FenwickElliott

Solicitors

Summer Review 2004

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1. INTRODUCTION

Our Summer Review is now in its eighth year. Ever-extending circulation, coupled with a high demand for back copies, is testament to its continuing popularity. Change and expansion mark the theme of the last year as we grow and meet the needs and demands of our clients both here and internationally. I welcome our many new clients.

In the last 6 months alone, the expanding size and nature of both our project dispute work and our process engineering engagements has required the recruitment of 5 leading solicitors to supplement our existing excellent team. We now have over 20 construction lawyers on board.

All this growth and resourcing has meant we have overwhelmed and overgrown our existing offices at 353 and 408 Strand. I am pleased to announce the entire firm will move to one large floor plate at Aldwych House, 71/91 Aldwych, London WC2 in late October.

This marks an exciting watershed after 18 years in the Strand and the beginning of a new era as we push forward with plans my partners and I have in store following the launch of the firm as a Limited Liability Partnership in April. Formal Change of Address details will follow very shortly.

We will be all round better equipped and set up for our business needs, and even more conveniently sited for the TCC court, counsel chambers and the major arbitral/ADR suites.

Some hint of all this will be evident to those who may have surfed our newly revamped web pages, which went live in April of this year.

Adjudication

This year's Review features the continuing impact of adjudication and its steady march in complexity, formality and legal and evidential rigour.

The dynamics of adjudication continue to be an important part of our contentious work (but things are changing, of which more below) and our involvement directly and indirectly with Sir Michael Latham's current review of the HGCRA underpins our reputation and knowledge in this field.

As some of you will know, Chancellor Gordon Brown announced in the Budget the Government's commitment to review the adjudication and payment provisions in the HGCRA following industry concerns over unreasonable delays in payment. The current review sponsored by Minister Nigel Griffiths has Sir Michael under-taking a detailed reassessment of the Act, the good and the bad, and I set below in section 3 some of my thoughts on what has been a remarkable six years since the Act came into operation.

Mediation

As we featured in last year's Review, the courts are continuing to emphasize the importance of ADR. We have found that properly used, ADR can prove to be of real assistance in to reducing litigation and the likelihood of trial. There is now no doubt a real cost risk if only lip service is paid to the ADR process; the courts have gone so far as to disallow a winner his costs.

Three recent decisions of *Cowl, Dunnett* and *Hurst* have helped to clarify the obligation to undertake alternative dispute resolution under English law. ADR Orders are now firmly in the arena in light of the decisions in *Shirayama Shokusan* and *Halsey*.

Trials and arbitration

For the first time in six years we have noticed a small drop in the volume of domestic adjudications and an increase in cases going to trial and to arbitration.

This summer alone we have three concurrent trials running and it seems this trend is growing as parties in major disputes choose to go beyond adjudication to their chosen final resolution forum.

Non-contentious work

This last year we have reviewed two major developers' suites of procurement arrangements across the board from appointments with consultants, suppliers and contractors to the drawdown arrangements with funders. This also has been a growth area for us.

Our non-contentious work since last year has covered the full spectrum of construction projects documentation from standard form and bespoke contracts to design and build; engineer, procure and construct/turnkey; joint venture agreements; and service/supply contracts, construction management and management contracting arrangements. The firm also advised this year on bonds, warranties and guarantees, process and facilities management.

Conferences

As well as continuing with our regular Adjudication Update seminars at the Savoy, this year we have sponsored three major conferences. The first two were *Building 100 Club* events. On 3 February 2004 we started with the *Construction Clients Convention* and on 16 June the *Building 100 Breakfast Club* – an exclusive meeting with the man in charge of delivering the 2012 London Olympic bid, Mike Power, the Chief Operating Officer. Both were a huge success.

More recently still we sponsored the King's College Conference on 1–2 July entitled "*Key construction risks and dispute resolution – an international perspective*". This was an ambitious and highly successful two-day event, supported by Fenwick Elliott LLP, the SCL and SCA.

On its first day, it considered key risks to successful construction and infrastructure projects and how they can be identified and managed. The second day was devoted to the current state of knowledge and practice on the resolution of disputes within such projects.

On both days the focus was international, rather than purely domestic, with significant input from other regions, including Australia and SE Asia.

International work

Talking of overseas, I am also particularly pleased that we continue to benefit from a transatlantic business arrangement with the single largest dedicated construction practice in the USA working as a unified team on overseas commissions. More announcements on this exciting development in our overseas work will follow in the near future.

Summary

As you may gather it has been a time of great development, full of exciting avenues. We have had a productive and enjoyable year with an excellent team. Thank you our clients for the opportunities you have given us.

Long may this continue!

Simon Tolson

2. MEDIATION

In last year's Review, we highlighted the growing number of cases from the courts which provided judicial encouragement for mediation. In short, the message from the courts was that parties who refused a genuine offer to try and resolve a dispute through a form of alternative dispute resolution – be it negotiation or a more formal mediation process – ran the risk of being penalised on costs even if ultimately successful in the litigation.

As ***David Robertson*** explains, in May of this year, the Court of Appeal took the opportunity to clarify the position further.

The costs consequences of a refusal to mediate - the Court of Appeal's decision in *Halsey*

Halsey v Milton Keynes General NHS Trust; Steel v Joy and Halliday [2004] EWCA Civ 576

Background

The use of use alternative dispute resolution (ADR) in general, and mediation in particular, in the construction industry has grown rapidly over the past five years. More particularly, following the introduction of the Woolf reforms and the new Civil Procedure Rules (CPR), the courts, and the parties, are now obliged to resolve disputes in accordance with the CPR's *"overriding objective"*, namely:

- to ensure that the parties are on an equal footing;
- to save expense;
- to deal with the case in ways which are proportionate;
- to ensure that the case is dealt with expeditiously and fairly; and
- to allot to it an appropriate share of the Court's resources.

To achieve this goal, the courts are obliged to proactively manage cases and the litigants must attempt to avoid litigation by settling the dispute. In order to facilitate potential settlement, litigants are required to follow pre-action protocols; for building and engineering disputes, the applicable protocol is the Pre-action Protocol for Construction and Engineering Disputes.

The normal rule with regard to the parties' legal costs is that costs follow the event, i.e. the successful party recovers its costs (or in practice a portion of its costs) from the unsuccessful party. However, there have been several significant decisions where costs orders have gone against successful litigants on the basis that those litigants failed to seriously consider mediation in accordance with their obligations under the CPR.

In *Susan Dunnett v Railtrack Plc* [2002] EWCA Civ 302 the Court of Appeal refused to make a cost order against the unsuccessful respondent (Dunnett) on the basis that the appellant (Railtrack) had refused to mediate the dispute, having been advised by the Court that it would be highly desirable to do so.

Given that the CPR requires the parties to consider ADR, and that obligation is extended into the pre-action protocols, there is now a clear obligation on the parties to seriously consider some form of mediation or other ADR process. Prior to *Halsey* it seemed clear that this obligation would, if ignored, lead to cost consequences, even if the party concerned is successful. The key question, and the one answered to some extent by the *Halsey* decision, is whether there may be circumstances when a failure to mediate is justified.

The facts of the Halsey case

In *Halsey v Milton Keynes General NHS Trust; Steel v (1) Joy (2) Halliday* the Court of Appeal considered the important question of when a judge should impose cost sanctions on an unsuccessful litigant on the grounds that he refused to take part in mediation. The judgment concerned two appeals, and also reviewed submissions from four interveners, namely, the Law Society, the Civil Mediation Council, the ADR Group and CEDR.

In the first case Mr Halsey died while in hospital. His widow alleged negligence. However, she was unsuccessful at trial and so the NHS claimed its costs. Following *Dunnett* the claimant argued that the NHS should not receive its costs as the claimant had written to the NHS suggesting mediation. The NHS refused on the basis that it believed that it had a good defence and should not be forced to make financial offers to settle in mediation and so wanted to avoid the costs of mediation. The claimant argued that this was an unreasonable refusal to mediate. The trial judge did not agree with the claimant, and so made the usual costs order thus awarding the NHS its costs.

In the second case of *Steel v (1) Joy and (2) Halliday* the claimant was unlucky enough to be injured in two separate road accidents. The first in 1996, and the second in 1999. The defendants admitted liability and the only issue was whether the second defendant had caused further damage to the claimant. The second defendant refused an offer to mediate on the basis that the dispute concerned a question of law. The second defendant was successful and asked for its costs. The trial judge awarded costs to the second defendant, thus following the usual costs rule.

The Court of Appeal's decision

In giving the Court's decision Lord Justice Dyson made it clear that it was no longer necessary to make extensive references to the CPR or Court Guides in order to demonstrate the importance of ADR. He did, however, draw a distinction between the Court's encouragement of parties to agree to mediate, and the Court ordering the parties to mediate. Whilst he supported the Court's encouragement, even in the strongest terms, he considered it quite wrong for the Court to order the parties to mediate. Forcing a "*truly unwilling*" party to mediate was not only unacceptable, but was also an obstruction to a party's rights to access to the Court and a breach of Article 6 of the European Convention on Human Rights.

In *Dunnett* the Court's *"encouragement"* to mediate came in the form of two recommendations to do so. The decision in that case demonstrated that the Court's encouragement to the parties to undertake some form of ADR may be robust, and that cost sanctions may follow.

CPR Part 44.3(2) provides that the general rule is that an unsuccessful party will pay the costs of a successful party, but "*the court may make a different order*". If a court is to deprive a successful party of some or all of his costs because of a refusal to agree to ADR then "*such an order is an exception to the general rule that the costs should follow the event*". The key question for the court will be whether a party had acted unreasonably in refusing ADR.

Determining whether a party has been unreasonable

At paragraph 16 of the *Halsey* decision Dyson LJ listed the considerations which should be borne in mind in deciding

whether a party had acted unreasonably in refusing ADR. Those considerations are:

1. the nature of the dispute;
2. the merits of the case;
3. the extent to which other settlement methods have been attempted;
4. whether the costs of the ADR would be disproportionately high;
5. whether any delay in setting up and attending the ADR would have been prejudicial; and
6. whether the ADR had a reasonable prospect of success.

Dyson LJ then considered each of these in turn.

With regard to the nature of the dispute, he acknowledged that there were some cases where ADR was not appropriate. These included the determination of issues of law or construction, allegations of fraud or disreputable conduct and requests for injunctive or other relief.

The second relevant consideration to be taken into account, according to Dyson LJ, is whether the party refusing to mediate reasonably believes in the strength of its own case. He noted that large organisations in particular might otherwise fall victim to tactical proposals to mediate, with the attached threat of costs sanctions for refusal. Those with strong cases may be forced to mediate, and thereby incur additional costs, notwithstanding the strength of their cases. Therefore, Dyson LJ considered that "*the fact that a party unreasonably believes that he has a watertight case is no justification for refusing to mediate*". Conversely, a *reasonable* belief that one has a watertight case may well justify refusing to mediate.

The third consideration is what other attempts at settlement have already been made. This will be relevant because it may demonstrate that one party is making an effort to settle or that the other has an unrealistic view of the merits of its case.

Dyson LJ's fourth consideration is whether the costs of mediation would be disproportionately high given the sum at stake. The costs of the mediation may only be minimal, perhaps the costs of one day in court; however, it may also be possible to resolve a dispute with a single day in court.

The fifth consideration will be the delay (if any) to the trial resulting from a late proposal to mediate; suggesting mediation late in the day may not be acceptable if it will delay the trial.

The sixth and final consideration that should be borne in mind in determining whether a party refusing to mediate has acted reasonably, will be whether the mediation had a reasonable prospect of success. In the court's view this consideration will often be relevant to the reasonableness of a refusal; however, it will not necessarily be conclusive. For example, it may be the refusing party's unyielding stance itself that renders a positive outcome highly unlikely. Dyson LJ noted that in these circumstances the unlikelihood of success should not offer the refusing party grounds for refusing to mediate.

For this reason Dyson LJ held that it is not sufficient for the court to confine itself to considering the objective question of whether a mediation might have succeeded. The Court of Appeal instead adopted a wider test, focusing not just objectively on the dispute but also on the parties' "*willingness to compromise and the reasonableness of their attitudes*".

Burden of proving unreasonableness

Dyson LJ said that the burden should not be on the refusing party to satisfy the court that the mediation had no reasonable prospect of success, but instead the burden should be placed on the "*unsuccessful party to show that there was a reasonable prospect that mediation would have been successful*".

Therefore, in order to upset the general costs rule that the unsuccessful party should pay all or some of the other side's costs, it is for the loser in litigation to prove that there was a reasonable prospect for successfully concluding a mediation.

By its decision in *Halsey* the Court of Appeal has established a useful list of six considerations to help determine whether a party has acted unreasonably in refusing to mediate, such that an exception to the general costs rule should apply.

The Court of Appeal also recognised that there is a scale of approaches when it comes to the Court "*encouraging*" parties to mediate. A party which refuses to consider whether its case is suitable for ADR is "*always at risk of an adverse finding at the cost stage of the litigation*".

This is particularly the case where the Court has made an order requiring parties to consider ADR. On the other hand, a pledge by public bodies, such as government departments and agencies and the NHS Litigation Authorities, should not be given great weight. Such pledges are merely an undertaking to consider ADR and not an undertaking that ADR would be adopted in every case.

In the two cases before the Court in *Halsey*, the Court considered that the letters written in one (*Halsey*) were "*somewhat tactical*" and were devised in order to build pressure for the other side to settle the matter under threat of an adverse cost order for refusing to mediate. The second case (*Steel*) raised a question of law concerning causation. The Court of Appeal held that the defendant had not acted unreasonably in saying that he wanted to have the question resolved once and for all by the Court. Further, the issue was disposed of by the Recorder in about two hours, and so the costs were not significantly high when compared to the costs of a mediation.

There is one final point arising from this case. Dyson LJ stated:

"*All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR*."

This presents a clear message to the legal profession, undoubtedly including claims consultants, that when advising clients in respect of disputes, a failure to properly advise their clients as to whether a particular dispute is suitable for ADR by the application of the considerations in *Halsey* may amount to negligence.

3. ADJUDICATION

Following the Spring 2004 Budget, Sir Michael Latham is carrying out a review of the working of the Housing Grants Construction and Regeneration Act 1996. Everyone should be aware that this may well lead to changes to the way in which adjudication works. We will, of course, ensure that we keep everyone updated on just what those changes are and how they will affect the construction industry.

In his introduction, ***Simon Tolson*** indicated that he had a number of thoughts on the remarkable six years that have passed since the introduction of the HGCRA.

