. ALL CHANGE AT THE TCC

There have been a number of changes at the Technology and Construction Court (TCC). In September 2004, Mr Justice Jackson replaced Mr Justice Forbes as Head of the TCC. In May of this year, HHJ LLoyd QC retired from the bench to concentrate on arbitration matters. In July 2004, Peter Coulson QC, formerly of Keating Chambers, was appointed Judge at the TCC.

However, there are more fundamental changes in the pipeline. On 7 June 2005, Lord Chief Justice Woolf issued a Practice Direction setting out new interim arrangements for the management of cases in the TCC. The Practice Direction sets out potentially significant changes. Although recognising the fact that TCC Judges try many arduous and complex cases and show a high degree of expertise in the management and trial of these, the Lord Chief Justice noted the lack of involvement of High Court Judges in the work of the TCC. He said that this had been a source of concern within the construction (and IT) industries. Whilst

[12] This is no surprise given the comments of Nigel Griffiths in October 2004 when he responded to the Latham Review.

noting that the longer-term future of the TCC is currently under discussion, the Lord Chief Justice set out the following interim provisions:

(i) Mr Justice Jackson, currently in charge of the TCC, who was previously required to spend half of each Term away from the Construction Court, will now be principally based at the TCC and will only sit in other Courts when there is no TCC work requiring the immediate involvement of a High Court Judge; and

(ii) The Judge in charge of the TCC will consider every new case which is started in or transferred into the London TCC. The most complex and heavy cases will be classified "HCJ", which means that these will be managed and tried either by the Judge in charge of the TCC or by another suitable High Court Judge. However, it is envisaged that the majority of the cases will be classified "SCJ". These cases will be allocated to a named Senior Circuit Judge by operation of the rota. The Senior Circuit Judges will be those Judges who are currently working at the TCC.

This new measure only affects cases started in London.

The panel of High Court Judges will be Mr Justice Christopher Clarke, Mr Justice Elias, Mr Justice Field, Mr Justice Ouseley and Mr Justice Simon. Of these, Mr Justice Clarke is probably the best known, being counsel to the Saville Inquiry into "Bloody Sunday" deaths, before joining the judiciary in December.

At this stage it is difficult to predict exactly what effect these changes will bring to the Court. A new Guide to Practice in the TCC is currently being finalised. It is due to take effect from 3 October come out in autumn 2005. This will provide further details of the proposed differentiation between "HCJ" and "SCJ" cases.

The Guide is more detailed than its predecessor in a number of areas. For example, in relation to adjudication the old guide, which dated from 2001, merely referred to the guidance in *Outwing*. Section 9 of the new guide is far more comprehensive. The aim of the Guide in the words of Judge Thornton is to a *"ensure speed, economy and ease of use"*.

Judge Thornton also, in an article which appeared in Building Magazine on 5 august 2005, said that:

> The TCC judges intend in future to take a more active stance in keeping costs to a minimum. To that end, they will be using their powers to cap costs, to assess costs summarily and to adapt court procedures in line with the overriding objective of controlling the expense of TCC litigation. The court is to revisit the pre-action protocol to see whether the procedure can be simplified and whether the cost of implementing it can be reduced. This is a much valued process that requires parties, before embarking on TCC cases, to attempt to negotiate a settlement to their disputes by using a structured negotiation procedure.

To be fair, this approach, which is clearly to be welcomed, is already apparent from the judgments coming out of the TCC and we comment on a number of these in Section 4 below which deal with costs.

There is one other new directive and this relates to experts. In June 2005, the Civil Justice Council launched its Protocol for the Instruction of Experts to give Evidence in Civil Claims. It will apply to any steps taken for the purpose of civil proceedings by experts or those who instruct them on or after 5 September 2005. Until now, the CJC, set up as a government body as one of the recommendations of the Woolf Report, had had little impact on construction cases, but this protocol is likely to acquire a status rather greater than any previous codes and protocols, which it is designed to replace. It is not a Pre-action Protocol carrying with the format weight of CPR, but possible sanctions for non-compliance may well be comparable.

The aims of the Protocol as set out in section 2 are as follows:

> 2.1 This Protocol offers guidance to experts and to those instructing them in the interpretation of and compliance with Part 35 of the Civil Procedure Rules (CPR 35) and its associated Practice Direction (PD 35) and to further the objectives of the Civil Procedure Rules in general. It is intended to assist in the interpretation of those provisions in the interests of good practice but it does not replace them. It sets out standards for the use of experts and the conduct of experts and those who instruct them. The existence of this Protocol does not remove the need for experts and those who instruct them to be familiar with CPR35 and PD35.

Whilst in essence the Guide restates the principles with which all experts will be familiar, every expert, particularly if involved in a case which is heading for court, would be well advised to ensure that they are familiar with the Protocol.

Those principles were recently restated in the case of *Great Eastern Hotel Ltd v John Laing Construction Ltd* which demonstrated just how important it is that an expert understands and complies with the primary duty he owes to the court. Judge Wilcox here found that one of the experts had failed to understand that duty.

An expert must thoroughly research all the evidence available to him. What he should not do is uncritically accept the evidence put forward on behalf of those instructing him. This is particularly the case when the experts on the other side put forward evidence that challenges and contradicts that picture. In such circumstances an expert must revisit his earlier expressed views in accordance with his clear duty to the court.

Judge Wilcox made it clear that the court is looking for an expert who bases his conclusions upon sound and thorough research, who has extensive practical experience in the discipline he is claiming expertise in (and it helps if he has relevant experience of operating under similar contractual provisions as exist in the particular case) and who is prepared to make concessions when his independent view of the evidence warrants it.

A copy of the Protocol can be found at www.ewi.org.uk/files/ExpertsProtocol.pdf.

4. THE IMPACT OF MR JUSTICE JACKSON

One thing that has been noticeable about the appointment of Mr Justice Jackson is the number of decisions he has given, which have been reported. We thought it would be sensible to summarise the most important of these as they provide an interesting insight into the impact of the appointment of Mr Justice Jackson within the TCC. Since his appointment, the topics he has dealt with include:

- The basic principles of enforcing an adjudicator's decision;
- Can you set off against an adjudicator's decision?
- What constitutes a contract in writing?
- What is a dispute?
- Arbitration clauses;
- The Single Joint Expert; and
- The duty of impartiality when certifying payment.

Three of the decisions relating to adjudication (*Balfour Beatty v Serco*, *Stratfield v AHL* and *Amec v Secretary of State*) have been dealt with in section 2 of this Review.

The "Justice Jackson" judgments often provide a useful summary of the current case law and then a statement of the principles to be derived from this. From these cases, it is possible to discern quite clearly Mr Justice Jackson's approach to a number of topical legal and procedural matters. For example, there is one other case which deals with adjudication. Ever since the introduction of adjudication, there has been debate about the extent to which the Judges within the

TCC viewed adjudication favourably. Whatever the merits of that debate, the decision of Mr Justice Jackson in *Carillion v Devonport* demonstrates a decidedly pro-adjudication approach. It is worth setting out his comments at some length:

> 76. Prior to 1998, if there was a dispute about payment within the construction sector, money would generally remain in the pocket of the paying party until final resolution of that dispute. This was a source of concern, for reasons set out in a number of reports including Sir Michael Latham's report, "Constructing the Team", published in 1994. The statutory system of compulsory adjudication was set up to address this problem. The purpose of an adjudication was and is to determine who shall hold the disputed funds, and in what proportions, until such time as the dispute is finally resolved.
>
> 77. In order to achieve this objective, it is necessary that adjudication should be as speedy and inexpensive as circumstances permit. The adjudicator is not necessarily expected to arrive at the solution which will ultimately be held to be correct. That would be asking the impossible. The adjudicator is required to arrive at an interim resolution within strictly drawn constraints.
>
> 78. Over the last seven years, adjudication has been widely used in the construction industry. On many occasions, the parties have chosen to use the adjudicator's decision as, or as the basis for the final settlement of their disputes. This is a perfectly sensible and commercial approach. It has been remarked upon by the judges of this Court. Nevertheless that perfectly sensible and commercial approach, which many parties choose to adopt, cannot change the juridical nature of adjudication or transform the legal duties which are imposed upon adjudicators by statute.
>
> 79. One can detect in the first instance cases over the last six years some slight differences[13] in emphasis and approach. In borderline cases what one judge may regard as a permissible error of law or procedure on the part of an adjudicator, another judge may characterise as excess of jurisdiction or a substantial breach of the rules of natural justice.
>
> 80. In my view, it is helpful to state or restate four basic principles:
>
> 1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see Bouygues, C&B Scene and Levolux;
>
> 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see Discain, Balfour Beatty and Pegram Shopfitters.
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see Pegram Shopfitters and Amec.

This reference to the judges needing to show a degree of scepticism is consistent with a broad international consensus and that adjudication should not be thwarted by relatively modest complaints about procedure. In the New Zealand case of *George Developments Limited v Canam Construction*, the Court of Appeal noted that the purpose of the Construction Contracts Act was to facilitate regular and timely payments between the parties to a construction contract and that technical quibbles should not be allowed to vitiate on a payment claim that substantively complied with the requirements of the Act. A "technocratic" or "formalistic" interpretation of that Act would undercut

[13] It would be right to treat the words "some slight differences" as a triumph of tact over candour.

Parliament's intent that cash flow be maintained.

A similar approach was taken by the New South Wales Court of Appeal in Australia, in the case of *Brodyn v Davenport*, where the Court said:

> 55. In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v Hickman*; *Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination.

However, the Carrillion case has certainly not decided that attempts to set off against sums awarded by adjudicators will always fail. As we noted above, Mr Justice Jackson decided in *Balfour Beatty v Serco* that Serco were not, in the circumstances of the particular case, entitled to set off their claims against a decision of an adjudicator, made in favour of Balfour Beatty.

Moving away from adjudication, the seven fold test as to what constituted a dispute in *Amec v Secretary of State for Transport* is not the only arbitration-related case considered by Mr Justice Jackson.

In a case known as *X* v *Y* to protect the confidentiality of the parties, Mr Justice Jackson had to consider a challenge to the decision of an arbitral tribunal that the tribunal did not have jurisdiction to deal one of the heads of claim being advanced in that arbitration. The challenge was made pursuant to section 67 of the 1996 Arbitration Act. The proceedings were issued in the Commercial Court, but transferred to the TCC since the issue in dispute concerned a construction contract.

The question here was whether one of the heads of claim being advanced in the arbitration, fell outside the scope of the arbitration clause in the contract which was the subject of the arbitration dispute. Essentially, Mr Justice Jackson had to consider the meaning of words or phrases in the context of other arbitration clauses or contracts, something which he noted must be considered with caution. From his review of the authorities, on this occasion, Mr Justice Jackson put forward four propositions:

> (i) The question whether a dispute falls within the arbitrator's jurisdiction turns upon the construction of the relevant arbitration clause. This is an objective exercise of contractual interpretation (see Bingham L.J. in Ashville at p.506).
>
> (ii) Previous decisions about the proper interpretation of different arbitration clauses may be persuasive but they do not constitute binding precedents (see May L.J. in Ashville at pp.494-495).
>
> (iii) There have been cases where courts have held that a dispute concerning one contract falls within the ambit of the arbitration clause of another earlier contract. Each of these decisions turns upon its own particular facts (see Faghirzadeh, A. and B. and El Nasharty).

(iv) If an arbitration clause is drafted in appropriate terms, it may encompass a claim for contribution under the Civil Liability (Contribution) Act 1978 (see Wealands).

Accordingly, here the arbitral tribunal did not have jurisdiction to consider the claim, since it could not be said to be a dispute relating to the specific contract.

It should not be forgotten that the TCC is not confined to London. We frequently find ourselves dealing with the courts in Leeds, Birmingham and elsewhere. Mr Justice Jackson has over the past year spent some time in Leeds hearing TCC cases. In one of these, *Quarmby Electrical Limited v Trant*, Mr Justice Jackson considered the use of single joint experts in what he termed "lower value construction cases".

The Quarmby case concerned a Sub-Contractor's Final Account. HHJ Graville had ordered that a single joint expert be appointed to deal with the technical issues. Both parties accepted the expert's findings in respect of defects and the valuation of variations. This lead to a substantial saving of court time and legal costs. Mr Justice Jackson provided valuable guidance to those considering proposing a single joint expert:

> I fully accept that in the larger construction cases the device of a single joint expert is generally reserved for subordinate issues or relatively uncontroversial matters. However, in the smaller cases, such as this one, if expert assistance is required, it is difficult to see any alternative to the use of a single joint expert in respect of the technical issues. If adversarial experts had been instructed to prepare reports and then give oral evidence in the present case, I do not see how there could have been a trial at all. The respective experts' fees and the trial costs would have become prohibitive. In lower value cases such as this one, I commend the use of single joint experts. The judge, of course, remains the decider of the case. He is not bound by everything which the single joint expert may say. However, the judge is able to perform his functions within more sensible costs parameters.

The Civil Procedure Rules enable both parties to put written questions to a single expert: see Rule 35.6. This facility was used in the present case. Part 35 of the Civil Procedure Rules and the accompanying practice direction are silent on the matter of a single joint expert being called to give oral evidence. The commentary at paragraph 35.7.1 of the current edition of the White Book states:

"If a single joint expert is called to give oral evidence at trial, it is submitted, although the rule and the practice direction do not make this clear, that both parties will have the opportunity to cross-examine him/her, but with a degree of restraint, given that the expert has been instructed by the parties."

