

Annual Review 2018/2019

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



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November 2018

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It is my great pleasure to introduce (once again) our 2018/19 Annual Review to you. This is our 22nd edition of this popular now perennial 'publication'. Our inaugural edition coincided with the double whammies of the Arbitration Act and the 'Construction Act' in 1996.

This year the demise of Carillion, the advent of GDPR, the Data Protection Act 2018 and the 'post mortems' of Grenfell on Building and Fire Regulation have impacted the business of many of our clients. The dynamics of such events mean we all must adapt and learn.

Construction litigation volumes continue to decrease (a theme common across the Courts in England), some of the modernisation programme since the Jackson Reforms in April 2013 have served to make litigation less attractive to business clients but this is more than compensated by international arbitration and adjudication both of which are now the premier methods of solving disputes in the construction industry and keep us very busy. Payment disputes upstream and downstream and disputes over the failure to make interim awards on extensions of time, or agree loss and expense/compensation, employer variation/changes and defects remain the most common dispute areas.

Multiple global trends are shaping the future of construction – trends related to markets and customers, disruptive technology, sustainability and resilience, modern flexible working practices and workforce changes, society, politics and regulation.

Whilst traditionally and compared to many other industries, the construction industry has been slow at technological development, indeed innate conservatism are words that were used to describe the

construction industry, it is now distinctly undergoing major disruptive changes. Efficiency gains have to increase and are beginning to do so. Modular construction has to deliver clever cheaper alternatives to bespoke every time. Building Information Modelling is just a small cog of that change in a large transmission system. But as a low-margin industry (as the construction press reminded us again over the summer), a lack of investment in research and development in the UK over recent decades must now give way to more if we are to be competitive, especially when compared to other industries, so it must change. We see the beginnings around us. The rise of analytics, machine learning algorithms, the use of things like augmented reality using Microsoft HoloLens to look at construction sequencing. The maturity of various technologies, and the testing of their application in construction, will radically alter the face of the industry by de-risking it.

We are also seeing the Internet of Things, and 'big data' etc providing building owners with more information on the condition of their assets - allowing contractors to maintain structures more efficiently and proactively. We too are following and investing in smart technology.

I am pleased to say despite Brexit the UK is doing very well, no more so than our international work and practice in and around London and the regions. The capital's European rivals may be trying to stab us in the back, but our best qualities always come to the fore when we are up against it. Brexit is the catalyst for change. We will all make it to the other side, it is the way of our peoples. As I said a year ago let's just get on with the job – please.

What also stands out for me here at Fenwick Elliott as I reflect on the year now behind us is the positive way in which so many of my colleagues have risen to the challenges on some very major projects we have worked on, helping clients overcome breakpoints and grown the business at all levels in the process. We have done so by providing highest quality services to our business clients and sought out new opportunities to enhance our services in our core specialisms. This year there is a lot to be proud of. As lawyers acting on big projects we have found no shortage of work. Keeping the quality of those we hire, and train has been a paramount consideration.

I am also delighted to announce the promotion of two Senior Associates to

Partners. Jonathan More and Patrick Stone took their new roles with effect from 1 October 2018 and would like to congratulate them on their significant achievements. They bring the number of Partners/Members in the firm to 20. At one time that was the maximum legal number of partners in a law firm.

Combined with our other hiring's and recent promotions these senior additions complement the opportunities we have taken through external recruitments to meet our expanding business needs and are testament to the strength and confidence we have in the markets where we operate.

As to what we cover in this Review as ever we have endeavoured to capture into the one publication the highs and lows of the construction law year. Our purpose as always is to enlighten (well we try) and to flag to you areas of the law and practice that we hope are valuable to your business.

Last but not least I want to thank all of you for the opportunities your legal problems have given us to resolve this past year in London and the rest of the World. Long may this continue and be to our common advantage.

I hope you will flick at leisure through the rest of the Review, it may also earn you a CPD point or two.

Welcome to the 22nd edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from the past 12 months including, from page 31, 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.



Jeremy Glover
Partner, Editor

This year's Review features a wide range of articles, reflecting the typically diverse range of issues we have found ourselves looking at over the past year. These include on pages 10 and 11 an article by James Mullen about anti-oral variation clauses. As James notes, if there is an oral instruction or variation, as a matter of good practice make sure that it is recorded in writing.

In our 2017 Review, we highlighted two Court of Appeal cases on this topic. This year, one of them reached the Supreme Court. In last year's Review we looked at the way concurrent delay was dealt with. This followed a rare decision from the TCC on the topic. This year that case, as Marc Wilkins explains on pages 21 and 22, reached the Court of Appeal.

Claire King is the editor of our monthly newsletter Insight which provides practical information on topical issues affecting the building, engineering and energy sectors – <https://www.fenwickelliott.com/research-insight/newsletters/insight>. In April 2018, Claire provided an update on the Bribery Act. Find out more on pages 18, 19 and 20.

Claire notes that it has been said that addressing bribery is a good thing because it creates the conditions for free markets to flourish, something which may be of some significance with Brexit just around the corner.

Lucinda Robinson provides further practical advice with a guide to signing contracts on pages 6 and 7. That is followed on pages 8 and 9 by an article by Sarah Buckingham where she explores Third Party Agreements. Our projects team has noted that recently it has become a constantly recurring theme when reviewing amendments to building contracts that the contractor was expected to assume all of the employer's obligations, liabilities and risks under agreements the employer has entered into "up the line" that relate to the carrying out of the works as if these obligations were set out in the building contract. Sarah, too, provides some practical advice from a contractor's perspective.

The Fenwick Elliott Blog – <https://www.fenwickelliott.com/blog> – which Andrew Davies keeps a watchful eye over, goes from strength to strength. We have included a couple of sample entries on page 46. One of these by Robbie McCrea, looks at the new DIAC arbitration rules. As you may know, our office in Dubai has been open for over three years now and goes from strength to strength. Headed by Nicholas Gould and offering a fully integrated specialist construction law and arbitration practice operating from the DMCC, the office has Arabic speakers with knowledge of local laws and practices, as well as international expertise in construction law.

From an international arbitration point of view, the key development in the UAE in 2018 was the long-awaited introduction of a new Arbitration Act. At pages 25 and 26, together with Ahmed Ibrahim, I explain the key features of the legislation. It is clear that the new Act stands as an expression of intent to modernise and bring the arbitration law in the UAE in line with international best practice.

The year 2017 saw the introduction of the second edition of the FIDIC Form. Our international newsletter, International Quarterly – <https://fenwickelliott.com/> – has featured a number of articles about the new Contract. At pages 23 and 24, I look at the treatment of force majeure. As had been well foreshadowed, in the new edition, clause 19 which was headed "force majeure" has been replaced by clause 18,

"exceptional events". This is an interesting change; the term force majeure is typically provided for within most civil codes, whereas it is not a term of art under the common law.

Of course, we also feature the latest updates from the adjudication world. Andrew Weston on pages 14 and 15 asks whether a company in liquidation can adjudicate when the dispute includes determination of any claim for further sums said to be due to the referring party. Martin Ewen on pages 16 and 17 then reviews a decision of Mr Justice Fraser where he extended the long-established grounds on which a party can seek a stay of execution of an adjudicator's decision.

The same Judge in June gave the final judgment (perhaps for now) in a dispute where there had been four adjudications and numerous judgments, including those resulting from a split trial (with one determining liability in 2017 and the other quantum in June 2018). Rebecca Ardagh at pages 12 and 13 sets out some of the lessons that we can all learn from the long-running litigation.

Our Review, however, begins in different style, with our latest recruit, Ruth Leake, interviewing Victoria Russell on the way in which construction disputes are dealt with. Victoria was the recent recipient of The Society of Construction Law's President Medal 2018 for her outstanding contribution to construction law.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. As always, I'd welcome any comments you may have on this year's Review: just send me a message, my contact details below:

Email jglover@fenwickelliott.com or on Twitter [@jeremyglover](https://twitter.com/jeremyglover)

How the construction dispute landscape has changed

According to a recent report by Arcadis entitled “Does the construction industry learn from its mistakes?” the average value of disputes in the UK construction industry has transformed from being the lowest globally, to one of the highest.

While the principal causes of construction disputes may not have changed greatly, the landscape in which they are unfolding certainly has. With construction disputes continuing to grow in size and complexity we asked our newest recruit **Ruth Leake** to speak to **Victoria Russell**, a consultant at Fenwick Elliott LLP, to find out more.

Victoria’s wealth of experience as a construction law specialist, including her recent award of The Society of Construction Law’s President Medal 2018 for her outstanding contribution to construction law, means she is perfectly placed to tell us about some of the developments she has experienced.

Could you please give me an overview of the changes you have seen throughout your career?

When I was close to qualifying as a solicitor in 1981, I answered a job ad in The Times which said “Great future for a good fighter”. It didn’t mention construction. I thought it sounded interesting so applied, and got the job. All my friends thought I was mad. I was the first female lawyer my then firm had hired. Four years later, when I became a partner, I was horrified to discover that they had drawn up a list of all the clients they thought would object to having a woman as their solicitor. Fortunately for me, none of them had done so. I really hope that wouldn’t happen now.

There have been many changes to construction dispute resolution in the intervening 37 years. When I started my career, the construction Judges were called Official Referees. Case management was occasional and haphazard and trials were double- or triple-booked, causing enormous delay and uncertainty plus huge expense. Litigation was a battlefield, with few if any emerging victorious.

Back then, the standard forms of contract were largely JCT, usually with an arbitration agreement, so the majority of disputes were resolved by arbitration. Arbitration, however, became the mirror image of litigation, with lengthy and expensive hearings. Lawyers were unfortunately to blame.

Which changes do you feel stand out as improving the handling of construction disputes?

It became clear that dispute resolution needed a major shake-up. After the Arbitration Act 1996, the developments which have been most significant, and had the most impact, include the Woolf reforms leading to new Civil Procedure

Rules in 1998, intended to provide access to justice. The introduction of pre-action protocols has resulted in much earlier exchange of information by all parties and there is now a clear expectation that parties will make serious attempts to try and settle their differences at pre-action stage. There’s more of a “cards on the table” approach.

The Judges in the Technology and Construction Court have led the way in demonstrating how best to manage cases, and have pioneered a far more efficient and effective way of litigating. There are much clearer lines of judicial and administrative responsibility for the civil justice system. There are shorter waiting times for trial. Judges have a “hands-on” attitude, which can only be a good thing.

The advent of all forms of Alternative Dispute Resolution (ADR), but particularly mediation, and the introduction of statutory adjudication under the Housing Grants, Construction and Regeneration Act 1996, have combined to change the landscape of dispute resolution. Domestic arbitration has largely faded away. Adjudication has proved a successful and usually relatively cost-effective way of resolving disputes. The courts uphold the vast majority of adjudicators’ decisions and most cases don’t go on to subsequent litigation. Mediation is widespread and often results in satisfactory settlements.

Part 8 proceedings have been particularly useful and Part 36 helps promote a greater incentive for parties to settle.

Litigation has, however, for too long remained very expensive, and disproportionately so for small to medium sized claims. The recent Jackson reforms are intended to address this, introducing strict cost budgeting requirements with sanctions for non-compliance. Costs should now be more predictable and proportionate.

It amazes me, however, how we still regularly get clients who have very little idea whether they have an enforceable contract and if so, what its terms consist of.

How do you think technology has changed the landscape of construction disputes?

This has, of course, been the other biggest change. When I qualified in 1981, there were telexes and word processors, happily now long since consigned to the bin. Technology has had a dramatic impact on virtually every aspect of dispute resolution. There is now full digital access to the courts, with pleadings and other documents filed online. Disclosure is managed electronically and the many weeks I spent in the early years of my career sitting in site huts ploughing through and marking up shelves full of lever arch files seem a distant memory.

Judgments are now reported on bailii.org as soon as they are handed down, so it is much easier to keep up to date. Research is largely conducted online too, which is much simpler and easier than it used to be.

You mentioned disclosure being dealt with electronically, do you feel it has become more or less burdensome?

I think that disclosure has actually probably become more burdensome, despite and because of the advent of technology; there are more documents to review largely because of the vast number of emails which people send, as well as texts.

Any other changes, or perhaps anything you think might never change?

Parties don't now just contract on JCT. After a period of getting used to it, NEC has proven both popular and successful, and there are a range of other forms as well as partnering and alliancing agreements. It amazes me, however, how we still regularly get clients who have very little idea whether they have an enforceable contract and if so, what its terms consist of. The "battle of the forms" will perhaps never fade away.

Executing contracts: how to get it right

Steve Jobs said “[e]xecution is worth millions”. He was talking about implementing ideas, but his words neatly apply to contracts. As **Lucinda Robinson** explains, even after a maximum effort has been exerted to negotiate a deal and draft a contract, a slip at the final hurdle could cost millions.

Failing to execute a contract correctly, particularly a deed, can result in:

1. An unenforceable contract. Deeds are often used if one party is not providing consideration. Consideration is something of value brought to the deal (e.g. payment or supply of services) and is an essential ingredient for any contract. If there is no consideration and the deed has not been executed correctly, it is not binding.
2. Confusion about whether an agreement has been reached, resulting in expensive, time-consuming arguments about whether there is a contract and, if so, what terms apply. This rather defeats the point of having a contract to provide certainty.
3. A shorter limitation period. Deeds can be enforced for 12 years from when the relevant cause of action accrues; simple contracts for 6 years. Deeds are commonly used in construction because it may take several years for a defect to manifest and be investigated. If you want 12 years of protection, the deed must be executed correctly.

Here is how to get execution right when the law of England and Wales applies.

Step 1 - determine what the document is and if any formalities apply

Are you dealing with a contract or a deed? Simple contracts do not have to comply with any formalities. Provided that the essential components of a contract are present (offer, acceptance, consideration and intent), a contract will be formed (even orally). In contrast, a deed must:

1. Goddards case.
2. Points 2, 3 and 4 come from the Law of Property (Miscellaneous Provisions) Act 1989.
3. Law of Property (Miscellaneous Provisions) Act 1989 and s.44 of the Companies Act 2006.
4. Sections 43, 44 and 46 of the Companies Act 2006 as amended by the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009.
5. Integral Petroleum SA v SCU-Finanz AG [2015] EWCA Civ 144.
6. Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd & Anor [2012] EWCA Civ 265.
7. R (on the application of Mercury Tax Group and another) v HMRC [2008] EWHC 2721.

1. Be in writing;
2. State on its face that it is a deed;
3. Be delivered, meaning the parties must demonstrate an intention to be bound. It is presumed that companies have this intention when they sign, but this can be rebutted, e.g. if the words say “executed but not delivered until dated by...”; and
4. Be executed in line with the rules at Step 2 below².

If these criteria are not met, then you may still have a simple contract. If not, or that

is not enough, then the document must be amended and re-executed.

Step 2 - identify who must sign

Again, the rules differ depending on whether the document is a simple contract or deed.

Deeds can be executed by a company in any of these ways:

1. Affixing the company seal;
2. Two directors, registered as such at Companies House, sign;
3. One registered director plus the company secretary sign; or
4. One registered director signs, in the presence of a witness who also signs the document. It is good practice for the witness' name, address and position to be printed in case execution needs to be verified. The witness should not be one of the other signatories, related to them, or a child³.

If you need a deed, then it is essential to check that the right people sign for each party by checking the records at Companies House. It can help to remind the parties who must sign when you issue the deed for execution. If the rules are not complied with the document will not take effect as a deed but may constitute a simple contract.

A simple contract can be signed on behalf of a company by any of the methods listed at 1 to 4 above or by a person (or persons) with express or implied authority to sign. Whilst it is best practice to follow these rules and ensure that the signatories have authority (e.g. by checking the company's articles), there is a presumption that execution is compliant if it falls within the general nature of the rules. A failure to follow internal rules about signing and delegated levels of authority is usually an internal matter. Rarely will it result in an unenforceable contract.

A foreign company can execute a contract or deed in one of these ways:

1. By affixing its common seal;
2. In any manner permitted by the law of the country in which the company is incorporated; or
3. Expressing the document to be signed on behalf of the company and having it signed by a person with authority to sign under the laws of the country in which it is incorporated⁴.

It can be worth obtaining a legal opinion from a lawyer qualified in the jurisdiction of the foreign company on the validity of the proposed method of execution under its local law, related formalities and whether the proposed signatories have authority. In one case, for example, an English law contract was held not binding because only one authorised representative of a Swiss company had signed and Swiss law required two signatories⁵.

Step 3 - agree how it will be signed

Traditionally wet-ink signatures have been applied to original, hard copy documents either by circulating them for all to sign or in counterpart. The use of wet-ink signatures has been preferred because (forgery aside) the signatory was clearly present and intended his or her signature to be on the contract. The same cannot be said for electronic signatures just yet (except in rare cases where sophisticated electronic signature packages are deployed).

The term "electronic signature" is a broad one and it can cover a signature saved as a pdf or image file, as well as a signature block (or even just an initial) at the end of an email⁶. These are valid and increasingly used methods. The challenge is proving they were applied by the right person and not tampered with or misappropriated.

Following the Mercury tax case involving a dispute about a "virtual" signing, the Law Society issued guidance on how best to do this⁷. One method it deems appropriate for both deeds and contracts involves circulating the execution version of the contract as a pdf to all signatories. Each one then signs and circulates their signature page, confirming that they authorise its use in the final version. The party coordinating signing then collates all signature pages, adds them to the execution version and completes the document. That becomes the original and copies are circulated to all parties. The Law Society's guidance is not exclusive. The key seems to be to ensure that everyone involved agrees the version of the document to be signed and how the process will work.

In summary, there is more to execution than it may seem. To keep it simple, work out in advance if you need a deed or a simple contract, who must sign it and how. If it goes wrong, you may need to have the document re-executed to be sure you can rely on it – something to check and put right sooner rather than later.

Third-Party agreements: a contractor's perspective

As Sarah Buckingham discusses, it seems to have become a recurring theme recently when reviewing amendments to building contracts that the contractor is expected to assume all of the employer's obligations, liabilities and risks under agreements the employer has entered into "up the line" as if these obligations were set out in the building contract.

Typical third-party agreements may include an agreement for lease or a licence to alter agreed with the employer's landlord or a funding agreement with a bank.

The wording inserted into the schedule of amendments will usually impose the following on the contractor: the contractor is deemed to have read and have full knowledge of the third-party agreements (even where it does not have any knowledge of them at all and usually has not even been sent a copy), it must not put the employer in breach of any of the employer's obligations under these agreements and it must perform all of the obligations under these agreements as if they were directly incorporated into the building contract. Therefore, all the provisions in the third-party agreement that place an obligation on the employer in relation to the works should be read as being the contractor's obligation too. It is as simple as that. How and why has this come about?

"Just because the employer has agreed to something up the line, why should the contractor be left holding the baby?"

The negotiation, drafting and agreement of the terms of most third-party agreements (whether property or finance related) will usually be driven by factors more pressing at the time than avoiding conflicts between their final terms and those of a building contract. As mere construction lawyers, we become involved much later in the process or where the contractor may not even have been involved at all. In effect, therefore, the agreement for lease, licence to alter or funding agreement is often presented to the contractor as a fait accompli – it "is what it is".

There is no room for manoeuvre and the landlord/funder will not accept anything else. From the employer's perspective (i.e. the tenant or the borrower), it does not want to be left exposed to risk because it has agreed to something "up the line" but cannot get the contractor to mirror those same obligations "down the line". The employer will therefore simply want the contractor to take on board all of its obligations (in so far as they relate to the

works) so that there are no potential gaps. But, wait a minute – just because the employer has agreed to something up the line (in order to obtain his lease or be able to draw down funds), why should the contractor be left holding the baby?

Just as we should never advise in a vacuum without understanding the specifics of a job (i.e. where it is, what's being built, is it high risk or run of the mill, etc.?) and the impact those specific factors may have on carrying out the works in practice, so should third-party agreements not be negotiated and agreed in isolation. Without consulting contractors and/or construction specialists little or no thought may be given as to how these agreements sit with the contractor's obligations under the building contract and the reality of how works will be carried out in practice.

The employer's lawyers may argue that the contractor was involved at the "drafting stage" of a third-party agreement. However, although the contractor may have had some input in relation to the technical documents appended to, e.g. a licence to alter, it is rarely the case that it has been involved in negotiating and drafting the legal and operative provisions.

There are potentially many issues lurking within the third-party agreements which may be foisted on to contractors. Some may be obvious but others may be hidden and not immediately apparent. A more efficient approach is for the employer to identify those obligations that he really needs the contractor to comply with and only pass those down in the schedule of amendments. However, in our experience it is rare for this exercise to be undertaken – the time, effort and cost involved are off-putting so the employer simply passes the entire third-party agreement down wholesale. For the contractor then, spotting any potential conflicts or additional obligations is like looking for a needle in a haystack.

The employer's lawyers will often counter this with "Ah, but this is only in so far as these obligations 'relate to the carrying out of the works' so the contractor doesn't need to worry". Does this do the trick and neatly resolve the problem? No, unfortunately it does not when you take a closer look at the specific obligations in these agreements.

An obvious example relates to timing. A licence to alter or agreement for lease will often include an obligation on the tenant to procure that the works are complete by

a specific date or within a specified time of having entered into the agreement. What is the effect of this if the works go on beyond this date? Under an agreement for lease, this may entitle the landlord to terminate the tenant's right to do the works. The contractor's obligations in relation to the date for completion of the works, however, are clearly set out in the contract particulars and there is a mechanism in the building contract that clearly provides that if there is an event entitling the contractor to an extension of time the completion date is pushed out accordingly. Under the building contract the contractor's only obligation is to pay LDs and nothing else, so does the late contractor also pick up the bill if the licence to alter is terminated?

Is it really the case that third party obligations only relate to the carrying out of work, so the contractor doesn't need to worry?"

Another example relates to obtaining all necessary consents, an obligation on the tenant which will usually be included in any licence to alter. The contractor should be very careful to check precisely the promises it may be making to the employer/tenant under the third-party agreement versus its commitments under the building contract. This can be a classic case of obligations being imposed by the back door.