There are the good:

(i) The Act has been a great success;

(ii) With six years of *"suck it and see"*, much has been clarified and tested;

(iii) We now know decisions are enforceable despite error – *Bouygues v Dahl-Jensen (UK) Limited*;

(iv) Decisions are immune from attack in other clauses – *C&B Scene v Isobars*;

(v) The whole contract (for now) must be in writing! – *RJT Consulting Engineers Ltd v DM Engineering*;

(vi) Jurisdictional challenges are viewed critically – *Levolux; Shimizu Europe Limited v Automajor Limited* and *IDE Contracting Limited v RJ Carter Cambridge Limited;*

(vii) Late decisions are okay if reached within 28 days or such agreed extended period.

But there have been some practice issues and bad habits:

(i) Doubts have been raised about using adjudication for complex final accounts, – where very involved disputes must be decided within a 28-day period. A disturbing school of thought has developed that one should not use adjudication for complex cases. I for one am unhappy with the idea of restricting the type of dispute that can be referred – it risks chucking the baby out with the bathwater.

(ii) There is a distinct unease (worryingly) in the TCC that a party should have the right to adjudicate where it has substantively initiated arbitration or litigation despite what *Breen* and cases like *A&D Maintenance v Pagehurst* decided.

(iii) Natural justice and adjudication have been a jealous and suspicious couple.

(iv) The question of whether it is *"right"* the Act restricts the type of contract that may be referred to adjudication e.g. is it appropriate that purely petrochemical contracts under s105 (2) are outside the Act, ditto residential occupiers under s106, same again principal PFI contracts?

(v) Clauses that make winning referring party pay the costs of the loser are wrong and bound to go in this review.

(vi) There is unanimity amongst the cognoscenti that the courts lost their way in *RJT Consulting Engineers Ltd v DM Engineering* insisting on a contract fully *"evidenced in writing"*. Just when we all thought s107 was straightforward we learnt it ain't necessarily so! All this will change if this government gives time to amend the Act before the next election.

(vi) Lastly, the uncertain juridical basis for enforcement of adjudicators' decisions must be addressed if uncertainty is to be removed at the enforcement stage. The decisions to date are not properly reconcilable, and any attempt to find an answer that fits within the dicta of those decisions alone is unsatisfactory.

At Fenwick Elliott we continue to provide assistance on adjudication in all shapes and sizes, from small disputes about the value of interim applications to more technical extension of time claims to more complex final account disputes which can be worth many millions.

Where appropriate we will take steps to assist in the enforcement of those decisions. We set out below in section 11 details of one such case where the paying party unsuccessfully tried to argue that they did not have to pay on a technicality based on the date when the adjudicator delivered his decision.

On occasion, we have found ourselves before the courts to resolve whether the parties can proceed with an adjudication following the service of a Notice of Adjudication. In June of this year we successfully defended one such attempt to seek a declaration that the adjudication we had commenced could not proceed.

The case was *Connex South Eastern Ltd v MJ Building Services Group plc* and it came before His Honour Judge Seymour QC. Connex, as is increasingly typical, put forward a number of issues:

(i) Is there an agreement in writing pursuant to s107 of the HGCRA?

(ii) Did MJ have the right to refer the dispute to adjudication even if the agreement has been discharged by the acceptance of Connex' repudiation;

(iii) Did MJ have the right to refer the dispute?

In relation to the first point, it was argued that there had been no written acceptance of MJ's tender. The Judge thought that this was irrelevant. There was a reference to Connex giving an instruction to MJ to carry out the project immediately in the meeting minutes. The minutes were written with the authority of the parties and therefore constituted evidence of the acceptance of the tender.

As an adjudication can take place after the contract works have been completed, the repudiation argument did not succeed. However, the repudiation was accepted in November 2002 and the adjudication was not brought until February 2004; it was therefore suggested that this was an abuse of process.

The Judge disagreed. Following *Herschel v Breen,* an adjudication could be commenced at any time even if other proceedings were extant. However, the Judge did recognise that there had to be some limits. Thus whilst no limitation period was laid down for commencing an adjudication, any limitation defence would have to be taken into account by an adjudicator. If he failed to do so, then any payment pursuant to his award might well give rise to a claim for restitution.[1]

Fenwick Elliott Update Seminars

We continue to hold regular Update Seminars at the Savoy. Speakers over the past year have included HHJ Bowsher QC, Andrew Hemsley, Sean Brannigan and Stuart Kennedy.

The next seminar will be held on Monday 10 November 2004.

We were also fortunate in May that ***His Honour Robert Smellie CNZM QC***, found the time to provide us with an insight into the adjudication process in New Zealand. Given the current review of the HGCRA, his comments, some of which are set out below, might be of especial interest.

A comparison of New Zealand legislation with HGCRA

The New Zealand equivalent of HGCRA came into force on 1 April 2003. Like you we have experienced a slow start. Only one nominating authority is operating so far and its appointments

[1] For further information on restitutionary claims see section 7 below.

number about 20. The majority of those I gather were in the nature of value assessments…although I can give you my view of the legislation based upon a substantial construction practice at the Bar and 17 years as a High Court Judge, I am not able from direct experience to say how it is working. Anecdotal evidence, however, suggests that sub-contractors are enjoying better cash flow than in the past.

Non-monetary disputes

Many, if not all, of you will know that one of the strongest reasons advanced against the HGCRA and the scheme prior to enactment was that complex issues of delay, overheads, site access, unforeseen conditions, etc. etc. could not be adequately addressed in the short timeframes fixed for adjudication.

Those arguments influenced the draftsmen of the original New Zealand Bill. Ian Duncan Wallace QC, writing in the *International Construction Law Review*, applauded the Bill as first tabled in Parliament, contending that it avoided many of the objectionable features of the English legislation. However, when the Select Committee reported back for the Second Reading it recommended that adjudicators should have jurisdiction to address disputes about rights and obligations of the parties under the contract. But whereas monetary decisions can be enforced, rights and obligations rulings cannot. Rather, if a party fails to comply fully with the rights and obligations ruling, the other party can bring proceedings in court to enforce the rights under the contract. In that event it is provided that *"The Court must have regard to, but is not bound by, the adjudicator's determination"*.

Just how well that obvious compromise will work, and whether parties will be inclined to utilise it, remains to be seen.

Enforcing an adjudicator's award

Right from the start it seems to have been the intention of both draftsmen and legislators that once the adjudicator had ruled, irrespective of whether he or she was right or wrong, payment should be immediate and if not paid there should be a short, obstacle-free, route to recovery.

The obligations of the adjudicator to act in an independent, impartial and timely manner, avoid unnecessary expense and observe the rules of natural justice, etc. are spelt out in great detail in the New Zealand Act. Furthermore, the things that he or she must take into consideration are also recorded.

An adjudicator must consider only the following matters:

(a) The provisions of the Act.

(b) The contract in question.

(c) The claim, including submissions and relevant documents.

(d) The respondent's response, including submissions and relevant documents.

(e) The report of any experts appointed to advise (if any).

(f) The results of any inspection.

So far, so good. The adjudicator appears to be on a pretty tight rein. You might think that if it can be shown he has fallen short on his fairness obligations or gone outside what he is permitted to consider, his determination will not be enforced. Again, however, the Select Committee broadened that horizon and added:

(g) "Any other matters which the adjudicator reasonably considers to be relevant."

Nonetheless, despite spelling all that out in detail, at the end of the day once the determination (decision) is published, there are only three grounds upon which entry of judgment for the amount awarded can be resisted:

(a) That the amount has been paid.

(b) That the contract in question is not one to which the Act applies.

(c) That a condition precedent to payment has not been satisfied.

If none of those apply, or if the defendant fails to raise one or more within 15 days the court has no discretion and judgment *must* be entered.

Alternatively, failure to pay on an award entitles the payee to treat the award as a debt due and recover it, plus costs reasonably incurred, i.e. solicitor and client costs – provided reasonably incurred – the court is the arbitrator of that. In such a case, *"The Court must not give effect to any counter-claim, set-off or cross demand other than a set-off of an established liquidated amount."*

So some of the weighty issues that the judges of the TCC have grappled with – have there been genuine discussions before adjudication was sought, is the claim advanced at adjudication different from that originally made, were the rules of natural justice breached – simply will not arise.

At first blush this is all good news for the successful party and perhaps not unwelcome news for adjudicators. But if an unsuccessful party is denied the opportunity to argue a breach of natural justice or that the adjudicator has not considered one of the mandatory matters in section 65, the potential for the dispute to live on in the form of subsequent arbitration or court proceedings may well be enhanced.

Also the New Zealand Act, while following your model in allowing adjudicators to bypass other proceedings even if commenced earlier in time, recognises that an application for judicial review could close an adjudication down if a significant breach of natural justice, error of law or actions outside jurisdiction can be established. Of course a party seeking to follow that path must be quick off the mark.

Conversely, the thorough *"going over"* that adjudicators' decisions appear to get in the TCC, it seems to me, is far more likely to end the matter either by acceptance of the Court's view or a pragmatic commercial settlement …

Other significant differences

(a) The definition of construction work is, of course, linked to the definition of construction contract, which is the primary source of jurisdiction under the New Zealand Act. That Act does not include the services of professionals. Thus contracts of architects and engineers are not covered. Prefabrications off site are only covered if customised for the particular contract.

(b) A construction contract can be written or oral or partly written or partly oral. Looking at your definitions it seems to me they go pretty close to allowing an oral or partly written and partly oral contract, but the simplified New Zealand definition, I suggest, avoids argument on that score.

(c) The tight timeframes are all expressed in working days, which makes them look pretty tough. But since your days include weekends

and holidays, the differences are not so great. But a progress claim becomes due within 20 days and if not paid becomes a debt due, which is recoverable together with actual and reasonable costs immediately. Once an adjudicator is appointed, the claim must be filed within 5 working days and the respondent must reply within the same timeframe (it can be extended by agreement or at the adjudicator's discretion). But section 46(1)(b) *prohibits* an adjudicator from taking a late response into account. The adjudicator has 20 working days, which can be extended to 30 at his discretion if necessary, to provide the determination. Once the determination is published the payer must pay up within 2 days.

(d) The choice of adjudicator or nominating body is only binding if made after the dispute or difference arises. This was probably introduced to prevent economically dominant parties from effectively making a prior selection. I anticipate that adjudicators in New Zealand will be appointed by authorised nominating authorities who are appointed by the Minister in charge of the Bill. Such authorities have to satisfy certain criteria as to competence, training and selection processes. At present the Arbitrators and Mediators Institute of New Zealand is the only authorised nominating body.

(e) If the parties settle part-way through the adjudication, they may request the compromise to be recorded in the form of a determination on agreed terms. The successful party then has the advantage of the fast-track procedure to judgment.

(f) Consolidation of two or more pending adjudications can be effected by consent. Consolidation, however, potentially lifts complexity and throws time limits out of kilter. That was recognised and so it is permitted by agreement but not made mandatory.

(g) In the New Zealand Act reasons are not subject to request but are mandatory unless the parties otherwise agree …

(h) The provisions for adjudicators' fees are different. The fees are either to be agreed between the adjudicator and the parties or, in the absence of agreement, an amount *"that is reasonable having regard to the work done and the expenses incurred by the adjudicator"*. For myself, I prefer getting agreement before the appointment is accepted. It is invidious to raise that issue once the adjudication is under way and equally distasteful to have to argue about what is reasonable after the determination is published.

(i) Finally, section 57(5) provides that the adjudicator does not get paid if a determination is not produced within the 20 days or such extended time as provided, etc. Then subsection (6) provides: *"(6) Despite subsection (5), an adjudicator may require payment of his or her fees and expenses before communicating his or her determination on a dispute to the parties to the adjudication."* This legitimises for New Zealand adjudicators a practice which I understand is employed by some adjudicators in the United Kingdom to ensure timely remuneration for their efforts.

It will be interesting to see in what respect the UK review will adopt any of the procedures adopted in New Zealand.

4. PAYMENT NOTICES

The Housing Grants, Construction and Regeneration Act 1996 not only introduced adjudication, but also introduced new payment rules and notices, which are now mirrored in all standard forms of construction contracts and professional appointments and must also be included in bespoke contracts. Payment notices remain an area which is not always easily understood.

Victoria Russell sets out below a summary of what payment notices are all about and highlights how they are treated by some of the more popular standard forms. To do this, it is necessary to begin with a reminder as to what the legislation says.

The relevant sections of the HGCRA relating to payment notices are as follows:-

Section 110 – Payment Notice

"(1) Every construction contract shall

(a) provide an adequate mechanism for determining what payment becomes due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than 5 days after the date on which a payment becomes due from him under the contract, or would have become due if

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated ..."

Section 111 – Withholding Notice

"(1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts."

Section 112 – The right to suspend work

"(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made ('the party in default').

(2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.

(3) The right to suspend performance ceases when the party in default makes payment in full of the amount due ..."

A *"construction contract"* is defined in section 104 as

"(1) ... an agreement with a person for any of the following;

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References ... to a construction contract include an agreement

(a) to do architectural, design or surveying work, or

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape, in relation to construction operations."

Section 105 defines *"construction operations"* as meaning

"(a) Construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings or structures forming or to form part of the land (whether permanent or not) ...

(b) ...

(c) Installation in any building or structure of fittings forming part of the land, including ... systems of heating, lighting, air conditioning, ventilation, power supply, drain-age, sanitation, water supply or fire protection, or security or communications systems.

(d) External or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration ...

(e) ...

(f) Painting or decorating the internal or external surfaces of any building or structure."

Sections 110 to 112 therefore apply to the vast majority of construction contracts and professional appointments; it is vitally important to be aware of them and the consequences of failure to comply with their requirements. Many people still do not realise the very wide scope of the HGCRA and the broad range of contracts it covers.

It is also important to note that you *cannot* contract out of these provisions.

"Due date" and "final date" for payment

The concepts of *"due date"* and *"final date"* for payment are clearly central to the payment obligations of the HGCRA. Unfortunately, they are not defined in the legislation. However, the *"due date"* of any payment is generally understood as the date from which the obligation of the paying party to meet that payment commences.

It is standard practice in the construction industry to allow the paying party a stated period after the *"due date"* within which the payment is to be made. The last date for payment without the paying party falling into breach of contract is referred to as the *"final date"*. This date is particularly important for two reasons. Firstly, the statutory right of the payee to suspend performance of the works for non-payment crystallises after the *"final date"*, if payment is not made by then. Secondly, it serves as a reference point for determining whether the paying party has served a withholding notice on time (see below).