It must be a matter for the discretion of the judge whether oral examination of a single joint expert is appropriate. In a case where the single joint expert is dealing with major issues, such oral examination might be appropriate and proportionate. In such a case it is the practice of other TCC judges to whom I have spoken, and indeed of myself, for the judge to call the expert, and then for both sides to cross-examine. However, where the report of the single joint expert comes down strongly on the side of one party, it may be appropriate to allow only the other party to cross-examine.

Before leaving the topic of single joint experts I wish to make four further comments:

(1) The choice of single joint expert is important. He should be someone in whom both parties have confidence.

(2) If the case is one in which it might become appropriate for the single joint expert to give oral evidence and be cross-examined, it is desirable to alert the expert to this possibility when he is invited to accept instructions.

(3) Experience shows that quite often the instruction of a single joint expert leads to settlement of the whole litigation.

> (4) The procedure for dealing with single joint experts should, so far as possible, be addressed at case management hearings in advance of trial. Also provision should be made for securing payment of the fees of single joint experts before they undertake work.

Finally, Mr Justice Jackson in the case of *Costain Ltd & Othrs v Bechtel Ltd & Anr* in May of this year, considered the role of the project manager under the NEC contract when it came to assessing and certifying sum due to the contractor.

Costain were part of a consortium of contractors carrying out work in respect of the Channel Tunnel Rail Link. The consortium entered into a contract to carry out the extension and refurbishment of St Pancras Station. The contract provided that:

> The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.

The contract, though amended, was based upon the NEC Form of Contract. The contract was a target cost contract with a pay and gain mechanism providing for the Costain consortium to be paid actual cost less disallowed cost as defined by the contract. The project manager (RLE) was another consortium. The dominant member was Bechtel Rail Link Engineering. Many of the RLE personnel who worked on the contract were also Bechtel employees. On 6 February 2005, RLE issued payment certificate no. 47. This valued the work carried out as approximately £264 million, but disallowed costs of some £1.4 million. On 8 April 2005, payment certificate no. 48 was issued. The total of disallowed costs had risen to £5.8 million.

The Costain consortium alleged that at a meeting held on 15 April 2005, one Mr Bassily instructed all Bechtel staff to take a stricter approach to disallowing costs. It also alleged that he instructed the Bechtel staff to disallow legitimate costs when assessing the payment certificates. The Costain consortium were concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to them. Accordingly, the consortium issued a claim alleging that Bechtel and Mr Bassily had unlawfully procured breaches of contract by the employer. The claim sought interim injunctions restraining the RLE consortium from acting in such a way in relation to the assessment of the contractor's claims.

Bechtel argued that they were obliged to look after the employer's best interests and that therefore they did not owe a duty to act impartially in respect of consideration of the payment applications.

Mr Justice Jackson disagreed, holding that it was properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer and contractor.

On the evidence before the court, Mr Justice Jackson found that Mr Bassily had, in fact, been telling Bechtel staff to exercise their functions under the contract in the interests of the employer and not impartially. However, when acting as project manager, it was the RLE consortium's duty to act impartially as between employer and contractor and not to act in the interests of the employer.

The Judge considered the authorities, starting with *Sutcliffe v Thackrah* where the House of Lords discussed the role and duties of an architect in that situation. Lord Reid said:

> It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other maters requiring professional skill he must form and act on his own opinion.
>
> Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which

> the contractor gets. Under the R.I.B.A contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.
>
> The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.

Mr Justice Jackson noted that these comments had generally been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract. The issue here concerned the duty of certifiers in general, but the specific duties of the project manager under the present contract. Four reasons were put forward as to why the contract here was different:

> (i) The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.
>
> (ii) The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.
>
> (iii) The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The project manager is specifically employed to act in the interests of the employer. In Royal Brompton Hospital NHS Trust v Hammond (No. 8) [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey Lloyd QC at paragraph 23 described the project manager as "co-ordinator and guardian of the client's interest".
>
> (iv) The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially.

This was an application for an Injunction and the Judge agreed that the Costain consortium had raised serious questions to be tried both in relation to whether RLE had acted in breach of its duty to act impartially as between employer and contractor and whether as a consequence the employer was thereby in breach of contract. In addition to this, the Costain consortium had raised a serious question as to whether the RLE consortium had committed the tort of procuring a breach of contract.

However, Mr Justice Jackson was not prepared to exercise the court's discretion at this interim stage and grant the injunction (and it is important to bear in mind that this judgment does not provide a definitive answer on this issue) to correct any failings in the contractual payment procedures. The reason for this was that these could ultimately be compensated for by way of damages. Whilst the claimants had demonstrated that there were potentially serious questions to be tried thus passing the threshold test in *American Cyanamid Co v Ethicon* [1975] AC 396 at 409D, the claimants failed to pass the test of the balance of convenience.

One key interest in this case is the debate concerning the obligations owed by the project manager to the contractor in respect of the assessment for payments and the employer's obligations to the contractor in

the event of any breach of such obligations by the project manager. The form of contract, whilst amended in many significant respects, is based very much on the NEC target cost contract and therefore the issues considered are of great significance to the industry as a whole, particularly given the popularity of this form of contract for major infrastructure projects.

The defendants argued that they were in fact obliged to look after the employer's best interests and that they did not owe a duty to act impartially in respect of consideration of the contractor's payment application. The Judge held that, at the very least, it is properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer or contractor.

Somewhat frustratingly, it is not known whether or not this matter will proceed further, but there can be no doubt that a definitive answer on this issue would be extremely welcome. If it is held that the project manager does not owe such a duty of impartiality, it is a little difficult to see how this can sit comfortably with the supposed overriding objective of contracts of this nature to attempt to foster collaborative working and avoid confrontation.

5. COSTS

There have been a number of interesting cases relating to the recovery of costs over the past year. Amongst the issues covered by the courts are:

(i) Recovery of costs from non-parties;
(ii) Penalties for failing to consider mediation; and
(iii) Costs incurred during the "pre-action protocol" stage of a case.

(i) Non-party costs

One of the most irritating things for a successful party is when the other side, after losing a case, goes under with the result that a defendant is unable to recover all his costs. This is what happened in *Gemma v Gimson,* a case which came before Judge Thornton.

His decision provides a detailed analysis of the law applicable to the making of non-party costs orders. It enables the court to fully lift the corporate veil where the driving force behind litigation is the directors acting possibly for personal gain or protection and not in the best interests of the company.

In an action in the Technology and Construction Court, Mr and Mrs Gimson had been awarded a sum in excess of £232,000 plus interest and costs against Gemma Limited. As soon as litigation was lost and the company was faced with a substantial judgment, it went into liquidation, since it had only been kept afloat by Mr and Mrs Davies for the purpose of conducting litigation and on losing it, they immediately decided to pull the plug on the company and on Mr and Mrs Gimson's chances of recovering something from it.

Mr and Mrs Gimson sought an Order against Mr and Mrs Davies that Mr and Mrs Davies, who had not been party to the original action, should be liable to pay Mr and Mrs Gimson the costs of the action that the Davies' company, Gemma Limited, had been ordered to pay.

Judge Thornton summarised the law thus:

> 12. I can now summarise the relevant principles that are applicable to the Gimsons' application for a non-party costs order against Mr and Mrs Davies:
>
> (1) Non-party costs orders against non-parties are to be regarded as exceptional. In the context of costs proceedings, "exceptional" refers to a case which is outside the ordinary run of cases where third parties pursue or defend claims for their own benefit.
>
> (2) Where a party seeks a costs order from a non-party who is connected with an insolvent company party, the Court must have in mind that any non-party costs order will erode the principle that a company has separate liability from the individuals associated with it.
>
> (3) It is necessary but not a sufficient starting point for considering whether to make a non-party costs order against someone associated with an insolvent company party that the non-party has funded or assisted in the funding of the insolvent company's part in the litigation.

(4) A claiming party can only obtain a non-party costs order against a non-party if it can establish a causal link between the funding provided by the non-party and the costs incurred by the claiming party.

(5) Where the non-party is a director or officer of the insolvent company party, a non-party costs order will not normally be appropriate if the non-party, when funding and acting in relation to the litigation, was doing so in the pursuance of his or her duties owed to the company and in the best interests of the company and all of its creditors and shareholders.

(6) Where, however, the non-party or director or officer stood to benefit from the litigation, controlled and directed it or started or pursued it unreasonably or for an ulterior purpose not connected with the best interests of the company, a non-party costs order will usually be appropriate.

(7) Overall, when considering whether these principles are applicable and how they should be applied, a could should have in mind the overriding objective of litigation and should only make a costs order against a non-party that is proportionate and fair and which meets the justice of the case.

In this case, almost all the entire funding of its claim and its defence and of the security provided for Mr and Mrs Gimson came from Mr and Mrs Davies. Further, the decision to prosecute Gemma Limited's claim and to defend to the hilt Mr and Mrs Gimson's counterclaims was taken exclusively by Mr Davies with Mr Davies' knowledge and approval. Thus, the litigation was started by a company whose dominating influence knew, or ought to have known, that the company had no answer to the counterclaim that would inevitably be placed by the defendants.

The company was entirely controlled by Mr and Mrs Davies, who had funded the litigation. When the litigation was lost, the company was wound up. It had only been kept afloat for the purposes of the litigation.

However, in *CIBC Mellon Trust Company and Another v Wolfgang Otto Stolzenberg and Others* an order for costs was sought against a shareholder of the company.

CIBC Mellon Trust ("the Trust") was the trustee of various Chrysler Canada benefits and pensions plans and Daimler Chrysler Canada Inc. The Trust brought an action against Wolfgang Stolzenberg and, amongst others, two companies called Chascona NV ("Chascona") and Mora Hotel Corporation NV ("Mora") for fraudulent misrepresentation in relation to a number of substantial loans and investments made by the Trust between 1984 and 1992.

In 1999, judgments were entered in default against Mora and Chascona for large sums of money and costs. An application was made by Mora and Chascona to have those judgments set aside but that application was unsuccessful and costs were ordered against Mora and Chascona. Mora and Chascona then sought permission from the Court to appeal the set aside order, but permission was refused and Mora and Chascona were ordered to pay the costs of that application. In June 2004, Mora and Chascona appealed to the Court of Appeal on this issue. That appeal and permission application were dismissed and Mora and Chascona were ordered to pay the Trust's costs of that appeal and application.

A Mr Cavazza was a 75% shareholder in both defendant companies. In February 2004, the Trust obtained an order that Mr Cavazza pay the costs awards against Mora and Chascona of the set aside application (billed but not assessed at over £1 million) and the application for permission to appeal to the court.

In relation to the judgments obtained in 1999, the Trust had their costs of these assessed and also applied for an order that Mr Cavazza pay the costs of that costs assessment. The Trust was not successful in that application and an order was made that it pay Mr Cavazza's costs of that application.

The Trust appealed the costs assessment costs decision and Mr Cavazza cross-appealed in relation to the other orders against him, arguing that as a shareholder he should not be ordered to pay Mora and Chascona's costs. The Trust also applied for an order that Mr Cavazza pay Mora and Chascona's costs of the appeal application to the Court of Appeal made in June 2004.

The question of interest was the liability of a shareholder to make payment of a defendant company's costs. The Court of Appeal found that there was no reason why a shareholder, not being a director, or a person duly

authorised, appointed and legally obliged to act in the best interest of the company, should not have a costs order made against him if he funds, controls and directs litigation by the defendant company in order to promote or protect his own financial interest (including his interests as a shareholder). Of course, whether it is appropriate to or not depends on the facts of each case. If a shareholder chose to involve himself in the company's litigation, and therefore usurped the role of the directors, that shareholder did so at his own risk.

Gemma v Gimson, where a costs order was made against directors who had funded and directed litigation, is one of the rare exceptions where the corporate veil may be lifted. The *CIBC Mellon* case makes it clear that even if it is a shareholder, rather than a director, that is directing and funding the litigation, a costs order may be made against them, something which should be taken into account by claimants and defendants alike when considering costs liability.

(ii) Penalties for failing to consider mediation

We have made clear in previous Reviews that following decisions such as *Halsey*, a party who refuses a genuine offer to mediate largely does so at his own risks on costs. This was reinforced by the Court of Appeal decision in *Burchell v Bullard*.

This was an appeal by a small builder against a costs order made following heavily contested litigation arising out of work done to a property owned by the Bullards. The builder's solicitors in May 2001, suggested that to avoid litigation the matter be referred to ADR. The response was that as the matters complained of were technically complex, mediation was not an appropriate way to settle matters. No Part 36 offers or payments had been made. Following a trial in March 2004, Burchell recovered almost the full £18k claimed. The Bullards recovered £14k, being approximately 15% of the counterclaim. As part of the counterclaim related to the roof, Burchell had also taken Part 20 proceedings against a roofing sub-contractor. The Trial Judge ordered that Bullard pay Burchell's costs of the claim, but that Burchell pay Bullard's costs of the counterclaim and the costs of the roofing sub-contractor.

LJ Ward described the costs picture as being "horrific". The builder's costs were £65k. The Bullards, costs were £70k. The Bullards had also rejected an offer from Burchell to submit the costs question to mediation pursuant to the Court of Appeal scheme. LJ Ward said that in making a costs award following the event, the Trial Judge had fallen into error. He should have considered alternatives - namely making a percentage order. LJ Ward noted in particular that Burchell had not exaggerated his claim. However, the Bullards had exaggerated their claim as it only succeeded to the extent of 15%.

LJ Ward then considered the Halsey case. He thought that a small building dispute is exactly the kind of dispute that lends itself to ADR. However, the offer of mediation was made before Halsey, and indeed before the earlier case of *Dunnett v Railtrack*. Therefore, the act of refusing mediation in 2001, was not necessarily an unreasonable step at that time. Here, LJ Ward specifically drew attention to Paragraph 5.4 of the Pre-Action Protocol Construction Engineering Disputes which expressly requires parties to consider that a pre-action meeting or some form of ADR procedure be more suitable than litigation. LJ Ward said:

> ...Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate ... made before the claim was issued. With court fees escalating it may be folly to do so.