For example, the building contract may be completely silent on who is to obtain planning permission. Alternatively, the building contract may provide that the contractor's obligations are simply to assist the employer in the process of obtaining all necessary consents but it is the employer's responsibility to actually obtain them. If the licence to alter states that the tenant is under an absolute obligation to obtain any consents necessary for the carrying out of the works (e.g. planning permission, party wall awards, etc.), which it often will, the contractor will assume this obligation, by virtue of the third-party agreements clause, as if it is directly set out in the building contract. The employer/tenant can then simply point to this clause and say that as this obligation relates to the carrying out of the works it is incorporated into the building contract and is the contractor's risk.

The position can be made even worse if the licence to alter also provides for the landlord to be indemnified against any liability by reason of any failure to obtain any consent, permit or licence, etc. If the tenant/employer decides to proceed prior to obtaining planning permission or fails to obtain it, any enforcement action taken by the planning authorities will be the contractor's liability. In fact, the opposite should actually be the case – the contractor should be seeking an indemnity from the employer/tenant in case it instructs the works to proceed without having obtained planning.

Another sobering example is a requirement, potentially buried in the small print of a lengthy funding agreement, to provide a performance bond upon request and which may not crop up until later in the project or when the employer decides to re-finance its loan. The danger is obvious – the contractor may be completely unaware of this obligation until it is far too late. What surety will agree to provide a bond halfway through a project or in the potential event that the contractor's credit rating has subsequently fallen since the start of the job?

Does including a priority clause (i.e. setting out which contract prevails in the event of conflicts between them) solve the problem? Not necessarily. There could be obligations imposed on the contractor under a third-party agreement which do not necessarily conflict with, but which are additional to, those set out in the building contract. For example, an agreement for lease may include an obligation to carry out the works "to the Landlord's surveyor's satisfaction". Under the building contract the contractor is required to carry out the works to the standard required under the building contract, no more and no less. What might the landlord's surveyor say in addition to this?

The danger is obvious – the contractor may be completely unaware of this obligation until it is far too late.

Third-party agreements may be defined narrowly (i.e. specific agreements which are expressly listed) or widely and generally (i.e. any third-party agreement that the employer has entered or may enter into in

the future). Even if the contractor agrees to be bound by third-party agreements provided to it before the date of entering into the building contract, it needs to read them very carefully to spot any conflicts/additional obligations, and price and programme its works accordingly. Where the employer has the ability to provide further third-party agreements during the course of the project, the contractor simply may not be able to comply at all.

This begs the question, what is it the employer wants to pass on to the contractor that it is not already able to do via the mechanisms contained in the building contract? The employer has the ability, after all, to vary, suspend or stop the works if it so chooses. What more does it need to accomplish? Or, in the rush to get all contracts signed and sealed and proceed with the project, is it just being lazy? It seems that the job of finding the needle in the haystack must fall to somebody, but why should it be the contractor? It is unreasonable to expect the contractor to pick up all of these risks "by the back door" of the third-party agreements. Spotting the conflicts or any additional obligations is an onerous task and one which it may not actually undertake at the appropriate time – it is then only later that the reality of the obligations it has assumed comes back to bite.

No oral variation clauses

In our 2016/2017 Review, we discussed three court decisions about anti-oral variation clauses. In 2018, one of these cases reached the Supreme Court. **James Mullen** takes up the story.

Like many commercial contracts, construction contracts often include what is commonly referred to as a “No Oral Modification” (“NOM”) clause. Such a clause is intended to prevent oral variations to a contract, instead requiring any variation to be agreed in writing by the parties.

As noted by Lord Sumption in *Rock Advertising Limited v MWB Business Exchange Centre Limited*, which we shall look at in more detail below, there are at least three commercial reasons for including a NOM clause in a contract:

1. It prevents attempts to undermine written agreements by informal means;
2. In circumstances where oral discussions can give rise to misunderstanding and cross-purposes, it avoids disputes not just about whether a variation was intended but also its exact terms; and
3. A measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them.

However, whilst NOM clauses may be intended to create certainty, it may be surprising to learn that until recently the law on the effectiveness of NOM clauses was anything but certain.

The uncertainty surrounding the effectiveness of NOM clauses was due to a number of factors.

First, the principle of “freedom of contract” entitles parties to agree whatever terms they choose (subject to limits imposed by public policy) and it also entitles parties to discharge or vary those terms by agreement, including by consensual oral variation.

Secondly, at common law there are no formal requirements for the validity of a simple contract provided the essential elements of offer, acceptance and consideration are present, meaning a common law contract can be made orally as well as in writing. As noted by Lord Briggs in *Rock*, these matters are as applicable to the variation of an existing contract as they are to the making of a contract in the first place.

Thirdly, the uncertainty was due in some part to a couple of previous inconsistent

decisions on NOM clauses by the Court of Appeal (“CA”). In *United Bank*¹ the CA had refused leave to appeal on the grounds that in the face of a NOM clause, no oral variation of written terms could have legal effect. The issue arose again two years later in *World Online Telecom*². In that case, the CA noted that the parties had made their own law by contracting and they could, in principle, unmake or remake it. However, and apparently in ignorance of the decision in *United Bank*, the Court went on to say that in the absence of decisive English authority, there was room for debate and movement on the issue. Therefore, the CA felt that it was a sufficient reason for refusing summary judgment that “*the law on the topic is not settled*”.

In *Rock*, the Supreme Court has now finally clarified the position on the effectiveness of NOM clauses, deciding that such clauses are to be given effect so as to prevent oral variations to a contract.

Background

MWB Business Exchange Centres Ltd (“MWB”) operated offices in Central London. Rock Advertising Ltd (“Rock”) entered into a licence with MWB for office space (“the Contract”). Clause 7.6 of the Contract was a NOM clause and provided that:

“All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.”

Rock fell into arrears and proposed a revised payment schedule to a credit controller at MWB. There was then a telephone discussion between Rock’s director and MWB’s credit controller. Rock contended that the parties had agreed orally to vary the Contract in accordance with the revised payment schedule.

Soon after, MWB locked Rock out of the premises on account of failure to pay arrears and terminated the Contract. MWB sued Rock for the arrears and Rock counterclaimed damages for wrongful exclusion from the premises. The fate of Rock’s counterclaim, and therefore the claim, turned on whether the oral variation was effective given the inclusion of the NOM clause in the Contract.

First instance

The claim was first considered by the Central London County Court which found

1. *United Bank Ltd v Asif and Anor* (11 February 2000, unreported).
2. *World Online Telecom v I-Way Ltd* [2002] EWCA Civ 413.
3. *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016].
4. [2016] EWCA Civ 396
5. *Cardozo J, New York Court of Appeals in Alfred C Beatty v Guggenheim Exploration Company and Others* (1919) 225 NY 380 (at pages 387 to 388).

in favour of MWB, giving effect to the NOM clause. The Judge decided that MWB's credit controller had agreed to vary the Contract in accordance with the revised payment schedule but the variation was ineffective because it did not comply with the requirements of clause 7.6.

Court of Appeal

Rock appealed the decision and the case was heard by the CA in March 2016³. Between the CA hearing Rock's appeal and the handing down of its judgment in June 2016, a differently constituted CA handed down its judgment in *Globe Motors Inc and Ors v TRW Lucas Varity*⁴ which also considered the effectiveness of a NOM clause.

In *Globe*, the CA's decision on another point meant it did not have to decide the effectiveness of the NOM clause. However, given the CA's previous inconsistent decisions the Court took the opportunity to give an obiter view on the issue. The CA did not give effect to a NOM clause, saying that parties could orally vary a contract even if it contained a NOM provision. Citing party autonomy, the CA reasoned that as a matter of general principle, parties had the freedom to agree whatever terms they wished, and could do so in a document, by word of mouth or by conduct. It followed that in principle the fact that a contract included a NOM clause did not prevent the parties from later making a new contract varying the original contract by oral agreement or by conduct.

The CA in *Rock* agreed with the reasoning in *Globe*, citing party autonomy as the most powerful consideration. In support, the CA referred to the well-known words from an American judgment nearly 100 years ago:

*"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived . . . What is excluded by one act, is restored by another. You may put it out by the door, it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again. . ."*⁵

The CA allowed Rock's appeal and found that the oral agreement to revise the schedule of payments also amounted to an agreement to dispense with the requirements of clause 7.6. It followed that

MWB were bound by the oral variation.

The Supreme Court

MWB appealed and the dispute came before the Supreme Court in 2018, with the Court noting that the case raised "*truly fundamental issues in the law of contract*".

The lead judgment was given by Lord Sumption with which the majority of the Supreme Court judges agreed. Lord Briggs reached the same conclusion as Lord Sumption, albeit for different reasons. The Supreme Court overturned the CA's decision, giving effect to the NOM clause and deciding that the Contract had not been varied by oral agreement as it did not comply with the requirements of clause 7.6.

In his judgment, Lord Sumption said that to not give effect to a NOM clause was to override the parties' intentions. He considered the CA's reliance on party autonomy to be "a fallacy", saying that party autonomy operated up to the point when the contract was made, but thereafter only to the extent that the contract allowed.

Lord Sumption also dismissed the theory that parties who agreed an oral variation in spite of the NOM provision must have intended to dispense with the clause. What the parties to such a clause had agreed was not that oral variations were forbidden, but that they would be invalid. The mere fact of agreeing an oral variation did not contravene a NOM clause, it was simply the situation to which the NOM clause applied. It was not difficult to record a variation in writing, save for those cases where the variation was so complex that no sensible businessman would do anything but record it in writing.

In Lord Briggs' view, a NOM clause continued to bind the parties until they expressly (or by strictly necessary implication) agreed to do away with it, which they could do without following the requirements of the NOM clause. Lord Sumption did recognise that enforcement of NOM clauses came with the risk that a party may act on the contract as varied and then find itself unable to enforce it. However, the Judge noted that the safeguard against such injustice lay within the various doctrines of estoppel, albeit the scope of estoppel could not be so broad as to destroy the whole advantage of certainty which the parties had stipulated when they agreed terms which included a NOM clause. At

the very least, (i) there would need to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself.

Comment

On construction projects, there are often informal discussions and/or oral instructions and variations between the parties. However, the reality is that most standard form building contracts already provide that oral instructions will be of no immediate effect until confirmed in writing (for example, see clause 3.12 of the JCT Standard Building Contract with Quantities). The decision in *Rock* confirms that the courts will give effect to these types of clauses and so if the requirements of a NOM clause are not followed, there is a very good chance that the instruction and/or variation will not be effective.

Lord Sumption acknowledged that giving effect to a NOM clause means there is a risk of parties undertaking work on the basis of an oral variation and then finding that they are unable to enforce it. In these circumstances, the doctrine of estoppel will hopefully protect a party against injustice although certain requirements would need to be met in order for the argument to succeed.

The practical message arising from *Rock* is really one of common sense and good practice: make sure you know and understand your building contract, ensure that any formal procedures to vary it are followed, and ensure that you maintain good records. We cannot stress enough the importance of maintaining good records during a construction project. If there is an oral instruction or variation, as a matter of good practice make sure that it is recorded in writing. Doing so will hopefully prevent disputes arising between parties in the future. Whilst they may not seem important at the time, these records could potentially become key documents in any subsequent dispute between the parties.

"Make sure you know and understand your building contract, ensure that any formal procedures to vary it are followed, and ensure that you maintain good records."

Valuable lessons in valuation (and expensive lessons in conduct)

Sometimes a dispute seems to take on a life of its own. Fortunately such occurrences are rare. But, as **Rebecca Ardagh** explains, when it does happen there are likely to be a number of pointers that we can all learn from.

In June 2018, the Technology and Construction Court (likely) brought an end to what Fraser J could only describe as “*some long running, and bitterly fought, litigation*”¹ with his decision in *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*.² Ultimately, this dispute consisted of four adjudications and numerous judgments, including those resulting from a split trial (with one determining liability in 2017³ and the other quantum in June 2018).

The liability and quantum judgments serve as scathing guides as to “what not to do” both when completing a construction project and when appearing as a party to a court proceeding; making them important decisions not only for those in the construction industry, but also those who engage in litigation in general. The lessons arising from the recent quantum decision are summarised below. For analysis of the lessons coming out of the 2017 liability decision, please see Issue 206 (August 2017) of Fenwick Elliott’s Dispatch publication (https://www.fenwickelliott.com/sites/default/files/dispatch_issue_206.pdf).

Background

Imperial Chemical Industries Ltd (“ICI”) engaged Merit Merrell Technology Ltd (“MMT”), a specialist engineering piping manufacturer, as part of the construction of a new paint manufacturing facility. The contract was an amended NEC3 contract and was originally valued at approximately £1.9 million. The works required increased quite considerably once the project commenced, however, and MMT had been paid £20.9 million at the time that the claim form for the proceedings was issued. In August 2014, ICI’s parent company, AzkoNobel, replaced the ICI personnel involved with the project and the relationships under the contract began to deteriorate rapidly.

From mid-2014, payments to MMT slowed down and ICI directed that all welding cease on 16 October 2014. ICI alleged that there were a number of defects in the works carried out by MMT, and the parties met in an attempt to agree a resolution, though no agreement stuck. The independent project manager resigned on 9 October 2014, and was replaced by one of AzkoNobel’s employees.

Although there were attempts made to restart the welding works in January 2015 on a limited basis, ICI wrote to MMT on 17 February 2015 and accepted what it

described as MMT’s repudiation of the contract, terminating the contract and ejecting MMT from the site.

The primary disputes between the parties concerned the termination of the contract and the valuation of the works. Fraser J determined in the liability decision that ICI did not validly terminate the contract and, in purporting to do so on the grounds of repudiation, had repudiated the contract itself. In light of this, the further obligations of both parties under the contract had come to an end on 17 February 2015; however, any rights and obligations that they had at that time remained. The quantum trial was necessary to determine the value of MMT’s account and whether there was any payment to be made either to ICI or MMT.

Revisiting assessments

During the course of the works, there had been a number of assessments made by the independent Project Manager, as well as agreements reached between MMT, the Project Manager and ICI as to the valuation of compensation events. One of the primary issues throughout the course of the quantum trial was whether there was any legal ability to revisit these assessments under the NEC3 contract terms (as amended, in this case).

Turning first to the assessments made by a Project Manager under an NEC3 contract: option W2 provides at W2.3(4) that it is open to the Adjudicator to “*review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a quotation which has been treated as having been accepted*”. This amounts to an express confirmation that an Adjudicator has the power to revisit an assessment made by a Project Manager under the contract including, said Fraser J, a compensation event. Fraser J concluded that this consequently endorses the court’s ability to revisit such assessments outlining, at paragraph 64, that “*the scope and extent of an adjudicator’s powers are not determinative of the court’s jurisdiction, but the court can certainly not have less power in this respect than an adjudicator*”. In coming to this conclusion, Fraser J also referred to the decision of *Grove Developments Ltd v S&T (UK) Ltd*,⁴ citing *Henry Boot Construction Limited v Alstom Combined Cycles Limited*.⁵

As for the ability to revisit agreements reached with ICI, the Project Manager and MMT, the basis upon which these could

1. [2018] EWHC 1577 (TCC), paragraph 2.

2. [2018] EWHC 1577 (TCC).

3. [2017] EWHC 1763 (TCC).

4. [2018] EWHC 123 (TCC).

5. [2005] 1 WLR 3850.

be challenged requires both legal and evidential assessment. In this case, unlike the assessments made by the Project Manager, the legal assessment is one of first principles and not the NEC3 contract terms. The evidence in this case was conclusive that the parties intended for the agreements they reached to be final agreements, and Fraser J held that they ought to be treated as such.

Weight of previous assessments

Despite the fact that assessments made by the Project Manager can be revisited, they will not be easily displaced. The conclusions made by those involved in the project, with detailed and in-depth knowledge of the works, products, quantities and values at the time that the works were carried out, carry significant weight from an evidential point of view. To this end, Fraser J stated at paragraph 69: *"There has to be some evidential basis for the court deciding to depart from the assessments reached at the time . . . Accordingly, although the assessments reached at the time do not conclusively determine ICI's rights in this respect, they are of powerful evidential weight."*

Correct approach to valuation

In light of the above, any party attempting to challenge a valuation arrived at and agreed to during the course of the works will need to provide sufficient evidence that it is right to depart from this valuation. This may require both evidence of fact as to the valuation's suitability from the time that it was carried out, as well as expert evidence as to the correct valuation.

In this case, ICI was criticised for not presenting any evidence from the time the works were carried out (relying only on the witness evidence of an employee who joined the project late and did not have detailed knowledge of the project works) and for seeking to revalue the account in its entirety. The decision made by ICI's quantum expert (or, perhaps, the instruction to the quantum expert) to ignore these agreed valuations and contract rates rather than use them as a starting point was one of the many criticisms made by Fraser J. This was not only because it departed from logic, but also because it amounted to an expert reaching a conclusion as to law and evidence (namely, whether these valuations were binding).

The conclusion of Fraser J was that, where such valuations and assessments exist,

they ought to be contemplated in expert evidence.

Expert evidence

ICI's witness evidence drew significant criticism from Fraser J in both the liability and quantum trials. The witnesses of fact in particular were chastised for factual inaccuracy, inconsistency and bias. One important point made by Fraser J early in the quantum judgment was that, by virtue of the split trial, all issues of liability had already been decided and needed to be accepted by both parties as being the final position when dealing with the evidential matters in the quantum trial. Attempts by witnesses to speak to a position that Fraser J had previously dismissed at the liability trial were condemned.

This, in addition to the apparent partisan rather than independent nature of the ICI expert evidence, and the fact that conclusions as to legal issues and causation were drawn, led Fraser J to set out in detail the duties held by expert witnesses and those instructing them. In particular, the court referred to CPR part 35, Practice Direction 35 and the six points contained therein.

A criticism directed at the experts on both sides was the lack of cooperation between them in preparation of the Joint Statement by the Quantum Experts, which read essentially as a reiteration of each expert's own view, the unnecessary provision of a Scott Schedule and late submission of further evidence. Fraser J highlighted the court's dissatisfaction with a suggestion from counsel that the court write directly to the quantum experts for assistance where issues were still outstanding, and the submission of an "Agreed Expended List of Issues" the day after oral closing with an Explanatory Note.

Fraser J pointed out that the approach taken was *" . . . an extremely unhelpful approach. There were a total of four counsel instructed for this trial, and I consider that the court is entitled to greater assistance on such detailed matters and on the use and scope of the Scott Schedule – a document neither ordered by the court, nor approved – than it received in this case."* This serves as a useful reminder that, particularly where expert evidence is voluminous, detailed and there is little by way of agreement, counsel and experts should ensure that it is presented in an accessible way that is in accordance with the court's orders and tied back to its relevance to individual

items (such as PMIs) or issues. In particular, the presentation of evidence should not amount to the parties effectively saying, *"the court has the trial bundle; here are the figures; please just get on with it"*.

Conclusion

The series of decisions in relation to this dispute, through both adjudication and litigation, provide valuable guidance as to the application of the NEC3 form, particularly as to defects, termination and valuation, as well as guidance for counsel, parties and witnesses as to preparation and presentation of a case before the court.

Of particular relevance in the quantum decision is the fact that the court will be able to revisit assessments made by the Project Manager during the course of the works; however, there will need to be convincing evidence presented to show that these valuations ought to be departed from. As for agreements between the employer, contractor and project manager, first principles require that the intention of the parties in reaching these agreements be taken into account. In this case, the evidence confirmed that the parties intended their agreements to be binding and so they were treated as such.

For these reasons, when conducting any valuation or revaluation exercise, the contemporaneous evidence as to agreed value or price will be convincing and ought to be considered, even if just in the alternative, by any expert.

Finally, even outside of the field of construction, this judgment provides guidance to counsel, witnesses and parties to proceedings as to the importance of the preservation of evidence, the duties of expert witnesses (and those instructing them) when preparing and presenting witness evidence, and the need to be mindful of the prior decisions in a case that has a longer litigation history.

With MMT being awarded indemnity costs less 5% following the liability trial, these mistakes as to conduct may be expensive ones to make.

"When conducting any valuation or revaluation exercise, the contemporaneous evidence as to agreed value or price will be convincing and ought to be considered"

Can a liquidator adjudicate a dispute that arose under a construction contract?

In August 2018, in *Michael J Lonsdale (Electrical) Limited v Bresco Electrical Services Limited (In Liquidation)*,¹ Mr Justice Fraser had the opportunity in the context of CPR Part 8 proceedings to clarify whether or not a liquidator can pursue a claim in adjudication arising out of a construction contract.

As **Andrew Weston** explains here, this was a case in which Pythagoras Capital Limited (on behalf of Bresco's liquidator) commenced an adjudication in respect of monies claimed from Lonsdale arising out of a disputed termination, but were they right to have done so?

In Lonsdale, the question to be answered, as framed by Mr Justice Fraser, was *"Whether a company in liquidation can refer a dispute to adjudication when that dispute includes (in whole or in part) determination of a claim for further sums said to be due to the referring party from the responding party?"*

For the reasons summarised below, Mr Justice Fraser confirmed the precedence of rule 14.25 of the Insolvency Rules 2016 when it comes to claims under construction contracts pre-dating the liquidation. Mr Justice Fraser firmly dismissed any notion that such claims might be referred to adjudication after a company has been placed in liquidation.

Background

Bresco entered into a contract with Lonsdale for electrical installation works in August 2014. Bresco left the site in December 2014 before the works had been completed. Both Bresco and Lonsdale alleged wrongful termination against the other. Bresco then became insolvent and entered into liquidation on 12 March 2015.

In October 2017, Lonsdale intimated a claim against Bresco, claiming the direct costs of completing the works said to have been caused by this termination. Bresco's liquidator responded that it was Lonsdale who had wrongfully terminated, and so owed Bresco money.

On 18 June 2018, Bresco commenced an adjudication against Lonsdale under the contract. Lonsdale invited the adjudicator to resign on the basis he had no jurisdiction, given Bresco had been placed in liquidation. The adjudicator declined the invitation, having concluded he did have jurisdiction.

Lonsdale commenced Part 8 proceedings and the parties agreed to stay the adjudication pending the determination of Lonsdale's claim.

