FENWICK ELLIOTT

The construction & energy law specialists

Annual Review 2020/2021

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

Contents

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ANNUAL REVIEW

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Welcome to the 24th edition of our Annual Review. As always, our Review contains a round-up of some of the most important developments from our clients' point of view over the past 12 months including, from pages 56, our customary summaries of some of the key legal cases and issues, taken from both our monthly newsletter Dispatch as well as the Construction Industry Law Letter.

2020 will be remembered for one thing and many of our articles in this year's Review reflect the impact of the COVID-19 pandemic. This includes our first two articles on pages 6 - 13, where Jon Miller looks at the legal implications of COVID-19 on construction contracts and then some of the practical steps parties on projects affected by the pandemic should take.

That said, as usual the Review features a wide range of articles, reflecting the typically diverse range of issues we have found ourselves looking at over the past year. As always this includes an adjudication update. On pages 36 - 38, I update the Bresco story, looking at both the Supreme Court's decision on whether an insolvent party can ever enforce adjudication decisions and the cases that followed. On pages 34 - 35 Ciaran Williams asks whether the time has come for adjudication to be extended across the entire construction industry, including power generation. Whilst Martin Ewen, on pages 31 - 33, explains why parties may need to look again at their standard payment and invoicing terms.

Parties should always review their standard termination provisions, and on pages 42 - 45 Karen Gidwani and Lucinda Robinson provide practical guidance on the issues you need to consider, whether the termination is at common law or under the contract. Whether abroad or at home, the question of whether or not delay damages apply is always an important one. As Sam Thyne discusses at pages 54 - 55, the New Zealand Supreme Court was asked to clarify the extent of the penalties doctrine.

Aside from COVID-19, 2020 has been particularly tough for leaseholders of new build properties up and down the country who have found out that their properties are covered in combustible cladding. Rebecca Penney at pages 14 - 15 explains more about this growing scandal. Then Stuart Duffy on pages 16 - 17 looks at two recent cases which relate to cladding flammability issues and considers some of the Government's plans to address the many issues which came to light following the Grenfell tragedy. This is a topic covered too by Simon Tolson in his introduction.

There continue to be a number of developments in the world of digital technology and processes that offer wide-ranging benefits to the construction, energy, infrastructure and legal industries. Dr Stacy Sinclair, introduces our special section on technology and digital construction on page 18 before writing about data & digital processes on pages 28 - 29.

On pages 19 - 20 Mark Pantry looks at the new Information Protocol published by the UK BIM Framework to support BS EN ISO 19650-2, while Catherine Simpson on pages 24 - 25 looks at the challenges and legal implications of Digital Twins.

On pages 21 - 23 Huw Wilkins asks whether COVID-19 might spark a revolution in offsite modular construction. Jesse Way on pages 39 - 41 discusses the meaning of "building structure", noting that it is not always easy to determine what the design life of a building (or a part of it) is intended to be.

With the World Green Building Council setting up an Advancing Net Zero project dedicated to supporting market transformation towards 100% net zero carbon buildings by 2050, Natalie Beeraje, on pages 26 - 27, asks whether we are ready for Net Zero.

With the announcement at the end of last year of its alliance with one of Saudi Arabia's leading law firms, Hammad & Al-Medhar, Fenwick Elliott continues to grow in the Middle East. On pages 48 - 49, James Mullen looks at the current status of Saudi Arabia's "Vision 2030", potentially one of the most ambitious construction projects undertaken on the global stage. On pages 46 - 47 James Cameron discusses the impact and benefits of the Commercial Courts Law in the Kingdom.

The International Arbitration world has adapted quickly to the changes and restrictions imposed by the pandemic, with everyone adapting to the need for virtual hearings and more. Sana Mahmud on pages 50 - 51 looks at the changes introduced in October 2020 by the new London Court of International Arbitration (LCIA) Rules. Many of the changes were simple tweaks to ensure that the existing rules meet the demands of current best practice and incorporate the use of available communication technology.

One of the key issues in any international arbitration dispute is which law applies to the arbitration agreement. In October of this year, the UK Supreme Court ruled on the correct English approach to answering the question as to which system of law governs the validity and scope of an arbitration agreement when the governing law of the contract containing it differs from the law of the nominated seat or where there is no specified system of law at all. I explain more at pages 52 - 53.

Our website (www.fenwickelliott.com) keeps track of our latest legal updates or you can follow us on Twitter or LinkedIn. We have a page dedicated to addressing the impact of COVID-19 on the construction industry. As always, I'd welcome any comments you may have on this year's Review: just send me a message by email to *jglover@fenwickelliott.com* or on Twitter @jeremyrglover.

Stay safe

Jeremy

Simon Tolson
Partner

It is my great pleasure to introduce our 2020/21 *Annual Review.* This is the 24th edition of our publication and boy what a year it has been. Autumn is here. Trees have started dropping their leaves, the Christmas countdown has begun and the promised second coronavirus wave has hit.

Our offices officially re-opened on 15 June 2020 once the Covid lockdown started to ease (I know things have reversed a little since September) and we have some staff there each day and a manned reception. Having undertaken a staff survey we found the majority were comfortable and fully effective working from home. We have seen no dip in performance and that is down to the huge commitment of everyone in Fenwick Elliott, with a little help from our clients!

This Annual Review has, like the firm, come a long way since our first. The year 2020 is "a bit special" mainly because due to the said coronavirus we have worked nearly eight months of it (almost but not quite entirely) virtually. We have cared for every member of staff, made no one redundant and grown in the process, both in size and confidence.

On the horizon, over the next few weeks the Government is expected to announce several key construction decisions such as: the National Infrastructure Strategy; the Williams Rail Review; the Energy White Paper and its Heat Strategy. All have been long anticipated; all have been pushed into the ambiguous promised land of "autumn" – which we all understand to mean "before the end of the year".

Chancellor Rishi Sunak has repeated his promise to publish the National Infrastructure Strategy this autumn, and he has stressed that cancelling the Budget will have no impact on the content of the infrastructure strategy – which at first blush sounds like good news. Other than small modular reactors, Boris Johnson's speech at the Conservative Party conference that the nation will power all UK homes with wind energy by 2030 looks to be the death knell for big nuclear. Hitachi pulling out of Wylfa has put the wider nuclear sector in a holding pattern.

As for the Department for Transport's (DfT's) five-year £27bn RIS2 roads funding plan, like Heathrow's third runway and the HS2 challenge by Chris Packham, this will also go before a red judge in the coming months – with all eyes on the outcome of the Supreme Court ruling on Heathrow. So it seems, for major contractors at least, more blocking than gatewaying lies ahead and more government procrastination before much new infrastructure can be given the green light. But for smaller and medium-sized contractors my take is that the picture is better than some admit to.

I well recall previous difficult times, such as Black Monday in 1987, and how we endured the deep recession of 1991 and the financial crash that started in 2008. We learnt much from 1991, and thrived from the experience and adaptations we made in the financial crash. It's all about adapting to needs and caring about the output. Each period set its own challenges, but we kept our heads and sought out new markets, new territories. What is different about this pandemic is that the implications of avoiding the virus and the health implications of catching it are wholly unique for the construction industry.

Covid implications are of course not great for our economy, today's news is that construction output is to fall by 14.5% this year, so the CPA warns us. However, the forecast predicts that output could grow by 13.5% next year. At the moment it is being powered by pent-up demand in private housing and the completion of refurbishment work that stopped when sites were closed following lockdown in March. The stamp duty holiday and the end of the first phase of the Help to Buy scheme in March 2021 are also fuelling the housing sector. They say homeowners are spending more on improvements with money saved because of the lack of travel and hospitality opportunities. But the end of the stamp duty holiday and a deteriorating economy carry the risk of reducing demand in Q2 next year.

Uncertainty continues to loom for the commercial sector. If working from home becomes more deep-seated in society, footfall in city and town centres will decline leading to a lack of demand for office and retail space.

The Government has an extra special responsibility, therefore, to deliver on its announcements I refer to, like such as its £900m for "'shovel-ready"' projects announced in August. Let's see it; it's cards up on the table time is here if we are to ensure construction recovery does not stall in the next 12 months. It is interesting to observe that in the past 150 years the world has seen an unprecedented improvement in health, and not just across Europe and the USA; life expectancy has in fact doubled in all regions of the world and with it huge increased demand for the built environment, and not just the rebuilding after the last world war, but new cities, towns, and vast infrastructure hubs.

What also stands out is how abrupt and damning negative health events can be on the economy. Most striking is the large, sudden decline of life expectancy in 1918, caused by an unusually deadly pandemic inappropriately called the "'Spanish flu"'. There is little doubt 2019 – 2021 at the current run rate will reveal a similar picture, notwithstanding all that modern medicine can throw at it. But we are all learning at a rate of knots. Like then, we will come out the other end, but one thing is sure; all of us must man the pumps to their maximum as we have much reconstruction to do. Oh and I am not forgetting climate change outcomes to be avoided through necessary disruptive change. At the same time the geopolitical landscape is getting ever more tottery.

Allow me one last distraction, I read that in WW2 the start of war was marked at home, not so much as by a national lockdown as by the fact that on 1 September 1939, with war looking unavoidable, the BBC took steps to prepare for the conflict. Shortly after noon the television service was unceremoniously shut down, following the cartoon Mickey's Gala Premiere! It was said that the strong signal from the transmitter at Alexandra Palace would provide a navigational aid for enemy aircraft. At the same time, the radio service was re-organised into one Home Service. While television remained silent during the war, BBC Radio – after an initial hiccup when the airwaves were filled with organ music which provided a welcome distraction – soon resumed service. At least our modern airwaves and cable media are maxed out for our needs for this duration and investment in that infrastructure is now more essential than ever must be made, and not just for the pandemic but the journey ahead.

Thankfully technology is adapting very fast, as must we. You may see some of our input in that arena on Building Magazine's "Digital Building Week", with contributions by Partner and Head of Innovation Dr Stacy Sinclair focusing on collaboration, how the industry can build smarter and on the digital transformation of the construction industry.

This past year our investment in legal tech continues with the firm now using litigation analytics, tracking and predictive tools and our text-analytics and data mining solutions. All this investment is with the aim of improving services and reducing costs to our clients.

We have in our engine rooms continued active involvement and growth in complex and high value construction and engineering litigation and international arbitration in the fields of renewable and alternative energy and infrastructure operations. At the end of September the new 2021 Legal 500 rankings went live and to our delight we have kept our ranking as a Tier 1 firm for Real Estate – Construction – Contentious. Then in October we were given a 1st tier ranking by Chambers and Partners as well. We have also received some of the best client individual and firm testimonials yet; a big thank you to those who gave feedback.

But all this work is not taken for granted. I have to thank all my Partners and every single member of staff for the huge contribution they have made to making this happen.

As a business we are conducting more international arbitration than ever before. Fewer disputes are going to the High Court than in the past (a national trend) but in international construction International Arbitration is a big chunk of what we do. For many years it has been a key area, our patronage and participation around the growing new international arbitration centres expands, albeit we are running arbitrations (and adjudications) virtually or in hybrid hearings since Covid set in.

Our Dubai office builds on our many years' experience starting in the 1990s advising clients on construction and energy projects in the MENA region. Thanks to the efforts of Ahmed Ibrahim, our Managing Partner and Patrick Stone in Dubai, our regional office for the MENA area is very busy and has grown significantly this past year, including great steps in the Kingdom of Saudi Arabia where Toby Randle is working with our Saudi partner, Hammad & Al-Mehdar.

A word on Grenfell

As I write this introduction the news of the day is that one of the most senior figures involved in the refurbishment of Grenfell Tower has shocked the inquiry into the fire by making a last-minute disclosure of hundreds of pages of notes from his five-year stint at Kensington and Chelsea Tenant Management Organisation ("KCTMO").