LJ Ward thought an appropriate costs award was to award Burchell 60% of the costs of the proceedings, claim and counterclaim lumping them together to include 60% of the sub-contractor's costs. This was because the Bullards had asserted that the roof had to be replaced and the roof had been built by the sub-contractor. It would have been unwise for the builder not to have brought the sub-contractor into proceedings.

(iii) Pre action protocol costs

The Burchell case was commenced prior to the introduction of the Pre Action Protocol for Engineering and Construction Disputes. Since the introduction of the Protocol, one question that has arisen is who pays the cost of investigating issues raised during the protocol process but dropped when proceedings came to be issued? The answer to that seems to be: not the person who raised the claim which was dropped.

In, *McGlinn v Waltham Contractors Limited & Others*, McGlinn issued proceedings as a result of alleged defective work in the building work carried out to his property. Before commencing the proceedings, McGlinn went through the steps prescribed by the Pre-Action Protocol for Construction and Engineering Disputes. This led to a mediation which was unsuccessful.

However, the claims made by McGlinn in the proceedings in the TCC, did not include claims in respect of overpayment and loss and expense paid to Waltham. These were claims made at the outset of the Pre-Action Protocol Procedure.

At the first case management conference, one of the defendants sought an interim payment of £20,000 in respect of costs which they claimed were thrown away at the Pre-Action Protocol stage in considering and responding to these claims which had been abandoned by McGlinn. There was no direct authority on the question of the general recoverability of costs incurred in compliance with the Pre-Action Protocols. The Judge was of the view that as a matter of principle, costs incurred in so complying may be recoverable. The claims had been abandoned after court proceedings had been issued, then the defendants would have been entitled to their costs.

However, HHJ Coulson QC said that "save in exceptional cases", costs incurred by the defendant at the stage where Pre-Action Protocol in dealing with and responding to issues which are subsequently dropped when proceedings are commenced, cannot be cost incidental to those proceedings. As a matter of general principle, claims made at the time of the Protocol Procedure which were then deliberately excluded from the court proceedings bear no real relation to the subject of the litigation. Here, the proceedings have been narrowed such that there was only one real subject, being the defective work alleged by McGlinn.

The Judge also felt that it would be contrary to the whole purpose of the Pre-Action Protocols, which are an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had allegedly included in their Protocol claim letters. The whole purpose of the Protocol procedure is to narrow issues and allow a prospective defendant where possible to demonstrate to a prospective claimant that a particular claim is doomed to failure. This is what had happened here.

Therefore, unless these circumstances were exceptional and thereby gave rise to some sort of unreasonable conduct, costs incurred by the defendant at the Pre-Action Protocol stage in successfully persuading a claimant to abandon a claim, and not costs to the extent of any subsequent proceedings and are not therefore recoverable.

6. INTERNATIONAL ARBITRATION

As Simon Tolson indicated in his introduction to this year's Review, Fenwick Elliott is becoming increasingly involved in international work. One of the advantages Fenwick Elliott can offer is that London is one of the leading locations for international arbitration. As **Nicholas Gould** explains, a recent House of Lords decision has reinforced London's standing.

For many years London was considered one of the leading, if not the leading place to hold an international arbitration. In respect of international projects, it is not unusual for the place or the "seat" of the arbitration to take place in a different country to the location where the project was built. For example, a process engineering plant might be built in Indonesia by a joint venture German and Italian contractor for an employer based in Singapore, with funding provided by an American bank, and the contract providing that disputes will be resolved by arbitration in London.

The seat of the arbitration is fundamental. Parties need to know that the place where the arbitration is to be held has a local legal system that will support the arbitration, and a court system that will enforce the process.

So, in London the detailed provisions of the Arbitration Act 1996 would apply and the parties would have recourse to the court to provide the back-up and integrity required by the international community. The economic benefits to London are substantial. Not only does London, as the choice of seat, bring to the capital parties in dispute that need hotels to stay in and a venue for the arbitration, but it also provides work for lawyers and the many international consultancy experts that are based in the UK.

However, the English courts have been subject to the criticism that they intervene in the arbitration process by substituting their own decision for that of the arbitrators when the court considers that the arbitrators have made some error. On the one hand there is the need for the correct application of the law to the dispute, but opposing that view is the argument that the parties have chosen arbitration rather than litigation in order to resolve the dispute. Lord Justice Saville (as he was then) recognised that London was becoming a less attractive option because of the intervention of the English courts. He chaired the Departmental Advisory Committee on arbitration law that led to the introduction of the Arbitration Act 1996.

The aim of that Act was to substantially reduce the ability of the court to intervene in the arbitration process, thus aiming to restore London to the preferred choice of venue for international arbitrations.

It was hoped then that the Arbitration Act 1996 would restore London to pole position. This expectation was dealt a blow by the Court of Appeal in *Lesotho Highland Development Authority v Impregilo Spa & Others* [2003] EWCA Civ 1159. In that case the joint venture contractors constructed a dam in Lesotho. Disputes had arisen in respect of extra costs, and the arbitrators had decided that the award would be given in European currencies and that the contractor should be awarded interest from the date on which the claims became due.

The employer argued that the arbitrators had made an error of law, because the contract set out which currencies were applicable (the Lesotho Maloti), and Lesotho law did not recognise a claim for pre-award interest. The seat of the arbitration was London, the Arbitration Act 1996 applied and so the employer argued that the arbitrators had acted in "excess of their jurisdiction" under Section 68(2b) of the Arbitration Act 1996 and that the arbitrators could not grant pre-arbitration award interest under section 49 of the Act. The Court of Appeal agreed with the employer, holding that the arbitrators had acted in excess of their jurisdiction.

While there may have been some force in the argument that the arbitrators should have applied contractual currency to their award, the message that was sent to the international community was that the English courts were still keen to intervene in international arbitration awards.

However, all was not lost. The joint venture contractors appealed to the House of Lords, and the decision was issued on 30 June 2005 (*Lesotho Highland Development Authority v Impregilo Spa & Others* [2005] UKHL 43). By a majority the House of Lords concluded that the arbitrators might have made an error of law by selecting European currencies. The Arbitration Act 1996 did not allow them to disregard the substantive law applicable to the contract between the parties. Neither should they have awarded interest which ignored applicable Lesotho law. Nonetheless, the House of Lords went on to hold that an error of law does not necessarily mean that the arbitrators had acted in excessive of their jurisdiction. A "mere error of law" did not amount to an excessive of jurisdiction under section 68(2)b, and so the appeal was allowed.

The House of Lords considered that the Arbitration Act had to be interpreted in a businesslike manner in order to assist the arbitral process. Hopefully this decision will reinforce London as a prime location for international arbitrations, restoring confidence in the international community that the English courts will not interfere with an arbitration award made in London.

7. FREEDOM OF INFORMATION

The Freedom of Information Act 2000 (FOIA) came into full effect on 1 January 2005. It provides for a general right of access to information held by public authorities in England, Wales and Northern Ireland. In an extract from a paper, which can be found in

full on our website, **Victoria Russell** outlines some of the key effects of this legislation.

The FOIA applies to approximately 100,000 public authorities, operating at all levels, for example: central government departments and agencies; local authorities; NHS bodies, including individual GPs, dentists, opticians and pharmacists; schools, colleges and universities, the police, the armed forces, quangos, regulators and advisory bodies. Courts and tribunals are not covered by FOIA, neither are the security and intelligence services. UK public authorities that operate in Scotland are covered by the UK Act rather than the Scottish legislation.

FOIA lists out a number of organisations which it specifically designates as public authorities for the purposes of FOIA. Those relevant to the construction industry and the higher education sector include:

- the Building Regulations Advisory Committee,
- the Commission for Architecture and the Built Environment,
- the Construction Industry Training Board,
- the Council for Science and Technology,
- the Economic and Social Research Council,
- the Environment Agency,
- the Health and Safety Commission and Health and Safety Executive,
- the Higher Education Funding Councils for England and Wales, and
- the Medical Research Council.

The Lord Chancellor has been given the power to designate other bodies as public authorities if they carry out public functions, which power could, for example, conceivably be used to designate trade associations as public authorities where they are operating schemes for qualifying firms for technical competence under self-certification schemes. This power could also be used to designate private firms as public authorities where they are involved in PFI contracts, especially where they are running schools or prisons.

In essence, FOIA gives people a general right of access to information held by or on behalf of public authorities.

What information is covered by FOIA?

FOIA applies to any recorded information held by or on behalf of a public authority. This includes:

- Paper records
- E-mail
- Information stored on computer
- Audio or video cassettes
- Microfiches
- Maps
- Photographs
- Handwritten notes, or any other form of recorded information.

The language used in communications should therefore now reflect the possibility of future disclosure. E-mails forming part of the public record should be properly managed. Unrecorded information which is known to officials but not recorded is not covered.

The age of the information is irrelevant. The new rights of access apply to information recorded at any time, including information obtained before FOIA came into force.

There is nothing to stop the use of information obtained under FOIA in litigation. Requests are therefore likely to be made to support potential claims, as a form of "pre-action disclosure".

Anyone who destroys a record after the public authority has been asked for it, in order to prevent its disclosure, will be committing a criminal offence. However, it is not an offence to destroy records which have not yet been requested.

What is the justification for making such information available?

FOIA is intended to promote a culture of openness and accountability amongst public sector bodies, and therefore to facilitate better public understanding of how public authorities carry out their duties, why they make the decisions that they do, and how (and why) they spend public money.

The justifications put forward for freedom of information legislation are on the whole twofold, based both on principle and on pragmatism.

The principled justification is that government exists to serve those who elect it and who fund it by their taxes, and that where a government holds information then it does so on the public's behalf. Such information should therefore not be kept secret without good reason. This justification applies to the relationship between government and commercial organisations just as much as it does to the relationship between government and private individuals: government activity ultimately depends on the wealth created by commercial undertakings.

The pragmatic justification is that it is assumed that a more open style of government will lead to better informed public debate, and hence a better quality of decision making.

The concept of freedom of information actually evolved in China more than 1,200 years ago, during the Tang Dynasty. One of the early Chinese emperors, who ruled from 627 to 649, established an "Imperial Censorate", which not only recorded official government information but was also expected to scrutinise the government and its officials, criticise them where necessary and generally to expose misgovernance, bureaucratic inefficiencies and corruption.

Sweden was the first country to enact freedom of information legislation, in 1766. Two centuries later, the United States followed and many other countries now have mature FOIA regimes, including Australia, Canada and New Zealand.

The UK experience is unique: no other country has introduced a statutory freedom of information regime on to a system already working to a formalised non-statutory openness regime through a Code of Practice, which has hitherto been the case in the UK.

The right of access under FOIA

FOIA is summarised as:

An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them; and for connected purposes.

Section 1 provides as follows:

(1) Any person making a request for information to a public authority is entitled:

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him.

Note that FOIA refers to "information" not "documents". Information requested will be extracted from any relevant document(s), but the whole document(s) will not necessarily be supplied.

It is important to note that FOIA applies not only to information *held by* a public authority but also to information held *on behalf of* a public body. A private contractor holding information on behalf of a public authority could be the direct recipient of a request for information or could be contacted by the public authority on whose behalf it holds the information in order to respond to a request. However, the obligation to respond to requests under FOIA is upon the public authority only, and private contractors should therefore not respond to requests, but should forward any requests received directly to the public authority as soon as possible. The private contractor's obligations in assisting with responding to requests for information held by them on behalf of the public authority will be determined by the contract under which the information is held. This should also determine who will bear the costs of collating information in response to a request.

Exemptions

Section 2 sets out the circumstances under which a public authority may refuse a request. In broad terms, these are as follows:

- Absolute exemptions. These are cases where the right to know is wholly dis-applied. In some cases there is no legal right of access at all, for instance information supplied by or relating to bodies dealing with security matters. In other cases, for instance information available to the

applicant by other means, or personal information relating to the applicant, it may be possible to obtain the information by alternative means although not through FOIA.

- Qualified exemptions. These are cases where a public authority, having identified a possible exemption, must consider whether there is a greater public interest in confirming or denying the existence of the information requested and providing the information to the applicant or in maintaining the exemption.

There are 23 categories of "exempt information" in FOIA, including:

- Information accessible to the applicant by other means.
- Information intended for future publication.
- Information supplied by, or relating to, bodies dealing with security matters.
- Information relating to national security, defence, international relations, relations within the United Kingdom.
- Information the disclosure of which would, or would be likely to, prejudice the economic interests of the UK or the financial interests of any administration in the UK.
- Information the disclosure of which would, or would be likely to, prejudice law enforcement.
- Information relating to the formulation of government policy.
- Information the disclosure of which would, or would be likely to, prejudice the effective conduct of public affairs.
- Information the disclosure of which would, or would be likely to, endanger the health and safety of any individual.
- Information relating to personal data.
- Information provided in confidence.
- Information which constitutes a trade secret.
- Information the disclosure of which would prejudice the commercial interests of any person.

A public authority cannot contract out of its responsibilities under FOIA and unless information is covered by an exemption it must therefore be released if requested.

Section 41: Information provided in confidence

Section 41 of FOIA provides that:

(1) Information is exempt information if
  (a) it was obtained by the public authority from any other person (including another public authority), and
  (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial would constitute an actionable breach of confidence.

There are thus two components to this exemption:

1. The information must have been obtained by the public authority from "any other person"; a "person" may be an individual, a company, a local authority or any other legal entity.

