FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2022/2023

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

Contents

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ANNUAL REVIEW

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Welcome to the 26th edition of our *Annual Review*. As always, our *Review* contains a round-up of some of the most important developments from our clients' points of view over the past 12 months including, from page 54, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter *Dispatch* as well as the *Construction Industry Law Letter*.

Inevitably, this year, our *Review* focuses on the continuing economic and political challenges facing the construction industry. Simon Tolson discusses these in his Introduction and on pages 8-11 Lucinda Robinson and Sam Thyne look in more detail at some of the steps the industry can take to mitigate its position. Martin Ewen, in one of the more popular Fenwick Elliott Blog pieces, provided 15 top tips for employers dealing with insolvency. We reproduce that article on page 66.

The Building Safety Act 2022, which is primarily concerned with the safety of buildings and those who live in them, has provided one of the biggest changes to the regulatory regime for the design, procurement, construction, and management of buildings for a very long time. At pages 12-15, Ben Smith explains how it significantly increases the risk profile of those to whom it applies.

In last year's 25th Anniversary Edition, we featured articles on witness and expert evidence. In 2022, as Ted Lowery explains at pages 23-25, the courts have continued to take a close interest in the role of experts. Whilst Rebecca Ardagh at pages 20-22 and Stephanie Panzic at pages 18-19 look at the latest developments in disclosure and witness evidence. And, yes, we do, of course, look at the impact of the Wagatha Christie and Johnny Depp hearings.

You may well remember that the summer of 2022 was very, very hot. Taj Atwal at pages 28-29 looks at how the standard forms deal (or do not deal) with the risks associated with extreme heat. Whilst COP26 might not have proven to be the big step forward hoped for, and needed, the construction industry continues to make its own advances towards helping to achieve net zero. Aurelia Russo at pages 26-27 explains how the new NEC Net Zero Option X29 works, whilst as Simon Tolson discusses at pages 30-33, the UK government has identified nuclear energy as having a key role in a "*secure, low-carbon, affordable energy future*".

Adjudication is always a focus of our *Reviews*. The *Dispatch* summaries are all adjudication-based, whilst Adele Parsons updates us, at pages 16-17, on the latest from the courts on the relationship between the enforcement of an adjudicator's decision and the Insolvency Rules. Tiered dispute resolution or ADR clauses are often found in construction clauses. At pages 46-47, George Boddy discusses why it is so important that the way they are supposed to work is clearly set out.

Huw Wilkins has embarked on a project to provide an *A-Z of Construction Terms*. Further details can be found on our website but you can find "G is for global claims" at page 45.

We also take a deeper look at other aspects of the NEC Form, with Claire King at pages 38-42 looking at the Accepted Programme and Mark Pantry at pages 43-44 considering Early Contractor Involvement. FIDIC continue to update their contracts. At pages 52-53, I look at the new approach to liquidated damages in the Green Book.

As the impact of the Russian invasion of Ukraine continues to provide shockwaves across the construction industry, at pages 48-49, Sana Mahmud looks at whether investment treaty arbitration offers recourse to recover losses arising as a result of the continuing conflict.

There have been a number of changes to the way the Kingdom of Saudi Arabia approaches arbitration, and James Cameron at pages 50-51 asks how "arbitration-friendly" the Kingdom really is.

The other key issue which we cannot ignore is the continuing impact of technology. As Stacy Sinclair sets out at pages 34-37, it pervades every aspect of design, procurement, construction, and operation – the whole life cycle of both new and existing buildings, assets, and infrastructure. Moving forward, it is already proving to be the enabler and provider of solutions to the very serious issues we face today, including climate change, connectivity, and connection.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. As always, I'd welcome any comments you may have on this year's *Review*.

Just send me an email to jglover@fenwickelliott.com or find me on Twitter @jeremyrglover.

Jeremy Glover

Simon Tolson
Senior Partner

It is my great pleasure to introduce our *2022/23 Annual Review*, our 26th edition. We have so much in this *Review* for you to read. Pace yourself!

The past year – the wider canvass

Given the macroeconomic position, it will come as no surprise that all sectors are struggling with supply chain uncertainty, skilled labour, inflation, availability issues and inflation running at least 10%.[1] The late Ronald Reagan memorably described inflation as being *"as violent as a mugger, as frightening as an armed robber and as deadly as a hitman"*. This year, the Russian invasion of Ukraine, post-Covid pandemic, GBP/$ exchange rate, etc., are all leading to some interesting pricing and programming challenges – and emphasising the importance of knowing what you're signing up to.

We are seeing much less fixed price contracting on longer term jobs (e.g., more than 50 or so weeks on site and civils in particular). If all the packages cannot be let at the outset (e.g., on a phased project), then there's a huge risk. So, we have seen some novel pricing and programming arrangements not previously used in the past 20 years. The cost of materials[2] we have seen rise across the piece, well above forecasted figures. Steel prices rose 77.4% in 2021 and timber prices rose 80%. This year, things have only got worse and changed quicker. One of the most extreme examples is the price of rebar, which increased by 45.8% from the 2021 average to March 2022. Who has really studied the JCT fluctuation provisions unless they were in practice before 2000? The construction industry has now definitely come out of a period of stability.

Looking ahead, employers are already seeing negotiation around the inclusion of fluctuation provisions. Some contractors will want to mitigate the risks of price increases and may walk away from tenders if they are unable to take the financial risk where an employer refuses the inclusion of any fluctuation provisions. We have seen in two-stagers that, at the second stage, main contractors sit down with clients and, in some cases, renegotiate the price or renegotiate how they deliver projects.

For the UK and most jurisdictions, Covid has also obviously been a defining event over the past two years, as well as Brexit, which has a continuing impact. However, domestically, for large elements (certainly not all) of the construction industry, in hindsight, the effects of Covid have been less than the profound impact on the likes of hotel, catering, entertainment, aviation and travel.

Regrettably, this cannot be said of the repercussions of war in Ukraine. Just as the industry was sighing with relief over an "end" to Covid, the effects of this war produce a noxious combination of effects for the construction industry worldwide. These range from supply chain disruption to price spikes of almost all building materials – especially energy prices. OPEC has only heaped more pressure on gas. In almost all jurisdictions, lawyers like us are grappling with issues such as sharp price increases and delays caused by supply problems and sanctions.

The underlying trends and developments seem to be crystallised in similar ways the world over. For contractors, it proves difficult to pass on rising prices to employers, although there are always some exceptions; the legal possibilities can be summarised as: "time, but no money". One has to bear in mind that, even before the invasion began, prices of construction materials, particularly steel, timber, and concrete elements, had risen significantly. This process has, of course, been aggravated strongly by the war, but in terms of "unforeseen events", these latter price rises did not easily qualify as such.

The result is that the construction industry is struggling to offer fixed prices, especially for large projects with a long programme. Prices for construction materials often qualify as "daily rates". The war and inflationary trends have produced an unpleasant mix of serious supply chain glitches and unpredictable price developments.

Outlook

More positively, we are regularly seeing ongoing innovation in building techniques and processes on our clients' projects, most notably digitalisation, voice assistants,[3] MMC and prefabrication and, for lawyers, yes, smart contracts. Additionally, the main market sectors keep moving in the same directions: the expectation of massive public investment in infrastructure and the government's 'Build Back Better' strategy should see Britain's historic underinvestment in infrastructure being addressed with £600 billion of public sector investment over the next five years fired by large stimulus packages, e.g., for the overhaul of public infrastructure and climate transition works in the energy sector from hydrocarbon to renewables and nuclear. There is also the ongoing urbanisation[4] and the growing demand for affordable housing; retail yielding to leisure and logistics developments; and, finally, rethinking of the office workplace as we move away from the once habitual 9 to 5 office routine.

A combination of the necessary overhaul of public infrastructure like power transmission and generation and the up-and-coming energy and climate transition, as well as demand for efficiency to run housing (sub Passivhaus), all appear prevailing catalysts for developers, constructors, funders, and investors in these sectors.

My aim and hope is that Fenwick Elliott thrive from these areas and help you, our clients, leverage their position.

Fenwick Elliott news

I am pleased to say that Edward Foyle became a partner in April 2022. At 22 partners and nearly 100 staff, Fenwick Elliott is the largest specialist construction and energy law firm in the UK.

In other excellent news, the results from this year's Legal 500 and Chambers' UK Guides are Fenwick Elliott's best overall rankings ever! To our great delight, we have kept our top spot as a Tier 1 firm in both. Overall, this is a superb set of results, and testament to our output and reputation. We have some great soundbites to quote from what peers and respondents said:

"The practice is unique in its depth and breadth of knowledge of experience of complex construction issues and disputes. The team is always seeking to get the best result for their clients."

"Very experienced practitioners with excellent knowledge of the construction industry and construction contracts. They are truly dedicated to the case and the client's needs."

"The firm's ability to provide out-of-the-box solutions and handle complex situations is stunning. They're extraordinarily responsive and provide a fully-fledged service."

"A superb firm with a stellar international arbitration practice and excellent strategical thinking."

"Both the partners and the senior associates at Fenwick Elliott are very able, from a technical legal perspective and also in terms of the provision of strategic dispute advice."

"Fenwick Elliott are hands-on, have great business understanding, know the law, and have great team spirit."

"The key with Fenwick Elliott is that they show a real understanding of construction and always show a real determination to understand the project to allow them to advise us accordingly."

Thank you to those who provided feedback.

I want to thank all my partners and every single member of staff for their huge contributions to make this happen. This is a Fenwick Elliott team effort.

Training and webinars

In addition to our well known publications such as *Dispatch, IQ, Insight, CILL,* our *Blog* and things like *Huw Wilkins' Collection of Construction Law Terms: A to Z,* we have put out many webinars on construction law related topics of current topicality.

These webinars, instigated in 2020, have been a runaway success. Our statistics since 2020:

- 53 webinars, to September 2022
- 16,327 registered viewers; 9,735 attended

You can find links to everything at: https://www.fenwickelliott.com/research-insight/articles-papers

Other things done in Fenwick Elliott

Fenwick Elliott remains committed to promoting equality, diversity, and inclusion. We have had an active ED&I group for over 18 months consisting of partners and senior managers. We also have a staff group that meets regularly and undertakes various initiatives – like charities work. The sort of activity we have undertaken in the last year following consultation includes:

- Maternity coaching/paternity buddying
- Transparency policies
- ED&I training sessions
- Trainee buddy scheme
- We are proud to be a part of the 10,000 Black Interns programme for 2022 and will be again in 2023; this initiative aims to transform the horizons and prospects of young black people in the United Kingdom by offering paid work experience across a wide range of industries, including the law and construction
- Charities including Lighthouse, Waste Aid, Construction Youth Trust

We are also looking to put in place mental and physical health support policies. We foster an open, challenging, participative and rewarding environment, for all our employees. We identify employee development expectations and opportunities through regular reviews and endeavour to ensure that pay and benefits are competitive. This is not just good business; it is people-sense and one that I am proud we invest in.

We see corporate social responsibility is also important to our staff and we take our responsibility to the wider communities seriously. We seek to minimise the impact we have on the world's resources while seeking to maximise the impact we have on the well-being of those we serve.

We encourage and enable our lawyers and business services staff to play a role in making a positive difference to the lives of others.

We are also committed to taking action on climate change. It's no longer just related to environmental lawyers. It is already fundamentally impacting all areas of law, business, and society. For solicitors like us, it's beginning to affect how our business is run and how we provide legal services.

We have for the last year now had an active "Green Group", recognising the importance that the business takes account of green issues both internally and externally (with clients). In the past nine months, this has mainly focussed on:

- FE carbon footprint – working with NetZeroNow on our carbon footprint and with that our involvement in their pilot scheme with the Law Society, to coincide with COP27
- We are signatories to the Greener Litigation Pledge
- We are contributors to the Chancery Lane Project, a collaborative initiative of international legal and industry professionals whose vision is one where every contract enables solutions to climate change.

Lastly for now

As a sector-focused law firm, we pride ourselves on our extensive industry expertise. So, rather than talk solely about ourselves, and the work we have been doing for our clients, this *Annual Review* is instead based on articles which give our take on cases and developments in our market over the past 12 months – and where things are heading.

If you would like to discuss any of the points raised in these pages in more detail, please do not hesitate to contact any of us. As always, we are here to help.

Simon Tolson

1. Prices in the construction industry, as estimated by the Construction Output Price Index (OPI), increased to 9.6% in the 12-month period to June 2022.
2. Mace, for example, reported on 29 September 2022 material shortages exacerbated by the invasion had led to the cancellation of some projects.
3. With well-researched algorithms and a strong artificial intelligence in place, voice assistants can now well understand the user's need and give suitable suggestions. Voice assistants are a humane way to interact with machines!
4. Between 2018 and 2030, the urban population is projected to increase in all size classes.

Paying the price: high inflation and short supply

There is always tension between an employer's need for costs certainty and a contractor's need for flexibility, but current circumstances twist the knife. In the first of two companion articles in the 2022/23 *Annual Review*, **Lucinda Robinson** looks at what parties should currently be considering when negotiating their contracts.

2022's construction headlines have repeatedly featured material and labour shortages, and soaring materials, labour and energy costs. According to *Building*, between June 2021 and June 2022, fabricated steel rose 46.3%, builder's woodwork by 19%, and plastics for doors and windows by 24.3%, whilst labour costs increased by 4.5%. On 1 July 2022, *Construction Enquirer* reported that manufacturers of energy intensive materials like cement would only accelerate as energy prices escalate.

Improvement looks unlikely in the short term, as Brexit and Covid-19 implications continue to unravel, the war in Ukraine proceeds, and inflation hits a 40-year high (as reported by the *Financial Times* on 6 September 2022). The harsh reality is that construction projects are costing more and taking longer.

That question can be answered in advance and recorded in the contract. Set out below is a suggested agenda for an upfront discussion, followed by a look at the price fluctuation and extension of time provisions that come into focus when these anticipated risks arise.

Issues to discuss at the outset

Parties negotiating contracts now should recognise reality and factor in the risk of increased costs and delay. Several ways to do this can be considered.

Design:	Specifying materials that are quicker, easier, and cheaper to source.
Suppliers:	Identifying multiple suppliers to avoid dependence on just one and checking their financial position to ensure they are likely to continue in business.
Materials:	Ordering materials in advance and using bonds to secure any advance payments needed to facilitate this. Storing them securely and, if off site, clearly allocating them as property of the employer and providing vesting certificates.
Substitutions:	Agreeing that alternative materials can be used if those specified cannot be procured or become difficult or more expensive to procure.
Prices:	Including a fluctuations clause covering key materials (if not all), labour and energy.
Programmes:	Including float in the programme to allow for delays caused by labour shortages or supply issues.
Delays:	Allocating responsibility for delay fairly, in terms of time and costs.

A fair allocation of risk is critical. Whilst an employer may be tempted to pass all risk of increased costs and delays to the contractor (especially in a design and build contract), this may not be wise.

Where contractors are willing to take on D&B projects, tender prices are increasing and negotiations over the terms and conditions are intensifying. The spectre of insolvency looms large with over 3,400 construction businesses closing between April 2021 and April 2022 (according to the *Financial Times* on 26 June 2022).

Contractors and subcontractors are acutely aware of how quickly their profit margins will disappear if costs multiply and they have not obtained the protections they need in the terms, programme, or price.

What contractual clauses might help

Key clauses that parties might need to turn to as prices and resources decrease, include price fluctuation clauses and extension of time provisions. These are worth focusing on when new contracts are negotiated and, on existing contracts, becoming familiar with.

Fluctuation clauses

Fluctuation clauses, allowing contractors to charge more if prices increased, were largely overlooked during years of stable pricing. When picking their battles, contractors opted to take the risk of (unlikely) price increases and negotiated on other issues instead. Now, price increases are one of the most significant risks on any project, fluctuations clauses should be a top priority. Contractors will want the benefit of such a clause and should also ensure the contract includes a "base date" from which the increase is calculated (e.g., date of tender or contract).

NEC4 deals with price variabilities in two ways. Primary Option clauses tackle pricing head on, with the contractor taking the risk of fixed costs under Options A and B, some form of risk sharing applying under Options C and D, and (the contractor's utopia) costs reimbursable Option E enabling the contractor to recover the actual cost of its works. Secondary Option clause X1 provides a specific fluctuations clause and, if selected, the Contract Data needs to include the details needed to make it work.

JCT 2016 includes fluctuation terms which can be incorporated by selection in the Contract Particulars. Parties can select Option A covering contributions, levy, and tax fluctuations; B covering fluctuations in labour and material costs as well as tax; or C which is a price adjustment formula using indices from RICS. The wider the better, from a contractor's perspective.

If there is no fluctuations clause, the contractor's only routes to more money will be through variations or loss and expense claims. In either case, the contractor will have to meet the criteria for such claims to succeed, which may be a challenge. Including a contingency for price increases in the contract price might help to mitigate this, but quantifying the contingency is not easy when prices are so volatile, and the resulting bid may not be attractive.

> *Material or labour shortages can cause significant delay but will rarely justify an extension of time on their own under standard form contracts.*

Time

Material or labour shortages can cause significant delay but will rarely justify an extension of time on their own under standard form contracts. It is the reason for the shortage which will dictate whether the contractor qualifies for relief from liquidated damages.

Brexit, Covid-19, and the war in Ukraine are commonly referred to as the reasons for material shortages, but it can be hard to disentangle these reasons and trace a particular supply issue back to one of those events precisely. For example, delayed manufacture and supply of one component may result from a shortage of labour because the workforce has returned to home countries following Brexit or Covid-19, as well as the absence of a specific material originating from Ukraine.

Once a reason has been identified, it must then be linked to a relief event in the contract.

Under NEC4, the Contractor will obtain an extension of time if it can prove a compensation event has occurred. Potentially relevant compensation events may be:

- Option X2 – Changes in law occurring after the Contract Date.
- 60.1(1) – If performance becomes impossible, as opposed to more difficult or more expensive.
- 60.1(19) – An event delays practical completion which neither party could prevent, and an experienced contractor would have judged so unlikely to occur that it would have been unreasonable to plan for. This is NEC4's version of force majeure. In 2022, Covid-19 and the war in Ukraine are foreseeable, so would not fall into this category now.

Under JCT 2016, the Contractor can claim a Relevant Event in similar circumstances.

- 2.26.1 – If variations are instructed to overcome supply issues. For example, a product is substituted, then time may be recoverable (as well as loss and expense because there is an equivalent Relevant Matter).
- 2.26.12 – A change in law. This can entitle a contractor to time (but not money), provided there really is a change in the law and not just an equivalent exercise of statutory powers.
- 2.26.14 – Force majeure. JCT 2016 does not define force majeure, so its interpretation is informed by common law. Even if war or pandemic are covered, the challenge is that they are probably an indirect, rather than direct, cause of delay to a project. Loss and expense is not recoverable for force majeure under JCT 2016.

Unfortunately for contractors, none of the provisions in either contract is a neat fit. Under existing contracts, the contractor will need to work hard to demonstrate that its circumstances do meet the necessary criteria to afford relief.

When negotiating new contracts, the contractor could try to widen the number, or scope, of relief events. For example, by including war, pandemic and material or labour shortages as relief events, or inserting a definition of force majeure that includes them.

> *It is the reason for the shortage which will dictate whether the contractor qualifies for relief from liquidated damages.*

So, who pays?

Ultimately, the parties must decide between them who pays if prices escalate, or delays occur because labour and materials are scarce. It is easy for employers to say this is the contractor's problem and push the risk downstream, but it is everyone's problem if the contractor, or another key supplier, folds and cannot complete. Collaboration will be the key from the beginning to end. Ideally, risk should be understood and carved up pragmatically at the outset, so the project is more likely to withstand these external pressures.

If claims arise, then it is hoped that the parties will adopt a collaborative approach to resolving them. Either way, the contractor can be expected to use any contractual hooks and commercial pressure it can. The usual considerations will, of course, apply. Is the drafting of the relevant provisions clear and not beset by ambiguities or conflicting provisions across the contract documents? Do the parties have the requisite records to prove their points? Have all notice requirements and conditions precedent been fulfilled? Where every penny counts, getting these basics right is more important than ever. ■

Bracing for recession: mitigating challenging economic conditions

It has been a calamitous few years for all in the wake of the Covid-19 pandemic and the severe supply chain issues resulting from the war in Ukraine. To make matters worse, during the first half of 2022, the prospect of a recession dangled above us like the sword of Damocles, and recently it appears the thread has snapped. **Sam Thyne** looks to see what the construction industry can do to counter these challenges.

What does a recession mean for the construction industry? Unfortunately, we know all too well, with the memories of the 2008 recession still fresh for many. In the 2008 Great Recession, the construction industry saw reduced growth, fewer new projects, massive levels of insolvency and unemployment, more disputes and increased delay on ongoing projects. It is, unfortunately, a very bleak picture.

Anyone involved in the construction industry will tell you that cashflow is king. Without a steady stream of cashflow, the construction industry flounders. In times of recession, consumers spend less on building which has the effect of reducing new orders in the industry. This means less work for everyone, and fiercer competition for the work there is, which usually results in contractors cutting thinner margins. All this slows down cashflow and spells trouble for the industry.

However, while the prognosis looks grim, parties should be actively working to mitigate any fallout by utilising contractual mechanisms they already have in place.

> *A failure to comply with a strict notice requirement can result in a party's contractual recourse falling away, a trap you don't want to find yourself in ever.*

Contract award

There is a myriad of commercial considerations that go into the tendering and bidding of projects, so many that it would be naïve of a legal article to try address them. Focussing on the contractual mechanisms, however, parties should consider the type of contract they are entering into.

Fixed price lump sum contracts are the most prevalently used form of contract at present. They're popular because (at least, at first glance) they offer certainty to the employer, and an opportunity to the contractor. If the contractor can be efficient, they can increase their margin. However, "fixed price" may be one of the biggest misnomers in the industry, as variations and claims often increase the initial lump sum price.

There are disadvantages to this model during the current economic climate. First, with the massive increases in costs of materials, the initial lump sum costs are no longer economic. Contractors who are lucky enough to have a change in cost mechanism in their contract are using these to make claims and those that don't may be stuck paying the cost. Second, as (absent any valid claims) a Contractor is tied to their price, in a more competitive bidding environment, their margins are eroded almost entirely. This sets up a more combative relationship between employer and contractor.

> *'Fixed price' may be one of the biggest misnomers in the industry, as variations and claims often increase the initial lump sum price.*

Parties may want to explore different methods of contracting, such as cost reimbursable (or cost plus) contracts. These are contracts where the employer pays the costs of the works plus a percentage of profit to the contractor. There are, of course, nuances and variances to this model. A key feature of cost reimbursable contracts is that the employer has greater oversight of costs, and more opportunity to scrutinise and approve them prior to costs being incurred.

While cost reimbursable contracts are often considered more expensive and less certain for the employer, with proper cost forecasting and scrutiny, these concerns can be mitigated. If managed well, there is the huge benefit of avoiding any nasty surprises in terms of variation and claims. For the Contractor, while they do not have the opportunity to increase their margins through efficiency, they have the benefit of a guaranteed margin, which is valuable in times of uncertainty. A bird in the hand...

Exploring different contract models may assist parties in navigating the more difficult economic conditions.

Insolvency

Another unfortunate consequence of a recession is an increase in insolvencies in the construction market. Insolvencies can be incredibly damaging to a construction project and often end up costing the employer much more.

In order to mitigate the impact of a contractor insolvency, employers should first make sure all their paperwork is in order. A common document required as part of a construction contract is a collateral warranty provided by subcontractors.

Among other things, this allows the employer to step into the shoes of the contractor in the event of a contractor insolvency and continue the works with the existing subcontractors, at the same contract price. This is a quick and efficient way of continuing the works with the most appropriate subcontractors. However, as with any bit of fiddly paperwork, these documents are not always executed. Employers should ensure that they have executed collateral warranties from all subcontractors.

In addition, employers should stay vigilant about the solvency of their contractors and look out for warning signs, in particular, high staff turnover, decreases in labour on site, slow progress and delay, removal of plant and equipment, requests for early payment or payment outside the payment regime, agitation from subcontractors about not receiving payment, and an increase in unsubstantiated claims.

When problems start to become apparent, employers should make their own preparations and consider the implications that the insolvency may have for the project. Would it be more costly to assist the contractor with their solvency issues or have another contractor finish the work? It may be the case that the best option is to provide assistance to the contractor to allow them to finish the job.

Finally, employers should be aware of what the contract says in the event of an insolvency. For instance, termination provisions usually entitle the employer to terminate on the insolvency of the contractor; however, there are careful notice provisions that may need to be observed. Even where the contractor is insolvent (or appears to be), the employer needs to be very careful about exercising termination rights under the contract.

> *Employers should stay vigilant about the solvency of their contractors and look out for warning signs, in particular, high staff turnover, decreases in labour on site, slow progress and delay.*

Disputes

Instances of disputes rise during recession. Matters that may not have been worth fighting for become worthwhile when any extra cash is a necessity.

Documentation is crucial to any dispute. Both contractors and employers should ensure that their records are comprehensive and that there is written record of everything going on in their projects. In particular, both parties should ensure that instructions relayed on site are accurately documented in writing.

Extra vigilance should be taken when it comes to contractual notices and other conditions precedent under the contract. A failure to comply with a strict notice requirement can result in a party's contractual recourse falling away, a trap you don't want to find yourself in ever, but particularly during tougher economic conditions.

Conclusion

There is very little positive spin we can put on the challenging economic conditions ahead. In order to best weather the recession, parties to construction projects need to be familiar with the contractual tools they have available to them and make sure they are exercising them appropriately. Much like with the Covid-19 pandemic (where some parties may have found themselves without an adequate force majeure mechanism to address the issue), unless they can come to an agreement, parties are stuck with the bargain they made. By ensuring compliance with even the most frustrating of contractual requirements, parties put themselves in a better position to withstand the turmoil. ■

The Building Safety Act: practical considerations for businesses

The Building Safety Act 2022 (''BSA'') is a major change to the regulatory regime for the design, procurement, construction, and management of buildings. Therefore, as **Ben Smith** explains, it significantly increases the risk profile of the companies to whom it applies. The BSA is principally concerned with the safety of buildings and the individuals in them and, therefore, is predominantly, but not exclusively, concerned with residential buildings.

What is the impact of the BSA?

The impact of the BSA can largely be divided into three categories: (1) claims and liability; (2) design, procurement, and construction; and (3) aftercare and facilities management as part of a digital golden thread impacting the whole life management, adaption, and re-purposing of buildings.

(1) Claims and Liability

Several changes to the claims and liability regime came into force on 28 June 2022. The headlines changes are:

- A new cause of action in respect of defective cladding products (s.149 of the BSA), which has a retrospective limitation period of 30 years and a prospective limitation period of 15 years.
- A new cause of action in respect of defective construction products (s.148 of the BSA), which has a prospective limitation period of 15 years.
- Section 1 of the Defective Premises Act 1972, which creates a duty to carry out works to new build dwellings in a professional manner and with proper materials so that the completed works are fit for habitation, now has a retrospective limitation period of 30 years and a prospective limitation period of 15 years.
- A new section 2A of the Defective Premises Act 1972 (s.134 of the BSA), which extends the duty in section 1 to all works, including refurbishments, to dwellings. This new section has a prospective limitation period (only) of 15 years.
- The introduction of Building Liability Orders which give the courts power, in respect of liabilities arising out of a building safety risk (which include fire safety), to extend liability from the original contracting party to any associated company, even where the original company has been dissolved, and make those associated companies jointly and severally liable.

There will also be a new cause of action for breaches of the Building Regulations in the design and construction of **any building** which results in damage including injury to any person under Section 38 of the Building Act 1984. The BSA has introduced a new prospective limitation period of 15 years for claims accruing under Section 38 of the Building Act; however, Section 38 is not yet in force.

Additionally, the BSA (section 161) creates new criminal and civil offences for directors and legal persons for failure to comply with: certain mandatory reporting requirements, cost contribution orders and the new Construction Product Regulations, together with obstruction or impersonation of an authorised officer and providing false or misleading information to the building safety regulator.

Practical points to consider:

- Is everyone in the business aware of the new causes of action and potential liabilities under the BSA? If not, does specific training need to be considered?
- Is the supply chain aware of the new causes of action and potential liabilities? Is this a risk the business may want to manage to reduce the risk of exposure to claims under the BSA on future projects?
- For new projects, consider whether it is possible to agree to contract out of parts of the BSA, or agree reduced limitation periods. Although, note that the BSA specifically provides that any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, any liability arising under sections 148 and 149 of the BSA is void. There does not appear to be any comparable wording in respect of causes of action under the Defective Premises Act 1972, or the Building Act 1984.

(2) Design, procurement, and construction

A new building safety regulator

The BSA introduces a new Building Safety Regulator (''BSR''), which will sit within the Health and Safety Executive and implement a new regulatory regime for ''higher-risk buildings'' (''HRBs''). It is anticipated that the BSR will be up and running by April 2023.

Higher-risk buildings

The BSA is primarily concerned with the regulation of ''higher-risk buildings''. There are separate definitions of higher-risk buildings in the BSA depending on whether the building is pre/during construction, or post construction. For buildings pre/during construction, Part 3 of the BSA defines higher risk buildings for the purposes of BSR as:

- 18m or 7 storeys (or higher) and contains two or more residential units; or
- is a hospital, or care home.

It is proposed that work on a building which has the effect of making it a HRB, or work on a HRB which has the effect of making it a non-HRB, will also be subject to the new regulations. There has been a government consultation on the proposed Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations which will, hopefully, complete the definition of higher-risk buildings for the new building safety regime.

> *Is the supply chain aware of the new causes of action and potential liabilities?*

The golden thread

The term *"golden thread"* is not used in the BSA; however, in summary, it is taken to mean that, during the design and construction phase, the duty holders, for example, the client, principal designer or principal contractor, must maintain certain documents, which, importantly, demonstrate compliance with building regulations, for example, change logs, design and installation records, product specifications, documents relating to fire safety, floor plans, evacuation plans in the event of fire, etc. The information needs to be kept in an accessible and digital format.

Gateway 2: before work can start

Gateway 2 will replace the building control deposit of plans stage before building work starts for higher-risk buildings. Under the current regime, a decision is given within five weeks (or two months if agreed).