The public inquiry legal team – probing the flawed refurbishment of the tower block – said solicitors for KCTMO made the revelation at 4.40pm on Friday, 16 October 2020, that former director of assets and regeneration Peter Maddison had a stack of undisclosed evidence.

In an equally surprising disclosure TMO project manager for the Grenfell Tower refurbishment Claire Williams admitted in her evidence at the hearing that she had "binned" some of her notebooks relating to the project! In something of an understatement Richard Millett QC said today: "[They will] *have to give clear and convincing explanations of why these documents were not disclosed to the inquiry ... – until now"*.

If that were not enough news about Grenfell, nearly 1,000 residents of a nearby Notting Hill development were asked to leave immediately because of safety concerns relating to the construction of the buildings. This demonstrates how long in this journey to correction of combustible cladding on tall buildings we still have to go. These issues have occupied a number of Partners and fee earners on various fronts again this past year and we have led a number of important webinars on it (as well as on many other fields), Jon Miller in particular.

Then there is the draft Building Safety Bill which comes of course not a moment too soon, published in July 2020 for pre-parliamentary scrutiny and consultation. It sets out five key-ways which as I see it could affect our clients. The Bill thankfully captures recommendations made by Dame Judith Hackitt and sets out measures to improve building and fire safety, with the primary aim of ensuring that residents are, and will feel, safer in their homes.

Within about a year we can expect wholesale reform of the regulatory system by the introduction of:

- broader powers for the Health and Safety Executive as it steps into the role of "building safety regulator";
- heightened accountability for the built environment industry;
- mandated building assurance certificates as a prerequisite to occupation in higher-risk buildings of six storeys or more;
- stricter lifelong obligations in higher-risk buildings concerning design, construction and occupation; and
- a new era of tenant responsibility through the introduction of mandatory to building safety and "building safety charges".

Our publications

Our publications and outputs continue to reach all parts of the globe. Since the COVD-19 outbreak began, Fenwick Elliott has endeavoured to assuage pressure on our clients by providing written updates in relation to the impact of COVID-19 on construction contracts, providing free webinars on issues we believe are key during this time and answering specific queries any of you may have. Links to the webinars can be found here: *https://www.fenwickelliott.com/research-insight/webinars*.

Our monthly newsletter, Dispatch has reached issue 240 and our blog too has many readers: *https://www.fenwickelliott.com/blog*.

For example in the latest blog we discuss the impact of COVID-19 – the Corporate Governance and Insolvency Act 2020 ("CIGA") is covered, with its mixture of temporary and permanent measures intended to provide "breathing space" to businesses who are struggling financially (possibly as a result of the COVID-19 crisis). As a result of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020, which came into force on 29 September 2020, winding-up petitions cannot be presented until after 31 December 2020 and small suppliers remain exempt from the prohibition on termination clauses until 30 March 2021.

The commercial effect of the Coronavirus pandemic is difficult enough to assess even without continual changes to the legislative landscape. At the time of writing, there is every possibility that the temporary restrictions imposed by CIGA could be extended again. With suppliers having lost one of their key contractual tools for protecting them against insolvent customers (termination on insolvency) and being unable to contract their way out of the effects of CIGA, close cash and credit control will be more important than ever. Going forward, suppliers will have to spend more time at tender stage considering payment periods and ensuring stringent credit checks and due diligence are carried out in respect of their customers.

In another blog we look at the International Council for Commercial Arbitration (the "ICCA") which recently published the snappily titled *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (the "ICCA Report"). The good news is that the statistics show gender diversity in arbitral appointments is slowly improving. For example, in 2012 research quoted in the ICCA Report, which was based on 252 arbitration awards dated prior to January 2012, found that only 3.6% of 247 individual arbitrators were women and that 81.7% of the tribunals were all-male panels. However, between 2015 and 2019 around one third (29.2 to 34%) of all appointments by arbitral institutions were women. This is obviously an important improvement.

The cases

What about decided cases you ask, well in this Review we touch on a number!

We reported in the year on the Supreme Court decision in *WM Morrison Supermarkets plc v Various Claimants* and whether an employer can be held to be vicariously liable for unauthorised breaches of the Data Protection Act 1998 (the "DPA 1998") committed by an employee. The Supreme Court set the record straight in a case where WM Morrison Supermarkets plc's ("Morrison's") disgruntled employee uploaded nearly 100,000 of Morrison's' employees' details onto a publicly accessible website.

In *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd and another,* the TCC considered the operation of ABI-type performance guarantees and the requirements for making valid demands under such instruments.

In *J Tomlinson Limited v Balfour Beatty Group Limited,* in which the Technology and Construction Court (the "TCC") considered the limited exceptions where the enforcement of adjudicators' decisions can be successfully challenged.

In the case of *Bresco Electrical Services Ltd (In in Liquidation) v Michael J Lonsdale (Electrical) Ltd,* the UK Supreme Court considered important questions about the operation of two statutory regimes; namely, adjudication and insolvency set-off. In particular, the court clarified the legal position in respect of situations where there are cross-claims between parties to a construction contract and one of those parties is in liquidation.

In *J & B Hopkins Limited v Trant Engineering Limited*, in which the Technology and Construction Court had to consider the enforcement of an adjudicator's decision as well as an application for a stay of execution.

In *DBE Energy Ltd v Biogas Products Ltd,* the Court considered a claim by DBE Energy Limited for breach of contract and negligence against Biogas Products Limited in relation to the design, manufacture and supply of components to be incorporated into an anaerobic digestion facility in Surrey, England.

In the recent case of *Platform Interior Solutions Limited v ISG Construction Limited,* the TCC considered a number of challenges to an adjudicator's decision and also whether payment of the adjudicator's fees constituted a waiver of the right to challenge the decision.

Now for some news in the firm

Our staff retention rates remain second to none for our business; a number of my partners and I have worked together for 30 years plus, many for over 20 and a number of our employees have been with us over two decades. That stands for a lot in this day and age. We are proud of our team spirit and ethos.

Over "Lockdown" and as we planned, we have gained no less than four new excellent partners: Martin Ewen, James Cameron, Lucinda Robinson and, since October, Dr Stacy Sinclair. Many of you know them well and it makes me immensely proud to see their progression.

Finally ... before I sign off, I want to thank all of you for the opportunities your legal problems, challenges and projects have given us this past year. Long may this continue and be to our common advantage.

I hope you will peruse the following pages at leisure, it will also earn you a CPD point or two and help you on your virtual quiz nights!

Enjoy this read and I have every confidence that by this time next year we will all be in a better place.

Simon

Coronavirus and construction: the law and practical actions

COVID-19 will never need an introduction, and 2020 will be forever dominated by discussing what happened. In construction circles the early months of 2020 were dominated by the need to review contracts and make quick decisions on how to proceed. **Jon Miller** summarises the key practical points that emerged.

1. But some force majeure clauses can give rise to a termination – see below.
2. SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Inc [2006] 1 Lloyd's Rep 163.
3. Frontier International Shipping Corp v Swiss Marine Corp Inc [2005] 1 Lloyd's Rep 390.
4. Tennants (Lancashire) Limited v C S Wilson & Co (1917) UKHL 523.
5. Tennants (Lancashire) v C S Wilson & Co [1917] AC 495.
6. Thames Valley Power Limited v Total Gas & Power Limited [2006] 1 Lloyd's Rep 668.
7. Navron v Callitsis Ship Management SA [1988] 2 Lloyd's Rep 416 and SVH Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Inc [2005] EWHC 2528.
8. Great Elephant Corp v Trafigura Beheer BV [2013] EWHCA Civ 905.
9. [2020] EWHC 972 (TCC).
10. Subject to limitations of liability clauses elsewhere within the underlining contract.
11. [1920] 2 KB 714.
12. [2018] EWHC 2866.
13. [2018] EWHC 1640.
14. The commentary here is largely based upon a JCT 2016 D&B.
15. Clause 2.26.14.
16. British Electrical and Associated Industries (Cardiff) Limited v Patley Pressings Limited [1953] 1 WLF 280.
17. Clause 2.24.1.
18. Clause 2.25.1.2.
19. Clauses 2.24.1 and 2.24.2.
20. Clause 2.25.3.1.
21. Clause 8.11.1.1.
22. If none is stated, the period is 2 months.
23. Clause 60.1.9 – see also clause 19.1.
24. Clause 11.2.4.

Introduction

The key points to bear in mind re coronavirus and construction contracts are:

- force majeure clauses (unsurprisingly they turn on the wording of the clause);
- notices, and when to give them;
- record keeping/evidence;
- other coronavirus related Relevant Events/Relevant Matters which could give rise to time and money;
- what to do with contracts that are about to be signed.

Force majeure

The contract wording is crucial

There is no established meaning in English law of "*force majeure*" and every force majeure clause turns on the words used. In broad terms most force majeure clauses:

- suspend the obligation to perform the Contract when a force majeure event has occurred (contrast this with Frustration which discharges the Contract completely)[1]; and
- the event must be beyond the control of the party relying on the clause.

Force majeure will only apply if there is a force majeure clause in the Contract. Force majeure excuses what would probably otherwise be a breach and effectively suspends temporarily an obligation to perform the Works, but it may not give rise to any compensation/loss and expense (e.g. a JCT Contract), unless the Contract provides otherwise (e.g. NEC3/4).

Force majeure clauses tend to be interpreted literally – they have been described as *"An exemption clause that must be construed strictly"*.[2]

"Beyond the contractor's control"

Unsurprisingly authors of contracts find it difficult to list every event which may have an impact on the Contract, and force majeure clauses normally contain a list of events, with a sweep-up phrase such as *"and any other clause beyond the Contractor's reasonable control"*. In a case where a clause which exonerated a party to a contract *"In the case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee"*, it was held that *"strikes, lockouts"* still had to be *"beyond the control of the consignee"*.[3]

Impossible

In a contract which provided for its cancellation where delivery of goods was *"impossible"*, the fact that new government regulations prevented exports of the goods halfway during a delivery window did not amount to force majeure. The Court held that under the Contract delivery could have taken place prior to the prohibition of products by the Italian Government earlier in the delivery period. In keeping with the principle that the words of any force majeure clause need to be looked at closely, a requirement rendering performance to be *"impossible"* before it did not have to be performed imposed a very high hurdle which the party relying on the clause could not overcome; they could have delivered the goods prior to the prohibition coming into force.

> *A force majeure clause should be construed in each case with a close attention to the words which proceed or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument.*

Prevent/hinder

Another example of the importance of the words used is a clause where delivery was suspended for reasons beyond the buyer's or the seller's control, which ultimately resulted in *"preventing or hindering"* delivery. The Court gave an indication that *"prevention"* is a more stringent test to overcome in that:

> *"'Prevention' in such a clause must refer to physical or legal prevention and not an economical profitableness and that 'hindering' must refer to an interference with the manufacture or delivery from the same cause as 'preventing', but interference of a less degree."*
>
> In this case the outbreak of war did not *"prevent"* or *"hinder"* the delivery of the goods in question at all as they could be obtained from alternative suppliers, albeit at higher prices.[4]

More expensive/price rises

The mere fact that performance of a contract may become more expensive, e.g. via the use of alternative agency labour or suppliers, does not amount to force majeure:

> *"By 'hindering' delivery is meant interposing obstacles which it would*

be really difficult to overcome. I do not consider that even a great rise of price hinders delivery."[5]

"*... the fact that a contract has become more expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration.*"[6]

I suspect that the nature of the obligation in the underlying construction contract is relevant as to whether force majeure will come into play. For example, if a contractor can purchase sanitaryware from anywhere, and has decided to purchase this sanitaryware from China as it is cheaper, force majeure may not apply if there is the same but more expensive sanitaryware available in the UK. Contrast this with a scenario whereby a contractor has to purchase Italian marble from a particular seller within Northern Italy, and there is no alternative supplier.