   The exemption does *not* cover information which the public authority has generated itself, although this may be covered by another exemption, under section 43, where disclosure of the information may prejudice the commercial interests of the public authority: see below.

2. Disclosure of the information would give rise to an actionable breach of confidence, in other words, if the public authority disclosed the information, the provider or a third party could take the public authority to court.

   A duty of confidence arises when one person (the "confidant") is provided with information by another (the "confider") in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected, for example a person whose details were included in the information confided, may have the right to take action through the courts.

Section 43: Trade secrets and commercial interests

Under section 43, information is exempt information if it constitutes a trade secret. However, the FOIA does not define a "trade secret", nor is there any precise definition in English law. However, the essence of a trade secret is generally regarded as comprising the following:

1. It must be information used in a trade or business. Information may be commercially sensitive without being the sort of secret which gives a company a "competitive edge" over its rivals which would constitute a "trade secret". The Information Commissioner gives an example of a public authority holding information about the state of repair of a manufacturer's equipment. While information about the *design* of the equipment may constitute a trade secret, information about its state of repair would not (even though it may be commercially sensitive) since it is not information which is used to help generate profits.

2. It is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. In considering cases involving former employees, the courts have often found that the question of whether or not the employee knew that disputed information was a trade secret was important.

3. The owner must limit the dissemination of the information or, at least, not encourage or permit widespread publication of it. It may be a statutory requirement for the information to be published in some form, e.g. at the Land Registry, Companies House, etc. and the information may therefore already be common knowledge in the business community. If the information is known beyond a narrow circle, then it is unlikely to constitute a trade secret.

Trade secrets are normally associated with matters such as secret processes of manufacture, special formulae, etc., in other words the idea of something commercially valuable in its own right which is private to the owner. How easy would it be for competitors to discover or reproduce the information for themselves? The Information Commissioner says that "generally, the less skill, effort or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret."

Information relating to a company's solvency, its ability to carry on business and its relationship with its holding company, although commercially sensitive, does not constitute a trade secret.

The Irish Information Commissioner has held that the price of a bid could constitute a trade secret up until the time the bid was accepted [Decision No. 9849, 31 March 1999].

FOIA applies equally to a public authority's own trade secrets as well as to those of, for example, a contractor or consultant with whom it is doing business.

A "commercial interest" is regarded as relating to an activity in the way of a business, trade or profession; as in the case of trade secrets, FOIA applies equally to the

commercial interests of a public authority as well as to those of external organisations.

When it comes to considering a public authority's own commercial interests, a range of circumstances may be applicable, for example the authority's position in the marketplace, both as a purchaser and as a supplier.

The prejudice to the commercial interests of a public authority must however be contrasted with prejudice to other interests, such as the public authority's political or other interests which are not protected by this exemption.

There is a distinction between commercial interests and financial interests, which the DCA Guidance describes as follows:

> A commercial interest relates to a person's ability successfully to participate in a commercial activity, whereas …
>
> A financial interest concerns the financial position of an individual or organisation.
>
> Although the commercial and financial interests of a commercial entity may be extremely closely related if it has a weak financial position, that will almost certainly affect its ability to engage in commercial activity that is not necessarily so in the case of a public authority.

Section 43(2) is a prejudice-based exemption, with the test being whether or not the commercial interests concerned would, or would be likely to, be prejudiced by disclosure.

Section 43(3) provides an exemption from the duty to confirm or deny whether or not the public authority holds information which could prejudice commercial interests, where acknowledging this could in itself be prejudicial.

This section is subject to the public interest test set out in section 2 of the Act. It does not apply beyond 30 years, the point at which information becomes a "historical record".

When could releasing information cause prejudice to commercial interests?

The DCA Guidance states as follows:

In order to decide whether or not disclosure could prejudice commercial interests, it is necessary to identify:

- The interests themselves and how disclosure might prejudice them, and
- Whose interests they are.

A [public authority's] or other body's commercial interests might, for example, be prejudiced where disclosure would be likely to:

- Damage its business reputation or the confidence that customers, suppliers or investors may have in it;
- Have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance; or
- Weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors.

The Information Commissioner's checklist is as follows:

1. Does the information relate to, or could it impact on, a commercial activity?
2. Is that commercial activity conducted in a competitive environment?
3. Would there be damage to reputation or business confidence?
4. Whose commercial interests are affected?
5. Is the information commercially sensitive?
6. What is the likelihood of the prejudice being caused?

Procurement-related information

Procurement-related information is likely to be the subject of a significant number of FOIA requests. A substantial amount of procurement-related information is likely to be commercially sensitive at some stage. The terms on which it was supplied will have a bearing on the assessment of whether or not the information should be disclosed.

Although there will generally speaking be a public interest in the disclosure of commercial information generated in relation to procurement, there will also be examples where the application of section 43 should be considered, including:

- Information relating to general/preliminary procurement activities, which the DCA Guidance suggests would include "market sounding information, information relating to programme, project and procurement strategies, and contextual information about the [public] authority, its business objectives and plans";

- Information relating to supplier selection, such as "qualification information for potential bidders, information about requirements including specifications, details of the qualification process, and details of qualified bidders";

- Information relating to contract negotiation and award, for example "bids, papers about capabilities of bidders, evaluations of bids, negotiating briefs and recommendations, the contract, information about successful bid and bidder, and information about other bids and bidders"; and

- Information relating to contract performance and post-contract activities, for example "information about implementation, information about performance, information about contract amendments with supporting papers, and information which may be provided and reviewed by third parties (e.g. consultants/auditors)".

It is important also to remember that the requirements of the public procurement regime need to be taken into account in relation to the possible disclosure of commercial information; the EU Directives and Regulations recognise that the interest of suppliers in sensitive information supplied by them in procurement must be respected and that both the interests of suppliers and the public interest may combine to mean that certain information relating to a contract award is withheld from publication.

The likelihood of relying successfully on this exemption to resist disclosure appears to be greater for unsuccessful bidders. The Irish and Western Australian Information Commissioners have both upheld the reliance on this exemption in the context of product and tender information supplied by unsuccessful bidders: *Re Mark Henry and Office of Public Works, Information Commissioner* Decision No. 98188, 25 June 2001, and *Re Maddock, Lonie & Chisholm and Department of State Services* [1995] WAICmr 15 (2 June 1995).

In the Australian case of *Re Byrne and Swan Hill Rural City Council* [2000] VCAT 666 (31 March 2000), in which the requested information was disclosed despite its commercial sensitivity, two important benefits of allowing access to the information were recognised: there was public interest in knowing what the public body "was promised by way of operational performance" in order to enable the public to monitor whether the contractor was meeting performance standards and "the wider public and certainly the … rate payers [had] an interest in informing themselves as to the fitness of the operator of one of their public facilities". The ruling in this case serves to demonstrate that a successful tenderer will be more vulnerable than an unsuccessful tenderer when it comes to the public interest test.

Conclusion

Whilst the true extent of freedom of information under FOIA has yet to be seen, it is clear that public procurement information will in many cases be subject to a presumption of disclosure. It is important for public authorities and private contractors/consultants to be aware of the legislative requirements and their potential implications.

8. PARTNERING – USE OF CONTRACTS

Dr Julian Critchlow was one of the Fenwick Elliott speakers at our first Seminar for the Education Sector, when he explained the relationship between partnering and the contractual structure of a project. In April 2005, he gave a talk at a seminar entitled "Controlling Costs in Social Housing Through Supply Chain Partnering". The aim of the talk, which is set out below, was to demonstrate through the use of practical examples, which partnering contract to use and when:

The Standard Forms of Contract have been subject to much criticism. For example, Sachs LJ in *Bickerton v NW Metropolitan Hospital Board* [1967] 1 ALL ER 97 at 978-9 referred to:

> …the unnecessarily tortuous and amorphous provisions of the RIBA Contract….the position reflects no credit on the RIBA. It is lamentable……and deviously drafted with what in parts can only be a calculated lack of forthright clarity.

Similarly, Salmon LJ in *Peake Construction v McKinney Foundations* (1971) 69 LGR 1 said that:

> Indeed, if a prize were to be offered for a form of building contract which contained the most one-sided, obscurely and ineptly drafted clauses in the United Kingdom, the claim of this contract could hardly be ignored, even if the RIBA Form of Contract was amongst the competitors.

More recently, the damage that can be done to construction projects by Standard Forms was articulated by Prof. Duncan Wallace who stated that:

> …..the steady current of change in the Standard Forms over the past three decades has given rise to a whole new industry – the claims industry – with a new self-appointed profession of "claims consultants" and advisers advising their services and professing expertise in the exploitation of the Standard Forms, and not infrequently stipulating for a semi-champertous remuneration expressed as a percentage of the sums recovered.

Historically, there is much anecdotal evidence to suggest that the claims mentality was much less aggressively apparent prior to the 1970s and 1980s. Projects proceeded without resort to formal dispute processes because the parties' relationships worked better than they often do today, largely because of a greater degree of mutual trust. In recent years a series of attempts have been made to turn the tide in the English Construction Industry, attempts that have received considerable impetus from the Latham and Egan Reports. However, whilst there appears to be something of a consensus in the Industry that collaborative working practices can significantly improve efficiency, financial gains, safety, and satisfaction for all concerned in the construction process, there is far from unanimity as to how collaborative working should be achieved.

There is very much rhetoric surrounding the subject but, with the exception of initiatives such as the Reading University Report, there remains comparatively little published material upon which to found commonly accepted partnering principles, and still less on how the laudable aims of partnering might be furthered. For example, the Strategic Forum has recently produced its document "Accelerating Change" which contains a considerable amount of exhortation but few indications of how to proceed in practice. Thus, the Document calls for an Industry with:

> Clients (experienced and inexperienced) procuring and specifying sustainable construction projects, products and services and a supply side that responds collaboratively to deliver these in a way that enables all in the integrated team to maximise, demonstrate, and measure the added value their experts can deliver.

It is questionable to what extent material of that kind assists the practical formulation of partnering techniques. It is, therefore, instructive to consider certain specific projects, very different in character, and examine how the participants have approached the need for collaboration in practical terms.

The University

The University had both an extensive Campus and an ambitious scheme for new build development. As such, the University is a fairly sophisticated purchaser of

construction services. However, it is unable to hold out to potential suppliers (contractors, consultants, etc.) a steady flow of high value work in the manner of organisations such as BAA and the major utilities. Nevertheless, their experience of traditional contracting under Standard Forms had not been satisfactory and they had the foresight to perceive that collaborative working could greatly assist future projects.

So, given the absence of a steady stream of work over many years, the use of a framework agreement regulating a series of projects was inapposite. Instead, the University contemplated successive projects that would each be subject to individual project partnering agreements. The University was well aware that forging effective teams for single projects can be difficult: there is insufficient time for relationships to develop.

To minimise the problem the University sought tenders from consortia rather than from individual contractors, those consortia to provide a comprehensive service comprising establishing the University's detailed requirements, design, and construction. This ensured that all those involved in the project, if they had not actually worked together before, at least had an active desire to do so; and it also had the effect of involving the consortium in the project from the conception stage so that they had a thorough understanding of the University's requirements.

To ensure that the University did not itself become isolated as against the consortium (since the consultant team was not instructed by the University separately), the University employed an independent project manager for the first project. However, success of that project, gave them the confidence to undertake project management in-house for the second project. They also appointed a Partnering Adviser who was responsible not just to the University but to all those involved with the project as a resource for advising on the partnering relationship and to assist with the speedy and appropriate resolution of any disputes that might arise.

Each of the consortium members was a party to the legal contract, and not just the lead contractor or consultant. That tied all concerned closely into the production matrix although the University recognised that, in doing this, they lost the advantage of having a single point of contractual responsibility.

The University then faced the question of how to incorporate partnering principles into the contract without serious legal exposure in the event of problems. They were aware that they did not have the power in the market place to limit problems by holding out the offer of significant work in the future. They were also aware that, however strong the relationship might be at the beginning of a project, relationships can deteriorate for many reasons, some of them external to the interrelation between the parties. Thus, a contractor could suffer cash flow problems or, worse, become insolvent.

The University's perception was that a receiver or liquidator would be highly unlikely to intervene in a partnering spirit. On the other hand, they wished to avoid the rigid and adversarial nature of the Standard Forms. PPC 2000 was considered but rejected on the basis that whilst many of its mechanisms were useful, its attempt to turn the language of partnering into binding legal obligations could cause immense difficulties.

Take, for example, Clause 4.2 of PPC 2000. It provides that:

> Each Partnering Team Member undertakes to the others to do all that it can, within its agreed role, expertise and responsibilities and in accordance with the Partnering Documents, to implement the recommendations identified by the construction Task Force in their July 1998 Report "Rethinking Construction" and to pursue for the benefit of the Project and for the mutual benefit of Partnering Team Members the targets stated in the KPIs.

This nebulous phraseology is supposed to amount to a binding legal obligation. It potentially means that every phrase of the Egan Report becomes a binding contractual obligation. That Report provides, *inter-alia*, under the heading "Improving Conditions on Site" that Tesco Stores has benefited in its projects from introducing visitors' centres, on-site canteens, changing rooms and showers on sites. PPC 2000 could, therefore, be construed so as to make such provisions a binding obligation on, presumably, the employer.

Again, the provision in Clause 3.1 for transparency of information could have the unwanted consequent of abrogating legal professional privilege (ie confidentiality between a party and his legal advisers).