The parties are free to agree how long this payment period is to be. The common practice adopted in the standard forms of construction contracts is to provide that, where the contract is administered by an independent contract administrator, the *"due date"* is the date of issue of the relevant payment certificate. Where there is no independent contract administrator, the *"due date"* is usually the date of submission of a payment application to the paying party. In professional appointments, the *"due date"* is normally the date of issue, alternatively the date of receipt, of an invoice.

The JCT Standard Form of Building Contract, 1998 Edition (JCT 98)

Clauses 30.1.1.1 and 30.1.3 of JCT 98 together specify dates when the Architect is to issue to the Employer Interim Certificates stating the amount then due to the Contractor. The date of issue of an Interim Certificate is therefore the due date for payment of the amount stated in it. Clause 30.1.1.1 states that the final date for payment of an Interim Certificate is 14 days after its issue.

Clause 30.8.1 provides that the Final Certificate is to be issued within 2 months of whichever of these occurs last: (i) the end of the Defects Liability Period, (ii) the date of issue of the Certificate of Completion of Making Good Defects, (iii) the date on which the Architect sent copies of the final accounts to the Contractor and Nominated Sub-contractors. The final date for payment of any amount due to the Contractor under the Final Certificate is 28 days from the date of issue of the Certificate.

The JCT Standard Form of Building Contract With Contractor's Design (WCD 98)

WCD 98 requires the Employer to serve a payment notice within 5 days after receipt of the Contractor's payment application. Where such notice is served the Employer is to pay the amount in the notice (subject to any withholding notice). The date of the payment notice is therefore the due date for payment. However, where no such notice is served, Clause 30.3.5 requires the Employer to pay the *full*

amount of the Contractor's application (again, subject to any withholding notice). In such a case the due date is therefore 5 days after receipt of the Contractor's payment application. The final date for payment in either case is 14 days after receipt of the payment application.

GC/Works/5 (1998) and (1999)

General condition 39 (1998 form)/1.39 (1999 form) provides for the Employer to pay the Consultant within 30 days of the Employer's receipt of the Consultant's valid invoice.

Although the wording of this clause is not as clear as it might be, the date of receipt by the Employer of the Consultant's valid invoice is regarded as the due date for payment of the amount stated in it, and the payment notice specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount is calculated, must be given not later than 5 days after receipt of the invoice.

It is therefore very important always to have an accurate record of when an invoice has been received and to put necessary systems in place to ensure that as soon as an invoice has been received, this is made known to any others involved in the project who will be issuing the requisite payment/withholding notices.

The final date for payment of the amount due (subject to any withholding notice) is 30 days from receipt of the invoice.

Payment notice requirements

Section 110(2) HGCRA provides that every construction contract must require the party for whom the work is done to serve a notice not later than 5 days after the due date for payment. The notice must state the amount that the paying party has made or proposes to make *and* the basis of its ca1cu1ation. In terms of content, it is designed to expose, very early, any differences between the parties regarding the amount due and its make-up for resolution, failing which either party may refer the difference(s) to adjudication.

Withholding notice requirements

The key requirements of the withholding notice are important to note, as the paying party will be treated as having failed to serve it if any of them is not met. They are*:*

- the notice *must* be served within the applicable time period;
- its content *must* be detailed, as required by sub-section 111(2), setting out the amount(s) to be withheld and the ground(s) for so doing;
- it *must* be in writing.

Period for service of withholding notice

Section 111(3) provides that the parties are free to agree the period for serving the withholding notice and that, in the absence of such agreement, the relevant period provided in the Scheme applies. Paragraph 10 of Part II of the Scheme states that the latest date for service of the notice is 7 days before the applicable final date. The latest dates for the main standard forms are:

- JCT 98: not later than 5 days before the final date for payment.
- WCD 98: not later than 5 days before the final date for payment.
- GC/Works/5 1998: not later than 7 days before the final date for payment.

- GC/Works/5 1999: not later than 7 days before the final date for payment.

See above for the definitions of *"final date for payment"* in these forms.

Consequences of failure to serve the notices

The legislation does not state what the consequences of failing to serve a payment notice should be. It is probably intended as a statement of good practice and an early identification of any differences between the parties regarding the quantification of the amount due. Some standard forms, such as WCD 98, go beyond this by providing that if the payment notice is not served, the amount claimed by the Contractor becomes the amount due and must be paid in full accordingly (subject to any withholding notice).

Although there is no sanction for failure to serve the section 110 payment notice, case law has established that it still remains open to the payer, notwith-standing the failure to serve this Notice, to dispute the sums claimed by the payee to be due (other than in WCD 98). There is often a difference between the amount *claimed* and the amount *due* under the contract/appointment.

The Act provides for two consequences of failure to serve a withholding notice. Firstly, under section 111 the paying party *"may not withhold payment after the final date for payment of a sum due under the contract"*. Second, section 112 provides that if the paying party withholds the whole of the amount or any part of it beyond the final date without an effective withholding notice, the payee is entitled to suspend performance of its obligations under the contract.

The absence of a withholding notice does not preclude a dispute about the amount properly due, which is quite different from a dispute about whether a sum of money due can be withheld.

If there is a dispute about whether a sum claimed is due, the claimant must prove that the sum claimed is contractually due, following the mechanism in the contract to establish the amount; if it does this, then the defendant cannot withhold payment on some separate ground unless it has served a valid withholding notice.

5. YOU BE THE JUDGE

Dr Julian Critchlow has set up a surgery in conjunction with *Building*. Julian poses a problem and requests answers. The best of those answers are then published together with Julian's expert opinion.

We set out below two of the problems together with Julian's two answers.

Problem 1 – Damages limitation

Global Works alleged that work by Readysteel was defective and that it would cost £30,000 to put it right. Global started arbitration proceedings. The arbitrator asked Global and Readysteel to estimate their costs, which were £80,000 and £70,000 respectively. As the arbitrator, you consider invoking your power, under section 65 of the Arbitration Act 1996, to limit the recoverable costs to keep them in proportion with the amount of the claim. Readysteel says that if you did that, it couldn't afford to defend the case.

How do you proceed?

Expert answer

This kind of problem arises in practice. There is no right or wrong answer. It is a

matter of judgment, and the arbitrator's discretion. In this case, it is probably open for the arbitrator to take either course: to limit or not to limit.

On balance it is suggested that, provided Readysteel is able to produce accounting evidence supporting its assertions as to its limited finances, a cap should not be imposed. This is because the desirability of securing proportionality of costs is a lesser consideration than the possibility of stifling a defence.

Problem 2 – What if a contractor refuses to leave the site?

Learnwell University engages Buildkwik Limited to build student accommodation. Liquidated damages are fixed at £3000 per week or part thereof. The contract contains an arbitration clause. The contract provides that if Buildkwik fails to proceed regularly and diligently, Learnwell will be empowered to dismiss Buildkwik from the works. The contract becomes extensively delayed and the parties blame each other. Learnwell dismisses Buildkwik but Buildkwik refuses to leave site. Learnwell seeks an injunction from the court requiring Buildkwik to leave. Should Learnwell be granted the injunction?

Expert answer

The attitude of the courts has been that a contractor does not have any entitlement to retain possession of the site if dismissed by the Employer. That is so even where the dismissal is wrongful and amounts to a breach of contract. This is because a Building Contract is simply an agreement for the contractor to carry out work for the Employer. It does not give the contractor any right of occupation of the site other than a bare licence to attend that can be revoked at any time. Previously, confusion over this principle arose because property lawyers, who drafted early construction contracts, incorporated into them some of the language of landlord and tenant, e.g. *"letting the site"* and *"forfeiting possession"*.

That general proposition has been challenged. Thus, where there was an arbitration clause that covered the dispute as to possession of the site, an injunction against possession was granted by the court pending a decision by the Arbitrator (*Foster and Dicksee v Hastings Corporation*).

Further damage to the general proposition seems to have been done in the recent case of *Bath and North East Somerset District Council v Mowlem plc*. In that case, the court granted the council an injunction restraining Mowlem from preventing the council giving access to site to a new contractor for part of Mowlem's works. In that case, the overriding issue for the court was the balance of convenience between the parties and whether, if the temporary injunction turned out to be wrongly granted, the council would have an adequate remedy in liquidated damages for the delay caused to the works. However, the principle that a landowner should not generally be deprived of possession of his property, even if he is in breach of contract, appears not to have been addressed.

Applying all that to the present case, Buildkwick might be able to argue:

(i) no injunction should be granted pending an award on the dispute by the arbitrator; and

(ii) on the balance of convenience, the injunction should not be granted as liquidated damages would be an adequate remedy for the council.

However, in seeking to resist the injunction, Buildkwick would need to be

aware that, in using those arguments, they would be challenging the courts' traditional approach. This is the kind of case that might well only be resolved on appeal.

6. THE BE COLLABORATIVE CONTRACT

With a steady increase in standard form partnering agreements over the last few years, ***Iftikhar Khan*** looks at one of the latest offerings in the market: The Be Collaborative Contract.

The Be Collaborative Contract was born as a result of the Egan Report on the UK Construction Industry. No doubt many readers will be aware that one of the significant suggestions of Egan's Report was that effective partnering should allow for formal contracts to be dispensed with. Against this backdrop the Reading Construction Forum put together a working group of experienced individuals from across the construction sector. The result: the emergence of the Be Collaborative Contract ("the Contract").

Composition

The Contract is made up of a purchase order and a separate set of terms and conditions. The suite of documents also contains a handy *"Guide to Use"* and an equally useful *"Guide to Risk Management"*, as well as a separate purchase order and terms and conditions for the supply of construction-related products.

The flexibility achieved through the use of the optional provisions means that contractors, consultants, sub-contractors and/or sub-consultants can be engaged on the same basic terms. To allow for this flexibility, the parties are referred to as *"Purchaser"* and *"Supplier"* rather than the traditional *"Employer"* and *"Contractor"*.

The collaborative approach

The Contract operates on the basis of one overriding principle – the parties are to work together in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect. It is this provision that provides the support under which all the other terms and conditions operate. Taking its lead from the Civil Procedure Rules, any court or adjudicator is required to take account of the overriding principle and of the parties' adherence to it when making any award under the Contract.

A similar *"trust and mutual co-operation"* provision also exists in the PPC 2000 but in that and other standard forms, this type of provision has never previously been the overriding principle. The issues raised by installing such a provision to be the overriding principle and, indeed, how the provision will operate in practice remains to be seen. As is almost always the case, the real test will be if and when relations break down.

For now though we can only hypothesise. For example, let's assume a Supplier is given notice of a breach under the Contract and is sent a notice to rectify the breach within 14 days or risk having the Contract terminated. The Supplier informs the Purchaser that he is having a cash flow crisis and cannot rectify the breach unless he is paid outside the terms of the Contract. At the same time he reminds the Purchaser of the overriding principle of working in the spirit of trust, respect and co-operation. The Purchaser decides that it is not in his interest to pay an already cash-strapped Supplier otherwise than in accordance with the payment terms and accordingly terminates the Contract.

The Supplier then invokes the overriding principle and argues that the Purchaser did not act in the spirit of mutual trust and

co-operation. If and when the case is heard by an adjudicator/court can the Purchaser be penalised as a result? In such a case you would hope not, but it leaves a taste of the sort of arguments that may well arise when relations between the parties have soured.

That problem aside, many provisions within the Contract are drafted on the basis that the parties must reach agreement on matters or alternatively resolve any disagreements using the dispute resolution procedure before they can proceed. The intention is that the parties must genuinely work together at all stages.

Another example of the collaborative approach is the requirement for the parties to draw up a project protocol. This is a document that sets out the aims and objectives of every project participant with regard to the delivery of the Project and the development of their working relationships. It is intended to enable the parties to express, in their own words, how they intend to work together. The document is not legally binding and can probably best be described as a non-binding charter.

Sub-contractors

All sub-contractors (whether nominated or not) or other persons employed on the Project are required to be employed under the Be Collaborative form of contract. Additionally, any sub-contractor has the right to have sight of the main contract (save any financial information). The flexibility of the Contract allows for this to be done without making substantial amendments to the Contract and the inclusion of this provision is aimed at protecting sub-contractors from being passed unnecessary risk from persons higher up the chain.

Where matters under the main contract concern the sub-contractor, the Supplier under the main contract (Purchaser under the sub-contract) has an obligation to use reasonable endeavours to consult with the sub-contractor before that matter falls to be determined. One can appreciate the aim of this provision is to keep the collaborative theme flowing through the chain.

That having been said, the sub-contractor is nonetheless bound by any decision made by, or with the agreement of, the Purchaser under the main contract. The question arises as to what if the Supplier does not use reasonable endeavours to bring to the sub-contractor's attention any decision that falls to be determined: will the sub-contractor be permitted to pursue a claim based on loss of an opportunity or will the overriding principle prevent him from doing so? It will be interesting to see how this provision works in practice.

Design obligations and incentivisation

The Contract has two alternatives so far as design is concerned. The first is an obligation to use reasonable skill and care and the second is a fitness for purpose obligation. As there is no obligation of mutual trust and co-operation before the Contract is actually entered into, no doubt purchasers will be attempting to impose a fitness for purpose obligation whilst suppliers will be striving for reasonable skill and care.

In terms of incentivisation, the performance of both parties can be monitored against key performance indicators, which are reviewed at monthly intervals. There is also a provision for bonus payments for early completion and payments of liquidated damages for any delay. These are essential ingredients in any partnering agreement and guard against complacency whilst at the same

time providing a benchmark for performance.

Allocation of risks

The Contract's main focus is on risk management and in this respect it contains innovative ideas for allocating risk within the Contract.

Risk register

The risk register is intended to identify potential risks relating to the delivery and performance of the Project, the probability of those risks occurring and their likely financial consequences. It then names the individual or organisation that will be responsible for managing the risk. Responsibility in this context though is only for reporting back to the project team. The risk register is viewed as a vital project management tool, providing the opportunity of preventing many risks from occurring and also mitigating the adverse effects of those that do occur.

By having to constantly update the risk register throughout the term of the Contract, the aim is to ensure the parties are constantly assessing potential risks that threaten to disrupt the Project. The risk register is not, however, a statement of the risks that each party bears.

The risk allocation schedule

It is the risk allocation schedule that specifies how the contractual risks are to be allocated between both parties. The schedule is completed at the beginning of the contract period and at that point would ideally mirror the risk register. It should list all the foreseeable risks between the parties and provide information as to which party has liability, both in terms of time and money, for meeting those risks. Risks can be allocated partially between the parties if required. In practice it would be down to the Purchaser to ensure that all the necessary risks were specified because if they were not then the Supplier could argue that he has not provided for them in the Contract and therefore they constitute a Relief Event (see below).