Foreseeability

There is no common law rule that a force majeure event should be unforeseeable, or in existence at the time the contract was entered into.[7]

However, in the absence of a general common law rule that foreseeability is a key element of force majeure, many force majeure clauses go on to state they may only be relied upon for (say) "unforeseeable" events. In one notable example, a force majeure clause referred to an "*unforeseeable act or event which was beyond the reasonable control of either party*". The Court of Appeal held that the word *"unforeseeable*" did not add anything – if an act was not within a party's control, it was very likely that it was also not foreseeable.[8]

Significantly, the force majeure clause within the JCT D&B 2016 makes no mention of foreseeability but the NEC3/4 does – see below.

> As a general rule force majeure must be the sole cause of the delay...but...the rule that a force majeure event has to be the sole cause of delay may not apply to a JCT Contract.

2 Entertain Video Limited and Others v Sony DADC Europe Limited and Others[9]

The Technology and Construction Court has recently considered the meaning of a force majeure clause which could have implications for how these clauses are interpreted within construction contracts.

This concerned the riots in North London in 2011 following the shooting of Mark Duggan – a warehouse was looted and eventually burnt to the ground. The fire took 10 days to extinguish but led to damage to a large number of DVDs, CDs, etc. worth circa £40m.

The contract for the storage/distribution of the DVDs/CDs contained a force majeure clause whereby:

"*Neither party shall be liable for its failure or delay ... if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to ... riot, civil commotion, malicious damage ... pandemic ...*"

Interestingly, the above clause included "*pandemic*" so would probably come into play in the current COVID-19 pandemic. However, here the Defendant alleged that the looting and burning down of the warehouse was "*beyond the reasonable control of [the Defendant]*" which included "*riot, civil commotion [and] malicious damage*".

The Court held that the force majeure clause did not exonerate the Defendant who was found liable for the damage caused by the looting and the subsequent destruction of the warehouse.[10]
This was because:

- the Court heard from witnesses and experts pointing out the warehouse had been broken into on occasions in the past, and the Defendant had failed to put in place sufficient safeguards against further break-ins;
- the Defendant did not follow the relevant British Standard for protecting the warehouse from damage by fire.

Accordingly the looting and fire damage was not "*beyond the reasonable control*" of the Defendant, who remained liable for the damage.

Much has been written about the interpretation of force majeure clauses in construction contracts. The 2 *Entertain Video* case emphasises the need to interpret the actual words used in any force majeure clause – in this case it was not a question of whether the rioting etc. was foreseeable, rather whether it was "*beyond the reasonable control*" of the Defendant. The Court decided it was not.

Epidemic/pandemic

In the current climate it may be useful to rely upon a quote from *Lebeaupin v Crispin and Company*[11] where the Court referred to a quote from a French textbook which stated, *"war, inundations, and epidemics, are cases of force majeure"*, with the Court adding: *"This is a wide definition, but I think that it usefully though loosely suggests not only the meaning of the phrase [force majeure] as used on the Continent, but also the meaning of the phrase is often employed in English Contracts"*.

The *Lebeaupin* case was concerned with a clause containing a list of events which included *"any cause not under the control"* of the party, but emphasised that the meaning of each cause turned upon the words used:

> *"A force majeure clause should be construed in each case with a close attention to the words which proceed or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."*

Notices

Unsurprisingly, one party will normally have to serve notice of force majeure on the other to benefit from a clause – in *GPP Big Field LLP v Solar EPC Solutions*[12] one of the reasons the contractor's claims failed was that he did not give valid notice of force majeure under the contract.

> The mere fact that performance of a contract may become more expensive, e.g. via the use of alternative agency labour or suppliers, does not amount to force majeure.

Causation

As a general rule force majeure must be the sole cause of the delay. In the 2018 case of *Seadrill Garner Operations Limited v Tullow Garner Limited*[13] drilling operations were delayed by:

- a drilling moratorium imposed by the Government of Ghana (a force majeure event); and
- Tullow's failure to progress a drill plan in areas unaffected by the moratorium (not a force majeure event).

The Court held that the force majeure event must be the sole cause of the default.

However, the rule that a force majeure event has to be the sole cause of delay may not apply to a JCT Contract.

JCT Contracts[14]

Introduction

Force majeure is a Relevant Event but not a Relevant Matter. Accordingly with existing JCT Contracts delay caused by coronavirus can give rise to an extension of time, but will not result in loss and expense as it is not a Relevant Matter.[15]

No definition

The real issue with a JCT Contract is that, whilst the interpretation of a force majeure clause depends on the words used, surprisingly a JCT Contract makes no attempt to define force majeure. In a case concerning a clause which stated *"the usual force majeure conditions shall apply"*, it was decided that this was too uncertain as force majeure clauses come in too many different varieties.[16] There is no reported case as to what force majeure means under a JCT Contract.

Impossibility/prevention/hindrance

In my view this does not apply to force majeure under a JCT Contract. The trigger for extension of time is *"the progress of the Works ... is being or is likely to be delayed"*,[17] which in turn causes a delay to the Completion Date.[18] This should probably in practice make it easier than a clause requiring performance to be *"impossible"* etc. as we merely need to establish that the Works are *"or likely to be delayed"*. This is an issue we may ultimately have to emphasise to adjudicators when looking at the authorities on force majeure, which turn on their own specific wording.

Notices – JCT

A Relevant Event notice needs to be given of force majeure when it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed. This is then followed, as soon as possible thereafter, with particulars of the expected effect including an estimate of the delay to the Completion Date.[19]

JCT Contract –causation

As mentioned above, normally it is essential that it can be shown the force majeure event was the sole cause of one party's failure to comply with its contractual obligations. However, I doubt as a matter of interpretation that this principle would apply to a JCT Contract.

In broad terms, where two or more Relevant Events give rise to a delay to the Completion Date, or even when a Relevant Event and an event which the contractor is responsible for, both concurrently delay the Completion Date, then under an unamended JCT Contract this can still give rise to an extension of time.

I have real doubts whether it needs to be established under a JCT Contract that the force majeure event was the sole reason for the delay despite the earlier authorities being quite clear on this point when force majeure events come into play. This is reinforced in JCT Contracts such as a JCT D&B 2016 which makes it clear an extension of time can be attributed to more than one Relevant Event.[20]

> *In GPP Big Field LLP v Solar EPC Solutions* one of the reasons the contractor's claims failed was that they did not give valid notice of force majeure under the contract.

Termination – JCT

Under a JCT D&B 2016, force majeure may ultimately give rise to termination of the contractor's employment[21], that is if the suspension is due to force majeure and continues for a length of time as stated in the Contract Particulars.[22]

NEC 3/4

Clause 60.1.9

The NEC 3/4 contains a clause which is often described as force majeure in everything but name:

"(19) An event which

Stops the Contractor completing the works or

Stops the Contractor completing the works by the date shown on the Accepted Programme,

and which

neither Party could prevent,

an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and

is not one of the other compensation events stated in this contract."[23]

A Compensation Event under this clause should give rise to not only an extension of time, but additional monies as well.

NEC Clause 60.1.9 –key issues

There are a few points to be borne in mind which are peculiar to the NEC:

- The NEC introduces a degree of foreseeability in that at the "*Contract Date"* there must have been such a *"small chance of occurring"* etc.;
- The "*Contract Date*" is a defined term within the NEC – "*the date when this contract came into existence*".[24] This term is sometimes amended to a later date when the last party signs the contract;
- The force majeure event must stop completion of the Works, or completion of the Works by the dates shown on the Accepted Programme. The NEC contains comprehensive provisions as to what the Accepted Programme should contain which frequently the Parties do not comply with. If there is no Accepted Programme then clause 60.1.9 may not apply (or at least may have some difficulty in applying).

Termination – NEC

A force majeure event can give rise to termination under an NEC contract. Clause 91.7 allows the employer to terminate a force majeure event if the anticipated completion is more than 13 weeks after the date on the Accepted Programme.

Has a force majeure event occurred for the purposes of construction?

In England the Government has not ordered building sites to shut down. Whether a force majeure event has occurred will always turn upon the wording of the force majeure clause in the contract, and how COVID-19 has impacted the site in question. There is no guaranteed answer to this question but we need to bear the following in mind:

- we are facing a global pandemic which has had a significant effect on the economy, transport, etc.;
- we have been given guidance whereby, when leaving their own household, people should try to remain 2 metres apart even on a building site (where possible). This would require changes not only to different methods of working at the work place, but also amendments to canteen arrangements, welfare and changing facilities. Also at least some over the counter trade merchants are closing.

Therefore in my view under most force majeure clauses COVID-19 would probably now be seen as a force majeure event.

Proving your claim and what needs to be done now

Having reviewed their construction contracts, the next major concern was how parties should tackle proving any potential claims. In what is in effect Part 2 of his summary of the impact of COVID-19, **Jon Miller** provides some practical examples of the issues that need to be addressed. Advice that holds true for any construction claim.

Delays

Only delays to the Completion Date can give rise to an extension of time. Programming information is crucial. The burden is on the party making the claim to show why the COVID-19 shutdown delayed the Completion Date.

Most sites are able to continue working safely. We are aware of a site where working practices have been changed whereby there is no more than one operative in each room, operatives start at different times and ensure they maintain a distance of 2 metres throughout.

But even then this will give rise to delays to the progress of the Works – i.e. changing working arrangements which slow progress may still give rise to an extension of time if they delay the Completion Date (and additional recoverable costs if the construction contract allows it).

How many people were supposed to be on site? Who was self-isolating/ill/had a pre-existing condition? What trade(s) were they and where were they supposed to work?

Was there a lack of supplies/materials? If so, when were they to be delivered (and eventually when did delivery take place)?

Nearly all construction contracts impose a need to mitigate/use best endeavours to reduce delays.[1] Record all attempts to try and find alternative labour and get new delivery dates – i.e. keep emails.

Best endeavours – a new weapon?

Many contracts contain a provision whereby the contractor is to use their "best endeavours" to mitigate delays.[2] We have experienced responses to requests for an extension of time whereby contractors and subcontractors have been reminded of their duty to use best endeavours and asked for an explanation of what they have been doing to discharge this responsibility.

What is "best endeavours"?

Unfortunately (yet again) there is no definitive legal answer. Explanations have been given whereby:

- *"Best endeavours means what it says – it does not mean second best endeavours."*[3]
- *"Best endeavours are something less than efforts which go beyond the bounds of reason but are considerably more than casual and intermittent activities."*[4]
- *"This proviso [to use best endeavours] is an important qualification of the right to an extension of time. Thus, for example, in some cases it might be the Contractor's duty to re-programme the Works either to reduce or prevent delay. How far the Contractor must take other steps depends upon the circumstances of each case, but it is thought that the proviso does not contemplate expenditure of substantial sums of money."*[5]

I suggest that a *"best endeavours"* obligation would include:

- if the site is shut down, continuing with off-site activities insofar as they can safely be carried out (e.g. design, but this might even include off-site prefabrication);
- reprogramming the Works in accordance with the SOP;
- looking at the possibility of replacing labour who cannot attend site (e.g. due to illness or self-isolation), even temporarily.

The key point as always, legally speaking, is to make sure that all efforts to use "best endeavours" are recorded and kept – e.g. emails.

A common mistake people make is that the additional costs incurred are not clearly attributable to the relevant delay/shutdown due to matters such as COVID-19.

Costs

Record separately all costs related to stopping on site or any slowdown, e.g.:

- demobilisation and remobilisation costs;
- the costs of making the site safe;
- materials – what was originally allowed for in the Contract Price, and what did it increase to?
- retaining labour/non-productive payments are often difficult to recover. Ask the employer/contractor what they want to do?