Under Gateway 2, this stage will be a stop /go point and building control approval must be obtained from the BSR before relevant building work can start. The process for an application, review and decision is expected to be arranged by the government. The information released by the government to date suggests that the application:

- Is to demonstrate how the proposed building work complies with all applicable building regulations' requirements;
- Includes a comprehensive description of the proposed building work, a detailed plan, and several prescribed documents, including a competence declaration, a design and build approach document, a fire and emergency file, a construction control plan, and a change control plan; and
- Must include a description of both their mandatory occurrence reporting arrangements and the golden thread arrangements.

The government has estimated that it will take the industry 41 days to prepare an application and it will then take the new BSR six days to review the application. This seems quite brief, and the government has since stated that it will take 12 weeks (or longer) in total to determine the application. It will be important to consider what happens if this process is delayed: will the contract still function as intended? In such circumstances, who has caused the delay and who takes responsibility for the delay?

It will be possible to apply for a staged approach to building control application. However, this will require careful consideration as to how this will work with the intended approach to the works and the functioning of the contract.

It is also possible that the BSR will approve the application with the imposition of certain requirements. For example, provision of a particular document by a certain date, only allowing the works to progress to a specified stage, or that notice is given when a specified stage of work has been reached and/or specified work is not covered up for a specified period to allow inspection by the BSR. If this happens, it will be important to consider all the *"what if"* scenarios and the implications under the contract.

Gateways 2 and 3: during the works

The government has indicated that there will be several requirements executed during the works, perhaps the most significant being:

1. The BSR can inspect works on HRBs, without notice, and enforce against any breaches of the regulations.
2. All changes from the original building control application must be recorded in a change control log. Changes will include defined "notifiable changes" and "major changes":
    a. Notifiable changes are changes which could have an impact on compliance in respect of all applicable building regulation requirements and will need to be notified to the BSR. No work can be carried out on the change for two weeks (or longer if agreed) to allow the BSR time to determine whether it needs to take any action.
    b. Major changes are changes which could have an impact on

compliance in respect of all applicable building regulation requirements to a great extent and will need to be notified to the BSR. No work can be carried out on the change for six weeks (or longer if agreed) to allow the BSR time to determine whether it needs to take any action.

3. Mandatory reporting to the BSR of any fire or structural safety issues during the works (such a report may trigger an inspection by the BSR as per item 1 above).

Practical points to consider:

- Is the supply chain aware of its responsibilities and the risk of an unannounced BSR inspection? Does this need to be factored into the procurement process, site training procedures, etc.?
- Who is going to be responsible for mandatory reporting to the BSR?
- Change Control:
    - How will this be accounted for in the design submission procedure?
    - What is the reason for the change? Is it client-driven, for example, value engineering, or contractor driven, for example, a change to the design to overcome unforeseen issues in an existing building?
    - Who bears the risk of the change and any associated delays?
    - What happens if the change is due to errors in the Gateway 2 approved design?
    - Will the design need to be varied to comply with Statutory Requirements (as defined in the contract)?

Gateway 3: handing over the works

The government has indicated that, as part of the completion and handover process, there will be certain requirements that have to be met, and documents to be handed over. Additionally, contractors and designers will have to give declarations of compliance, including:

- A completion certificate application must be submitted to the BSR for approval. The application must include plans and documents that reflect the as-built condition of the building, including all plans, documents, and drawings as part of the golden thread of information.
- The BSR will assess the application and carry out final inspection(s) of the works. If it is satisfied that the building work complies with all applicable building regulations, the BSR will issue a completion certificate. The BSR has 12 weeks (or longer if agreed) to determine the application. This is the end of the building control process.
- The building will need to be separately registered before occupation can commence. This is separate to the building control process.
- The completion certificate and the registration of the building both operate as "hard stops" to occupation of the building. It is a criminal offence to allow occupation of a HRB before a completion certificate has been granted.

> ***Consider your current document retention policy. Does it need to be amended as a result of the new lengthy retrospective limitation periods?***

Practical points to consider:

- Is Practical Completion linked to compliance with Gateway 3?
- If it is, what is the potential impact on/effect of the Gateway 3 process on: cashflow, release of retention, delays by the BSR, funding (for example, is final drawdown only once Gateway 3 has been achieved?) and the expiry of bonds and start of defect rectification periods?

(3) Post-construction and management of the building

Once occupation commences, it is the "accountable person's" duty to assess and manage building safety risks for the entire building, not just the part that is occupied. The accountable person is the person with intent to possess the building, or who has a repairing obligation and, therefore, is likely to be the owner/property owner or management company.

The accountable person is responsible for:

- Applying for the existing building to be registered as an HRB;
- Coordinating the golden thread of safety information and keeping it up to date; and
- Assessing the building's safety risks, managing these risks, for example, by providing timely repair works, and producing safety reports.

Failure by the accountable person to comply with their obligations is a criminal offence.

Managing legacy projects/risks

What you should consider when thinking about managing the impact of the BSA on legacy projects:

- Consider your current document retention policy and whether it needs to be amended as a result of the new lengthy retrospective limitation periods.
- Is any insurance going to be available for claims as a result of the extension to the retrospective and prospective limitation periods? Is it worth having a discussion with your broker?
- Do you need to review legacy projects/claims? While reviewing historic claims/projects is unlikely to be an attractive proposition, it may be a good idea if there is a possibility that the business may be exposed to claims under the BSA. At the very least, an audit will inform the business of the scale of the risk and any provision that needs to be made.
- It may also be a good idea to audit current active disputes and consider whether the merits would be affected by the BSA and put in place appropriate strategies to deal with this.

Comment

The above is not exhaustive but should provide a good overview of the impact of the BSA.

It is very much a moving target and secondary legislation is, without a doubt, required in order to clarify and bring into force a number of the significant concepts articulated in the BSA.

The BSA will have a huge impact in terms of how a project gets to site, gets built and can be occupied and all parties will really need to understand the ins and outs of the project.

Hopefully, the practical considerations above give food for thought and, importantly, watch this space! ■

> ***The BSA creates new criminal and civil offences for directors for failure to comply with certain mandatory reporting requirements and the new Construction Product Regulations.***

> *Who is responsible for coordinating the golden thread of safety information and keeping it up-to-date?*

Adjudication: an effective form of dispute resolution for an insolvent company or paper tiger?

Adele Parsons discusses how useful a dispute resolution tool adjudication really is for an insolvent company as the TCC continues to mediate the uneasy relationship between the enforcement of an adjudicator's decision and the Insolvency Rules in *FTH Limited v Varis Developments Limited*.[1]

Introduction

There is no escaping that times are tough for the construction industry. It, like the rest of the UK, is staring down the barrel of a long recession, which hardly seems surprising given the perfect storm of market challenges faced by the industry. Indeed, the jump in inflation, fallout from the pandemic and Brexit, supply chain pressures, lack of labour, rising material and fuel costs, and the current geopolitical climate caused by the war in Ukraine, must, for many in the industry, feel like a commercial nightmare from which there is little chance of yet waking up.

At the time of writing, in the 12 months ending in the second quarter of 2022, 19% of the insolvencies in England and Wales were within the construction industry; a total of 3,665 company insolvencies.[2]

Adjudication and insolvency

On the face of it, adjudication should be an effective tool for insolvent companies given its purpose is to provide a referring party with a rapid and relatively inexpensive method of resolving disputes to obtain cashflow quickly. Previously, however, it was argued that adjudication did not sit well with the mandatory set-off provisions within the Insolvency Rules.

These require that a liquidator set off any claims and counterclaims made against the insolvent company by a third party with which the company has had "mutual dealings". The result of this accounting exercise is a net balance in favour of either the company or the third party. In short, the right to set off seemed to undermine the temporary binding adjudicator's decision.

Any wrinkles between the adjudication regime and the Insolvency Rules were seemingly ironed out some two years ago when the Supreme Court[3] unanimously found that the right to adjudicate was not extinguished by the Insolvency Rules nor any cross claims that a responding party may have against an insolvent referring party. Indeed, the Supreme Court reasoned that, should the existence of a cross claim deprive a company of its right to adjudicate, this would be a *"triumph of technicality over substance"*.[4]

Essentially, the position remains that an insolvent company is not only entitled to commence an adjudication but to enforce the adjudicator's decision if necessary.

The caveats?

- The adjudicator does not have jurisdiction to award a cross claim to a responding party where that cross claim is greater than the amount sought by the referring party. The adjudicator can, however, make a declaration as to its value.

- Secondly, should the insolvent referring party seek to enforce the adjudicator's decision, they will not only need to evidence that they can provide security for the amount awarded in the decision but also for the other's party's costs of the enforcement.

FTH Limited v Varis Developments Limited: the facts

How the above works in practice was recently explored further in the case of *FTH Limited v Varis Developments Ltd*. Here, however, the question before the court was whether it should enforce two adjudicators' decisions awarded in favour of FTH where the latter had a Company Voluntary Arrangement or "CVA" in place.

To summarise, a CVA is a procedure that allows a company to essentially trade its way out of trouble by coming to an arrangement with its creditors over the payment of its debts. The aim is that the company settles those debts by only paying a proportion of what it owes to those creditors. Once approved, the CVA binds the company's creditors who can then only recover their debt from the company in accordance with the terms of the agreed CVA.

In the first adjudication, the adjudicator upheld the validity of a Pay Less Notice. In the second, it was found that Varis had not validly terminated the parties' contract and that it had, therefore, repudiated the contract.

Although Varis accepted that the two adjudicator's decisions were valid, it resisted enforcement of the adjudicators' decisions and sought a stay of execution as it had serious concerns about FTH's financial position and had crossclaims against FTH in the sum of some £1.7m.

Varis submitted that, although FTH had a CVA in place, it only had a 12-month life span, and only allowed FTH to recover 56p in the pound. In addition, it was apparent that the CVA's supervisors had not considered Varis's crossclaim.

1. [2022] EWHC 1385
2. https://www.gov.uk/government/statistics/company-insolvency-statistics-april-to-june-2022/commentary-company-insolvency-statistics-april-to-june-2022
3. *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25
4. Ibid, Lord Briggs [13]
5. [2000] BLR 522
6. [2019] EWCA Civ 27

Considering the above, Varis argued that if its crossclaim succeeded in whole or even in significant part, the CVA would fail and FTH would go into liquidation, and that if the court enforced the adjudicator's decisions, there was a real risk that Varis would be deprived of security for its crossclaim.

A compelling reason not to enforce

The Court agreed with Varis and refused to enforce the adjudicator's decisions. The starting point for the court's decision was *Bouygues (UK) Ltd v Dahl-Jensen*,[5] in which the Court of Appeal held that, where a company in liquidation seeks to enforce an adjudicator's decision but the Defendant has cross claims, there was a *"compelling reason"* to refuse summary judgment particularly given the provisional (i.e., temporarily binding) nature of an adjudicator's decision.

Notwithstanding that "compelling" reason, the court in *FTH* was quick to note the Court of Appeal's judgment in *Bresco v Lonsdale*[6] in which Lord Justice Coulson stressed that courts should be wary of reaching conclusions which prevent a company in clear financial difficulties from endeavouring to use adjudication. Indeed, not all adjudication decisions were subject to enforcement.

> ***The right to adjudicate is not extinguished by the Insolvency Rules nor any cross claims that a responding party may have against an insolvent referring party.***

Specifically, the Court of Appeal commented that the general position relating to a CVA may be very different to the situation where the claimant company is in insolvent liquidation. The reason for this is that the CVA, by its very nature, is designed to allow a company to trade its way out of trouble. In those circumstances and given that the purpose of adjudication is to provide a quick and cheap method of improving cashflow, adjudication could be a very useful tool to assist the operation of the CVA.

CVA: can you trade out of trouble?

The court did not enforce the adjudicators' decisions as it agreed that FTH had not been trading profitably and that there remained a real risk that Varis could be deprived of adequate (or any) security in respect of its crossclaim if the court enforced the adjudicator's decisions. The court found that FTH would be unable to repay the judgment sum and Varis's costs if the matter went to trial and the adjudicators' decisions were overturned.

As the enforcement had been refused, the court did not consider it necessary to grant a stay of execution. However, it did note that, if parties such as FTH wish to avoid a stay, they must provide detailed and reliable information in respect of their financial position. FTH had not done this. In fact, the court found it had been *"somewhat economical"* with the financial information it had provided meaning that court would have been justified in granting a stay had it been required.

Is adjudication effective for an insolvent company?

Arguably, the court's decision in *FTH* raises the often raised utility or "what is the point?" question, i.e., if a court is reluctant to enforce an adjudicator's decision where on the facts the claimant is insolvent (or heading that way) and unable to provide the necessary security, is there really any point in that party pursuing an adjudication?

Despite the increasing frequency in which cases like this have been heard by the courts over the last two to three years (a number which is only likely to rise in the current economic climate), it is clear that the merits of an adjudication enforcement claim made by an insolvent party will still very much depend on the facts.

What is clear from *FTH* is that the burden is on an insolvent company to not only demonstrate the effectiveness of the CVA to which it is bound but to provide transparent and detailed information of its financial position to persuade a court that it can provide security for both the claim amount and the other side's costs. Again, we are led back to the second caveat mentioned above.

In all, the reliance on the facts of each case and the lack of further definitive judicial guidance means that insolvent companies should be wary of how they proceed when considering adjudication.

Although billed as a cheap and quick form of dispute resolution, adjudication costs can easily spiral depending on the substance of the dispute, the use of experts and the number of submissions served by each party. Essentially, potential referring parties should fully review the merits of their substantive arguments and not just their bank accounts when it comes to commencing an adjudication to ensure that adjudication will not deplete already stretched funds further with little or no reward further down the line. ■

> ***In all, the reliance on the facts of each case and the lack of further definitive judicial guidance means that insolvent companies should be wary of how they proceed when considering adjudication.***

Factual witness evidence: recent lessons from the courtroom

Cases frequently succeed or fail based on the strength of their factual witness evidence. But what does "strong" witness evidence actually look like in practice? **Stephanie Panzic** draws upon recent case law to illustrate three key attributes of a compelling witness: they should be supported by documentary evidence, appear authentic, and be well prepared.

Support

It is critical for a witness's evidence to be backed up by documents. Simply put, memory cannot be trusted. This point took centre stage in *Instrument Product Development Ltd v W D Engineering Solutions Ltd,*[1] in which the Deputy Judge began his judgment with a thought-provoking paragraph:

"In a noted study published in 1981, 'Role of schemata in memory for places', the psychologists William Brewer and James Treyens reported on a simple but revealing experiment they had conducted. Each of the 87 study subjects was asked to wait briefly in an office before being led into another room. In that second room, they were asked to write down a list of everything they had seen in the office. The overwhelming majority recalled seeing typical office furniture – a desk, chairs, shelves and so forth. That was unsurprising since they had seen such items only seconds earlier. Thirty per cent recalled seeing books and ten per cent recalled seeing a filing cabinet. That was more unusual because the office contained neither books nor a filing cabinet."

The case itself involved two considerably different accounts of the same telephone conversation. The Deputy Judge preferred the witness evidence that was more consistent with documentary evidence. The point in time at which those documents were created was also considered, with the Deputy Judge noting that he derived no assistance from correspondence exchanged between the parties after their relationship had soured.

A phone call was also important in *Mansion Place Ltd v Fox Industrial Services Ltd*.[2] The defendant claimed that a conversation resulted in a binding agreement that the claimant would forgo any right to liquidated damages in return for the defendant forgoing any right to claim payment for loss and expense as a result of the delay. The claimant said that no such agreement was made. Following an adjudicator deciding in the defendant's favour, the claimant commenced proceedings in the TCC. Despite contradicting accounts of what was said during the phone call in question, Justice Eyre was persuaded that each party was *"seeking to give his honest recollection of what had been said and that neither of them was deliberately seeking to mislead me"*. Accordingly, the judge moved on to consider such evidence *"through the prism of contemporaneous documents"*, making the observation that, *"to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened"*.[3] The judge found that various documents, including the defendant's internal correspondence following the conversation, were more supportive of the claimant's recollection of the call.

In today's age of technology, documentary support is not just about traditional "documents". For example, in *AM Construction Limited v The Darul Amaan Trust*,[4] a key piece of evidence was footage from a "Ring cam" (a motion-activated security camera). The case turned on what was in an envelope posted through the door to the claimant's registered office by a process server. The defendant said that it contained a notice of adjudication; the claimant said that the notice of adjudication was missing (and, therefore, the subsequent adjudicator's decision was unenforceable). In considering the witness evidence, the Deputy Judge found several inconsistencies in the evidence of the process server, which were brought to light by the Ring cam footage submitted by the claimant:

"... there were parts of Mr Walker's evidence that I did not find reliable. First, his oral evidence that he tried to find someone in at about 3pm is refuted by Mrs Anwar's evidence that she had been in all afternoon and nobody had rung the doorbell, her evidence in this regard being supported by the absence of any 'Ring' footage of such an attempt."

"... the 'Ring' footage completely destroys the suggestion that Companies House was contacted after a failure to effect personal service ..."

Although those findings did not answer the question about what was in the envelope, they were sufficient to tip the balance in the claimant's favour:

"At the end of the day, I have to decide between a witness describing what was to her a highly unusual event whose account is supported by emails sent within a couple of hours of the delivery of the envelope (Mrs Anwar) and a witness describing a routine process

1. [2022] EWHC 1994 (Ch).
2. [2021] EWHC 2972 (TCC).
3. Ibid at [55].
4. [2022] EWHC 1478 (TCC).
5. [2022] EWHC 2017 (QB).
6. Ibid at [70]-[71].
7. [2022] EWHC 1994 (Ch) at [13].
8. Civil Action No: CL-2019-0002911.
9. https://edition.cnn.com/videos/entertainment/2022/05/05/amber-heard-testimony-johnny-depp-defamation-trial-azari-nr-cabrera.cnn
10. [2021] EWHC 2972 (TCC) at [54].
11. [2022] EWHC 1994 (Ch).
12. [2022] EWHC 1994 (Ch) at [5].
13. Ibid at [7].

whose evidence I have concluded was unreliable in certain respects (Mr Walker). I have come firmly to the conclusion that Mrs Anwar's evidence is to be preferred."

Importantly, a lack of documentary evidence for a case can be just as damning as adverse evidence. For example, in *Vardy v Rooney*,[5] a key source of evidence was WhatsApp messages sent between Ms Vardy and her agent. However, the agent claimed that she had accidentally dropped her phone into the North Sea, whereas Ms Vardy claimed that her messages had been lost when her phone back-up failed. The judge was sceptical of these accounts and noted that various precedents provide that the court may draw adverse inferences where a wrongdoer has parted with relevant evidence.[6]

> ***The agent claimed that she had accidentally dropped her phone into the North Sea.***

Authenticity

Judges and juries can also be persuaded by the general "manner" of a witness: a seemingly authentic witness is more likely to be believed.

In *Instrument Product Development Ltd v W D Engineering Solutions Ltd*, the Deputy Judge observed that the sole witness for the unsuccessful defendant seemed to have no, or almost no, recollection of areas that might reflect poorly on the defendant's case whereas, on other points, his evidence was lengthy and detailed and frequently came across as pre-prepared and only tangential to the points in issue.[7]

Taking a more popular example, in the infamous defamation trial between Johnny Depp and Amber Heard in Virginia,[8] Amber Heard's oral evidence was widely panned by laypeople on social media as appearing fake and exaggerated. One attorney remarked to CNN that *"there's something a little unauthentic, a little rehearsed about her testimony"*.[9] In the context of this jury trial, Ms Heard's manner is likely to have led to her downfall but, notably, in a similar trial in London in front of a judge rather than a jury, Ms Heard was successful. It is generally the case that a judge will be less persuaded by the general demeanour of a witness, although that does not mean it will be completely ignored. In *Mansion Place Ltd v Fox Industrial Services Ltd*, Justice Eyre provided some helpful commentary on this point: [10]

"In assessing those competing accounts, I will have some regard to the demeanour of the witnesses and the impression I formed having seen them in the witness box. However, in doing so I remind myself that by itself, demeanour can be an unreliable guide to the reliability of a witness's evidence. In part this is because of the inherent unreliability of any judicial assessment of demeanour. What might appear to one judge to be evasion and a reluctance to answer questions indicative of unreliability in the evidence of a particular witness might to another judge be seen as commendable caution and care in giving evidence indicative of the reliability of the same witness's evidence."

Preparation

The fact that a witness appears authentic does not automatically mean that their evidence will come across well. Proper preparation for a hearing is critical, both in terms of familiarity with the subject matter of the case and general trial processes and conduct.

Returning to *Instrument Product Development Ltd v W D Engineering Solutions Ltd*, [11] the Deputy Judge was candid about his views on the various witnesses. One was described as *"a helpful witness"* who *"gave comprehensive answers but ones that were always responsive to the question asked", "accepted where he felt his recollection was unclear", "acknowledged where matters were outside the scope of his knowledge"*, and *"understood his obligations to assist the court"*.[12] His review of another witness was less complimentary: *"had a discursive manner, and often gave long answers to the question that did not always address the point being put to him"*.[13] As already mentioned, the Deputy Judge was even more critical of the sole witness for the defendant and, ultimately, determined the case in favour of the claimant.

Witness familiarisation training is becoming increasingly popular, where witnesses are educated about how hearings are conducted and how to be cross-examined well, often using role-play (based on a fictional hearing) as a tool to improve the witness's skills. It is also important to ensure that a witness is familiar with what he or she says in the written statement (many months may pass between drafting the statement and giving oral evidence), the documents referred to (just because something is in a footnote does not mean it can be ignored), and any contrary accounts given by the other side's witnesses. Proper preparation can be the difference between a satisfactory witness and an excellent witness. ■

Wagatha Christie: drama, intrigue, and boat trips – but where was the evidence?

Drama, intrigue, and boat trips – but where, asks **Rebecca Ardagh**, was the evidence? In addition to being the "British showbiz trial of the decade"[1] and inspiration for a new TV drama series,[2] the decision in *Vardy v Rooney*[3] provides valuable lessons in relation to the preservation and presentation of evidence in proceedings.[4] This article will examine the elements of the case that set out these obligations and, in particular, those elements that relate to witness summaries, witness statements, witness credibility and, of course, document preservation.

1. Wagatha Christie case has been showbiz trial of the decade but the only winners are the lawyers, says Ellie Costello (gbnews.uk)
2. Everything you need to know about 'Wagatha Christie' drama (timeout.com)
3. [2022] EWHC 2017 (QB)
4. And we simply could not complete a 2022 review without at least one mention...
5. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 39
6. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 50
7. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 39
8. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 50
9. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 69
10. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 70
11. Ibid.
12. *Vardy v Rooney* [2002] EWHC 2017 (QB), paragraph 71
13. The similar though more objectively deliberate "burn it" instruction comes to mind (*Ocado Group PLC v McKeeve* [2022] EWHC 2079 (Ch))
14. [2022] EWCH 946 (QB)
15. [2014] 1 WLR 3926
16. Technology and Construction Court (TCC) guide - October 2022 - Courts and Tribunals Judiciary
17. *Vardy v Rooney* [2022] EWCH 946 (QB), paragraph 107
18. *Vardy v Rooney* [2022] EWCH 946 (QB), paragraph 111

Introduction

Vardy v Rooney concerns a defamation claim brought by Rebekah Vardy against Coleen Rooney for the reputational damage suffered by Ms Vardy as a result of the "Reveal Post". The Reveal Post was a post shared by Ms Rooney on social media following an extensive *"sting operation"* alleging that Ms Vardy's Instagram account was leaking information from Ms Rooney's private Instagram account to *The Sun* newspaper.

Ms Rooney conceded that the Reveal Post was in itself defamatory and, therefore, the primary purpose of the proceeding became the determination of whether one or both of Ms Rooney's argued defences, that the defamatory statement was true and/or in the public interest, were successful. The validity of the truth defence, in particular, turned entirely on documentary and witness evidence.

The Decision – who to believe?

Witness credibility

Mrs Justice Steyn determined ultimately that "*... it is necessary to treat Ms Vardy's evidence with very considerable caution*"[5] while Ms Rooney's evidence was *"honest and reliable"*;[6] so, what led to this difference in treatment? Mrs Justice Steyn relied upon both the substance of the witnesses' evidence, as well as the manner in which it was presented when considering reliability.

In relation to the substance of the evidence, Ms Vardy's evidence was inconsistent with the documentary evidence and that of other witnesses. On the other hand, Ms Rooney's evidence was consistent and, therefore, more easily corroborated. Mrs Justice Steyn was also concerned that Ms Vardy was *"unwilling to make factual concessions, however implausible her evidence"*.[7]

> ***The witness was 'unwilling to make factual concessions, however implausible her evidence'.***

As for presentation of the evidence, Mrs Justice Steyn was concerned that Ms Vardy was evasive when answering questions where Ms Rooney answered, *"without any evasion, and without conveying any sense that she was giving pre-prepared answers ... her evidence was clear and compelling"*.[8]

We know that witness evidence will be given weight according to the credibility of the witness – in cases where issues are not also evidenced in documents, witness credibility will be a key factor in being able to demonstrate a party's case. Mrs Justice Steyn's treatment of the evidence of Ms Vardy and Ms Rooney reinforces that witnesses should be clear and cooperative when questioned; evasiveness or defensiveness can come across as having something to hide or having pre-rehearsed answers to questions. In particular, a witness should be prepared and even comfortable to acknowledge and explain inconsistencies between his or her evidence and the other evidence before the court or reconsider his or her recollection in light of other evidence, if that is appropriate in the circumstances.

Document preservation

A further factor that played into the credibility of Ms Vardy's evidence was Mrs Justice Steyn's conclusion as to her explanation for the disappearance of her WhatsApp conversation with her agent, Ms Watts. Essentially, the defendant argued that Ms Vardy was either directly leaking private information about Ms Rooney, or instructing her agent, Ms Watts, to do so on her behalf. The majority of the communication between Ms Vardy and Ms Watts took place via WhatsApp consisting of written messages and media (images and voice recordings).

> ***The reasons ... given for the original WhatsApp chat being unavailable are each improbable. But the improbability of the losses occurring in the way they describe is heightened by the fact that it took the combination of these improbable events for the evidence to be unavailable.***

Unfortunately, the court was not privy to the entirety of these written messages or any of the media. In this regard, Ms Vardy claims she encountered a technical malfunction while uploading her WhatsApp history to her solicitors, which resulted in no media being uploaded and then the entirety of her conversation with Ms Watts being deleted from her phone. While the defendant argued that this incomplete upload and simultaneous deletion was deliberate, the claimant maintained it was accidental. The expert evidence considered it at least surprising and at most impossible. Ms Vardy also then encountered an issue with her laptop and subsequently disposed of it without notifying the defendant, meaning the original (and potentially complete) upload file could not be analysed.

This was coupled with Ms Watts losing her phone at sea sometime in August 2021, when a CCMC order requiring inspection of her mobile phone had been made on 4 August 2021. Mrs Justice Steyn noted that the timing of this was *"striking"*.[9]

Ultimately, Mrs Justice Steyn stated that, *"The reasons that Ms Vardy and Ms Watt have given for the original WhatsApp chat being unavailable are each improbable. But the improbability of the losses occurring in the way they describe is heightened by the fact that it took the combination of these improbable events for the evidence to be unavailable"*.[10] Though Ms Vardy did disclose some adverse documents, Mrs Justice Steyn was not *"persuaded that the imperfection of the effort to remove incriminating evidence shows that there was no such attempt"*.[11]

Mrs Justice Steyn considered that the above was sufficient to conclude that the claimant had parted with relevant evidence and for her to draw adverse inferences in light of this.[12] The claimant was also subsequently ordered to pay the defendant's legal costs on an indemnity basis rather than a standard basis, resulting in Ms Vardy being responsible for 90% of Ms Rooney's court costs (higher than what is ordinarily ordered in similar cases). Mrs Justice Steyn imposed these punitive costs as a result of her finding that the WhatsApp messages were deliberately destroyed, which was *"outside the ordinary and reasonable conduct of proceedings"*.

These examples are clearly (hopefully) extreme, though not entirely unheard of,[13] examples of a party's failure to comply with its document preservation and disclosure obligations. The parties (and their legal representatives) have strict obligations in this regard in almost all forums, and particularly in the Business and Property Courts by way of the Disclosure Pilot and Practice Direction 57AD. It is important to be aware of and understand fully the general obligations of the forum in which your claim is taking place, as well as the specific rules implemented by way of orders or directions during the case management process. Compliance (or otherwise) with such rules and obligations could have an impact on the way a party's evidence is treated, the outcome, and, in some cases, their wallet.

Pre-Trial Review – what can we say?

Witness Summaries

According to CPR 32.9(2), a witness summary is a summary of either the evidence that would otherwise be included in a witness statement (if the evidence is known), or the matters on which the party intends to question the witness (if the evidence is not known). Under CPR 32.9(1), where a party is required to serve a witness statement but is unable to obtain one, it may apply for permission to serve a witness summary instead.

> ***'This witness answered, 'without any evasion, and without conveying any sense that she was giving pre-prepared answers... her evidence was clear and compelling.'***

Ms Vardy served two witness statements and eight witness summaries, without having informed either the defendant or the court of the intention to do so, or even that those for whom witness summaries were being provided were intended witnesses for the claimant. In a pre-trial review,[14] Mrs Justice Steyn considered an application by Ms Vardy to rely on witness summaries and for relief from sanctions. In doing so, she considered CPR 3.9(1) and the approach applied by the Court of Appeal in *Denton v TH White Limited*.[15]

CPR3.9(1) requires the court to consider *"all circumstances of the case, so as to enable it to deal justly with the application, including the need – (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders"*.

The Court of Appeal in *Denton v TH White Limited* indicted this should be approached in 3 stages: 1) consider the seriousness of the failure (which may be the only stage if the failure is not serious or significant), 2) consider why the default occurred, and 3) evaluate all the circumstances of the case as in CPR3.9(1).

Mrs Justice Steyn considered that the claimant's failure was a significant one; however, the interests of justice weighed in favour of giving permission to the claimant to serve four of the witness summaries (as well as relief from sanctions). Mrs Justice Steyn considered that the specified four witness summaries were likely to contain relevant evidence and the topics on which they were intended to be questioned were clear. They were introduced on the deadline for witness evidence and their inclusion would not impact the forthcoming trial.