The success of the Contract depends very much on the correct use of both the risk register and the risk allocation schedule. Where the Purchaser desires to pass off all risk to the Supplier he can no doubt insert general statements within the risk allocation schedule and make the Supplier responsible for all the risk associated with the Contract. Whilst this would not be within the spirit of the Contract we wait to see if this is the practice adopted.

Relief events

Relief events are closely connected with the risk allocation schedule. The Supplier can recover additional time and money for foreseen risks that he is not responsible for in the schedule or unforeseen risks to the extent that these were not reasonably foreseeable and were beyond the Supplier's control. Relief events would also include variations.

Interestingly, the Contract provides that where the Supplier is a sub-contractor and the extent of the effects of a relief event are determined under the main contract, that determination will be binding on the Supplier. In so far as the determination of the relief event relates to entitlement to any monies this could potentially be argued to amount to a "pay when paid" clause and pursuant to s113 of the Housing Grants, Construction and Regeneration Act 1996 could be held to be ineffective.

Liability

The Contract contains a reciprocal obligation to make good all direct costs, losses and expenses incurred by one party which are due to the act, omission or

default of the other under or in connection with the performance of the services. With judicial clarification of the definition of *"direct losses"* following the case of *British Sugar v NEI Power Project Ltd* (1997) 97 BLR 42 the parties may desire to amend this so that they are not liable for economic loss such as loss of profits, etc.

There is also an option to limit the liability of the Supplier should the Purchaser agree.

Assignment and collateral warranties

Assignment is not permitted by either party without the consent of the other. This may need to be tweaked to allow for assignment to funders, etc. As regards collateral warranties the Contract contains a standard form which again may need tweaking depending on the mutual requirements.

Dispute resolution

In true partnering form the parties are to notify each other of any anticipated dispute so that it can be avoided by negotiation between them. The parties are also obliged to give serious consideration to any recommendation of the project team for the resolution of the dispute.

Should the matter be referred to adjudication, recourse is made to the Scheme of Construction Contracts, although there is a provision allowing the parties to choose the adjudicator nominating body.

Use

The Contract has been tested on three major projects, the largest of which is the University of Manchester Institute of Science and Technology's £30 million Interdisciplinary Biocentre.

David Bailey of architects Anshen Dyer (project co-ordinator) commented on its use that:

"Team members have been able to invest 100% of their energy and resources into moving the project forward without periodically being diverted into a contractual game of attack and defence. The completion date remains unaltered since the outset of the project and we continue to enjoy working together as a team."

Conclusion

The Contract is missing a lot of the verbiage found in many existing standard forms of construction contract and as a result there will be many who are hesitant in using it. As the *"Guide to Use"* points out, the primary aim has been to focus on expressing how the parties are to make the project work, not on how lawyers and judges may interpret individual provisions in the event of a dispute.

There is also the issue of how the Overriding Principle interacts with the other terms and conditions and the potential anomalies that may arise. Matters such as risk sharing arrangements, incentives and KPIs also require negotiation and agreement between the parties before the Contract is entered into. Notwithstanding the spirit of the Contract, the Purchaser may still decide to offload all the risk onto the Supplier. In this respect it is really down to the parties, the people most important to the process, to agree these matters in a manner that reflects the collaborative spirit of the Contract. Whether this will happen in practice remains to be seen.

What can be said at this point is that although it is highly likely that users will fine-tune some of the provisions, if utilised in its intended manner, the Contract, through encouraging proactive

involvement and thought by both parties, may prove to be an extremely useful tool.

7. RESTITUTIONARY CLAIMS

It is not uncommon for substantial construction works to be carried out without a contract or outside the express terms of an existing contract. Most construction contractors are familiar with the concept of payment on a *quantum meruit* basis and in these circumstances will blithely say – the work is done outside contract, there is no agreement as to price, please pay me a reasonable sum for my work. However, as ***Karen Gidwani*** discusses below, there remains considerable debate about how to quantify what makes up a reasonable sum.

Payment of a reasonable sum (or a *quantum meruit*) can be divided into payment arising from contractual situations and payment arising from restitution. As HHJ Hicks QC put it in *Serck Controls Limited v Drake and Scull Engineering Limited* [2]:

"A quantum meruit claim may…arise in a wide variety of circumstances, across a spectrum which ranges at one end from an express contract to do work at an unquantified price, which expressly or by implication must then be a reasonable one, to work (at the other extreme) done by an uninvited intruder which nevertheless confers a benefit which for some reason ... it is unjust for him to retain without making restitution to the provider."[3]

When services are rendered outside of the contractual framework then the area of law that the parties must rely on is that of unjust enrichment and restitution.[4] A key distinction between contract and restitution is that recovery in restitution looks at the benefit that has accrued to the defendant, unlike recovery in contract which focuses on the claimant's expectation loss.

But what is a reasonable sum in restitution? The matter has been extensively debated in the courts and by academic commentators and yet consensus has still to be reached. In particular, the courts have not decided an answer to the question of valuation of a quantum meruit where the claimant's conduct has caused some loss to the defendant. This question is of some importance in construction quantum meruit claims.

Background

In order to establish a claim in restitution, it is necessary to answer *"yes"* to the following three questions:

(i) Has the defendant been enriched by the receipt of a benefit?

(ii) Was the benefit gained at the claimant's expense?

(iii) Was it unjust to allow the defendant to retain the benefit?

A fourth question may then be asked, namely:

[2] 12 May 2000, TCC, this part of the judgment is unreported

[3] paragraph 34

[4] The modern view of non-contractual *quantum meruit* is that it is part of the law of restitution. This can be contrasted with the traditional view that non-contractual *quantum meruit* claims are founded in quasi-contract or implied contract. According to this theory, a contract is implied between the parties, a term of which is that the contractor should be paid a *quantum meruit* or reasonable sum for his work. This theory fell out of favour because essentially it is a legal fiction to imply a contract where one does not exist. The modern view now prevails and non-contractual *quantum meruit* is considered to be restitutionary *quantum meruit* based upon the restitutionary principle of unjust enrichment.

(iv) Are there any defences?[5]

In cases of restitutionary quantum meruit emphasis has been placed on the valuation of the quantum meruit, the benefit/enrichment referred to in the first question set out above. However, a claimant should not lose sight of the fact that he will have to address the other questions in order to claim successfully payment of a restitutionary quantum meruit. For example, in the recent case of *Stephen Donald Architects Limited v Christopher King*[6] HHJ Seymour QC held that a claim for a restitutionary quantum meruit failed not because there was no enrichment but because he could not find the "unjust" factor.

Recovery of a *quantum meruit* in restitution, rather than in contract, raises fundamental questions about the interplay of the law of contract and the law of restitution and whether a claimant should always try to sue in contract rather than in restitution. Apart from the obvious result that a restitutionary claim cannot be adjudicated[7], if there is no recourse to the implied terms offered by the law of contract, a number of questions arise, including:

- How can the claimant protect himself in relation to the quality of the contractor's work, and the time within which the contractor will do it? and
- What responsibility does the contractor have for bad work or delay?

These questions have been addressed, in part, by the courts' and the commentators' analysis of *"benefit"* in restitutionary *quantum meruit* cases and one particular question that has been looked at is whether a restitutionary *quantum meruit* can be reduced as a result of defective work or lateness in completion by the claimant contractor.

In *Crown House Engineering Limited v Amec Projects Limited*,[8] a case involving a claim for a restitutionary quantum meruit, Slade LJ in the Court of Appeal said:

"I am not convinced that either that learned work [Goff & Jones on the Law of Restitution, 3rd Edition] or any of the other cases cited to us affords a clear answer to the crucial question of law: On the assessment of a claim for services rendered based on a quantum meruit, may it in circumstances (and, if so, what circumstances) be open to the Defendant to assert that the value of such services falls to be reduced because of their tardy performance or unsatisfactory manner of their performance has exposed him to extra expense or claims by third parties?…

In my judgment, this question of law is a difficult one, the answer to which is uncertain and may depend upon the facts of particular cases. If, as the learned judge [at first instance] apparently considered the answer to it is an unqualified 'no, never', I cannot help thinking that, at least in some circumstances, there would result injustice of a nature which the whole law of restitution is intended to avoid."

As stated above, a key distinction between the law of contract and the law of restitution relates to recovery. Put simply, restitution will compensate on the basis of the benefit accrued to the defendant. Contract will try to put the claimant back

[5] Lord Steyn in *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1998] 1 All ER 737, HL at 740 expressly set out these four questions to be answered in relation to a restitutionary claim

[6] (2003) CILL 2027

[7] Part II of the Housing Grants, Construction and Regeneration Act 1996 requires there to be a construction contract as defined by that Act before the Act will apply

[8] (1990) 142 6 Const.L.J No.2 at 152–153

into the position he would have been in if the breach of contract had not occurred. These two concepts can have very different results.[9]

Further, a restitutionary *quantum meruit* claim may be maintained against a different person from the person who proposed to enter into the contract.[10] The person who is liable upon a claim for a restitutionary *quantum meruit* is the person who has benefited from the work. This can be contrasted to the position of a contractual *quantum meruit*, where the claim will be against the contracting employer.

Valuation of a quantum meruit in restitution

If the valuation of a restitutionary *quantum meruit* rests upon whether a benefit has been conferred on the defendant who has been enriched by that benefit then the argument arises that the claimant's claim is only for the amount that the benefit is considered to be worth to the defendant. Professor Birks[11] puts it thus:

"Benefits in kind are less unequivocally enriching because they are susceptible to an argument which for convenience can be called 'subjective devaluation'. It is an argument based upon the premise that benefits in kind have value to a particular individual only so far as he chooses to give them value…the fact that there is a market in the good in question, or in other words that people habitually choose to have it and thus create a demand for it is irrelevant."

The academic commentators manage to circumvent the problem of subjective devaluation with the concepts of free acceptance and incontrovertible benefit,[12] and in practice, the courts have steered away from the more academic arguments in relation to the valuation of a restitutionary *quantum meruit.* However, it is submitted that there will always be exceptions to free acceptance and incontrovertible benefit and therefore the question of subjective devaluation then becomes very pertinent.

Arguably, however, there are at least three[13] approaches to valuation of a *quantum meruit* which are sometimes taken either alone or in combination:

(1) the cost of the work to the contractor, plus perhaps a percentage mark-up;

(2) the value of the benefit conferred on the employer; and

(3) the going rate.

Keating argues that there is no formula of general applicability as to which approach is appropriate and is also uncertain as to whether a *quantum meruit* can be devalued in the case where, due to the claimant's conduct, the defendant has suffered additional costs. Keating, in a

[9] For example, A undertakes varied works for B. If there was a contract with a term allowing varied works to be undertaken with payment of a reasonable sum and B refuses to pay A then A will be compensated its costs of undertaking the varied works. In restitution, if those varied works gave no benefit to B beyond the works already being undertaken then it is arguable that no monies are due to A (see main text).

[10] Although this is also possible in contract to a limited extent pursuant to the Contracts (Rights of Third Parties) Act 1999.

[11] P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985), p.109.

[12] A detailed discussion of this area of jurisprudence is outside the scope of this essay. The reader is referred to Goff & Jones, *The Law of Restitution* (6th Edition, Sweet and Maxwell, 2002) and Professor Birks' books on the subject for a more in-depth analysis. A discussion of free acceptance, incontrovertible benefit and restitutionary quantum meruit was also part of the author's dissertation on this subject, published by King's College London.

[13] R. Fenwick Elliott – BCD.

passage which was quoted, apparently with approval, in *Costain and Tarmac v Zanen*[14] puts the matter thus:

"The courts have laid down no rules limiting the way in which a reasonable sum is to be assessed. Where a quantum meruit is recoverable for work done outside a contract, it is wrong to regard the work as though it had been performed to any extent under the contract. The contractor should be paid at a fair commercial rate for the work done. ... But it is unclear whether, in determining what is a reasonable sum, it is permissible or relevant to consider the plaintiff's conduct in performing the work and whether by reason of such conduct the defendant has suffered any unnecessary additional costs. Useful evidence in any particular case may include abortive negotiations as to price, prices in a related contract, a calculation based on the net cost of labour and materials used plus a sum for overheads and profit, measurements of work done and materials supplied, and the opinion of quantity surveyors, experienced builders or other experts as to a reasonable sum. Although expert evidence is often desirable there is no rule of law that it must be given and in its absence the court normally does the best it can on the materials before it to assess a reasonable sum."[15]

In the *Costain* case (a case of restitutionary *quantum meruit*), whilst the court did not endorse the principle of devaluing the benefit due to the claimant's conduct, it did recognise that restitutionary recovery is different to contractual recovery. In that case,[16] the arbitrator awarded the sub-contractor (Zanen) by way of *quantum meruit* not only £370,756 in respect of the cost to the sub-contractor of doing the work, but also a further £380,000 by way of share of the profit obtained by the main contractor on the work and/or to reflect the competitive advantage that the sub-contractor enjoyed by virtue of being on site already performing other work and thus not needed to mobilise specifically for the work that was the subject of the *quantum meruit.*

On appeal, HHJ Wilcox recognised the difference between payments of a *quantum meruit* on a contractual basis and on a restitutionary basis and, following a passage in *Hudson's Building and Engineering Contracts,*[17] decided that Zanen should be reimbursed for the value of the advantage received by the main contractor as a result of the services performed. The Judge therefore upheld the arbitrator's award, the net result being a payment to Zanen of costs on account of mobilisation that it would not have incurred but which other contractors would have incurred had the main contractor employed others to carry out the works in question.

The later case of *Serck Controls Limited v Drake and Scull Engineering Limited* [18] is more helpful on the question of devaluation. Here, HHJ Hicks QC was requested to consider, inter alia, whether the defendant was entitled to any deduction from the sum due to the claimant on a *quantum meruit* for loss incurred by the defendant by reason of the claimant's conduct. The Judge referred to the judgment of Mr Recorder Reese QC in *Sanjay Lacchani & Anr v Destination*

[14] Citation
[15] Para 4-26. This passage was quoted, apparently with approval, in *Costain and Tarmac v Zanen* (1996) CILL. 1220.
[16] This is now well established – see the cases of *Countrywide Communications Limited v ICL Pathways Limited* (unreported, 21 October 1999, QBD) and *Vedatech Corporation v Crystal Decisions & Another* (unreported, [2002] EWHC 818 (Ch)).
[17] Para 1.264 of the 11th Edition.
[18] Unreported, 12 May 2000, TCC.