1. E.g. JCT 2016 D&B clause 2.25.6.1.
2. For example see the JCT D&B 2016 clause 2.25.6.1.
3. *Sheffield District Railway v Great Central Railway* [1911] 27 TLR 451.
4. *Pips (Leisure Productions) Ltd v Walton* (1980) 43 P&CR 415.
5. Keating on Building Contracts, 6th edition (Sweet and Maxwell), p. 642.
6. Construction News, 6 May 2020, www.constructionnews.co.uk (online).
7. Construction News, Article, 6 May 2020, www.constructionnews.co.uk (online).
8. I.e. sending an email to all of my colleagues of whom a few replied.
9. Construction Leadership Council, "CLC COVID-19 Contractual Best Practice Guidance", 7 May 2020. I should point out here that I was involved but not exclusively in drafting this document.
10. Which I have been involved with.

Costs – the big mistake

A common mistake people make is that the additional costs incurred are not clearly attributable to the relevant delay/shutdown due to matters such as COVID-19. For example, demobilisation and re-mobilisation costs should be recorded separately. Suppliers' invoices should not simply cover all the materials delivered to site before and after a slowdown – get clear what materials increased in cost as a result of the shutdown and why.

Particularly infuriating are timesheets with 7 (or more) hours for every day without any explanation of what was being done, or where the operatives were working.

What is happening at the moment?

"Where it is not possible"/"Where it is possible"

The above phrases are being widely used in Government communications aimed at the workplace, and in construction industry advice. Employers, contractors and subcontractors are looking for a clear set of rules telling them what to do, and have criticised the use of these phrases as suggesting almost anything is "possible" with sufficient time and money.

One thing is clear however, it is impossible to produce a set of detailed rules which could govern a large number of different building operations.

Construction Industry Council – Site Orientation Procedures Version 6 ("the SOP")

Against this backdrop the SOP and its previous versions have become the benchmark as to how sites operate in the new post-COVID-19 world. The SOP covers areas such as how to travel to and from site (i.e. public transport should be avoided, if operatives drive to site in their own transport with others they should keep the windows open etc.), hand washing (when entering and leaving the site), toilet facilities (an attendant may be necessary to reduce overcrowding) etc.

When dealing with construction operations, significantly the SOP does not say work should stop if operatives cannot keep at least 2 metres from each other.

In these circumstances a hierarchy of controls is recommended:

- can the risk be eliminated completely (i.e. does it need to be done now or can it be done more safely in the future)?
- reducing the risk – reducing the number of people involved – e.g. avoiding the use of the lift (which will be very interesting in high-rise developments);
- isolating – keeping small teams together and separate from other operatives;
- control – limiting face-to-face working to 15 minutes or less;
- PPE – whilst not used when the 2 metre rule is in place, PPE could be relevant where this rule cannot be adhered to;
- The latest version of the SOP issued on 20 October 2020 even requires site canteens to display an NHS Track and Trace QR code.

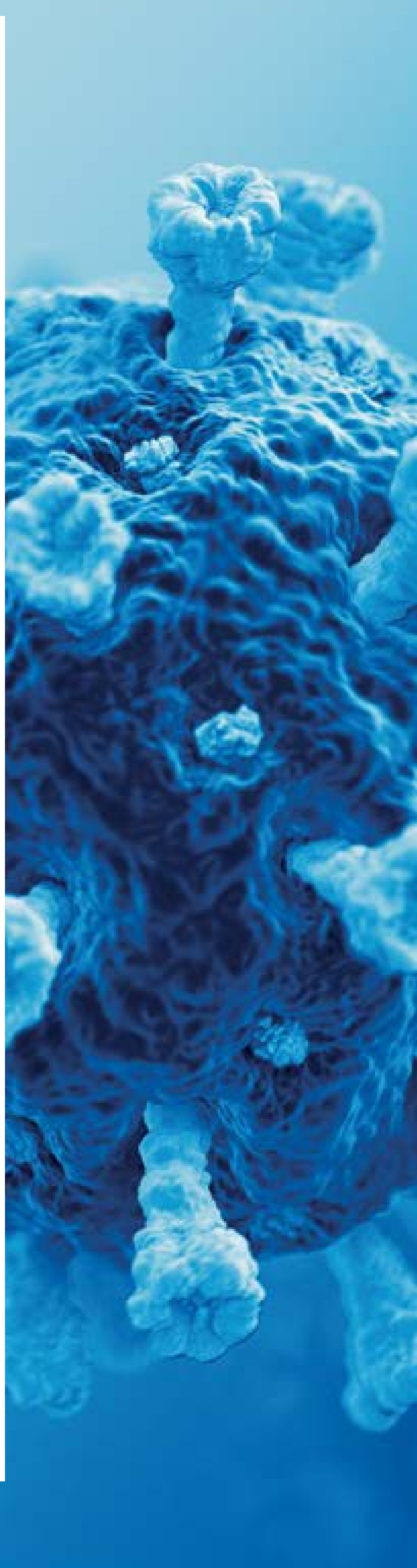
The SOP is guidance only, and does not have the force of law. Indeed, according to a *Construction News* survey 1 in 5 construction workers on site still believe there has been little or no attempt to maintain the 2 metre distancing rule.[6]

Nevertheless the HSE are almost certainly going to rely on the SOP when deciding if a site is operating safely or not, which ultimately could lead to enforcement action – apparently the HSE received more than 4,500 reports relating to COVID-19 between 9 March and the first week of May.[7]

> Faced with the potential for disputes that may keep the legal profession busy for years the CLC has recently issued their "Best Practice Guidance" in an attempt to avoid the intransigence which often blights the construction industry. The document also contains sample notices.

What should I do if the SOP is not being followed?

Highlight the failure in writing to the relevant subcontractor, principal contractor and the employer who all have duties not only to their employees but also those who might be impacted by the works under the Health and Safety at Work Act/CDM Regulations. Bear in mind though, there is no absolute requirement that everyone must be at least 2 metres away from each other at all times.



Refusing to work can have serious implications commercially speaking and will nearly always amount to a breach of contract, unless there is clear justification for the refusal. As always, gather together as much evidence as possible via photographs, emails written at the time etc., highlighting the issues.

As an adjudicator it never fails to surprise me when someone complains of a significant event on site, but has failed to even mention it in an email to anyone.

Extensions of time and money

A significant number of notices requesting an extension of time, and in some cases loss and expense, have been issued. Many of the notices are relying on a wide range of reasons, not only force majeure but also changes in law and statutory requirements, the issue of instructions in order to justify more time, and sometimes money. and ascertained damages being payable.

However, the small survey I conducted[8] covered around 40–50 projects and it appears to be that for some small commercial/residential developments employers and contractors alike have agreed to suspend the work with some form of agreement on financial terms. The same projects are now looking at what can be done to reopen. This, however, appears to be the exception.

Overall a few extensions of time, let alone anything else, have been dealt with. To some extent this may be quite rightly due to employers, contractors, consultants etc. all directing their efforts as to how they can proceed in light of the current restrictions, and particularly the SOP. However, to quote a leading developer who spoke to me, many employers, contractors etc. are "kicking the tin can down the road".

Essentially the question as to whether even an extension of time should be granted is not being answered. The common response is to simply ask what "*best endeavours*" are being used to mitigate the delay.

A senior representative of a large firm of consultants pointed out that many consultants are not entirely sure what to do with an extension of time claim based upon COVID-19. As mentioned before there are no real English cases as to whether COVID-19 would constitute force majeure under the JCT contract (although I believe that it would), and faced with this uncertainty some consultants are not entirely sure how they should react.

Records, records and records (again)

What is becoming apparent is that, with the parties' energies being directed as to how they can safely operate on site, very little attention is being paid to record keeping as to what the impact of the COVID-19 pandemic actually is on the works. Records are vital for establishing whether the contractor is entitled to an extension of time and (if applicable) any loss and expense.

We have been recommending preparing a daily narrative of what has happened on site, the number of operatives, the areas where they are working, and the reason for any shortcomings (e.g. operatives who have to self-isolate). This can even be done in the form of daywork sheets/daily allocation sheets provided they include the details, and could prove very useful in the future.

> The Construction Industry Council – Site Orientation Procedures ("the SOP"), has essentially become the benchmark as to how sites operate in the new post-COVID-19 world.

CLC Guidance

Faced with the potential for disputes that may keep the legal profession busy for years the CLC has recently issued their "Best Practice Guidance"[9] in an attempt to avoid the intransigence which often blights the construction industry. The document also contains sample notices to be given for claiming an extension of time for COVID-19 under a JCT and NEC contract, and an explanatory note on how the notices should operate.

The "Best Practice Guidance" recognises that the parties need to protect their positions by issuing notices, and I would expect the relevant notices to be given already under most standard form building contracts, but this is not enough.

The "Best Practice Guidance" then goes further by encouraging the parties to meet and discuss the problems that they are inevitably facing on site, and the commercial issues involved, and gives the precedent for a "Without Prejudice Subject to Contract" approach whereby the parties should be able to discuss the issues faced more openly without fear of what is being said being used against them in the future.

The "Best Practice Guidance" even explains what is meant by the terms "without prejudice" and "subject to contract" and contains a suggested agenda for any "without prejudice and subject to contract meetings".

Whilst the SOP produced by the CLC may have turned into the "go to" document for operating on site, it remains to be seen whether the "Best Practice Guidance" will have anything like the same impact. I have to say that my experience so far is that everybody is rather reluctant to discuss time and money, but hopefully the "Best Practice Guidance" will give the encouragement and tools for this to happen in at least some cases.

New contracts –dealing with COVID-19

There are inherent uncertainties in trying to price and programme new projects which are planned to start in the latter half of 2020 and beyond. No one knows when the restrictions will change next or end. In broad terms the few contracts that are being negotiated currently tend to be on the principle of "*benchmarking*".

> The small survey I conducted covered around 40–50 projects and it appears to be that small commercial/residential developments employers and contractors alike have agreed to suspend the work with some form of agreement on financial terms.

Conclusions

We have seen situations where a contractor under the NEC has made it clear its valuation of the delays and additional costs caused by COVID-19 assume the SOP would apply to the works but only until (say) 1 December 2020. Other contractors are trying to set out exactly what they have allowed for within their price by way of working restrictions etc., and for how long, with an added clause saying that should these restrictions change this could lead to a delay, increase in price, or even a decrease in the Contract Sum if the restrictions are removed far quicker than everyone anticipated.

However, that being said, a conversation with a recent developer revealed that they are finding that some contractors on new projects are seeking to insert clauses within new construction contracts containing not only more time but more money for COVID-19 related delays, but the developer's view regarding the state of the market is that contractors are starting to look at the lack of work going forward, and are not pushing too hard when it comes to seeking further money for disruption caused by COVID-19.

Finally, the CLC has published a suite of clauses to be inserted within the JCT D&B 2016 and NEC4[10] contracts whereby COVID-19 can either just give rise to an extension of time, an extension of time and the costs shared between the contractor and the employer (how they are shared is to be negotiated), or the contractor receives an extension of time and all costs associated with COVID-19. The amendments and guidance can be found at the CLC website.

The cladding scandal continues

Rebecca Penney is one of potentially thousands of private leaseholders who have been told that their properties are covered in combustible cladding. Understandably, she asks how did everyone get in this position and who really is responsible in the end for the necessary remedial works.

Aside from Ccovid-19, this year has been particularly tough for leaseholders of new build properties up and down the country whose properties have been affected by the latest cladding scandal to hit the Government. I am one of an estimated 3,000,000 private leaseholders who have been told that their properties are covered in combustible cladding and are effectively worthless until further notice. Our housing association, the "building owner" for the purposes of the relevant legislation, has known about the issues with cladding at our development since June 2018. The building is deemed to be so dangerous that we have had a waking watch in place 24 hours a day for the past two years and yet nothing has been done to rectify the situation. It has become increasingly apparent that litigation is on the horizon and there is no doubt an ongoing battle behind the scenes as to who should pick up the tab for the remedial works. So how did we get to this position, and who is ultimately responsible for the remedial works?

