

Disputes in the Construction Industry

UK

Dispute in business is inevitable, and the construction industry is no different. Disputes arise within this sector for all sorts of reasons, with several possible ways by which to resolve them. However, although often resolvable, disputes inevitably bring many challenges and legal issues to take into consideration. To find out more about these, we speak to Simon Tolson, Senior Partner at Fenwick Elliott LLP. As a construction lawyer of 27 years' standing and having worked in construction law and the industry for more than 30 years, Simon is perfectly placed to tell us all about the legal implications of the sector. Fenwick Elliott LLP is a specialist construction and energy law firm founded in 1986 and the largest truly specialist firm of its kind in the UK.

Can you please give me an overview of the disputes in the construction industry and current trends in your jurisdiction?

The construction industry is vast and at times contributes up to 10% to the UK GDP. It gives rise to many commercial issues that have to be grappled with, all brought into sharp focus by the difficult economic climate since mid-2008, its international umbrella and massive competing interests.

Employers have disputes with main contractors; developers have disputes with funders/banks/project sponsors. Main contractors also have disputes up and down the supply chain and sideways with various consultants and specialist suppliers.

Whatever the nature of the dispute, we have seen an increase in the willingness of parties to use alternative methods of dispute resolution to bring those disputes to an end.

Fenwick Elliott acts in an advisory capacity to the main boards of many major companies; we also engage in all types of dispute process and dispute resolution. This includes litigation, international commercial arbitration, adjudication and all forms of ADR from expert determination, to mediation and early neutral evaluation.

We also undertake considerable project services work.

What are the main causes of dispute in this sector?

The main cause is money in the wrong pocket and/or money being tight, closely followed by all attempts at single point responsibility where the client interferes with the project in the build. Change management, in other words, disputes over actual or implied variations and scope of work, are the hot potatoes of our industry, as well

as time-related issues such as culpability for project or package delay, and then qualitative disputes over attainment or otherwise of contract specifications and building standards.

Can you please talk about any recent cases you have been involved in? What were the main challenges involved and how did you overcome them?

Yes, my most recent major case was a trial that has just closed in the TCC. It concerned termination of the largest low-density polyethylene plant contract (EPC) in the world. It is an important case as once judgment is handed down we will have a new pronouncement on the meaning of 'due diligence' with regard to a contractor's obligation to get on with the works, as well as judgment on the capping of liability in the EPC context. It was also the first full paperless TCC trial involving nearly 250,000 documents.

Recent research by E.C. Harris suggests that tough economic conditions and increasing project complexity are causing significantly drawn-out legal disputes with higher values. Is this something you would agree with? Why?

I would not say disputes per se are becoming longer, or more drawn out. Yes adjudication has become more sophisticated than it was and picked up a lot of legal and procedural baggage by virtue of 15 years of jurisprudence.

What has changed in litigation is the sheer volume of data we now process with e-disclosure and the advent of paperless trials. We are entering a brave new world from which there will be no return.

The increasing nature of collaboration with BIM is an area in which I expect to see some test cases in the next five years regarding who carries the can if the design is flawed or fails.

What are the main challenges you face when working on construction disputes? What is the best form of dispute resolution for this sector?

Often the sheer volume of electronic data and the issues associated with it, along with the mobility of labour, can mean that three years after the build, the key people one needs to see could be in Azerbaijan or Hobart! The next is the increasing dependency on projects reliant upon specialist sub-designer consultants and subcontractors to do the grunt work but without a true figure in command of the full project brief — Project Manager yes, Master no!

Are there any legislative changes you feel there is a need for?

I think there is enough regulation/legislation! One only has to look at competition law, bribery, tendering, blacklisting, Eurocodes, Late Payment of Commercial Debts Regulations 2013, planning law changes, etc. The construction industry is burdened enough already and is going through a thousand hells to keep its head above water. So what is really needed is a period of stability to allow growth. **LM**

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