On the other hand, the remaining witness summaries were not as likely to contain relevant evidence as the claimant could not establish a strong enough connection between these proposed witnesses and the issues to be determined. Given the significance of the default found in the first stage, the fact that the interests of justice were not as strong for these summaries, and the potential impact on efficient litigation, tipped Mrs Justice Steyn, who did not grant retrospective permission to serve, and relief from sanctions in relation to the final two witness summaries.

In practice, *Vardy v Rooney* further confirms the court's strict abidance by the principle that witness summaries should only be used in situations where a party is required to provide a witness statement but is unable to obtain one and has applied for permission to serve a witness summary in its place. The summary should be clear as to the evidence the witness will give or will be questioned in relation to, and a party should be prepared to demonstrate the basis on which it considers whether the witness is in a position to provide such evidence including documentary or corroborating evidence of the proposed witness's relationship to or knowledge of the person or issue at hand.

Witness statements

The claimant applied for 127 paragraphs of Ms Rooney's witness statement to be struck out either in part or in full. Mrs Justice Steyn referred to paragraph 10.60 of the Queen's Bench Guide 2022, which stated in part that witness statements *"should not include commentary on the trial bundle"* and *"should be as concise as the circumstances allow; inadmissible or irrelevant material should not be included"*. This can be compared to paragraph 12.1.4 of the Technology and Construction Court Guide,[16] which states that:

"The witness statement should be as concise as possible without omitting anything of significance, refer to documents only where necessary and should not:

- *Quote at any length from any document to which reference is made;*
- *Seek to argue the case, either generally or on particular points;*
- *Take the court through the documents in the case or set out a narrative derived from the documents, those being matters for argument; or*
- *Include commentary on other evidence in the case (either documents or evidence of other witnesses)."*

Ms Rooney's witness statement included numerous instances of her summarising communications already in evidence that she was not party to and using these to support the personal opinions or conclusions she had at that time. This was both a recitation of the evidence in the case, as well as commentary on such evidence. Mrs Justice Steyn pointed out that this also amounts to arguing the case. Giving *"commentary on the effect of those communications is a matter of argument for counsel. It has no place in the defendant's witness statement"*.[17]

Mrs Justice Steyn granted the claimant's application in relation to the majority of the paragraphs identified in the application for commentary. It is worth noting that some of the paragraphs in which Ms Rooney recited or commented on were allowed to remain, but only in instances where Ms Rooney was party to those communications and, therefore, could give evidence on them.

When it came to considering whether material was relevant, Mrs Justice Steyn elected to take a generous view given this was only a pre-trial review and she was not privy to *"the full range of arguments that the parties will deploy when the substantive issues are tried"*.[18] It is likely that the court will allow itself more scope to consider applications concerning relevance at a substantive hearing.

In practice, parties need to ensure that witness statements are strictly limited to that witness's own, relevant evidence. It is not an opportunity to highlight or draw attention to the documentation before the court, particularly where the witness was not party to that documentation contemporaneously.

Conclusion – the outcome will turn on it

It has long been said that there are no silver bullets in disclosure – and, although it is true that they are not often found, attempts to avoid disclosing one can be just as fatal to a case as the bullet itself ever could. At least, that could be said about this case.

Documentary, witness, and expert evidence consumes a significant amount of the time and expense of any claim. It is important to ensure that both parties and their representatives are aware of and complying with the rules and guidance in the CPR, applicable court guidelines, and specific orders from the outset. Legal representatives also need to take particular care to ensure their clients and witnesses are aware of and comfortable with their obligations at each stage of the proceeding; the outcome really will turn on it. ■

Expert evidence: a roundup of case law over the last 12 months

Our *Annual Review* for 2021 included an article by Huw Wilkins entitled "Expert Evidence: English courts send a message to experts". As **Ted Lowery** explains, over the last 12 months the courts have continued to reinforce the message that CPR Part 35 and Practice Direction 35 must be satisfied and have imposed drastic sanctions for non-compliance.

Introduction

The principal judgments over the last 12 months can be broadly grouped under the following headings:

- Permission for expert evidence.
- Independence.
- Unopposed expert evidence.
- Expert (mis)behaviour.

Looking at these in turn.

Permission for expert evidence

CPR Part 35 states that expert evidence may only be adduced with the permission of the court. It should be borne in mind that the court's permission is not automatic and that, when granted, the permission will often be prescriptive, identifying the relevant disciplines and issues to be addressed by the experts. The court's exercise of tighter control over expert evidence was one of the key objectives associated with the introduction of the Civil Procedure Rules in 1999, i.e., to reduce the proliferation of expert evidence in litigation (albeit primarily in the clinical negligence sector rather than in construction disputes).

A judgment from August 2022 illustrates that the court will not permit expert evidence that is considered superfluous, notwithstanding that the parties may have agreed to this.

In *Siemens Mobility Ltd v High Speed Two (HS2) Ltd*,[1] Siemens applied for permission under CPR 35.4(1) for each party to adduce and rely upon evidence from an independent expert witness in the field of rolling stock dwell time, door configuration, seat configuration and rolling stock platform interfaces. The judge refused the application on the grounds that it was neither reasonably necessary nor proportionate to permit expert evidence in these disciplines to be adduced to resolve any of the issues to be determined at trial and that such evidence would not otherwise assist the court to resolve any of the pleaded issues.

When expert evidence is permitted, the courts will still continue to monitor the product: in *Radia v Marks*[2] the judge criticised the evidence of both experts for ranging far beyond the confines of the court's directions, concluding that the expert evidence had provided only marginal assistance in resolving the case. In *Barrowfen Properties Ltd v Patel & Others*,[3] there was a dispute over whether a court's direction that each party had permission to call one expert in the field of evaluation of finance costs should be construed (and limited) by reference to the correspondence exchanges and the pleadings.

Whilst the judge found that the direction was expressed in wide and unambiguous terms and was not so restricted, this decision illustrates the court's active approach to policing permissions. An extreme example of this approach was seen in March 2022 in *Andrews & Ors. v Kronospan Ltd*[4] where the court took the drastic step of revoking the claimants' permission to rely upon the evidence of its expert, notwithstanding the significant repercussions of doing so in terms of costs and possible delay to the trial.

In summary, permission for expert evidence remains a matter for the court's discretion and albeit rarely expressly stated in the court's directions, the *quid pro quo* of permission being granted will be compliance with CPR Part 35.

> ***"The expert had been had been forthright, abrasive and adversarial during the hot-tubbing sessions to the extent of rebuking the court.***

Independence

It is axiomatic that an expert must offer independent opinion evidence as part of his/her duty to the court. Ordinarily, independence will require the expert to have no prior substantive connection with the instructing party, but there are exceptions: for example, in *Multiplex Constructions (UK) Limited v (1) Cleveland Bridge UK Limited and (2) Cleveland Bridge Dorman Long Engineering Limited*,[5] the court confirmed that lay witnesses who possess relevant expertise may offer opinion evidence, albeit subject to objectivity challenges.

In *Tehrani v Hamilton Bonaduz AG & Ors.*,[6] the Intellectual Property Enterprise Court was confronted with a similar situation to *Multiplex* where the claimant inventor/patent owner acted as her own expert witness. The judge found that, in principle, there was no reason why an expert should not be closely connected to the instructing party, (for example, an employee as was the case in *Multiplex*)

1. [2022] EWHC 2190 (TCC) (17 August 2022).
2. [2022] EWHC 145 (QB) (26 January 2022).
3. [2022] EWHC 207 (Ch) (3 February 2022).
4. [2022] EWHC 479 (QB) (7 March 2022).
5. [2008] EWHC 2220 (TCC).
6. [2021] EWHC 3457 (IPEC) (22 December 2021).
7. Like Caesar's wife, experts must be seen to be above suspicion.
8. [2022] EWHC 1290 (TCC) (27 May 2022).
9. Ibid.
10. [2021] EWCA Civ 1442 (7 October 2021).
11. Ibid.
12. [2022] EWHC 2226 (TCC) (25 August 2022).
13. Ibid.
14. [2022] EWHC 333 (TCC).
15. [2022] EWFC 53 (13 June 2022).

but there was a higher than usual requirement for the claimant to show that acting as expert, her clear and primary duty was to assist the court objectively and truthfully. On the particular facts in this case, the judge found that the claimant's actions in her capacity as an expert did not provide the necessary indication of her objectivity.

Notwithstanding the principle endorsed by the judge, expert evidence offered by employees, family members or close associates will always attract enhanced criticism based upon a perceived want of independence[7] and the experts themselves will probably find it more difficult to demonstrate impartiality.

In *Coldunell Ltd v Hotel Management International Ltd*,[8] the claimant's expert in a dilapidations dispute was familiar with the property having first been instructed some years before to deal with an insurance claim and having acted as the contract administrator for preceding external works and boiler repairs.

The judge did not accept the defendant's criticisms, finding that the duality of roles did not prevent the claimant's expert from providing genuinely held independent expert opinion to the court. Given that a relatively modest sum of around £1 million was at stake, it was reasonable and proportionate for the claimant to be allowed to rely on the expert's detailed knowledge of the condition of the property and works required. In this instance, the claimant's expert was able to demonstrate objectivity (in contrast to his opposite number – see below).

A novel aspect of the requirement for expert independence was considered in *Radia v Marks*.[9] In this case, Mr Radia claimed damages against Professor Marks – who had acted as a single joint expert in employment appeal tribunal proceedings – for failing to notice discrepancies in Mr Radia's medical notes, which led to the failure of Mr Radia's discrimination disability claim against his employers. The judge dismissed Mr Radia's claim stating that an expert did not owe a duty to protect his or her instructing party from the risk of an adverse finding on credibility: any such duty would create a real conflict with the expert's overriding obligation to the court to provide an independent view. That appears to be a manifestly sensible outcome.

Unopposed expert evidence

Possibly one of the most significant cases over the last 12 months concerning expert evidence was the Court of Appeal's judgment in October 2021 in *Griffiths v TUI (UK) Ltd*.[10] At first instance, the claimant had relied upon an expert's report prepared by one Professor Pennington. Having failed to call any expert evidence of their own or required Professor Pennington to attend for cross-examination, TUI critiqued the adequacy of his report's reasoning in their written closing submissions: the judge dismissed Professor Pennington's evidence and the claim.

By a majority verdict, the Court of Appeal confirmed that there was no strict rule that prevented a court from considering and rejecting the contents of an expert's report which complied with Part 35, even if it had not been challenged by contrary evidence or cross-examination.

This was a controversial outcome, not the least because of the points made in the dissenting judgment of Bean LJ who expressed the view, in terms, that a fair trial required expert evidence to be challenged by peer evidence or cross-examination and that, in principle, uncontroverted evidence should generally be accepted by the court.

It does seem inequitable that an expert should be deprived of the opportunity to answer criticisms made for the first time in the closing submissions, with the other side having declined the opportunity to challenge the expert's evidence at any preceding stage. We can, at least, say that this is probably an unlikely scenario in construction disputes, where in most cases there will be opposing expert evidence that will have been challenged in detail at an early stage.

Expert (mis)behaviour

The last 12 months have seen a fresh crop of expert witnesses who have been censured by judges for failing to comply with CPR Part 35 and the Practice Direction. It must, however, be said that, in two of these cases, the experts' instructing solicitors also had their wrists slapped where both cases featured revelations of collaboration between experts and solicitors over the contents of the experts' joint statement.

In *Andrews & Ors. v Kronospan Ltd*,[11] the Senior Master revoked the claimants' permission to rely on the evidence of their dust analysis and modelling expert where disclosed documents showed that the expert had sought input from his instructing solicitors during the process of agreeing the joint statement (and also appeared to regard himself an advocate

for the claimants). The Senior Master concluded that, in view of these serious transgressions by the claimants' solicitors and expert, it was not disproportionate to revoke the permission for the expert's evidence in order to preserve the integrity of the experts' discussion process and to ensure that the court's decisions were based on objective expert evidence.

In *Pickett v Balkind*,[12] the claimant's solicitors inadvertently disclosed a letter that alluded to exchanges between the solicitors and expert concerning the joint statement. The claimant applied for an injunction to restrain the defendant from using the letter in evidence but this application was dismissed: the judge agreed with the defendant that the letter revealed a potentially serious breach of paragraph 13.6.3 of the TCC Guide (which provides that the parties' legal advisers must not be involved in negotiating or drafting the experts' joint statement) so the relevant parts of the letter could not be privileged. This case has not yet come to trial but the ramifications of the claimant's expert being cross-examined by reference to a letter indicating the malleability of his professional opinions can be imagined.

Several other judgments over the last 12 months have featured acts or omissions by experts that have diminished, sometimes irretrievably, the value of their evidence to the court (and their clients). For example:

- In *Coldunell Ltd v Hotel Management International Ltd*,[13] the judge rejected the defendant's expert's evidence on several grounds including that he had never physically inspected the property, had relied on argument rather than opinion and had made statements that demonstrably lacked credibility.
- In *Struthers & Another v Davies (t/a Alastair Davies Building) & Another*,[14] the judge criticised an expert whose views were largely derived from looking at photographs rather than from a site visit and whose quantum calculations were not transparent.
- In *Gallagher v Gallagher (No.2) (Financial Remedies)*,[15] the judge considered that the husband's expert was not impartial including on grounds that the expert had used the words "*we can argue*" in emails and had been forthright, abrasive and adversarial during the hot-tubbing sessions to the extent of rebuking the court for allowing what he regarded as excessive detail from the wife's expert.
- In *Davies-Gilbert v Goacher*,[16] the judge criticised an expert who had disregarded the instructions he had received from the court and his instructing solicitors in order to ignore evidence which did not support his opinion.
- In *Reynolds v Stanbury CSB 123 Ltd*,[17] the judge dismissed the evidence of an expert on several grounds including that his report was an "*... unimpressive, results-driven piece of work*" with findings that the expert could not justify in cross examination, creating the impression that the expert was treating the giving of evidence in court as a game.

Summary

Judgments that touch upon expert evidence illustrate best practice (for both experts and solicitors) often through stark examples of what not to do. Over the last 12 months, the courts have reinforced some of the more obvious "do nots" for expert evidence: experts should not ask solicitors for input into the joint statement, experts should not use collective pronouns when referencing their client's arguments and, in a specific construction dispute context, experts should not offer opinions on a site they have never visited. ■

Cutting carbon: the small print

Aurelia Russo looks at the main components of NEC's new Option X29 in the context of NEC4 ECC and highlights some key points for Contractors.

Getting started

As pressures to cut carbon increase, those working on upcoming projects should be looking to tackle climate issues at the outset, long before any works start on site. This inevitably begins with the tender documentation and the construction contract. Climate change is now the newest addition to the long list of contractual risks to be allocated between the parties. NEC has already developed its first offering for dealing with this critical issue, but does it go far enough?

Secondary Option X29 Climate Change

The core aim of X29 is to *"reduce the impact of the creation, operation, maintenance and demolition of the works on climate change"*.[1] How exactly this reduction is achieved on projects and what contribution the construction industry as a whole can make towards a carbon-zero world is yet to be seen.

Broadly, the Option integrates requirements for tackling climate change into the Scope (the *Climate Change Requirements*, or "CCRs") and introduces a pain-gain mechanism by way of a Performance Table, detailing financial rewards and penalties attached to net zero targets and time frames.

Collaboration (X29.2)

The ethos of the NEC suite is reiterated in relation to climate change. The Contractor is to collaborate with the Climate Change Partners ("CCPs"), being those parties listed in the CCRs as contributing to the sustainability of the project.

Contractors should expect the list of CCPs to be long, particularly on large-scale projects. This obligation therefore fosters an overall spirit of teamwork and cooperation between all those working on the project, at least in relation to climate issues. As the CCPs are part of the Scope, the Project Manager may amend the list unilaterally as they see fit during the life of the project. Contractors should bear in mind that building good relationships with key CCPs could create opportunities for innovation and cost-savings.

Early warning (X29.3)

Notice should be given as soon as either the Contractor or the Project Manager become aware of any matter affecting the CCRs.

Dependent on how comprehensive the CCRs are, this could be a burdensome task, particularly as there will surely be some doubt over what matters may or may not affect the CCRs. Further, what level of impact is enough to warrant an early warning notice? Contractors should err on the side of caution and notify in all cases. CCRs which are objective and measurable will, of course, make any impact and necessary warning easier to ascertain.

Climate change plan (X29.4)

The *Climate Change Plan* (the "Plan") is a Contractor-led document which describes how it will fulfil the CCRs. The Project Manager has two weeks to accept or reject the Plan, however, if the Contractor is faced with silence, it is not entitled to assume that the Plan is accepted.

Contractors should ensure that the Plan complies with the CCRs, and that it will not affect the provision of the works. The Plan sits outside of the Scope and NEC refers to it as merely a *"statement of intent"*.[2] The Contractor commits no breach by failing to comply with the Plan; a breach is in fact committed when the Contractor falls short of the CCRs. Contractors who do not have in-house expertise should consider appointing an external consultant to advise on how to meet the CCRs without pricing themselves out of the job.

> ***X29 introduces a pain-gain mechanism by way of a Performance Table, detailing financial rewards and penalties attached to net zero targets and time frames.***

Disclosure (X29.5)

The CCRs should set out the parties' respective rights to disclose, publicise and market their climate credentials. Positive statistics on net zero can assist Contractors when bidding on other projects, therefore it is preferable that the CCRs grant broad rights of disclosure. If, however, the CCRs are silent on this point, the Contractor should continue to comply with its general obligations of confidentiality under the contract in relation to such information, otherwise it risks acting in breach of contract.

1. https://www.neccontract.com/news/final-version-of-x29-released
2. NEC4 Guidance Notes, Engineering and Construction Contract, Option X29 Climate Change (2022)
3. NEC4 Guidance Notes, Engineering and Construction Contract, Option X29 Climate Change (2022)

Acceleration and defects (X29.6)

If the parties have opted to use a Performance Table in addition to the CCRs, the Contractor should ensure that quotations for accepting defects or accelerating the works include any proposed changes to the Performance Table. This is important to avoid being held to targets which are no longer realistic or achievable, and incurring financial penalties as a result.

Compensation events (X29.7 - 10)

The Contractor is able to claim for compensation events which only impact the Performance Table. If such a compensation event is given, then the Performance Table will be updated in accordance with the Contractor's quotation. The Performance Table is a new element for the Contractor to consider when notifying a compensation event. It may wish to claim for adjustments to time, money, and the Performance Table where all three are impacted by the same event.

> *The core aim of X29 is to 'reduce the impact of the creation, operation, maintenance and demolition of the works on climate change'.*

Contractor's proposals (X29.11)

The Contractor is free at any time to make proposals for the achievement of the CCRs. Any such proposal may be rejected by the Project Manager for any reason. If the Project Manager wishes to accept a proposal, it cannot change the Scope until the Contractor's quotation is agreed. The Contractor will be awarded time and money in accordance with the agreed quotation, and if applicable, the Performance Table will also be updated. This mechanism gives the Contractor the protection it needs to feel comfortable in implementing new technology and science arising during the life of the project.

Performance measurements (X29.12)

If a Performance Table is in place, the Contractor is obliged to report on its climate performance against those benchmarks at the intervals stated in the Table.

Where performance is in the red, the Contractor is given an opportunity to make proposals for improvement. If this process fails, the Contractor will be liable for the financial penalty set out in the Performance Table. Although NEC refer to such sums as *"negative incentives"*,[3] it is easy to imagine how disputes over penalties may arise akin to liquidated damages for delay. The Contractor should feel encouraged to raise any issues it has with the Table as early as possible during contract negotiations. Although, the Contractor is afforded some protection by the fact that the Performance Table is not Scope, meaning that the Project Manager cannot unilaterally increase the financial penalties, nor decrease the rewards.

Where performance is in the green, the Contractor will be entitled to the relevant financial reward. Contractors should think about how the rewards and penalties contained in the Table may be passed down to subcontractors to incentivise their contribution to the targets.

Limitation of liability (X29.13)

The Performance Table is expressly excluded from any limitation of liability under Option X18 (Limit of Liability). Generally, the Contractor will require that its total liability under the contract is limited to either the contract price or the level of its professional indemnity insurance. Depending on how the Performance Table is drafted, the Contractor's liability thereunder could far exceed its insurances. This exclusion exposes the Contractor to a portion of unlimited liability which should be resisted during contract negotiations.

Stepping up

Option X29 offers a helpful solution for parties wishing to incorporate climate change obligations into their NEC4 contract. The success of the Option will vary across projects due to its reliance on the content of the CCRs, the Plan, and the Performance Table – all of which are left to the parties to draft. On large-scale projects, this exercise will likely require significant input and investment from both sides if the contract is to have any chance of making a meaningful impact on the project's carbon footprint. ■

When the heat is on: extensions of time and extreme weather

In the UK, we all well recall the mini heatwave back in July. With further disruption from climate change likely, **Taj Atwal** looks at some of the key statutory and contractual issues that the construction industry needs to be aware of.

Introduction

Journalists were observing the temperature very carefully during the summer of 2022, waiting for the moment the temperature in the UK reached a new record high. And, in Lincolnshire on 19 July 2022, the temperature did just that, reaching 40.3 degrees.[1] With schools closing and the government advising people to work from home where possible, there was yet more disruption to the construction industry.

There are measures available to mitigate the effects of usual high temperatures, but the inevitable question is: who pays? For example, one of the world's oldest suspension bridges, Hammersmith Bridge, was wrapped in foil to keep cracks from spreading and ultimately destroying the development. A £420,000 temperature control system was installed so that the bridge could maintain a safe temperature. The system allowed the council and engineers to track and maintain the temperature and alleviate any stress on the pedestals.[2]

With climate change getting worse and the never-ending burning of fossil fuels, such as oil, gas and coal, the planet is heating up and it looks like heatwaves in the UK may become far more common. So, what might the construction industry need to be thinking about?

Extreme heat and legislation

Temperatures in the indoor workplace are governed by the Workplace (Health, Safety and Welfare) Regulations 1992.[3] In addition, where reasonably practicable, assessments of the risks to health and safety are required under the Management of Health and Safety at Work Regulations 1999.[4]

However, putting it into perspective:

"There's no maximum temperature because workplaces with hot processes such as bakeries or foundries would not be able to comply with such a regulation. They use other measures to control the effects of temperature. These other measures should also be used to manage the risk of working outdoors in a hot environment."[5]

When there are high temperatures, the working environment needs to be properly controlled because heat is a hazard and can cause overheating and fire to flammable materials.

So, what can Employers do to make working in hot weather safer? The Health and Safety Executive (HSE) issued guidance recommending that they should adhere to the following:[6]

- provide sun protection advice in routine health and safety training;
- site water points and rest areas in the shade to encourage hydration;
- remind workers that they can remove personal protective equipment when resting;
- provided it is safe to do so, encourage workers to wear clothing that covers the skin including hats with a brim or flap that protects the ears and neck;
- remind workers to use sunscreen with a sun protection factor (SPF) of at least 15 on any exposed skin;
- where practicable, schedule work to minimise exposure to heat and sun; and
- encourage workers to check regularly for any unusual skin spots or moles.

A failure to provide a safe and healthy working environment may leave an employer at risk of possible prosecution.

What do the contracts say?

As well as protecting their workforce, employers and contractors need to consider where the risks of working in excessively hot temperatures lie in their contracts.

JCT Contracts

Under the JCT standard forms, *"exceptionally adverse weather conditions"* are a relevant event which may entitle a contractor to an extension of time. However, the JCT does not define *"exceptionally adverse weather conditions"*. Therefore, the contractor will need to persuade the contract administrator that there is an entitlement.

Here, it is important to note that JCT have collaborated with the Met Office to provide two forms of weather reports: *A Weather Planning Report* and *A Downtime Report*. Both are designed to support claims for an extension of time and compensation under the JCT (and NEC) contracts.[7]

1. Record high temperatures verified - Met Office
2. Wrapped in foil: Hammersmith Bridge is ready to take on the heat (interestingengineering.com)
3. The Workplace (Health, Safety and Welfare) Regulations 1992 (legislation.gov.uk)
4. Further information and HAS guidance can be found here: Temperature (hse.gov.uk)
5. Extreme heat: What are my rights at work? | HSE Media Centre
6. HSE - Temperature: Outdoor working
7. Downtime Report for weather delays in construction - Met Office
8. NEC contracts—interpreting the list of compensation events (clause 60) ... (lexisnexis.com)
9. See NEC3 Guidance Notes, 'weather records during the contract', page 72.

FIDIC 2017 Yellow Book

The FIDIC 2017 Yellow Book provides more clarity on "exceptionally adverse climatic conditions". Sub-clause 8.5(c) states:

"exceptionally adverse climatic conditions, which for the purpose of these Conditions shall mean adverse climatic conditions at the Site which are Unforeseeable having regard to climatic data made available by the Employer under Sub-Clause 2.5 [Site Data and Items of Reference] and/or climatic data published in the Country for the geographical location of the Site."

Further, clause 2.5 requires an Employer to provide any information about the climate that is in its possession to the Contractor:

"The Employer shall have made available to the Contractor for information, before the Base Date, all relevant data in the Employer's possession on the topography of the Site and on sub-surface, hydrological, climatic, and environmental conditions at the Site. The Employer shall promptly make available to the Contractor all such data which comes into the Employer's possession after the Base Date."

FIDIC has also provided some limited guidance on what exceptional climatic conditions are. The 2000 FIDIC Guide suggests that:

"it may be appropriate to compare the adverse climatic conditions with the frequency with which events of similar adversity have previously occurred at or near the Site. An exceptional degree of adversity might, for example, be regarded as one which has a probability of occurrence of four or five times the Time for Completion of the Works (for example, once every eight to ten years for a two-year contract)."

If you had a two-year contract, the UK summer heatwave of 2022 clearly falls within that definition.

> ***What is missing from these notes is any reference to the impact of high temperatures. A sign perhaps of the NEC's UK origins.***

NEC4 (2017)

The NEC4 Form provides more detail about when weather conditions might be considered to be suitably adverse to qualify as a compensation event. Sub-clause 60.1(13) states:

"A weather measurement is recorded:

- *within a calendar month,*
- *before the Completion Date for the whole of the works,*
- *at the place stated in the Contract Data,*
- *the value of which, by comparison with the weather data, is shown to occur on average less frequently than once in ten years.*

Only the difference between the weather measurement and the weather which the weather data show to occur on average less frequently than once in ten years is taken into account in assessing a compensation event."

Clause 60.1(12) allows the Contractor to make a claim for a compensation event where adverse weather is recorded *"within the Site"*.

NEC *"seeks to define exactly what constitutes adverse weather by defining it as weather conditions that are shown, in comparison to local weather data recorded at a weather station identified in the Contract Data (which ideally should be the weather station closest to the site)"*.[8] However, the Guidance Notes specify that *"if there is not a weather station nearby, the weather measurements should be made using gauged and equipment installed at a place stated in the Contract Data"*.[9]

What records must be taken to qualify as a *"compensation event"*? Well, NEC suggests the following:

- cumulative rainfall (mm);
- number of days with rainfall more than 5mm;
- number of days with minimum air temperature less than 0 degrees Celsius; and
- the number of days with snow lying on the ground at a time to be agreed by the Employer and the Contractor.

What is missing from these notes is any reference to the impact of high temperatures. A sign perhaps of the NEC's UK origins. The Contractor must, therefore, fall back on the specific reference in the sub-clause to temperatures which *"occur on average less frequently than once in ten years"*.

What can a Contractor do before making an extension of time claim?

1. Look to see which party bears the risk for exceptionally adverse weather conditions.
2. Check the contract requirements and ensure that any notice is given in time and in the correct form.
3. Keep proper records of weather reports on site, where possible use the Met Office website. Be ready to compare the conditions encountered with those you would expect to encounter based on previous years.
4. Remember, it is not enough to simply say that it was hot, even if the temperatures were record-breaking. You must explain how the hot weather caused delay and/or led to disruption or the incurring of other additional costs.

Conclusion

In the UK, we only tend to think about adverse weather in terms of snow, torrential rain or storms, but the summer of 2022 has shown that unusually high temperatures now may also need to be taken into consideration. As well as the risks to workers, parties need to consider the potential for increased fire hazards. When it comes to looking for relief under the standard forms, however, even if there is no specific mention of high temperatures, the approach to claiming time and money is no different whether there is a heatwave or prolonged snowstorm.

Be guided by your contract and remember that, whilst it is tempting to concentrate on proving just how hot it was, it is just as important to demonstrate how that caused delay and/or additional cost. ■

Adversity helps usher a new nuclear age

The UK government has identified nuclear energy as having a key role in a "secure, low-carbon, affordable energy future". **Simon Tolson** explains more.

Background

This position was taken before Russia started a war with Ukraine. It is all made the more poignant now. In April 2022, a new government body, *Great British Nuclear*, was set up to bring forward new projects, backed by the funding of £120 million *Future Nuclear Enabling Fund*.[1]

Then, in May 2022, Boris Johnson stated that his government plans to *"build a nuclear reactor every year rather than once every decade"*. If this were achieved, it would still be a decade before the grid would benefit. A recent report by the UN Economic Commission for Europe (UNECE) clearly stated how important nuclear power is to net zero targets: *"the world's climate objectives will not be met if nuclear technologies are excluded from future decarbonisation"*.[2]

Reducing emissions now requires extending the life of nuclear plants, and substantially enhancing the rate of nuclear new build. Nuclear is a major source of clean energy in Europe. It is also symbiotic with the needs of power networks. A high proportion of variable renewable energy (VRE) through wind and solar needs the "crutch" of nuclear as it is the only substantial source of clean "firm" power that can meet base load requirements for now. Without it, and even with existing battery storage, blackouts and brownouts are likely whenever there is calm weather (wind drought[3]) with cloud cover across the European landmass, particularly at night when solar ceases to work. Battery power is economic only over a maximum four-hour period. Nuclear provides the only possible source of sustainable firm power to replace coal and gas.

> ***The prospect of gas shortages and fuel poverty has naturally brought energy security to the top of the political agenda.***

Why we fell out of love with nuclear

The first reason for the UK's slow progress in nuclear is the UK's poor record of building major power infrastructure on time and to budget. Indeed, many of the reactors built in the 1960s and '70s were poorly procured due to the absence of good project management, namely, the planning and construction of such Civil Nuclear Regulator[4] controlled infrastructure projects.[5] For example, Dungeness B station in Kent, the first AGR station, started construction in 1965 and was meant to be completed within five years. The station was not connected to the grid until 1983 and did not start commercial operation until 1985 – 15 years behind schedule. As early as 1969, the Wilson Committee, which was set up to examine the causes of these delays, pointed to inefficient management.[6] Project managers responsible for overseeing construction were either incompetent or had little incentive to speed things up, and the committee recommended that more control should be exercised.