The Part 8 proceedings

The Judge's starting point was the Insolvency Rules 2016, rule 14.25: *"An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other", where "mutual dealings" include mutual credits/debts between the company and a creditor.*

1. [2018] EWHC 2043 (TCC).
2. [2015] EWHC 1065 (Ch).
3. 4162-0704-2580, v. 1

The Judge reviewed the relevant authorities and found that the respective claims and counterclaims of Lonsdale and Bresco were caught by rule 14.25 as they were "mutual dealings" between the company in liquidation (Bresco) and the creditor (Lonsdale). The mandatory Insolvency Rules required that an account must be taken of those dealings in each direction to arrive at a single net balance due either to, or from, the company in liquidation, as at the date of liquidation.

The Judge concluded:

"...as at the date of the liquidation, and as a direct result of what occurs upon the appointment of the liquidator and the operation of the Insolvency Rules, the disputes between Lonsdale and Bresco that consist of claims and cross-claims between them become replaced with a single debt. That is thereafter the dispute, namely the result of the account that the 2016 Rules require to be taken to determine the balance payable in which direction."

The only dispute that remained in law was that of taking the account under the 2016 Rules. The only claim that Bresco could have, subject to that account of the mutual credits/debts with Lonsdale, was a claim to the net balance under rule 14.25(2). The net balance due to one party or the other arises under the Insolvency Rules and not the contract. Accordingly, there could be no jurisdiction for an adjudicator to decide the issue.

"A company in liquidation cannot adjudicate when the dispute includes determination of any claim for further sums said to be due to the referring party."

Bresco sought to rely on practical and commercial aspects of the situation in light of the fact that liquidators across the country regularly refer disputes to adjudication. Bresco also cited the judgment in *Philpott v Lycee Francais Charles de Gaulle School*,² where the Judge was asked by the liquidators of a company in voluntary liquidation to consider in the context of cross-claims whether adjudication was available; the Judge confirmed that it was. Mr Justice Fraser was clear that factors such

as the conduct of many insolvency practitioners cannot affect the correct legal characterisation of disputes as mutual dealings which are set down in the Insolvency Rules, which have statutory force. With respect to the judgment in *Philpott*, Mr Justice Fraser made clear that he considered those passages concerning adjudication where a company is in liquidation simply to be wrong and declined to follow the corresponding reasoning.

The decision

Mr Justice Fraser held in favour of Lonsdale. Lonsdale was granted the declarations sought and the adjudication was not allowed to continue as the adjudicator did not have jurisdiction to determine the dispute referred to him.

When can a party seek a stay of an adjudicator's decision?

It is thought that the advent of adjudication has led to there being more new case law in construction disputes in the past 20 years than there has been over the previous 100. Certainly there was a time when it felt that every time you went to court for an enforcement hearing you were all dealing with something new. More recently the pace of change has slowed, but it has not stopped. As **Martin Ewen** sets out, 2018 saw the extension of the long-established grounds on which a party can seek a stay of adjudicator's decision.

Introduction

In the case of *Gosvenor London Limited v Aygun Aluminium UK Limited*¹, Gosvenor made an application for summary judgment in respect of an adjudicator's decision which was made in its favour against *Aygun Aluminium Limited* ("Aygun"). The amount of the decision was £553,958.47 plus VAT. The application was resisted by Aygun on the basis of fraud. Aygun also brought its own application for a stay of execution, in the event that its opposition to the summary judgment application was unsuccessful.

The facts

Gosvenor and Aygun were parties to a contract entered into in May 2016 ("the Contract") for Gosvenor to perform certain cladding and other associated works for the installation of a facade at the Ocean Village hotel in Southampton.

The project fell into delay and Gosvenor referred a dispute to adjudication. The adjudicator awarded £553,958.47 plus VAT to Gosvenor, which was for outstanding labour costs.

The adjudication enforcement proceedings

In the adjudication enforcement proceedings, Aygun raised, as part of its defence, an allegation of fraud. It said that following some enquiries "it is now the Defendant's case that a substantial proportion of the Claimant's award is based on sums fraudulently invoiced to the Defendant". In essence, Aygun claimed that there was an "enormous discrepancy" between sums invoiced by Gosvenor and works actually done or labour actually provided. Aygun argued that at least £300,000 had been fraudulently invoiced. Aygun accepted that it had not raised this as a defence in the adjudication, arguing that the relevant information was not available to it at that time.

Despite the range of allegations and witness statements served by Aygun, Gosvenor had served no evidence at all. The Judge described this as "extraordinary".

The Judge considered the principles that apply on enforcement when fraud is alleged. If fraud is to be raised in an effort to avoid enforcement, it must be supported by clear and unambiguous evidence and argument. Further, a distinction has to be made between fraudulent acts that could have been raised as a defence in the adjudication and those which neither were nor could

reasonably have been raised but which emerged afterwards.

The Judge recognised that a particular issue for Aygun was why it had not raised some of these issues in the adjudication. For example, the valuation evidence showing the large discrepancy could have been, and the Judge thought should have been, deployed in the adjudication.

Therefore the Judge allowed the application for summary judgment, before considering the matter of Aygun's application for a stay of execution in the event that Gosvenor succeeded in obtaining summary judgment.

The application for a stay

Aygun raised a number of factors in its application. In summary, they were as follows:

1. The points it had raised in respect of what it said was fraud by Gosvenor.
2. The financial viability (or lack of) of Gosvenor.
3. If paid, the money would be dissipated before the hearing of Aygun's challenge to the substantive dispute dealt with in the adjudicator's decision.
4. Statements made by Mr Popa, a director of Gosvenor, that if Gosvenor were to face a claim from Aygun he would "immediately wind up the company" and Aygun "would never get a penny out of him".
5. The fact that other companies in which Mr Popa was a director had been liquidated.

The statutory company accounts of Gosvenor were also a material factor. The company accounts for Gosvenor showed significant discrepancies. The Judge described the explanation of the discrepancies (including those given by the accountant at the hearing) as "so obviously wrong, that had the matter not been so serious, it would have been verging on the comical".

Turning to the principles that apply to a stay of enforcement of a judgment given on an adjudicator's decision, the Judge noted that in *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC) [2005] BLR 374 the court set down the principles that apply. In that case, the application sought a stay on the basis that the claimant would be unable to repay the sum if the

1. [2018] EWHC 227 (TCC)

2. [2018] EWHC 177 (TCC)

defendant were successful in an arbitration on the substantive issues. The application was refused and a stay was not granted. In that case the judge set out the principles that apply when considering a stay, which can be summarised as follows:

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

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

(c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion with considerations (a) and (b) firmly in mind.

(d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances rendering it appropriate to grant a stay.

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

(f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

The above principles have been applied over 40 times in the Technology and Construction Court and are the foundation for consideration of whether a stay of execution of an adjudicator's decision should be granted or not.

The Judge decided that there were "special circumstances" in this case which justified a stay of execution. The Judge categorised these as follows:

(i) Facts relating to the alleged

fraudulent acts which should have been deployed before the adjudicator.

(ii) Facts relating to the behaviour in January 2018 of Gosvenor's employees, including threats and intimidation, in relation to the enforcement proceedings.

(iii) Facts relating to the unsatisfactory and contradictory accounts of Gosvenor.

These represented an extension to the points listed in the *Wimbledon v Vago* case. However, as the Judge said, there was no question of fraud in that case and that case could not be expected to deal with such a situation. The Judge therefore added the further following principle:

"(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

Conclusions and implications

The Judge made it clear that this item was only likely to arise in a very small number of cases, and in exceptional factual circumstances. A high test was to be applied as to whether the evidence reached the standard necessary for this principle to apply. Further, it was not intended to reopen the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases. Here the evidence was that Gosvenor (or those who control it) "would specifically organise its financial affairs, other than in the ordinary course of business, to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied".

"The clear inference was that Gosvenor would specifically organise its financial affairs to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied".

Accordingly it was appropriate to stay the execution of the adjudication decision.

Note: Around the same time the case of *Equitix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited*² also addressed the grounds for a stay of execution of an adjudicator's decision.

In that case the court also considered the principles in *Wimbledon v Vago*. The Judge said that the "financial information made available by the claimant, and thus available to the court, is unsatisfactory", giving examples, before concluding: "I regret, therefore, that I am bound to conclude that the claimant has been much too economical with the information relating to its financial position. There may be a number of reasons for that, but the absence of the information requested and required by the Companies Act is another factor when the court is considering a stay of execution."

The Judge decided that although the claimant was entitled to summary judgment in the full amount ordered by the adjudicator, the defendant was obliged to pay only £4.5 million, and to bring a further £1 million into court. There was a stay of execution in respect of the remaining sum (around £4.5 million).

"I am bound to conclude that the claimant has been much too economical with the information relating to its financial position."

The Bribery Act 2010: a refresher

Claire King is the editor of *Insight*, our monthly newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In April 2018, eight years on from the introduction of the Bribery Act 2010, Claire provided a refresher on what the Act means for those in the construction industry. If you would like to receive regular copies of *Insight* please email Claire: cking@fenwickelliott.com

1. By Claire King and with thanks to Laura Bowler for her research and assistance.
2. See for example PWC's 2014 survey entitled "Fighting corruption and bribery in the construction industry" part of their "Engineering and construction sector analysis of PWC's 2014 Global Economic Crime Survey" which noted that 49% of the respondents reporting economic crime say it includes bribery and corruption – the highest in any industry. They further noted that 70% of the most serious economic crimes were perpetrated by insiders.
3. The Bribery Act came into force on 1 July 2011.
4. See Sections 1(2) and (3) of the Bribery Act. The relevant sections state: "1(2) Case 1 is where—
a) P offers, promises or gives a financial or other advantage to another person, and
(b) P intends the advantage—
(i) to induce a person to perform improperly a relevant function or activity, or
(ii) to reward a person for the improper performance of such a function or activity.
(3) Case 2 is where—
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity."
5. See Section 1(2) of the Bribery Act.
6. Improper performance is defined at Sections 3, 4 and 5 of the Bribery Act. By way of summary only, it means performance which amounts to a breach of expectation that a person will act in good faith, impartially, or in accordance with a position of trust.
7. See Section 1(3) of the Bribery Act.
8. "The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing", Ministry of Justice, March 2011, Foreword <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
9. "The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing", Ministry of Justice, March 2011, Paragraph 28 <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

The Ministry of Justice's guidance on the Bribery Act 2010 (the "**Bribery Act**") from March 2011 stated the obvious when it wrote "everyone agrees that bribery is wrong...". With concerns about economic recovery being dented by the Bribery Act, Kenneth Clarke (the Secretary of State for Justice at the time) was at pains to emphasise:

"We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good because it creates the conditions for free markets to flourish."

Globally it is estimated that between 10% and 30% of the value of construction output is lost due to corruption. Closer to home there is evidence that corruption is also a significant issue within the construction sector² and that, internationally, corruption levels are rising generally.³

With the eighth anniversary of the Bribery Act receiving its Royal Assent (granted on 8 April 2010)⁴ this Insight provides a refresher of the key provisions of the Bribery Act, how it impacts on the construction industry and also reviews some of the most high profile prosecutions arising in the last few years.

Key offences for individuals

The Bribery Act consolidated a number of previous common law and statutory offences to create the following key offences:

1. Bribing another person (active offence) pursuant to Section 1;
2. Accepting a bribe (passive offence) pursuant to Section 2;
3. Bribing foreign public official pursuant to Section 6.

In relation to Section 1 of the Bribery Act, a bribe can be an offer, promise or a financial or other advantage to another person⁵ the aim of which is either:

1. Intended to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance;⁶ or
2. Where the person offering the advantage knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance⁷ of a relevant function or activity.⁸

In relation to Section 2, four broad categories of requesting or receiving bribes were created. These again incorporate the notion of improper performance of an activity or function caused by the bribe. The definition of financial or other advantage is also along the same lines as for the Section 1 (active) offences.

What is a "bribe"?

What is clear from the wording of all of these sections is that bribery is not restricted to offering a simple monetary reward. The wording covers a broad range of ways in which bribery can be committed.⁹ So what form could a bribe take if it doesn't constitute the classic "brown envelope"?

Potential "bribes" (depending on their context) include corporate hospitality, Christmas gifts (a crate of Champagne for example), employing someone related to an organisation or awarding a contract to someone in expectation of a favour being repaid.

"Addressing bribery is a good thing because it creates the conditions for free markets to flourish"

Perhaps one of the most difficult examples is in respect of corporate hospitality. Is what is being offered just a day at Wimbledon or is it an inducement or reward for improper performance? The Ministry of Justice acknowledges in their guidance that "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix"¹⁰ but draws upon principles, such as timing, to consider whether the reality of a corporate event is different from the perception.

Taking a client to Wimbledon will not fall foul of the guidelines in and of itself. However, if the event exceeds the industry norm¹¹ (e.g. paying for a whole team to go on an expensive skiing weekend) or, for example, occurs during a tender process rather than upon completion of the Contract, then it could be viewed differently.

Likewise, those who take or receive referral fees (e.g. letting agents who are paid

referral fees in return for introducing fit out contractors to their clients) need to be careful that the nature and extent of the arrangement does not fall within the scope of the Bribery Act. Indeed, some trade organisations provide further guidance and advice in respect of these types of issues including the RICS. Transparency is key.

The key test that has to be applied pursuant to Sections 3 and 4 of the Act is that of expectation. In particular the test is:

“what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.”
[Emphasis added]

The fact the expectation is of a reasonable person in the United Kingdom is significant because it means standards in this country are expected to be imposed abroad. The only caveat to this is where a local custom or practice in another country *“is permitted or required by the written law applicable to the country or territory concerned.”*

In other words, the fact that a country’s public officials are used to being bribed (or even actively expect such bribes) does not mean meeting their expectations isn’t an offence under the Bribery Act. The test is what a reasonable person would expect in the United Kingdom.

Section 7 - Failure of commercial organisations to prevent bribery

The key part of Section 7 of the Bribery Act provides that:

“(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.”
[Emphasis added]

As a result of this section a commercial organisation can be prosecuted if an *“associated person”*¹² bribes another person

intending to obtain or retain business or an advantage for the relevant commercial organisation.¹³

What is an “associated person”?

It should be noted that an *“associated person”* includes anyone who performs services for the company (whether as an employee, agent, subsidiary or even a Joint Venture Partner).¹⁴ This means that subsidiary companies in different jurisdictions can end up costing the parent company in the UK a fortune in fines. Indeed, Subcontractors and Suppliers could also land Main Contractors on the hook unless appropriate precautions and procedures are taken and put in place to prevent bribery from or by them.

What are “adequate procedures”?

Companies can therefore be held liable for the conduct of their associated persons unless they can show, on the balance of probabilities, that they had *“adequate procedures”* in place to prevent such conduct. Six principles were laid down by the Ministry of Justice Guidance intended to assist in determining what adequate procedures are. These include:

1. Proportionate procedures;
2. Top-level commitment;
3. Risk assessment;
4. Due diligence;
5. Communication (including training);
6. Monitoring and review

The specific procedures that any company needs to have in place to prevent bribery depend on the size and risk profile of an organisation. However, key measures include: explicitly prohibiting bribery of any kind; implementing systems to stop it happening; detailed procedures on gifts, hospitality etc.; training and whistle blowing procedures to name but a few. Contractors and Consultants will normally be expected to produce their anti-bribery policy as part of the tendering process. Likewise, anti-bribery provisions are now standard in construction standard forms.

The JCT forms provide that an Employer may terminate the Contractor’s employment if the Contractor has committed an offence under the Bribery Act.¹⁵ The NEC4 suite of Contracts provides that the Contractor will not perform a *“Corrupt Act”*¹⁶ and will prevent a

Subcontractor/Supplier from undertaking a corrupt act as well as ensuring they have similar provisions within their Subcontracts.¹⁷ A right to terminate exists in certain circumstances where there has been a corrupt act.¹⁸

FIDIC note that *“corruption’s taint includes the procurement of design and construction”*¹⁹ and urges both Member Associations and Member Firms to develop and maintain high ethical systems in order to prevent corruption and bribery from occurring. The FIDIC Pink Book provides that the Employer is able to terminate the Contract with 14 days’ notice if the Employer has determined that the Contractor has *“engaged in corrupt, fraudulent, collusive or coercive practices.”*²⁰

Depending on the size of a project, its location and general risk profile more comprehensive wording may be required. For example, some contracts impose indemnity provisions should the agreement’s obligations in respect of bribes (including a duty to notify) be breached with the indemnification carved out from any liability cap.

Recent case law and penalties

So what type of cases have been brought to date by the Serious Fraud Office (*“SFO”*) (which is the main prosecuting body for bribery and corruption offences)? Well there are surprisingly few but the two key ones are *R v Sweett Group Plc* and the more recent *Rolls Royce* case.

R v Sweett Group Plc (“Sweett”)

The first company to achieve the dubious pleasure of being successfully convicted under the Bribery Act was a construction company.

*Sweett*²¹ were convicted under Section 7 of the Bribery Act on 19 February 2016, for failing to prevent an employee in Dubai (working for Cyril Sweett International Limited, a UAE subsidiary of Sweett) from bribing a senior executive of a development company (known as AAAI) to secure the award of a contract for the building of the Rotana Hotel in Abu Dhabi.

The offence was described by the judge as a "system failure" of Sweett as it had taken place over a long period of time. A fine totalling £2.25 million was ordered and Sweett's share price sank by more than 20%.

Sweett were unable to rely on the statutory defence of having adequate procedures in place to prevent the bribery occurring because an accounting firm had produced a number of reports calling for better internal governance but little had been done in light of them.

Indeed, the SFO did not offer Sweett what is known as a Deferred Prosecution Agreement ("DPA") due to their perceived lack of cooperation and self-reporting.²² This also increased the level of the fine applied. In particular, Sweett asked the AAAL to say the amounts were legitimate rather than act transparently.

In other words, Sweett's conduct after the bribery came to light made their position far worse.

Rolls Royce

Perhaps the highest profile bribery case so far under the Bribery Act has been against Rolls Royce.

Rolls Royce²³ were made to pay approximately £600 million due to two subsidiaries committing fraud, bribery and corruption offences over a number of years. The investigation took four years to bring about a successful conviction and included a review of over 30 million documents,²⁴ the discovery of agreements to make corrupt payments to agents in connection with the sale of Trent aero engines spanning over 17 years,²⁵ corrupt payments in connection with the supply of gas compression equipment in Russia²⁶ and failure to prevent employees of Rolls Royce providing inducements in China and Malaysia between 2010 and 2013.²⁷

Importantly Rolls Royce were offered a DPA by the SFO which meant they were able to avoid being debarred from public works contracts (a very significant part of Rolls Royce's business). This was subject to some debate in the press.

Conclusion

There is no doubt that the Bribery Act can have real teeth, both in the UK and abroad, although the number of prosecutions has been relatively small to date. The consequences in terms of fines as well as in respect of reputation are extremely serious. As such it is essential to keep the provisions of the Bribery Act in mind and ensure that procedures are in place to, ideally, ensure that bribery will not take place in the first place but also, if the worst comes to the worst, provide a defence to a prosecution.

10. See Section 7 of the Bribery Act.
11. See Section 8 of the Bribery Act.
12. Clause 8.6 JCT Design and Build Contract 2016, Clause 6.6 JCT Minor Works Building Contract, Clause 8.6 Intermediate Building Contract 2016.
13. Core Clause 18.1 NEC4 Engineering and Construction Contract, Core Clause 17.1 NEC4 Professional Services Contract, Core Clause 18.1 NEC4 Design, Build and Operate Contract.
14. Core Clause 18.2 NEC4 Engineering and Construction Contract, Core Clause 17.2 NEC4 Professional Services Contract, Core Clause 18.2 NEC4 Design, Build and Operate Contract.
15. See Clause 91.8 of NEC4 Engineering and Construction Contract, June 2017.
16. FIDIC Policy Statement < http://fidic.org/sites/default/files/fidic_policy_corruption.pdf>
17. Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (FIDIC Pink Book), Clause 15.6.
18. R v Sweett Group Plc (unreported). See the SFO's Press Release dated 19 February 2016.
19. As set out on the SFO's website: "A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions. DPAs can be used for fraud, bribery and other economic crime. They apply to organisations, never individuals.
The key features of DPAs are:
 - They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).
 - They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'
 - They avoid lengthy and costly trials
 - They are transparent, public events"
20. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036.
21. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 20.
22. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 4(iv).
23. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 4(vi).

Concurrent delay: allocating the risk

Concurrent delay is an issue which continues to be a topic of much debate. **Marc Wilkins** explores how recently, the spotlight has turned to the enforceability of clauses which seek to allocate the risk of concurrent delays.

In last year's Annual Review Jeremy Glover reported on the decision of Mr Justice Fraser in *North Midland Building Limited v Cyden Homes Limited*.¹ In July of this year the case came before the Court of Appeal.²

The dispute concerned a contract based on a heavily amended 2005 edition of the JCT Design and Build standard form, under which Cyden Homes had engaged North Midland as contractor on a project to design and build an exceptionally large home, together with substantial outbuildings, for members of the Dyson family.

The works were delayed for various reasons, and a dispute arose between the parties as to North Midland's entitlement to extensions of time. A major point of dispute related to whether a bespoke amendment, which incorporated a new sub-clause 2.25.1.3(b) into the extension of time machinery, took effect to exclude North Midland's entitlement to an extension of time for delay where Relevant Events were concurrent with delay events for which North Midland was responsible. Sub-clause 2.25.1.3(b) stated as follows:

"any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account".

Essentially, the intention of this new clause was to reverse the accepted position under the unamended JCT extension of time provisions, which was to maintain the contractor's entitlement to an extension of time in the event of concurrent delay (a position which has obtained judicial approval)³

In the Part 8 proceedings before Mr Justice Fraser sitting in the TCC, North Midland had sought two declarations. First, that the effect of sub-clause 2.25.1.3(b) was to render time "at large" in circumstances where a delay caused by a Relevant Event is concurrent with any delay for which North Midland is responsible. Second, that in such circumstances, North Midland's obligation was to complete its works within a reasonable time, thus rendering the liquidated damages provision void.