EWS1

Following the Grenfell tragedy in 2017, the Government announced a number of reforms designed to improve fire safety in high rise multi-occupied buildings, including the Building (Amendment) Regulations 2018 which prohibit the use of combustible cladding in buildings over 18m and the now infamous Advice Note 14, which extended building owners' obligations to checking that the materials contained within external wall systems are of limited combustibility and safe. This in turn led to surveyors valuing "unsafe" buildings that could not demonstrate compliance with Advice Note 14 at £0 and mortgage lenders became unwilling to lend against such properties.

On 16 December 2019, in a bid to give confidence to lenders, RICS introduced a new requirement to facilitate the process of evaluating and selling properties, the EWS1 (External Wall fire Review) form. The EWS1 form is intended to record *"in a consistent manner what assessment has been carried out for the external wall construction of residential apartment buildings where the highest floor is 18m or more above ground level or where specific concerns exist".*

EWS1 contains two options for recording the findings of the fire engineer undertaking the assessment for the building owner. Option A applies where the 'primary materials' (i.e. the cladding and the form of insulation) used in the external wall system are known to be of limited combustibility[1]. Option B applies where the 'primary materials' includes materials that are combustible. Under this option a fire engineer is required to confirm through an appropriate risk assessment that the fire risk is sufficiently low or (more often than not) that remedial works are required.

Whilst the EWS1 process was introduced to give mortgage lenders confidence that high rise blocks over 18m were safe, unfortunately it has had the opposite effect on the market. The situation was exacerbated on 20 January 2020 when the Government suddenly published a consolidated advice for owners of multi-storey, multi occupied buildings. The consolidated advice draws together the advice in the previous advice notes 1 to 22 and makes clear that owners of buildings under 18m have equal responsibility to make sure those buildings are safe. This in turn means that the vast majority of multi-storey, multi-occupied blocks in the country must now go through the process for obtaining the EWS1 form, regardless of whether the block has been constructed using cladding. There are a very limited number of inspectors in the UK that are qualified to carry out the necessary investigations with the result that some leaseholders have been told that they will have to wait up to 10 years to obtain an EWS1 form for their building. The situation is further complicated by the fact that many consultants are unwilling or unable to sign the EWS1 form due to concerns about their liability and whether or not they will be covered by professional indemnity insurance.

By issuing the various advice notes on fire safety, it appears as though the Government is retrospectively seeking to rewrite the regulatory regime.

Whilst the latest Government advice does not state that the EWS1 is a compulsory requirement, it is now abundantly clear that mortgage lenders are insisting on EWS1 forms as a pre-requisite to lending to prove that building owners have discharged their fire safety obligations, with the result that a huge number of people are now

1. As defined in BS9991:2015

2. *https://www.insidehousing.co.uk/news/news/one-property-manager-registers-450-buildings-for-safety-fund-67744*

3. *https://publications.parliament.uk/pa/cm5801/cmselect/cmcomloc/172/17202.htm*

effectively trapped in their flats and unable to sell.

Liability for remedial works

Whilst the Government has set up various funds for remedial works, including most recently a £1bn Building Safety Fund for the removal of non-ACM cladding, it is becoming increasingly clear that this will not be sufficient. It was reported in September that one property manager alone has applied for cladding remediation funding for 450 buildings, enough work to take up 90% of the total fund[2] and by the Government's own admission, the fund is expected to cover only a third of affected buildings. Whilst priority will be given to building owners who can demonstrate that contractors can start work on cladding remediation by 31 March next year, it seems very likely that a large proportion of building owners will be unable to meet that requirement that given the current backlog of work and the length of time that takes to have a fire consultant carry out the necessary investigations.

In a new report issued in June this year, the Housing, Communities and Local Government select committee expressed the following concerns:

"Given the urgency of these remediation works, it is necessary for the government to provide the funding up front. However it cannot be fair for the financial burden of remediating buildings to rest solely with taxpayers. Those who are responsible for this crisis should be made to contribute. For each affected building, the government should actively seek to recover funds from the construction companies, architects, suppliers of faulty products, approved inspectors and any others who are found to be responsible for fire safety defects."[3]

This is evidenced by the fact that the availability of Government funding is contingent on building owners being able to show that they are actively seeking to recover those sums from their contractors and other suppliers.

So where does this leave architects and design and build contractors?

Typically, a building owner will have a direct contractual link with the relevant architect and/or design and build contractor. It may also have the benefit of collateral warranties or have had rights assigned to it. Where a defect has been cause by negligent design or advice, the question of whether the designer or contractor has complied with its duty of care will be subject to the test of reasonable skill and care. In many cases, the duty to exercise reasonably skill and care will be an express obligation within the contract or collateral warranty itself. This raises the question of whether a claim can successfully be brought in circumstances where the relevant professional executed its design in accordance with industry standards and the Building Regulations that were applicable at the relevant time.

Historically, architects and design and build contactors have been able to successfully defend such claims made by building owners on the basis that compliance with Approved Document B (the relevant Building Regulation regarding fire safety) is sufficient to discharge any allegations of breach. However, by issuing the various advice notes on fire safety, it appears as though the Government is retrospectively seeking to rewrite the regulatory regime on the basis that compliance with Approved Document B is no longer adequate to demonstrate compliance with the requirements of the amended Regulations.

> The building is deemed to be so dangerous that we have had a waking watch in place 24 hours a day for the past two years and yet nothing has been done to rectify the situation.

It is not yet clear how this will pan out in the courts. Towards the end of last year, Camden Council commenced a £130m claim in the Technology and Construction Court against Partners for Improvement in Camden and its principal contractors, Rydon Construction, Rydon Maintenance, Faithful + Gould and United Living South who were involved in the refurbishment of the Chalcots estate in London. The council is seeking to recover the costs incurred in addressing multiple fire safety failings at the estate which includes the removal of ACM cladding from the outer façade, the rectification of serious internal defects (including inadequate internal fire stopping and fire doors) as well as the costs of fire marshals and additional security. If successful, this could pave the way for many other similar claims.

It is likely that the Grenfell Inquiry, now in its second phase, will also have a significant impact on future legal proceedings. It may be that building owners will await the outcome of this and other claims before seeking to recover the costs of remedial works, however this will do little to allay the concerns of the millions of leaseholders stuck in unsafe buildings with no way out for the foreseeable future.

Grenfell: remedying defects and establishing change

There have been two recent cases which have discussed cladding flammability issues. **Stuart Duffy** explains the significance of these with reference to details of the Government's apparent plans to address some of the many issues which came to light following the Grenfell tragedy.

It has been more than three years since the fire at Grenfell Tower, which claimed 72 lives and exposed serious failings across the whole system of building and managing high-rise homes.[1] As is commonly known, it was the cladding at Grenfell which was vital to the spread of the fire. There have been two recent cases relating to cladding flammability issues which highlight some of the construction issues that surround the Grenfell tragedy.

Sportcity 4 Management Limited and others v Countryside Properties (UK) Limited [2020] EWHC 1591 (TCC)

In this case, Countryside Properties (UK) Limited (the "Defendant") made an application for summary judgment and/or striking out the claim brought by Sportcity 4 Management Limited and others (the "Claimants"). The substantive claim related to cladding issues at a development comprising 350 apartments (the "Property"). It was alleged that the remediation work would cost over £15 million, which is a reminder of just how high the costs of "post-Grenfell cladding remediation work" can reach.

In late 2013, agents managing the Property on behalf of the Claimants asserted that there were problems with the cladding at the Property. The Defendant attended the Property in 2014 to undertake some additional works and attended the Property again in August 2017.

> Limitation does not restart following remedial work. Instead, there is a fresh cause of action in respect of the remedial work, which is subject to its own limitation period.

The Claimants set out three causes of action in their particulars of claim: (1) a claim under the leases relating to the Property, (2) a claim under the Defective Premises Act 1972 (the "DPA") and (3) a claim that the Defendant breached a duty of care in tort. The Defendant denied that it owed a duty or breached such a duty in respect of the leases and DPA claims. Furthermore, the Defendant accepted that it owed a duty of care in tort, but denied any breach of that duty.

The main thrust of the Claimants' case under the leases was that, on a proper construction of the terms, the Defendant was the landlord and, as such, became liable under a number of covenants expressed in the leases. In summary, the Judge did not consider that the Defendant was the landlord and did not consider that it made the covenants in question. This claim was dismissed.

The claim under the DPA was based on alleged failings in the original construction works. The Defendant alleged that the Claimants were statute-barred from bringing this claim, as the limitation period in respect of the original works had expired. In response, the Claimants alleged that the additional works performed at the Property in 2014 and the attendance in 2017 meant that the cause of action in respect of the original works had recommenced. The Judge disagreed, holding that the cause of action in respect of the additional works and the site attendance were separate from the cause of action in respect of the original works. The Judge held that the Claimants had no prospect of defeating the limitation argument and dismissed this claim.

With regard to the tort claim advanced by the Claimants, the Defendant alleged that the damages sought were for pure economic loss and were irrecoverable in accordance with the approach in *Murphy v Brentwood* [1991] 1 AC 398. The Judge held that the authorities compelled him to conclude that the losses were pure economic loss and were irrecoverable. This claim was also dismissed.

The Defendants were entitled to summary judgment in respect of the claims under the leases and the DPA and the tort claim was struck out.

Comment

Despite the Claimants' valiant attempts to recover the costs of the cladding remediation work, all three of their claims were dismissed. The key point to draw from this case is that the limitation clock in respect of completed work does not restart following remedial work. Instead, there is a fresh cause of action in respect of the remedial work, which is subject to its own limitation period.

RG Securities (No.2) Limited v Allianz Global Corporate and Specialty CE and others [2020] EWHC 1646 (TCC)

This was an application for summary judgment made by the third defendant, R Maskell Limited ("Maskell"), on its defence against RG Securities (No.2) Limited (the "Claimant"). The key issue was whether

1. Gov.uk, "Explained: The Draft Building Safety Bill" *https://www.gov.uk/government/news/explained-the-draft-building-safety-bill*
2. Ibid., pdf page 184, paragraph 228.
3. Gov.uk, "Explained: The Draft Building Safety Bill" *https://www.gov.uk/government/news/explained-the-draft-building-safety-bill*
4. Ibid., pdf page 157, paragraph 41.
5. Ibid., pdf page 157, paragraph 45.
6. Ibid., pdf page 157, paragraph 47.
7. Ibid., pdf page 208, paragraph 366.
8. Ibid., pdf page 157, paragraph 48.
9. Ibid., pdf page 157, paragraph 49.
10. Ibid., pdf pages 204-205, paragraph 344.

the claim made against Maskell was statute-barred by virtue of the Limitation Act 1980. The substantive claim related to cladding flammability issues at St Francis Tower in Ipswich – the tallest residential block in Suffolk (the "Tower"). The Tower was substantially refurbished by Maskell prior to 2009 (the "Refurbishment Works"), during which the Tower was over-clad with a Trespa cladding system. The Claimant purchased the freehold in 2015.

The Claimant's case was that the Refurbishment Works were not done in a workmanlike or professional manner or with proper materials and, as a result, the Tower was not fit for habitation. The Claimant alleged that the cladding system at the Tower was even more flammable than that used at Grenfell and sought to recover the costs of the remediation works which were estimated to be £3,589,373.70. Maskell pleaded that the Claimant had run out of time to bring its claim.

> Where facts relevant to a cause of action have been deliberately concealed, the limitation clock starts to tick when the concealment was discovered or ought to have been discovered.