The second reason nuclear lacked popularity was that it was cheaper to construct and operate the highly efficient Combined Cycle Gas Turbines (CCGT), i.e., gas-fired power stations exemplified by the 1990s "Dash for Gas" which, today, supply 42% of UK electricity, dominating our electricity generation.

The paucity of nuclear electricity generation was also due to Labour's actions in government:

1. In 1997, they closed down the small modular reactor programme launched by John Major's government in 1995.
2. In 1997, they banned the building of new nuclear power stations in the UK (but permitted Sizewell B to be completed).
3. Many years later, they said they would allow new nuclear power stations to be constructed but no public money could be used.

A third blow to nuclear was dealt in March 2011. The tsunami disaster at Fukushima Daiichi stopped new nuclear in its tracks in Japan and led many countries to also halt planned stations. In Europe, Germany's knee-jerk move was to permanently shut down eight of its 17 reactors and pledge to close the rest by the end of 2022.[7] Suddenly, nuclear was the sick patient.

Last, but not least, the growing popularity of the Green Party movement stated its fundamental opposition to nuclear energy, which it considers expensive and dangerous, not carbon neutral, and reliant on uranium[8] which is not renewable. The Green political movement was largely shaped in the '70s to '80s, when nuclear power was very new, in the minds of many linked to military use and its risks little-understood. At that date, environmentalist opposition to it was arguably justified. Today, many

1. The Fund is open to both traditional larger projects and to Small Modular Reactors (SMRs).
2. https://unece.org/climate-change/press/international-climate-objectives-will-not-be-met-if-nuclear-power-excluded
3. "Wind drought" experienced in Europe in 2021 saw SSE in the UK report a 32% drop in power from its renewable assets.
4. Since 2014, the Office for Nuclear Regulation (ONR), a public corporation independent of central government.
5. A 1963 select committee report on the electricity industry pointed out that it took five years for a station to be commissioned in the UK, compared to two-and-a-half years in the US and just 13 months in Japan.
6. Report of the Committee of Enquiry into Delays in Commissioning C.E.G.B. Power Stations... The National Archives
7. On 6 September 2022, the German government announced its plans to keep the Isar 2 and Neckarwestheim nuclear power plants, both of which are located in the southern part of the country as emergency power stations.
8. Uranium is a relatively common element in the crust of the Earth (very much more than in the mantle). It is a metal approximately as common as tin or zinc, and it is a constituent of most rocks and even of the sea and we have at least 180 years supply.
9. The RAB simply assesses the value of the assets used in the performance of a regulated function. In practice, it is an accounting number that reflects the value of past investments into network infrastructure.
10. On 20 July 2022, the Sizewell C Project application was granted development consent by the Secretary of State for Business, Energy, and Industrial Strategy.
11. It is estimated that the explosion released about 400 times more radioactive material into the earth's atmosphere than both the bombing of Hiroshima and Nagasaki combined.
12. Sanctions introduced since Russia's war on Ukraine has meant Germany has increased its use of coal by 27%.
13. Making large amounts of fuel from organic matter as biofuels (fuel ethanol, biodiesel, renewable diesel, renewable heating oil, and sustainable aviation fuel (SFA)) has proved to be more difficult and costly than expected given grain crop prices and food demand. The most difficult challenge in developing biofuels for the next few years is the cost for economic feedstocks.
14. Rolls-Royce SMR Ltd has designed a factory built nuclear power plant that will offer clean, affordable energy for all.
15. On 19 July 2022 National Grid paid £9,724 per megawatt hour, more than 5,000% than the typical price, to Belgium to prevent south-east London losing power!

people believe that nuclear is safe, clean, and well-understood enough that environmentalists should support it. But many Green voters remain unconvinced.

The UK undertook no new nuclear power station building after Sizewell B was completed in 1995 until Hinkley Point C started in March 2017. Work on the Wylfa Newydd project in Anglesey was suspended in 2020 after Hitachi failed to reach a funding agreement with the UK government. Moreover, although six sites were originally identified over a decade earlier for replacement, only one, Hinkley Point C, is under construction. It is hoped that funding via the Regulated Asset Base (RAB) model[9] will enable Sizewell C to be economically financed[10] with others to follow. Russia's invasion of Ukraine has increased the importance of making it possible for Sizewell C participants to reach a final investment decision. And on 29 November 2022 Rishi Sunak's government, following the lead of Boris Johnson, confirmed the go-ahead of the project.

Sizewell C will be a 3,200 MWe power station comprising of two EPR units on the site that currently hosts a single large, pressurised water reactor (Sizewell B). With the exception of site-specific foundations and structures, the new power station will be a copy of Hinkley Point C.

Like Hinkley Point C, Sizewell C will be capable of supplying approximately 7% of the UK's annual electricity requirement. It will be able to run at full power for 90% (or more) of the hours in the year.

By following Hinkley Point, Sizewell is not a first of kind and so should be a less risky project. Trades have been trained, construction glitches have been sorted out, supply chains have been created, managers have gained experience, and designs have been proofed, completed, commissioned, and tested. As a result of this "de-risking", Sizewell C will be a more economically palatable venture that should begin saving customers' money once operating.

Wylfa is awaiting approval for what will be a resurrection. Oldbury and Bradwell are, for now, mothballed sites and await new opportunities, maybe using SMRs.

Consequently, as of September 2022, the UK has only nine operational nuclear reactors at the five locations below (eight advanced gas-cooled reactors (AGR) and one pressurised water reactor (PWR)), producing 5.9 GWe.

Power Station	Type	Net MWe	Gross MWe	Current operator	Construction started	Connected to grid	Commercial operation	Accounting closure date
Torness	AGR	1205	1364	EDF Energy	1980	1988	1988	2028
Hartlepool	AGR	1185	1310	EDF Energy	1968	1983	1989	2024
Heysham 1	AGR	1222	1250	EDF Energy	1970	1983	1989	2024
Heysham 2	AGR	1230	1360	EDF Energy	1980	1988	1989	2028
Sizewell B	AGR	1195	1250	EDF Energy	1988	1995	1995	2035

USA

Equally, across the pond, rising electricity prices and rolling blackouts in California in 2020 focused fresh attention on nuclear power's key role in keeping America's lights on. Today, ninety-two nuclear plants crank out a fifth of the US's total electrical output. And despite residual public misgivings over Three Mile Island in 1979 and Chernobyl in 1986,[11] the industry has learned its lessons and established a solid safety record during the past 20 years or so. More encouragement for Sizewell C's potential viability.

Europe

Currently, European nuclear chiefly feeds off France. Of the 103 nuclear power reactors (100 GWe) in operation in 13 of the 27 EU member states, over half of the EU's nuclear electricity is produced by France. The 56 units operating in three non-EU countries (Russia, Ukraine, and Switzerland) account for about 15 to 20% of the electricity in the rest of Europe. But, with half of France's reactors now down for maintenance, the timing could not be worse.

The demand for more juice and energy security

The rapid growth of the population and the drive for economic development rely on continuous supply of energy and the upgrade in the electricity infrastructure. Although fossil fuels are still the primary energy source,[12] the problems associated with security of supply and transmission and the environmental impact from CO_2 emissions now limit their use. However, in the midst of the energy transition from old fossil-based power to new technologies, renewables are needed.

Any UK shift to nuclear will take some years to hit the grid. It is no answer for 2022 which will see domestic energy cost increase by 180% and business' bills double. This has, of course, been driven by Russia's reductions in gas supply to Europe this year and then, at the end of August 2022, ceasing its gas supplies via the Nord Stream 1 pipeline altogether. This has increased European demand just as the world emerges from Covid restrictions. The prospect of these gas shortages and fuel poverty has naturally brought energy security to the top of the political agenda.

Low carbon and renewable energy sources, such as nuclear and renewables, will now be increasingly adopted[13] to progressively meet these energy demands.

UK government bites the bullet on nuclear and SMRs

In November 2021, the UK government announced that the UK would invest £210 million in small modular nuclear reactors (SMRs). Not a moment too soon.

> *Rolls Royce in the UK leads the way with their small modular nuclear reactors.*

Rolls Royce[14] in the UK leads the way with their small modular nuclear reactors. The company's 470-megawatt SMR will cost about £1.8 billion and will require a site of only about 10 acres, in contrast to Hinkley Point's 430 acres. This means the SMR power plants will have a power density of over 10,000 watts per square metre – that can be easily accommodated. The good news is that Rolls Royce expects to receive regulatory approval from the government by 2024 for its SMR and that it will begin producing power on Britain's electric grid by 2029.

The UK SMR programme aims to:

- Return £52 billion of value to the UK economy by 2050 if a full fleet of 16 stations is built;
- Generate a £250 billion export market with job creation of up to 40,000 high-value jobs; and
- Rejuvenate UK manufacturing communities in the north of England and north Wales.

SMRs can also be deployed on ships and in aircraft. Their "modular" format means they can be shipped by container from the factory and installed relatively quickly on any proposed site. They can be used in providing energy to produce hydrogen to create synthetic fuel.

The advantage of SMRs is that they have a projected construction time of three to five years, while a large reactor takes typically nearer 10 to 12 years. At over 400 Mwe, they also deliver some serious electrical punch and, at approximately £1.8 billion, extremely good value.

The UK moves now afoot for both larger reactors (European Pressurised Reactors (EPRs)) and a mix of SMRs have been accelerated by the above mentioned soaring international gas and electricity prices, and the very real possibility of gas shortages (ergo less electricity generated) this winter 2022. This is now hastening the global shift to green energy in the long run, but at the expense of higher current demand for hydrocarbon fuels.[15] But one thing is clear: Europe has been pushing gas and nuclear as an essential part of the energy transition from oil and coal. Europe's dependence on Russian gas has inspired an emphatic push for energy independence, especially via renewables and alternate supply routes for LNG.

Energy security

Looking back, the UK does not have the best track record with nuclear plants, with some plants closing earlier than expected. Hunterston B closed in January 2022 due to cracks in the reactor's graphite core, and Dungeness was decommissioned in 2021 due to corrosion in the pipework.

Moreover, there has been a noticeable lack of a stream of replacement plants coming online to replace the aging fleet as the units slowly die off one by one.

> *A high proportion of variable renewable energy (VRE) through wind and solar needs the 'crutch' of nuclear.*

A variety of measures will be required to maintain and enhance the UK's energy security through the net zero transition. Demand reduction, such as through improved household insulation and more energy efficient appliances and machinery, has been shown to be a fast, inexpensive, and effective way of improving energy security by lowering overall energy demand. Increasing the amount of domestic energy generation can lessen the risk of energy failing to get to customers, either due to problems transmitting or transporting it, or due to geopolitical tensions. As the energy transition progresses, new sources of flexible electricity generation to balance supply and demand will be needed, such as batteries, green hydrogen, demand response or interconnection with other networks.

The UK's ambitious nuclear plans come at a time when France's nuclear fleet is at half capacity, shut down due to routine maintenance and defects. The UK is getting no electricity from the French interconnectors.

Could a new nuclear reactor each year be the solution the UK needs to alleviate its energy-related woes, to generate 24GW by 2050, harking back to the days of the French large-scale nuclear buildout of the 1980s, in which 44 nuclear plants began commercial operation in a single decade? Or has the golden age of nuclear been and gone? After all, the last time France put a new reactor live was over 20 years ago. I suggest we are about to see a nuclear renaissance.

The expectation now is that Sizewell C will use the RAB model, successful on the Thames Tideway Tunnel and Heathrow's Terminal 5, to finance the construction and operation. Here's to the renaissance in nuclear! ■

Net zero targets: 'the world's climate objectives will not be met if nuclear technologies are excluded from future decarbonisation'.

Digital transformation: fasten your seat belt

Technology is pervading all aspects of design, procurement, construction, and operation – the whole life cycle of both new buildings, assets, and infrastructure, as well as existing. As **Stacy Sinclair** explains, it is already proving to be the enabler and provider of solutions to the very serious issues we face today; for example, climate change and connectivity and connection in the era of Covid-19.

The sheer amount of technology which exists today is astonishing: from machine learning and AI to data analytics, digital twins, drones, and design configurators, to "smart contracts" and contract review/automation platforms. The challenges, or barriers, to digital transformation are not necessarily around the availability or the existence of the technology. Rather, the industry is grappling with the issue of "adoption". The who, what, when, why, where, and how of adoption:

- Who will help and advise us in the adoption and implementation?
- What technologies should we adopt to digitally transform? What issues (technically, legally, and otherwise) do we need to be aware of?
- When should we adopt these technologies, now or later after others have proved it?
- Why should we adopt it; is it really a gamechanger?
- Where do we start and where are we adopting this – across the entire organisation and across all aspects of our business and the design/construction/operation process?
- How do we technically implement, and how do we encourage, usage?

Whilst there are no easy answers to any of the above questions, we first must keep in mind Steve Jobs' advice, delivered at an Apple Worldwide Developers Conference in 1997 in response to severe criticism from a member of the audience:

"You've got to start with the customer experience and work backward for the technology."

> ***The challenges, or barriers, to digital transformation are not necessarily around the availability or the existence of the technology. Rather, the industry is grappling with the issue of 'adoption'.***

As with the technologies we employ here at Fenwick Elliott, the first questions to address, even before any of the questions around "adoption", are: what problem are we trying to solve? What process are we

1. *The Construction Playbook*, Version 1.1, HM Government, September 2022, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1102386/14.116_CO_Construction_Playbook_Web.pdf.*
2. *https://www.gov.uk/government/publications/the-construction-playbook.*
3. *The Construction Playbook*, Version 1.1, page 22.
4. *The Product Platform Rulebook*, Edition 01, Construction Innovation Hub & UKRI, September 2022, *https://constructioninnovationhub.org.uk/media/stljeu2k/the-product-platform-rulebook_edition-1-1.pdf.*
5. See for example, the Forge, Landsec, *https://www.building.co.uk/buildings/the-forge-a-platform-for-transforming-office-construction/5116360.article.*
6. *The Construction Playbook*, Version 1.1, section 8, page 58.
7. *Smart Legal Contracts (Summary)*, The Law Commission, November 2021, page 3, *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/6.7776_LC_Smart_Legal_Contracts_2021_Final.pdf.*
8. Smart legal contracts, Advice to Government, Law Commission, Law Com No 401, November 2021, *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/Smart-legal-contracts-accessible.pdf.*
9. The Weather Ledger, Digital Catapult, May 2021, *https://www.digicatapult.org.uk/wp-content/uploads/2021/11/Weather_Ledger_WP5_report-v2.pdf.*
10. Legal Statement on cryptoassets and smart contracts, UK Jurisdiction Taskforce, The LawTech Delivery Panel, November 2019, *https://cms.lawtechuk.io/uploads/4.-Cryptoasset-and-Smart-Contract-Statement.pdf.*
11. *Smart legal contracts, Advice to Government*, Law Commission.
12. Ibid, and also see *Smart Legal Contracts (Summary)*, Law Commission.
13. *Smarter Contracts*, LawTechUK, February 2022, *https://resources.lawtechuk.io/files/report_smarter_contracts.pdf.*
14. C Christensen, *The Innovator's Dilemma, When New Technologies Cause Great Firms to Fail*, Harvard Business Review Press, 1997.

trying to automate or digitise? And, what is the customer experience (whether this be our client's experience or our own internal users' experience)? Whilst this initial understanding is fundamental, of course, solving the issues around adoption are key to a successful digital transformation. A number of organisations globally, including the UK government, are leading the march by publishing guidance, setting strategic outcomes, and tackling head on those issues which seemingly are barriers to adoption and implementation.

This article looks at three of the recent developments over the past year which have aimed to advance, enable and contribute to the digital transformation of the construction industry: Version 1.1 of the UK Government's Construction Playbook, the latest UK publication on the legal status of smart contracts and FIDIC's newly formed Digital Transformation Committee.

UK Government Construction Playbook – Version 1.1

At the beginning of September 2022, the UK government released an update to its Construction Playbook (Version 1.1).[1] The Playbook was first published in December 2020, providing government guidance and best practice on sourcing and contracting public works, projects and programmes, including setting out the government's expectations on engaging the supply chain. In summary, the recent updates include:

- strengthening its practical guidance;
- attempting to remove ambiguities;
- incorporating new legislation (e.g., the Building Safety Act & the Environmental Act);
- addressing whole-life carbon assessments, reducing waste, etc.; and
- seeing all activities through the lens of carbon.

In addition, a number of new guidance notes and model clauses have been provided:[2]

- Modern Methods of Construction Guidance Note;
- Longer Term Contracting Programmes, Projects and Portfolios in Construction Guidance Note;
- Promoting Net Zero Carbon and Sustainability in Construction Guidance Note;
- Market, Supplier & Supply Chain Engagement in Construction Guidance Note;
- Summary: Recommendations in Constructing the Gold Standard: An Independent Review of Public Sector Construction Frameworks;
- HMG Model Clause – Conflict Avoidance; and
- HMG Model Clause – Subsurface Data Sharing.

One theme which remains at the heart of the Construction Playbook, and indeed has been enhanced, is "digitalisation". Notably, 3 of its 14 key policies are:

- "Harmonise, digitise and rationalise demand";
- "Further embed digital technologies"; and
- "Payment mechanism and pricing approach".

Harmonise, digitise and rationalise demand: the Playbook expects processes associated with design, delivery and operation to be increasingly digitalised as this will develop and accelerate the "platform approach" and modern methods of construction ("MMC").

With regard to the "platform approach", the Playbook notes that the government *"will look to procure construction projects based on product platforms comprising of the kit of parts, production processes, knowledge, people and relationships required to deliver all or part of construction projects".*[3] The Playbook references the "Product Platform Rulebook", published by the Construction Innovation Hub in May 2022, for further detail on platform approaches.[4] The Rulebook defines a "product platform" as:

- *"The kit of parts, associated production processes, knowledge, people and relationships required to deliver all or part of construction projects using a platform approach:*
- *A product platform provides a stable core which is configured and combined with complementary components (via defined interfaces) to suit a particular project.*
- *A product platform also includes the processes, tools and equipment required for assembly".*

The product platform approach is a new way of thinking, a new way of designing, a new way of constructing and contracting – one which requires collaboration and an open mindset – but one which is already proving success.[5]

Further embed digital technologies: contracting authorities and suppliers should use the UK Building Information Management (BIM) Framework to standardise approaches to generating and classifying data, data security and data exchange – as well as support the adoption of the Information Management Framework and the creation of the National Digital Twin (*"an ecosystem of connected digital twins across the built environment"*). The Playbook recognises that the volume of data in relation to construction is rapidly increasing – though is often fragmented or not easily accessible – and improving the consistency and quality of data is essential.

Payment mechanism and pricing approach: the Playbook expects suppliers to invest in automated digital payment and contracting systems and processes to improve transparency, information exchange, payment performance and contract management across the supply chain.[6]

The UK's Construction Playbook puts digital working and digital processes at the forefront, an important step in the journey towards the digital transformation of the industry.

> ***"As with the UK's Construction Playbook, the Law Commission's and LawTechUK's publications are an important step for the digital transformation of the construction industry.***

Smart contracts and the law

Many organisations are currently looking at the digitisation and automatic generation of their contracts, as well as the technology-enabled automatic review and analysis of them, with the aim of increasing efficiency and productivity, minimising risks and errors, and generating insight for data-led decision making. Also, on the not-so-distant horizon, there is the automatic "execution" of these contracts, and/or the clauses within them: smart contracts.

A "smart contract" is:

- *"a legally binding contract in which some or all of the contractual obligations are defined in and/or performed automatically by a computer programme";*[7] or
- *"computer code that, upon the occurrence of a specified condition or conditions, is capable of running automatically according to pre-specified functions".*[8]

In other words: if X occurs, then execute Y.

Nick Szabo, a computer scientist, and legal scholar known for developing the concept of the smart contract in the 1990s, illustrated the smart contract by comparing it to a vending machine. An automatic transaction is executed when two conditions are met (the money is received, and the snack is selected):

- *money inserted + snack selection = snack dispensed.*

In the context of construction, an example might be: if the concrete lorry turns up on site with the correct amount/specification (which is monitored automatically by the use of sensors and other image recognition technology), payment of a pre-agreed sum is automatically deposited into the concrete supplier's bank account. Whilst this is a hypothetical example, we are already beginning to see some use of smart contracts/clauses in certain sectors, and research both in industry and academia is well-progressed.

For example, 'The Weather Ledger' was a successful collaboration funded by Innovate UK which created a smart contract (clauses), with the use of distributed ledger technology ("DLT") and the Internet of Things ("IoT"), to interpret and execute the weather-related Early Warning Notice and Compensation Event clauses in the NEC standard form of contract. If predetermined weather thresholds were reached, using sensors and connected databases, a notification was sent to the appropriate parties. After the Compensation Event is checked and verified, a compensation claim is raised with the client.[9]

Whilst there are a number of issues to consider for adoption and implementation of smart contracts, one perceived barrier was the legal status of a smart contract: is such a contract valid and enforceable? There has been some debate of this in the UK, and ultimately the government's LawTech Delivery Panel, along with the Law Commission, convened task groups to review, leading to the most recent findings in February 2022.

First, in December 2017, the Lord Chancellor asked the Law Commission to work on smart legal contracts. This was paused with the creation of the UK Jurisdiction Taskforce ("UKJT"), a task group under the government's LawTech Delivery Panel. In November 2019, the UKJT published its legal statement on cryptoassets and smart contracts.[10] It concluded that, in principle, smart contracts are capable of giving rise to binding legal obligations and are enforceable in accordance with their terms. Following this, the Ministry of Justice asked the Law Commission to undertake a scoping study on smart legal contracts, building on the findings of the UKJT legal statement.

In November 2021, the Law Commission published its advice to government.[11] It confirmed that the current legal framework in England and Wales is able to facilitate and support the use of smart contracts without the need for statutory reform, and that current legal principles can apply to smart contracts in much the same way as they do to traditional contracts.[12] The Law Commission helpfully summarised smart contracts and identified that they can take different forms, albeit that, regardless of the form used, the performance or execution of the contract (or a clause/obligation of the contract) is by code, i.e. with the use of technology. The forms of smart contracts are:

- *Form 1:* natural language contract with automatic performance by code;
- *Form 2:* a hybrid smart contract; and
- *Form 3:* a contract recorded solely in code.

The Law Commission set out the main features of a smart contract: (1) some or all of the contractual obligations are performed automatically by a computer programme; and (2) the contract is legally enforceable. In addition, it reviews the formation, interpretation and remedies when dealing with smart contracts, and includes a non-exhaustive list of issues that parties may wish to provide for in their smart legal contract.

In February 2022, LawTechUK published *"Smarter Contracts"*, a report documenting the outcome of its project which identified important examples of how technology is transforming contract use across various key industries.

The report sets out case studies which demonstrate digital-first solutions to real-world problems: electronic signatures, contract automation and management, insurance, renewable energy, financial services, trade, sale of goods and services, logistics and transportation, the digital ownership of physical assets, sport sponsorship, home buying and selling and the digital company.[12]

As with the UK's Construction Playbook, the Law Commission's and LawTechUK's publications are an important step for the digital transformation of the construction industry, providing much needed guidance and know-how. We can expect to see more applications of smart contracts and smart clauses in the near future.

FIDIC's new Digital Transformation Committee

In April 2022, FIDIC announced the formation of its new Digital Transformation Committee ("DTC").

> ***You've got to start with the customer experience and work backward for the technology.***
>
> Steve Jobs, 1997

The purpose of the new committee is to monitor and identify changes in digital technologies that futureproof FIDIC's products and services (such as the FIDIC contract suite), identify issues and trends in the digital space that could be potential disruptors to FIDIC and or its members and the wider industry, develop FIDIC's value proposition for digital services, and advise and monitor large digital programmes. The strategic priorities, as outlined in the terms of reference, include:

- advocating and guiding on the use of new and existing technologies across the consulting engineering industry;
- completing and publishing guidance on digital platforms that would be of use to FIDIC members;
- advising and assisting FIDIC in the exploration of digitising and developing the FIDIC contract suite to aid productivity and user friendliness; and
- exploring new technologies, products and services that FIDIC could offer its members and the wider sector.

I am delighted to have been appointed Chair of the DTC, working with 12 other expert committee members from across the engineering and digital communities who are passionate about the transformation of our industry.

At FIDIC's Global Infrastructure Conference in Geneva in September 2022, on behalf of the DTC I chaired the Digital Transformation Forum, comprised of six panellists. We explored the following two key topics:

- *"Digital Transformation: optimise traditional or paradigm shift?"*
- *"Data & Digitalisation: the foundation for transformation"*

The panel presentations were inspiring and thought-provoking, with excellent discussion and feedback from the audience which will help to inform the DTC's thinking and way forward.

Whilst the DTC is very much at the outset of its journey, in a period of listening and learning and establishing its activities and Task Groups, its enthusiasm and energy is clear, not only from within the DTC, but also within FIDIC, its members and its global contract users. The launch of the DTC demonstrates FIDIC's recognition of the fundamental role that technology will play in the future of the industry, as well as its commitment to supporting its members on this journey. Again, this is another important step in the digital transformation of our industry.

Please do reach out if you would like more information or would like to be involved.

Conclusion

Whilst each organisation is moving at its own pace and has its own roadmap, it is clear that the speed of digital transformation across the industry, as a whole, is set to increase dramatically – to date, we have only just scratched the surface.

This article set out but three examples of initiatives over the past year that are supporting and advancing the transformation, addressing the issues of "adoption" through their guidance, know-how and expectations – investigating and assisting with the perceived barriers to adoption and implementation.

And there are many more examples out there.

In Clayton Christensen's *'The Innovator's Dilemma',* he sets out how disruptive technology in the US mechanical excavator industry of the 1900s destroyed a number of well-established, leading companies.[13] The excavator industry of the 1800s and early 1900s was dominated by the steam-powered shovel and earth-moving equipment. Eventually, by the 1920s, the gasoline-powered engines took over. From the 1940s to the 1960s, the hydraulic-actuated systems replaced the cable-actuated systems. By the 1970s, only four of the 30 (or so) established manufacturers of cable-actuated systems managed to transform themselves into hydraulically-actuated systems. Those that failed did so because it didn't make sense to them to change, until it was too late.

We also saw a similar situation, as many have documented, when Kodak did not transform from traditional film to the digital camera. Equally, some have pondered that the same failure would have happened to Microsoft had it not moved to the Cloud (which was a real possibility at the time).

If the frequent Microsoft updates and iPhone releases are anything to go by, the pace of change is much faster than the previous century. At the recent FIDIC Conference in Geneva in September 2022, which I mentioned above, the President of the World Economic Forum, Børge Brende, spoke of the pace of change in technology: there is no place for complacency, and we must fasten our seat belts.

Do not wait until it is too late. Take on board the guidance available, take advice, address the issues of adoption and fasten your seat belt... ■

NEC Accepted Programmes: a practical guide[1]

Claire King edits *Insight*, our newsletter which provides practical information on topical issues affecting the building, engineering, and energy sectors. In June 2022, Claire wrote about the NEC Accepted Programme. Here is an extract from that article.[2]

The Accepted Programme sits right at the heart of the NEC form of contract. Its aim is to encourage good project management by not only ensuring that all parties to the project know what they have to do and when, but also by facilitating the prompt and prospective assessment of compensation events as and when they occur on the project. In order to achieve these aims, numerous prescriptive procedures governing Accepted Programmes are provided for.

All too often, however, these procedures break down, sometimes right from the beginning of the project. This can be for a wide variety of reasons, but all too often it is because parties do not fully understand what an Accepted Programme should contain or the processes for updating it.

NEC Objectives and the role of the Accepted Programme

The NEC's objectives are to *"facilitate and encourage good management of risks and uncertainties, using clear and simple language"*. To achieve that goal, the NEC encourages the early identification of problems and a proactive approach to addressing those problems. The idea is firmly that issues are resolved as work progresses so that there is no final account process (or associated dispute) at the end of the job. These goals are supported by prescriptive contractual procedures. All parties also have a duty to act in a *"spirit of mutual trust and cooperation"*.

The Accepted Programme is a key project management tool in the NEC form and is crucial for achieving the NEC's objectives. Broadly, it has two roles:

1. To ensure that all parties know what they have to do, and when; and
2. To provide a tool to enable the prompt and (hopefully) prospective assessment of compensation events and, specifically, the extensions of time claimed pursuant to them.

A tool for assessing compensation events contemporaneously

The Accepted Programme is intended to encourage collaborative working and dispute avoidance. In particular, it provides a tool to allow the assessment of extensions of time (via compensation events) contemporaneously and without the need for a complex and expensive delay analysis.

Under Clause 63.5, the Accepted Programme is the tool the Project Manager should use for assessing compensation events. The Accepted Programme used for assessing an extension of time (compensation event) is the one current at the dividing date. The dividing date is set out in Clause 63.1:

"For a compensation event that arises from the Project Manager or the Supervisor giving an instruction or notification, issuing the certificate or changing an earlier decision, the ***dividing date is the date of that communication.***

For other compensation events, the ***dividing date is the date of the notification of the compensation event****"* [Emphasis added].

Sometimes amendments are made to the definition of the dividing date. For example, stating that the dividing date is the date a quotation is requested. In the author's view, this is to be discouraged. The logic of the dividing date in the definitions is that this is as close as possible to when the event itself occurred (assuming there is prompt notification of a compensation event). If the date is anything else, assessment can become much more difficult and theoretical (i.e., removed from the reality of what is happening on the ground), thus building in more room for unnecessary disputes.

Obviously, the closer the Accepted Programme is prepared to the dividing date, the easier it should be for the Project Manager to assess the impact of any compensation event (and for a Contractor to update the Accepted Programme to show the impact of any compensation event).

A hook for compensation events

Incorporating crucial dates into the Accepted Programme is encouraged by the fact that there are a number of specific compensation events which cross reference to the Accepted Programme. These include:

- Clause 60.1 (2): Failure to allow access by the date shown in the Accepted Programme;
- Clause 60.1 (3): The Client does not provide something by the date shown in the Accepted Programme; and
- Clause 60.1 (5): The Client or others do not work within the times shown on the Accepted Programme.