North Midland sought to rely on the doctrine of prevention, arguing that it had been prevented from completing its works by Cyden Homes, and therefore time had been set at large. In dismissing this argument, Mr Justice Fraser held that the prevention principle simply did not arise and that this case was purely concerned with the correct construction of the clause in issue. As to the meaning of sub-clause

2.25.1.3(b), Mr Justice Fraser found that it was "crystal clear".

Mr Justice Fraser made clear that save in certain specific cases such as illegality, parties are free to contract on whatever terms they choose, and such terms will override any common law doctrine such as the prevention principle.

North Midland appealed that decision on two grounds: (1) that the clause allocating risk in relation to concurrent delay is contrary to the overarching principle of law or public policy and is of no effect, and in the alternative (2) that a term ought to be implied which would prevent Cyden Homes from deducting liquidated damages in respect of periods of concurrent delay. Here, we are interested in the first ground of appeal.

The Court of Appeal Decision

Whilst Mr Justice Fraser's judgment was received positively by most, there were some who expressed doubt about it. However, the Court of Appeal unanimously upheld Mr Justice Fraser's decision, confirming that clauses which seek to allocate the risk of concurrent delay to the contractor are, in principle, valid and enforceable. The lead judgment, which was given by Lord Justice Coulson, provides a useful reminder of the principles of freedom of contract and prevention. It also provides some helpful comments in relation to concurrent delay.

- **Clear and unambiguous terms**

Lord Justice Coulson held that clause 2.25.1.3(b) of the contract was unambiguous, and agreed with Mr Justice Fraser that it was "crystal clear". Its meaning and effect was that on the happening of two concurrent delay events, one being a Relevant Event, and the other being an event for which North Midland was responsible, there would be no entitlement to an extension of time.

- **Freedom to allocate risk**

Lord Justice Coulson made clear that the most important reason for rejecting the first ground of appeal was that clause 2.25.1.3(b) was a term which had been expressly agreed between the parties. Having examined the authorities, he confirmed the position (as stated by Mr Justice Fraser at first instance) that the parties were free to contract out of some or indeed all of the effects of the prevention principle.

1. Neutral Citation Number: [2017] EWHC 2414 (TCC).

2. Neutral Citation Number: [2018] EWHC Civ 1744.

3. See *Walter Lilly and Co Limited v Giles Mackay and Another* [2012] EWHC 1773 (TCC).

4. 18(6) Const. L.J. 436.

5. SCL Paper 179, February 2013, available at <http://scl.org.uk>

6. See for example the 2017 FIDIC forms of contract.



- **The prevention principle**

In light of the clear and unambiguous nature of clause 2.25.1.3(b), and in the absence of express or implied terms which might have assisted North Midland (there were none on the facts), the only way North Midland could have avoided the effect of the clause was to persuade the Court that the clause was rendered inoperable by reason of some overarching principle of law or legal policy.

North Midland argued that the prevention principle was a matter of legal policy which would operate to prevent Cyden Homes enforcing the clause. However, North Midland's arguments in this regard were rejected by the Court of Appeal.

In addressing this argument, Lord Justice Coulson provided a useful reminder of the origins of the doctrine of prevention and its operation. He noted the importance of the decision of Jackson J in *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No.2)* [2007] BLR 195, referring to Jackson J's neat summary of the ambit and scope of the prevention principle in that case, i.e. that (1) legitimate actions by an employer under a construction contract which cause delay to completion may be characterised as prevention; (2) where the contract provides for an extension of time in respect of those events, time will not be set at large, and (3) any ambiguity in the extension of time clause should be construed in favour of the contractor.

Lord Justice Coulson held that here the prevention principle was "not engaged" as there was no contravention of either of the first two principles identified by Jackson J in *Multiplex*. He noted that among the list of Relevant Events identified at clause 2.26, was "any impediment, prevention or dispute, whether by act or omission, by the Employer..." which gave rise to an entitlement on the part of Cyden Homes to an extension of time. Accordingly, time would not be set at large by the occurrence of those events. In relation to the third principle, Lord Justice Coulson said this was not triggered since the meaning of the clause in question was "crystal clear".

In any event, Lord Justice Coulson made clear that the prevention principle does not have the status of an overriding rule of public or legal policy, and that it can only operate by way of implied terms. As such, the prevention principle is not capable of overriding an express term of the contract.

- **Freedom to allocate risk**

Lord Justice Coulson made clear that the most important reason for rejecting the first ground of appeal was that clause 2.25.1.3(b) was a term which had been expressly agreed between the parties.

Having examined the authorities, Lord Justice Coulson confirmed the position (as stated by Mr Justice Fraser at first instance) that the parties were free to contract out of some or indeed all of the effects of the prevention principle. In effect, that is exactly what North Midland and Cyden Homes had done, in terms that were crystal clear.

Concurrent delay

Whilst the question of whether there was in fact concurrent delay was not an issue to be decided in this appeal, Lord Justice Coulson addressed briefly the issue of concurrent delay. In doing so he gave the Court of Appeal's approval to the definition of concurrent delay put forward by John Marrin QC in his article "Concurrent Delay" published in the *Construction Law Journal* in 2002⁴ and again in his 2013 SCL paper entitled "Concurrent Delay Revisited".⁵ That definition is as follows:

"A period of project overrun which is caused by two or more effective causes of delay which are of approximate equal causative potency."

Lord Justice Coulson left open the debate about whether or not an employer could be said to have prevented completion by the contractor in circumstances of concurrent delay, given that the contractor would have been in culpable delay in any event. Although it was raised in the proceedings, a finding on this question was considered unnecessary for the purposes of disposing of the appeal, and unwise without hearing full submissions on the point.

Comment

This decision confirms the already accepted position that absent any specific public policy grounds which might justify a departure from the express agreement of contracting parties, the principle of freedom of contract will prevail. Therefore, a clearly worded agreement which seeks to remove a contractor's entitlement to an extension of time in the event of concurrent delays will be valid and enforceable. From a practical perspective, the judgment is helpful in that it effectively

approves a form of wording that would achieve this aim in a contract based on the JCT forms, and which could easily be adapted to suit other standard and bespoke forms of construction contract.

It is worth mentioning that as well as reversing the accepted position in respect of the unamended extension of time machinery in the JCT standard form, clauses such as the one in this case will also be in conflict with the approach adopted in the Society of Construction Law's Delay and Disruption Protocol (2nd edition) in relation to concurrent delay. However, there has for a while been a growing trend towards amending standard form contracts to provide certainty in relation to how the risk of concurrent delay is allocated. This trend is already starting to feed into standard forms, albeit with neutral wording which simply highlights the issue of concurrent delay, leaving it to parties to include special conditions allocating the risk.⁶

The financial consequences of clauses such as the one in this case will be plain to contractors: where there is a period of concurrent delay to completion, the contractor will no longer be entitled to loss and expense for that period and will face deductions or claims for liquidated damages. Therefore, employers may well find contractors are reluctant to accept such clauses or, if they do, the additional risk will be reflected in their price. That said, whilst concurrent delay is an issue that is often raised on delayed projects, true concurrency of the type defined by John Marrin QC rarely occurs.

FIDIC, force majeure, exceptional events and the "but for" test

Under the 2017 edition of the FIDIC Rainbow Suite, clause 19 which was headed "force majeure" has been replaced by clause 18, "exceptional events". **Jeremy Glover** notes that this is an interesting change, especially given that the term "force majeure" is typically provided for within most civil codes, whereas it is not a term of art under the common law.

The essential scheme of the FIDIC Form has remained unchanged, namely for something to amount to an exceptional event, there must be an event which is beyond the control of the party affected and which the party affected could neither have foreseen or provided against before entering into the contract nor avoided once it had arisen. The event must also not be the fault of the other party. Under sub-clause 18.2 of the new second edition, the Contractor must give a Notice, in the proper form, within 14 days of becoming aware, or of the date when it should have become aware, of the exceptional event. Subject to this, under sub-clause 18.3, the Contractor may be entitled to an extension of time and/or recovery of costs incurred as a result. If the exceptional event is prolonged, the option of termination may arise.

A question that might arise is whether a Contractor can only rely on this type of clause in circumstances where it can show that it would have been able to perform the contract "but for" the exceptional event, or whether it is enough to show that the event in question prevented the Contractor from performing its obligations under the Contract. This question was considered by Mr Justice Teare in the case of *Classic Maritime Inc. v Limbungan Makmur SDN BHD & Anr.*¹

On 5 November 2015, the Fundao dam, in the industrial complex of Germano in Brazil where iron ore is mined, burst. Iron ore production immediately stopped and shipments were suspended. Classic had entered into a long-term contract of affreightment (the "COA") for the carriage of iron ore pellets from Brazil to Malaysia. Limbungan was the charterer under the COA. Limbungan relied upon the dam burst as a force majeure event excusing it from liability for failing to provide cargoes of iron ore pellets for shipment from Brazil to Malaysia. Classic disagreed and claimed damages for breach of contract.

Clause 32 of the COA provided as follows:

"Exceptions

Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God . . . floods . . . accidents at the mine or Production facility . . . or any other causes beyond the Owners'

Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party . . ."

Mr Justice Teare noted that the clause was described as "a force majeure clause" though as with the new FIDIC Contract, that phrase is not used in it. The Judge thought it was better described as an "exceptions clause". There was no dispute that the dam burst was an "accident at the mine". Limbungan said that as a result of the dam burst, it found itself unable to supply cargoes for shipment under the COA. Classic said that the collapse of the dam had no causative effect on the charterer because the shipments would not have been performed even if there had not been a dam burst.

Classic submitted that the effect of clause 32 was to impose a "but for" test of causation. Since the clause required Limbungan's failure to supply a cargo to "result from" the force majeure event (in this case the dam burst), and also for that event to "directly affect" the performance of Limbungan's obligation, Limbungan was required to prove that, but for the dam burst, it could and would have performed the COA in accordance with its terms.

Limbungan disagreed, saying that whilst clause 32 imposed a causation requirement in the sense that it had to be shown that the dam burst rendered performance of Limbungan's obligations impossible, it was not necessary for Limbungan to show that but for the dam burst it would have performed its obligations.

The Judge summarised the position in this way. Does the "but for" test have to be satisfied in a force majeure or exceptions clause which does not cancel the contract for the future, like a frustration clause, but provides a defence to a claim in damages for breach of the contract? The Judge felt that there was "an important difference" between a contractual frustration clause and what he had termed an exceptions clause. There was a difference between clauses which result in the discharge of a contract and the COA here:

"A contractual frustration clause, like the doctrine of frustration, is concerned with the effect of an event upon a contract for the future. It operates to bring the contract, or what remains of it, to an end so that thereafter the parties have no obligations to

1. [2018] EWHC 2389 (Comm).

2. 4130-9229-0072, v. 1

perform. An exceptions clause is concerned with whether or not a party is exempted from liability for a breach of contract at a time when the contract remained in existence and was the source of contractual obligations. It is understandable that a contractual frustration clause should be construed as not requiring satisfaction of the 'but for' test because that is not required in a case of frustration."

However, the "exceptions" in the contract here were different. It was not concerned with writing into a contract what is to happen in the event of a frustrating event. It was concerned with excusing a party from liability for a breach that has occurred. As the Judge said, in these circumstances, it would be a "surprise" that a party could be excused from liability where, although an event within the clause had occurred which made performance impossible, the party would not have performed in any event for different reasons. Therefore clause 32 required Limbungan to show that but for the dam burst the cargo would have been supplied.

"Does the 'but for' test have to be satisfied in a force majeure clause which provides a defence to a claim in damages for breach of the contract?"

Therefore the court went on to consider whether, but for the dam burst, Limbungan would have supplied cargo for the voyages which were the subject of the present claim. This was a factual issue. On the facts, the Judge doubted whether, but for the dam burst, Limbungan would have been able and willing to supply cargoes for shipment pursuant to the COA with Classic. Limbungan were unable to demonstrate that their inability to fulfil the COA was "resulting from" or "directly affected by" the dam burst. This was because Limbungan had not fulfilled the two shipments prior to the dam burst, and at the time of the dam burst it appeared unable and/or unwilling to supply cargoes for shipment pursuant to the COA.

Quantum

When it came to assessing quantum, Limbungan said substantial damages were not recoverable because, even if Limbungan had been able and willing to ship the cargoes but for the dam burst,

Classic would not have been entitled to substantial damages because the dam burst would in fact have prevented Limbungan from shipping any iron ore pellets. Classic described this as "an impermissible sleight of hand", from not being ready to perform the COA when liability was being assessed to being ready to perform when damages were being assessed. The Judge disagreed with Classic's approach noting that the recoverability of substantial damages depended upon the compensatory principle and therefore upon a comparison between the position of Classic as a result of the breach and the position it would have been in had Limbungan performed its obligations. Here, if, but for the dam burst, Limbungan had been able and willing to ship the five cargoes, no cargoes would in fact have been shipped because of the dam burst and the dam burst would, in that event, have excused Limbungan from its failure to make the required shipments.

So, contrary to the approach on liability, clause 32 of the COA worked in Limbungan's favour as far as quantum was concerned.

Conclusion

The dispute between Classic and Limbungan related to the performance of the COA. Did clause 32 set out circumstances which might excuse Limbungan from their breach of contract? In coming to the decision he did, Mr Justice Teare seemed to accept that there was a difference between clauses which result in the discharge of a contract (which did not apply the "but for" test) and the COA here, which exempted a party from liability for non-performance. Therefore it is likely that the "but for" test will apply, under English Law, to other similar "force majeure-type" clauses which merely exempt parties from liability for non-performance.

However, as noted above, whilst clause 18 of the FIDIC Form primarily deals with the effect on performance of an exceptional event, it does also potentially provide for termination. Mr Justice Teare's approach did not deal with this type of contract, so under common law there still may be a conflict about whether or not the "but for" approach to liability adopted in the Classic case would apply. However, parties alleging force majeure will no doubt be called upon to show that they would have been able to perform had the force majeure event not occurred.

Arbitration in the UAE

The Federal Arbitration Act ("FAA") came into effect in the UAE on 16 June 2018. **Ahmed Ibrahim** and **Jeremy Glover** provide a guide to the key provisions you need to be aware of.

The FAA had been long-anticipated and it undoubtedly serves to bring arbitration in the UAE in line with modern global arbitral practice. Indeed, the FAA is broadly based upon the UNCITRAL Model Law and therefore confirms the application of well-established arbitration procedures that are now adopted into law in more than 111 jurisdictions worldwide.

Applying to ongoing as well as new arbitrations, the FAA sets out the procedural law for arbitrations in the UAE. In doing so, it replaces Articles 203–218 of the UAE Civil Procedure Code ("CPC"). By Article 2, it applies to:

- Any arbitration seated in the UAE, unless the Parties have agreed that another law apply, provided there is no conflict with the public order and morality of the State.
- Any international commercial arbitration seated outside the UAE, provided the Parties have chosen the FAA to apply.
- Any arbitration arising from a dispute governed by UAE law.

It therefore does not apply to the DIFC and ADGM, financial free zones in Dubai and Abu Dhabi which have their own rules governing arbitrations which are based in those jurisdictions.

Formalities of the arbitration agreement

By Article 7 of the FAA, an arbitration agreement must be in writing. This can include where the agreement is part of a document signed by the parties or where the agreement is contained in an exchange of correspondence, which can include an exchange by way of email. Article 5(3) permits incorporation of the arbitration agreement by reference to any other document containing an arbitration clause; this will constitute an agreement to arbitrate provided that reference is clear both in its meaning and in stating that it forms part of the agreement.

By Article 4(1), when the arbitration agreement relates to a company, it can only be concluded by an authorised representative who has authority to arbitrate. This is important because one of the grounds for challenging an arbitral award, set out in Article 53(c), is that the party to the arbitration does not have the legal capacity to enter into the arbitration. For a UAE LLC, this usually means being

either the General Manager or a person having the authority to act on behalf of the General Manager.

There has been a long debate as to whether this authority should be express or "apparent" authority should suffice. The position in light of the old law was the same in terms of requiring the arbitration agreement be executed by the General Manager something confirmed in numerous decisions by the court of cassation. Until 2014, UAE courts did not recognize the apparent authority concept in concluding an arbitration agreement. However in 2014, the Dubai Court of Cassation in case number stated:

"The manager may vest in any person all or part of his powers unless the same is prevented under the Company's memorandum of Association. In such case the second agent shall be the representative of the company and his acts shall be valid towards the company. It is also established that in legal precedence of this Court that if the name of a certain company is mentioned in an agreement and another person signed such agreement, this shall constitute a legal presumption affirming that the person who signed it did so for and on behalf of the company. Hence the effects of such agreement shall be added to the company's rights and obligations, as the person who is delegated in such case shall be considered to be the company's representative." [emphasis added]

In that judgment¹, the following two-pronged test establishes the authority of an individual to enter into an agreement (which includes an arbitration clause) on behalf of a company as a matter of UAE law:

- The company is required to be named as a contracting party in the agreement; and
- The individual signing the agreement does so in their capacity as representative of the company.

In our view, the new FAA does not change the position of apparent authority as developed by Dubai Courts.

For companies not incorporated in the UAE, the wording of Article 53(c) suggests that when deciding whether the signatory

1. Following this judgement, the Dubai Court of Cassation adopted a more relaxed approach in requiring a special power of attorney – see for example Dubai Court of Cassation decisions 386/2015 (Real Estate), and 17 of 2016 (Real Estate).
2. The FAA does not address Article 257 of the Penal Code., which provides that any arbitrator or expert witness may be subject to criminal prosecution if either party alleges that they have acted unfairly, or not independently.
3. Thereby incorporating the principle of kompetenz-kompetenz.
4. Although the Tribunal can extend this by a further 15 days, presumably to cater for requests which come in at the end of the 30-day period.
5. By Article 29, the language of the arbitration shall be Arabic unless agreed otherwise.
6. 4125-7653-0712, v. 3-7653-0712, v. 2

has the necessary authority, what matters is whether that signatory has the legal capacity or authority "to dispose of the disputed right". This suggests that, where a company is incorporated in England and Wales, any dispute as to whether or not the party had that authority will be determined under English law.

Arbitrators

The default number of arbitrators is three. By Article 10, when approached a potential arbitrator must disclose in writing anything which relates to their possible independence and/or impartiality. This is entirely in keeping with international practice and, for example, Article 9.1 of the DIAC rules.²

The Tribunal does have power to rule on its own jurisdiction.³ If a party wishes to object to any ruling, by Article 19, it must do so within 15 days. The court must then issue a decision on the matter within 30 days.

The arbitration process

As noted above, the FAA applies to all ongoing arbitrations. That said, it is not thought that the FAA will have a significant impact on the procedures of any arbitrations that are already under way. For example, the FAA does not change the Tribunal's general powers to determine the procedure of the arbitration or would not impact upon, say, the parties' choice of the DIAC Rules as the applicable procedural rules or any agreement to follow the IBA Rules for the giving of evidence. Article 23(1) provides that parties may agree on the procedures to be followed by the Arbitral Tribunal, including making these procedures subject to the effective rules in any arbitration institution. Further, the FAA confirms the continued applicability of certain provisions from the now superseded Civil Procedure Code, including that the law must not conflict with notions of public order or morals (Article 2(1)).

By Article 33 of the FAA, the Tribunal is empowered to decide the procedures and methods of putting forward evidence. This is provided that, in compliance with Article 26, each party is given an equal opportunity to present its case. Article 33 includes specifying time limits or the method for exchanging evidence. Giving this type of authority to the Tribunal is entirely in keeping with the current international drive to ensure that arbitration provides for a proportionate and efficient means of dispute resolution.

Articles 28, 33(3) and 35 make it clear that hearings can be held through what are termed "modern means of communication" without the need for "the physical presence" of the parties, thereby confirming that the use of video-conferencing or maybe telephone hearings is permitted, a potentially cost-saving measure when Tribunals, parties and witnesses are often spread across the globe. Article 28 seems to go further and enables the Tribunal to hold arbitration hearings in any venue that the Tribunal considers appropriate, taking into account the circumstances of the case. As there is no restriction on the venue selection, this in theory means that the Tribunal may decide to hold hearings outside of the UAE. However, until this is tested by UAE courts, it would be safer to select the venue within the UAE, or to obtain the parties' consent to hold the hearing outside the UAE.

"Giving the Tribunal power to decide the procedures and methods of putting forward evidence is entirely in keeping with the current international drive to ensure that arbitration provides for proportionate and efficient means of dispute resolution."

Article 33(3) also confirms that the hearing, unless agreed otherwise, is to be held in private, a reminder of the confidentiality of the arbitration process. Parties should, however, be aware that the FAA does not provide that the ratification process in the local courts must be kept confidential.

The Tribunal, by Article 32(3), may choose to proceed with the arbitration where one party fails to comply with any agreed or ordered procedure and to draw such conclusions from that failure as it deems appropriate. This is entirely in keeping with Article 32.4 of the DIAC Rules.

However, if something does go wrong during the arbitration, watch out for Article 25 which says that if a party does not object to a breach of the arbitration rules and procedures within seven days of becoming aware of the issue, they may find that they have lost the right to object later on.

The CPC made no reference to the ability of the Tribunal to award interim measures. This has been addressed in the FAA. The Tribunal may issue temporary or preservative measures in the instances set out in Article 21, including to maintain evidence that may be deemed essential to resolving the dispute, to prevent damage or prejudice to the arbitration process, or ordering either party to abstain from doing anything that can damage or prejudice the arbitration. If either party disagrees with an order made by the Tribunal then it may choose to seek direction from the court, although any such court application will not require the suspension of the arbitration.

Further, Article 39 confirms that the Tribunal may issue temporary judgments before the issue of the final award. These temporary judgments are enforceable before the courts. Again, this provides certainty in an area not previously covered by the CPC.

The parties' ability to enforce interim measures or temporary awards is a very helpful development. This is particularly important in construction cases where there might be a need to preserve evidence, compel a contractor to leave a site or to stop calling the bank guarantees. Further, it encourages Tribunals to bifurcate the proceedings to deal with jurisdictional and admissibility questions as a preliminary issue. These are also common questions in construction disputes given the common use of standard forms that usually provide for notification periods, and multi-tier dispute resolution process, the non-compliance with which might give rise to admissibility and jurisdictional questions. The parties will be able to challenge or enforce Tribunal's decisions in this respect.

