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Essential Construction Law Update  
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## Making and resolving claims: the approach of the courts to adjudication and mediation

**Jeremy Glover, Partner**





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- Mediation: 10 years after Halsey;
- Mediation: is it ever reasonable to decline a request to mediate?
- What about adjudication? Has anything changed in the last 12 months?
- How important is it to serve a notice challenging an adjudication or DAB decision on time?
- Appointing the adjudicator.



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## Mediation: is it ever reasonable to decline a request to mediate?

*“Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court’s role is to encourage, not to compel. The form of encouragement may be robust...”*

2004

Dyson LJ

*Halsey v Milton Keynes General NHS Trust*



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## Mediation: is it ever reasonable to decline a request to mediate?

### The merits of the case

*“Given the nature of this dispute, it does not seem to me to be realistic for someone ... to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement. Indeed if that had been his view then it is surprising that no application for summary judgment was ever made, which it was not.” [Garritt-Critchley]*

*“However, on the merits of the case, I consider that BAE's reasonable view that it had a strong case is a factor which provides some but limited justification for not mediating.” [NGM v BAE]*



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## Mediation: is it ever reasonable to decline a request to mediate?

### Timing

Paragraph 5.4 of the Construction Pre Action Protocol makes it clear that parties should at the Protocol Meeting review whether:

*“some form of alternative dispute resolution would be more suitable than litigation at the pre-action meeting”.*

### Have other settlement methods been attempted?

Can you say: *“Well we’ve had very lengthy and detailed round table discussions, they have not gone anywhere and it’s not sensible to spend any more money on the case.”* [Garritt-Critchley]

### Have you made a Part 36 or other form of settlement offer?



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## Mediation: is it ever reasonable to decline a request to mediate?

### **Did the mediation have a reasonable prospect of success?**

*“The argument that there was a considerable dislike and mistrust between the parties did not have any real foundation either. Unfortunately, that is very often the case in relation to parties to litigation. And it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most usefully. They are well trained to diffuse emotion, feelings of distrust and other matters in order that the parties can see their way to a commercial settlement...”*

*“Parties don’t know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience.”*

[Garritt-Critchley again]



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## Mediation: is it ever reasonable to decline a request to mediate?

- (i) Always respond promptly to an offer to mediate;
- (ii) If you are prepared to mediate, then be proactive;
- (iii) If there is further information you require prior to participating in any mediation, request this without delay;
- (iv) Keep a record of events;
- (v) If you believe you have reasonable grounds for refusing do not sit on the invitation to mediate. Silence is not an option. Respond promptly and explain why you are declining;
- (vi) Do not wait until you are facing a costs sanction to justify your decision not to mediate: it will be too late.
- (vii) If you decline to mediate, review the reasons on an on-going basis to ensure they remain reasonable.
- (viii) Never close off the possibility of mediation for all time as circumstances may change. When is the right time for you?





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## Adjudication over the last 12 months

Has anything really changed in terms of the TCC's basic overall approach?

No: if you are challenging enforcement of an adjudicator's decision, you almost always start 1-0 down before a file has been opened.



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Do the contractual time limits apply if you are challenging an adjudication decision in court?

*“Having decided to reject the adjudicator's decision on the ground that he had no jurisdiction because there was no dispute fit to go to adjudication, Fermanagh adopted a high risk strategy of ignoring the adjudicator's assessment, contesting Gibson's claim to enforce the adjudicator's settlement figure in the High Court proceedings and not serving a notice of intention to refer to arbitration under the agreed terms of contract notwithstanding that the contract spelt out clearly that an adjudicator's decision stands as binding unless taken to arbitration in a manner procedurally satisfying the contractual provisions?”*

*Fermanagh District Council v Gibson (Banbridge) Ltd*



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## Adjudication: appointing the adjudicator

**RICS application form:** Are there any Adjudicators who would have a conflict of interest in this case?

*“We would advise that the following should not be appointed:*

*[AB] and [BB] of [B and partners]; [CD] ; [EF] regarding his fees - giving rise to apparent bias; [GH] for dispute of a minimum fees charge and apparent bias; Additionally [I, J, K, L, M, M and N], [the First Adjudicator] who has acted previously or anyone connected with Fenwick Elliott solicitors who have advised the Referring Party.”*

Eurocom Ltd v Siemens plc



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## Adjudication: appointing the adjudicator

*“The false statement was material. It was made in the context of a process by which an adjudicator had to be nominated by an impartial adjudicator nominating body and, on the basis set out above, was made improperly to eliminate candidates on the basis they had a conflict of interest when they had none.*

*On that basis I conclude that the fraudulent misrepresentation would invalidate the process of appointment and make the appointment a nullity so that the adjudicator would not have jurisdiction.”*

*If a party which is in breach of contract, fails to follow the correct adjudication process in a way which goes to the heart of the appointment then the adjudicator does not have jurisdiction.”*

Mr Justice Ramsey  
Eurocom Ltd v Siemens plc



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## The Construction Supply Chain Payment Charter

Jatinder Garcha, Senior Associate





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## Introduction

- Part of the Government's Construction 2025 industrial strategy;
- Construction Leadership Council (CLC) established to take forward that strategy. Comprised of 30 members from all parts of the construction industry and responsible for developing an "action plan";
- Payment Charter officially launched on 22 April 2014 ("the Charter").