Accordingly, the University elected a two-stage process. The first stage was pre-construction and concerned the production of detailed design and costing information. This process enabled the University to communicate its requirements in considerable detail and to ensure that the product accurately reflected those requirements without the need for significant change during the build phase. Further, given the preliminary nature of this initial exercise, it was possible to incorporate many partnering mechanisms without importing significant risk of the sort identified above in respect of PPC 2000. The agreement, accordingly, provided for:

- the appointment of a partnering adviser;
- the formation of a Core Group;
- dispute resolution as administered by the Core Group;
- incentives as determined by the Core Group;
- production of a risk register and assessment of risk.

Once the deliverables in terms of specification and programme had been produced according to the initial contract, it was then possible to have the work itself undertaken according to a Standard Form of Construction Contract (in this case JCT 1998 with Contractor's Design with certain bespoke amendments.

The entire arrangement was produced jointly with the consortium who were involved in the project more or less from its conception and collaborated in formulation of the contract terms. Participation was initially by way of open forum and, once the contracts were put into operation, communication was continued through meetings of the Core Group and Partnering Workshops.

Hitherto, the University has found that its projects have proceeded without dispute and time and budget. Thus, the University has taken the benefit of aspects of partnering whilst, at the same time, protecting its legal position should problems arise.

The Retailer

The Retailer's position differs from the University's. Their need for construction services is much longer term, albeit that the project cost is generally lower and involves more maintenance than new build. However, its construction turnover is such that it can offer the incentive of significant and regular work to suppliers. Consequently, relationships can be forged over a longer period and there is a commercial imperative on suppliers to ensure that their relationship is satisfactorily maintained. Therefore, the Retailer has decided to devise a Collaboration Agreement to be entered into with each of its suppliers with a Standard Form of Project - Specific Contract operating under its aegis. Its firm wish is to operate in a true spirit of openness and trust and to adopt an approach which, if appropriate, will be wholly emotive. Indeed, to this end, they have undertaken a number of projects without any formal contract at all. They do recognise that the absence of a formal written contract does not mean that no contractual obligations can arise between the participants. Thus, if the Retailer to carry out the work within a reasonable time, and an entitlement to be paid a reasonable sum. Certainly, where the relationship is a strong one, determining such rights and liabilities can be done in a spirit of cooperation.

However, there is potentially greater efficiency in the process if all participants have, from the beginning, a clear understanding of their rights and obligations. Furthermore, in the absence of a contract, risk lies where it falls: and this may not comprise an appropriate allegation of risk.

Thus, if a contractor has an obligation to complete within a reasonable time, he will get full credit for all neutral events, such as exceptionally adverse weather. However, commercially, a sharing of risk (e.g. an extension of time but no additional money) may be more appropriate. Equally, as in respect of the University, the Retailer was concerned to ensure that excessive contractual detail did not polarize the parties and inhibit cooperation. They have sought, therefore, to try to obtain the best

of all worlds by retaining the principal legal obligations within the project-specific contracts and importing those partnering obligations that are not readily susceptible to becoming legal obligations into the Collaboration Agreement.

Thus, Collaboration Agreement and a copy of the original draft on which the Collaboration Agreement was based is enclosed with these notes (is expressed to be outside the formal contractual matrix). This has allowed for the inclusion of requirements such as to work in a relationship characterised by efficiency, honesty, openness, and cooperation. As observed earlier, such obligations can have unforeseen and unwanted consequences if translated into contractual terms. For example, it might be argued that an obligation on the employer to cooperate would require him to abandon the strict terms of the contract as to timing so as to require him to allow additional time, beyond that stipulated in the contract, for a submission of a claim. There are already indications that the courts may well have regard to partnering terms of this kind when construing the parties' strict legal entitlements – see *Birse Construction Limited v St. David Limited* (2000) BLR 57.

Despite being extra-contractual, the Collaboration Agreement does nevertheless have practical significance: it goes beyond a mere assertion of how the parties agree to interrelate. The headings include achieving best practice, health and safety, quality, environment, risk and identification, concurrent engineering, efficiency, training, and a framework management team.

The Framework Management Team is of particular significance. It encompasses representatives from each of the principal participants and is responsible for coordination of new projects, formation of joint management teams (or Core Groups) for individual projects, arranging partnering workshops, liaising with management teams, and forming a Disputes Resolution Panel. As to the latter, the distinguishing characteristic of an effective partnering arrangement is not the absence of disputes but their swift and efficient resolution achieved without damage to the parties' relationships.

The standard contract for individual projects has yet to crystallise. However, it is envisaged that, in the first instance, it will be short – not more than about 10 pages (as opposed to 100 pages for JCT 1998). The Retailer takes the view that excessive detailing of contractual rights and responsibilities is more likely to encourage disputes rather than forestall them. The contract is intended to incorporate partnering mechanisms including key performance indicators, other incentives for completion below budget, a risk register, a free flow of information, and open book accounting.

Conclusion

Lessons that can be learned from these experiences are that:

- partnering is not a single, monolithic process, and different techniques fit different circumstances;
- there is a big advantage in ensuring that the project teams are compatible and in involving the whole team in the procurement process;
- some partnering terms may best be kept outside of the legal contractual terms applying to the individual project;
- there is often an advantage in short, straightforward contracts: simplicity helps reduce disputes, and very complicated terms are particularly unnecessary where there are strong partnering relationships across the project team.

9. KEY STRATEGIC ISSUES AT THE INITIATION PHASE OF A CONSTRUCTION PROJECT

With project management becoming more established as a distinct profession offering value added services to the client, also commonly termed as an employer/owner, more clients are now looking for single person or single organization responsible for the overall shaping, directing and delivery of their construction projects. **Chau Ee Lee** discusses some key strategic issues which must be considered during the crucial project initiation phase of a construction project from a project team's perspective to effectively manage an emerging construction project, regardless of size and complexity.

Issues

Broadly speaking, some key strategic issues include the project aims/objectives, the briefing process, the building project advice process and the management of the design process.

Management of the Project Aims/Objectives

The expectations of the client in relation to these factors time of cost and quality are to be made explicitly at this crucial initiation phase of the project as these factors, when combined together, form the framework by which eventual project risks and performance can be evaluated. In this context, these three factors form the primary criteria that are conventionally used to measure project performance.

There are two key needs. There is the real need to organise and deliver the project so that it is ready for commissioning and occupation in accordance with the client's original request. This goes hand in hand with the requirement to establish key or milestone dates that must be met if the project is to meet its deadline. Such milestones can initially be set at high or strategic levels in terms of the project overall. Significant dates or milestones for the overall project must of course include the date for contract documentation completion, the date for possession of the site, the date of practical completion, the dates for final handover of the completed building.

There is generally a cost constraint in that there may be limited financial resources allocated to a project. Therefore it may be necessary to look into two key areas. On the one hand, the evaluation of the initial project price forecast is crucial as this is required to develop a meaningful management cost control system or what is commonly known as MCCS. The identification of design cost limits, associated fee levels, overall initial construction and relevant whole life construction cost limits are crucial as the availability of such reliable cost information will enable the client to make decisions on whether the project should proceed and if so, which proposal would facilitate the optimum use of finance.

There must be in place a draft quality statement setting out the anticipated quality plan, quality assurance requirements and outline specifications for the workmanship to be achieved for the project when considering the quality factor. Such information reliably communicated to the client will ensure that the relevant standards that can be achieved with the project budget are made known to the client.

Management of the briefing process

At the briefing process, the client has to make clear what it wants and needs from the project. In particular, key concerns to be addressed include establishment of client empowerment, management of project dynamics, end-user involvement, and the use of appropriate visualisation techniques and team-building processes.

To establish client empowerment, it would be necessary that the client's real business aims in relation to the project and its full organisational situation be disclosed with the assistance of an internal project manager. Once there is an establishment of client empowerment, certain issues can be addressed. These issues include ensuring that the client is aware of its full range of business activities and of the real project constraints faced by the construction team in providing a solution to the needs identified. This also serves to encourage the client's active participation in the development of the projects thereby ensuring that the project manager can interact with the most appropriate member of the client's organisation in terms of authority and that the necessary support is available for that person in terms of access to senior decision-makers in the client's organisation.

The proper management of project dynamics means that the client has to clearly identify any real project constraints as soon as possible, and key objectives such as time, cost and quality are fully addressed and made explicit as soon as possible. It would also be necessary for the client to develop and encourage a sense of ownership of a project programme that shows key milestones or dates by which definite parts of the project are required and can be delivered by the construction team. Finally, the client is to agree with the project team

on methods of interacting and working together towards the common goal of project completion and satisfaction, and ensure that this process is given a life by being seen as a continuous process that actively seeks out feedback so as to strive for continued development and improvement.

To ensure that the appropriate visualisation techniques are used such that they lead to appropriate end-user involvement, it is necessary that resources are allocated for adopting the latest technology so as to provide a visual means by which the client's needs and the project team's initial responses can be better communicated between the parties concerned. It is essential that the client is prepared to commit to this financial "burden" so that these facilities that make use of computerised visualisation techniques to simulate responses and create virtual building projects within which the client can experience what the finished project will look and feel like.

Naturally, there must be in place appropriate team-building processes where the client has to be aware of the need to select its team on the basis of skills and ability and not based strictly on the lowest price. Following this, there have to be resources provided to ensure that the team, once assembled, understands the management structure of the proposed project. When this process of team-building is set up, the team members are encouraged to try and ensure that the actual individuals that make up the project team remain as constant as possible throughout the life of the project.

Management of building project price advice process

Once there is sufficient information from the client about the project, it is appropriate to engage in managing the issues faced in the project which are related to the development of the design and the formulation of a reliable early stage project price forecast. These two processes are often undertaken in a concurrent manner. The generation of a reliable initial project budget figure is an essential first step towards setting up a cost control system that will ensure that the project as envisaged at the design stage is in fact delivered within the budget agreed with the client. This price advice process and its formulation will have to be made known to both the client and the project team.

Management of the design process

To ensure that the design process serves to manage the project and not just to monitor the output or product of the designers, three key elements have to be present. Firstly, a framework that sets out design tasks needed to achieve recognised stages of design development. Secondly, there must be time/space for reflection, interaction and access to the client to ensure that the appropriate problem has been identified and the optimum design solution is adopted. Lastly, there has to be adequate resources identified to provide support to allow the design process to progress and the installation of a design manager dedicated to delivering predetermined tasks within agreed constraints.

In order that the above three criteria are fulfilled, one has to look into the design management principles, the critical issues relating to design management and the design management activities.

Design management principles require that the following steps be taken so that a framework is set out for the design tasks needed to achieve recognised stages of design development. This framework requires the design management team to be identified and their responsibilities made explicit in terms of the programme and the responsibilities of individuals within the programme, the coordination of input and output to the design and the responsibility for its quality evaluation (which requires the identification of internal responsibility for design production and design decision-making) and responsibility for organisational interface management (and, if necessary, to develop a network of internal design managers).

Critical issues relating to design management will invariably arise. It is important therefore that there is sufficient time/space for reflection, interaction and access to the client's organisation. To make sure that the appropriate problem has been identified and the optimum design solution is adopted, two important aspects have to be taken care of. Firstly, milestones are to be

set up and agreed upon so that the emergent design can be recognised and ensuing activities implemented. This can be achieved by a formal procedure of "signing-off" whereby the relevant designers responsible for originating that portion of the design, the relevant designers who will subsequently use this design and the project team/project manager of the project agree that the work produced is fit for purpose. Secondly, for an appropriate team approach, it is prudent to appoint/identify the design leader at each stage of the process and set out a design management system by which conflicts can be resolved.

The major milestones related to the emergent design are termed as the "business case" stage, "concept design" stage and "sketch design" stage. For the "business case" stage, the project team/project manager and the design team need to determine the actual project aims and objectives. The "concept design" stage requires the project team/project manager and the design team to utilise recognised value management techniques to evaluate options and determine priorities for action. As the initial design information emerges, the project manager must manage the contributions of the project team and allocate sufficient resources to draft an initial strategic project plan - which is meant to determine the overall strategies for the project and capture and record the proposed decision-making structure between the project participants. The sketch design stage involves the project manager and the design team refining the agreed concept proposals so that the appearance and proposed layout of the project are made explicit and the principal structural and component options are determined.

The management of the design process also includes the important criterion of project team-building and leadership. Construction project teams are unusual in that they are highly multidisciplinary. Architects, engineers, surveyors and project managers have their own specialisations and their own professional responsibilities. In addition, projects tend to be complex and have a relatively short lifespan, thereby giving rise to a significant learning curve in relation to the lifespan of projects as a whole.

Construction project teams tend to suffer from high levels of sentience and interdependency and, as a result, they have definite team-building performance requirements. As a result of the sentience problem, the natural characteristics of the group are for a group of specialists to work on their own particular areas without effective communication. This will invariably lead to differentiation, which is the tendency for teams to fragment.

Integration is a basic requirement for teams that tend to differentiate. Integration is simply the extent and process of defining responsibilities and control. A highly integrated team is one where everybody knows exactly what he or she has to do in order to meet the targets. A non-integrated team is one where there are no specified targets and everybody can do more or less what they think is best at any one time.

Generally, the more multidisciplinary the team, the higher the tendency towards sentience and interdependency. In such cases, highly structured teams tend to develop. This is also the case where the project is relatively complex and where a long learning curve may be evident. More differentiated teams might work better in other situations, depending on the nature of the project and on the specific objectives that are required.

Given the nature and structure of a construction project team, there has to be in place a good team-building process. This process usually includes eight primary sections. They include establishing commitment, developing team spirit, obtaining the necessary resources, establishment of both clear goals and success/failure criteria, formulation of senior management support, demonstration of an effective programme leadership, development of open communications, the application of reward retribution systems and the control of conflict between parties.

Conclusion

During the crucial project initiation phase, a proactive approach to address these more strategic issues as well as a proactive approach to develop an effective culture of teamwork amongst the differing design organisations likely to be involved at the start of the project will help to ensure effective delivery of the project's agreed key performance indicators.