Canada (UK) Limited[19] and, in particular, the following passage:

" ... If the building contractor works inefficiently and/or if the building contractor leaves defective work then, quite obviously, the actual costs incurred by the building contractor must be appropriately adjusted and/or abated to ensure that the owner will not be required to pay more than the goods and services provided are truly (objectively) worth. What is not clear is whether the value of the goods and services provided should also be adjusted if, by reason of tardy performance, the employer can demonstrate that he has incurred some extra expense or suffered some loss which would not have been incurred or suffered if the building contractor had completed the works within an objectively reasonable time."[20]

HHJ Hicks QC then stated[21]:

"55. What emerges from the authorities ... is that distinctions need to be drawn ...

"56. A second distinction is that between defects made good during the course of the work ... and those remaining at completion. There should clearly be a deduction for the latter, because the work as handed over is thereby worth less ...

"57. A third distinction is between what I have called the 'basic valuation', which is the subject matter of the last two paragraphs, and matters which, even if expressed in terms of a 'reduction' or 'diminution' of the valuation are in essence 'cross-claims', in the words of Bingham LJ in Crown House. *They are in essence cross-claims because what the defendant seeks is in truth compensation for loss or expense suffered or liabilities incurred by reason of the claimant's conduct ...*

"58. If that is the nature of such claims they must depend upon breach of some duty by the claimant, so the first question is as to the nature and extent of the duties owed, in the absence of the express terms, when carrying out such work."

The Judge went on to find that as no duty or cross-claim had been alleged, he did not have to decide the issue. The judgment is important in recognising that defective work should be valued as part of the objective valuation of the *quantum meruit*. However, in relation to reduction of the valuation due to Drake's loss, the Judge almost appears to be pointing to the law of tort (breach of some duty) as the answer. The alternative interpretation is the concept of restitutionary cross-claims, however this seems a cumbersome method to enable devaluation.

There have been no further cases, to our knowledge, that have specifically focused on this question. The present position therefore appears to be that if a claimant claims a restitutionary quantum meruit, the defendant may be able to devalue that quantum meruit if the works rendered by the claimant are defective. However, this approach has not been expressly approved by commentators such as Birks and Goff & Jones and, apart from the case of Serck Controls, not widely reported. In relation to tardy performance, the courts have recognised the question but failed to deal with it. Therefore, until this area of law is decided, parties in construction disputes will, on this point, be far better protected in the law of contract.

[19] (1997) 13 Const. LJ 279, QBD (OR)
[20] At pages 283–284
[21] Paragraphs 55 and 56

8. Q&A FOR *HEATING & VENTING NEWS*

Jon Miller provides a regular service in *Heating & Venting News* by answering typical questions which arise on a regular basis during the course of building projects. We set out below three of the more common problems.

Question 1 – Payment

We are sub-contracted to a main contractor. The main contractor has certified our last two interim payments but says he won't pay them until he receives sums owing to him from the employer. How can we make them pay?

Answer

Following the introduction of the Housing Grants, Construction and Regeneration Act 1996, a main contractor cannot withhold payment from a sub-contractor until he is paid by his employer. The main contractor must pay you the sums certified by the final date for payment, as specified in your sub-contract or, alternatively, if no dates are specified in the sub-contract, by the Scheme for Construction Contracts. If he has a valid ground for withholding payment (for example a valid contra charge) he may issue a withholding notice within the time limit specified in the sub-contract or the Scheme but in the absence of such a notice, payment must be made.

You can force payment by means of bringing adjudication proceedings (if circumstances permit) or by other legal proceedings. Alternatively, you have the right to suspend performance on your obligations under the sub-contract (on notice to the main contractor) pending payment.

Question 2 – The letter of intent

We are working pursuant to a letter of intent for a main contractor on a major project. We have not yet managed to agree the terms of the sub-contract with the main contractor and have now exceeded the sum authorised by the letter of intent. The main contractor says we are not entitled to payment of these additional sums. What can we do?

Answer

The letter of intent entitles you to payment of sums to the limit of the authority contained in that letter. In relation to sums exceeding that limit, providing you have been requested to carry out this work by the main contractor, you will be entitled to payment on a quantum meruit basis. This means that you will be entitled to be paid a reasonable sum for the work carried out. There are various means of valuing the work and there is no hard and fast rule as to how it should be valued.

You should be aware that if there is no contract governing the work you have carried out (over and above the limit of the letter of intent) you have no obligation to complete that work and can leave site (preferably on notice to the main contractor). This might provide you with some leverage to obtain payment.

Question 3 – Extensions of time

We are working on a mechanical sub-contract package. Because of problems with access we now know that we will not be able to complete by the sub-contract completion date. However, there is no extension of time clause in our sub-contract. How do we apply for an extension of time?

Answer

If your contract provides no mechanism for the employer to grant an extension of time, any act of prevention by the main employer will mean that you are no longer bound by the completion date in the sub-contract and, instead, you will be entitled to complete your works within a reasonable time. What constitutes a reasonable time will depend upon all of the circumstances. At the end of the project these will be considered and all acts of prevention will be taken into consideration in assessing by what date you should have completed.

If your sub-contract contains a provision for liquidated damages, this will also fall away as without a completion date, a mechanism for liquidated damages cannot operate.

9. THE CHANGE MANAGEMENT SUPPLEMENTS

In our previous Summer Reviews, we have detailed some of the key points of the Society of Construction Law protocol on the management of delay and disruption.

Following the publication of that protocol, Fenwick Elliott and Pickavance Consulting have jointly created detailed guides to help practitioners incorporate the new protocol into each of the major JCT standard forms of construction contracts.

The two firms have drafted change management supplements and guidance notes for employers, contractors, design teams and contract administrators initially on four JCT contract forms. These include JCT98, JCT with contractors' design, the IFC and major projects form.

The protocols move away from the traditional approach where the contractor is obliged to manage risk, but the contractor has to deal with the consequences of any changes.

The supplements are designed to ensure that the protocols are introduced into construction projects in a way that is both legally binding and consistent with the rest of the contract terms. The guidance notes, which complement each supplement, contain details of how to complete the supplements and operate the necessary procedures to manage change as a project proceeds.

For the employer, the main benefit is that he can be closely involved in the change process rather than leaving the whole business to the contractor and hoping he will get it right. The major benefit for the contractor is that the supplements reduce the chance of things going wrong in the first place. And if problems arise, they ensure contractor and employer work together to get things back on track.

For further information please contact ***Dr Julian Critchlow*** or ***Nicholas Gould.***

10. FENWICK ELLIOTT NEWS

Staff news

In January of this year ***Nicholas Gould***, who has been with Fenwick Elliott since March 2002, became a partner. It has been a busy year for Nicholas, as he has just become secretary of the Society of Construction Law and is on the Adjudication Society Committee.

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

Toby Randle joined as an Associate at the beginning of June 2004 from Simmons & Simmons. As part of his wealth of experience in contentious and non-contentious construction, Toby has a first-class Certificate in Construction Law and Administration and as part of his

university studies spent a year on an EC scholarship at the University of Utrecht.

David Robertson, who joined as an assistant solicitor in February 2004, was admitted as a barrister and solicitor of the High Court of New Zealand in 1996. He began his career at Simpson Grierson in New Zealand and then worked at Baker & McKenzie in Australia. David has acted as a consultant to the Commonwealth Secretariat on international law issues and worked as a legal adviser to the Ministry of Foreign Affairs of Bahrain.

Charlotte Fox, another solicitor from Simpson Grierson, joined Fenwick Elliott as an assistant solicitor in February 2004. On top of her specialist skills in media and communications law, she has a thorough grounding in all stages of litigation, arbitration, mediation and tribunal hearings.

Iftikhar Khan joined Fenwick Elliott as an assistant solicitor in April 2004 from the Jacob's Engineering Group. He qualified as a solicitor in June 2003 after working at Freshfields Bruckhaus Deringer and Canary Wharf Group plc.

Prue Berrey, who joined Fenwick Elliott as a paralegal in September 2003, was appointed an assistant solicitor in April 2004. Qualifying in 2002 in Queensland, Prue specialised in contentious and non-contentious matters for commercial and private clients.

Richard Bailey joined Fenwick Elliott as an assistant solicitor in May 2004. Richard previously worked for both Bevan Ashford and Taylor Wessing (formerly Taylor Joynson Garrett).

Michael Forde joined Fenwick Elliott in June 2004 as an assistant solicitor; he has a postgraduate diploma in Construction Law and Administration from Trinity College Dublin.

Website

As Simon Tolson mentioned in his introduction, some of you may have noticed that we launched our revamped website at the beginning of April this year. The address, of course, remains the same – www.fenwickelliott.co.uk.

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

Fenwick Elliott LLP

As Simon Tolson also mentioned in his introduction, Fenwick Elliott became a UK limited liability partnership (LLP) on 1 April. The move followed a recent change in legislation which recognises the realities of operating as a modern partnership advising on large commercial transactions.

After careful consideration we took this decision because we believe the move to LLP status is in the best interests of our clients and staff. The relationship between a LLP and its members is similar in terms of rights and liabilities to that of a UK company and its directors. Unlike a conventional partnership, the members are not personally liable for its debts, beyond the capital committed to the LLP.

We feel that the new structure will enhance our professional competitiveness and help us attract the very best people to support our commitment to providing excellent client service. The change will enable the firm to remain strong and independent. If you have any questions or require any further information, please contact ***Neil Elliot*** at first instance.

11. CASE ROUND-UP

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

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

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

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

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

ADJUDICATION

Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd & Anr and Simons Construction Ltd v Aardvark Developments Ltd

These two recent cases both deal with what happens when an adjudicator does not issue his decision within the required timescale.

In the first, where Fenwick Elliott acted for the successful party, the adjudication was conducted on a documents-only basis. The adjudicator reached his decision and sent it out in draft form to the parties by email on 20 May 2003. He asked that his draft should be checked to see that all points had been dealt with. Following the making of some changes, the decision was signed on 22 May 2003, the date the decision was due. However, the decision was sent out by dx and only reached the parties on 23 May 2003. The defendants said the decision fell outside the authority given to the adjudicator which was to *"make"* a decision by 22 May 2003 and that *"make"* means, under clause 39A.5.3 of the JCT Adjudication Rules, a decision which must reach the parties before the end of 22 May 2003.

The second case followed the issue of proceedings by an adjudicator for his fees. On the day the decision was due to be published the adjudicator had informed the parties that his mother had died and that although he was in a position to provide a draft decision later that day, he required an extension of time. Aardvark agreed to an extension of time. Simons objected to any decision being published that was not in its final form but made no comment on the request for an extension of time. The adjudicator duly issued his decision marked *"draft for the parties' comment"* and said that the final decision would be published in seven days.

Neither Simons nor Aardvark commented on the draft decision which was duly issued without amendment seven days later. As part of the decision, Simons was ordered to pay the adjudicator's fees. Simons then wrote to the adjudicator stating that the decision was late and so was not binding. Simons did not pay the fees and in defending the proceedings

issued by the adjudicator sought a declaration that the decision was not capable of enforcement.

In the *Barnes & Elliot* case, HHJ LLoyd QC noted that adjudicators ought to be well aware of the importance of complying with the time limits set by Parliament which were, he said, crucial to the effectiveness of adjudication. Given today's instantaneous methods of transmission, the use of first-class post or DX was archaic. Thus the contemporaneous duty to communicate a decision could and should easily be achieved by an adjudicator.

However, as here, an error by an adjudicator which resulted in a delay of one or two days was excusable and *"within the tolerance and commercial practice that one must afford to the Act and to the contract"*. The decision here was valid and did not become invalid because of an error by the adjudicator in dispatching the decision, which meant that it did arrive within the time limit. However, there are limits to that judicial tolerance and HHJ LLoyd QC suggested that where an adjudicator cannot arrive at a decision within the period required then, before time runs out, further time should if possible be obtained.

In the *Simons* case, HHJ Seymour QC unsurprisingly first of all found that the draft decision was not one which was capable of enforcement by the court. However, he also concluded that the final decision, the one which was seven days late, was binding and capable of enforcement by the court. In other words, the failure here to produce a decision within the required timescale did not deprive the adjudicator of jurisdiction.

A similar decision was reached in Scotland, in the case of *Ritchie Brothers (PWC) Ltd v David Philip (Commercials) Ltd.*

Buxton Building Contractors Ltd v Governors of Durand Primary School

Buxton carried out the construction, under the JCT IFC 98 form of contract, of a new residential block for the School. During the works, the School raised concerns about the works and maintained that as a result of Buxton's alleged failure to address the complaints, it had incurred costs in calling up maintenance teams to undertake extensive call-out duties in respect of the defects.

In the adjudication, Buxton identified the dispute as being a simple one, namely, that the certified sum was due and payable in the absence of any notice of intent to withhold payment. The dispute was a small one and the Judge, HHJ Thornton QC, agreed with the approach of the adjudicator that he would decide the dispute without a hearing or meeting. However, the Judge cautioned that as the School was not legally represented and given the need for the adjudicator to ascertain the applicable facts in law, it was incumbent on him to identify fully all the issues that had arisen and then come to a decision on them. The School had served details of the sum to be withheld and the reasons for the withholding. Buxton said that the material in relation to the cross-claim was irrelevant as the notice of withholding was invalid. The adjudicator agreed and decided that the sum claimed was due pursuant to a validly issued interim certificate and that no withholding notice had been served by the School.

This was sufficient for HHJ Thornton QC to decide not to summarily enforce the decision. The decision showed that the adjudicator had not considered the nature, content, validity or quantification of the cross-claim. The Judge felt that the cross-claim could and should have been capable of being set off against the retention release. Of course, Buxton argued that

despite the errors, the adjudicator's decision was still valid. However, the Judge preferred the submissions on behalf of the School that the decision had been reached without the adjudicator having considered or decided upon the content of the submissions and the documents referred to him by the School. Therefore, the adjudicator had not fulfilled his statutory duty to decide the dispute referred to him under paragraph 17 of the Scheme. The decision was:

" ... intrinsically unfair in that it was arrived at following a failure to consider all the side core referred issues that were and remain in dispute. It was arrived at following a failure to take into account relevant material and information that had previously been placed before the Adjudicator."

It is also interesting that the Judge did not give directions for trial and said the parties should attempt to negotiate a settlement of all of the disputes that had arisen.