1. With thanks to Scott Jardine of Ankura for his excellent graphics.
2. The full version can be found at www.fenwickelliott.com/research-insight/newsletters/insight/94.
3. See Clause 31.1.
4. Ibid.
5. Ibid.
6. See Clause 31.2.
7. See Clause 31.3.
8. See *Scheldebouw BV v St James Homes (Grosvenor Dock) Limited* [2006] EWHC 89 (TCC).
9. See Clauses 10.1 and 10.2.
10. Ibid.

Clause 60.1 (19), the NEC equivalent to a force majeure provision, also expressly cross references to the Accepted Programme and, more specifically, the date shown for planned Completion shown in the Accepted Programme, as part of the test as to whether there is a compensation event or not. Obviously, in order to claim these compensation events, the Accepted Programme must have been prepared properly and contain the relevant dates as hooks for any claim.

Carrots and sticks to encourage the production of an Accepted Programme

Given the central importance of the Accepted Programme, the NEC4 also contains both carrots and sticks to encourage their production and updating. Clause 50.5, for example, provides that if there is no programme in the Contract Data, one quarter of the Price of Work Done to Date is retained in assessments of the amount due until the Contractor has submitted a first programme (showing the information which the contract requires) to the Project Manager for acceptance.

Clauses 64.1 and 60.2 also provide a strong incentive for the Contractor to submit their programmes. If the Contractor does not do so, they lose control of the compensation event assessment process. First of all, the Project Manager is required to assess all compensation events[3] and, secondly, the Project Manager should use their own assessment of what the programme should be to assess the impact of the compensation event.[4]

Setting up an Accepted Programme

Section 3 of the NEC4 contains all of the key provisions governing what the first Accepted Programme is and what it should contain.

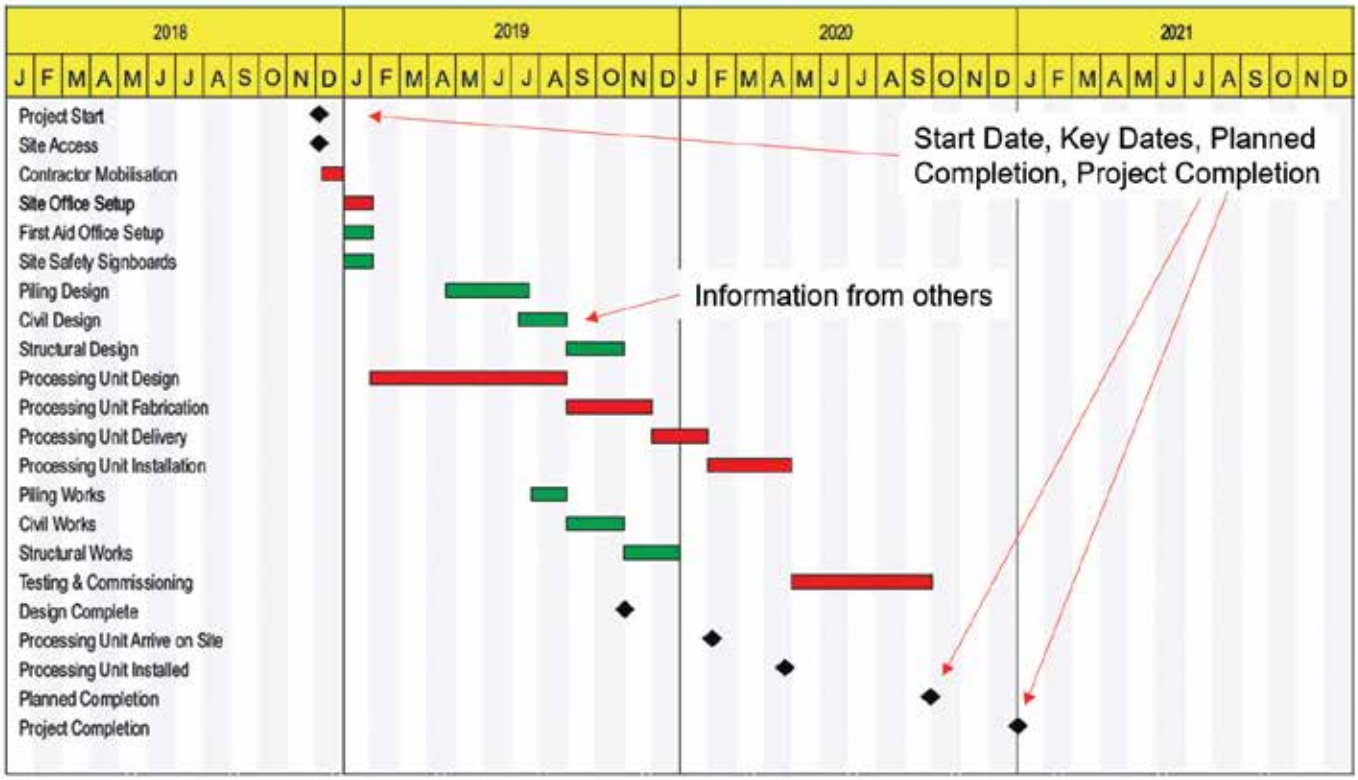
The first Accepted Programme is either the programme identified in the Contract Data or the programme to be submitted to the Project Manager for acceptance.[5] It is important to note that the Accepted Programme and the Activity Schedule (for Options A or C) are not the same documents but are required to be correlated. Clause 31.4 (Option A) requires that *"the Contractor provides information which shows how each activity on the Activity Schedule relates to the operations on each programme submitted for acceptance"*. This is an ongoing duty and does not just relate to the first Accepted Programme.

What must an Accepted Programme contain?

Assuming the first Accepted Programme is not already attached to the contract, then the contractor needs to note the very detailed and prescriptive information listed in Clause 31.2. This includes:

- The starting date, access dates, Key Dates and Completion Date;
- Planned Completion;
- The order and timing of the operations which the Contractor plans to do in order to Provide the Works;
- The order and timing of work of the Client and Others as last agreed with them by the Contractor, or if not so agreed, as stated in the Scope;
- The dates when the Contractor plans to meet each Condition stated for the Key Dates and to complete other work needed to allow the Client and Others to do their work;
- Provision for float, time risk allowances, health and safety requirements, and the procedures set out in the Contract;
- The dates when the Contractor will need: access to a part of the Site if later than its access date, acceptances, Plant and Materials and other things to be provided by the Client, and information from Others;
- For each operation, a statement of how the Contractor plans to do the work identifying the principal Equipment and other resources which will be used; and
- Other information which the Scope requires.

An example of a programme showing key information is set out below:



Statement of how the Contractor plans to do the work

Along with each Accepted Programme, there is also a requirement for a statement of how the Contractor plans to do the work (sometimes called a programme narrative).[6] This should include details of the:

1. Sequence of planned works;
2. Resources required (types and numbers);
3. Key equipment required;
4. Critical path;
5. Time risk allowances, assumptions used;
6. Key dates such as access dates or information from others; and
7. Description of working calendars and interfaces.

This is an important document and should be issued with every programme submitted for acceptance. Practically, it provides the Project Manager with visibility of what the programme is really showing. It also shows what has changed, and why, since the last Accepted Programme. As such, it is a vital project tool and, when done well, can help to prevent a breakdown of the Accepted Programme process.

Reviewing the Accepted Programme

Once the Accepted Programme has been submitted, the Project Manager has two weeks to notify his acceptance or reasons for rejecting it. The reasons for rejecting the programme are limited to the following:

1. The Contractor's plans are not practicable;
2. It does not show the information required by the Contract;
3. It does not represent the Contractor's plans realistically; or
4. It does not comply with the Scope.[7]

When considering assessing the Accepted Programme, the Project Manager should act as they do when they are a certifier, i.e., impartially and take their duties under Clause 10 seriously.[8]

What happens if the Project Manager does not respond?

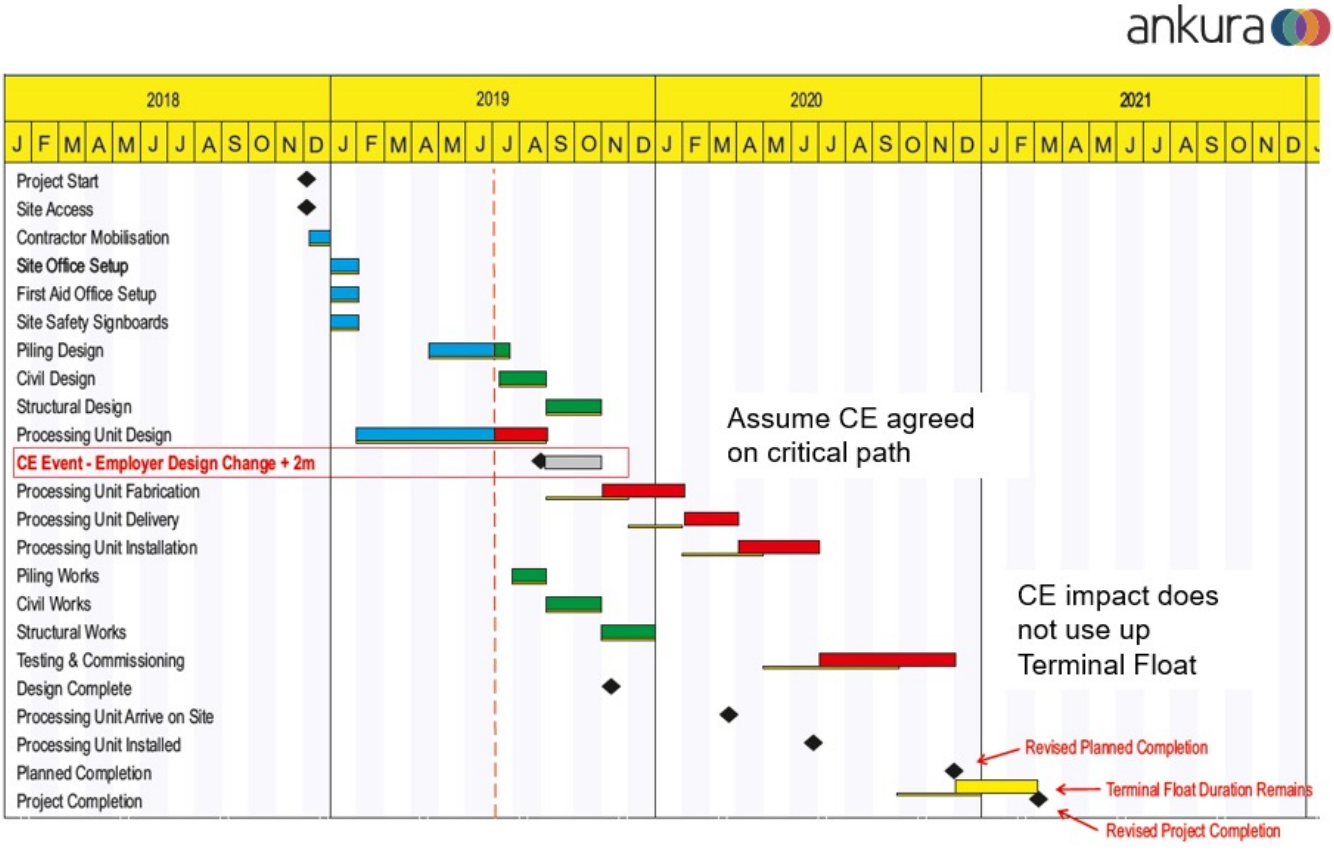
If the Project Manager does not respond within two weeks, then there is a useful deeming provision provided within the NEC4 which, unfortunately, is not present in the NEC3. After two weeks, the Contractor can submit a notice of failure to accept or reject the Accepted Programme under Clause 31.3. If the Project Manager remains silent after 1 week, then there is deemed acceptance of the programme.

How do I deal with delays to the project?

Where you need to submit a quotation for a compensation event, this should include the assessment of (prospective) delay impact by the Contractor. As set out above, it is important to get the dividing date right and also to use the Accepted Programme that was *"current at the dividing date"*.[9]

Time impact is usually shown on the programme by adding new activities to model the delay event which will include new or extra TRA if appropriate.

An example of how to show such a delay is set out below:



Common Problems

Unfortunately, too often we see issues building up right from the beginning of the project. For example, these problems include, but are in no way limited to:

1. **Delays to the submission of the initial Accepted Programme** meaning you are constantly trying to catch up and nobody can use the Accepted Programme as a project tool in the way intended;
2. **Subcontractors providing Accepted Programmes which are not realistic and, therefore, extremely difficult to feed into the main contractor's programme.** This can be for a variety of reasons including the subcontractors' own failure or lack of resources perhaps. However, equally, subcontractors quite often have to work from an incomplete picture provided by a main contractor and, accordingly, are shooting at an invisible target. Providing the necessary level of information to allow a subcontractor to properly programme their works is essential. Often, there is a circular process required with information exchanged on an interactive basis before the optimum level is reached;
3. While not catastrophic, **working on different programming software** can cause very real difficulties and make the timetable for flowing up a subcontractor's Accepted Programme into the main contractor's Accepted Programme more difficult;
4. Quite often **subcontractors are working on different contract forms** meaning they have no obligation to provide regular updates, or if they do, they are in a slightly different format to that required by the NEC. This is something to avoid if at possible. Equally, if subcontractors are unfamiliar with the NEC form, they will need an education process so that they understand what is required from them;
5. **Constant rejection by Project Managers** is not unheard of. Quite often this is because there is one issue in the original, or an early, Accepted Programme which is never quite resolved because the relevant people do not sit around the table to discuss it and understand the thought processes which underpin it. This initial rejection can be for a sensible reason but quite often snowballs as the Accepted Programme gets further and further behind the work being carried out on the project on the ground;
6. Occasionally, we also see **deliberate rejection of Accepted Programmes by Project Managers** (or contractors in relation to subcontractor programmes) so that they can assess the compensation events. This is not conduct we would recommend, not least because it leads to problems down the line and serves to harden people's attitudes meaning that the collaborative 'working together' ethos of the NEC can be fatally undermined; [10]
7. Other issues include **failure to show key information** (such as dates when the client was to provide information or access to various parts of the site) on the Accepted Programme meaning there is no entitlement to compensation events. What should be an easy hit for a contractor or subcontractor then gives no entitlement; and
8. **Accepted Programmes are submitted but do not show the potential impact of compensation events,** which are disputed or not accepted at that time, *"just in case"*. This then makes assessing them very difficult for all involved.

> *"The Accepted Programme is a key project management tool in the NEC form and is crucial for achieving the NEC's objectives.*

How can I get around these problems?

It is, of course, much easier to list the problems than to find solutions to them. However, practical advice to resolve these issues includes:

1. **Sticking to the contractual deadlines right from the start.** This means sufficient programming resource needs to be allocated. Getting the Accepted Programme right needs to be prioritised and put higher up the list of things to do. Main contractors need to get around the table with their subcontractors to discuss any issues and ensure the subcontractors can provide the information the main contractor needs to feed up the line;

2. **Getting around the table and explaining what you have done (helped by a detailed programming statement) is also essential if issues are starting to build up.** It may be that it is just not clear what the Accepted Programme is showing and why, but that once explained the problem can be resolved;

3. **If problems continue and Accepted Programmes continue to be rejected (for what you consider to be invalid reasons), then it is even more important to continue the process.** Continue to submit accurate updated programmes. They will save you both time and money if there is a dispute at the end of the project, and they are good contemporaneous evidence of delays if they are accurate. They are also intended to be a project management tool and, sticking to that, discipline should hopefully encourage good project management even when others are failing to perform their role;

4. **Do not forget the Clause 31.3 notification process set out in the flow diagram below.** That may be a way of getting deemed acceptance under the NEC4 programme (it does not apply to the NEC3 form) if a Project Manager is being particularly slow; and

5. Finally, **it may be worth thinking about escalating the issue** of the Accepted Programme further up the command chain. Getting an Accepted Programme agreed at the beginning of the job is important and if this is proving very difficult then it can be a recipe for problems later on in the project. Clause W2 of the NEC4 provides for escalation to senior representatives, and parties should not be afraid to use this tool if necessary.

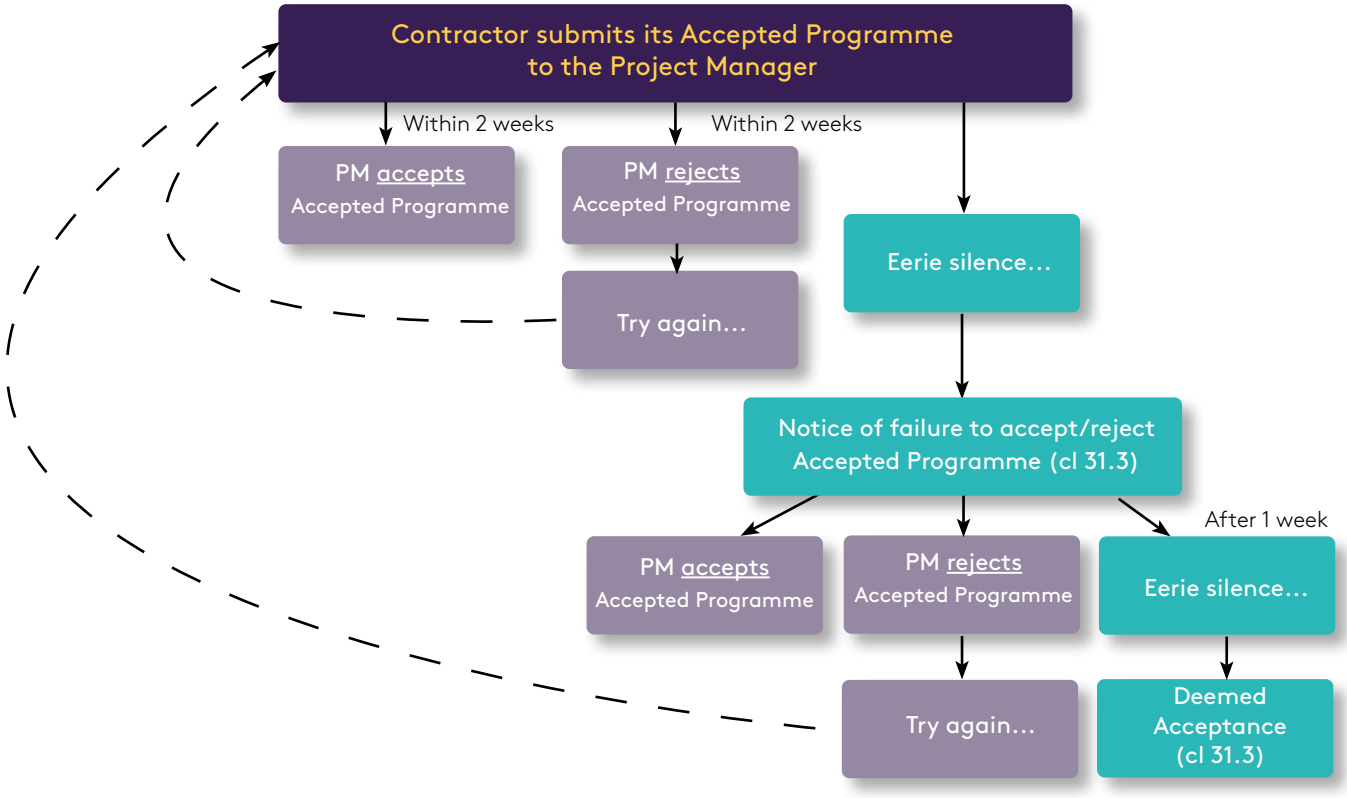
> *Getting the Accepted Programme right needs to be prioritised and put higher up the list of things to do.*

One other tactic to consider (albeit an aggressive one) is to adjudicate and ask for a declaration that a programme should be accepted. This would undoubtedly be a bold step to take, particularly at the start of a project, and it may damage relationships going forwards. That said, if the Accepted Programme submitted is being rejected for minor or inconsequential issues (or, indeed, just so the Project Manger can assess compensation events), then this is the sort of behaviour that may be worth considering nipping in the bud. Otherwise, problems can rapidly snowball, and this is a recipe for a final account dispute down the line.

Overview

Unfortunately, carrying out a delay analysis at the end of the job will take time and can be expensive. Furthermore, memories are not as fresh, staff leave, and records are lost, meaning that being in this position is always unattractive. For this reason, it is incumbent on all parties involved in NEC projects to try to understand, and fully buy into, the Accepted Programme process. In particular, to resolve issues as and when they occur so that they do not snowball. This is much easier if the programmes are accurate (both in terms of as-built data and logic) and supported by a detailed narrative explaining the thinking that lies behind it, and a transparent approach to showing delays and TRA is adopted. ■

Clause 31.3 Process



Early supply chain involvement and NEC4 Option X22

In a recent webinar, part of Fenwick Elliott's webinar series, Claire King and Mark Pantry spoke about Early Contractor Involvement (ECI) and the use of Option X22 of the NEC4 Engineering and Construction Contract. As part of that webinar,[1] they spoke about how the future of ECI and how the principle of ECI is being extended and developed in Early Supply Chain Involvement (ESI). **Mark Pantry** explains more.

ECI is a collaborative procurement technique where the client engages the contractor earlier in a project's lifecycle so that the contractor can input into the design or pre-construction phase. This brings the contractor's specialist expertise to the project at an earlier stage and potentially allows the contractor to add enhanced buildability to reduce risk in the project and achieve savings, both in terms of greater value for money and improvements on the project programme.

Current usage of ECI is predominantly in the public sector and limited to large and complex construction projects. Despite there being increased interest and calls for greater engagement in ECI, it appears that uptake has not increased significantly. In particular, the UK government's guidance on sourcing and contracting public works projects (The Construction Playbook, Version 1.1) states that *"[e]ngaging early with the supply chain and developing clear, appropriate outcome-based specifications are critical factors in achieving timely and cost-effective delivery"*.

One criticism of ECI is that the supply chain below the main contractor is not contributing efficiently towards ECI due to commercial behaviours of main contractors and clients. In a 2019 University of Cambridge study[2], it was found that supply chain perceptions of ECI were different from the other parties involved in project and that the supply chain was isolated from the collaborative ideals and commercial benefits of ECI which were touted by main contractors and clients. This led to a lack of collaboration and a reversion to the more traditional adversarial relationships.

ESI extends the principle of ECI by formally engaging the main contractor, sub-contractors, and supply chain in the pre-construction phase to input into design, price, programme, and risk management for the project. The intention being to unlock greater value in projects, as well as flowing down key project objectives to the supply chain. For example, if a project had particular sustainability or carbon reduction objectives, these could be achieved through supply chain input and innovation.

ESI and NEC4 Option X22

The provisions of Option X22 were a new option clause introduced in the NEC4 suite of contracts when they were published in 2017, but the drafting itself is based on similar model Z clauses which were published for use with the NEC3 form.

As a clause, Option X22 is split into two distinct elements:

- ECI – these provisions divide the works into Stage One and Stage Two and incorporate the mechanism of the Contractor's submission of design proposals and the Client's subsequent decision to issue notice to proceed.
- Incentive – these provisions introduce a separate financial incentive for the Contractor through the Client's initial budget for the project when compared to the actual cost of the project.

Option X22 divides the works into two stages, both of which are defined in the Scope. The Scope should clearly set out what is required from the Contractor in each stage and, in relation to Stage One, these should include details of design, procurement and construction activities, programming, deliverables and other services to be provided by the Contractor. Any of the client's ESI requirements would need to be included in the Scope; this would likely include obligations on how the Contractor engages with its supply chain and flows down project objectives and requirements to subcontractors, subsubcontractors and suppliers.

> ***A University of Cambridge study found that the supply chain was isolated from the collaborative ideals and commercial benefits of ECI.***

In Stage One, the Contractor is paid its Defined Cost on a cost reimbursable basis, but the contractor must also prepare a detailed projection forecast of that cost at the intervals in the contract data. Such forecasts are submitted to the Project Manager for acceptance. The cost of any work that is not included in the accepted forecast is treated as a Disallowed Cost.

During Stage One, the Contractor is required to submit its design proposals for Stage Two for acceptance by the Project Manager. The design proposals are required to be submitted in accordance with the submission procedure in the Scope. These submissions procedures are usually extensive and detailed and can be where

1. You can watch the webinar here: https://www.fenwickelliott.com/research-insight/webinars-podcasts/nec-accepted-programmes-practical-guide
2. *Procurement models: is early contractor involvement beneficial to the UK construction industry?* [University of Cambridge: 2019]

the Client sets out its requirements for ESI and can include obligations in relation to transparency of the Contractor's supply chain.

If Option X22 is to be used with ESI, then the parties may wish to consider expanding the existing provisions in relation to the roles of the key persons. Most of the studies on ECI and ESI show a clear benefit in having the same key persons from the Contractor and its supply chain involved with the project during the ECI period. Having key persons involved is important for collaboration, consistency, project knowledge and also for the relationship between the parties. Option X22 includes an obligation for the Contractor to maintain key persons in place during Stage One and such persons cannot leave the project without an instruction from the Project Manager or if they are unable to continue to act. This obligation could be extended to key members of the supply chain involved in the project to ensure that continuity of personnel.

> ***If a project had particular sustainability or carbon reduction objectives, these could be achieved through supply chain input and innovation.***

Moving towards Stage Two of a project, the most important element for all parties is agreeing the total of the Prices for Stage Two. Clause X22.3(5) states that the total of Prices for Stage Two is assessed by the Contractor using the Pricing Information it had prepared at the start of the contract and had included in the contract data. If ESI is being utilised, then we would expect the Contractor's supply chain to have a degree of input into the Pricing Information at an early stage, so that they can be involved in the Contractor's assessment of the Prices.

The Client makes the decision whether to proceed to Stage Two and, if it wants to proceed, the Project Manager issues a notice to the Contractor. If the decision is made not to proceed with Stage Two, then a notice is issued, and Stage Two is omitted from the Scope of the works. This omission is not a compensation event, and it is not a termination reason under the termination table. This means that the contract does not terminate but it effectively concludes because there is no further Scope for the Contractor to carry out.

The second element of Option X22 is the financial incentive for the Contractor which is there to encourage innovation and cost saving through the life cycle of a project. If ESI is being used, then this incentivisation could be flowed down to the Contractor's supply chain, although consideration will need to be given as to how members of the supply chain are incentivised: do they gain their incentive if their subcontract works save on project costs or only if the project as a whole comes under budget?

Option X22 introduces the new defined term of the Budget which is the value declared by the Client at the start of the project and is used to compare the Project Cost for the assessment of the budget incentive. The Budget is intended to be the maximum amount available to cover all costs for the complete delivery of the project and not just limited to construction costs. The Project Cost represents the total amount incurred by the Client from payments made to the Contractor and others for the items stated in the Budget. If the Project Cost on completion of the whole of the works is lower than the Budget, the Contractor is rewarded with a budget incentive payment. It is suggested that, in an ESI arrangement, the incentive payment is shared with the Contractor's supply chain.

Conclusion

An increased use of ECI and ESI will undoubtedly see an increase in the use of Option X22 under the NEC4 Engineering and Construction Contract. If ESI is to be used on a project, then the parties will need to consider how the provisions of Option X22 are flowed down to the Contractor's supply chain so that all members of the supply chain adopt a mutually beneficial, open, and collaborative approach, sharing ideas and innovative solutions to enable a successful project delivery. ■

G is for global claims

Huw Wilkins has set himself a task of preparing an A-Z of Construction Terms[1].

Here is his entry for G, dealing with global claims.

What is a global claim?

Keating on Construction Contracts describes a global claim as a claim that provides *"an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for"*.[2]

The Society of Construction Law's *Delay and Disruption Protocol* (2nd edition) provides an alternative definition of a global claim, being *"one in which the contractor seeks compensation for a group of Employer Risk Events* [i.e., something which under the contract is at the risk and responsibility of the Employer] *but does not or cannot demonstrate a direct link between the loss incurred and the Individual Employer Risk Events"*.

Courts' approach to global claims

Those opposed to global claims argue that they contravene the generally accepted legal position that a party must prove a causal link between the sums it claims and individual events (in the context of contractors' claims being either events under the contract entitling the contractor to loss and expense, or breaches of contract entitling the contractor to claim damages). This is why, historically, the courts have not looked favourably on global claims. In *Wharf Properties v Eric Cumine Associates (No.2)*,[3] faced with a global claim, Lord Oliver described the pleading as *"hopelessly embarrassing"* and referred to the claimant's obligation *"to alert the opposite party to the case which is going to be made against him at trial"*.

However, more recently, the courts have taken a more lenient approach when considering global claims. By way of example, in the case of *Walter Lilly & Co Ltd v DMW Developments Ltd*,[4] although Mr Justice Akenhead concluded that the claim before him was not a global claim, he did consider (obiter) that *"in principle, unless the contract dictates that a global cost claim is not permissible if certain hurdles are not overcome, such a claim may be permissible on the facts and subject to proof"*.

> ***"For a party endeavouring to prove a global or total costs claim, 'there are added evidential difficulties in proving a global or total costs claim'.***

Mr Justice Akenhead also set out the following requirements with regards to global claims:

- the contractor must prove its case as a matter of fact on the balance of probabilities;
- the contractor must satisfy any contractual requirements (e.g., conditions precedent), or the claim will be disqualified;
- it is open to a party to prove its claim with whatever evidence will satisfy the tribunal and meet the requisite standard of proof;
- although there is nothing "wrong" with a global claim, there are evidential difficulties to overcome – to establish that the loss incurred would not have been incurred in any event (i.e., causation);
- the fact that one or a series of events or factors, which are either unpleaded or the risk/fault of the contractor, caused or contributed to the total or global loss, does not necessarily mean that the contractor can recover nothing – it depends on what the impact of those events/factors is, such that the global claim would simply be reduced by the loss resulting from that event/factor;
- there is no need for the tribunal to go down the global claim route if the actual cost attributable to an event can be readily determined (although note that he did acknowledge that in such circumstances, whilst the global cost claim should not be rejected out of hand, the tribunal will be more sceptical about the global cost claim); and
- a global claim should not be rejected just because the contractor (i.e., the party making the claim) has caused the impossibility of disentanglement.