The award

The award must be in writing and signed by the arbitrators. By Article 41 (6), the award can be signed electronically and outside the place of the arbitration, so arbitrators no longer have to be physically present in the UAE when they sign the award.

"Awards can be signed electronically and outside the place of the arbitration, so arbitrators no longer have to travel to the UAE to sign the award."

By Article 42(1), the Tribunal shall issue the award by the date agreed upon by the parties and if no date is agreed upon the award shall be issued within six months from the date of the first arbitration hearing. The six-month time limit to issue the award can be extended with the agreement of the parties or by making a request to the court to extend the period. This is similar to the wording of Article 210 of the CPC which required tribunals to render awards within six months from the first arbitration hearing unless otherwise agreed.

The FAA also introduces a slip rule, with Article 50 empowering the Tribunal, either on its own initiative or upon the request of one of the parties, to correct clerical or mathematical errors in its award. Article 51 goes further and gives the parties the right to ask the Tribunal to deal with issues they believe have been omitted from the award. The slip rule is not designed to enable the parties to have a second chance and seek to persuade the Tribunal to change its mind about the substantive decision. Any request and/or correction must be made within 30 days.⁴

Enforcement of arbitration awards

There has been no change to the requirement that arbitration awards must be ratified. Article 52 confirms that to be enforced a decision confirming the award must first be obtained. The documents that need to be submitted have not changed, namely the original award (or a certified copy), a copy of the arbitration agreement, an Arabic translation of the award if needed,⁵ and a copy of the minutes of deposit of the award at court. However, the identity of the court has changed, with applications being made to the Court of Appeal. This is a positive step which should improve the speed of ratification and help ensure that arbitration matters are heard before those with specialist knowledge. The Court of Appeal then has 60 days to respond to the request for ratification.

Under Article 54(2), if a party wishes to challenge an award, it must do so within 30 days of the date of notification of the award. However, presumably that would not stop a party from opposing an application to ratify the award, made after the 30-day period had expired.

The grounds for refusing ratification include that the arbitration agreement was not valid, that the award was not made within the time limit and if there were

procedural "irregularities", the same phrase as used in the CPC. It is very difficult to make a successful challenge on the grounds of serious procedural irregularity in England and Wales under section 68 of the Arbitration Act 1999 and the courts have made it clear that applications to set aside for misconduct should not become a backdoor means of appeal on questions of fact or law.

A step in the right direction

Whilst with any law, it may take some time, by which we mean judicial interpretation, before its full extent is known, the FAA stands as an expression of intent to modernise and bring the arbitration law in line with international best practice. As such it should help increase confidence in the arbitration process within the UAE, something to be welcomed.

"The FAA stands as an expression of intent to modernise and bring the arbitration law in the UAE in line with international best practice."

The 2017 FIDIC dispute resolution procedure: the new dispute resolution mechanism

When FIDIC updated the Rainbow Suite of Contracts, one key question was the extent to which FIDIC would amend the dispute resolution provisions. In particular, how would FIDIC address the provisions relating to “binding but not-final” DAB decisions? **Robbie McCrea** explains what FIDIC have done.

1. Sub-clause 20.3 of the 2017 Yellow Book.
2. Sub-clause 3.7 of the 2017 Yellow Book.
3. Sub-clauses 3.5 and 20.1 of the 1999 Yellow Book.
4. Sub-clause 3.7 of the 2017 Yellow Book.
5. Per the Court of Appeal in *Amec Civil Engineering Limited v Secretary of State for Transport* [2005] CILL 2288.
6. Sub-clauses 3.7.4 and 3.5, respectively.
7. Sub-clause 3.7 of the 2017 Yellow Book.
8. Sub-clause 21.3 of the 2017 Yellow Book.
9. The FIDIC Guide to the Gold Book states that: “Prevention is better than cure, and the DAB is entrusted also with the role of providing informal assistance to the Parties at any time in an attempt to resolve any agreement.”
10. For instance, in *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*, HHJ Lloyd QC commented that the conduct of the adjudicator meant that this was a case of “apparent bias” in that he appeared to lack impartiality, having been privy to a number of without prejudice offers and some rather heated discussions in his capacity as mediator.
11. Sub-clause 21.3 of the 2017 Yellow Book.

Introduction

In December 2017 FIDIC released its second edition of the Conditions of Contracts for Plant and Design Build (“the 2017 Yellow Book”), the Conditions of Contract for Construction (the “2017 Red Book”) and the Conditions of Contract for EPC/Turnkey (the “Silver Book”), together the “2017 Contracts”. As expected, FIDIC has made substantial amendments to the dispute resolution provisions from the 1999 Red, Yellow, and Silver Books (together the “1999 Contracts”), and it has addressed the provisions relating to “binding but not-final” Dispute Adjudication Board (“DAB”) decisions which have been the cause of persistent dispute since the 1999 Contracts were released.

However, rather than scale back following the controversy caused by the binding but not-final DAB decision, and the severe consequences to contractors that have in many instances resulted, FIDIC has chosen to affirm this direction. The 2017 Contracts therefore retain the same core structure of the DAB as a mandatory pre-condition to arbitration (albeit it is now a “Dispute Avoidance/Adjudication Board”, or “DAAB”), including that non-final DAAB decisions must be promptly complied with, and it has expanded this concept through the inclusion of a similar mandatory procedure of binding but not-final Engineer determinations.

The 2017 Contracts offer a refurbished dispute resolution mechanism, which includes some helpful and much needed revisions to its predecessor, and introduces some useful new provisions. It is an ambitious dispute platform and will without question be subject to dispute and debate. At its best, it offers both parties the ability to obtain fast and inexpensive relief, with three tiers of binding determinations designed to prevent the need for arbitration. At its worst, it places two-tiers of mandatory determinations in the way before a party can begin to obtain a final binding decision in arbitration.

Parties will need to think carefully about whether a three-tiered system of determinations is suitable for their needs. Key issues are whether or not these provisions do in fact offer the system of relief promised, including how non-final determinations of the Engineer and DAAB are likely to be treated in the jurisdiction that the contract is based as well as under the governing law of the contract, and attempting so far as possible to agree in

advance between the Parties and Engineer as to how this mechanism will work.

This paper will address the dispute resolution provisions in the 2017 Contracts in two parts, as follows:

The new dispute resolution mechanism

Background

The dispute mechanism in the 2017 Contracts follows on from a worldwide trend of promoting dispute avoidance over arbitration.

The 1999 Contracts introduced the now infamous Dispute Adjudication Board into its contracts for the first time, which replaced the Engineer’s binding decision in the 1987 FIDIC Conditions of Contract as a pre-condition to arbitration. The 1999 Contracts still require the Engineer to make a determination as the first step in the claims process, albeit under a reduced timescale.

In the 2008 Gold Book FIDIC expanded the role of the DAB further by defining it as a Dispute Avoidance/Adjudication Board, and including a new clause 20.4 “Avoidance of Disputes” which permits the parties to agree to request that the DAB provide informal assistance with any issue or disagreement between the parties, which shall not bind either party should they proceed to obtain a formal determination.

The 2017 Contracts go further again. Like the 2008 Gold Book, the DAB is defined as a “Dispute Avoidance/Adjudication Board”, and it is empowered to provide informal assistance. In addition, the role of the Engineer has been increased to play a facilitative role and to issue binding determinations that will become final unless an NOD is issued.

The dispute resolution mechanism compared

As described above, the 2017 Contracts follow the same core structure as the 1999 Contracts, which can be broadly divided into the following constituent parts:

- Making a claim;
- The role of the Engineer (not the Silver Book);
- Avoidance of disputes (new);
- The DAB;
- Amicable settlement; and
- Arbitration.

These are each discussed and assessed against the 1999 Contract provisions below.

Making a claim

The 1999 Contracts include separate provisions for the Employer and Contractor to make a claim, with a notable difference being that Contractors must make their claim within 28 days of becoming aware of the event giving rise to the claim, and provide a fully detailed claim within 42 days (Sub-clause 20.1), whereas Employers need only provide notice "as soon as reasonably practicable" (Sub-clause 2.5)."

The 2017 Contracts include one consolidated clause for claims, Sub-clause 20.2, under which both parties must progress their claims within the 28 and 42 day periods under Sub-clause 20.1 of the 1999 Conditions. It also includes a new procedure enabling a waiver of these time-limits in certain instances¹, which is clearly designed to provide some clarity and a mechanism for determining when a claim will be time-barred.

The role of the Engineer

The Silver Book does not include any role for the Engineer, although the procedure outlined below for the Red and Yellow Books is more or less identical albeit the steps are carried out by each of the Parties rather than an Engineer.

The role of the Engineer has been expanded under the 2017 Contracts, including new functions and obligations. In relation to claims, the Engineer must²:

- Consult with the parties to attempt to reach agreement, and if no agreement is reached within 42 days;
- Make a "fair determination" within a further 42 days.

Under the 1999 Contracts³ the Engineer was required to consult and ultimately make a fair determination within just one 42 day period. Under both the 2017 Contracts and the 1999 Contracts the Engineer may request that further information be provided before making a determination.

The 2017 Contracts also include an express requirement that the Engineer act "neutrally" in discharging the above duties⁴. Although many would consider that neutrality is already encompassed as a matter of common sense in the obligation

to issue a "fair determination," and this has been confirmed to be the case as a matter of English law⁵, the position is not so clear in all jurisdictions and the addition of an explicit obligation of neutrality is a helpful addition.

Furthermore, whether both the 2017 Contracts and 1999 Contracts provide that the Engineer's determinations shall be binding on the parties unless and until revised by the DAB or in arbitration⁶, the 2017 Contracts go further to state that unless either party issues an NOD with the agreement or determination issued by the Engineer within 28 days, that agreement or any part of that decision not expressly included in an NOD shall become final and conclusive⁷, and immediately enforceable in arbitration. Parties will therefore need to be conscious of these time limits.

The 2017 Contracts have therefore extended the Engineer's role in claim resolution from a minimum 42 days to 84 days, with the prospect of its determination becoming final if neither party issues a valid NOD. The new provisions do not state how a non-final Engineer's determination is to be enforced, although we expect the intention is that a party would obtain a DAB decision on the failure to comply followed by an arbitral award pursuant to Sub-clause 21.7 (discussed further below).

Avoidance of Disputes

A new "Avoidance of Disputes" provision has been added which permits the parties to jointly ask the DAB to informally discuss and/or provide assistance with any issue or disagreement⁸. The parties will not be bound to act on any advice given in this process. This provision is taken from the 2008 Gold Book⁹, and it is in keeping with FIDIC's promotion of dispute avoidance, but its practical effect is questionable.

The issue is that the DAB is by this clause being asked to act as a kind of mediator, whereas in the following clause it must act as adjudicator, and these functions are not usually compatible. A mediator will often become privy to confidential and other commercial considerations of the parties, and is there to facilitate settlement, and this is plainly not compatible with the role of adjudicator who must decide the parties' legal rights and obligations. This dual role scenario has already been met with some concern in the UK¹⁰.

The DAB

The DAB procedure under the 2017 Contracts retains its core aspects, namely that a DAB must issue its decision within 84 days of a dispute being referred to it, and that decision shall be immediately binding upon the parties who shall promptly give effect to it. However, the new provision includes a number of revisions designed to clarify and assist in enforcing these obligations, including¹¹:

1. DAB decisions are now expressly binding on the Engineer;
2. The Parties and Engineer must comply with the DAB's decision "whether or not a Party gives a NOD with respect to such decision under this Sub-clause"; and
3. If the DAB awards payment of a sum of money, that amount shall be immediately due and payable after the payer receives an invoice, without any requirement for certification or notice. In addition, the DAB may require an appropriate security to be issued for payment of the sum awarded.

Furthermore, Sub-clause 21.7 provides that if either party fails to comply with a DAB decision, whether final or not-final, the other party may refer the failure itself directly to arbitration pursuant to Sub-clause 21.6.

The above provisions were intended by FIDIC to have already been provided for in the 1999 procedure, but which as many contractors have painfully found out, the 1999 wording was not so clear and has been the subject of fervent debate since those conditions were released. This debate is captured in the Persero series of cases in Singapore, which ran for a eight years on the issue of whether a non-final DAB decision issued under Sub-clause 20.4 could be enforced summarily by an arbitral award.

Under both the 1999 and 2017 Contracts either party can prevent a DAB decision from becoming final by issuing an NOD within 28 days. However, the 2017 Contracts wording adds that if no arbitration is commenced within 182 days after the NOD is issued then that NOD shall be deemed to have lapsed and be no longer valid. This will allow DAB decisions to become final where arbitration is not pursued, and that is helpful, however where finality is relevant to enforcement this provision may also be subject to dispute. For instance, if a party commences

arbitration but then allows it to lapse, will a new 182 day period commence or does that prevent a non-final DAB from ever becoming final?

Finally, the new wording includes a revised provision for when no DAB is in place, which now permits the parties to proceed directly to arbitration if a dispute arises and there is no DAB in place¹². This is a potentially important revision compared to its equivalent in the 1999 Yellow Book, Sub-clause 20.8, which is headed “*Expiry of Dispute Adjudication Board’s appointment*”¹³.”

The 1999 Contract wording was subject to debate before the Swiss Supreme Court¹⁴ and the UK Technology and Construction Court¹⁵, and both courts found that the DAB was a mandatory pre-condition to arbitration, and that Sub-clause 20.8 would only apply in the exceptional situation where the mission of a standing DAB has expired before a dispute arises between the parties, or other limited circumstances such as the inability to constitute a DAB due to the intransigence of one of the parties. Although the Swiss Case ultimately permitted the DAB to be avoided after the Contractor had spent over 18 months attempting to have it constituted, the English case refused to allow the litigation to proceed until the DAB procedure was completed.

Under the 2017 Contracts parties will be able to skip the DAB procedure if it is not in place when the dispute arises, although once the DAB has been set up or once the parties begin the process of setting up a DAB, no matter how frustrating that process may be, the DAB will become mandatory and the process will not be able to be abandoned.

Amicable settlement

The mandatory amicable settlement period has been reduced from 56 days to 28 days under the 2017 Contracts¹⁶. Furthermore, where either party fails to comply with a DAB decision, that failure may be referred directly to arbitration and the amicable settlement period will not apply¹⁷. This clarifies that the parties’ obligation to “promptly” comply with a DAB decision means in less than 28 days.

Arbitration

The arbitration provisions for non-final DAB decisions are effectively the same under both contracts, namely that where an NOD has been issued either party may refer the dispute to be finally decided in international arbitration¹⁸. The 2017 Contracts also expressly permit an arbitral tribunal to take account of any non-cooperation in

constituting the DAB in its awarding of costs.

As noted above, the new wording includes an expanded Sub-clause 21.7 (Sub-clause 20.7 of the 1999 Yellow Book), which permits any failure to comply with a DAB decision, whether final or not-final, to be referred directly to arbitration. In relation to non-final DAB decisions, the right to enforcement by interim relief or award is subject to the fact that the merits of the dispute are reserved until resolved in a final arbitral award. Although this revised contractual clarification/position will be welcomed by contractors, there are still likely to be challenges in many jurisdictions as to whether the enforcement of non-final DAB decisions via an arbitral award is supported by the local or governing laws of the contract.

Conclusion

The new dispute procedure provides some useful revisions which address fairly well some of the problem areas of the 1999 Yellow Book, and which are aimed at promoting compliance with the pre-arbitration steps. These include better defined responsibilities and accountability for the Engineer, and revisions to the DAB and arbitration provisions which should avoid the perpetual 1999 Yellow Book disputes as to whether an NOD cancels the binding effect of a DAB decision, and whether a non-final DAB decision can be summarily enforced in arbitration.

The new procedure also expands the pre-arbitral steps, including a mandatory additional 42 day period in the Engineer’s determination, plus a further 28 days to issue an NOD. To the extent that non-final determinations by the Engineer and DAB are able to be enforced, including under the governing law of the contract, then the new wording will be welcomed by contractors as providing for quick relief and something like the security of payment regime that were intended by FIDIC in the 1999 Yellow Book¹⁹.

However to the extent these non-final determinations are not able to be enforced then, except in limited circumstances for instance where no DAB is in place at the time of dispute, parties may be required to go through an even longer mandatory claims procedure than under the 1999 Yellow Book before they are able to commence an arbitration that will give them final and enforceable relief. Parties should therefore think carefully as to whether this mechanism, in whole or part, is suitable for their particular needs.

1. Sub-clause 20.8 of the 2017 Yellow Book.
2. Sub-clause 20.8 of the 1999 Yellow Book.
3. Decision 4A_124/2014
4. Peterborough City Council v Enterprice Managed Services Limited [2014] EWHC 3193 (TCC).
5. Sub-clause 21.5 of the 2017 Yellow Book.
6. Sub-clause 21.7 of the 2017 Yellow Book.
7. In Sub-clause 20.6 of the 1999 Yellow Book and Sub-clause 21.6 of the 2017 Yellow Book.
8. See for instance, PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30 at paragraphs 70 and 71.



Adjudication Board

Our Senior Partner, **Simon Tolson**, is a past Chairman of TeCSA, the Technology and Construction Solicitors Association. Here, in an extract from a paper prepared for the TeCSA Adjudicator Panel, Simon explains what makes a good Adjudicator.

Key Characteristics of an effective Adjudicator – attributes and skills

The TeCSA view has always been that it should set appropriately high standards for those who join its adjudication panel and who therefore may be nominated from time to time to act as Adjudicator. TeCSA keeps these issues under regular review as the law and practice is ever moving.

This is natural and normal as TeCSA has been at the heart of the development of statutory adjudication since even before its introduction with the 1996 Act. Indeed TeCSA (then ORSA) produced the first set of compliant adjudication rules in 1995.

Honesty and integrity

Being honest and impartial are a key characteristic of an effective Adjudicator and that attribute applies for as long as an adjudicator holds him or herself out. Of course, we have seen that some adjudicators come unstruck right at the start of the process when they accept appointments.

Adjudicators, like arbitrators, should handle requests for information regarding their relationships with parties in a professional, considered manner, and should refrain from 'descending into the arena'. The repeat appointment of adjudicators/arbitrators is a fact of modern practice, which means that full disclosure, for the purposes of doing justice to the parties, is necessary in order to preserve the integrity of the relevant dispute resolution process. TeCSA takes this issue most seriously.

Make no mistake, adjudication today is a "formal dispute resolution forum with certain basic requirements of fairness" to quote from Fraser J who said in *Beumer Group UK Ltd v Vinci Construction UK* adjudication:

"... for all its time pressures and characteristics concerning enforceability, is still a formal dispute resolution forum with certain basic requirements of fairness..." and "... although adjudication proceedings are confidential, decisions by adjudicators are enforced by the High Court and there are certain rules and requirements for the conduct of such proceedings. Adjudication is not the Wild West of dispute resolution."

That also means an adjudicator needs to behave and conduct themselves with transparency and must have a clear rounded understanding of the law in relation to such things as actual and

perceived bias. In *Beumer Group* we saw a striking example of obfuscation and poor candour by that adjudicator's failure, to disclose his involvement in a simultaneous adjudication involving one of the parties which was a material breach of the rules of natural justice. After considering the relevant authorities on the matter, Fraser J determined that there was a clear breach of natural justice. By parity of reasoning with *Dyson LJ in Amec v Whitefriars* and, more recently, *Coulson J in Paice and Springall v MJ Harding Contractors*, he considered that if a unilateral phone call between the adjudicator and one of the parties could lead to the appearance of sufficient unfairness to deny enforcement of the adjudicator's decision, then there was no scope for arguing the case before him did not also have the appearance of sufficient unfairness:

"If unilateral telephone calls are strongly discouraged (if not verging on prohibited) due to the appearance of potential unfairness, it is very difficult, if not in my judgment impossible, for an adjudicator to be permitted to conduct another adjudication involving one of the same parties at the same time without disclosing that to the other party. Conducting that other adjudication may not only involve telephone conversations, but will undoubtedly involve the receipt of communications including submissions, and may involve a hearing. If all that takes place secretly, in the sense that the other party does not know it is even taking place, then that runs an obvious risk in my judgment of leading the fair minded and informed observer to conclude that there was a real possibility of bias. All of this can be avoided by disclosing the existence of the appointment at the earliest opportunity."

The Adjudicator's Task

The process of adjudication has of course at its heart speed, economy, and some quasi arbitral principles. The adjudicator's task is to:

- Ascertain the facts and the law;
- Without disproportionate expense, but that still means doing ones best;
- Within the constraints of the 28-day process as may be extended;
- Having regard to the contractual rules and the law;
- Having regard to the provisional and binding nature of the Decision;
- Act fairly and impartially as between

- the parties, giving each party a reasonable opportunity of putting its case and dealing with that of his opponent; and
- Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Key characteristics of a good adjudicator when deciding whether to accept an appointment

A pivotal moment for an adjudicator is of course when he or she is approached with a nomination. The very first question an adjudicator should ask himself, when deciding whether to accept an appointment, is “Do I have jurisdiction?” In other words, can the adjudication process be set in train at all? Whilst, an in-depth analysis is not necessarily required at this stage, an initial and proportional review to flag any issues should be undertaken by the adjudicator. In order to determine this, an adjudicator should ask himself the key questions listed below.

1. Is there a conflict of interest preventing me from acting?
2. Does there appear to be an obvious problem with any of the checklist jurisdiction issues listed below:
 - Is there a contract?
 - When was the contract entered into?
 - Is the contract a construction contract within the definition of sections 104(1) and 105 of the HGCRA?
 - Is the contract with a residential occupier and excluded by section 106 of the HGCRA?
 - Does it relate to construction operations within the territorial application of the HGCRA?
 - If the contract is not a construction contract under the HGCRA, does the contract expressly provide a right of adjudication in any event?
 - Has the adjudicator’s appointment been made in accordance with the contract? Has the referral been validly made?
 - Is there a crystallised dispute?
 - Has the dispute arisen under the contract?
 - Has more than one dispute been referred to the adjudicator? If not how closely related?
 - Has there been a previous adjudication on the same dispute?
 - Are the parties to the contract the same parties who are bringing the

adjudication?