The Claimant's response to the limitation argument was that Maskell had concealed the lack of building regulations approval for the Refurbishment Works and that, as a result, time did not begin to run for limitation purposes until the concealment was discovered. NHBC Building Control Services Ltd was appointed to act as the approved inspector for the Refurbishment Works and the Claimant relied on a number of communications from NHBC to Maskell made between 2009 and 2014 as evidencing that Maskell knew that building regulations approval had not been obtained. This included requests for payment and information from Maskell so that building regulations approval could be obtained. It was alleged that neither were provided.

In January 2015, solicitors acting for the Claimant submitted a number of pre-purchase enquiries to Maskell. These included a request for evidence which demonstrated that the Tower complied with building regulations. The solicitors acting for Maskell responded, noting that *"there has never been a problem with the building regulation approval, so we are not doing anything further on that"*. The Claimant relied on this communication when making its concealment argument. Maskell denied that any concealment had taken place and alleged that, even if it had, the limitation period in respect of the Claimant's cause of action had expired before the concealment took place.

The key legislative provision was section 32 of the Limitation Act 1980, which is titled "*Postponement of limitation period in case of fraud, concealment or mistake*". The Judge considered that the effect of section 32 was that, if there had been a deliberate concealment by Maskell of any fact relevant to the Claimant's cause of action, the limitation period would be postponed. The Judge considered the House of Lords case *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] A.C. 102 and held that application of the principles in Sheldon meant that time would "reset" from the date on which the deliberate concealment was discovered or when it ought to have been discovered. This meant that, if there was a concealment, the Claimant would not be statute-barred from bringing its claim and this would be the outcome even if the limitation period had expired prior to the concealment. The Judge held that the Claimant's case on concealment had a realistic prospect of success and was more than merely arguable. Maskell's application for summary judgment was dismissed.

Comment

The key point to draw from this case is that, where facts relevant to a cause of action have been deliberately concealed, the limitation clock starts to tick when the concealment was discovered or ought to have been discovered.

The Building Safety Bill

The Building Safety Bill (the "Bill") was published on 20 July 2020. The Bill aims to address the many building safety issues identified in the post-Grenfell reviews led by Dame Judith Hackitt. The Bill focuses on "higher-risk buildings", which is yet to be defined, but is expected to include residential buildings taller than 18 metres.[2] Despite the focus on higher-risk buildings, the Bill seeks to address some issues which are relevant to all buildings. The Government has described the proposed changes as "*the biggest improvements to building safety in nearly 40 years*".[3]

Gateways

The Bill introduces a new "gateway" regime whereby building safety issues are reviewed at three distinct stages of development:

1. Gateway one will be completed by those applying for planning permission.[4] Information submitted at this stage will need to demonstrate that fire safety requirements have been considered and incorporated into proposals.

2. Gateway two occurs prior to construction commencing[5] and until the requirements of this gateway are fulfilled construction will not begin.[6] At this stage, the client will need to provide a signed declaration that they are content with the skills, knowledge, experience and behaviours of the principal designer and principal contractor.[7]

3. Gateway three occurs at project completion, where the building control body assesses whether the work has been carried out in accordance with the building regulations.[8] At this stage, all prescribed documents and information (the "Golden Thread of Information") must be handed over to the "Accountable Person"[9] who has an ongoing duty to assess the building safety risks following completion.

Golden Thread of Information

Building regulations will set out the specific documents, data and information which will make up the Golden Thread of Information. However, it is suggested that the information will relate to a building's fire and structural safety and will be held digitally. Building regulations will also define the prescribed circumstances where information must be shared and the prescribed persons it must be shared with.[10]

Comment

Those involved in construction are likely to have greater duties to prepare, maintain and disclose building safety information and companies may wish to start considering what systems they will use in order to maintain their Golden Thread of Information. Furthermore, a lack of preparation for gateways could cause projects to fall into delay and could provide further obstacles to practical completion. Whatever conclusions are drawn from the Bill, there seems to be a common message: a greater shift towards transparency in construction and building safety.

Technology & Digital Construction

Welcome to the *Technology & Digital Construction* section of this Annual Review 2020/2021.

Digital technologies and digital processes are fundamental to the success of the construction, energy and infrastructure industries.

As the World Economic Forum estimates, 70% of new value created in the economy over the next decade will be based on digitally enabled platform business models.[1] Furthermore, it is anticipated that digital ecosystems will represent more than $60 trillion in revenue by 2025, or more than 30% of global corporate revenue.[2]

In order to achieve a digitally enabled, better built environment, all disciplines must come together and collectively shape and drive the way forward. Legal is no exception.

Fenwick Elliott is committed to collaborating on the evolution of a better built environment. We recognise that not only do innovations and advancements have the potential to enhance and drive efficiency, performance and productivity, they also have the potential to bring new complexities and risks. New issues and interfaces require consideration and resolution and the solutions must incorporate knowledge, lateral thinking and collaboration across the industry at the outset.

To support and promote the advancement of the digital transformation in the construction and energy industries we have focused the next five articles on just a few of the digital and technological developments within the construction industry:

- **The new (BIM) Information Protocol:** Mark Pantry considers the publication of the new Information Protocol which supports those contracts which use the BS EN ISO 19650-2.
- **Offsite modular construction:** Huw Wilkins discusses the increased use of offsite modular construction, particularly in the wake of Covid-19, and some legal considerations to keep in mind when doing so.
- **Digital Twins:** Digital twins are transforming how the industry approaches design, construction and operation of the built environment. Catherine Simpson explores some of the legal issues to consider at the outset.
- **Net Zero:** Carbon neutrality by 2050, are you ready? Natalie Beeraje reviews the basics of net zero and how climate-related litigation is being used as a tool to influence behaviour.
- **Data and digital processes:** I look at the significance of data in construction and construction law, and some of the opportunities and challenges the industry faces in a world of big data.

We have been excited to see the growth and pace of the digital transformation of the construction industry taking shape, particularly over the past seven months. The industry really has turned an extraordinary global crisis into an enabler for change and transformation.

Digital tools and tech such as automation, AI/machine learning, robotics, drones, digital twins, AR/VR, BIM and offsite manufacturing really are household names now, with blockchain and smart contracts certainly on the horizon.

We hope the topics covered here assist in navigating through some of the unchartered challenges and opportunities. If there is anything in particular you would like to discuss or collaborate on, please do not hesitate to get in touch.

Dr Stacy Sinclair | Partner, Head of Technology & Innovation.

1. Digital Transformation: Powering the Great Rest, World Economic Forum, July 2020, *https://www.weforum.org/reports/digital-transformation-powering-the-great-reset*.

2. Ecosystem 2.0: Climbing to the next level, McKinsey Digital, 11 September 2020, *https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/ecosystem-2-point-0-climbing-to-the-next-level*.

The new (BIM) Information Protocol

2020 saw the publication by the UK BIM Framework of a new Information Protocol. **Mark Pantry** explains more.

Those in the construction industry who have implemented (or have tried to implement) Building Information Modelling ("BIM") in their projects may know that following the publication of BS EN ISO 19650-2 in 2019 there has been a missing document: a template Information Protocol to support contracts which use ISO 19650. This has now been addressed by the publication by the UK BIM Framework of its template Information Protocol.

But what is ISO 19650 and what is an Information Protocol? The ISO 19650 series is an internationally agreed set of standards for managing information over the life cycle of a built asset using BIM. The ISO 19650 series has been incorporated into UK standards as the BS EN ISO 19650 series. BS EN ISO 19650-2 is the part of those standards that deals with the delivery phase of the assets.

An Information Protocol (or as it was previously known, a BIM Protocol) is a document required under ISO 19650 which agrees the various rights, roles and responsibilities of the parties to achieve compliance with BS EN ISO 19650-2.

The new Information Protocol uses the CIC BIM Protocol as its starting point. Those who have used the CIC BIM Protocol will therefore be familiar with how the new Information Protocol is intended to operate and its general principles.

The Information Protocol does not operate independently; it needs to be incorporated into a contract, whether that be a building contract, a consultant's appointment or similar, for it to have contractual effect. Some building contracts such as the JCT Design and Build Contract, 2016 edition, already include optional drafting to incorporate the Information Protocol but other contracts will need an incorporation clause drafted into them to give effect to the Information Protocol.

That being said, what if the Information Protocol is inconsistent or conflicts with the terms of the contract to which it is appended? The Information Protocol states that the contract takes precedence when resolving any conflict or inconsistency but the Information Protocol takes precedence over other documents that form part of the contract. This order of precedence of documents will not always be appropriate for every project and should be confirmed on a project by project basis.

The new Information Protocol now sets out the Information Particulars at the front of the document. The Information Particulars are the project-specific details that need to be completed. These use the particular terminology of ISO 19650 and include basic details such as the Appointor and Appointee together with more technical documents such as the Exchange Information Requirements and the BIM Execution Plan. The success of any Information Protocol is dependent on these technical documents, with missing or incomplete documents leading to uncertainty as to the processes to be followed by the parties.

Clauses 3 and 4 of the Information Protocol sets out the obligations of the various parties. Clause 3 sets out the obligations of the appointing party; usually the ultimate client or a party managing information on the client's behalf. Clause 4 sets out the obligations of the appointee and the appointor.

As the Information Protocol is drafted for use throughout the supply chain the identities of the appointee and appointor will change depending on where in the supply chain the Information Protocol sits. The identities of the parties are captured in the Information Particulars.

> The new Information Protocol is a template which should be built on by the project parties to reflect project-specific requirements.

The parties are required to manage, prepare and deliver information and documents in accordance with BS EN ISO 19650-2. The parties are also required to review and update documents when required. Information is to be produced, shared or published at the times stated in the Information Particulars, but clause 4.6 of the Information Protocol now acknowledges that such compliance may give rise to an extension of time and/or additional costs under the contract, and there is an express, positive obligation in clause 4.7 for the parties to provide such information and assistance required by the Information Particulars.

It is recognised that compliance with BS EN ISO 19650-2 will generate a large quantity of data and this will only increase as the technology advances. The electronic exchange of data is detailed in clause 5 of the Information Protocol, with the Appointing Party being responsible for establishing, implementing, configuring and supporting the common data environment ("CDE") solution and workflow.

The information on the CDE solution is to be stored securely by the Appointing Party for the period specified in the Information

Particulars. Following the decision in *Trant v Mott MacDonald* [2017] EWHC 2061 the Information Protocol now confirms when parties should have access to the information held in the CDE solution.

The Information Protocol develops the CIC BIM Protocol as to how the parties manage, use and transfer information. Clause 6 sets out how information is to be managed and by whom; clause 7 confirms the level of information needed as a contractual deliverable and clause 8 sets out how information is to be used.

The Level of Information Need is perhaps the most important here. It is ultimately for the client to specify how much information it wants and to what detail, but there have been difficulties in the past with clients trying to define this level of need, for example clients saying that they want "BIM Level 2" for their project. It turns out that "BIM Level 2" means different things to different parties, and there is no standardised accepted level of information.

On that basis the Level of Information Need must be as detailed as possible and should ideally include indicators so that parties can tell that they have reached the required level.

To allow information to be used effectively by the parties, clause 8 provides for licences to be issued where a contract does not contain such provisions. While this is a helpful clause, it is likely that most contracts entered into will contain some copyright or other licence detailing the use and sharing of information.

Clause 10 of the Information Protocol deals with liability. Neither party to the Information Protocol has liability to the other if the other party changes or modifies the model or related work for any other contractually defined purpose.

> The Information Protocol does not operate independently; it needs to be incorporated into a contract, for it to have contractual effect.

The new Information Protocol is an ideal starting point for anyone wanting to incorporate an information protocol or BIM protocol for a project. It should, however, be remembered that it is a template which should be built on by the project parties to reflect project-specific requirements.

Might Covid-19 spark a revolution in offsite modular construction?

As **Huw Wilkins** discusses, offsite modular construction is a process of constructing a building in modules offsite, within a factory setting, before transporting those modules to site for installation.