A contractor may seek to advance a global claim if it is impractical or impossible to demonstrate causal links between specific events and losses such that a global claim is the only way for the contractor to advance its claim.

Whilst a global claim may, on its face, be relatively quick and inexpensive to formulate, a contractor will need to meet the requirements set out by Mr Justice Akenhead in the *Walter Lilly* case. Contractors should also note the comments of Mrs Justice Carr in the more recent case of *John Sisk & Son Ltd v Carmel Building Services*,[5] that for a party endeavouring to prove a global or total costs claim, *"[t]here are added evidential difficulties in proving a global or total costs claim"*.

Although the Court's approach to global claims appears to have softened in recent times, it will be easier for an employer to undermine a global cost claim. This means that, whilst it might be quicker and less expensive for a contractor to put forward a global claim, a contractor will be far better placed if it can present an itemised claim, demonstrating causal links between its losses and the employer's actions (or issues that are at the employer's risk). ■

1. Further letters can be found here: www.fenwickelliott.com/research-insight/articles-papers/construction-law-terms-a-z
2. *Keating on Construction Contracts*, 11th edition, paragraph 9-064.
3. [1991] 52 B.L.R. 503
4. [2012] EWHC 1773 (TCC)
5. [2016] EWHC 806 (TCC)

ADR clauses following *Children's Ark Partnerships Ltd v Kajima Construction (Europe) UK Ltd*

George Boddy recaps the law in relation to alternative dispute resolution (ADR) clauses and explains the extent to which the TCC's recent decision in *Children's Ark Partnerships Ltd v Kajima Construction (Europe) UK Ltd*[1] has changed the position.

ADR clauses: a recap

ADR clauses are very common in construction contracts. At its simplest, an ADR clause allows the parties to agree that, if a dispute arises in connection with their contract, they will use a form of alternative dispute resolution to attempt to resolve it either prior to, alongside or as a precondition to formal dispute resolution such as litigation or arbitration.

ADR clauses can be extremely valuable in the event of a dispute. Such clauses give parties a roadmap towards reaching a potential resolution of it and the chance to avoid the time and cost of litigation or arbitration. This can help preserve the commercial relationship, which is often lost by the time lawyers are instructed and formal proceedings are afoot.

There are various types of ADR clause. Some clauses will simply provide for the parties to refer their dispute to litigation or arbitration and do not specify a form of ADR. More often, ADR clauses will specify a form of alternative dispute resolution that the parties must undertake, such as negotiation between principals, expert determination, or mediation, in order to attempt to resolve their disputes. It is usual for there to be an *"escalation"* or *"multi-tiered"* procedure in, whereby, after the service of some form of dispute notice by one party on the other, the parties are required to try one form of ADR first to resolve their dispute and then to move on to a second form of ADR in the event the first fails, and so on, before a party resorts to litigation or arbitration.

The construction contract between the Children's Ark Partnerships Ltd ("CAP") and Kajima Construction (Europe) UK Ltd ("Kajima") contained a tiered ADR clause, which provided for litigation *"subject to the provisions of the Dispute Resolution Procedure"* (DRP). The DRP applied to any dispute or claim arising from the contract, which were to be first referred to the Liaison Committee (LC) for resolution. The LC was to be comprised of representatives of only CAP and of Brighton and Sussex University Hospital Trust ("the Trust").

CAP had entered into a project agreement with the Trust to design, build and finance the redevelopment of a children's hospital and had engaged Kajima to provide the design and construction works. The Court referred to the omission of a representative from Kajima on the LC as a *"curiosity"*.

The LC was expressly stated to provide a means of resolving disputes amicably. Where a dispute was referred to it, the LC was to seek to resolve it within 10 working days and its decision was to be final and binding unless otherwise agreed. However, it was accepted by the parties during the hearing that as Kajima was not represented on the LC, any decision it made could not possibly be binding.

> ***To be enforceable, an ADR clause must be 'sufficiently clear and certain by reference to objective criteria'.***

The procedural background

CAP alleged that there were defects in the cladding system installed by Kajima, who agreed to carry out various remedial works without prejudice to its position on liability. The parties agreed to enter into a series of limitation standstill agreements to allow Kajima to carry out the remedial works and, once they were complete, Kajima refused to enter into a further standstill.

However, CAP considered it still had further claims to bring against Kajima, including claims intimated against CAP by the Trust. CAP, therefore, issued proceedings against Kajima a week before the limitation period was due to expire and immediately sought a stay of proceedings to allow the parties to attempt to resolve the dispute via the contractually agreed ADR mechanism and to go through the Pre-Action Protocol.

In response to CAP's application, Kajima applied to strike out or set aside CAP's Claim Form on the grounds that CAP had failed to comply with the contractual ADR clause before commencing litigation, which it said was a condition precedent. Kajima contended that it had been deprived of a limitation defence that would have been available to it if CAP had complied with its contractual obligations. Kajima brought the application under CPR r. 11(1) on the basis that either the Court's jurisdiction had not been invoked[2] or the Court should decline to exercise its jurisdiction.[3] Kajima requested that the Court use its discretion under CPR r. 11(6) to strike out CAP's claim due to the failure to comply with the condition precedent.

1. [2022] EWHC 1595 (TCC). We understand that leave has been given to appeal to the Court of Appeal.
2. CPR r. 11(1)(a).
3. CPR r. 11(1)(b).
4. [2019] BLR 576.
5. *Channel Tunnel v Balfour Beatty Ltd* [1993] AC 334 and *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2008] Bus LR 132.
6. *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] BLR 576 at [32(iii)].
7. *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC) at [81].
8. *Wah (Aka AlanTang) v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch) at [60].

Are parties required to comply with ADR clauses before commencing litigation?

As long as the ADR clause meets certain requirements, the Court has a discretion to stay proceedings commenced in breach of it. These requirements were set out by O'Farrell J in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*:[4]

1. The ADR clause in the contract must be an enforceable obligation;

2. The obligation must be clearly expressed as a condition precedent to court proceedings or arbitration; and

3. The ADR clause must be sufficiently clear and certain and, for example, include machinery to appoint a mediator or other step in the procedure without the need for further agreement between the parties.

CAP argued that O'Farrell J had gone too far in respect of the second requirement. CAP suggested that the ADR clause did not necessarily need to be expressed as a condition precedent for a Court to order a stay of proceedings commenced in breach of it.

The Court carefully reviewed the authorities[5] and concluded that, insofar as ADR provisions prior to litigation (as opposed to arbitration) were concerned, the case law did not appear to have distinguished between mandatory obligations and conditions precedent for the purposes of deciding whether to stay proceedings commenced in breach of an ADR clause. The Court, therefore, respectfully disagreed with O'Farrell J in *Ohpen* that the ADR clause had to be expressed as a condition precedent before a Court would order a stay of proceedings. However, the Court concluded that the other two requirements identified by O'Farrell J did apply.

It now appears to be settled that parties to a construction contract, which includes an enforceable and mandatory ADR clause, must comply with it prior to commencing litigation, even if it is not expressed in the form of a condition precedent. If they do not, there is a risk that the Court will grant a stay of proceedings to allow compliance with the provisions of the clause.

Notwithstanding the above, the Court found that the ADR clause did amount to a condition precedent due to the presence of the words *"subject to the provisions of the Dispute Resolution Procedure"* before the rest of the jurisdiction clause which provided for litigation.

Will the ADR clause be enforceable?

In order to be enforceable, an ADR clause must be *"sufficiently clear and certain by reference to objective criteria"*.[6] Additionally, there should be no need for a further agreement between the parties before the procedure under the ADR clause can commence and the process for selecting a party to resolve the dispute and to pay that person should be identified.[7] Finally, the ADR process should be clearly defined so that it can be determined objectively what the parties have got to do to comply with it and how it will be exhausted or ended without one party being in breach.[8]

The Court decided that the ADR clause in the contract between CAP and Kajima did not meet these requirements and that the clause did not create an enforceable obligation:

1. First, there was no *"meaningful description of the process to be followed"* and the LC could make its own rules and procedures. The Court was particularly critical of the fact that Kajima itself was not required to be represented on the LC. Kajima's participation would, therefore, require further agreement.

2. Secondly, it was not possible to see how an ADR clause, which did not require Kajima's attendance, could possibly provide a means of "amicably" resolving a dispute between it and CAP or how a decision of the LC could be binding on Kajima if it was not present.

3. Finally, it was not clear how any dispute was to be referred to the LC by the service of a dispute notice or similar.

In the light of the Court's finding that the ADR clause was not enforceable, Kajima's application for strike out was dismissed.

In the Judge's *obiter* remarks, she found that had the ADR clause been enforceable; the fact that it was expressed as a condition precedent would have given rise to a jurisdictional issue under CPR r. 11(1)(b), but not 11(1)(a) (as this was clear from authority). However, the Judge commented that she would have done no more than stay the proceedings, as that was the default remedy, and would not have used her discretion to grant the draconian relief of strike out because she found that CAP's decision to issue the Claim Form to avoid the expiry of limitation was an *"entirely sensible approach"*.

Comment

The decision confirms the Court's willingness to enforce parties' commercial agreements and signals its endorsement of ADR clauses as a means of resolving disputes, provided they are enforceable.

Indeed, following *CAP v Kajima*, it now appears that an ADR clause does not have to be expressed as a condition precedent to the commencement of litigation in order for the Court to stay the proceedings to allow for the ADR process to take place. Those acting for parties whose contracts contain a mandatory ADR clause, and where litigation is contemplated, should check to ensure it has been complied with, particularly if limitation is due to expire. If the ADR clause has not been properly complied with, then, absent any other non-compliance, the default option for the Court is to grant a stay of proceedings rather than any more stringent relief.

> ***"As long as the ADR clause meets certain requirements, the Court has a discretion to stay proceedings commenced in breach of it.***

The case also serves as a warning for those drafting ADR clauses to ensure that they are sufficiently clear and certain by reference to objective criteria. If not, you may well find that they are not enforceable. ■

Investment treaty arbitration: a possible avenue for claims arising out of the invasion of Ukraine?

Russia's ongoing war continues to have devastating consequences for the people of Ukraine, both personally and economically. As part of a possible economic fightback against Russia, **Sana Mahmud** looks at whether investment treaty arbitration offers recourse to recover losses arising as a result of the continuing conflict.

The basis of investment treaty claims

Investment treaty arbitration is arbitration between a company or an individual investor against a state for breach of that state's obligations under international law to protect the investor's investment. A bilateral investment treaty (BIT) is a treaty between two states under which each state agrees to afford rights and protections to investors from the other.

Russia is party to 84 BITs with other countries,[1] including many European and Middle Eastern states. Ukraine and the United Kingdom also both have BITs with Russia; however, it should be noted that there is not one in force with the United States.[2] Of these 84 BITs, 63 are currently in force. Russia is also party to a number of further multilateral treaties containing investment provisions.[3] For the purposes of this article, international energy companies will perhaps be the most likely claimants, but contractors with investments or business in Russia may also be affected.

> *Russia is not a signatory to the ICSID Convention, and any award pursuant to a BIT rendered by an arbitral tribunal will have to be enforced under the New York Convention.*

Types of claims

Broadly, two types of claims are likely to be relevant here. The first are claims for damage to investments within Russia, and the second are claims for damages to investments in areas of Ukraine now under Russian control.

In respect of the first type of claim, an investor may be able to claim damages in circumstances where Russian countermeasures to Western sanctions affect operations and investments in the country. Where, for example, a company has had to exit the Russian market and/or can no longer operate efficiently as result of those measures, it may be possible for the investor to bring a claim under the terms of a relevant BIT.

The second type of claim already has some precedence, although it may be less common than the first. Following Russia's 2014 invasion and occupation of the Crimea, there have been a number of investment treaty arbitrations initiated under the Ukraine-Russia BIT,[4] some of which have resulted in significant awards favourable to the investor. The claims in these cases have largely related to the expropriation or nationalisation of assets held by Ukrainian individuals or companies.

What an investor must demonstrate

The first question to consider is whether the individual or company that wants to pursue a claim can be classed as an investor under the applicable treaty, and whether that treaty's definition of investment applies in the circumstances. As set out in an article in last year's Annual Review,[5] treaties will often define an investor and investment broadly; however, careful consideration will need to be given to the precise wording of the particular BIT. For example, it is likely that construction companies that carry out works under an infrastructure contract with the Russian state or a public authority will qualify as investors.

The protections offered under BITs commonly include provisions that:

- Protect the investor's legitimate expectations;
- Protect the investor against uncompensated expropriation or nationalisation by the host state;
- Guarantee fair and equitable treatment;
- Guarantee protection and security for the investor's investment; and
- Guarantee that the foreign investor will be treated no worse than local investors.

When considering whether to bring a claim, an investor must be able to demonstrate that measures introduced by Russia amount to a breach of the provisions found in the applicable BIT, and that the breach has caused a loss to the investor.

Some BITs can also contain provisions that guarantee compensation for losses arising out of war or armed conflict which leads to a change of *de facto* control over a territory. This can apply, for example, in circumstances where the investment was made prior to the annexation of Crimea by Russia and may cover not only property that is physically damaged or destroyed in the conflict itself, but also to loss of profits as a result of disruption to business operations.

1. https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation?type=bits
2. If, however, if the claimant company is a US-owned company, but the entity affected adversely is a subsidiary incorporated in a country with which Russia has a BIT, the subsidiary may be able to bring a claim.
3. https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation?type=bits
4. See for example, *Oshadbank v The Russian Federation; Aeroport Belbek LLC and Igor Valerievich Kolomoisky v The Russian Federation; Everest Estate LLC et al. v The Russian Federation; PJSC Ukrnafta v The Russian Federation;* and *Stabil LLC et al. v The Russian Federation*
5. https://www.fenwickelliott.com/research-insight/annual-review/2021/investment-treaty-arbitration

Enforcement issues

In cases brought under the Ukraine-Russia BIT in relation to the expropriation of investments in annexed Crimea, Russia has largely not engaged in the process but has challenged the award at the later stages when the investor has sought enforcement by a relevant national court.

It should be noted that Russia is not a signatory to the ICSID Convention, and any award pursuant to a BIT rendered by an arbitral tribunal will have to be enforced under the New York Convention. This means that the relative ease of the self-contained ICSID enforcement regime is unavailable if a claim is decided in the investor's favour. Given its approach to the Crimea claims, Russia will likely challenge the award in the courts where enforcement is sought pursuant to the national law of the seat of the arbitration.

A further complication may arise when enforcement is sought in states where Russian state assets are frozen as a result of sanctions. Accessing these funds could be difficult and companies would need to ensure that an exception to the law applies that would enable an investor to receive the compensation awarded by a tribunal. The LCIA has recently been granted a licence in relation to UK sanctions that allows it to process payments from parties subject to the regime to cover arbitration costs. Whilst this exemption will likely apply largely to commercial arbitrations, it may indicate a willingness by states to allow payments in circumstances where they are made pursuant to an award.

For these reasons, an enforcement strategy should be considered carefully at the outset before a claim is brought. This is particularly important in circumstances where enforcement must be sought in a third country in which Russia has assets that are subject to sanctions. The earlier an award is made, the earlier it can be enforced, before the potential deluge of similar claims starts.

What to think about now

As the crisis and conflict continues to develop, companies whose operations or assets are affected by the war or by Russian countermeasures to western sanctions should consider whether there are any relevant BITs that offer protection for their investments.

If there is an applicable BIT in force pursuant to which a claim can be brought, companies should, at a minimum, protect their position by:

- Compiling and preserving all documents relating to the ownership, corporate structure and value of the investor company and investment;
- Compiling a comprehensive list of all assets and affected contracts in Russia and/or Ukraine;
- Compiling evidence of the effect of the conflict and any Russian countermeasures to sanctions on business operations;
- Compiling and preserving all information and communications with any Russian state officials;
- Keeping up to date with further sanctions developments in Russia and third countries where enforcement could be sought; and
- Considering whether to issue a notice of dispute under the relevant BIT as many contain six-month negotiation provisions before the commencement of any arbitration proceedings.

Conclusion

If an applicable BIT exists, it is potentially possible for an investor to bring a claim against Russia for damages arising out of the consequences of the invasion of Ukraine. However, the terms of the BIT must be considered carefully alongside a clear enforcement strategy before any action is commenced. ■

Saudi Arabia continues to move towards arbitration-friendliness, but are we there yet?

There can be no doubt of the Kingdom's aspirations. In recent months, it has been reported that Saudi Arabia is set to become the largest construction site in history, with investment in current infrastructure and real estate projects estimated to be over USD 1.1 trillion. Giga-projects like NEOM, King Salman Park, Diriyah Gate and the Red Sea Project, and the launch of a new airline to rival Emirates indicate the scale of the Kingdom's ambitions on its path to achieving its Vision 2030.

Inevitably, all this construction has attracted many of the world's largest contractors. But questions remain as to how "arbitration-friendly" the Kingdom is. **James Cameron** explains more.

The Saudi Center for Commercial Arbitration (SCCA) recently published an article in the *Global Arbitration Review* entitled "A progress report on Saudi Arabia's arbitration-friendliness".[1] In that article, the SCCA benchmarks Saudi Arabia as an arbitral seat by reference to the London Centenary Principles of the Chartered Institute of Arbitrators (CIArb London Centenary Principles), and explains how it meets each of those principles and compares favourably to other jurisdictions that are considered *"arbitration-friendly"*.[2]

What are the CIArb London Centenary Principles?

The CIArb London Centenary Principles comprise principles that CIArb consider *"necessary for an effective, efficient and 'safe' Seat for the conduct of International Arbitration"* and can be summarised as follows:

1. **Law** – effective local law that recognises and respects the parties' choice of arbitration.
2. **Judiciary** – an independent judiciary that is competent and efficient and respectful of the parties' choice of arbitration.
3. **Legal expertise** – an independent legal profession with expertise in international arbitration.
4. **Education** – a commitment to education of counsel, arbitrators, the judiciary, experts, users, and students regarding international arbitration.
5. **Right of representation** – a clear right for parties to be represented by someone of their choice, whether from inside or outside the jurisdiction of the seat.
6. **Accessibility and safety** – the seat must be easily assessable and free from unreasonable constraints on entry, exit and work, etc.
7. **Facilities** – adequate facilities for the provision of arbitration services (e.g., hearing rooms, transcription services, etc.).
8. **Ethics** – professional and other norms which embrace diversity of legal and cultural traditions.
9. **Enforceability** – adherence to international treaties and agreements governing the recognition and enforcement of awards made at the seat and in other countries.
10. **Immunity** – clear right to immunity from civil liability for arbitrators for anything done in good faith in their capacity as arbitrator.

How does Saudi Arabia measure up?

The SCCA article goes through each of the CIArb London Centenary Principles in turn and sets out how the Kingdom meets the requirements imposed by those principles. Of particular interest was the SCCA's position on: (i) the arbitration law in Saudi Arabia; (ii) the efforts being made in relation to the professional legal community and education, and the parties' rights of representation; (iii) the recent appointments of international experts; and (iv) the statistics relating to judicial enforcement of awards.

> ***"The arbitration process is Sharia compliant, even when seated outside of the Kingdom and subject to international institutions rules.***

Arbitration law in Saudi Arabia

The SCAA notes that the Saudi Arbitration Law[3] is modelled on the UNCITRAL Model Law on International Arbitration and has *"paved the way for a more arbitration-friendly era"*. In broad terms, we agree with this assessment.

In a previous issue of the *Review*, we provided a summary of the Saudi Arbitration Law and relevant Sharia principles.[4] We noted there that international arbitration practitioners from outside the Kingdom should be mindful of some unique elements of arbitrating in the Kingdom and should consider the following tips:

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

We concluded that this makes it important for parties who are arbitrating and/or potentially looking to enforce an

1. The full article by James MacPherson, Leading International ADR Specialist, is publicly available here: https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2022/article/progress-report-saudi-arabias-arbitration-friendliness
2. The CIArb London Centenary Principles are available here: https://www.ciarb.org/media/4357/london-centenary-principles.pdf
3. Royal Decree No. M/34.
4. The article entitled "Arbitration in the Kingdom of Saudi Arabia: the 'New Arbitration Law', Shariah principles and enforcement of awards in the Kingdom" is available here: https://www.linkedin.com/pulse/arbitration-kingdom-saudi-arabia-new-law-shariah-awards-james-cameron/

award in the Kingdom to engage counsel familiar with the Sharia throughout the arbitration process, even if the arbitration is subject to non-Sharia rules and governed by non-Sharia law.

The professional legal community and education and the parties' rights of representation

The SCCA notes that the Saudi Bar Association in 2019 launched the Saudi Accreditation Standards for Lawyers, which is described as *"a set of processes endeavouring to set national legal progression standards meeting international best practices and maintaining a high level of professionalism"*. The SCCA says that these kinds of initiatives are *"ensuring that Saudi lawyers will be competitive domestically and internationally"*.

> ***Saudi Arbitration Law has 'paved the way for a more arbitration-friendly era'.***

This is consistent with our experience in the Kingdom too, where we often are engaged with or opposed to counsel who operate at a high professional standard. However, as noted by the SCCA, the Saudi Arbitration Law makes it clear that a party may appoint a representative (who does not need to be a lawyer) from inside or outside the Kingdom, regardless of gender, nationality, or religion.

The recent appointments of international experts

As noted in the SCCA article, the SCCA has recently *"added high-profile ADR experts to its board of directors, rules advisory committee and committee for administrative decisions as part of its objective to provide first-class rules and services"*. The third independent board of directors of the SCCA was appointed by Royal Decree that was issued on 23 March 2021 and is chaired by Walid Abuanumay with Toby Landau serving as vice chair. Half of the incoming board members are leading international arbitration experts, and are drawn together from Saudi Arabia, Egypt, France, the United Kingdom, and the United States.

This move will be welcomed by the international contractor community, and the fruit of such a diverse range of arbitration experts will doubtless be borne out in the years to come.

The statistics relating to judicial enforcement of awards

Of particular interest were the statistics the SCCA published regarding the enforcement of awards in Saudi Arabia. In 2019, the SCCA notes, more applications for enforcement were filed than had been filed between 2013 and 2018. In 2021, the SCCA notes, Saudi courts enforced 204 domestic and foreign awards, with an aggregate value of USD 2.1 billion. Enforcement proceedings were resolved on average within two weeks, which is impressive by any international measure.

An SCCA study of Saudi court cases published between 2017 and 2021 indicated that, of the 540 judgments which were issued, and 603 motions registered with the appellate courts, nearly a third of these related to enforcement or nullification of arbitral awards. Of the motions to annul an award, only 6% were granted, half of which were granted on Sharia and public policy grounds.

This does reinforce the need to be mindful of the points we note above, but also should give some comfort to those operating in the Kingdom that the Sharia and public policy arguments are not being unduly relied on to annul arbitral awards, and that, in the main, arbitral awards are being enforced through an efficient court process.

Conclusion

Saudi Arabia continues to push towards its Vision 2030, and in doing so continues to champion arbitration as a means of resolving disputes. As the SCCA notes, significant strides are being taken in that regard. Saudi Arabia has a modern international arbitration law, a supportive judiciary, and is bringing in specialist international expertise to continue to develop its arbitration environment.

While the signs are promising, it remains to be seen whether the Kingdom will continue on its path to becoming a regional – and perhaps one day international – hub for arbitration. ■

Delay and liquidated damages: some new ideas from FIDIC

We are all used to the traditional idea behind delay (or liquidated) damages, so as **Jeremy Glover** explains, it was interesting to see FIDIC expanding the concept when they released the second edition of the Green Book.

Why do we have Delay Damages clauses?

In the case of *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 at [74], Lord Leggatt explained that:

"Such a clause serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project."

The FIDIC Guide to the 1999 Rainbow Suite takes a similar view, noting that the purpose of Delay Damages is to compensate the Employers for losses they suffer as a consequence of delayed completion. Where the amount of Delay Damages is pre-agreed, the intention is that the Employer does not have to prove actual loss and damage. The benefit of liquidated damages is that they avoid the difficulty (and expense) of proving and assessing actual loss where a delay occurs. For the Contractor, Delay Damages effectively act as a limit on their liability for delay. They also provide a degree of certainty for both parties.

Under the FIDIC 2017 second edition of the Rainbow Suite, the basic scheme is that:

- If the Contractor fails to complete their Works within the Time for Completion, the Employer is entitled to levy Delay Damages.
- The Delay Damages shall be deducted at the rate provided for in the Contract Data.
- The Contract Data provides for the maximum amount of Delay Damages to be capped.
- Unless the Contract is terminated, Delay Damages are the only remedy available to the Employer prior to Completion.
- The Delay Damages do not relieve the Contractor of their other contractual obligations.
- To recover the Delay Damages, the Employer must make an application in accordance with sub-clause 20.2.

The precise way in which a Delay Damages clause might work will depend on the law under which the Contract operates:

- In South Africa, under the Conventional Penalties Act 15 of 1962, the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if they receive the Delay Damages as specified in the Contract. For example, if the Employer does not suffer any loss due to the Contractor's delay.

- In Qatar, Article 265 of the Civil Code allows the parties to calculate the amount of damages payable in the event of delay. However, by Article 266, the court can reduce the Delay Damages if the Contractor can show that the Employer has not suffered any loss, or if the amount claimed is exaggerated. By Article 267, the amount of Delay Damages agreed in the Contract Data will act as a cap on the damages payable, except in circumstances of fraud or gross mistake.

- In contrast, in the UAE, under Article 390 of the Civil Transactions law (Civil Code), both the Contractor and the Employer may challenge the element of "loss". Article 390(2) entitles the Judge to vary the parties' agreement to reflect the actual loss. A court *may* set aside the liquidated damage entirely in the unlikely event of the employer suffering no loss from the delay. Further, the court may also reduce the damages to reflect the actual loss. In both scenarios, the burden of proof is placed squarely on the Contractor. Similar standards will be applied to the Employer who is trying to argue that their actual loss exceeds the liquidated damages.

- Under English law, a liquidated damages clause will not be enforceable where it constitutes a "penalty".[1] In the case of *Cavendish Square Holdings BV v Tatal El Makdessi,*[2] the Supreme Court held that:

"... a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach ... But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations".

1. *Dunlop Ltd v New Garage Co Ltd* [1915] AC 79
2. [2015] UKSC 67
3. [2005] EWHC 281 (TCC) – some 90 years after the *Dunlop* case.
4. [2021] EWHC 2207 (TCC)

However, whatever the jurisdiction, parties should be aware that, as a starting point, the courts will attempt to respect the parties' agreement. The result in practice is that the courts are reluctant to vary the Liquidated Damages clause unless it is evident that the liquidated damages considerably exceed the actual loss. In the English case of *Alfred McAlpine Capital Projects Ltd v Tilebox*,[3] Mr Justice Jackson noted that only four cases had been referred to him where the relevant clause had been struck down as a penalty. Even allowing for the fact that the more obvious cases would be unlikely to reach the courts, that is a very small number indeed.

It is always sensible to keep a record explaining why the amount of the liquidated damages was set at the level it was, and why it represents a reasonable and proportionate figure based on actual estimates and, at least in the UK, why it acts as a protection of a legitimate commercial interest.

In *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd*,[4] Mrs Justice O'Farrell said that:

"The liquidated damages provision was negotiated by the parties, who both had the benefit of advice from external lawyers... The court should be cautious about any interference in the freedom of the parties to agree commercial terms and allocation of risk in their business dealings... [Liquidated damages provisions] limit the contractor's exposure to an unknown and open-ended liability, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project."

Extending the delay damages principle

The second edition of the FIDIC Green Book, which came out in 2021, has taken the basic principle behind Delay Damages (in the sense of a pre-agreed contractual rate) – certainty and the avoidance of incurring unnecessary time and costs in disputing the amounts that may be awarded to a party – and extended it to prolongation costs.

The 1999 first edition already had fixed pre-agreed amounts payable for loss of profit in the event of termination. In the 2021 edition, sub-clause 10.4 fixes a Contractor's loss of profit in the event of termination for cause by the Contractor or termination for convenience by the Employer at 10% of the value of those parts of the Works not yet executed at the date of termination. The same rate applies where works are omitted.

For the Employer, liquidated damages for losses arising from a termination for cause are set at 20% of the value of those parts of the Works not executed at the date of the termination. The new edition makes it clear that this is an exclusive remedy.

The treatment of prolongation costs is bolder and new to FIDIC. Clause 1.1.35 defines prolongation costs as *"the only compensation due from the Employer to the Contractor for an EOT resulting from compensable delay"*.

Clause 11, which deals with Risk and Responsibility, contains a table setting out details of the Contractor's potential entitlement. This table includes reference to Prolongation Costs. Not only is this a defined term, but there is also a set formula in the Contract Data detailing how to calculate the compensation for onsite and offsite overheads per day of compensable extension of time. This is based on the *"average weight"* of the Contractor's onsite and offsite overheads per day, and the value of the works executed at the time of the delay.

FIDIC are clear within the Guidance Notes that their new approach is based on *"a liquidated damages provision, for ease of use by the parties"*.

The Green Book is intended for use on (relatively) lower value projects and FIDIC is looking to reduce the time and cost associated with these losses, which can be quite complex and require expert evidence. The new approach is also in line with FIDIC's philosophy of trying to make their contracts clearer, so that everyone knows where they stand; the ultimate aim being to help to avoid disputes.

A greener way forward?

So, will FIDIC look to extend the practise in other ways?

FIDIC is currently setting up a task force to consider how to deal with net zero and other sustainability provisions. One possible option might be the use of pre-agreed damages for a failure to achieve pre-agreed reductions in emissions or other environmental targets. For now, at least, this might be too ambitious as it would require a detailed understanding on all sides of the agreed targets and methods of reporting. Degrees of understanding vary widely and so this may not be achievable, or at least achievable fairly, without loading risk on to the Contractor. Liquidated damages are not a one-size-fits-all solution.

Perhaps a fairer, better way forward to setting and achieving carbon emission targets might be to adopt a more collaborative approach to incentivise all parties to achieve the climate goals on a particular project. ■

Adjudication: cases from *Dispatch*

Our usual case round-up comes from two different sources. As always, we highlight here some of the more important cases which may not be covered in detail elsewhere in the *Review*. First, there is our long-running monthly bulletin entitled *Dispatch*. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to **www.fenwickelliott.com**. If you would like to receive a copy every month, please contact Jeremy Glover or sign-up online **https://www.fenwickelliott.com/researchinsight/newsletters/dispatch.**

We begin by setting out some of the most important adjudication cases as taken from *Dispatch*. Second, there is the *Construction Industry Law Letter* (*CILL*), edited by Fenwick Elliott's Karen Gidwani. *CILL* is published by Informa Professional. For information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on **+44 (0)20 3377 3976**.