10. FENWICK ELLIOTT NEWS

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

Charlene Linneman joined as an assistant solicitor in May 2005. Charlene previously worked in the construction team at Australian firms McCullogh Robertson and Mallesons before joining Curtis David Garrard when she moved to England.

Yann Guermonprez joined as an assistant solicitor in July 2005 from White Case LLP in Paris. Yann, who has a LLB from King's College London and a Master of Private Law from the Surbonne in Paris, has considerable experience in international and domestic proceedings.

Samantha Manalo joined as an assistant solicitor in August 2005 from Davies Arnold Cooper. Samantha previously worked in the construction team at New Zealand firm Kensington Swan.

In addition we are also pleased to announce that Stefan Cucos, who joined Fenwick Elliott in April 2003, having qualified as a solicitor in July 2005, has joined our team of assistants.

Education seminars

In addition to our regular Adjudication Update Seminars, in October 2004, we held our first seminar for the education sector. Copies of the papers given by Mathew Needham-Laing (Complying with public procurement law) and Dr Julian Critchlow (Scheduling and executing the project: delay, disruption and change management) can be found at our website at www.fenwickelliott.co.uk/pages/articles_cont.htm.

Our next education seminar, to be chaired by Lord O'Neill, will be held on 1 November 2005. Topics for discussion will include procurement project management, the Building Schedule for the uture programme and the Freedom of Information Act. For further information please contact Victoria Russell.

Website

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

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

11. CASE ROUND-UP

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

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

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

Finally, there is our monthly bulletin entitled *Dispatch*, which is available in hard copy or electronic form, and has now been running for over five years. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.co.uk. If you would like to receive a copy every month, please contact Jeremy Glover.

We have split the case round-up into two, and deal first with summaries of some of the most recent adjudication cases, which are taken from *Dispatch*. Then we set out summaries of some of the more important other cases, starting with one from the *Building* website and then continuing with further cases from CILL. An index appears at the end of this review.

ADJUDICATION

Amec Projects Ltd v Whitefriars City Estates Ltd

Amec entered into a contract incorporating the JCT Standard Form of Contractors Design which provided for the reference of disputes to an adjudicator either appointed by agreement or when there was no agreement, by the individual named as the adjudicator in Appendix 1 to the contract or in the event of his unavailability a person nominated by that person. A dispute arose and Amec successfully referred the matter to an adjudicator. However, the adjudicator the matter was referred to was not the adjudicator named in the contract. Accordingly, the court refused to enforce the award because as the adjudicator was not the named adjudicator, he did not have jurisdiction.

Amec tried to refer the same dispute to adjudication again but before the matter could be referred, the named adjudicator died. Amec said that as the contractual mechanism for appointing an adjudicator had broken down, the Scheme would apply. Amec thus sought the appointment of the original adjudicator. He again made an award in Amec's favour. Whitefriars again refused to pay.

The Judge at first instance said that the correct contractual machinery had been applied but also held that there had been breaches of natural justice. Both parties appealed. The CA agreed that the second adjudicator did have jurisdiction. The adjudicator named under the contract could not be the adjudicator because he was unavailable and he had not nominated an adjudicator. Therefore the default machinery of the Scheme had to apply.

Whitefriars did not submit that the adjudicator was in fact biased in reaching his second decision. Whitefriars claimed that the decision should be declared invalid on the grounds of apparent bias - that is whether a fair-minded and informed observer, having considered all the circumstances, would conclude that the decision was biased, or that there was a real possibility that it was biased. The difficulty here was that the adjudicator had been nominated to decide the same issue as he had purportedly decided in the first adjudication. Could the adjudicator be relied upon to approach the issue on the second case with an open mind, or was there a real (as opposed to fanciful) possibility that he would approach his task with a closed mind, predisposed to reach the same conclusions as before regardless of the evidence and arguments that might be adduced?

Dyson LJ said that the mere fact that the adjudicator had previously decided the issue was not of itself sufficient to justify a conclusion of apparent bias. The adjudicator should be assumed to be trustworthy and to understand that he should approach every case with an open mind. Whilst it would be unrealistic to expect him to ignore his earlier decision, he must be careful not to approach any re-hearing with a closed mind. There must be something of substance. Dyson LJ observed that the intentions of Parliament vis-à-vis adjudication would be undermined if allegations of breaches of natural justice were not examined critically when they are raised by parties who are seeking to avoid complying with an adjudicator's decision.

One reason advanced here was that Amec's solicitors had spoken to the adjudicator once he had been reappointed. They indicated that the reason why the dispute was referred back was that as he was familiar with the facts, this would save time and costs. Dyson LJ did not accept that this remark amounted to an invitation to the adjudicator to reach the same decision as on the previous occasion.

Balfour Beatty v Serco Limited

Serco engaged BB to design, supply and install variable message signs at locations on motorways. By an adjudication decision, BB were awarded an extension of time providing a revised completion date of 7 June 2004 and also the sum of £620,000 plus VAT. Serco refused to pay saying that as at 6 December 2004 the works were not practically complete. Thus it was entitled to levy liquidated and ascertained damages (LADs) for the period after 7 June 2004. This sum exceeded the sum payable to BB.

Mr Jackson noted that the adjudicator had granted an interim extension of time and awarded loss and expense in respect of the period of the extension. He did not refuse to

grant any further extension of time. He had not been asked to do so and the question was left open. Mr Jackson then considered the various authorities about whether you can setoff against an adjudicator's decision including *Levolux v Ferson*. He concluded that where it follows logically from a decision that the employer is entitled to recover a specific sum by way of LADs, then the employer may set-off that sum against monies payable to the contractor or pursuant to a decision, provided proper notice, if required, is given. Where the entitlement to LADs has not been determined either expressly or impliedly by a decision, then the question of whether an employer is entitled to set-off LADs would depend upon the contract terms and the circumstances of the case.

Here, the adjudicator had not reached any definitive conclusion as to the total extension of time due to BB. Thus no specific entitlement to LADs followed logically from the decision. As the contract required that both parties give effect to the decision forthwith, BB were entitled to payment.

Carillion Construction Ltd v Devonport Royal Dockyard

This cases arises from a project involving the fit-out of a submarine dockyard. The dispute here arose after completion. It was one of those big disputes, which some judges have suggested are not really suitable for adjudication. Carillion sought over £10 million and the adjudicator ended up with over 29 lever-arch files of material. As a consequence, the dispute could not be resolved within 28 days and the adjudicator asked for and received two extensions. He therefore had 10 weeks to come to a decision. Carillion were awarded over £10 million. Devonport declined to pay.

Mr Justice Jackson in his judgment reviewed the recent case law and set out four basic principles which he said applied to any attempt to enforce an adjudicator's decision:

(i) The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);

(ii) The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;

(iii) Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;

(iv) Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice.

One of the issues discussed was Devonport's contention that the adjudicator's decision on defects was reached in breach of the rules of natural justice and was not supported by any, or any adequate, reasons. Here, the adjudicator had reduced the Devonport claim for defects from £2.9 million to £2.3 million. In fact, Devonport suggested that their claim for defects was much higher, but the Judge accepted that the adjudicator had considered this aspect of the Devonport claim and rejected it. Accordingly, even if that decision was wrong, it could not be argued that it was something the adjudicator had failed to address.

Here, the adjudicator had accepted the original claim for defects, but made a modest reduction in quantum for what the Judge said were perfectly sensible reasons. This reduction amounted to about 20%, a small sum in the context of the overall dispute. The reduction in quantum was said by the Judge to be the result of the adjudicator casting a critical eye over the expert evidence.

This was precisely the kind of exercise which one would expect the adjudicator (who was himself an experienced engineer) to undertake. It was unrealistic in a case such as this, to expect an adjudicator, who may be struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature. Again, the Judge considered that the

adjudicator had properly considered the claims put before him.

Mr Justice Jackson also had to consider interest. He thought that it made obvious commercial sense for an adjudicator to have the power to award interest. Here, he agreed that paragraph 20(c) of the Scheme provided a free-standing power to the adjudicator to award interest whether or not there was an express term contained within the contract for the payment of interest.

The case also demonstrates how quickly enforcement cases can move. Here, there were 22 days between the commencement of this case and trial and judgment.

Machenair Ltd v Gill & Wilkinson Ltd

This was a dispute about a Final Account. Gill raised a counterclaim including damages for delay. Machenair suggested that Gill were not entitled to pursue this counterclaim at all. The reason given was that following receipt of various applications for payment, Gill had failed to serve a withholding notice in accordance with section 111 of the HGCRA. Machenair suggested that this meant that the counterclaim was absolutely barred. Mr Justice Jackson sitting in Leeds disagreed. He confirmed that whilst the effect of section 111 of the HGCRA was to exclude the right of set-off, it did not bar for all time any otherwise valid claims which might exist against a party.

Ritchie Brothers (PWC) Ltd v David Phillip (Commercials) Ltd

DPL resisted enforcement saying that the decision was reached after the expiry of the relevant time period. At first instance, Lord Eassie held that underlying paragraph 19(3) of the Scheme, was the intention that once started, the adjudication process should be seen through even if the decision is delivered late. The expiry of the 28-day period is not enough to say that the adjudicator's jurisdiction has come to an end. In other words, the provisions of the Scheme relating to the time within which the adjudicator must reach his decision are directory not mandatory.

The matter then came before the Inner House of the Court of Session. By a 2:1 majority, the Scottish judges reversed the decision. LJ Clerk felt that the key question was whether, despite the expiry of the 28-day time limit, the adjudicator retained his jurisdiction. The true interpretation of paragraph 19 was that jurisdiction ceased on the expiry of the 28-day time limit, unless it had already been extended in accordance with the Scheme. The court had to choose between two alternatives, that jurisdiction expired at the end of the 28th day or that it continued after that date and remained in existence until one of the parties should serve an adjudication notice under paragraph 19(2) of the Scheme. LJ Clerk felt that this interpretation reflected the natural meaning of paragraph 19(1)(a). It was a simple and straightforward approach. Paragraph 19(1) says that an adjudicator shall reach his decision not later than 28 days after the date of the Referral Notice (unless extended).

The Judge noted that the situation in this case need never have arisen. Adjudicators are specialists who should be able to assess the prospects of reaching a decision within the necessary timescale as soon as they receive the papers. If there is any doubt, the adjudicator should at once seek the referring parties' consent to an extension of time or, if need be, seek the consent of both parties. Accordingly, the decision of the adjudicator was set aside.

In reaching this conclusion, the Scottish courts are in effect disagreeing with the TCC decisions in *Barnes & Elliott Ltd v Taylor Woodrow* and *Simons Construction Ltd v Aardvark Developments Ltd.*

Trustees of the Stratfield Saye Estate v AHL Construction Ltd

There has been considerable controversy about the CA decision in the case of RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd where the CA held that, for the adjudication provisions of the HGCRA to apply, all the terms of the contract must be evidenced in writing. This, of course, is not an issue which currently forms part of the Government's review of the adjudication legislation.

It had been thought that it was not entirely clear which terms they had in mind. According to Lord Justice Walker it is all the terms, according to Lord Justice Ward it is all but the trivial terms, whilst many took

comfort from Lord Justice Auld who commented that it was the terms in dispute.

This point was considered by Mr Justice Jackson. The Trustees had sought a declaration that an adjudicator did not have jurisdiction because there was no agreed scope of works in writing. The contract had been agreed on a "cost plus" basis because the exact work content could not be fully identified. Shortly after AHL had commenced work, the Trustees cancelled the contract and AHL claimed for loss of profit on the cancelled work. AHL were awarded £75,000 by the adjudicator. The Trustees refused to pay.

Mr Justice Jackson considered the RJT decision and decided that all the express terms of a construction contract had to be in writing if the HGCRA was to apply. He said that:

> The reasoning of Auld LJ, attractive though it is, does not form part of the ratio of RJT.

However, it was not all good news for the Trustees. The contractual terms do not need to be set out in a formal contract document. Here, the Judge held that the contract and the scope of works were sufficiently evidenced in writing by letters, drawings and meeting minutes.

William Verry (Glazing Systems) v Furlong Homes Ltd

Furlong commenced a "kitchen sink final account adjudication". The adjudication notice and the referral were drafted very widely and covered all aspects of the final account. One of the matters referred was Verry's entitlement to an extension of time. Having been granted an extension of time to 2 February 2004, Verry submitted a claim for an extension of time down to 24 June 2004. Furlong responded that Verry had provided nothing that would add to the extension of time already granted. Furlong's adjudication notice requested a decision that the extension of time granted by Furlong to 2 February 2004 was correct. Alternatively, the adjudicator was asked to decide the appropriate extension of time.

In its response, Verry claimed an entitlement to an extension of time to 27 July 2004. Furlong objected to this, stating that Verry were putting forward a new extension of time claim. Following submissions concerning authorities such as *Nuttall v Carter* and *AWG v Rockingham*, the adjudicator decided that Verry could rely upon the matters referred to in the extension of time submission in its response and he decided that Verry were entitled to an extension of time to 27 July 2004. In the enforcement proceedings, Furlong contended that the adjudicator did not have jurisdiction to consider Verry's "new claim" for an extension of time.

HHJ Coulson QC decided that there were three questions to answer. First, whether the extension of time part of the response was a new claim for an extension of time which had not been made before. Second, if it was, whether Verry were entitled to rely upon it in an adjudication. Third, if Verry were not entitled to rely upon it in principle whether they were able to rely upon it in fact because, by their conduct, Furlong gave the adjudicator the necessary jurisdiction.