Trends in the use of offsite modular construction

Offsite modular construction is not a new concept; London's Crystal Palace, which hosted Prince Albert's Great Exhibition in 1851, was built using prefabricated modules in a grid formation. Then, in the aftermath of World War Two, the UK government introduced the "Emergency Factory Made" housing programme. These houses were required to replace homes destroyed during the war, but they were only intended to last 10-15 years, before being dismantled and replaced.

More recently, we have seen a growing focus placed on modern methods of construction including offsite modular construction. Its benefits include:

- the design for manufacture and assembly ("DfMA") approach simplifies the design. Coupled with standardised production techniques, this allows manufacture and assembly to be more efficient, reducing time and cost and the risk of over-runs;
- most of the work is undertaken in a factory – a controlled, safer environment;
- DfMA enables quantities to be measured to a high degree of precision, which results in less waste; and
- fewer site deliveries result in reduced carbon emissions.

In 2017, the UK government announced that five government departments[1] would introduce a presumption in favour of offsite construction from 2019, which was confirmed in the "Construction Sector Deal" launched in July 2018.

The private sector has also started to embrace offsite modular construction:

- housing developers such as Barratt Homes, Legal & General and Berkeley Group have begun to invest in offsite modular construction; and
- contractors such as Laing O'Rourke and Wates have committed to strengthening their capabilities in offsite modular construction.

Construction during the Covid-19 nationwide lockdown

Perhaps unsurprisingly, the construction industry was a key area of focus during the first Covid-19 nationwide lockdown. Despite government urges to stay open and carry on, many construction sites were shut down because of the difficulties in complying with social distancing rules. Those that stayed open were subject to criticism for putting the health and safety of their workforce (and others) at risk.

> Offsite modular construction could prove to be a beneficiary of the pandemic, because the social distancing rules cause less of an issue for offsite modular construction.

Offsite modular construction wasn't affected in the same way. Indeed, there were a number of high- profile success stories for offsite modular construction. In China a new 1,000-bed hospital dedicated to treating those with Covid-19 was built in less than two weeks. Closer to home, sections of Grange University Hospital in South Wales were opened a year early to help cater for Covid-19 patients. It included, for example, 661 horizontal corridor services modules and 243 bathroom pods manufactured from 3D models. It was because of its modular construction that the health board was able to take possession of 50% of the space within the hospital early. Less publicly, because offsite modular construction is less labour intensive, and predominantly undertaken in factories with only limited time required on site, it was easier to comply with social distancing requirements so that work could continue.

Throughout the pandemic, the Construction Leadership Council has issued Site Operating Procedures which are based on the government guidelines. At the time of writing, version 5 of these remains in place. With the second wave of Covid-19 upon us, and further restrictions already coming into force in parts of the country, contractors must have in place plans and method statements to deal with Covid-19. To comply with these requirements, it is likely that fewer people will be allowed on site at any one time. This will, in turn, impact the sequencing of work, programme and contractor's preliminaries.

For the same reasons that it wasn't impacted (to the same extent as traditional construction) in the nationwide lockdown earlier this year, offsite modular construction won't be affected (to the extent of traditional construction) as stricter restrictions return. Against this backdrop, offsite modular construction looks more appealing for those starting new projects.

Are certain industries more likely to move towards offsite modular construction?

Embracing offsite modular construction may be at least part of the answer to the perennial housing shortage. Offsite modular construction is ideally suited to housebuilding, whether one-off high-end modern houses or large-scale developments such as build-to-rent schemes or affordable housing.

However, there are a number of other sectors that are equally well-suited to offsite modular construction. The restrictions that have been in place during the past year have forced a change in people's lifestyles. People's work and social/home-life have been forced to move online with greater IT and internet use. Two beneficiaries of this might be:

- Warehousing: over the past five years shopping habits have moved away from the high street and shopping centres, to shopping online and delivery to the door. The pandemic accelerated this move. It also saw more and more people look towards having their weekly "big shop" delivered online, with supermarkets expecting this to continue longer term. This move online requires less shop space and more warehousing.
- Data centres: as people work from home, the work "Zoom" call has become an invaluable form of communication. Outside working hours, more and more people are streaming their favourite shows and films. This increased internet use requires increased data centre capacity.

Both warehouses and data centres are well-suited to offsite construction.

But offsite modular construction can also be more widely used in infrastructure. For example, in August 2020, the first permanent structure to be delivered for HS2 – a 65-metre road bridge over the M42 – was installed in a matter of days, having been built offsite and transported to site for assembly. A similar operation will take place later this year for a bridge over the A446.

> Sections of Grange University Hospital in South Wales were opened a year early to help cater for Covid-19 patients. It included, for example, 661 horizontal corridor services modules and 243 bathroom pods manufactured from 3D models.

Legal considerations regarding offsite modular construction

There are, however, a number of issues arising from offsite modular construction that parties will need to consider when negotiating contract terms. A key consideration will be what payment terms to apply. In circumstances where most of the work is done in a factory before being delivered to site for installation, the contractor will want to front-load payment for cash flow purposes, whilst the employer will want to protect itself against the risk of the contractor's insolvency in circumstances where it pays for work before it is installed on site. The payment terms will need to be clear and, if it is a "construction contract" under the terms of the Housing Grants, Construction and Regeneration Act 1996, it must provide an "adequate mechanism" for determining what payments become due and when, as well as the final date for payment.

Some issues that parties should also consider include:

- Design freezes: offsite modular construction benefits from settling on a final design as early as possible (it may be preferable for all parties to have phased design freezes). This is because, once work starts in manufacturing the prefabricated components, changes to the design are likely to be far more complex and costly to accommodate than they would be on a traditional build. Parties will need to decide how variations are to be valued in circumstances where the cost of a late change in the design might be far more than if the change had been made before the design freeze.

- Rights of inspection, and potentially testing, at the factory where the prefabricated components are being manufactured: a rigorous inspection and testing regime might identify defects at this early stage, rather than once units have already been manufactured or, worse still, installed.

- When ownership of the prefabricated components passes: the employer will likely want ownership to pass on payment, to give it some protection against the contractor's insolvency.

- When risk of the prefabricated components passes: where ownership and risk pass at different times (for example where ownership passes on payment, but risk passes on delivery), the parties will need to consider how to deal with risk, which may require contractual provisions governing storage of the components and additional insurance.

- Storage and delivery of prefabricated units: there is unlikely to be storage space on site, and prefabricated units will be stored in the factory. This will also require a delivery schedule to ensure the prefabricated units are delivered on time (to allow the work to take place) but not early (because of the lack of storage on site).

- Defects: As in all cases, once a defect is identified, it will be necessary to identify the cause of that defect, and what work is required to remedy the defect (and who is liable for that defect). However, in a project that involves multiple identical units (for example modular bathrooms), it will be necessary to investigate whether any other units are (or may be) affected by the same defect (which may not yet have manifested in those other units). For example, if the defect arises because of a batch of a particular material, all modules using that batch of material will likely be affected. In the worst-case scenario, a design defect will affect all identical units. Parties will therefore need to clearly set out the scope of work, define what a "defect" is and allocate risk.

Whilst there may in time be a standard form dedicated to offsite modular construction, until that happens there is no reason why these matters cannot be dealt with through carefully drafted amendments to existing standard form contracts.

Conclusion

Before the Covid-19 pandemic, offsite modular construction was gathering some momentum, driven by both public and private sectors. Social distancing rules undoubtedly had an impact on the construction industry; that impact is likely to continue beyond the end of the pandemic. Offsite modular construction could prove to be a beneficiary of the pandemic, because the social distancing rules cause less of an issue for offsite modular construction.

> In August 2020, the first permanent structure to be delivered for HS2 – a 65-metre road bridge over the M42 – was installed in a matter of days, having been built offsite and transported to site for assembly.

When parties are deciding whether to use offsite modular construction, there will be a number of important technical considerations to determine whether it is suitable. There will also be legal considerations and the parties will require appropriate drafting to reflect the allocation of risk, particularly regarding payment and transfer of ownership.

The challenges and legal implications of digital twins

Catherine Simpson explores some of the challenges to the adoption of digital twins and considers how they might be addressed in construction contracts.

The concept of the digital twin is gaining momentum in the construction industry. Its potential applications look set to transform the way in which owners and operators design, construct, maintain and manage their assets. But what are the legal implications of digital twins? We explore some of the challenges to their adoption and consider how they might be addressed in construction contracts.

What is a digital twin?

A digital twin is a digital replica of a physical asset, process or system in the built or natural environment. Unlike other models, a digital twin typically uses real-time data from various sources, such as sensors placed on the physical twin, and applies advanced analytics, machine-learning and artificial intelligence to replicate real-world situations. Thus, the digital twin can be used to predict how the physical asset, process or system will react to changes.

To date, most applications have taken place on a relatively small scale. However, the Government is promoting the development of a national digital twin that will capture all UK infrastructure. Therefore, it seems inevitable that we will see digital twins being developed on a much larger scale and becoming increasingly influential.

What are the legal implications of digital twins?

At the most basic level, a digital twin could simply act as a central repository of information, incorporating data about how a specific asset – say a building – has been designed and constructed, into which further data is added about how it performs and ages over time. This could be used to inform the management, operation and maintenance of the building.

> The Gemini Principles, a series of values published to guide the creation of the national digital twin, place heavy emphasis on clarity of purpose, trust, openness, quality and the effective function of the twin.

However, at the most advanced level, a digital twin could be something far more complex and multilayered, incorporating virtual projections of almost anything. This is the scale which the UK government is advocating – an intricate model of our current infrastructure which could be used to inform decisions and test solutions to population growth, congestion, climate change, you name it. A model of this complexity would be very challenging for a contractual framework to govern. Issues such as data ownership, causation and liability could all potentially be unclear, difficult to unravel, and contentious.

Data ownership

In many cases digital twins may incorporate copyright material, meaning that the intellectual property provisions of contracts will need to be updated to reflect the now wider range of use of the data for the digital twin. In some cases, this may be as simple as including the digital twin within the contractual definition of permitted use, but this will vary from contract to contract.

Any licence granted in relation to use of the data should be for a suitably long period so as not to expire before the end of the life of the twin. This is likely to be the full life cycle of the asset, process or system, so potentially many years.

There also needs to be legal clarity on who is the rightful owner of the data held within the model. It is important that the rights of individual parties making a distinct contribution continue to be recognised, particularly where the data shared incorporates copyright material. However, complex situations may arise where more than one party have contributed, as the end product of the data sharing might result in a situation of joint ownership.

Unless there are specific contractual provisions covering this, the rights of joint owners may not be clear. Further, if ownership of the individual data contributions sits with the party who shared the data, where does ownership of the digital model as a whole lie? This will need to be established.

Data sharing and confidentiality

By their very nature, digital twins rely on data sharing, and the contracts that govern them must allow for that. This runs contrary to current norms that oppose non-essential sharing of data. However, this prevailing cultural resistance to data sharing, particularly where the benefits of doing so are technical, complex, or difficult to understand, must be broken down if the full benefits of digital twins are to be realised. The case will need to be made (where it can be) for the perpetual benefits to the public, as a legitimate reason for sharing data.

There is a related issue of confidentiality. Given the number of stakeholders who may have access to the digital twin, some parties may not feel comfortable with sharing confidential information, such as trade secrets. This may be further compounded by the fact that with any data-sharing platform there is always a risk of security breaches and data losses, and any vulnerabilities associated with such systems will increase substantially when different digital twins are amalgamated.

Where the data is considered to be confidential, appropriate non-disclosure clauses may be required within individual contracts, or a project-wide confidentiality agreement may need to be signed by all the parties. Where there are many users of the twin, different access permissions may be required to allow confidential data to only be viewed by certain users. Similarly, some parties may request the redaction of certain data. However, this should be proportionate. Although it may not be essential that all information be embedded into the model, a digital twin will only ever be as good as the data that goes into it.