Which payment application did the pay less notice apply to?

Advance JV & Ors v Enisca Ltd

[2022] EWHC 1152 (TCC)

In a decision dated 8 February 2022, an adjudicator decided that Advance did not issue a valid pay less notice against an interim application for payment and that, consequently, Advance was to pay Enisca the sum of £2.7 million. In general terms, the amended NEC3 subcontract form provided that:

- Enisca could make an application for payment on or before the assessment date;
- Advance was required to assess the amount due for payment and certify a payment by issuing a Contractor payment certificate within three weeks of the assessment date;
- Payment became due 21 days after the assessment date; and
- A party intending to pay less than the notified sum must notify the other party not later than seven days before the final date for payment.

In Application 23 (the application immediately prior to the application on which the adjudication was based), the difference between the parties was £1,415,902.42. It was common ground that the assessment date of this application was 24 September 2021.

On 22 October 2021, Enisca submitted Application 24 by email. The gross value showed an increase of over £1.4 million, or almost 40%. The last date for providing a pay less notice was 26 November 2021. No payment certificate was provided by Advance to Enisca, and no document was provided which expressly sought to respond to Application 24.

On 19 November 2021 (the next assessment date under the Contract), Enisca submitted Application 25, an increase of just £85,661, but the net payment applied for was £2.7million. On 25 November 2021 (one day befor e the expiry of the time window for provision of a pay less notice in respect of Application 24 and within the 21-day period for certification following the assessment date in respect of Application 25), Advance sent a package of documents which included a "Certification of payment assessment" expressly said to be for the assessment date of 19 November 2021 ("the Payment Certificate"), i.e. the assessment date referable to Application 25, payment cycle 29.

The assessment resulted in a negative payment value and the figures were adjusted to show a zero payment. The pay less notice made reference to "application No 25", the back-up assessment referred to "application 25" and the sum considered to be due was calculated by reference to the assessment of, and comparison with, the information provided in Application 25.

Notwithstanding this, Advance said that the pay less notice could be relied upon as a valid notice in response to Application 24 because the contractual requirements for timing and content were met, it was sent before 26 November 2022, and properly construed, the terms of the pay less notice would have indicated to the reasonable recipient that Advance did not intend to make any further payment, either in respect of Application 24 or Application 25.

Here, in the absence of service by Advance of a payment certificate, there was no dispute that the notified sum was the sum contained in Application 24. Enisca noted that it was the "backbone" of the HGCRA that payment cycles exist which create due dates and final payment dates. Provision was made for notices to be given during each of these cycles and pay less notices must be referable to the notice identifying the notified sum. Whilst there was no absolute requirement for a pay less notice to make express reference to the notice to which it is responding, it must nevertheless be clear that it is, in fact, responding to that particular notice.

The Judge commented that the construction of notices must be approached objectively. How would a reasonable recipient have understood them taking into account the relevant context. The Judge also referred to Coulson on *Construction Adjudication*: *"The courts will take a common sense, practical view of the contents of a payless notice and will not adopt an unnecessarily restrictive interpretation of such a notice ... It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective".*

A payment notice must be referable to individual payment cycles. Here, Application 25 was an application for a different amount from that previously applied for in Application 24, albeit not by a significant margin, but these applications were, and were intended to be, substantively different and assessed at different dates. It was difficult to see how one notice referable to only one assessment date could possibly be said

to be responsive to two applications for payment. The pay less notice referred to Application 25; it was not a pay less notice in respect of, or referable to, Application 24. The timing point, namely the provision of the pay less notice one day before the end of the deadline for Application 24, was no more than neutral in circumstances where the pay less notice was also within the (overlapping) period for service of a pay less notice under Application 25.

If the pay less notice was intended to remedy the failure to serve a payment certificate in relation to Application 24, then it did not make that clear. In the absence of any suggestion that it was designed to plug that gap, the reasonable recipient would have taken it at face value. The decision was enforced.

Were the amendments made in the contract to the adjudication process compliant with the HGCRA?

Bexheat Ltd v Essex Services Group Ltd

[2022] EWHC 936 (TCC)

BHL applied for summary enforcement of a *"smash and grab"* adjudication decision for just over £700k in relation to Interim Payment Application 23. ESG sought to rely on an earlier "true valuation" adjudication in relation to Application 22.

Mrs Justice O'Farrell said that, if ESG wanted to do this, it could and should have raised this in a pay less notice. Having failed to do so, the sum claimed in Interim Application 23 became the "notified sum" due for the purposes of section 111 of the HGCRA, and BHL was entitled to enforce the decision through summary judgment. ESG's submission that the court should order a stay of execution pending determination of the "true value" of Interim Application 23, by adjudication or litigation, was contrary to the general rule that adjudicators' decisions are intended to be enforced summarily and the successful party should not, as a rule, be kept out of its money.

ESG resisted enforcement on two other grounds:

1. ESG had a contractual entitlement to set off or make deductions against the adjudicator's award; and

2. BHL had deprived ESG of its contractual right to electe to have the true value of the application payment in dispute determined at the same time by the same adjudicator as the notifed sum dispute.

Under the Contract, clause 30 provided that:

"30.2 The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub-Subcontract or otherwise.

30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another."

The problem for ESG was that these sub-clauses were contrary to the provisions of the HGCRA and the Scheme. They were seen as attempts to get around the key principles underlying the adjudication process.

The Scheme includes the following provisions:

"21 In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.
...
23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

In *Ferson Contractors Ltd v Levolux AT Ltd* [2003] EWCA Civ 11, the CA considered whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict. Mantell LJ said that:

"The intended purpose of s.108 is plain ... 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. "

The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.

ESG also said that the adjudicator was wrong to refuse to allow joinder of the "true value" of Interim Application 23 with the "notified sum" issue in the second adjudication, in accordance with clause 30.3 of the Contract. Again, the Judge disagreed. Here, the clause, which gave ESG an unilateral right to refer more than one dispute to the adjudicator, was inconsistent with paragraphs 8 and 20 of the Scheme, which require the consent of all parties to a multiple dispute adjudication.

Both clauses were contrary to the principles underlying statutory adjudication. The decision was accordingly enforced.

Are agreements for design and supply covered by the adjudication legislation? Is "inordinate delay" in bringing an application grounds to refuse enforcement of an adjudication decision?

Cubex (UK) Ltd v Balfour Beatty Group Ltd

[2021] EWHC 3445 (TCC)

Cubex sought the summary enforcement of an adjudicator's decision in the sum of £410k. BB said that the contract related either wholly to excluded activities or at least in part to them. Following the case of *Cleveland Bridge UK Ltd v. Whessoe-Volker Stevin Joint Venture* (*Dispatch* Issue 186), if the contract related in part to excluded operations, then, as a hybrid contract, the court would not have jurisdiction. Cubex was required to carry out the design and supply of the doors in issue. BB relied on sections 105(2)(d)(i) and (ii) of the HGCRA saying that the contract would be one for the manufacture or delivery to site of building or engineering components or equipment, materials, plant, or machinery.

The Adjudicator concluded that as an agreement to undertake design was within the scope of the HGCRA, that meant that the contract was not a supply only contract. The Judge disagreed, noting that section 104(2) of the HGCRA provided that:

"(2) References in this Part to a construction contract include an agreement –
(a) to do architectural, design or surveying work, or [...] in relation to construction operations...

(5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."

On the basis that the design was said to be in relation to the supply of doors, this brought matters back to section 105(2)(d). The contract was not, therefore, a construction contract within the meaning of the HGCRA. This was sufficient to end Cubex's claim. But the Judge went on to address certain other issues.

One of these related to the contract. It was said that the Adjudicator had not been appointed under a contract about which there was or could be no dispute.

The Adjudicator found that the essential terms of the contract had only been agreed by 23 February 2017. However, there was nothing in the evidence which indicated what those outstanding essential terms were said to be. The Judge noted that this was: *"perhaps unsurprising given that 23 February 2017 was not a date for which either party contended as the date of a concluded contract"*. Further, it appeared that the adjudicator had found a contract which was not contended for by either of the parties relying on the agreement of essential terms on that date, which terms Cubex itself could not identify. The failure to draw the parties' attention to the Adjudicator's analysis which concluded with the contract coming into existence on 23 February 2017 was a sufficient breach of natural justice to be material.

BB had also suggested that the claim for enforcement has been brought late. Specifically, that there had been *"inordinate delay"* on the part of Cubex between the Decision being issued on 1 May 2018 and the commencement of the enforcement proceedings in September 2021. The explanation for the delay included that that the solicitor involved had changed firms and financial constraints on Cubex.

The Judge did not consider that there was any specific obligation to bring enforcement proceedings by any particular date within the relevant limitation period.

Will the courts summarily enforce adjudication decisions where the claimant is subject to a company voluntary arrangement (or "CVA")?

FTH Ltd v Varis Developments Ltd

[2022] EWHC 1385 (TCC)

FTH, who were subject to a CVA, sought summary enforcement of two adjudication awards. Varis accepted that they were valid awards but resisted enforcement and/or sought a stay, on the basis of FTH's financial position and its own crossclaims. Coulson LJ in *Bresco v Lonsdale* (See *Dispatch* Issue 241), had said that:

"... the general position relating to a CVA may, depending on the facts, be very different to the situation where the claimant company is in insolvent liquidation ... A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow."

Here, the Judge noted that *Bresco* did not provide *"very definitive guidance"* as to how the Court should approach a case where a claimant subject to a CVA seeks summary enforcement of an adjudicator's decision. There was jurisdiction to grant summary judgment, but whether the Court would do so in any given case depended on the facts of that case. The proper approach was to consider, on the facts of this case, whether there was a real risk that the summary enforcement may deprive Varis of security for its crossclaim.

Varis submitted that there was a real risk that summary enforcement would deprive Varis of security for its crossclaim. The CVA here was not, on its face, designed to allow FTH *"to trade its way out of trouble"*. Even if the CVA fulfilled all financial expectations, there would only be a recovery of 56p in the £. However, FTH's two claims would not, in fact, produce the recovery foreshadowed in the CVA. The second, (not the claim here), would not lead to any recovery, which would make the projected recovery *"entirely unachievable"*. It was, therefore, much closer to: *"the straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what they can in order to make a distribution to creditors"*, as per *Bresco*.

FTH said they were now carrying out work and receiving revenue, but this was not of assistance, as there was no evidence that they were trading profitably. The CVA supervisors had not considered the Varis crossclaim (put at £1.7 million). If this succeeded, in whole or in significant part, the CVA would fail and FTH would go into liquidation with very little, if any, recovery for creditors. Finally, the CVA was for 12 months only, and had not been validly extended.

The Judge, therefore, concluded that Varis had shown that here there was a real risk that summary enforcement would deprive them of security for their crossclaim. Varis had also applied for a stay under the *Wimbledon v Vago* principles (See *Dispatch* Issue 61). Here, the Judge noted that the Courts expect parties in the position of FTH who wish to avoid a stay to provide detailed and reliable financial information. Here, (see *Equitix v Bester*, [2018] EWHC 177 (TCC)) FTH had been *"somewhat economical with information"* relating to its financial position. This was a case where, generally, the uncertainties in the information supplied made the Judge more inclined to grant a stay. Further, this was not a case where FTH's financial position was the same as its financial position when the Contract was made in 2018. FTH's finances had clearly deteriorated in late 2019, leading to the CVA in May 2020. Finally, FTH's financial position was not due, wholly or in significant part, to Varis' failure to pay the adjudication award. Had it been necessary, the Judge would have granted a stay.

Can you obtain a declaration that an adjudicator's decision was wrong? And if it was, what was the consequence?

Hart Builders Ltd v Swiss Cottage Properties Ltd

[2022] EWHC 1465 (TCC)

Hart made an application under Part 8, seeking, amongst other issues, a declaration that a decision of an adjudicator was wrong and no longer binding upon the Parties.

The Adjudicator had decided that the matter at issue between the Parties had been settled by an Acceptance Agreement. The Judge decided that the Adjudicator was mistaken. Was Hart, therefore, entitled to launch a fresh adjudication? SCP said they could not, because of the effect of Paragraph 9(2) of the statutory scheme, which prevents two adjudications about the same dispute.

The Judge was of the view that, on the issue upon which the Adjudicator based their Decision, although wrong in law, was not a nullity. However, as a result of the conclusion reached, the Adjudicator declined to determine the amount(s) due as between the Parties. Did this prevent the financial dispute now being

determined in a fresh adjudication? The Judge referred to the 4th Edition of *Coulson on Construction Adjudication:*

"If the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that earlier adjudication, then paragraph 9(2) is unequivocal: in such circumstances, the adjudicator must resign. Doubtless as a result of this finality, there have been a large number of reported cases in which the responding party has sought a declaration or a finding that the adjudicator should have resigned and that, in consequence, he had no jurisdiction to give the decision that he did...

"Perhaps unsurprisingly, the majority of the reported cases dealing with what might be called attempted readjudication demonstrate a general desire to find that the disputes in question were not the same or substantially the same ..."

In *Hitachi Zosen Inova AG v John Sisk & Son Ltd* [2019] EWHC 495 (TCC), Stuart-Smith J considered a similar case:

"The referred dispute in the eighth adjudication was the valuation of Event 1176. That was precisely what the adjudicator declined to decide in the second adjudication, for want of substantiating evidence at that time. The dispute referred to in the eighth adjudication was, therefore, not the same as the dispute in the second adjudication.

"In my judgment, the dispute referred to in the eighth adjudication was also not 'substantially the same' as the dispute decided in the second. It is important to bear in mind that the comparison to be made is between what was referred in the eighth adjudication and what was decided in the second. Once it is recognised that there was no valuation decision at all in the second adjudication, it become clear that, in the matter of the value to be attributed to and recovered for Event 1176, there is no overlap at all ..."

In the case here, there were two issues before the Adjudicator: (1) did the Acceptance Agreement mean that they could not enter upon the merits of the Clause 8.7.4 assessment? (2) If not, what decision should be reached in respect of that assessment?

Because of the decision reached on issue (1), the Adjudicator did not make any decision on issue (2).
Therefore, now that the decision on issue (1) had been held to be wrong, a second adjudicator was free to decide issue (2) on its merits.

Could a party obtain a freezing injunction to prevent the dissipation of assets before a summary enforcement hearing?

Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd

[2022] EWHC 1203 (TCC)

By a pre-action letter of claim, Liberty claimed sums in the total of £1.15 million. By reply, NJCH asserted a right to recover overpayments in the sum of £2.6 million. On 21 October 2021, NJCH started a "true value" adjudication in respect of the value of work carried out.

On 18 February 2022, the adjudicator ordered Liberty to repay some £2.5 million. Liberty did not pay and NJCH issued summary enforcement proceedings on 29 March 2022. The court issued a standard directions order on
1 April 2022. The hearing was listed for 15 June 2022.

On 21 April 2022, NJCH obtained a freezing injunction, without notice, that Liberty must not remove or in any way dispose of the value of any of its assets up to the value of £2.9 million. At the full, on-notice hearing, Mrs Justice O'Farrell was satisfied that NJCH had a good arguable case in relation to the substantive adjudication enforcement claim:

"It is well-established that the court's approach to adjudication enforcement is a robust one. The applicant has the benefit of a 'true value' adjudication decision in its favour for a substantial sum of money. Generally, the court will enforce such adjudication decisions, even where it can be shown that there are errors of fact or procedure. The only defences that will usually succeed are a breach of the rules of natural justice or the absence of jurisdiction on the part of the adjudicator."

It was common ground that Liberty had transferred assets, with a total value of almost £6 million, to related third-party entities in November 2020, despite knowing at that time that NJCH claimed an entitlement to re-payment of very substantial sums. NJCH did not find this out until 2022. There was therefore a very real risk that Liberty would be unable to satisfy any judgment against it. NJCH did not have to establish that Liberty intended to deal with its assets with the purpose of ensuring that any judgment would not be met. The test was an objective assessment of the risk that a judgment may not be satisfied because of an unjustified dealing with assets.

Accordingly, the freezing injunction was kept in place until after the adjudication enforcement hearing on 15 June 2022.

How many disputes were referred to the adjudicator?

Quadro Services Ltd v Creagh Concrete Products Ltd

[2021] EWHC 2637 (TCC)

Quadro sought summary enforcement of an adjudication decision against Creagh, who said that the adjudicator had no jurisdiction because three disputes were referred to them. An adjudicator will not have jurisdiction to adjudicate more than one dispute in a single adjudication.

Here, during the course of the project, Quadro made applications for payment and raised invoices for the amounts claimed. Three invoices were outstanding, two were approved by Creagh's QS, one was apparently not replied to at all. The payment applications were cumulative, with each payment application being for the full value of the work done, less the previous payment applications. No pay less notices were issued in respect of any of the applications. The total value outstanding was £40,026.

Quadro was owed monies by Creagh on four other contracts and an issue was said to have arisen over works at one of these sites. In the adjudication, Creagh said that the adjudicator did not have jurisdiction because Quadro had referred three separate disputes under one notice and referral, i.e., the three applications for payment. Quadro said that the dispute was the failure to pay a debt in the sum of £40k under one contract for works that they had carried out for Creagh. Any issue as to the consideration of the sums agreed and rendering of the invoices were sub-issues to be considered in resolving that one dispute – namely, the debt. Creagh took no further part in the adjudication. The adjudicator considered that *"a single dispute had been referred, namely a dispute over an amount owed"*.

Before HHJ Watson, Creagh said that the claims here could be decided without reference to each other. The questions of whether there was a valid payment application, the due date, the final date of payment, whether a pay less notice was served, and whether the final date for payment had passed, had to be considered separately for each claim.

The Judge considered that one dispute could include numerous sub-issues which might be capable of being determined

independently from each other. Whether they were sub-issues or separate disputes was a question of fact.

Here, the dispute that was referred was the failure to pay £40k. Whilst Creagh were correct to say that the adjudication involved the consideration of the payment process of three separate payment applications, each of which could be decided in isolation from the other, this was not the case here, because Creagh had not taken any issue with the payment process before the adjudication. It had not raised any issue as to the validity of the payment applications or suggested that it had issued any pay less notices. It had simply not paid and had raised a claim on another project.

The result was that, in the absence of any substantive dispute as to liability to pay the invoices, the adjudicator considered the validity of the payment notices and concluded they were valid applications for payment. That it was "technically" possible to determine whether each individual invoice was due without determining whether the other invoices were due did not mean that those issues could not be sub-issues in the wider dispute as to whether Quadro was entitled to the sum it claims it was due under the contract. The Judge further noted that, if Creagh's argument was correct, then:

"the result would be that the parties would be put to the very significant cost and inconvenience of numerous separate adjudications to recover a single claimed balance under a single contract. That would be contrary to the policy underlying the adjudication process of efficient, swift, and cost-effective resolution of disputes on an interim basis".

Would the court stay a court claim where the claimant had not complied with the first of two adjudication decisions?

RHP Merchants And Construction Ltd v Treforest Property Company Ltd

[2021] EWHC B40 (TCC)

TPC applied to stay and strike-out a claim by RHP for £105k on the grounds that RHP had failed to comply with an adjudicator's decision despite there being a court order requiring them to pay the sum of £300k. RHP relied on the fact that, eight days after the enforcement judgment, there was a second adjudication decision where TPC was ordered to pay RHP £245k, including the adjudicator's costs. This sum was calculated on the assumption that RHP had paid the first adjudication award to TPC. The Judge, Roger Stewart QC, noted the need to strike a balance between the general HGCRA policy of *"pay now, dispute later"*; and the rights of parties to have access to the courts with any litigation being conducted promptly and efficiently.

Amongst other issues, TPC issued a petition for a winding-up order against RHP. This application was dismissed and TPC was ordered to pay indemnity costs at £23k. The Judge noted that this appeared to be because the alleged debt or petition sum was disputed substantially in the court proceedings here. Other offers were made. TPC offered to set off the costs order which they were subject to. RHP offered to pay the sum of £36,494.69 (a figure based on netting off the two adjudication decisions) on the basis that the TPC application was withdrawn.

One of the options TPC sought was that proceedings should be stayed pending payment of the outstanding amount of the judgment debt, subject to a six-month longstop whereby the claim should be struck out if payment was not made. RHP's position was that the proceedings should not be stayed at all, but if the Court was minded to grant a stay, that should be on the basis that proceedings were stayed until RHP paid the balance of the sums owed between the parties pursuant to the respective adjudication and court orders. TPC relied on the case of *Anglo Swiss Holdings LTD & Ors v Packman Lucas Ltd* (See *Dispatch* Issue 115) where Mr Justice Akenhead had said:

"i. The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.

ii. In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.

iii. The power is one that is to be used sparingly and in exceptional circumstances.

iv. Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably."

In that case, the Judge held that the claimants were ignoring the contractual and statutory requirements to honour an adjudicator's decision, and that they were, therefore, avoiding the pay-now-argue-later approach of the HGCRA. The bad faith involved putting forward claims which they either knew or significantly exaggerated.

TPC said that RHP was ignoring the contractual and statutory framework; that, had the applicant been paid, it would have the money in hand; that they were not insured; RHP could fund solicitors and counsel; and, that the parties were not in an equal footing. TPC said that RHP had *"commenced a barrage"* of different forms of dispute resolution and had confirmed in a solicitor's letter that it had no intention of complying with the Court's previous order of 5 November.

RHP said the situation was different, in particular because of the existence of the second adjudication. The policy of pay-now-argue-later should apply with equal force to the second decision, which affected the majority, though not the entirety of the sums due under the first adjudication decision. TPC said that there was a substantial difference between the position of the first adjudication award which has been found to be enforced, and that of the second adjudication decision, which had not been enforced, but where there were obvious question marks as to the jurisdiction.

The Judge noted the tension between access to justice and the core essence of the adjudication pay-now-and-argue-later regime, which necessarily involved the ability to argue later. In balancing these considerations, the Judge cautioned that in line with the *Anglo Swiss* case, a stay would only apply in clear cases.

Here, the Judge felt that the second adjudication was of importance, in the context of pay-now-argue-later, when looking at the overall position. This was despite the fact that the Judge had considerable doubts as to whether or not the second adjudicator did in fact have jurisdiction. Further, the insolvency Judge had decided that there was a real dispute which was going to be decided in these proceedings.

That said, there was no valid reason why RHP had not paid the net sum which was due to TPC on the basis of the two adjudication decisions, and even taking into account the costs orders. Taking account of the fact that RHP had managed to achieve success in the second adjudication award, it owed a minimum sum of £36,494.69, always taking into account the fact that they could, in due course, seek to reopen that.

This was not a case where RHP had acted in bad faith. RHP's actions were consistent with a "determined view" that they were owed money rather than the other way around. However, it was not right to simply give an order to that effect without any time limit and without any sanction, given that RHP had said that it could pay that sum. The Judge, therefore, ordered that, unless RHP paid the sum of £36,494.69 to TPC within 28 days, these proceedings would be struck out.

Was there a dispute?

Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM United Kingdom Ltd

[2022] EWCA Civ 440

At first instance, amongst other issues, the Judge held that IBM had wrongfully repudiated the contract with CISGIL. The Judge found that, in accordance with clause 11.7 of Schedule 5 of the contract, CISGIL disputed the AG 5 invoice in good faith, and that, in consequence, IBM could not rely on the non-payment of that invoice to justify termination. The CA agreed.

In reaching this conclusion, the CA had to consider whether or not there was a dispute. Coulson LJ said that the *"best simple summary"* was provided by Mr Justice Akenhead in the case of *Whitley Town Council v Beam Construction (Cheltenham) Ltd* [2001] EWHC 2332 (TCC), where the Judge said that:

"a dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted."

Coulson LJ also considered that construction adjudication was relevant to the Judge's, at first instance, description of the overall scheme set out in paragraph 11 of Schedule 5 as being one in which, *"unless CISGIL disputed the invoice in good faith in accordance with paragraphs 11.11 and 11.12, it was obligated to pay the invoice within 7 Business Days of receipt"*.

Those provisions were: *"clear and unambiguous and introduced a 'pay now, argue later' principle"* – the basic principle underlying construction adjudication.

The first issue was whether or not the AG 5 invoice was disputed by CISGIL. Coulson LJ said that it was. CISGIL said in an email that they: *"cannot accept this invoice for payment"*. A claim had been made by IBM in the form of the invoice, and that claim was expressly not accepted by CISGIL because of the absence of the Purchase Order Number. There was, therefore, in the plainest terms, a dispute as to the AG 5 invoice.

The suggestion that there was no dispute because CISGIL did not use the word "dispute" or similar and/or did not trigger the dispute machinery under clause 11 was rejected. This was not necessary for there to be a dispute in law. The email was also not *"simply (making) an administrative request for the invoice to be resubmitted with a Purchase Order"*. That is not what the email said.

LJ Coulson noted that these arguments ignored the common-sense approach to the meaning of "dispute". They were also an overly technical approach to the construction of notices. A reasonable recipient of the notice would have the terms of the contract well in mind and the contract required a unique Purchase Order number for every invoice. The CA also considered whether CISGIL acted in good faith. Coulson LJ was of the view that, unless the contracting party has acted in bad faith, it is difficult to see how they can be in breach of an obligation of good faith. Here, IBM had conceded that IBM accepted that no individual acted dishonestly or in bad faith. If no one acted in bad faith, there could not have been a breach of the obligation to dispute invoices in good faith.

The Judge, at first instance, found that CISGIL acted fairly and honestly towards IBM and did not conduct itself in a way which was calculated to frustrate the purpose of the contract or act in a way that was commercially unacceptable. There was no intentional or objectively reprehensible conduct, and so, no room for a good faith challenge.

That left the so-called prevention principle. However, given that the invoice was disputed and that CISGIL acted in good faith, it followed that CISGIL complied with the contract. That leaves no room for the prevention principle, which simply provides that a contract should not be construed in a way that allows the contract-breaker to take advantage of his own breach. Here, there was no breach in the first place. ■

Other cases: *Construction Industry Law Letter*

Negligence – Horseplay on construction sites

Andrew Chell v Tarmac Cement and Lime Ltd

[2022] EWCA Civ 7

Court of Appeal;
Before Lady Justice Nicola Davies, Lady Justice Simler and Lord Justice William Davis;
Judgment delivered 12 January 2022

The facts

Mr Chell was employed by Roltech Engineering Ltd ("Roltech") as a site fitter. From December 2013 his services were contracted out to Tarmac Cement and Lime Ltd ("Tarmac") at a site controlled and operated by Tarmac. Tarmac also employed its own fitters to work alongside those supplied by Roltech.

Tensions on-site arose between the Tarmac fitters and the Roltech fitters. In or about mid-August 2014, Mr Chell raised the issue of these rising tensions with his supervisor, Mr David Gane, and had a meeting with Mr Gane and Mr Geoff Grimley of Tarmac about it.

On 4 September 2014, Mr Chell was working in the workshop on-site when he bent down to pick up a length of cut steel. Mr Heath, one of the Tarmac fitters, had brought two "pellet targets" with him to site and put them on a bench close to Mr Chell's right ear. Mr Heath then hit them with a hammer causing a loud explosion. It was apparently a misguided practical joke, but the result was that Mr Chell suffered a perforated right eardrum, noise-induced hearing loss measured at 9–10 decibels and tinnitus. Mr Heath was dismissed from his employment.

Mr Chell brought a claim against Tarmac claiming negligence and also that Tarmac was vicariously liable for the actions of Mr Heath. The claim was heard in the County Court and the District Judge found that Tarmac was neither vicariously liable for Mr Heath's actions nor negligent.

In respect of vicarious liability, the District Judge found that the facts did not support a finding that Mr Heath's actions in hitting the two pellet targets with a hammer were within the field of activities assigned to him by Tarmac and further that there was not a sufficiently close connection between the actions of Mr Heath and the employee/employer relationship between Mr Heath and Tarmac.

In respect of negligence, the District Judge found that on the findings of fact there was not a reasonably foreseeable risk of injury from a deliberate act on the part of Mr Heath or any Tarmac employee to Mr Chell such as to give rise to the duty to take reasonable steps to avoid that risk. In making this finding the District Judge relied upon, among other things, the lack of any threat of violence or suggestion that violence was at all likely, the fact that Mr Heath was described as not volatile and the fact that the availability of heavy and dangerous tools in itself did not create a foreseeable risk of injury.

In particular, the District Judge stated that horseplay, ill-discipline and malice are not matters that should be expected to be included within a risk assessment and that he did not accept that there had been failure by Tarmac to prepare a suitable and sufficient risk assessment because of its failure to identify in the General Site Rules the risk posed by horseplay, ill-discipline and malice. The District Judge further found that increased supervision to prevent horseplay, ill-discipline or malice would not be a reasonable step to expect an employer to identify and take.

Mr Chell appealed, arguing amongst other things, in relation to negligence that the District Judge had erred in failing to make certain findings of fact and had those findings been made he should have concluded that Tarmac was negligent in its general failure to design and implement a reasonable system to maintain discipline on-site.

The appeal was heard in the High Court, where the Judge dismissed the appeal (see *CILL*, October 2020), holding that the District Judge was correct in deciding that horseplay, ill-discipline, and malice are not matters that he would expect to be included within a risk assessment. The nature of the business of Tarmac and the nature of the site meant that there were issues to be addressed in the General Site Rules which put at serious risk not just health and safety but also the lives of people working on the site. In this context, it is expecting too much of an employer to devise and implement a policy or site rules which descend to the level of horseplay or the playing of practical jokes. The Judge also found that Tarmac was not negligent in failing to implement a reasonable system to maintain discipline on site.

Mr Chell appealed again, this time to the Court of Appeal.

Issues and findings

Was Tarmac vicariously liable for the actions of its employee?

No. Mr Heath's wrongful act was not done in the course of his employment or authorised by Tarmac. There was not a sufficiently close connection between the act which caused the injury and the work of Mr Heath so as to make it fair, just, and reasonable to impose vicarious liability on Tarmac.

Had Tarmac breached its duty of care?