Diamond & Others v PJW Enterprises Ltd

This is a Scottish decision of the 2nd Division of the Inner House (in effect the Court of Appeal) on an appeal from a decision of Lady Paton. This case was important because it provided judicial confirmation that there was nothing to stop a claim of professional negligence being made in an adjudication. The appeal did nothing to reverse this conclusion. LJ Clerk confirmed that an adjudicator did have the power to award damages. Agreeing with Lady Paton, he said that the statutory references to adjudication of *"a dispute under the contract"* and of *"any dispute under the contract"* must *"comprehend a dispute on a claim that there has been a breach of contract. The power to adjudicate on such a dispute implies…the power to award damages if the breach is proved."*

Diamond also claimed that the adjudicator had failed to take into account relevant material. Again, LJ Clerk agreed with Lady Paton. Whilst the adjudicator had not mentioned various references that were given to him, the court held it wrong to conclude from this that he had failed to take them into account. It was an adjudicator's duty under paragraph 17 of the Scheme to consider any relevant information submitted to him by either party. The court held that it should be assumed that he did so unless his decision and his reasons suggested otherwise. Here, it was clear from the appendix to the decision that the adjudicator had taken the various references into account.

Finally, LJ Clerk also agreed that the adjudicator had made an error in law by failing to specify what degree of skill and care was applicable and by failing to provide a cogent reason why Diamond's allegedly wrong decisions amounted to a breach of contract. However, following cases such as *Bouygues*, the Judge concluded that as the correct question had been answered, the decision was not reviewable on the ground that the answer was incorrect. This was not a case where the adjudicator had failed to understand the question that was remitted to him even though the decision was described as *"inept"*.

Rupert Morgan Building Services Ltd v Jervis & Anr

This is a brief but important case from the Court of Appeal which concerns the meaning of s111 of the HGCRA. Here, Jervis withheld payment of part of an interim certificate, but failed to issue a withholding notice as prescribed by the Act. The defendants said that it was open to them to prove that items of work that went to make up the unpaid balance were

not done, were duplicated or represented snagging for work that had already been paid for.

Although LJ Jacob made reference to the numerous authorities on this question, he felt that they concentrated on the *"unspoken but mistaken assumption . . . that the provision is dealing with the ultimate position between the parties"*. He turned to the actual contract in question, which was in the standard form provided by the Architecture and Surveying Institute. Clause 6.22 said that *"the Employer shall pay the Contractor the amount certified within 14 days of the date of the certificate"*. Thus it was not the amount of work done which defined the sum that was due but the sum stated in the certificate. LJ Jacob continued:

"In the absence of a withholding notice, s111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the money right away. The fundamental thing to understand is that s111(1) is a provision about cash flow. It is not a provision which seeks to make any certificate, interim or final, conclusive."

If, as in *SL Timber v Carillion Construction*, the contract did not provide for a system of certificates and a contractor simply presented a bill for payment then that bill would not make any sums due. Therefore, no withholding notice would be necessary in respect of work not done, as payment would not be due. LJ Jacob set out the following five advantages of this approach:

(i) It draws a line between claims for set-off which do no more than reduce the sum due and claims which go further such as abatement;

(ii) It provides a fair solution which safeguards cash flow but does not prevent a party from raising disputed items in adjudication or litigation;

(iii) It requires the client who is going to withhold to be specific in his notice about how much he is withholding and why. This limits the amount of withholding to specific points, which must be raised early;

(iv) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or, if necessary, arbitration or legal proceedings; and

(v) It is directed at the mischief which s111(1) was aimed at – namely, payment (or non-payment) abuses.

It was conceded that the principal disadvantage was the risk of insolvency. However, as the Court of Appeal said, this risk can be minimised if certificates are carefully checked and any withholding notice is given within time.

Interestingly, LJ Jacob flagged up the possibility that there may be a duty on architects (and presumably other contract administrators) to ensure that a lay client is aware of the possibility of serving a notice in sufficient detail and good time. Given the clarity of this ruling, even if there is no legal responsibility for failing to do this it is surely good practice, even if the client has some experience of the construction industry.

Therefore, this judgment is of assistance in clarifying the position where no withholding notice has been given. Where

an interim certificate has been issued, the absence of a s111 notice will mean that it is not permissible to withhold from the payment due (in respect of items of work already paid for or work not in fact carried out). It should be noted that the issue here related to interim certificates. In these circumstances, it may well be possible for a party who fails to issue a legitimate withholding notice to remedy the situation in a later certificate. However, with a final certificate, the situation may well be different and it may therefore be necessary to instigate proceedings to recover any overpayment.

Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd

D&D retained KGA to design an impounding gate across the entrance of a marina. The gate never worked properly. D&D brought a successful claim for breach of contract and negligence in adjudication. KGA refused to honour the adjudicator's decision. KGA resisted enforcement of the decision on a number of grounds, including:

(i) The claim referred was not the same claim as the one the parties had been corresponding about prior to the notice of adjudication;

(ii) The adjudicator made an error of law and answered the wrong question; and

(iii) The procedure adopted by the adjudicator was unfair.

HHJ Seymour QC disagreed.

(i) He laid emphasis upon looking at what, on the facts, the dispute was about. Here, it was clear that there was a dispute between the parties about liability. This dispute had crystallised and would not go away simply because the quantum of the claim had changed;

(ii) The adjudicator had addressed the correct issue in law, namely whether KGA had performed its contractual obligations with reasonable skill and care; and

(iii) The procedure adopted by the adjudicator of conducting separate interviews with the parties and their experts was permitted by the CIC Model Adjudication Procedure. It was also fair because the adjudicator informed the parties of the details of his interviews.

HHJ Seymour QC was critical of the approach adopted by KGA, which he said was:

"Simply to seek to raise any and every point, good, bad or indifferent, by way of objection to the Decision without regard to whether any particular point was consistent with, or arguably properly alternative to, any other point."

London & Amsterdam Properties Ltd v Waterman Partnership Ltd

This case concerned a professional negligence claim, this time in relation to an alleged failure to release design information which it was said caused delays to a steelwork package contractor. L&A said that it had had to pay the steel contractor an additional £1.3 million as a result and claimed that money from Waterman. L&A primarily relied on the fact of the settlement with the steelwork contractor. Waterman said that it did not have sufficient particulars to respond to the claim in relation to either liability or quantum. L&A refused to provide this additional information. In adjudication proceedings, L&A were awarded approximately £700k.

However, HHJ Wilcox decided that there had been a significant breach of natural justice. Not only had L&A not revealed full particulars of its case in relation to causation and quantum prior to the adjudication, L&A had also sought to adduce additional evidence right at the end of the adjudication process. This latter information was not made available until after Waterman had responded in the adjudication. Waterman was not therefore able to take account of it. HHJ Wilcox, who felt that the decision to withhold quantum evidence was deliberate, held that this amounted to an evidential ambush.

Although the Judge stressed that mere ambush in itself, however *"unattractive"*, does not always amount to procedural unfairness, he did decide that there was a triable issue on the question of whether the decision by the adjudicator to accept the additional late evidence was a breach of natural justice and also as to whether the adjudicator had acted impartially as required by s108 of the HGCRA. With the late evidence, the Judge held that the adjudicator should either have excluded the new statement or given Waterman a reasonable opportunity to deal with it. As L&A had declined to provide an extension of time, the only option available was to exclude the additional statement.

The Judge also said that had L&A provided the information when it was first requested, the parties would have been able to consider their differences *"in a sensible commercial way reflecting the legal strengths and weaknesses of their respective positions before adjudication commenced. The Claimant chose not to."* As the dispute here was complex, involving the evaluation of the activities of many parties over many years and issues of professional negligence, the Judge suggested that such a dispute was best suited to arbitration or litigation.

Costain v Strathclyde Builders Ltd

Costain obtained an adjudicator's decision in its favour calling for Strathclyde to pay forthwith an amount withheld as liquidated and ascertained damages in respect of various interim certificates. In resisting enforcement, Strathclyde said that there had been a breach in the principles of natural justice. Three days before the decision was due, the adjudicator wrote to the parties and asked for an extension of four days to reach his decision. The reason for this was that he wanted to discuss one point with his appointed legal adviser. The result of these discussions was not made known to the parties, nor were they told of the terms of discussions that had taken place. Neither party made a request to be told the terms of the discussions nor to see the result. Neither party was invited to comment on the advice and neither party requested the opportunity to do so. Nevertheless, Strathclyde said that the advice given was material to which the adjudicator was minded to give significance. Therefore, the failure to disclose the substance of that advice and invite comment was a breach of the principles of natural justice.

Lord Drummond Young set out nine principles that applied to natural justice and adjudication. The overriding principle was that each party be given a fair opportunity to present its case.

If an adjudicator takes specialist advice and that adviser produces an opinion then this must be disclosed for comment. It does not matter if that advice is from a legal adviser or a programmer. To succeed in alleging a breach, a party must demonstrate the possibility of injustice, not necessarily that actual injustice had occurred.

Here, there had been a breach of the principles of natural justice. The

adjudicator had not indicated what he had discussed with his legal adviser and so it was not clear whether it was a matter that had been adequately dealt with by the parties' submissions.

Westminster Building Co. Ltd v Andrew Beckingham

WBC tendered for refurbishment works to a property owned by Beckingham. Part 1 of the specification stated that the contract would be in the form of JCT IFC 1998 incorporating various amendments. The letter of intent instructed WBC to proceed and stated:

"My Surveyor will be progressing the preparation of the formal contract documents over the next few weeks for signature by both parties, in the interim please proceed to make arrangements for the implementation of the works. In the unlikely event of matters not progressing I would confirm that you will be reimbursed any reasonable expenditure in connection with the project."

The day after work started a completed contract was sent out. Whilst WBC signed and returned it, Beckingham did not sign. Work proceeded and a *"capping agreement"* was signed by both parties. This stated that the fees would not exceed £300,000 including VAT, and provided for a staged release of retention. Payment certificates 5 and 6 were issued by which time the contractor had been paid £284,209.90. Beckingham refused to pay on the basis that the maximum sum due in accordance with the capping agreement was £270,000 (after deduction of the £30,000 retention). He did not serve any withholding notice. The dispute was referred to an adjudicator who decided that Beckingham should pay WBC £122,409.16 plus interest.

A variety of issues arose including whether the contract was governed by an adjudication clause, whether the adjudicator had jurisdiction to deal with the dispute because of the capping agreement, and whether the adjudication was unfair and therefore not binding.

HHJ Thornton QC held that the letter of intent was not sufficient to form a contract because when the body of the letter was read with the last paragraph, the intention was clearly that if a contract was not concluded then the contractor would be reimbursed any reasonable expenditure. Further, it was also anticipated by the parties that there would be a formal contract document.

A formal contract was prepared and signed by WBC and given to Beckingham for signature. However, although he received the signed contract and allowed the works to proceed, Beckingham did nothing further. By acting in this way, Beckingham was held to be signifying acceptance of the contract terms put forward by Westminster and to be waiving any precondition as to signature, if such was the effect of the wording of the letter of intent. The absence of any executed documentation did not prevent the court from finding that a binding contract had been entered into because all of the necessary ingredients for a valid contract were in existence.

The capping agreement set the fee at £300,000, and provided a mechanism for release of retention. However, it did not amount to a settlement agreement. The adjudicator had decided that the agreement was a variation to the original contract but was of no effect because it was not supported by consideration. In the absence of a withholding notice, Beckingham had no surviving defence to resist payment of the decision, save for a challenge pursuant to the Unfair Terms in Consumer Contracts Regulations 1999. HHJ Thornton QC held that those regulations, whilst applicable, did not

assist Mr Beckingham because the contract was in plain language, Mr Beckingham had been professionally advised, there was no significant imbalance in the terms of the contract, and the adjudication clause did not significantly exclude or hinder his (i.e. the consumer's) right to take legal action.

OTHER CASES

Building Magazine Legal Briefing

"No Records, No Claim"

JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs

16 January 2004, TCC, HHJ Thornton QC

The facts

Following the outbreak of foot and mouth disease in 2001, JDM entered into a contract with DEFRA to construct burial sites and infrastructure works. Under the contract, JDM was to be paid a reasonable rate for such labour and materials as it provided. JDM produced timesheets to back up its claim for fees. DEFRA said they were unreliable. The problem with the timesheets was that although the documentation was verified by JDM (or its sub-contractors), they had not been countersigned, as required by the contract, at the time by a DEFRA representative.

The procedure which JDM had agreed to, involved a DEFRA representative being based on each site who would record the times and activities carried out by each individual or an item of plant. The sheet would then be signed each day by that representative and a nominated JDM employee. In practice, many sites had no DEFRA representative. Even where there was such a representative, often the timesheets were not verified or authenticated.

The issues

HHJ Thornton QC set out a number of considerations in relation to placing weight on the timesheets. These included that JDM was an experienced service provider for the government and had no reason to inflate/overcharge.

The timesheets were prepared under the contract and pursuant to a contractual requirement of accuracy and reliability. Records were also being made to enable JDM to fulfil its obligations under the working time regulations. JDM had no reason to think that the timesheets would not be verified or authenticated.

The timesheets and invoices were contemporaneous. The production of the timesheets was the only reasonable means for JDM to prove its entitlement.

The decision

Therefore, the Judge concluded:

"It would be to allow DEFRA to take advantage of its breach of contract if DEFRA was to be allowed to make any more extensive challenge to the time sheets than it could have done following their verification by one of its site based representatives. Thus, for any time sheets now in issue which had not been verified by DEFRA on site, DEFRA now has the evidential burden of showing that the contents of the time sheet were inaccurate. In practical terms, therefore, DEFRA is restricted in its attack on the time sheets to showing that they contain arithmetical or other patent errors, that they are subject to some general error such as not allowing for deductible meal breaks, were fraudulently produced or were produced by a process which was inherently unreliable such that no weight may be placed upon them."

Comment

This is an interesting case because contractors and sub-contractors frequently seek to prove entitlement by reference to timesheets, which are often not approved. In this case DEFRA did not check and approve the timesheets provided by the contractor. When the contractor sought payment, DEFRA sought to argue that the timesheets could not be relied upon because they had not been verified and approved by DEFRA at the time the work was carried out. The Judge held that DEFRA were seeking to take advantage of its own breach and he would not allow it. DEFRA were, therefore, restricted to showing that the timesheets were inaccurate, rather than the contractor having to show that they were accurate.