The adjudicator will have limited information at the very outset, but all of the key questions should be kept under review until any further information becomes available. The adjudicator should consider whether requesting further information from the parties might assist in resolving some of these key questions, and this can be balanced against the fact that the parties might by their conduct just submit to the adjudication process.

Anyhow, once an adjudicator has satisfied himself with the answers to these questions, there are two further questions that are worth asking, as a matter of good practice, before the adjudication process commences.

These are:

- Is the dispute too complex to be fairly determined within 28 days?
- Do I have the necessary expertise?
- Further, if there has been a previous adjudication, an adjudicator should also consider whether he has been asked to decide a matter on which there is already a binding decision by another adjudicator.

In addition, the adjudicator might wish to consider two further questions:

- To what extent is there jurisdiction to deal with the costs of the adjudication; and
- The jurisdiction to deal with slips, errors and mistakes in the decision.

Key characteristics on the job

Top ANBs like TeCSA expect adjudicators to have sufficient knowledge of the Acts and the relevant Statutory Instruments comprising the Scheme for Construction Contracts (‘the 1998 Scheme’ applicable to contracts under the 1996 Act or ‘the 2011 Scheme’ applicable to contracts entered into after 1 October 2011) (and together ‘the Schemes’) together with an understanding of the court’s interpretation of them at the time.

Adjudicators are expected to be aware of how the drafters of the standard form contracts have incorporated the requirements of the Acts into their documents and, where a particular standard form of contract forms the basis of the construction contract out of which the adjudication arises, grasp how that contract works and has been construed

by the courts. Knowledge of the various procedural rules that apply under certain contracts will also be desirable. Adjudicators are expected to have a detailed, accurate and conversant understanding of the current practice and procedure of adjudication and to have a sufficient knowledge of the general subject matter of the dispute to be able to identify the relevance of all matters before them. Above all else, adjudicators are expected to be available, and be prepared to carry out the function of adjudicator within the timescale allowed. This is a very important fact to note because it is almost certain that it will not be known at the time of nomination if the timescale will be extended, however complicated the dispute.

What makes a good adjudicator? What are their characteristics? Are they different from those that make good arbitrators, or even good Judges? Is one adjudicator better than another?

At a meeting of Society of Construction Law on 11 May 2010, Coulson J as he then was identified what were referred to as the “seven golden rules for adjudicators”. It is worth sharing them here. They were:

(1) **Be bold:** Adjudicators have a unique jurisdiction, where the need to have the right answer has been subordinated to the need to have an answer quickly. Coulson reminds us that the adjudicator’s decision can be incorrect (in terms of fact and law) and still be upheld. The important thing is that payment is made to the correct person. Adjudicators must remember that adjudication is all about ensuring that, where appropriate, payment gets to the right people at the right time.

(2) **Address Jurisdiction issues early and clearly:** Adjudicators should always deal expressly with any jurisdictional challenge, and they should not abdicate the responsibility for providing an answer, even if it is not binding. They should consider the challenge applying common sense, but must avoid being too jaundiced. There will be occasions (however late) when the jurisdictional challenge is made out, and in those circumstances, the adjudicator is going to save everybody a lot of time, money and effort by resigning then and there. The adjudicator should not shy from dealing with challenges relating to his jurisdiction. Better to exercise caution and withdraw at an early stage than have the decision overturned. Under the TeCSA Rule 12, the adjudicator can of course decide his or her jurisdiction. Ensuring an adjudicator

has the jurisdiction to decide the dispute referred to him is of utmost importance to the adjudication process.

(3) **Identify and answer the critical issues(s):** Adjudicators must ignore, unless it is unavoidable, the sub-issues and the red herrings. They should avoid being long-winded and instead concentrate on what they know to be the real point. Everything else will usually fall into place. The adjudicator should make sure he identifies the issues in dispute and deals with each one giving only concise reasons for his decision.

(4) **Be fair:** Wherever possible, the adjudicator should properly consider every aspect of the parties' submissions. If the adjudicator has planned out a timetable from the outset then the parties will know what they need to do and when, and disputes over (for instance) the admissibility of last-minute submissions will be much less frequent. The adjudicator should ensure that his decision is clear and free from ambiguities.

Part of fairness is to show no bias. The test, which an adjudicator is required to apply when deciding whether the adjudicator should recuse himself for bias was stated by Lord Hope in *Porter v Magill* [2002] at paragraph 103: *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*.

In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. The Adjudicator must always remain independent of the Parties. Helping the unrepresented Party may easily create the impression of bias. The limit of assistance is in the matter of not allowing one party to take advantage of the weaker party. Do not make a case for an unrepresented party. Safeguard the party from unfair advantage only.

They must do so without fear or favour, affections or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all

considerations extraneous to the particular case.

(5) **Provide a clear result:** Most decisions are lengthy and detailed. The adjudicator must always try and ensure that, at the end, they make plain precisely what each party must do as a consequence of the decision.

(6) **Do it on time:** The adjudicator must complete the decision within the statutory period or any agreed extended period. They must not allow the timetable to slip. It is counter-productive to expand an adjudication from six weeks to three months, because it means that the parties have to spend a fortune, which they probably cannot recover, for a decision that either of them could challenge subsequently. And when the adjudicator has completed the decision, it should be issued immediately. It ruins everything if, as happened in one recent case, the adjudicator completes the decision just as the time was expiring, and then sits on it for three days before deciding to send it out to the parties.

(7) Finally, the adjudicator should **avoid making silly mistakes** such as arithmetical errors, name and number transposition, awarding interest incorrectly etc. It is hard to disagree with the rules Coulson J identified. The adjudication process is generally a quick one. In the early days, adjudication was described as quick and dirty, but temporary²³. It is not as dirty as it may once have been²⁴ and often not in reality temporary so the essentials must focus on that expedition aspect and qualitatively it must be up there but bearing in mind it is still essentially a 28 to 42 day process.

Conclusions

Adjudication is alive and kicking because it largely fills a need. Long may it. The procedure and timetable may vary, but the parties are still looking to you the Adjudicator to resolve the dispute, which will involve identifying the issues, weighing the evidence, deciding who wins what points and producing a legally robust reasoned decision. In my view the analytical skills requisite to determine the dispute will never leave us unless artificial intelligence becomes a game changer in this field.

There will always be a need for the Adjudicator to be as straight as a bat and a person with an affinity with the subject matter ideally learned as much from the university of life as the classroom.

Case law update

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 the *Construction Industry Law Letter (CILL)*, edited by Fenwick Elliott's Karen Gidwani. CILL is published by Informa Professional. For further information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0)20 7017 7974 or by email: kate.clifton@informa.com.

Second, there is our long-running monthly bulletin entitled *Dispatch*. This summarises the recent legal and other relevant developments. If you would like to look at recent editions, please go to www.fenwickelliott.com. If you would like to receive a copy every month, please contact Jeremy Glover or sign up online <http://www.fenwickelliott.com/research-insight/newsletters/dispatch>. We begin by setting out some of the most important adjudication cases as taken from *Dispatch*.

Adjudication: cases from Dispatch

Adjudication: failure to consider a defence

DC Community Partnership Ltd v Renfrewshie Council

DC entered into a contract with Renfrew for the construction of a new special needs school at Linwood. The contract incorporated the 2005 NEC3 Form, Option C. A dispute arose as to the sum Renfrew was liable to pay the pursuer in respect of payment certificate number 33. The amount due was £287k, no pay less notice was served and Renfrew paid the sum notified.

On 6 June 2017, DC served a notice of adjudication in respect of three aspects of its dispute with payment certificate number 33. There were three limbs to the dispute, relating to separate subcontract packages. The project manager had assessed one item at £254k and the other two at nil. DC said the three items had been underassessed in the amount of £821k. The adjudicator agreed.

Renfrew defended enforcement proceedings saying that the adjudicator had failed to address a material defence, also known as failing to exhaust his jurisdiction. During the adjudication, Renfrew had submitted that DC were in delay and that they were accordingly entitled to deduct delay damages (of £469k) from Renfrew. Had the project manager's assessment included the claims being made in the adjudication, Renfrew would have issued a pay less notice to limit the payment. Renfrew further said that if the adjudicator opened up the assessment and decided that further sums were due, they would rely on their right of set-off. The delay damages were £468,666 (from 18 November 2016 to the due date amounting to 162 days x £2,893) and should be offset against any sums which might become payable to the Referring Party.

The adjudicator in his Decision listed the submissions he had received and confirmed that:

"I have considered all the submissions and their accompanying documents, but have not found it necessary to refer to all of the

material provided to me in explaining the reasons for my decision."

The adjudicator did not make any reference to Renfrew's claim for delay damages to be offset, even though he decided he could open up the assessment.

DC said that the adjudicator had not failed to consider the set-off submission. A court should not be overly critical of the adjudicator's reasons. Where, as here, the defence had been raised at a very late stage, it was legitimate to bear that in mind. A court should only interfere in the plainest of cases. Further, if the adjudicator had failed to deal with the delay damages defence, the court should conclude that it had not been a material line of defence, and it should enforce the adjudicator's decision. Renfrew could not make the defence because it had not issued a pay less notice.

Renfrew said that the defence of set-off of delay damages fell within the scope of the adjudication and that the adjudicator failed to address it. This omission was a failure to exhaust his jurisdiction. There was no discussion of set-off in the decision. One could not place reliance upon the adjudicator's general statement that he had considered all of the submissions or that the relief sought was declined. It was held that:

"The adjudicator was under an obligation to provide adequate, intelligible reasons dealing with all material matters. If he [the adjudicator] had rejected the set off defence, he had not explained the basis upon which he had done so."

Further, Lord Doherty noted that:

"The scope of an adjudication is defined by the notice of adjudication together with any ground founded upon by the responding party to justify its position in defence of the claim made..."

Although DC had had the opportunity to respond, it did not. The Judge was not persuaded that the adjudicator had addressed the set-off defence. He made no explicit reference to it in the decision, and the general comments such as "The Council's relief sought is declined" fell far short of being sufficient to show that the defence was considered but was rejected for stated reasons, especially as the adjudicator was obliged to give written reasons for his decision. Lord Doherty said that:

“the adjudicator [was] required to give at least some brief, intelligible explanation of why the defence of set off was being rejected...”

This was not a case where the rejection of the defence was implicit in the reasons given. The failure to address the set-off defence was material. The claim had a substantial potential value equivalent to more than half of the principal additional sum which the adjudicator decided was due.

Further, Lord Doherty said that it was not a prerequisite of the set-off defence that a pay less notice should have been given. Where a compliant payment notice has been given, the notified sum is the amount specified in the notice. A pay less notice only needs to be given if the payer intends to pay less than the notified sum. If, on the other hand, the payer is content to pay the notified sum, there is no basis for a notice that the payer intends to pay less. By advancing the set-off defence in the adjudication, Renfrew did not alter its position in relation to the notified sum. Rather, it sought to set off delay damages against any additional sums that the adjudicator might decide were payable. Renfrew was entitled to deploy that defence to the claim for additional sums. The decision was not enforced.

Adjudication: enforcement and fraud *Gosvenor London Ltd v Aygun Aluminium UK Ltd*

Gosvenor agreed to perform certain cladding works for Aygun. Disputes arose and Gosvenor applied to enforce an adjudicator’s decision in the sum of £555k. Aygun accepted that adjudicators’ decisions will be enforced by the courts, regardless of errors of fact or law, but alleged fraud on the part of Gosvenor. No allegations of fraud were raised in the adjudication proceedings.

However, in the defence to the enforcement proceedings Aygun said that following enquiries, “a substantial proportion” of the adjudication award was based on sums which had been fraudulently invoiced. The sums invoiced by Gosvenor for operatives simply could not reflect the amounts due, because of an “enormous discrepancy” in sums invoiced to Aygun and works actually done or labour actually provided. A

valuation assessment had been performed by Aygun that showed that the very maximum of £100k of labour costs could and/or should have been invoiced, rather than the figure of over five times that. Aygun also said that they “simply” did not have the evidence to hand at the time of the adjudication to make such a serious allegation.

The Aygun claims were supported by witness statements. There was no evidence at all served by Gosvenor in response to these witness statements until after submission of the draft judgment. As Mr Justice Fraser said, not only was it far too late, it was “extraordinary”. The Judge considered the principles that arise on enforcement when fraud is alleged. If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution, it must be supported by clear and unambiguous evidence and argument. Further, a distinction has to be made between fraudulent acts that could have been raised as a defence in the adjudication and those which neither were nor could reasonably have been raised but which emerged afterwards.

The Judge recognised that a particular issue for Aygun was why they had not raised some of these issues in the adjudication. For example, the valuation evidence showing the large discrepancy could have been, and the Judge thought should have been, deployed in the adjudication: “Parties to construction contracts who do not manage their own projects properly are not granted some sort of immunity in terms of adjudications, or the enforcement of adjudicators’ decisions.”

Therefore, the Judge granted the application for summary judgment. However, Aygun also brought an application for a stay of execution, relying on the fraud issue and the lack of financial viability on the part of Gosvenor. The Judge considered the basic principles as outlined in the *Wimbledon v Vago* case ([Dispatch](#), issue 61) [HYPERLINK] and held that there were the following “special circumstances” to justify the grant of a stay of execution:

- (i) Facts relating to the alleged fraudulent acts which should have been deployed before the adjudicator.
- (ii) Facts relating to the behaviour in January 2018 of Gosvenor’s employees,

including threats and intimidation, in relation to the enforcement proceedings.

- (iii) Facts relating to the unsatisfactory and contradictory accounts of Gosvenor.

These represented an extension to the points listed in the *Wimbledon v Vago* case. However, as Mr Justice Fraser said, there was no question of fraud in that case. The Judge therefore added the further following principle:

“(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.”

The Judge made it clear that this item was only likely to arise in a very small number of cases, and in exceptional factual circumstances. A high test was to be applied as to whether the evidence reached the standard necessary for this principle to apply. Further, it was not intended to reopen the whole issue of the basis upon which stays of execution will be ordered in adjudication enforcement cases. Here the evidence was that Gosvenor (or those who control it) “would specifically organise its financial affairs, other than in the ordinary course of business, to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied”.

Accordingly it was appropriate to stay the execution of the adjudication decision.

Adjudication enforcement and Part 8 *Maelor Foods Ltd v Rawlings Consulting (UK) Ltd*

Rawlings made an application for the stay to arbitration of a Part 8 claim. Maelor had engaged Rawlings to carry out works at a meat processing premises in Wrexham on the basis of the 2011 JCT standard building contract with approximate quantities. Disputes arose and an adjudicator issued a decision in favour of Rawlings for some £720k. Maelor then issued the Part 8

proceedings noting amongst other things that:

- The objections to the adjudicator's jurisdiction would be relied upon in defence of any enforcement proceedings.
- Maelor sought the court's determination of issues of law which arose in the adjudication.
- In the adjudication, as well as disputing the adjudicator's jurisdiction Maelor submitted that the interim payment notice (IPN) was invalid so that no pay less notice was required to be served and no sum was payable to Rawlings.
- The adjudicator rightly accepted that in order to succeed in a reference the IPN had to be contractually valid, but wrongly decided that the IPN was valid.

Article 8 of the Contract provided that any dispute or difference between the parties of any kind whatsoever arising out of or in connection with this contract should be referred to arbitration in accordance with CIMAR. However, Article 8 also provides for two exceptions to that arbitration provision. The second exception was:

"Any disputes or differences in connection with the enforcement of any decision of an adjudicator."

The question for the court was whether the dispute between the parties contained in the Part 8 claim form was governed by the arbitration agreement or the exception. If the dispute was within that exception, then there could be no stay because the dispute would not be covered by the arbitration agreement.

Maelor said that if one focused on the dispute at hand, the reality of the situation here was that the Part 8 claim was a response to the adjudication award and a way of forestalling enforcement. Thus it was a defence to enforcement. Mr Justice Eyre QC disagreed. The dispute did not fall within the exception and was not a dispute in connection with the enforcement of a decision of an adjudicator. The wording of the exception specifically referred to "the enforcement of" an adjudicator's decision.

The Judge said that:

"The use of those words and the need to give effect to them is . . . significant in the

context where the underlying approach to adjudication awards is one of 'pay now, argue later', but where there are categories of challenge to an award which can operate as a defence to enforcement. One can see ample sense in the parties excluding from arbitration an application actually to enforce an adjudication award and a line of defence which relates closely and directly to enforceability of such an award."

The wording of the Part 8 claim also included not only that: "The objections to the adjudicator's jurisdiction will be relied upon in defence of any enforcement proceedings", but also that "the employer seeks the court's determination of issues of law which arose in the adjudication". Maelor were seeking declarations said to be a matter of law as to the invalidity of the IPN, the incorrectness in law of the adjudicator's decision and of whether sums were due pursuant to the IPN. Maelor referred to the Part 8 claim as being a "pre-emptive strike to defeat enforcement of the [adjudicator's] decision". This led the Judge to "pause for thought", but in the end the Judge said that this could not prevail against the wording of the arbitration clause here and the emphasis in that clause on disputes in connection with the enforcement of a decision:

"The fact that a challenge by way of Part 8 claim, or indeed otherwise, to the correctness of an adjudicator's decision might be a pre-emptive strike if made and determined in time, and might at the end of the day render nugatory the relief awarded by way of enforcement of an adjudicator's decision, does not mean that it is a dispute or difference in connection with enforcement."

Adjudication: jurisdiction defences

Morgan Sindall Construction and Infrastructure Ltd v Westcrowns Contracting Services Ltd

Another short reminder.

This was an adjudication enforcement case about liability for alleged defective flooring. Westcrowns said that the adjudicator had decided on matters which were outside the scope of the dispute referred to him and/or had dealt with two

disputes when only entitled to deal with one. MS said that Westcrowns were barred from relying on the first ground on the grounds that, although they could have done, they had not taken this point in the course of the adjudication and so were now barred from doing so.

Lord Clark noted that the jurisdictional challenge did not arise until the Rejoinder. The basis for that challenge now was that there were two disputes. Therefore it was not a point that had been taken during the adjudication and Westcrowns were now barred from raising this challenge to jurisdiction.

Pay less notices

Muir Construction Ltd v Kapital Residential Ltd

This was a Scottish case which came before Lord Bannatyne. Following a lengthy dispute, the parties had agreed a Settlement Contract which was executed on 7/8 April 2016. The contract rectification period ran from 21 July 2015 to 20 July 2016. On 21 December 2016, Kapital issued a pay less notice ("PLN") valuing the sums due to Muir at "zero". The PLN was issued ten days before the retention sum was to be paid by Kapital to Muir pursuant to the Settlement Contract.

Kapital said that following the decision in *Surrey & Sussex Healthcare NHS Trust v Logan* (Dispatch Issue 200), a "common sense, practical view" of the contents of a pay less notice should be taken, not "an unnecessarily restrictive" one. Provided that the notice made "tolerably clear" what is being withheld and why, the courts should not intervene.

Here, the PLN included (i) a formal letter from Kapital to Muir on 21 December 2016; (ii) the formal PLN; (iii) a note of outstanding snagging; and (iv) an expert opinion which detailed defects and incomplete works. Where the retention amount was small and a very large amount of work was necessary for defects to be remedied, it was enough to say the remedying of the defects would require a sum well in excess of the retention sum. This was the basis upon which the PLN in this case arrived at "zero".

Muir said that the PLN did not properly specify the basis of the "zero sum". Taking a strict view, the Judge saw some "substantial force" in this argument.

No basis for the zero sum figure was put forward in the PLN or the supporting documentation. The Judge noted that:

"From none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated. There is no calculation put forward which would allow the reasonable recipient to understand how that figure is arrived at. There is no specification which would allow the reasonable recipient to make any sense of the figure arrived at. The defender sets forth no figures and thus no basis substantiating the zero sum figure in the PLN or in any of the other documentation upon which it relies.

With no difficulty I reject the defender's response with respect to this point. It amounted to no more than saying the sum retained is not a large one and given the number and nature of problems founded upon in the PLN the cost of remedying these would clearly amount to a figure well in excess of the retained sum and thus a basis for the zero sum figure was provided. That is not providing a basis for the figure. I am persuaded that the PLN in order to properly provide a basis needs at least to set out the grounds for withholding and the sum applied to each of these grounds with at least an indication of how each of these sums were arrived at."

In reaching this conclusion the Judge referred to the case of *Maxi Construction Management Ltd v Mortons Rolls Ltd* (Dispatch Issue 15) where Lord Macfadyen had said that: "specification of the basis of calculation" was required. There was no specification here. As a result the Judge said that the PLN was neither valid nor effective.

Further as part of the Settlement Agreement, where Kapital had undertaken work to remedy the defects, it could only recover costs where (i) it had already incurred the cost sought to be withheld and (ii) it could evidence that to Muir. This meant that the "mere crystallising of the liability" in terms of invoices becoming due and payable was not sufficient to satisfy the condition of costs having been incurred. To allow this, would potentially allow an invoice which did not, in part at least, represent work actually done and/or where payment was not made timeously but made some material time later, to form the basis for

a valid PLN. On the facts here, the proper construction of "costs incurred" for the purposes of a valid PLN was that the sums in any invoices for work done had to have been paid by 21 December 2016.

Adjudication: Part 8 and natural justice *Victory House General Partner Ltd v RGB P&C Ltd*

This was an adjudication enforcement case arising out of the development and conversion of an existing office building into a hotel in London. The employer, VH, brought a Part 8 claim, which was met by an application by RGB for summary judgment to enforce an adjudicator's decision.

Deputy Judge Smith QC did not consider that the case was suitable for a Part 8 application as it raised matters of disputed fact. The Part 8 procedure should only be used where a claimant seeks a court decision on a question which is unlikely to involve a substantial dispute of fact. It was not an answer to this point to suggest that issues could be resolved in the Part 8 proceedings on the basis of assumed facts. This would potentially result in the unsatisfactory situation where a party, if dissatisfied with the Part 8 decision, would still then be in a position to challenge any disputed matters of fact at a later time in further substantive proceedings. There would be no saving of costs and resources and no advantage in permitting determination of the issues to be expedited.