In answering the first question, the Judge formed the view that Verry's response was a fuller explanation for the claim originally made on 2 July 2004. The fact that a new extension date was sought, reflected the fact that work continued on site after 2 July 2004 and down to 27 July 2004. Further, the Judge accepted the new supporting documentation and the new extension of time date.

Even if the claim were new, the adjudicator was entitled to have regard to it. This was a matter of commercial common sense. If Furlong had wanted to restrict the scope of the adjudicator's investigation they could have defined the dispute as being whether or not on the basis of the letter of 2 July 2004 and the information contained within it, Verry were entitled to an extension of time beyond 2 February 2004.

The Judge then considered the authorities on the question of what can and should constitute a dispute. In *Carter v Nuttall* it was held that "when a party had had an opportunity to consider the position of the opposite party and to formulate arguments in relation to that position, what constitutes a dispute between the parties is not only a claim which has been rejected... but the whole package of arguments advanced and facts relied upon by each side…" In contrast, in *AWG v Rockingham*, it was held that

"...an Adjudicator is not confined to considering rigidly only the package of issues, facts and arguments which are referred to him".

Here, the Judge said that even if the extension of time claim was a new one, it formed part of the dispute which was referred by Furlong. In addition, Verry were responding to this claim, they did not start the adjudication. They had to defend themselves as best they could against the suggestion that their entitlement to an extension of time was to 2 February 2004 and that liquidated damages should be deducted for the period of delay thereafter. They were not to be taken as having agreed that in some way they could only defend themselves with half a shield, relying on some matters of fact but not others. According to the Judge, Verry were entitled to take whatever points they liked to defend themselves and the adjudicator was obliged to consider all such points.

William Verry Ltd v North West London Communal Mikvah

Following an adjudicator's decision that NW was to pay Verry £67k plus interest, NW declined to pay on a number of jurisdictional grounds including:

(i) That the appointment was invalid because the referral notice was issued one day too late; and
(ii) That the adjudicator wrongly, unfairly and without justification failed to consider a critical issue that had been referred to him.

In accordance with Clause 41A of the contract, the referral notice must be provided within seven days of the adjudication notice. However, Clause 41A.5.5 said that an adjudicator, in reaching his decision, shall set his own procedure. Here, the adjudication notice was issued on 3 December 2003, and the adjudicator, who was appointed on 5 December 2003, held that Verry should provide him with its referral notice on 11 December 2003. Verry duly did this. NW, in enforcement hearings, claimed that this should have been done by 10 December.

HHJ Thornton QC said that s108(1)(b) of the HGCRA requires that the contractual adjudication procedure should have the object of securing the referral to the duly appointed adjudicator within seven days of the date of the adjudication notice. This is a minimum requirement. However, there is nothing in the wording of that section to prevent a contract from being drafted in such a way so as to provide a machinery that enables an adjudicator to extend that timescale. This is what happened here. Accordingly, Verry had complied with the adjudicator's procedural direction.

Finally, the adjudicator had decided that he could not revalue the works to take into account any defects or snagging items because in a previous adjudication on the same project, he had determined the gross value of the work and no further work had been carried out since that decision. Here, however, there had been a subsequent interim valuation certificate which indicated that the state of the work had changed by virtue of the discovery of alleged defects showing that previously valued work had not been properly executed. The adjudicator was not precluded from revaluing the work because of this. This particular adjudication was seeking a further valuation of the work taking into account and giving appropriate effect to the list of defects and snagging items. On top of this, the adjudicator had made a further error in relation to abatement and he had shown an inconsistency of approach when compared with the previous adjudication. The effect of these errors was that the adjudicator had failed to consider the existence or value of alleged defects in the work. This was even though the dispute referred to him had involved a consideration of these matters as part of his determination as to whether the interim certificate should be opened up, reviewed and revised.

Accordingly, following cases such as *Joinery Plus v Laing*, the question for the court was whether the errors were so fundamental that they went to jurisdiction. HHJ Thornton QC decided that the errors here were ones which had been made as part of the adjudicator answering the right question wrongly rather than in answering the wrong question. However, ultimately the Judge decided that the errors were "just, but only just" ones which fell within the adjudicator's jurisdiction.

This left the Judge with three options: enforcing the decision, giving leave to

defend the application and giving directions or dismissing the application. Here he was mindful of procedural realities. It was open to NW to start a fresh adjudication by promptly serving an adjudication notice and having the dispute about the defects resolved within about six weeks. Indeed, if NW did not take such a course, it would suggest that some of the claims put forward in the enforcement hearing (namely the claimed abatement) were in reality of little merit.

Therefore HHJ Thornton QC decided that the decision should be enforced because it was valid and enforceable. However, the resulting judgment was not to be drawn up for six weeks from the date of the handing down of the judgment so that if a subsequent adjudication decision was made in favour of NW (in respect of the defects and the abatement claim), effect could be given to that and so a payment only be made to the net winner. This way of proceeding best gave effect to the overriding objective which the court must have in mind when seeking to resolve a dispute as expeditiously, economically and fairly as possible between two parties.

Wimbledon Construction Company 2000 Ltd v Vago

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

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

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

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

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

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

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

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

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

(vi) Even if the evidence of the claimant's present financial position

> suggested that it was probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
>
> (a) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or
>
> (b) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

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

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

OTHER CASES

Building Magazine Legal Briefing

Abbott v Will Gannon & Smith Ltd
Court of Appeal (Civ Div) 2 March 2005

The facts

The respondents were owners of a hotel and retained the services of the appellants to design the work necessary to remedy structural defects in a large bay window of the hotel.

Remedial work was carried out to the engineer's design in 1997. In late 1999 the respondents noticed that the lintel over the window had moved and cracked the surrounding structure. Further remedial works had to be carried out.

The respondents subsequently brought a claim against the appellants both in contract and tort. The claim was not issued until September 2003.

The contract claim was by that stage, time barred. The appellants argued that the claim was also time barred in tort as the cause of action accrued when the work was completed in 1997 and six years from that date had passed. The respondents argued that the cause of action accrued when or shortly before they first noticed cracking in 1999 and was not therefore time barred. The court held that the claim was not statute barred as it was brought within six years of the cracks appearing. The appellants appealed.

The issue

The issue was whether the claim in tort was time barred.

The decision

The Court of Appeal held that the present state of the law of England was not clear but the court was bound by an earlier House of Lords decision in *Pirelli General Cable Works v Oscar Faber* [1983]. This meant that the cause of action accrued when the physical damage occurred. The tort claim was not therefore time barred. The court added that even if it was not bound by *Pirelli* and the cause of action accrued at the time the respondents suffered economic loss then the defective design would have caused loss when it manifested itself in some way. The result would thus be the same and the claim would not be time barred.

Commentary

The appellants were unsuccessful in arguing that the later House of Lords case of *Murphy v Brentwood* [1991] was inconsistent with the earlier House of Lords decision in *Pirelli* and therefore *Pirelli* should not be followed. Although the Court of Appeal sympathised, the court felt bound by the *Pirelli* decision, as it had not been expressly disproved.

Construction Industry Law Letter

Emcor Drake & Scull Limited v Sir Robert McAlpine Limited

Technology and Construction Court
His Honour Judge Richard Havery QC
Judgment delivered 7 May 2004

The facts

The defendant main contractor engaged the claimant specialist mechanical and electrical services sub-contractor for a PFI project involving new building and refurbishment of a hospital and day centres in Dudley. The proposed sub-contract conditions were the DOM/2 Standard Form amended to align with the main contract conditions. The parties agreed a price of £34.25 million on 13 June 2001, but the defendant then told the claimant on 3 July 2001 that it would issue a short form of order up to a maximum value of £1 million to enable the commencement of design and procurement while the sub-contract conditions remained under review.

The claimant commenced work the next day, and on 20 August 2001, wrote back to the defendant a letter similar to, but different from, the original letter accompanying the order. The letter indicated that the claimant would enter into a sub-contract on the terms set out in this letter when called upon to do so. The defendant did not call upon the claimant to enter into a sub-contract on the terms recorded in this letter, but continued to issue orders limited to a maximum amount, which ultimately reached £14 million.

When the defendant sought to increase this maximum amount by £20,285,000 on 15 October 2002 to bring it up to the aggregate total of £34,285,000, the claimant rejected this order on the basis that negotiations between the parties as to the terms of the contract remained ongoing. The claimant offered to accept an uplift of £3 million as an interim measure while negotiations continued.

The defendant maintained that there was already a contract in existence between them and the claimant for £34,250,000 worth of works dating back to 20 August 2001 and that the claimant was in repudiatory breach of this contract. The defendant purported to accept the repudiatory breach and then purported to serve first a payment ("section 110") notice stating the amount it considered due under the contract, then a withholding ("section 111") notice purporting to set off the sum due to the claimant against the loss resulting from the repudiatory breach. The claimant brought proceedings to recover this withheld sum.

Issues and findings

Did the claimant have an obligation to complete the whole of the mechanical and electrical works on the Dudley Hospitals PFI project?

No. His obligation was to carry out design, procurement and site works for the M&E works for the project consistently with the construction contract but limited in value to £14 million.

Was the claimant entitled to an order for payment of £1,105,160.65 with interest from the January 2003?

Not at present. He was entitled to be paid a reasonable sum for the works carried out, up to a limit of £14 million. In circumstances where the contractual basis for the certification process used was uncertain, funds became due for payment under the contract by virtue of the work that had been done, and this was in dispute. The amount of the proposed payment stated in the paying party's section 110 notice was not *ipso facto* the amount due under the contract.

Commentary

The claimant must have assumed that if it could defeat the defendant's less than plausible defence that there had been a contract in place all along for the full value of the Works notwithstanding the sequence of limited orders which it issued, the defendants set-off based upon a repudiatory breach of contract would fall away, and it would be able to collect the £1m+ which the defendant had acknowledged by notice was otherwise due to it.

But there was a sting in the tail. Relying upon *Rupert Morgan Building Services (LLC) Limited* v *David Jervis & Harriet Jervis* [2004] BLR 18 (CA), the Judge noted that there was a distinction between a case

where a certificate made the sum due, and a case where it was the doing of the work that made the sum due.

The Judge noted that in the present case, whilst there had been a system of certification in operation, there was no evidence before him of its contractual basis, and that therefore the "certificates" did not of themselves make any sums due. The claimant had to prove that work to the value claimed had been done, and this was a dispute that the Judge was not in a position to resolve at the present hearing.

Gemma Ltd v Gimson & Another

Queen's Bench Division, Technology and Construction Court
His Honour Judge Thornton QC
Judgment delivered 11 August 2004

The facts

Mr and Mrs Gimson employed Gemma Limited ("Gemma") to construct a luxury dwelling for themselves and their three children. An architect was employed by the Gimsons to certify completion of stages of the works and six sub-contractors were employed in relation to specialist packages. This action related to one of those sub-contractors, Gemma. The contract between the parties contained various clauses including the following:

- That the Gimsons were deemed to have accepted that the house had been constructed in accordance with the agreement save only for defects or omissions notified in writing by the Gimsons within the period of completion;

- Gemma undertook to remedy any defects after completion as soon as the contract price had been paid and the Gimsons could not delay payment because of minor defects that could reasonably be dealt with following payment;

- No retention from the contract would be made for defects; and

- The Gimsons would not take possession of the house without the written consent of Gemma until monies had been paid.

The house was certified as complete in November 2001 but the Gimsons maintained that there were a significant number of defects. They refused to pay and, in purported reliance on the contract, Gemma refused to give possession of the house and stopped work. The Gimsons regained possession and carried out remedial works themselves.

This case concerns a claim by Gemma for payment for the final stage of the works. The Gimsons counterclaimed for damages, including damages for inconvenience, anxiety and distress.

Issues and finding

Did Gemma have any entitlement to payment for the final stage of the works and, if not, had it repudiated the contract by stopping work?

Gemma had no entitlement to the claimed sum and was found to have repudiated the contract by stopping work. The reason given was that completion for the purposes of the contract had not occurred.

Were the Gimsons entitled to damages in respect of inconvenience, anxiety and distress?

Yes, as this matter had caused much distress to the family, intensified by the extreme hostility shown by Gemma, who was the defendant's next-door neighbour, damages were awarded in respect of inconvenience, anxiety and distress.

Commentary

As well as dealing with some interesting points concerning repudiation in circumstances where the contractor believed the contract to have been completed, this case provides an example of circumstances where a court will award general damages for inconvenience, anxiety and distress.

It appears from the facts in this case that matters between the parties became so acrimonious that the usual level of inconvenience associated with domestic building works was surpassed and became a matter that qualified the claimants to be compensated. It seems that the fact that the builder was the Gimson's next-door

neighbour added to the distress and anxiety caused.

This is a situation that is probably more likely to occur in domestic construction works rather than the more commercial employer/contractor situation where a repudiatory breach of contract is unlikely to cause undue inconvenience, distress or anxiety to the innocent party. However, this is not to say that such a situation cannot arise.

Great Eastern Hotel Company Limited v John Laing Company Limited & Laing Construction plc

Technology and Construction Court
His Honour Judge David Wilcox
Judgment delivered 24 February 2005

The facts

The Great Eastern Hotel Company Limited ("GEH") decided to refurbish the Great Eastern Hotel at Liverpool Street, London. GEH appointed John Laing Company Limited under a Construction Management Agreement (CMA) as Construction Manager to manage the procurement of the construction process. Laing Construction Plc were the guarantor John Laing Company Limited. The intention was that the redevelopment would be carried out by various specialist trade contractors undertaking specific trade packages, managed and coordinated by the specialist Construction Manager under the CMA.

The project did not run smoothly. The budget was £34.8m. The project overran by almost one year and the overall out-turn cost of the project was some £61m.