Construction Industry Law Letter

Close Invoice Finance Ltd v Belmont Bleaching and Dyeing Company Ltd

Queen's Bench Division
His Honour Judge Bowsher QC
Judgment delivered 16 April 2003

The facts

The claimant was a debt factoring company to which Eaton Engineering Limited had assigned a debt that it claimed was owed to it by the defendant under an agreement to install a machine at the defendant's premises. Eaton's quotation for the works, which was accepted by the defendant, set out timescales for delivery, installation and commissioning, and provided that payment would be made in stages, namely 30% upon delivery to site, 40% upon completion of erection and 30% once the machine had been commissioned and handed over. Eaton went into liquidation and abandoned the work. It was agreed that commissioning was never completed but the claimant maintained that the erection stage had been completed and claimed payment for that stage. Alternatively, it was argued that Eaton had rendered substantial performance of the works and was thus entitled to payment.

Issues and findings

Was the claimant entitled to payment where the works for the relevant stage were not complete?

No. Payment was not due unless and until the stage was complete.

Was the claimant entitled to payment where the works for the relevant stage were substantially complete?

No. Insufficient evidence was produced to demonstrate that the stage was substantially performed so as to entitle the claimant to payment.

Commentary

The doctrine of entire contracts, which can apply equally to arrange for stage payments, may mean that a contractor will only be entitled to payment on completion of the stage for which payment is to be made. However, the doctrine of entire contract can in some cases be subject to the principle of substantial performance, by which a contractor can obtain payment even if there are some defects in the works. However, substantial completion has to be proved: it is not enough to just put forward evidence that a considerable amount of work has been done.

Substantial completion, whilst a lesser test than practical completion, means what it says.

Daejan Investments Ltd v The Park West Club Ltd v (Part 20) Buxton Associates

Technology and Construction Court
His Honour Judge David Wilcox
Judgment delivered 3 November 2003

The facts

Daejan sought permission to re-amend its Part 20 particulars of claim. The dispute related to the installation of waterproofing and Daejan had commenced a Part 20 claim against Buxton, engineers on the project, stating that no competent engineer could have advised that the specific waterproofing system used should have been installed.

The claim between Daejan and Park West had been running at least since early 2002 and complaints had been made as early as 15 February 2002 as to the quality of the waterproofing works undertaken by Daejan. The parties had discussed engaging a waterproofing expert and Park West had in fact engaged an expert, Mr Paul Carter. Daejan and Park West considered appointing Mr Carter as a joint expert but this was rejected by Daejan. Park West obtained a report from Mr Carter, although in this judgment, the Judge stated that the fact that Mr Carter was not an engineer was a fundamental defect in the report.

Daejan then sought to use Mr Carter's report as a basis of its allegation of professional negligence against Buxton. In December 2002 Daejan sought leave of the court to join Buxton as Part 20 defendant. The Part 20 claim was then amended in April 2003. In November 2003 Daejan sought to make further amendments as elements of the amended pleading were speculative and not borne out by contemporaneous investigation.

Issues and findings

Was Daejan entitled to amend its pleading?

Yes, it would be wrong for the Judge not to give leave because the proper issues between the parties must be the subject of resolution.

Should Daejan have complied with the Pre-Action Protocol for Construction and Engineering Disputes in relation to its Part 20 claim?

Yes, a Part 20 claimant is not relieved of the obligation to comply in substance with the terms of the approved protocol, otherwise parties to litigation brought otherwise than in accordance with the protocol might be subject to unfair commercial advantage and to threat of litigation and persistence in litigation based on allegations without any real substance.

Should Daejan pay Buxton's costs?

Yes, this had been a case of shifting allegation whereby Buxton had been robbed of the proper opportunity in the course of litigation to consider what its true position was. The failure to comply with the pre-action protocol very much bears upon the position of costs and the Judge could not see no good reason why Buxton should not be put in the position than they would have been in had things been done properly.

Commentary

His Honour Judge Wilcox has made it crystal clear that failure to comply with pre-action protocol may result in an adverse costs order and criticism from the court. Here, Daejan were ordered to pay all of Buxton's costs to date in litigation which had been running between those

two parties for nearly a year. This is likely to be a considerable expense.

Whilst the Judge upheld the principles of the CPR and the construction and engineering pre-action protocol, he did not address the issue of bringing a Part 20 claim as a defendant when proceedings have been issued against you. In such a case, to follow the pre-action protocol may be difficult given the time constraints of the litigation in which you are involved. In this case, it is submitted, the court would have to take this into account in considering pre-action conduct and consequent costs.

The Judge also reiterated an important point, namely that an issued claim should be properly investigated and not be speculative.

Earls Terrace Properties Ltd v Nilsson Design Ltd and Charter Construction plc (Part 20 Defendant)

Technology and Construction Court
His Honour Judge Thornton QC
Judgment delivered 20 February 2004

The facts

In August 1996, Earls Terrace Properties Limited ("ETPL") engaged a contractor, on a design and build basis, to carry out restoration and refurbishment works to 25 properties at Earl's Terrace, Kensington, London. Nilsson were ETPL's architect and prepared the Employer's Requirements. The first construction contract was terminated and in November 1996, Charter were engaged, on a prime cost basis, to carry out the remainder of the works.

Prior to completion of the works, water penetration to the basements of 11 of the 25 houses was discovered and this led to lengthy remedial works. ETPL argued that the project had been delayed by 15 months. ETPL sued Nilsson on the basis that Nilsson had failed to provide Charter with appropriate design details and had failed to supervise Charter properly. Nilsson joined Charter on the basis that Charter had failed to implement the design correctly.

ETPL's claim was divided into three categories of loss: direct building and remedial costs, compensation and holding costs for the 15-months' delay.

It was an assumed fact that Nilsson knew that ETPL were a development company and that the project was a commercial development funded by a third party and that any delay to completion of the project would result in funds being held in the project for longer than they would otherwise be.

ETPL funded the project by way of a Construction Credit Agreement between Vastint Holdings BV and ETPL. ETPL is a wholly owned subsidiary of Prime Property Holdings Limited which is a wholly owned subsidiary of Vastint. Whilst the funding was repayable on demand, the credit agreement also provided that £20m of the funding would be provided interest free and that funding arrangements over the £20m limit would attract interest at 10% per annum.

For its holding costs claim, ETPL claimed its interest payable at LIBOR plus 2% on its investment, being the total loan advance for the acquisition and development costs for the entire development less advances on four houses and the car parking spaces. Interest was claimed for the 15-month period from June 1998 to September 1999 totalling £5,981,240. Further interest was claimed on that sum pursuant to the Supreme Court Act 1981.

The parties agreed to refer the holding costs category of loss to the court as two

preliminary issues, summarised by the judge as:

1. Are holding costs recoverable as damages? This included a consideration of a number of issues, including whether ETPL had suffered loss and whether ETPL was entitled to be compensated by applying the interest rate of LIBOR plus 2% to the funds that it had invested in the project for the period of the delay or by applying an interest rate which reflected the actual cost to ETPL of borrowing the funds that it had invested in the project for that period of delay.

2. Was ETPL obliged as a matter of principle to give credit against the sum claimed for the corresponding benefit gained by the increase in the value of the houses during the period of delay?

Issues and findings

Are holding costs recoverable as damages?

Yes. ETPL has a claim for that part of the entirety of the funding that ETPL is able to establish at trial was locked into the development for any period as a result of the delays caused by the remedial investigations and works because it was on loan for longer than it should have been or because either ETPL or Vastint was unable to make commercial use of the money.

Was ETPL entitled to recover damages even though it was arguable that ETPL had sustained no loss?

Yes, on the principles set out in the cases of *Alfred McAlpine Construction Limited v Panatown Limited* (1998) Constr. LR 46, CA and *John Harris Partnership (a firm) v Groveworld Limited* (1999) CILL 1485.

Was ETPL entitled to recover interest at the notional rate of LIBOR plus 2%?

Yes. A foreseeable rate of interest, being a commercially reasonable rate, is recoverable.

Must credit be given for enhanced proceeds of sale?

No. In accordance with principles of calculation of damages due to breach of contract such credit need not be given because the sales and any increased profit are unconnected with the original breaches, did not form part of the same transaction on the breaches and were not caused by them.

Commentary

The issue of claiming holding charges as damages is a live one. Here, the Judge has given clear guidance that such charges are recoverable as damages and are considered to be consequential losses. Further, the amount of such damages need not be specifically pleaded. This should assist in preparation of claims relating to funding charges following delays.

The judgment also helpfully summarises the law in relation to the recovery of consequential loss including where losses are incurred by a third party which a party to the action wishes to recover.

Finally, the conclusion that the rise in the housing market will not normally affect the measure of damages will be of interest to developers and contractors alike when quantifying losses due to delay.

Phee Farrar Jones Ltd v Connaught Mason Ltd

Technology and Construction Court
His Honour Judge Toulmin CMG QC
Judgment delivered 30 April 2003

The facts

In 1997 Phee Farrar Jones ("PFJ") took a five-year lease on the 3rd, 6th and 9th floors of Alhambra House, Charing Cross Road, London. Later they took a lease on the 7th floor also. The leases of all floors expired on 23 June 2002. In August 2000 Connaught Mason ("CM") contracted with PFJ to carry out some refurbishment works on the premises. In January 2001, flooding (in respect of which CM admitted liability) caused extensive damage to the building. Of the floors PFJ occupied, extensive work was required on the 3rd and 6th floors but not on the 7th and 9th floors.

PFJ claimed damages on the basis that they decided the staff needed to be kept together in one building, and the cheapest option was to lease (as they did in April 2001) and fit out premises at 10 Alfred Place, London. In June 2001 PFJ moved out of Alhambra House and into 10 Alfred Place.

Although the work on Alhambra House was completed in October 2001, PFJ continued in occupation of 10 Alfred Place until 30 June 2002 and continued to pay rent until 10 September 2002. PFJ continued to pay rent for Alhambra House until the lease expired on 23 June 2002.

PFJ said that they attempted to assign the lease on Alhambra House or to sublet the premises. However due to the downturn of the market after 11 September 2001, they were unable to do so.

They further contended that they would have moved back into Alhambra House if it had been possible to assign the lease on 10 Alfred Place after October 2001, until such a time when it would no longer have been commercially and financially sensible to have moved back into Alhambra House bearing in mind that the lease expired on 23 June 2002.

CM argued that the real or dominant cause of PFJ entering into the lease for the premises at 10 Alfred Place was that PFJ wished to fulfil ambitious plans for the expansion of its business and workforce and that the flood provided the occasion upon which the lease was taken but not the cause. Hence, they argued, the dominant cause of the move was the desire to further PFJ's expansion plans, but if the reasons for the move to Alfred Place were mixed, i.e. partly to provide for expansion and partly to provide alternative accommodation during the period of loss, the appropriate basis for compensation would be a proportion of the actual cost of Alfred Place for the period of loss of use of the relevant floors of Alhambra House.

They further alleged that it was not reasonably necessary to keep the workforce together during the period of the move and that the move to the premises at Alfred Place was an unnecessarily extravagant way of covering the period when PFJ was required to vacate the two floors of Alhambra House.

Issues and findings

Was the claimant entitled to damages on the basis that the flood was the cause of its relocation?

Yes. The evidence showed that PFJ would not have relocated but for the flood.

Had PFJ acted reasonably in making the arrangements it did in relocating its business?

Yes. It had considered different options and acted reasonably, hence it was entitled to recover.

Was PFJ entitled to recover costs in respect of wasted management time?

No. Such costs can only be claimed if they amount to a separate expense, such as overtime or lost revenue, which would otherwise have been obtained. PFJ had not shown evidence that such had occurred.

Commentary

It is often assumed that, where a party incurs expenditure following a breach of contract, it is entitled to recover those costs. That is not correct. If the expenditure would have been incurred in any event then it is not recoverable from the other party.

Moreover, even if caused by the breach, the costs must be reasonably incurred. In this case, the court considered the cost of relocating the claimant's business was reasonably incurred and caused by the defendant. But as the judgment shows, a claimant may have to demonstrate that it acted as it did after investigating and considering, in detail, the options available. The court gave no guidance as to how a court should assess the reasonableness of a claimant's actions, but it is worth noting that in the Scottish case of *McLaren Murdoch & Hamilton Limited v The Abercromby Motor Group Limited* (CILL April 2003, p.1964), the court suggested that the claimant's actions should 'not be weighed in fine scales'.

The Judge's finding on the claim for lost management time is worthy of note. Recoverability of sums in respect of lost management time has been recognised in several recent claims, such as *Horace Holman v Sherwood* and, in the Scottish courts, *Euro Pools Plc v Clydeside*. In the *Horace Holman* case, recovery in respect of management time was made even where the time spent could not have been said to be directly profit-making. The court in this case took a more restricted approach.

Sahib Foods Ltd v Paskin Kyriakides Sands (a firm)

Court of Appeal (Civil Division)
Lord Justice Ward, Lord Justice Potter and Lord Justice Clarke
Judgment delivered 19 December 2003

The facts

The appellant firm of architects ("PKS") was held by His Honour Judge Bowsher QC to be wholly liable for the destruction by fire of a food factory in Southall of which the respondent ("Sahib") was the leaseholder.

The Judge reached this decision notwithstanding findings of negligence both against Sahib's production manager at the time who failed to give accurate information as to the use of the room in which the fire started, and against an employee of Sahib, who failed to turn off the gas under a pan containing a substantial volume of cooking oil at the end of his shift in the room in which the fire started, and against his supervisor who failed to check that the gas had been switched off. This was on the basis that PKS should by its design have guarded against the consequences of the negligence on the part of Sahib. PKS had specified combustible panels for the room in which the fire broke out when they were on notice that there was a risk of fire.

Accordingly, the Judge held that Sahib's negligence only caused the damage to the room in which the fire started whereas PKS's negligence caused the entirety of the damage to the rest of the factory which resulted from the spread of the fire. PKS appealed on the issue of its liability and against the finding on contributory negligence. The Court of Appeal dismissed the first ground but allowed the appeal on the second point.

Issues and findings

Was Sahib contributorily negligent in the spread of the fire?

Yes. Sahib had suffered damage partly as a result of its own fault and partly as a result of the fault of PKS, and so in accordance with section 1(1) of the Law Reform (Contributory Negligence) Act 1945 damages had to be reduced to the extent that the court thought just and equitable having regard to its share in the responsibility for the damage.

Was the defendant liable for the spread of the fire notwithstanding the fact that the fire had started because of the claimant's negligence?

Yes. The defendant had notice of the risk of failing to install fireproof panels from specialists in fireproof insulation and failed to pass this to the highest authority in the claimant company or to ascertain the nature of the cooking processes in the room where the fire started.

Commentary

The Court of Appeal was not persuaded that there was no contributory negligence on the part of Sahib towards the spread of the fire beyond the room in which it started to the whole factory.