Under the contract, RGB was obliged to procure a transformer or substation. Until the transformer was installed, the electrical and mechanical services could not be completed. The project fell into delay and there was a disagreement about payment. In March 2017, the parties entered into a short Memorandum of Understanding ("MoU"). The MoU provided for three-stage payments. The first two were made, VH said in accordance with the MoU, and it was common ground that the transformer was installed. The next month, RGB issued Application 30 in the sum of some £680k plus VAT. VH refused to pay this sum, saying that the payment terms were now governed by

the MoU. RGB said that the payment notice was late, there was no pay less notice and, contending that the MoU was not binding, referred this dispute to adjudication. During the adjudication, RGB's position shifted to noting that whilst the MoU was legally binding the parties did not intend it to replace the provisions of the Contract.

Towards the end of the adjudication process, the Adjudicator asked a series of questions. Both parties replied. In the Decision, the Adjudicator rejected RGB's primary case that the MoU was not legally binding but also rejected VH's case that the MoU superseded the Contract and effectively governed what payments were to be made by VH to RGB up to the date of Practical Completion. Instead, the Adjudicator held that the true effect of the MoU was to suspend the obligation on VH to make interim payments under the Contract until such time as the transformer was installed. Given that Application 30 was made after that date, it was valid and, in the absence of any valid pay less notice, was payable. VH said that the Adjudicator's decision as to the true construction of the MoU did not reflect an argument that had been advanced by either party. The Adjudicator had invented a new point on construction which was central to his Decision and so was a material breach of natural justice.

The Judge disagreed. The parties were aware from the outset that a central question in the adjudication concerned the true and proper construction of the MoU. They each made detailed submissions on this issue. Echoing the words of Mr Justice Fraser in the case of *AECOM Design Build Ltd v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC), the Judge noted that a party wishing that they had put more comprehensive submissions to the adjudicator on the point he had highlighted was "not the same as there having been a breach of natural justice, still less a material breach". The Adjudicator did not go off on a frolic of his own. The Decision was made against the background of having posed a specific question about the purpose, scope and effect of the MoU and Contract; a question which both parties had the opportunity to answer.

Case update: adjudication enforcement and winding-up petitions

Victory House General Partner Ltd v RGB P&C Ltd

This was an application to restrain notice being given of a winding-up petition, which sought payment of some £820k following an adjudicator's decision in respect of goods supplied and services rendered for the development and conversion at Victory House, Leicester Square, London.

The building contract was in the form of a JCT Design and Build Contract 2011 and related to the development and conversion of an office building at Victory House. RGB served an interim payment application, number 30, on 11 July 2017 which led to the adjudication. The decision rejected an argument put forward by Victory House that it was not liable to pay the sum identified in the interim application because the parties had entered into a memorandum of understanding which provided for other payments to be made which were not as large as the figure claimed in application number 30. Victory House also said that it had served a valid pay less notice. Again the adjudicator rejected this argument which meant that the adjudicator did not go into the question as to what would have been the value of the work, the subject of interim application number 30, if that work had fallen to be valued by him.

Victory House brought TCC proceedings by way of a Part 8 claim (see *Dispatch* 212). In the TCC Deputy Judge Smith held that RGB was entitled to summary judgment in relation to the adjudication decision. The TCC case did not determine two matters, one relating to the memorandum of understanding and the second relating to the question as to the notices which had been served by Victory House and the effect of those notices. Deputy Judge Smith made case management directions as to what was to happen in relation to these outstanding points. As Mr Justice Morgan noted in the winding-up proceedings, it was important to recognise that the fact that matters were still being pursued did not in any way detract from the final and binding character of the TCC judgment, which was to be complied with by 2 February 2018.

The petition debt here was based on the

judgment debt. Mr Justice Morgan made clear that the judgment debt was no longer a disputed debt. There was no question of a set-off being asserted. However, Victory House did not pay and RGB issued a further interim application notice, number 31. Application 31 rolled up all of the work which had been the subject of the previous interim application, including the sums awarded by the first adjudicator. Prior to the second adjudication, Victory House had paid on account some £8.5 million. RGB claimed £11.7 million.

The second adjudicator reached the conclusion that the gross value of the work done, up to the valuation date, was just over £7 million. Allowing for retention, the net payment due to RGB was £6.9 million. The adjudicator decided that the sum due on interim application number 31 was nil. He did not make an order that the contractor pay back any part of the £8.5 million already received and it was agreed the adjudicator did not have the power to make that order. However, the logic of the order was that RGB had received a substantial sum, something of the order of £1.5 million, in excess of the sum due on a true valuation in accordance with the contractual provisions. The figure of £8.5 million paid by Victory House to RGB did not include the judgment sum because the judgment sum had not been paid by Victory House.

RGB issued the winding-up petition in relation to the judgment debt. Victory House raised two reasons as to why they should not have to pay.

First, the result of Adjudication No. 2 was that if Victory House did pay the judgment debt, it would immediately become entitled to be repaid that sum so there is a cross-claim.

Second, there was said to be a cross-claim for unliquidated damages (the cost of remedial works) for alleged breaches by the contractor of the building contract. The Judge noted that those issues had been considered in a third adjudication and "rightly or wrongly" had effectively been rejected. He therefore concentrated only on the first cross-claim item.

Mr Justice Morgan referred to the decision of Mr Justice Coulson in *Grove Developments v S&T* (*Dispatch* 213). One of the issues there was whether, following a smash and grab adjudication, the employer could ask for a second adjudication in which he asked the second

adjudicator to carry out a valuation of the work that had been done in accordance with the contractual provisions. Mr Justice Coulson suggested that the employer could, provided they had honoured the first adjudication decision.

Mr Justice Turner noted that Mr Justice Coulson had also said that if the figure determined in the second adjudication by way of interim payment was a smaller figure than had earlier been paid, in particular in accordance with the first adjudication, the employer would be entitled to ask for repayment of the figure appropriately calculated. The *Grove* case was one where there were two adjudications in relation to a single interim payment application, with one adjudication turning on the formal documents that had been exchanged, and the other involving what was described as a "true" valuation of the same matter.

Here Victory House said that their case was stronger because there had not been a second adjudication on the same certificate but a subsequent adjudication in relation to a later certificate in which the earlier one was subsumed. The second adjudicator had carried out a "true" valuation in accordance with the contractual provisions, in relation to an application for an interim payment, and it had emerged that no sum was payable.

Mr Justice Turner agreed that Victory House could say that it was "bad enough" for the employer that it has paid some £8.5 million when Adjudication No. 2 has determined that the correct interim payment would be of the order of £7 million. It would be worse if the employer, to avoid winding up, then had to pay the further sum by way of the judgment debt.

The Judge then decided, following the 1999 case of *Re Bayoil SA*, that he had no doubt that Victory House had a bona fide cross-claim on substantial grounds and he dismissed the petition.

Other cases: Construction Industry Law Letter

Contract construction - PFI contracts - setting aside certificates - manifest error

Amey Birmingham Highways Limited v Birmingham City Council

Court of Appeal;
Before Lord Justice Jackson, Lord Justice
Moylan and Sir Stephen Tomlinson;
judgment delivered 22 February 2018

The facts

By a PFI contract dated 6 May 2010 ("the Project Agreement"), the Birmingham City Council ("BCC") engaged Amey Birmingham Highways Limited ("ABHL") to undertake the rehabilitation, maintenance, management and operation of the road network in Birmingham for a 25-year period.

The Project Agreement provided for a five-year Core Investment Period, during which ABHL would carry out the Core Investment Works in accordance with the Output Specification and ten agreed milestone dates. An independent certifier was to certify completion in respect of those milestone dates.

Clause 19.2.1 of the Project Agreement provided as follows:

"From the Service Commencement Date [ABHL] shall accurately update the Project Network Model in accordance with Performance Standard 8 of Schedule 2 (Output Specification) and shall ensure that the information contained in it is up to date at all times."

Part 1A of the Output Specification ("PS1A") set out the work to be done in order to achieve each of the ten milestones in the five-year Core Investment Period. Part 1B of the Output Specification ("PS1B") set out the condition in which ABHL had to maintain the roads, footways, verges, cycle

tracks and kerbs during the subsequent 20 years of the contract.

On 22 October 2008, BCC supplied to ABHL a database document known as DRD0626 detailing the Birmingham road network. DRD0626 contained six tables of data. Both parties intended that DRD0626 should be the initial version of the Project Network Model ("PNM"). Some of the details in DRD0626 recorded the assets that existed. However, about 60% of the inventory details were based on national averages rather than detailed observation and measurement.

On 7 June 2010, ABHL started to perform its services under the Project Agreement including the Core Investment Works. All went well for the first three and a half years and the independent certifier certified completion in respect of the first five milestones.

In February 2014, BCC noticed that ABHL was deliberately leaving certain parts of roads and footpaths unrepaired. From the beginning of 2014 ABHL took the view that its contractual obligations in PS1 extended only to those roads, footways, kerbs, verges and cycle tracks which were detailed in two of the six tables of data in DRD0626: MSEC and MINV. ABHL's position was that it was under no duty to repair or maintain any sections of roads, footways, kerbs, verges or cycle tracks that were not detailed in MSEC or MINV. Since a large part of DRD0626 was based on default data, there were many areas which fell into this category.

The rationale for ABHL's position was that, as intended, they were using DRD0626 as the PNM. ABHL was regularly updating four of the tables in that database as they gained new information about the road network (the four tables being MSURV, MECSURV, MCON and MSCRIM). ABHL were not, however, updating MSEC and MINV. Those two tables contained inventory data.

BCC maintained that ABHL was in breach of contract: ABHL was under a duty to rehabilitate and maintain the road network that actually existed, not a hypothetical road network based on default data. BCC maintained that ABHL was obliged to update the default inventory data in the PNM with actual inventory data as survey results came in. ABHL denied that it was under such a duty. The independent certifier took the view that it was not his role to resolve contractual issues between the parties and in due course issued certificates in respect of milestones 6, 7, 8

and 9.

With regard to the completion certificates, clause 13.5.1 of the Project Agreement provided that any completion certificates issued by the independent certifier would, in the absence of fraud or manifest error, be final and binding. However, clause 70.2.6 of the Project Agreement stated that an adjudicator in any adjudication proceedings brought by the parties under the Project Agreement had the power to open up, review and revise any opinion, certificate, instruction or determination of decision of whatever nature given or made under the Project Agreement.

BCC referred the dispute as to ABHL's compliance with the Project Agreement to adjudication. The three issues referred to the adjudicator were: (i) the scope of ABHL's obligation in relation to the Core Investment Works; (ii) whether ABHL was under an obligation to keep the PNM updated; and (iii) whether milestone certificates 6 to 9 could and should be set aside.

On 9 July 2015, the adjudicator issued his Decision, finding in BCC's favour on all three issues. On the first issue, the adjudicator found that ABHL's obligations to perform the Core Investment Works and meet the requirements of PS1 extended to the Project Network as a whole and was not limited to the RSLs (Road Section Lengths) as recorded in the PNM contained in DRD0626. On the second issue, the adjudicator found that ABHL was obliged to update the PNM and maintain a Project Network Inventory which accurately reflected the actual extent of the Project Network and the Project Road. Finally, the adjudicator found that the completion certificates for milestones 6 to 9 inclusive should be set aside or alternatively opened up, reviewed and revised and the relevant calculations performed again by reference to an actual Project Network Inventory.

ABHL was unhappy with the adjudicator's decision and referred the matter to the TCC. The Judge came to the opposite conclusion to the adjudicator on the first two issues and therefore did not decide the third issue.

BCC appealed to the Court of Appeal, in effect seeking to reinstate the decision of the adjudicator.

Issues and findings

Was ABHL under a duty to update the MINV

and MSEC tables in the PNM?

Yes.

What was the extent of ABHL's obligations under the Project Agreement?

ABHL's obligations extended to the whole of the road network, as it exists on the ground.

Should milestone certificates 6 to 9 be set aside?

Yes. Milestone certificates 6 to 9 should be set aside for manifest error.

Commentary

Clause 19.2.1 appears to be quite clear on its face. However, the Project Agreement was to be read as a whole and ABHL's arguments, successful at first instance, concentrated on the other elements of the contract which supported its interpretation. These arguments were rejected by the Court of Appeal, applying the usual principles of contract construction.

Separately to that analysis, but one must wonder the extent to which this influenced the analysis, Jackson LJ made some comments about the type of contract in dispute. Jackson LJ characterised the PFI contract, a PFI contract which would run for 25 years, as a "relational" contract and noted that there has been much academic literature on such contracts and whether they are subject to special rules. Without delving into that debate, he noted that a relational contract is likely to be of massive length and contain many infelicities and oddities, and that both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. Jackson LJ warned against latching on to infelicities and oddities in order to disrupt the project and maximise gain and, in this regard, he made the pointed comment that the contract had worked perfectly satisfactorily for the first three and a half years until ABHL thought up its "ingenious" new interpretation of the contract.

Beyond the mere fact that these comments are related to PFI or relational contracts, on which there is very little case law, these comments are noteworthy for two reasons. First, there has in recent years been a trend for parties to PFI agreements, after a number of years of operation, to try to reinterpret their obligations in order to assist their commercial positions. Jackson LJ's comments could be taken as a warning

that the courts will not treat such cases lightly. Secondly, although Jackson LJ refrained from an analysis of whether there are special rules of contract construction for relational contracts, these comments could be seen as laying the groundwork for a more detailed consideration of this question.

Project insurance - co-insured - subcontractors

(1) *Haberdashers' Aske's Federation Trust Limited* (2) *The Mayor and Burgesses of the London Borough of Lewisham v (1) Lakehouse Contracts Limited* (2) *Cambridge Polymer Roofing Limited*; (1) *Zurich Insurance PLC* (2) *QBW Casualty Syndicate 386* (3) *CNA Insurance Company Limited*

Technology and Construction Court;
Before Mr Justice Fraser;
judgment delivered 19 March 2018

The facts

By a contract dated 29 June 2009 (known as the Design and Build Subcontract), Lakehouse Contracts Limited ("Lakehouse") was engaged as design and build contractor to undertake an extension and other works at Hatcham College, Lewisham. The project was funded under the now defunct Building Schools for the Future scheme with a similar project structure to a PFI contract. In this respect Lewisham Borough Council ("Lewisham") was the authority and contracted with a Local Education Partnership (the "LEP") for the works to be carried out. The LEP in turn contracted with Lakehouse. Hatcham College was operated by the Haberdashers' Aske's Federation Trust Limited ("Haberdashers") and Lakehouse also entered into a duty of care deed ("the Deed") with Haberdashers.

Lakehouse entered into a number of subcontracts including with Cambridge Polymer Roofing Limited ("CPR") for the roofing works required ("the Roofing Subcontract").

On 6 April 2010, CPR were to undertake hot work, using a blowtorch to stick down roof

membrane. At 1514 hours on that day, a fire occurred in the area of the hot work, which spread and caused extensive damage to the buildings, which had to be reinstated.

The Design and Build Subcontract set out provisions in respect of overall project insurance (the "Project Insurance") to be taken out and maintained by the LEP. The Project Insurance included Contractors' All Risks (CAR) insurance. The insureds were listed in Schedule 12 of the Design and Build Contract as the LEP, Lewisham, Haberdashers, Lakehouse and subcontractors of either the LEP and/or Lakehouse of any tier. The overall value of the Project Insurance was £50 million.

However, it was also the case that clause 6 of the Roofing Subcontract expressly provided that CPR obtain its own third-party liability insurance cover and this cover in the sum of £5 million was in place at the time of the fire.

On 28 November 2016, Haberdashers and Lewisham issued proceedings against Lakehouse and CPR in the Technology and Construction Court, seeking damages of more than £11 million, alleging breaches of the Subcontract, the Deed and common law duties of care.

On 21 December 2016, Lakehouse issued an additional claim against CPR, seeking a contribution, alternatively an indemnity, in respect of Lakehouse's liability to Haberdashers and Lewisham.

On 23 December 2016, CPR issued Part 20 proceedings against the three project insurers, Zurich Insurance plc, QBW Casualty Syndicate 386 and CNA Insurance Company Limited (together "the Project Insurers"), essentially claiming that CPR was entitled to the benefit of the Project Insurance.

On 21 December 2017, Lakehouse, Haberdashers and Lewisham agreed a settlement whereby Lakehouse paid Haberdashers and Lewisham the total sum of £8.75 million inclusive of costs, interest and damages in respect of the fire. In reality these funds came from the Project Insurers.

The Project Insurers (through Lakehouse) wished to recover the £5 million insurance cover held by CPR. CPR (by its insurers) argued that the existence and terms of the Project Insurance and the terms of the Roofing Subcontract meant that CPR was a co-insured and therefore was entitled to the cover provided by the Project Insurance,

notwithstanding the existence of its own cover, and that this provided a defence to Lakehouse's claim. The Project Insurers argued that the Project Insurance was in place and provided a "first call" in terms of making good the losses from the fire but the Project Insurers were entitled to bring a subrogated claim against CPR in Lakehouse's name to recover the losses insured by CPR under its own policy. Crucial to this analysis was the existence of CPR's own insurance cover, expressly required by the terms of the Roofing Subcontract.

On 20 June 2017, the court ordered that issues of the liability of the Project Insurers to CPR (on the assumption that the fire was caused by the negligence of CPR) and CPR's entitlement to certain declarations in this regard be determined as preliminary issues.

Issues and findings

Could the Project Insurers pursue a claim (in Lakehouse's name) against CPR even though subcontractors were a co-insured group under the Project Insurance?

Yes. The correct analysis was that the insurance of subcontractors is effected by way of a standing offer to the subcontractor which, if accepted, is incorporated into the subcontract by way of an implied term. Where there is an express term to the effect that the subcontractor will obtain its own insurance then that implied term is displaced. Accordingly, in this case CPR was not a co-insured under the Project Insurance. The judge left open the question as to whether a term effecting project insurance would be implied for uninsured losses arising under the subcontract; this issue did not arise in this case.

Commentary

This judgment has caused some alarm amongst subcontractors, although the approach is logical and consistent with established case law. Many construction and engineering projects are procured on the basis that there is project insurance in place and subcontractors will consider themselves to be covered by that insurance if subcontractors are a named class in the policy schedule.

What has now been clarified is that in reality whether a subcontractor can avail itself of that project insurance will depend upon the terms of the subcontract. By

adopting the analysis of the "standing offer", any express terms requiring insurance to be taken out will negate the implied term that the subcontractor is co-insured.

The judge's comments in relation to uninsured losses are to be noted: he did not exclude the possibility that a term may be implied such that a subcontractor could be co-insured for such losses. The question did not arise here as the claim by the Project Insurers was only for the £5 million cover held by CPR.

Finally, the judge took the opportunity to restate that there is precious little, if anything, left of the doctrine of *contra proferentem* in commercial cases.

Arbitrator bias - multiple references with same or overlapping subject matter *Halliburton Company v Chubb Bermuda Insurance Limited and others*

Court of Appeal;
Before Sir Geoffrey Vos, Lord Justice Simon and Lord Justice Hamblen;
judgment delivered 19 April 2018

The facts

On 20 April 2010 there was an explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico when a well which was in the process of being plugged and temporarily abandoned suffered a blowout. BP Exploration and Production Inc ("BP") was the lessee of the rig. Transocean Holdings LLC ("Transocean") was the owner of the rig and had been engaged by BP to provide crew and drilling teams. Halliburton Company ("Halliburton") provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well.

Both Halliburton and Transocean purchased liability insurance on the Bermuda form from Chubb Bermuda Insurance Limited ("Chubb") in similar terms, with coverage of US\$100 million, with an excess of US\$500 million. The policies were governed by New York law but provided for arbitration in London by a tribunal consisting of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. In the event of disagreement between the arbitrators as

to the choice of the third, the appointment was to be made by the High Court.

Following the Deepwater incident, numerous claims were made against BP, Halliburton and Transocean. A liability trial held in the Federal Court for the Eastern District of Louisiana held Halliburton to be 3% liable and Transocean to be 30% liable in respect of the claims made by the US Government. Halliburton settled its claims with private litigants for US\$1.1 billion and Transocean settled its claims with private litigants for US\$212 million and paid civil penalties to the US Government of US\$1 billion.

Halliburton made a claim on its liability insurance against Chubb. Chubb refused to pay Halliburton's claim, contending among other things that Halliburton's settlement of the claims was not a reasonable settlement and/or that Chubb had reasonably not consented to the settlement.

On 27 January 2015, Halliburton commenced arbitration by appointing an individual, known as N in the court proceedings, as its arbitrator ("reference 1"). Chubb appointed an individual, known as P in the court proceedings, as its arbitrator. The identity of the third arbitrator could not be agreed and so an application was made to the High Court. Following a contested hearing, on 12 June 2015 Flaux J appointed an individual, known as M in the court proceedings, as the third arbitrator. M was Chubb's preferred candidate. Halliburton's main objection to Chubb's candidates including M was that they were English lawyers and the policy was governed by New York law.

Prior to expressing his willingness to be appointed, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, including appointments on behalf of Chubb, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved.

On 18 September 2015, Halliburton served its Statement of Claim in reference 1. On 11 December 2015, Chubb served its Statement of Defence.

In December 2015, M accepted appointment by Chubb through Clyde & Co, who were also Chubb's solicitors in reference 1, in relation to an excess liability claim arising out of the Deepocean incident made by Transocean under its liability

insurance policy with Chubb ("reference 2"). The same manager, Mr Trimarchi, was responsible for monitoring the claims made by both Transocean and Halliburton on behalf of Chubb and took the decision to refuse the claim in each case.

Prior to his acceptance of the appointment in reference 2, M disclosed to Transocean his appointment in reference 1 and in the other Chubb arbitrations. Transocean raised no objection. M did not, however, disclose to Halliburton his proposed appointment in reference 2.

In August 2016, M accepted appointment as a substitute arbitrator in another claim made by Transocean against a different insurer on the same layer of insurance ("reference 3"). This proposed appointment was also not disclosed to Halliburton.

In references 2 and 3 there was an order for a trial of a preliminary issue which was potentially dispositive of the claims, if decided in favour of the insurers. It involved construction of the policy terms on undisputed facts relating to the exhaustion of underlying layers by reference to the fines and penalties paid by Transocean. The preliminary issue was heard in November 2016.