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## Commitments under the Charter

### **The Charter contains 11 commitments including:**

- Payment terms of 60 days applying to all new contracts from January 2015, reducing to 45 days from June 2015 and 30 days from January 2018;
- “Ambition” to move to zero retentions by 2025;
- Use of Project Bank Accounts on central Government Projects.



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## How is the Charter intended to work?

- The Charter itself is not a contractual document – but signatories agree to apply fair payment commitments in their dealings with the supply chain;
- Signatories to the Charter are monitored for compliance by reference to a set of Key Performance Indicators (KPIs);
- Performance against the KPIs is considered when awarding contracts.





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## Legal Issues and Commercial Considerations

- Voluntary commitment only;
- No contractual effect – effective enforcement/sanction will be an issue;
- Is the commitment not to deliberately delay payment and to make full correct payment with any withholding of payment being proportionate and demonstrably justified already covered by the Construction Act? Also, is there any need to sign a separate commitment to comply with the Contract?



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## Legal Issues and Commercial Considerations continued

- KPIs;
- Monitoring arrangements still being finalised – full set of reporting requirements to be agreed by the end of the year;
- “Broad agreement” on four core KPIs – “payment days in, payment days out, proportion of retentions and proportion of deals under supply chain finance agreements”;
- “Client” commitment is going to be essential.



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BIM: are you legally prepared?  
November 2014

Jeremy Glover, Partner



Cover image: © Dyer 2012, Oz Shopping & Entertainment Centre, Krasnodar, Russia



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## Key “legal” concerns about BIM

- What happens to my contract?
- Responsibility for design;
- Responsibility for errors in the design;
- Levels of detail;
- Cyber security and faulty software;
- Who should be the BIM (Information) Manager?
- Insurance;
- Copyright/Intellectual Property;
- Will completion and takeover arrangements change?
- Level 2 Bim;
- iBim (Level 3).



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## The 8 components of Level 2 BIM

- PAS 1192-2:2013: specification for information management for the capital/delivery phase of construction projects using BIM;
- PAS 1192-3:2014: specification for information management for the operational phase of assets using BIM;
- PAS 1192-4:2014: collaborative production of architectural, engineering and construction information - client information requirements – not yet available;
- PAS 1192-5: specification for security-minded building information management: (not yet available – December 2014/Easter 2015)
- CIC BIM Protocol;
- Government Soft Landings (GSL);
- Classification system (common language): (not yet available - Easter 2015).
- Digital Plan of Work (dPoW) (not yet available - Easter 2015).



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## BIM & Facilities Management

- Government soft landings (GSL);
  - Design Build Operate;
  - Practical Completion;
  - As-built drawings;
  - O&M Manuals,
  - H&S files;
- 
- Record BIM; Project Information Model (PIM)
  - Operational BIM; Assets Information Model (AIM)
- 
- PAS 1192-3: Specification for information management for the operational phase of construction projects using building information modelling



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## Government Soft Landings (GSL)

- GSL Policy September 2012 will apply to all government projects from 2016;
- The ongoing maintenance and operational cost of a building during its lifecycle far outweighs the original capital cost;
- Need to recognise this fact through early engagement in the design process;
- Widespread use of BIM in relation to the maintenance and refurbishment of existing assets
- Extended Aftercare Period: post construction proving of asset by contractors for 3 years;



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## Government Soft Landings (GSL)

### Three key areas:

- (i) Social outcomes: functionality and effectiveness;
- (ii) Economic outcomes: identify operational and capital costs early and thereby reduce costs;
- (iii) Environmental outcomes: meet carbon and sustainability targets.





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## Government Soft Landings (GSL)

- Aligns with RIBA Plan of Work 2013;
- GSL Champion – throughout the project – *“to maintain the focus of all parties on the required project outcomes;*
- Only propose change through the defined contractual route;
- Measure performance using data from the building control systems, occupier feed back and other records;
- Extended Aftercare Period shall not alter the contractual Defects Liability Period;
- Regular reporting and review meetings – decrease over the three year period;
- A variation between target consumption/operating cost and actual consumption/operating cost will not necessarily lead to calls for remediation – depends on the cause/extent;



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## The BSRIA approach

### 5 stages:

*“It is vital to Soft Landings that the project operates within a no-blame culture. It will ensure that information is shared, and that problems are discussed openly and not hidden or buried. While defects and poor workmanship must be resolved, all outcomes – good and bad – should be treated as a learning experience. This means that there must be a clear policy of proactive problem resolution, where emerging issues are addressed and resolved collaboratively.*

*Incentives of various kinds can be helpful but should be free of heavy legal definition. Any specific performance targets linked to those incentives should be kept realistic, but stretching where appropriate.”*



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## How to make GSL work

- BIM is the tool that makes GSL possible;
- Early engagement of all parties, especially end-users and stakeholders;
- Agree a defined budget and set of performance outcomes at the outset of a project;
- Does the contract clearly define roles and responsibilities?;
- Penalties, incentives, liability, insurance;
- Ensure the building is fully functioning at take-over;
- Are we, in reality, only extending the defects liability period or creating a new hand-over period?
- Re-define patent/latent defects;
- Payment: will the traditional retention cover the costs?
- Sharing of knowledge to benefit future projects: narrow the gap between design intent and actual performance.



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## So what is BIM?

- Technological change;
- Data and knowledge exchange;
- Co-ordination;
- Collaboration;
- Cultural change.