GEH issued a claim against John Laing Company Limited and Laing Construction Plc ("Laing") for breaches of the CMA alleging that Laing had so misconducted itself as Construction Manager of the project that completion was delayed by 44 weeks. GEH sought to recover over £17m by way of damages in respect of Laing's breaches of the CMA.

Issues and findings

What was the nature of the obligations that Laing as Construction Manager owed GEH?

The contract imposed upon Laing the obligations of a professional man performing professional services.

Did Laing breach those obligations?

Yes.

Was Laing under an obligation to scope the trade contractor packages?

Yes. The ultimate obligation to make sure a trade package was workable and complete was that of the Construction Manager.

What was the appropriate remedy for the breach of that obligation?

As the carrying out of the omitted works as variations was not as economical as carrying out the work as part of a trade package Laing should pay for the enhanced cost, assessed at 15% of the cost of the instructed variation.

What is the nature of the obligation to the court owed by the experts instructed by the parties?

To act independently, to test in a critical fashion, evidence and information provided by those instructing the expert and to be prepared to revise his opinion in light of new information.

Commentary

The case marks the first time, we believe, that a construction manager (CM) has been found publicly to be in breach of its obligations and liable to its client. However, it does not, as some have suggested, mark the beginning of the end for construction management.

The contract here was not an unusually onerous one. It provided that the CM should exercise all the reasonable skill, care and diligence to be expected of a properly qualified and competent CM, experienced in carrying out services for a project of similar size, scope and complexity. Laing's responsibility under the contract extended to selecting, managing, administering, planning and coordinating the work with the trade contractors, scoping their works and doing so in a proactive professional manner.

His Honour Judge Wilcox decided that the contract imposed obligations on the CM of a professional man performing professional services. Laing was not the guarantor of the job or an easy target to blame because the job went wrong. However, Laing did owe clear enforceable obligations to the client as an important member of the professional team. The Judge here found that Laing were in clear breach of those obligations.

As a direct consequence of Laing's breaches, the Great Eastern Hotel was unable to open on time. In fact it opened nearly a year late. Laing was found to be liable for the resultant loss of profit.

In addition, the Great Eastern Hotel was exposed to claims from the trade contractors for prolongation, delay and disruption. On the evidence, the dominant cause of this trade contractor delay was found to be the delay to the project as a whole caused by Laing.

Another key responsibility of the CM is the scoping of the individual trade packages. Here, Laing failed to take reasonable steps to include all of the subject works in the relevant packages. As an inevitable consequence instructions had to be issued to enable those omitted works to be carried out.

The expert evidence demonstrated that carrying out work as a variation was not as economical as carrying it out as part of a competitively tendered trade package. Judge Wilcox, in a decision on similar lines to *Turner Page Music v Torres Design Associates* (1997) CILL 1263, held that what was recoverable was the element representing the enhanced cost caused by the failure to have the works carried out at the economical package rate, namely 15% of the cost of the instructed variation.

Finally, the *GEH* case has again brought to the fore the importance of expert evidence and what happens when an expert fails to understand and comply with the primary duty he owes to the court.

It has been said many times that the role of the expert witness is not to act as the hired hand of the party paying his fee. An expert must thoroughly research all the evidence available to him. That means the evidence put forward by both sides. What he should not do is uncritically accept the evidence put forward on behalf of those instructing him.

If evidence is put forward that challenges and contradicts the picture put forward by the client, an expert must revisit his earlier expressed views in accordance with his clear duty to the court. An expert should base his conclusions upon sound and thorough research, have extensive practical experience in the discipline in which he is claiming expertise and also must be prepared to make concessions, at any stage in proceedings, when his independent view of the evidence warrants it.

John Doyle Construction Limited v Laing Management (Scotland) Limited

Extra Division, Inner House, Court of Session
Lord MacLean, Lord Johnston, Lord Drummond Young
Hearing date 11 June 2004

The facts

John Doyle Construction Limited ("JDC") entered into two works contracts, WP2010 and WP2011, in connection with the construction of a new corporate headquarters for the Scottish Widows fund. Laing Management (Scotland) Limited ("LMS") were the management contractors under an amended form of the Scottish Works Contract (March 1988) for WP2011. JDC began work on WP2011 on 25 September 1995 and were scheduled to complete 28 weeks later on 7 April 1996.

Practical completion in fact took place on 7 September 1996 after 50 weeks. JDC brought a claim in the commercial court for an extension of time of 22 weeks, and sought payment of £4,807,144.16, being the combined upward adjustment of the contract sum and loss and expense which flowed from their having to change their method of construction as a result of late provision of design and builders work information, delayed access to the site, and disruption of work on site. LMS sought to exclude certain averments in support of JDC's claim from probation on the grounds that they were irrelevant.

The commercial court agreed that any delay to WP2010 which went beyond the extension

of time granted to JDC was irrelevant to JDC's claim for an extension of time under WP2011, but did not exclude it from probation on the grounds that it may actually have contributed to the delay. The court also held that JDC's averments of loss and expense were relevant, notwithstanding the fact that the inclusion of adverse weather conditions and delay to completion of WP2010 (matters for which LMS bore no responsibility) amongst the pleaded causes potentially made a global claim unsustainable. LMS appealed against this decision.

Issues and findings

Should consideration of JDC's averments as to causation of a loss presented as a global claim be left to the conclusion of a proof before answer (that is, a full trial on the facts)?

Yes. If JDC could not sustain its global claim, it should still have the opportunity to demonstrate chains of causation between individual causes and heads of loss, to argue that causes which were LMS's responsibility were the dominant causes of their loss, or to use a process of apportionment to divide increased costs between the two sets of causes.

Commentary

The Court of Session upheld the decision at first instance and declined to do the Scottish equivalent of striking out part of the claimant's statement of case on the ground that it was not capable of supporting the claim as pleaded.

The point taken by LMS was simply that amongst the multiple causes alleged of the global loss claimed, there were some (delay to a previous works package at which no extension of time had been granted, and adverse weather conditions) which were not LMS's legal responsibility and that for a global claim to succeed, all the alleged causes of the claim had to be the legal responsibility of the party from whom recovery was sought.

The Court of Session made generous use of American and Australian authorities in deciding that if necessary, causes pleaded in support of a global claim which turned out to be unsustainable could still be examined by the court to see if they supported individual elements of that global claim, even if this was only on the basis of their being dominant or simply material causes operating concurrently with other causes which were not LMS's responsibility. The court did, however, emphasise that any such reconsideration of a failed global claim had to be confined to the case as pleaded.

Mowlem Plc v Phi Group Limited

Queen's Bench Division, Technology and Construction Court
His Honour Judge Gilliland QC
Judgment delivered 28 July 2004

The facts

Mowlem had subcontracted the earthworks and associated design and construction of the retaining walls to Phi under a formal subcontract.

The primary issue between Mowlem and Phi concerned Mowlem's supply to Phi of free issue fill to be incorporated into the earthworks. The free issue fill was found to be unsuitable for the purpose and contained some material that did not comply with the terms of the contract. Mowlem then supplied additional fill material (6F2) to Phi and claimed payment for the additional material on a *quantum meruit* basis and claimed for the cost of taking away from the site surplus material that was not used in the earthworks. A further claim was made in relation to the cost of Mowlem supplying a crusher plant for Phi's use.

On *the quantum meruit* claim, the arbitrator found that Phi had not agreed to pay Mowlem and that no term could be implied into the subcontract to that effect.

As to the cost of taking away surplus material (the displacement claim), the arbitrator found that this claim failed because Mowlem showed no legal basis for the claim. The further claim for provision by Mowlem to Phi of a crusher plant failed in the arbitration also because Mowlem had not demonstrated legal entitlement and no express term existed regarding payment for the plant and no such term could be implied.

Mowlem appealed to the court stating that the arbitrator had erred in law in relation to all Phi claims. This report deals only with

the *quantum meruit* claim in respect of the cost of the replacement fill.

Issues and findings

Was the arbitrator correct in concluding that there was no evidence of any mutual understanding that payment should be made and that there was no necessity for implying such a term?

Yes, the arbitrator had not erred in concluding that the parties had acted together for their mutual benefit and Mowlem were not entitled to payment on restitution in principle.

Was the arbitrator correct in concluding that there was no implied term to the effect that Phi had to accept whatever specified material was supplied and insufficient quantity to complete the subcontract works?

Yes, the arbitrator's finding that such a term was not required to give business efficacy to the subcontract and that finding did not demonstrate any error of law. The arbitrator had erred in relation to the quantity of fill to be supplied, but that did not affect the outcome of the appeal.

Commentary

The issue of *quantum meruit* is one that invariably provokes academic debate concerning both its application and effect. In this case, the court was firmly of the view that where one party provides a service or supplies a product to another, there is no presumption that that service or product must be paid for.

There was no express term in the subcontract governing payment for the replacement fill material and no evidence of a mutual understanding between the parties that that replacement fill should be paid for. Further, no term could be implied into the subcontract to that effect as, primarily, such a term was not required to give the subcontract business efficacy.

It is interesting that the Judge particularly referred to the fact that Mowlem's claim was not a claim for a contribution towards the cost of replacement fill but for the whole of the cost. He considered this in the context that the arbitrator had found that the supply of the replacement fill was to the mutual benefit of both parties: for Phi to complete its subcontract and for Mowlem to complete its main contract. In those circumstances, Mowlem could not recover on restitutionary principles. The Judge did not have to consider whether or not Mowlem would have recovered a contribution if that had been their claim, but he did comment upon it.

(1) Reed Executive Plc (2) Reed Solutions Plc v (1) Reed Business Information Limited (2) Reed Elsevier (UK) Limited (3) Totaljobs.com

Court of Appeal (Civil Division)
Lord Justice Auld, Lord Justice Rix, Lord Justice Jacob
Judgment delivered 14 July 2004

The facts

Following an appeal in the Court of Appeal in a trademark case, the claimants (Reed) and the defendants (RBI) could not agree costs. Reed had been unsuccessful in the Court of Appeal but argued that they should be entitled to 70% of their costs at first instance and all their costs of the appeal. RBI argued that they should be awarded 70% of their costs at first instance and all their costs of the appeal.

Reed wished to rely on "without prejudice" negotiations with RBI at the costs hearing. Two issues therefore came before the Court of Appeal to be decided. The first was whether the court could, in relation to the question of costs, compel the parties to disclose "without prejudice" negotiations and the second issue was whether or not the court's order on costs should reflect the fact that RBI were unwilling to take part in ADR (the Court of Appeal's mediation scheme) which was proposed to RBI by Reed.

Issues and findings

Can the court compel the parties to disclose the detail of "without prejudice" negotiations when dealing with the question of costs.

No. The established case law is clear on this and the principles of "without prejudice save as to costs" negotiations are well known.

Should the court's order on costs reflect the fact that RBI refused to take part in the Court of Appeal's mediation scheme?

No. The court considered the case of *Halsey v Milton Keynes* ([2004] EWCA Civ 576) and decided on the facts of this case that the costs order should not reflect the fact that RBI refused to take part on the Court of Appeal's mediation scheme.

Commentary

This is yet another case which establishes that a refusal to mediate in the right circumstances will not mean an adverse finding in relation to costs. It is clear that it will be the facts of each individual case that the Court will take account of, however the Court of Appeal did endorse the principles set out in *Halsey v. Milton Keynes.*

The re-statement on the law relating to "without prejudice" negotiations is helpfully clear and unambiguous. Only "without prejudice save as to costs" negotiations can be referred to on the question of costs unless both parties waive privilege.

Schering Corporation v Cipla Limited and Another

The High Court of Justice, Chancery Division
Mr Justice Laddie
Judgment delivered 10 November 2004

The facts

Schering was the registered proprietor of a patent. Cipla is an Indian based pharmaceutical manufacturer, which wanted to launch a pharmaceutical product in the UK. On 6 July 2004, the joint managing director of Cipla wrote to Schering's chief executive officer in a letter marked "*without prejudice*".

The letter stated Cipla's belief that Schering's patent was invalid. It also stated Cipla's intention to seek a revocation of the patent prior to the launch of Cipla's product in the UK. The letter went on to state that Cipla was prepared to avoid confrontation if there was *"an alternative commercial solution acceptable to both parties"*. Cipla gave Schering time to respond. At the expiration of that time, Schering obtained leave of the court to serve infringement proceedings on Cipla on the basis of the contents of the letter. Cipla applied for the claim to be struck out.

The parties agreed that if the contents of the letter of 6 July were privileged on the basis that it was a communication made "*without prejudice*", then Schering could not rely upon the content of the letter as a basis for alleging infringement and the claim should be struck out. The question for the court was, therefore, whether the letter of 6 July was a negotiating document.

Issues and findings

Was the letter marked "without prejudice" a negotiating document?

Yes. The court put itself in a position of a reasonable recipient and considered the meaning conveyed by the letter. In this case, the court felt that there was an invitation to Schering to negotiate and the fact that the letter was marked "without prejudice" reinforced that message.

Commentary

The privilege attaching to "without prejudice" correspondence is always a matter of concern to parties in the process of negotiation. The court here reaffirms the public policy benefit of allowing privilege to attach to negotiations in order that parties can negotiate settlements without the need for comments made in the process of negotiation to be submitted for consideration to the court at trial.

Clearly, the message in the present case is that in order to attract the privilege, the communication must be a negotiating document. Whilst not considered by the court in the present case, it is likely that following *Rush & Tompkins v Greater London Council* CILL March 1988 409, the application of the rule is not dependent on the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of the negotiations will, as a general rule, not be admissible at the trial.

Ultimately, it is the content not the form of the document that is important.

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