On 10 November 2016, Halliburton learned of M's appointment in references 2 and 3. On 29 November 2016, Halliburton's US lawyers, K&L Gates, wrote to M referring to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("the IBA Guidelines") concerning the continuing duty of disclosure of potential conflicts of interest and asking for clarifications and explanations.

On 5 December 2016, M replied by email stating that he had not made disclosure to Halliburton at the time of the appointments in references 2 and 3 because it did not occur to him at the time that he was under any obligation to do so. He acknowledged, however, that it would have been prudent for him to do so. He stated that he did not think that references 2 and 3 raised the same or similar issues to reference 1 and that he had remained independent and impartial. Notwithstanding, he offered to resign in references 2 and 3 if the results of the determination of the preliminary issues in those references did not bring them to an end.

Halliburton responded repeating its concerns about M's impartiality and

suggesting that he resign in reference 1. Chubb was not prepared to agree to this. On 15 December 2016, M wrote to the parties, noting his duty to both parties and suggesting that they try to agree a new chairman of the tribunal, failing which the matter would have to be referred to the Court (which M would prefer to avoid).

On 21 December 2016, Halliburton issued proceedings in the High Court seeking an order pursuant to section 24(1)(a) of the Arbitration Act 1996 that M be removed as an arbitrator.

On 3 February 2017 the High Court dismissed Halliburton's application.

On 1 March 2017, the tribunals in references 2 and 3 issued awards in favour of Chubb on the preliminary issues, bringing those references to an end.

On 5 December 2017, the tribunal in reference 1 issued its Final Partial Award on the merits, deciding in Chubb's favour. One of the arbitrators, N, issued "Separate Observations" in which he stated that he was unable to join in the Award as a result of his "profound disquiet about the arbitration's fairness", referring directly to the appointment of M as Chubb's party arbitrator in other arbitration proceedings arising from the same events.

Halliburton appealed the decision of the High Court.

Issues and findings

To what extent may an arbitrator accept appointment in multiple reference concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias?

The mere fact that an arbitrator accepts appointments in multiple reference concerning the same or overlapping subject matter with only one common party does not of itself give rise to an appearance of bias. Something more, of substance, is required.

When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality?

Disclosure depends on what the arbitrator knows and is a matter to be considered prospectively, taking into account the prevailing circumstances at that time. Disclosure should be given of facts and circumstances known to the arbitrators

which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased.

In this case, as a matter of good practice and of law, M should have made disclosure to Halliburton at the time of his appointments in references 2 and 3.

What are the consequences of failing to make disclosure?

Non-disclosure is a factor to be taken into account in considering the issue of apparent bias. However, non-disclosure of a fact or circumstance which should have been disclosed but does not on examination give rise to justifiable doubts as to the arbitrator's impartiality cannot in itself justify an inference of apparent bias. Something more is required.

In this case, on the facts, a fair-minded and informed observer would not conclude that there was a real possibility that M was biased.

Commentary

The Court of Appeal acknowledged at the outset of this case that it raised issues of importance to commercial arbitration law and practice, and the Court's full consideration of the facts of this case is worth reading.

Here, an issue arose because the chair of an arbitral panel in an international commercial arbitration was also appointed as party arbitrator on arbitrations concerning the same or similar subject matter or events. This is not uncommon in international commercial arbitration where there is a relatively small pool of experienced arbitrators that parties wish to preside over their disputes. The Court of Appeal emphatically stated that simply being appointed arbitrator in multiple references arising from the same or similar events was not sufficient to raise an inference of apparent bias; something more, of substance, is needed. Halliburton was unable to demonstrate anything further and therefore its appeal was dismissed.

To some extent, there is logic in the position taken by Halliburton but the common law is clear on this point and the Court of Appeal considered the relevant authorities in detail. From an international arbitration point of view, however, it is likely that not all jurisdictions will take the same approach, which is a valid consideration

when determining the choice of seat.

Private nuisance - damage - Japanese knotweed *Network Rail Infrastructure Limited v (1) Stephen Williams (2) Robin Waistell Limited*

Court of Appeal;
Before The Master of the Rools, Lady Justice
Sharp and Lord Justice Leggatt;
judgment delivered 3 July 2018

The facts

Mr Williams and Mr Waistell ("the Claimants") are the respective freehold owners of two adjoining semi-detached bungalows in Maesteg, South Wales. Network Rail Infrastructure Limited ("NR") owns land immediately behind the Claimants' properties comprising an access path bordered by a post and wire fence leading to an embankment which drops down onto an active train line. The rear walls of each of the Claimants' properties immediately abut the access path owned by NR.

On the embankment there is a large stand of Japanese knotweed, which had been present on NR's land at that location for at least 50 years.

In 2015 the Claimants brought claims in private nuisance against NR on the basis that the Japanese knotweed had caused damage to their properties. They each sought an injunction to require NR to treat and eliminate the knotweed on its land together with claims for damages.

There were two heads of claim for damages. First, the "encroachment claim". The Claimants alleged that the Japanese knotweed had encroached onto their properties, causing them to suffer damage. In each case, it was held that whilst the Japanese knotweed had spread to the Claimants' properties (or on the balance of probabilities was likely to) there was no physical damage to the properties. The Recorder held that as there was no actual physical damage caused by the encroachment, the encroachment did not give rise to a claim in private nuisance.

The second head was the "quiet enjoyment/loss of amenity" claim. The Claimants claimed that the presence of the Japanese knotweed on NR's land in close proximity to the boundary of the properties was a

sufficiently serious interference with the Claimants' quiet enjoyment or amenity value of their properties so as to constitute an actionable nuisance and that it was an unreasonable interference with their enjoyment of their properties as its presence affected their ability to sell the properties at a proper market value. The Recorder found in favour of the Claimants on this head of claim, finding that the ability to dispose of property at its proper value can be included in the amenity value of a property and that there had been a loss of enjoyment.

The claims were heard at Cardiff County Court and the Recorder found in favour of the Claimants.

NR appealed the decision of the Recorder. NR argued that where a residential homeowner suffers a diminution in value of their property by virtue of the presence of Japanese knotweed then it should not be the case, as the Recorder found, that such diminution in value, which is a pure economic loss, should be an actionable private nuisance on the basis that it interferes with the quiet enjoyment of the property.

In response, the Claimants sought to uphold the judgment of the Recorder for additional reasons: (i) that encroachment without physical damage could give rise to an actionable claim in private nuisance; and (ii) that the presence of Japanese knotweed roots and rhizomes in the Claimants' properties in any event constituted damage.

Issues and findings

Is physical damage necessary in order to give rise to an actionable claim in private nuisance?

No. In the case of nuisance through interference with the amenity of land, physical damage is not necessary.

Can diminution in value, which is economic loss, be considered to be a loss of amenity?

No. The Recorder's conclusion that the presence of the knotweed on NR's land was an actionable nuisance simply because it diminished the market value of the Claimants' respective properties was wrong in principle.

Commentary

This was a relatively rare case of the Court of Appeal upholding the decision of the trial judge but for entirely different reasons.

The court took the opportunity to set out a clear exposition of the principles that apply

to modern actions for private nuisance. Firstly, the court explained that a private nuisance is a violation of real property rights. This means that it involves either (i) an interference with the legal rights of the owner of the land; or (ii) interference with amenity of the land, that is to say the right to use it and enjoy it. Secondly, whilst nuisance is often broken down into different categories, the court should not adopt rigid categorisation as that would hinder considering nuisance in new social situations and factual situations which might involve more than one category. Thirdly, one must treat with caution the proposition that damage is always an essential requirement of the cause of action of nuisance. This proposition is derived from the old form of action which now has to be viewed in light of the more recent approach by the courts to nuisance cases. As part of this, the court noted that it is well established that in the case of nuisance through interference with the amenity of land, physical damage is not necessary to complete the cause of action. Fourthly, nuisance may be caused by inaction or omission as well as by some positive activity. Finally, the broad unifying principle in this area of law is reasonableness between neighbours (real or figurative).

Here, the court found that the trial judge had been wrong in principle to consider that diminution in value could be considered as loss of amenity in a private nuisance claim; accordingly the ground on which judgment had been given in favour of the Claimants was overturned.

However, the court went on to find that as no physical damage was necessary in a loss of amenity claim and, on the facts of this case, the Claimants should succeed in their claim on the basis of unlawful interference with their enjoyment of the amenity of their properties due to the impairment of their right to use and enjoy those properties.

Civil Liability (Contribution) Act 1978 – limitation

*R.G. Carter Building Limited
v Kier Business Services
Limited (formerly Mouchel
Business Services Limited)*

Technology and Construction Court;
Before Mr Edward Pepperall QC sitting as a

Deputy High Court Judge;
judgment delivered 5 April 2018

The facts

In or about 2001, Lincolnshire County Council (“the Council”) engaged R.G. Carter Building Limited (“Carter”) to build a new science block at Boston Grammar School. The science block was designed by Kier Business Services Limited (“Kier”). Problems arose with regard to water ingress and the Council commenced arbitration proceedings against Carter.

The arbitration was settled in 2015 upon terms that Carter would carry out remedial works at its own cost. Negotiations were conducted between Carter and the Council between December 2014 and June 2015 and agreement in principle was reached in April 2015, but all negotiations were conducted on a subject to contract basis.

On 29 June 2015, a settlement agreement was signed by the Council and Carter.

Carter considered that it had a claim against Kier for an indemnity or contribution in relation to the settlement that it had made with the Council. Carter’s claim was based upon the Civil Liability (Contribution) Act 1978 (the “1978 Act”). In the case of claims under the 1978 Act arising from claims that have settled, s. 10(4) of the Limitation Act 1980 (the “1980 Act”) states that the relevant statutory limitation period is two years from the date of agreement for the payment of compensation.

On 28 April 2017, Carter and Kier entered into a standstill agreement.

On 20 September 2017, Carter issued proceedings against Kier seeking an indemnity or a contribution of £205,908.60 in respect of the cost of the settlement. Kier’s position was that the claim was statute-barred and had been as at 28 April 2017.

Kier argued that the remedial works were agreed by 16 April 2015, or at the latest by 27 April 2015. All that remained to be agreed thereafter were ancillary matters that did not prevent time from running. Accordingly, as at 28 April 2017, Carter’s claim was statute-barred.

Carter argued that the two-year limitation period did not expire until after the standstill agreement as there was no agreement as to the remedial works until the parties to the arbitration proceedings

signed the settlement agreement on 29 June 2015. Alternatively, the date of the agreement between Carter and the Council was later than 28 April 2015 as the parties were still negotiating the terms of settlement throughout April 2015.

Issues and findings

Was the claim under the 1978 Act statute-barred?

No. The proper construction of s. 10(4) of the 1980 Act is that time starts to run from the date of a binding agreement as to the amount of the compensation payment. There was no such binding agreement between the Council and Carter as at 28 April 2015.

Commentary

The judge held that time only begins to start running for limitation purposes in a contribution claim concerning a settlement from the date on which binding agreement as to the amount of the compensation payment was made. In cases where negotiations are stated to be subject to contract then it will be difficult to argue that the date of the binding agreement is anything other than the date of the settlement agreement. However, the judge did not preclude time beginning to run from a date where immediate payment was agreed but further matters had been left to be agreed, but made clear that such cases would need to be the subject of clearly expressed agreement between the parties. This was not such a case.

Performance bond – JCT termination and insolvency provisions

Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc

Technology and Construction Court;
Before Mr Justice Coulson;
judgment delivered 20 December 2017

The facts

In or around 2015, pursuant to a contract in the JCT 2011 standard form (“the Contract”), Ziggurat (Claremont Place) LLP (“Ziggurat”) engaged County Contractors (UK) Limited (“County”) to build blocks of student accommodation at Claremont Place, Newcastle-upon-Tyne.

On 28 January 2015, HCC International Insurance Company plc (“HCC”) provided to Ziggurat a performance guarantee bond (“the Bond”) in respect of County’s performance under the Contract.

The Bond included the following provisions:

- That, in the event of a breach of contract by County, HCC guaranteed to Ziggurat that it would satisfy and discharge the losses and damages sustained by Ziggurat as established and ascertained pursuant to and in accordance with provision of or by reference to the Contract and taking into account all sums due or to become due to County.
- That damages payable under the Bond would include any debt or sum payable to Ziggurat under the Contract following the insolvency of County.

In February 2016, County suspended works, the evidence suggesting that the reason for this was County’s own financial difficulties and no default on the part of Ziggurat. Following service of notices of default, Ziggurat terminated County’s employment under the Contract, triggering the various provisions concerning termination and accounting for losses that are included in clause 8 of the JCT standard form. Approximately a week later County became the subject of a Company Voluntary Arrangement and was therefore considered to be insolvent as defined by clause 8 of the Contract.

Clause 8 of the Contract provides for the employer to terminate the employment of the contractor on the occurrence of various events, including insolvency. Clause 8.7 sets out the consequences of such a termination including the ability of the employer to engage others to complete the works and for the employer to then provide a statement of account to the contractor and, if an amount is owed by the contractor to the employer as a result, then this falls due as a debt.

Ziggurat engaged other contractors to complete County’s works. In March 2017 Ziggurat claimed payment of those costs against County pursuant to clause 8.7 of the Contract. At the same time, Ziggurat claimed these costs from HCC pursuant to the Bond.

County disputed the claim, arguing that the termination of its employment had been invalid due to a miscalculation of the

length of the relevant notice period and that accordingly Ziggurat had repudiated the Contract. County further stated that it disputed the sums claimed.

HCC also disputed the claim made. HCC argued that the Bond was a default bond rather than an on demand bond and that Ziggurat needed to prove that a breach of contract had taken place and that losses had been incurred as a result of that breach before a claim could be made. HCC went on to say that they were aware that County disputed the claim being made by Ziggurat and that until a formal decision as to whether County had breached the Contract and a formal ruling on the extent of losses arising had been established, HCC denied that any payment was due.

Ziggurat’s position was that a debt had fallen due under clause 8.7 of the Contract and therefore County was in breach of contract in not paying that debt and the Bond should respond as a result of that breach.

On 3 October 2017, Ziggurat issued proceedings in the Technology and Construction Court seeking declarations against HCC in respect of the true construction of the Bond.

Issues and findings

Was the sum claimed payable under the bond?

Yes. This result could be achieved with or without breach of the Contract.

Commentary

The decision in this case rested on the interaction between the insolvency and termination provisions of the Contract and the terms of the Bond. However, the provisions in question are not uncommon in construction contracts and the case law that the judge relied upon in coming to his conclusions related to very similar facts and circumstances.

The judge found that the relevant provisions of the Bond mirrored the principal termination routes of the Contract (which did not require default). This meant that the Bond could be triggered without breach of contract on the part of County, although this must still be through the operation of the relevant clauses of the Contract. In addition, the Bond was also triggered where there was a breach of the Contract.

The Fenwick Elliott Blog

Introduction

Our blog, headed by **Andrew Davies**, is now over a year old. Click on [www.https://www.fenwickelliott.com/blog](https://www.fenwickelliott.com/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. Your comments are very welcome.

In February 2018, **Robbie McCrea** wrote about the new DIAC rules.

Once in a decade update for DIAC Rules

In a rare case of good news for UAE arbitration in 2017, the Dubai International Arbitration Centre ("DIAC") announced during the Dubai Arbitration Week in November 2017 that its new set of arbitration rules would be enacted in 2018, replacing the current 2007 rules.

A pre-release version of the 2018 DIAC Rules (the "Proposed 2018 Rules") has now been circulated, and they look pretty good. Despite recent controversies for arbitration in the UAE, DIAC remains one of the busiest international arbitration centres in the world and, provided the new rules are enacted as promised, they should be welcomed by arbitration users and practitioners in the region.

The Proposed 2018 Rules include all of the expected revisions for a modern set of international arbitration rules, including emergency arbitrator, expedited procedure, and consolidation provisions. However, they also include a number of significant new provisions that are clearly designed to address the specific issues currently affecting arbitration in the UAE. The key new provisions are highlighted below.

The default seat of the arbitration is DIFC (Article 25.1)

The default seat has been moved from Dubai to the Dubai International Financial Centre ("DIFC"). DIFC is a separate jurisdiction within the Emirate of Dubai

that is common-law based, and is seen as more arbitration-friendly than the civil-law based Dubai courts.

If the seat of the arbitration is DIFC then the DIFC Courts, and not the Dubai Courts, will be the competent court to rule on issues arising from the arbitration; for instance interim measures, jurisdiction and other objections, and the enforcement of the award. Parties may of course choose an alternative seat; however, making DIFC the default signals an intention from DIAC to align itself with the procedural laws of other major arbitration centres.

Parties may be represented by persons of their choice (Article 7.1)

Parties' ability to choose their representatives is seen as a fundamental right in international arbitration. However, this has recently come into question in the UAE following the passing of Ministerial Resolution No. 972 of 2017 ("Resolution 972"), which prohibits anybody who is not a registered UAE lawyer from representing parties before arbitral tribunals. As registered lawyers in the UAE must be UAE nationals, this law on its face excludes not only non-lawyers but also anybody who is not a UAE national from representing parties in UAE arbitrations.

The ultimate effect of Resolution 972 within Dubai is still unclear. However, the Proposed 2018 Rules expressly permit parties to be represented by persons of their choice "*irrespective of their nationality or professional qualifications*", and if accepted in the enacted Rules it will resolve the issue for DIAC arbitrations.

Power to sanction (Article 50)

Another new provision that seems to be a response to a controversial new law (Article 257 of the Penal Code), Article 50 of the Proposed 2018 Rules empowers the arbitral tribunal to impose sanctions on either party when there is an attempt to unfairly obstruct the arbitration, jeopardise the award, make false statements and so on. This will no doubt be welcomed by arbitrators in dealing with frivolous allegations of wrongdoing against experts and tribunal members.

Other notable provisions

Other notable provisions include:

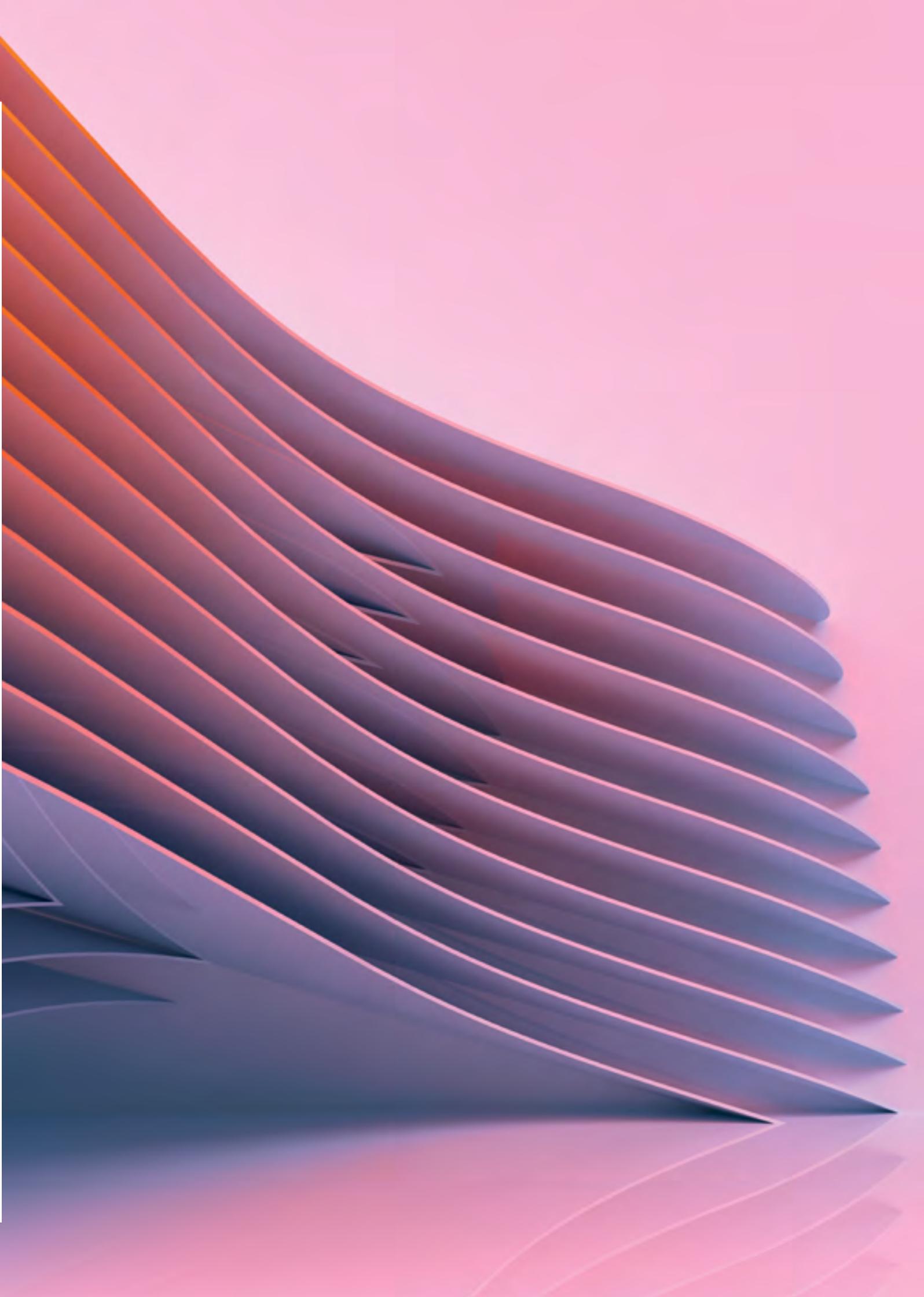
1. A new power for arbitral tribunals to suspend (Article 6.2), which will allow objections for failure to comply with

pre-arbitral requirements (such as the DAB procedure in a FIDIC Contract), to be resolved within the arbitration and without having to go to court.

2. Arbitral Awards may now be signed by tribunal members overseas rather than having to be in the UAE (Article 42.2).
3. Legal costs can be awarded (Article 2).
4. Parties may choose Shariah-compliant arbitration, in which case the arbitrators must be Islamic Law qualified (Article 52).

Conclusion

The Proposed 2018 Rules are an ambitious set of rules that provide an update in line with current international arbitration practice while also addressing a number of issues unique to arbitration in the UAE. The new rules should be welcomed, and we will keep you updated as to their enactment.





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