The Judge concluded that because Sahib's employee, who had misled the architects as to the use of the room where the fire started, did not have any duty to design the building, they did not breach any duty which they owed to PKS.

The Court of Appeal said that there was no need to show any such duty where contributory negligence was concerned, only that the damage suffered by the claimant was partly its own fault, which in this case it clearly was. The Court also decided the admitted duty on the part of PKS to guard against the consequences of Sahib's negligence was only one of many factors, and a variable one at that, in determining whether the claimant had so conducted itself that it failed to take reasonable care for the safety of its property and was therefore contributorily negligent for the damage to that property.

The 66% reduction of the £27 million claim would be of some comfort to the architect's insurers, but a large enough slice of the liability remained to underline the importance for professionals to make particularly careful investigations when put on notice of a serious danger and to ensure that the risk is expressly and specifically accepted by senior members of the client in instances where, in the interest of saving cost, recommended steps against the danger are not taken.

Shirayama Shokusan Company Ltd and five others v Danovo Ltd

High Court of Justice, Chancery Division
Mr Justice Blackburne
Judgment delivered 5 December 2003

The facts

Danovo owned and occupied the Saatchi Gallery on the first floor of County Hall under a 20-year sub-underlease from the sixth claimant, Cadogan Leisure Investments Limited, which itself held an underlease for part of the first floor from the first five claimants. Disputes arose

which led to the claimants commencing proceedings in which they sought to restrain alleged acts of trespass by Danovo by means of an injunction and to Danovo counter-claiming in these proceedings for injunctions restraining interference with its rights. The situation was further complicated by the service of a notice under section 146 of the Law of Property Act on the defendant by the sixth claimant as a prelude to proceedings for forfeiture of Danovo's lease for breach of a profit-sharing rent formula, and by accusations of dishonesty made by Mr Saatchi against persons associated with the claimants. There was also an application for summary judgment pending the month after the hearing of the defendant's present application.

Danovo suggested mediation of the various disputes. The claimants took the view that the dispute was black and white in that Danovo was either trespassing or it was not and contended that there was nothing to be gained by mediation. Accordingly, Danovo applied to the court for an order for mediation on the basis of Rule 1.1 of the CPR.

Issues and findings

Does the court have jurisdiction to order a party, who is unwilling, to have a dispute mediated?

Yes. Rule 1.1 of the Civil Procedure Rules provided the basis for such jurisdiction, and there was no authority to the contrary which bound to the court.

Should the court exercise its jurisdiction to order mediation in the circumstances of this case?

Yes. The parties were in long-term relationships and would need to talk to each other and work together in future, possibly for many years. The parties also had a shared interest in the success of the gallery, and in the profit rent arrangements under the Danovo sub-underlease.

Commentary

CPR 1.4 obliges the court to further the overriding objective of dealing with cases justly by actively managing cases. Active case management is defined under this paragraph as including *"encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure"*.

In the absence of any authority telling him otherwise and with the support of a decision by a judge who now sits on the Court of Appeal dating back to 1999, the Judge decided that *"encouraging"* and *"facilitating"* the use of mediation by the parties could extend to ordering that it be attempted where one of the parties was unwilling. The practice of the court to penalise parties unreasonably refusing to attempt mediation in costs has been well established since the case of *Dunnett v Railtrack* (CILL May 2002 1861), but the cases relied upon by the applicant had not received the same publicity and, in view of the wording of CPR 1.4, one can sympathise with the respondent's submission that they were wrongly decided.

The Judge gave a lot of weight to the long-term relationship of the parties and the significant common interests which they had in deciding to order mediation despite these impediments. The fact that only some of the disputes between the parties were actually before the court in the present proceedings also weighed significantly in favour of ordering mediation.

That said, the case gives no warranty to a party keen to mediate that the court will order a reluctant party to do so in all

circumstances, but it does place further pressure on reluctant parties to back up a refusal to mediate with very good reasons should they wish to avoid sanctions.

Stephen Donald Architects Ltd v Christopher King

Technology and Construction Court
His Honour Judge Seymour QC
Judgment delivered 30 July 2003

The facts

The claimant was the corporate manifestation of Mr Stephen Donald, an architect, and the defendant, a photographer. Mr King owned a property in London and in 1999 wanted to redevelop it to provide a photographic studio, living accommodation for himself and a number of flats for letting.

The parties discussed this idea in 1999 and, whilst no formal contract was entered into, the claimant carried out design and other works in connection with it. However, it became evident that the cost of the works on the basis of the claimant's designs would exceed the funding available and hence the defendant dispensed with the claimant's services and proceeded on the basis of a different design with other architects.

The claimant brought proceedings, arguing firstly that in January and June 2002 Mr King had agreed to pay a fee of £125,000 plus VAT for the services provided by the claimant and claiming damages for the alleged repudiation of that agreement.

Secondly, it claimed payment on a quantum meruit basis for such services and, thirdly, it also sought payment in respect of a cheque given to it by Mr King but subsequently stopped by him.

Mr King in turn counter-claimed, alleging that the claimant had negligently designed the flats in that the design was over-elaborate in its use of material and wasteful in its use of space and therefore proved so costly that they could not proceed with it. Mr King further contended that once such costs became apparent, the claimant failed to take proper steps to modify the design so that the work could be done within budget.

Issues and findings

If the parties did not contract regarding the services to be provided, was the claimant entitled to payment on a quantum meruit?

No. A quantum meruit was a claim in restitution and is based on the principle of unjust entitlement. Here, the claimant took a risk of the project not proving profitable and hence it was not unjust that the defendant not pay for the services provided.

Was the claimant entitled to sue upon the stopped cheque for £48,000?

No. It was an unenforceable loan and in any event there was a collateral contract under which it was agreed that the claimant would not present it until consented to by the funder, AIB. Breach of that agreement by the claimant exposed it to a claim for damages equivalent to the value of the cheque so the claim failed for circuitry.

Was the claimant negligent in its design of the project and in failing to take appropriate steps to modify the design once the cost became known?

No. The design was not the cheapest that could have been provided but was not a design no competent architect could have provided.

Once the cost of the works to such design became known the architect took appropriate steps to seek to reduce their price.

Commentary

This is an unusual case that emphasises that while ordinarily the request by a client for an architect's services will found a contract, this may not necessarily be the case.

Further, the absence of a contract does not mean that a party can automatically go on to claim a similar (or as in this case greater) sum on the basis of a quantum meruit. In considering the matters necessary to pursue a claim in restitution, the Judge held that in this instance any enrichment of the defendant was not unjust. The architect was unable to modify his plans to enable the development to proceed. In such circumstances, the architect took the risk on his fees of the development not proceeding.

Although the Judge rejected the claim for payment on a quantum meruit, it is worth noting that he considered that, if a claim had been justifiable, the sum awarded would have been calculated by reference to the suggested contract sum.

Whilst, it is sometimes suggested that the sum due on a quantum meruit should be calculated without regard to sums suggested in abortive contract negotiations, the decision by the court here suggests it will not always take such an approach.

As to the counter-claim which failed, the Judge gave guidance as to what a competent architect should do when faced with a high tender.

Tesco Stores Ltd v Costain Construction Ltd and others

Technology and Construction Court
His Honour Judge Richard Seymour QC
Judgment delivered 2 July 2003

The facts

During the course of extension and alteration works to a Tesco Superstore constructed by the defendant ("Costain") a fire occurred causing serious damage.

Tesco commenced proceedings against Costain alleging that:

- Costain was in breach of a contract by which it agreed to design and construct the store in the first place, and had been negligent in failing to provide appropriate fire stopping and inhibiting measures in the store as constructed.

- Costain was negligent in relation to the undertaking of an inspection of the store in about October 1993 to assess the adequacy of the fire stopping and inhibiting measures in place.

- Costain was negligent in its reporting on the results of that inspection.

Costain responded as follows:

- Costain denied that it had concluded any contract with Tesco in relation to the construction of the store although it was admitted that Costain had in fact built it.

- Costain denied that it owed to Tesco a duty of care in respect of the construction of the store for which Tesco contended.

- Costain contended that the inspection of the store in October 1993 had been

competently carried out and the results properly reported.

- Costain contended that Tesco's claims were statute barred.

On 20 March 1989, Tesco had written to Costain:

" ... we write to advise you that it is our intention to enter into a formal contract with your company in accordance with Tesco Standard Documentation, for use with design and build contracts ... and in a satisfactory contract sum being agreed between yourselves and the quantity surveyors (Bucknall Austin Plc).

In consideration of the contents of this letter, you are to consider your company's part in the design team and to put in hand all works in accordance with the instructions of the Employer's Representative.

The anticipated contract period will be 46 calendar weeks commencing on 3 April 1989 with completion on 3 February 1990, ... based on your first stage tender sum of £7,602,081.

If you repudiate the terms of this letter, you will be reimbursed for all reasonable, direct and actual loss (not to include reimbursement of any consequential loss or loss of profit) expected from the date of this letter up to the date upon which you advise Tesco Stores Limited that you do not propose to continue the project ... "

Costain replied to this letter by letter of 30 March 1989 as follows:

"We acknowledge receipt and thank you for your letter dated 20 March 1989 accepting our first stage tender in the sum of £7,602,081 subject to satisfactory negotiation.

We confirm we shall work with the design team and put in hand all works in accordance with the Employer's Representative.
We enclose as requested a copy of your letter of 20 March 1989 signed by the managing director, Mr W Sperry, in acknowledgement of the terms and conditions contained therein."

Costain then proceeded with the work of construction of the store and no formal contract documentation ever came into existence between the parties.

In July 1993 a fire occurred to another Tesco store causing substantial damage. As part of a wider review by Tesco, Costain were asked to carry out an inspection in relation to a number of stores that they had constructed including in relation to the store at Redditch.

On 19 October 1993 Costain wrote to Tesco in the following terms:

"Although we did not receive a letter specific to this store, we have taken it upon ourselves to carry out a detailed inspection of fire barriers as per other stores as instructed by our company in the Midlands.

We are pleased to report that further to this inspection fire stopping works complied with the requirements for design and regulations prevailing at the time of construction."

In this respect a further letter was sent by Costain to Tesco on 27 May 1994, stating as follows:

"We are pleased to report that further to a detailed inspection of the above store last autumn, we can confirm that fire stopping works complied with the design and statutory regulations prevailing at the time of construction."

The matter was listed before His Honour Judge Richard Seymour QC who ordered the hearing of a number of preliminary issues.

Issues and findings

Did Tesco and Costain enter into a contract in 1989 under which Costain was to carry out any work or supply any services for Tesco in relation to the Superstore at Redditch?

Yes. The contract was made by the counter-signature on behalf of Costain and returned to Tesco and Tesco's letter dated 20 March 1989.

What, if any, were the express terms of the contract?

The express terms of the contract were only that Costain would commence the work of constructing the store in advance of making a formal contract and those terms as to payment in the event that no formal contract was concluded set out in the letter dated 20 March 1989.

What, if any, were the implied terms of the contract?

There were implied terms of the contract that Costain would perform any construction work which it carried out under the contract in a good and workmanlike manner and insofar as any design decision in relation to the store was made by Costain, the element would be reasonably fit for its intended purpose.

Did Costain owe to Tesco any duty of care in relation to anything undertaken by Costain in connection with the Redditch site in 1989?

Yes, the duty of care owed by Costain to Tesco was to execute any building or design work that Costain in fact carried out itself with the care and skill to be expected of a reasonably competent building contractor so as not to cause damage to person or property or economic loss.

Did Tesco's cause of action in tort accrue as at the date of the fire, namely 4 August 2001?

No. Any cause of action accrued at the date on which Tesco in fact sustained economic loss as a result of the breach of the duty of care.

Commentary

As emphasised by the court, a letter of intent can form the basis of a contract into which the courts will be prepared to imply wide-ranging terms.

Importantly, the court in this case held that the term covers the works as designed and constructed would be reasonably fit for their purpose insofar as directly designed by the builder and does not cover the works as designed by other parties retained by the employer.

Whether a duty of care arises in that to prevent economic loss can be of great importance since the limitation period for actions runs from the date damage is suffered and not the date of breach, as in the case of contract. The court held that such a duty to prevent economic loss resulting from damage to the building itself, had been assumed by the design and build contractor.

However, the Judge did not rely on any specific assumption of such responsibility but on the fact that such a duty would normally accompany a contractual undertaking to design with reasonable skill and care. Such a term would expose almost all designers to the imposition of such a duty.

Thistle Hotels Ltd v Gamma Four Ltd and others

Chancery Division
Deputy Judge Sonia Proudman QC
Judgment delivered 3 February 2004

The facts

Thistle Hotels Limited ("Thistle") applied for security for costs against Gamma Four Limited ("Gamma") and Euro and UK Property Limited ("Euro"), two of the defendants, in respect of their counter-claims. Thistle contended that Gamma and Euro would not be able to pay Thistle's costs of the counter-claims if ordered to do so and that Gamma and Euro were companies resident outside of the jurisdiction.

Gamma and Euro defended the application on the basis that they could pay costs of the counter-claim if ordered to do so, that such an order would be inappropriate in any event as the counter-claims arose out of the same transaction as Thistle's claim and reflected the substantive defence and that the security for costs application was an abuse of the process.

The Judge considered all these arguments. In particular, the Judge gave detailed consideration to the question of the counter-claims arising out of the same transaction as the claim.

Issues and findings

Did the court have jurisdiction to make an order for security for costs pursuant to CPR 25.13?

Yes. Neither Gamma nor Euro demonstrated that they had assets readily available to meet any award of costs of the counter-claim. Further, Thistle had shown that there would be obstacles to enforcement of such a costs order.

Was it just to make an order for security for costs: did the counter-claims reflect the substantive defence?

Yes, an order for security for costs should be made. There were three elements to the counter-claims. In the case of the first element (a counter-claim for breach of warranty) the issues were properly referable to that counter-claim. In relation to the second and third elements the facts required to establish the counter-claims went well beyond the facts required to make good the defence and the counter-claims had *"independent vitality"*.

Was it just to make an order for security for costs: was there an abuse of the process?

Yes, an order for security for costs should be made, there had been no abuse of the process in terms of delay and Gamma and Euro had not demonstrated they had suffered any prejudice as a result of the alleged delay. Further, no evidence had been adduced that the claims of Gamma and Euro would be stifled if an order for security were made.

Commentary

This case provides a useful restatement of the law in relation to security for costs and, in particular, the issue of what constitutes a defence and what constitutes a cross-claim or counter-claim.

In many cases the facts of the defence and counter-claim will be closely linked; however, this in itself is not enough to argue that the security relates to the defence rather than the counter-claim.

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