No. In order to succeed in demonstrating a breach of the duty of care, it must be shown that there was a reasonably foreseeable risk of injury by reason of the actions of Mr Heath. Whilst horseplay, ill-discipline and malice can provide a mechanism for causing such a reasonably foreseeable risk, such risk was not made out on the facts of this case. Further, even if a foreseeable risk of injury could be established, the only relevant risk in this case was a general one of risk of injury from horseplay. The fitters by implication were to refrain from horseplay and it would be unreasonable and unrealistic to expect an employer to have in place a system to ensure that their employees did not engage in horseplay.

Commentary

The Court of Appeal unanimously upheld the decision of the High Court Judge in this case, finding that Tarmac was neither vicariously liable nor in breach of duty in respect of the injuries suffered by Mr Chell. The Court of Appeal endorsed the findings of both the County Court and High Court judges.

Of particular interest were the remarks made, in the context of breach of duty, in respect of horseplay on-site. Whilst horseplay, ill-discipline and malice can provide a mechanism for causing a reasonably foreseeable risk of injury, this risk was not made out on the facts of this case. Lady Justice Nicola Davies stated that it was unrealistic to suggest that there should be a specific instruction not to engage in horseplay in circumstances where the fitters were employed to carry out their respective tasks using reasonable skill and care and by implication refrain from horseplay. Given the nature of work carried out on construction sites, it is likely that this dicta is applicable to most sites such that the relevant duty is unlikely to apply in cases of ill-discipline or horseplay unless there are exceptional circumstances.

Practice Direction 57AC – When an application is appropriate – Proportionality – Indemnity costs

Angela Denise Curtiss and others v (1) Zurich Insurance plc and (2) East West Insurance Company Ltd

[2022] EWHC 1514 (TCC)

Technology and Construction Court;
Before HHJ Keyser QC sitting as a Judge of the High Court;
Judgment delivered 17 June 2022

The facts

Court proceedings have been brought by approximately 150 claimants ("the Claimants") who are the owners of flats in the Meridian Quay development in central Swansea. The Claimants claim damages in the tort of deceit alleging that Zurich Insurance plc ("Zurich") had misrepresented the condition of the flats in question, inducing their sale. Zurich strongly contests the claims.

A trial of issues common to certain lead Claimants is due to commence on 11 July 2022.

On 26 January 2022, the Claimants, by their solicitors, Walker Morris, served their witness statements. There were 49 witness statements, of which 39 were relevant to the issues to be tried. The statements included one from Mr Drummer, Zurich's surveyor who undertook warranty inspections at the development. On 8 February 2022, Zurich's solicitors, Clyde & Co, intimated to Walker Morris that they would be writing separately in respect of compliance with PD57AC. On 8 April 2022, that letter materialised together with a 109-page schedule setting out particulars of non-compliance.

On 6 May 2022, Walker Morris sent a detailed letter of response and made the point in the introductory section of the letter that PD57AC was not intended to encourage a party to perform a line-by-line analysis of a witness statement in order to object or excise a sentence that might stray beyond the bounds of PD57AC as this would not be consistent with the overriding objective.

On 13 May 2022, Zurich issued an application for an order pursuant to PD57AC para 5.2 that four of the trial witness statements be struck out in their entirety and that parts of a further 29 witness statements should also be struck out on the grounds of non-compliance with PD57AC. The judge heard the application and made an order that four witness statements be struck out on the basis that they contained no relevant evidence from the personal knowledge and observation of the makers but tended to introduce opinion evidence on matters that the judge had refused to permit expert evidence. The judge also struck out various parts of another lengthy witness statement on the basis that they consisted of commentary or opinion on documents or matters that the judge did not consider fell properly within the witness' evidence. Certain other parts of the application that were pursued were unsuccessful. In particular, the judge declined to order that Mr Drummer make a new witness statement, an order that Zurich had requested instead of pursuing 142 itemised objections on his witness statement.

With regard to costs, the Claimants argued that Zurich should pay 85% of the Claimants' costs on an indemnity basis. The Claimants argued that this was an appropriate costs order as most of the application was abandoned and much of what was pursued did not succeed. The Claimants submitted that the application as prepared was late, disproportionate, and unmanageable and that it was not an attempt to conduct litigation in a reasonable and proportionate manner but instead a piece of strategy by a party with deep pockets and presented a major distraction in the run-up to trial. Accordingly, the Claimants argued that the application should not have been made.

Zurich argued that it should be awarded its costs. Zurich submitted that it had succeeded on significant parts of its application and therefore the starting point was that it was the successful party even if the success was incomplete. Zurich stated that although the application might appear disproportionate, it should be viewed in the context of substantial litigation and very serious allegations of fraud. Zurich also argued that a significant proportion of the costs attributed to the application would in any event have been incurred in trial preparation and might properly be costs in the case.

Issues and findings

Who should bear the costs of the application?

The judge ordered that Zurich should pay 75% of the Claimant's costs on an indemnity basis and ought not to recover any part of its own costs. The application was fundamentally inappropriate and unjustified, and any points of merit on the witness statements could have been raised at trial. Applications for the imposition of sanctions for breach of PD57AC should not be used as a weapon for the purpose of battering the opposition. Further, when assessing how to respond to a failure to comply with PD57AC, a party must use common sense and have regard to proportionality. The power to strike out offending parts of a witness statement will be exercised only where it is reasonably necessary, and in many cases the appropriate course of action will be for the court to place little or no weight on witness evidence that fails to comply with PD57AC.

Commentary

Practitioners will welcome this judgment which makes clear that the use of PD57AC in an oppressive and disproportionate way will likely result in an adverse costs order.

It would have been evident to experienced practitioners that, without more, PD57AC would be used in exactly the way that Zurich used it in this case. Notwithstanding that it has been over 20 years since the Woolf Reforms, parties still indulge in procedural tactics to try to create pressure on the opposing party close to trial. In taking the approach that he did, the judge made clear that proportionality is paramount, citing as helpful the observation of Mellors J in the recent case of *Lifestyle Equities CV v Royal Court of Berkshire Polo Club Ltd* [2022] EWHC 1244 (Ch), that an application is warranted only when there is a substantial breach of PD57AC and that if this was the case then it should be readily apparent and capable of being dealt with on the papers.

Fire safety defects – Causation – Loss – Recoverable damages

Martlet Homes Ltd v Mulalley & Co Ltd

[2022] EWHC 1813 (TCC)

Technology and Construction Court;
Before His Honour Judge Stephen Davies sitting as a High Court Judge;
Judgment delivered 14 July 2022

The facts

In the 1960s, five concrete tower blocks were built in Gosport, Hampshire, to provide social housing. Two of the towers (Harbour Tower and Seaward Tower) were 16-storeys and 50m high.

The remaining three towers were 11-storeys and 30m high. In the early 2000s, a decision was made by the owner of the towers, Kelsey Housing Association Ltd ("Kelsey") to refurbish them and by a contract dated 20 January 2005 ("the Contract"), Kelsey engaged Mulalley & Co Ltd ("Mulalley") to undertake the refurbishment works. The Contract was in the JCT 1998 Standard Form With Contractor's Design.

Pursuant to the Contract, Mulalley was responsible for the design as well as the execution of the works, including the completion of the design and the selection of the specifications. The Contract conditions also imposed an obligation on Mulalley to comply with the Building Regulations. The Employer's Requirements further stated that the works were to be designed and constructed in accordance with, amongst other things, Agrément Certificates and conform with the requirements, directions, recommendations, and advice contained in the latest editions of Building Research Establishment (BRE) papers and reports.

The works included the application of combustible external wall insulation ("EWI") rendered cladding to most elevations. The EWI rendered cladding was the StoTherm Classic render system and consisted of an inner layer of expanded polystyrene ("EPS") insulation boards, fixed to the existing external walls with adhesive with supplementary mechanical fixing dowels. Two acrylic organic non-cementitious render coats were applied to the EPS insulation boards with a reinforcing glass fibre mesh layer between them. Both the EPS and the acrylic render are combustible substances, and therefore they created a fire risk where none had previously existed. In order to mitigate this risk, which was known, the StoTherm Classic system incorporated horizontal mineral wool fire barriers at each floor level above the third storey.

The works on the towers were completed between December 2006 and April 2008. Martlet Homes Ltd ("Martlet") subsequently acquired the towers from Kelsey. By operation of various transfers, Martlet became entitled to claim against Mulalley under the Contract. Martlet is a subsidiary of Hyde Housing Association Ltd ("Hyde") which acts on behalf of Martlet and owns a large number of properties in London and the southeast, including around 100 high-rise buildings.

The Grenfell Tower fire occurred on 14 June 2017. Post-Grenfell, Hyde established a Fire Safety Team ("FST") who reported to the Executive Management Team ("EMT") in order to manage Hyde's response to the implications of that disaster for the safety of occupants of high-rise buildings. Investigations in relation to the Gosport towers commenced in June 2017 and revealed not only the existence of the combustible EPS boards but also defects in the installation of the fire barriers which created a real risk that they would not operate as intended to prevent the spread of fire. A "waking watch" fire patrol system was implemented immediately for the towers.

After further investigations, Hyde decided to remove the entire EWI cladding system and replace it with a new, non-combustible cladding system using stone wool insulation panels. Remedial works were carried out between 2018 and 2020. The waking watch was maintained for each tower until the removal of the insulation boards.

In 2019, Martlet commenced an adjudication against Mulalley in respect of defects in the cladding in the towers. The adjudicator found against Martlet. In December 2019, Martlet commenced court proceedings. Initially, Martlet advanced the case solely on the basis that the installation of the horizontal fire barriers and the EPS insulation boards was defective ("the installation breach case").

Mulalley admitted that there were some defects in the installation of the EWI cladding, but denied that they were caused or were such to justify the scheme for complete replacement works ("the replacement works scheme") or the waking watch. Mulalley claimed that the real cause and justification for the replacement works scheme and waking watch was Martlet's realisation, triggered by the Grenfell Tower fire, of the risk posed by the fact that the EWI cladding, being combustible, did not meet the heightened fire safety standards which had come into force after the works had been completed. Mulalley contended that a scheme of limited repair works ("the repair works scheme") was all that was reasonably required to remedy the installation breaches, and that this would have cost far less than the cost of the replacement works scheme being claimed.

At trial an alternative case was advanced by Martlet, namely that if the court found in Mulalley's favour on causation of loss with regard to the installation breaches, nonetheless the EWI cladding as specified did not meet applicable fire safety standards as at the date of the contract including the Building Regulations 2000 (including Approved Document B) and the advice and recommendations contained in BRE 135 ("the specification breach case"). Martlet argued that it was entitled to the cost of the replacement works scheme and the waking watch as its losses arising from the specification breach.

Issues and findings

Was Mulalley liable for the installation breach and the specification breach?

Yes.

What damages were recoverable as a result of the liability finding?

Had Martlet succeeded only on the installation breach case, then it could only have recovered the costs incurred referable to the repair scheme and not the replacement scheme. As Martlet had succeeded in the specification breach case, however, it was able to recover the costs referable to the replacement scheme. The waking watch costs were recoverable for both the installation breach and the specification breach, although it is likely that the waking watch costs would have been for a lesser time period for the installation breach only.

Commentary

This is a very lengthy judgment and only limited parts of the judgment have been extracted in this article. This is the first post-Grenfell fire safety case to be considered by the Technology and Construction Court and has therefore excited some interest among practitioners. Although the case is fact specific there are some key points of note.

First, the main point in dispute was not whether work had been undertaken defectively but the losses that might arise from that defective work. Underlying Mulalley's position seemed to be the argument that actions taken by Martlet were caused by a reaction to the Grenfell Tower tragedy rather than the actual breaches of contract. On this point Mulalley were able to establish that if there had only been installation rather than specification breaches, a limited scope of remedial works would have been appropriate. However, the judge decided that once specification breach was established then the wholesale replacement undertaken by Martlet was considered to be justified.

Secondly, Martlet claimed the cost of implementing a waking watch on the towers, a practice that has been wingspread following Grenfell. Mulalley argued that the cause of the waking watch was the Grenfell Tower tragedy and not the installation or specification breach. The judge disagreed and the waking watch damages were allowed.

Service of Particulars of Claim – Practice Direction 6A – Service by email without prior consent not valid

Sir Robert McAlpine Ltd v Richardson Roofing Co Ltd

[2022] EWHC 982 (TCC)

Technology and Construction Court;
Before Mr Justice Waksman;
Judgment delivered 1 April 2022

The facts

By a sub-contract dated 6 May 2008, Sir Robert McAlpine Ltd ("SRM") engaged Richardson Roofing Co Ltd ("Richardson") to carry out the design and construction of cladding at a mixed-use retail and leisure development at Cabot Circus in Bristol.

Following the Grenfell fire tragedy, the main contractor for the development (BALP) intimated a claim against SRM and, without prejudice to that claim, instructed SRM to reclad relevant parts of the development. SRM in turn sought to pass the claim onto Richardson.

On 2 June 2020, SRM issued proceedings against Richardson. On 18 June 2020, SRM applied for the proceedings to be stayed. At this point, the claim form had not been served. SRM provided the stay application to Richardson's solicitors, Manleys, by email.

On 23 June 2020, and again prior to service of the claim form, Manleys sent to the court a notice of change of legal representative in Court Form N434. An email address for Manleys was given on that form.

The proceedings were subsequently stayed by consent pending SRM obtaining further information from BALP in respect of the claim. The letter sent to the court in relation to the stay, which was in a form agreed with Manleys, noted that the stay application had been served on Richardson. The consent order provided for the claim form to be served within seven days and it was sent by email to Manleys without objection.

On 10 November 2021, O'Farrell J made an order that SRM should serve its Particulars of Claim on Richardson by 5pm on 18 March 2022.

Paragraph 4.1(1) of Practice Direction 6A states that where a document is to be served by electronic means then the party to be served or their solicitor must previously have indicated in writing that they are willing to accept service by electronic means and provide details of where the communication is to be made. In terms of written indication, para 4.1(2) sets out what can be taken as sufficient written indication including at para 41.1(2)(c), "a fax number, email address or electronic identification set out on a statement of case or a response to a claim filed with the court".

At 4.19pm on 18 March 2022, the Particulars of Claim were sent by SRM's solicitors, Macfarlanes, solely by email, to Manleys. Richardson took the point that service had not been effected in accordance with the requirements of Practice Direction 6A in that an indication in writing had not been given for service by email.

SRM disputed Richardson's position and argued that there had been a previous indication in writing given the acceptance of previous court documents by email, alternatively, the notice of acting which had on it an email address was a response to the claim for the purpose of para 4.1(2)(c) of the Practice Direction.

SRM issued an application to determine whether the Particulars of Claim had been validly served.

Issues and findings

Had the Particulars of Claim been validly served?

No. The previous acceptance of documents by email was not sufficient to constitute an indication in writing that email service was acceptable, and the notice of acting was not a response to the claim for the purpose of para 4.1(2)(c).

Commentary

In what seems a somewhat harsh outcome for SRM on the facts, the judge made clear that it was important that the rules are understood and certain and that what is required to effect service by email is an explicit and clear indication that service by such means is acceptable. Here, there was no such indication.

The question of relief from sanctions was not before the court at this stage and it would be interesting to learn whether such relief was in any event given particularly as the judge viewed Richardson's argument as *"technical and unattractive"*.

The Civil Procedure Rules were drafted at a time when email was not the preferred method of service and still refer to the use of fax, which is a vanishing, if not vanished, form of communication. Whilst clarity is important this case does give rise to the question as to whether, given the overwhelming use of electronic communication, the rules relating to method of service should now be reviewed and updated.

Interpretation – Exclusion clauses

Soteria Insurance Ltd (formerly CIS General Insurance Ltd) v IBM UK Ltd

[2022] EWCA Civ 440

Court of Appeal;
Before Lord Justice Coulson, Lord Justice Phillips, and Mr Justice Zacaroli;
Judgment delivered 4 April 2022

The facts

In or about 2014, Soteria Insurance Ltd (formerly CIS General Insurance Ltd) ("CISGIL") engaged IBM UK Ltd ("IBM") to supply a new IT system for CISGIL's insurance business and to manage that system for a term of 10 years.

The contract comprised a Master Services Agreement ("MSA") and two other documents dealing with the detail of the services to be provided: the Implementation Statement of Work ("Implementation SOW") and the Managed Services Statement of Work ("Management SOW").

The MSA provided for IBM to deliver the new operating platform substantially before a long stop date of 31 December 2017, together with various staged completion dates. The contract sum for the Implementation SOW was £50.2 million and the contract sum for the Management SOW was £125.6 million.

Clause 23.3 of the MSA provided that neither party was liable to the other for indirect or consequential losses, loss of profit, revenue, savings, data, goodwill, and reputation, even if such losses were foreseeable or in the contemplation of the parties. Clause 23.5 of the MSA set out various caps on liability including at clause 23.5(a) a cap in respect of liability for the Implementation Services and at clause 23.5(e) a cap in respect of liability arising otherwise under and/or in connection with the MSA.

Serious delays occurred during the Implementation Services phase of the project for which IBM was responsible. On 24 March 2017, IBM submitted an invoice in the sum of £2.9 million in respect

of milestone Application Gate 5 ("the AG5 Invoice"). Due to the delays to the project, CISGIL refused to pay the AG5 Invoice. Following exchanges between the parties, IBM purported to exercise a contractual right of termination based on CISGIL's failure to pay the AG5 invoice. CISGIL disputed IBM's right to terminate and treated the termination as a repudiatory breach contract.

CISGIL claimed its losses arising from the repudiatory breach including a claim for wasted expenditure in consequence of the repudiation. IBM denied repudiatory breach and also denied that there was any entitlement to wasted expenditure in any event as such losses were excluded by clause 23.3 of the MSA.

The dispute went to trial and at trial, the judge held that IBM had wrongfully repudiated the contract. The judge further held that CISGIL had established a claim for wasted expenditure which she valued in the sum of £122 million. The judge went on to hold, however, that the claim for wasted expenditure was excluded by clause 23.3 of the MSA. The judge therefore ordered that CISGIL was entitled to recover damages of £15,887,990 in respect of additional costs and losses as a result of IBM's other breaches of contract, that IBM was entitled to set off against that figure the sum of £2.9 million in respect of the AG5 invoice and that therefore CISGIL was entitled to recover damages in the net sum of £12,998,390 plus interest.

CISGIL appealed with regard to the interpretation of clause 23.3. If CISGIL was successful in its appeal, then a further issue arose as to the level of contractual cap on the sum to be awarded (this issue had not been dealt with by the Trial Judge at first instance as she had not needed to in light of her decision). In respect of the cap, IBM argued that damages would be capped at £80,574,168, being the agreed cap under clause 23.5(a) of the contract. CISGIL argued that the damages would be capped at £96,274,168, being an aggregate of the caps at clauses 23.5(a) and 23.5(e).

IBM cross-appealed against the finding that it had wrongfully repudiated the contract and also claimed that, if a claim for wasted expenditure was open to CISGIL, the wasted expenditure had not been caused by the termination of the MSA, but that CISGIL would have suffered those losses in any event due to a change of strategic direction of CISGIL's parent company.

Issues and findings

Was a claim for wasted expenditure excluded by the contract?

No.

Did a contractual cap apply?

Yes.

Was the judge correct in respect of her findings on repudiation?

Yes.

Was there a break in the chain of causation?

No.

Commentary

Generally, this judgment is worth reading for the discussion on expectation and reliance losses and the review of the concept of wasted expenditure particularly in the context as an alternative to loss of profit claims.

In this comprehensive judgment, the Court of Appeal reversed the decision of the Trial Judge as to whether wasted expenditure was the subject of an exclusion clause in the contract. Lord Justice Coulson's approach was to apply the well-known principles of contract interpretation, both the general principles (*Arnold v Britton*; *Wood v Capita*) and those specifically relating to exclusion clauses (*Gilbert-Ash v Modern Engineering*; *Stocznia Gdynia v Gearbulk Holdings*) and make clear that express words would be necessary to affect such an exclusion and no such express words were in contained in the clause.

At first instance the Trial Judge (O'Farrell J) had distinguished her judgment in the case of *Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Ltd* [2017] EWCA Civ 2196, where in similar circumstances she had held that wasted expenditure was not excluded by the exclusion clause in the relevant contract. Lord Justice Coulson concluded that there was no distinction between the two cases and that *Royal Devon* had been correctly decided.

NEC3 subcontract – Omission of work – Compensation event – Valuation – Meaning of clause 10.1 (duty to act in spirit of mutual trust and cooperation)

Van Oord UK Ltd v Dragados UK Ltd

[2021] CSIH 50

Inner House, Scottish Court of Session;
Before the Lord President, Lord Menzies, and Lord Woolman;
Judgment delivered 5 October 2021

The facts

Dragados UK Ltd ("Dragados") was engaged by Aberdeen Harbour Board to design, manage and construct the Aberdeen Harbour Expansion Project ("AHEP") at Nigg Bay, near Aberdeen.

By a subcontract dated 16 March 2018, incorporating the standard form NEC3 conditions, Option B (priced contract with bill of quantities), as amended, Dragados subcontracted certain of the works to Van Oord UK Ltd ("Van Oord"). The subcontract scope of works included soft dredging works, the volume of which was originally estimated at about 2,150,000 m^3. The scope also included the filling of caissons. In its tender Van Oord inserted a "blended" rate for the dredging. The rate averaged out the cost of easier and more difficult works. Van Oord selected the rate on the basis that it would undertake all the dredging work.

The NEC3 standard form of Subcontract, Option B defines the total cost of the work as the "Prices", which are made up of any lump sums agreed for the works and the amounts obtained by multiplying the rates by the quantities in the bill of quantities. "Defined Cost" is defined as items set out in the Shorter Schedule of Cost Components and is used for the valuation of compensation events.

During the course of the subcontract, Dragados instructed the omission from Van Oord's scope and then transferred about one third of the dredging works to one of two other subcontractors, WASA Dredging UK Ltd ("WASA") and Canlemar SL ("Canlemar").

Dragados argued that the omission of works constituted a compensation event and that the effect was that the sum payable under the subcontract fell to be calculated by reference to Defined Cost rather than the bill of quantities, leading to a reduction in the rate payable.

The bill of quantities specified £7.48 per m^3 as the rate for dredging. Dragados proposed to reduce that rate, first in June 2019 to £5.82 per m^3 and then in September 2019 to £3.80 per m^3. Van Oord contested the rate reduction on the basis that it was invalid and sought payment at the original bill rate.

On 6 March 2020, Dragados terminated the subcontract, however the parties remained in dispute as to how to correctly value the dredging works that had been carried out by Van Oord.

Clause 63.10 of the subcontract (which was unamended from the standard form) stated that if the effect of a compensation event was to reduce the total Defined Cost and the event was either a change to the Subcontract Works Information or a correction of an assumption stated by the Contractor for assessing an earlier compensation event then the Prices would be reduced. The parties agreed that there was a reduction in Defined Cost but disagreed on whether there was also a reduction in the Prices and, accordingly, the bill rate payable for the remaining work.

The parties adjudicated on this issue and then Van Oord commenced court proceedings. A preliminary issue (debate) was held on whether the transfer of work constituted a breach of the subcontract (thereby giving rise to a compensation event) and, if so, the rate that should apply value to the works. The judge held that the transfer of work did constitute a breach of contract and that Dragados was entitled to reduce the bill rate payable to Van Oord for the remaining works.

Van Oord appealed (reclaimed) the first instance decision to the Inner House of the Court of Session. It was accepted at appeal that Dragados was in breach of contract, and the question that the court was asked to determine was whether, under the subcontract, Dragados was entitled to reduce the dredging rate. Van Oord sought declarations: (i) that Dragados was not entitled to reduce the sum payable to it for work done consequent upon the disputed instructions; and (ii) for payment of a sum based on the original bill rate.

Van Oord argued that Dragados was seeking to manipulate the subcontract it its favour and that had Van Oord known that it would be left with a disproportionately higher share of the more difficult work it would have increased the dredging bill rate in its tender. Van Oord claimed that Dragados: (i) insisted on a blended rate in the tender; (ii) transferred more of the easier work to the other two companies; and (iii) did so to avoid having to pay standby charges.

Dragados argued that there had been no manipulation on its part and that the NEC3 form provided a blueprint for the circumstances that had arisen. Dragados also maintained that the recalculation of the rates yielded a fair result to Van Oord, which would otherwise receive a windfall benefit. Dragados also argued that Van Oord: (i) showed poor productivity; (ii) would have made a loss on the transferred work; (iii) facilitated transfer of the works to WASA; and (iv) would be left neither better nor worse off by the NEC3 compensation event mechanisms.

In order to construe the relevant clauses of the subcontract, the Inner House also considered the meaning of clause 10.1 of the subcontract, containing the standard NEC obligation for the parties to act in a spirit of mutual trust and cooperation.

Issues and findings

What is the meaning of clause 10.1 (duty to act in a spirit of mutual trust and cooperation)?

Clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract (note this statement was made by reference to the leading textbook on the law of contract in Scotland). In particular, it aligns with three specific propositions: (i) a party will not take advantage of its own breach; (ii) a subcontractor is not obliged to obey an instruction issued in breach of contract; and (iii) clear language is required to place one contracting party completely at the mercy of the other (note the authorities cited for these propositions are all House of Lords or English Court of Appeal authorities). A party cannot enforce a contractual obligation if it is the counterpart of another obligation which it has breached (note the authorities cited for this proposition are an Inner House authority and a House of Lords authority). Clause 10.1 and clause 63.10 are counterparts. Unless Dragados fulfilled its duty to act in a spirit of mutual trust and cooperation, it could not seek a reduction in the Prices.

Did the instructions lead to a reduction in the dredging rate?

No. The instructions did not give rise to a reduction in the Prices, even if their effect was to reduce the total Defined Cost. Clause 63.2 of the NEC3 form states that if the effect of a compensation event is to reduce the total Defined Cost, the Prices are not reduced except as stated by the subcontract. On a proper construction of clause 63.10, it only applies to a lawful change, it therefore excludes instructions issued in breach of contract. Such instructions are invalid because they are not given *"in accordance with the subcontract"* as required by clause 27.3.

Commentary

This judgment is significant in two respects. First, the dicta on how to approach clause 10.1, which is a key obligation throughout both the NEC3 and NEC4 suites of contract. The Inner House made clear its view that clause 10.1 is not *"merely an avowal of aspiration"* and stated that it reflects and reinforces the general principle of good faith in contract. This was a contract subject to Scots law and the reference to the principle of good faith was supported by a reference to McBryde, *The Law of Contract in Scotland*, 3rd Edition, paras 17–23 to 17–24. There is a slightly different emphasis in Scotland to this subject than in England and Wales. Notwithstanding, the Inner House then set out three propositions with which clause 10.1 was said to align, all of which are statements of principle from House of Lords or English Court of Appeal cases. In essence, a party cannot benefit from its own breach of contract, a subcontractor is not obliged to obey an instruction issued in breach of contract, and clear language is needed to put one party at the mercy of another.

When the Inner House went on to consider whether the Prices should be reduced as a matter of construction of the relevant subcontract terms, there was no express reference to these principles, but they do appear to be reflected in the outcome and interpretation, namely that clause 63.10 does not apply to instructions made in breach of contract. The court in particular appeared to find the issuing of instructions in breach of contract to be repugnant, stating that the NEC3 should not be a *"charter for contract breaking"*.

Whilst the outcome is arguably a fair outcome to Van Oord, practical problems could arise in the application of this case. A contractor will often argue that the employer or contractor is in breach of the contract when issuing an instruction but there may be a dispute as to whether or not there is a breach. In principle, a contractor could state that it will not obey the instruction, but if it is subsequently found that the employer is not in breach then the contractor will itself be in breach of cl 27.3, which states that instructions in accordance with the contract should be obeyed.

It remains to be seen whether this case is followed by the English courts (or indeed whether Dragados will appeal this case to the Supreme Court) but as Scottish authority it will remain persuasive in English law. ■

The Fenwick Elliott Blog: insolvency of the main contractor

Since 2017, **Andrew Davies** has edited the Fenwick Elliott blog. The aim of these blogs is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects and to engage with you and share thoughts and ideas on these various matters through the comments facility. You can find out more here: www.fenwickelliott.com/blog.

In September 2022, **Martin Ewan** looked at contractor insolvency.

Having acted for employers on four projects in the past year where the main contractors have become insolvent, here are my 15 top actions for employers to consider when faced with main contractor insolvency.

1. Determine if termination is appropriate: is the main contractor insolvent? Carefully follow the contractual termination procedure.
2. Following termination, employers should take reasonable measures to ensure the site, works and materials are adequately protected.
3. In addition to securing the site, the employer needs to ensure the site is safe (compliance with obligations under the Construction (Design and Management) Regulations 2015).
4. Carry out a comprehensive audit of all of the plant, materials and documents on the site, and any off-site materials, in order to determine ownership.
5. Request the assignment of the supply of materials or goods and/or for the execution of any of the works for the purpose of the contract (subject to such being assignable).
6. Request copies of all the design documents (whether or not previously provided), subcontracts, collateral warranties, and other supply agreements.
7. Check the documentation provided is up to date (e.g., health and safety records, drawings, test certificates, manufacturers' warranties, etc.).
8. Where the employer decides to appoint a third party to take over the works, it is important to keep a comprehensive record of decisions to appoint new contractors and the costs incurred for the final account process.
9. The employer can issue a pay less notice within the prescribed timeframe to suspend payments to the main contractor.
10. Check the funding arrangements with developers, as they will need notice of the situation.
11. Instruct a quantity surveyor to undertake an audit of the site and prepare a detailed valuation of the works at the time of termination.
12. Keep adequate records of the works following termination so as to update the administrators of the costs accrued and additional costs incurred up to the date of completion.
13. Responsibility for insuring the works is now the employer's obligation, so employers should seek to get adequate cover for the works following the termination.
14. As for claims, employers should keep in mind that some policies operate on a claim made basis. Any claims against the main contractor will need to be made before the end of the contractor's insurance policy period.
15. Debt recovery, unless there is a performance bond to call on, or retention money to set-off against, the additional cost incurred by the employer in completing the works will be difficult to recover. Retention and bonds offer the easiest route for recovery. Therefore, employers should check the bond has not expired and the wording of the bond to enable the employer to bring its claims. Also submit a proof of debt in the insolvency. ■

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