Liability

Probably the most complex issue to touch on is that of liability. Digital twins are interconnected systems in which changes in one item of data will impact other parts of the model, and as the digital twin evolves, more and more parties may be using and relying on data that could include errors. In situations where there are multiple parties and data sources, the digital twin is likely to require a single organisation to act as gatekeeper to the data, to prevent unauthorised changes. However, where there is an error, it may still be difficult to establish where the liability lies.

Equally, the blame may not lie with one party alone, or it may be hard to prove that the original data provided was not of sufficient quality to begin with. The fact that different parties are relying on the accuracy of data provided by one another may also lead to trust issues.

The Gemini Principles, a series of values published by the Centre for Digital Built Britain's Digital Framework Task Group to guide the creation of the national digital twin, place heavy emphasis on clarity of purpose, trust, openness, quality and the effective function of the twin.

Given the complexity of potential liability issues, it would be beneficial to ensure that all contracts are clear about the purpose and function of the data, perhaps with reference to the Gemini Principles, with the aim of fostering trust between the parties involved and to encourage the sharing of data which meets the same high standards.

The NEC suite of contracts, which provide that parties must act in a spirit of mutual trust and cooperation, is certainly evidence that contracting can encourage more collaborative and open ways of working. Although it may be difficult to enforce such obligations (especially given the common law stance that neither party must act in good faith), having clear terms of reference may go some way to avoiding disputes between the parties later down the line.

> By their very nature, digital twins rely on data sharing, and the contracts that govern them must allow for that.

Conclusion

The range of potential legal issues will no doubt expand as the use of digital twins evolves. There will be project-specific legal considerations depending on the intended use of the digital twin, as well as issues of data ownership and liability which will need to be addressed in the relevant contract. Further, as the success of the digital twin depends to a large extent on close collaboration by all, this could be encouraged within the contractual terms themselves.

Net Zero: are you ready?

Before you can judge whether you are ready or not, you need to understand what net zero is all about. Let **Natalie Beeraje** be your guide.

Introduction

Climate-related litigation against companies and national governments (as seen in the landmark "Urgenda" case last year) is being used as a tool to influence behaviour around the world. Pressure groups are using the law to hold companies and governments to account for their environmental impact, in a drive to achieve net zero emissions. In this article, we will take a brief look at the law around "net zero", including recent cases impacting the construction industry.

Net zero –legal recap

The Paris Agreement kick-started this recent momentum in 2015. It set a long-term goal, to limit the rise of global temperatures to well below 2 degrees C above pre-industrial levels, and to pursue efforts towards keeping that below 1.5 degrees.

The IPCC Report in 2018 suggested that a target of limiting global warming at 2˚C above pre-industrial levels was no longer adequate, and that a target of 1.5˚C above pre-industrial levels.

This ushered an amendment to the Climate Change Act in June 2019 in the UK, setting the target to reduce the UK's net greenhouse gas emissions by 100% before 2050 – i.e. the "net zero" emissions target. The UK was one of the first major world economies to enshrine its commitment under the Paris Agreement to achieve net zero emissions by 2050 into national law.

The Environment Bill was introduced into Parliament in January of this year; however, due to COVID-19, the progress of the bill has been postponed until after the summer recess. Pursuant to the Environment Bill, the Office for Environmental Protection will be established to "scrutinise environmental policy and law, investigate complaints and take enforcement action where required ... to uphold environmental standards. The office's powers will cover all climate change legislation and hold the government to account on its commitment to reach net zero emissions by 2050." This will no doubt herald a rise in scrutiny of construction projects, and compliance with net zero legislation in the future.

Climate disputes impacting upon the construction industry

Alongside developments in legislation described above, we have seen a rise in climate-related litigation being brought against both governments and companies all over the world.

The landmark "Urgenda" case in December 2019 was a significant turning point. The Netherlands Supreme Court held that the Netherlands government was under an obligation to significantly reduce its greenhouse gas emissions by the end of 2020 (by at least 25% compared with 1990). This was due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents in the Netherlands. In response, this year, the Dutch government announced a plan of more than €3 billion, including €2 billion for large-scale solar projects, and the reduction of coal-fired power stations.[1]

> The Net Zero Carbon Buildings Commitment challenges its signatories to achieve net zero in operation of their own buildings by 2030. 61 companies globally have signed up. 21 are members of the UK Green Building Council.

In the UK, two recent cases bring home the importance of considering the UK's commitments under the Climate Change Act, in the context of construction projects. Earlier this year, the English Court of Appeal ruled that the government's plans to build a third runway at Heathrow Airport was unlawful because it had failed to take into account the UK's climate change commitments under the Paris Agreement, as required under the Planning Act.[2] The Court of Appeal therefore ruled that the government's policy was unlawful. The Supreme Court has given permission to appeal this decision. In light of the Court of Appeal decision, Transport Action Network launched judicial review proceedings against the Department for Transport in respect of RIS2 (Road Investment Strategy 2), in July of this year. RIS2 is the government's strategy for the investment of £27.4 billion into the road network. Transport Action Network is challenging the strategy on the basis that ministers published it without considering the net zero target, set out in the Climate Change Act 2019. A hearing on this challenge is anticipated by November 2020.

Companies should be mindful of potential litigation arising from "greenwashing", a term which describes organisations

1. https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan/
2. R. (on the application of *Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.
3. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf
4. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf
5. *https://www.worldgbc.org/advancing-net-zero*

misleading stakeholders about their environmental credentials. For example, Client Earth filed a complaint against BP in December 2019, in respect of its "Keep Advancing" and "Possibilities Everywhere" advertisement campaigns, on the basis that they violated OECD rules on misleading and deceptive claims. Client Earth alleged that these campaigns misled the public by "focussing upon BP's low carbon energy products when 96% of BP's annual spend is on oil and gas". BP withdrew those campaigns in February 2020. In June 2020, the UK National Contact Point for the OECD Guidelines for Multinational Enterprises noted that Client Earth's complaints were material and substantiated.[3] This will pave the way for more organisations to be challenged for "greenwashing", using the OECD guidelines.

In addition, actions are being brought by shareholders against their companies for failure to incorporate climate risk into their corporate strategies, and failure to disclose climate risks.[4] Typically, these have been in the context of banks, pension funds and investment funds. However, we expect that similar actions could be brought by shareholders across other industries, including construction.

(Net) zero place to hide

This is an area in which we expect to see an increase in policy and regulation in the coming years. The government will be under considerable public and political pressure to start implementing policies and legislation to achieve net zero, particularly in light of hosting COP 26 next year – this will be the largest international summit that the UK has ever hosted.

The construction and engineering sectors were drawn into sharp focus in The Committee on Climate Change's Net Zero Technical Report 2019. This states that in 2017:

- buildings alone account for 26% of total UK GHG emissions;
- UK surface transport sector accounted for 23% of total UK GHG emissions (as of 2017);
- industrial emissions in UK made up 21% of UK GHG emissions in 2017; and
- emissions in the UK power sector accounted for 15% of all UK emissions in 2019.

Many businesses around the world have publicly pledged their commitments to achieve net zero carbon targets. According to the independent Committee on Climate Change's recent Progress Report, 15% of FTSE 100 companies have set corporate targets to achieve net zero carbon or carbon neutrality by 2050. There have been some significant announcements in the oil and gas sector this year, with BP and Shell both declaring their net zero commitments. It is clear that widespread momentum is gathering, and new industry benchmarks are being set.

> Pressure groups are using the law to hold companies and governments to account for their environmental impact, in a drive to achieve net zero emissions.

How can you get ready?

It is clear that net zero commitments need to be taken seriously, as pressure is only set to increase between now and 2050.

For companies who are seeking to begin or accelerate their journey to net zero, the independent Committee on Climate Change has suggested two starting points: (1) Task Force on Climate Related Financial Disclosures and (2) Carbon Disclosure Project.

The World Green Building Council has set up the Advancing Net Zero campaign.[5] Its Net Zero Carbon Buildings Commitment challenges its signatories to achieve net zero in operation of their own buildings by 2030, and to advocate for all buildings to be net zero carbon by 2050. So far 61 companies globally have signed up to the Commitment, 21 of which are members of the UK Green Building Council.

With an expected rise in legal action in this area, it is advisable to plan ahead for climate-related legal risks for your organisation. Whilst we await further regulation and legislation from the government, teams of lawyers have got ahead of the game and started to draft model clauses which can be built into construction contracts. For further information about this, please do not hesitate to contact us.

Data & digital processes: beware of the electronic tumble dryer

The importance of clear and coordinated data is fundamental to the success of any construction project. **Dr Stacy Sinclair** discusses the scale and nature of data that the construction industry now faces, and the opportunities and challenges this raises.

Clear, consistent and coordinated data and digital processes are fundamental to the success of a construction project, as well as to the success of any subsequent claims or disputes. In a world of big data, data which is generated at an exponential rate each day, it is more important than ever to appreciate the significance of data and data management in your digital processes.

This article briefly discusses the scale and nature of data that the construction industry now faces, and the opportunities and challenges this raises. It then goes on to highlight some examples of what can go wrong if data and data management are not considered at the outset of a project.

Data: an electronic tumble dryer?

It was estimated that by 2020 the entire digital universe was expected to reach 44 zettabytes and by 2025 that 463 exabytes of data will be created each day globally.[1] By 2030, quantum computing and the quantum industry is predicted to be a multibillion-dollar industry.[2] How many of us even know enough about the difference between a gigabyte, a terabyte and a petabyte?

What we do know is that on any given construction project, the amount of data being generated daily across the project team is mammoth, and is only set to increase given the new and exciting technologies and platforms now being utilised more commonly.

Just to scratch the surface, data is generated from: *drone and video footage, photos, texts, WhatsApp, Slack, emails, Teams chats, BIM models, contracts, sub-contracts, sub-sub-contracts, specifications, schedules, site diaries, turnstiles and biometric clocks, the common data environment (CDE), shared project platforms, timesheets, asset databases, electronic invoicing and payment records, reports, weather records, correspondence, order forms, social media, programmes, etc...* The list seems endless.

Given the vast amount of data, companies and/or projects often face the issue of data silos and data overload. Setting aside issues of interoperability and compatibility, whilst some companies are actively progressing the extraction of analytics from their data in order to enable data-driven decision-making, others are either not using their data effectively and/or are not using it at all. Some may not even be entirely aware of all the data available on a given project, and/or appreciate where it is being stored.

Parties need to be alive to data management issues and minimise risks where possible for legal, security, GDPR issues and otherwise. Data and records of course are also a requirement in many contracts and sub-contracts[3], and indeed are of utmost importance if you want to succeed in evidencing your claim in a formal dispute.

For example, in 2019, in the case of *Freeborn & Anor v Marcal (t/a Dan Marcal Architects)*[4], a professional negligence claim was made against an Architect. The Judge held that the Architect was negligent as he did not produce a written brief or record the design changes for project. The Architect's daybooks, notebooks and sketch books certainly did not help matters. The Judge stated:

"...As volunteered by the Defendant [Architect] these notebooks contained a "tumble dryer of information". I would suggest a "tumble dryer of misinformation". The notebooks are confused, confusing and chaotic..."

Whilst this example is not necessarily "digital", it demonstrates the importance of organised and clear data and records. Digital data and electronic records of course have the potential to do much better if managed properly: they can be processed and analysed in bulk, quicker, more efficiently and more sophisticatedly. With the management issues we see with big data and its exponential growth, will we soon have the "electronic tumble dryer of misinformation" before the Courts?

> Parties need to be clear on what has been agreed in respect of data and digital processes, what are the deliverables, what are the requirements in respect of time, cost and quality, and what are the conditions for getting paid?

Collaborative tools and platforms to improve data management and workflows are constantly evolving. As more and more technologies are connected and we create continuous workflows and processes, from procurement and design right through to

1. *https://www.weforum.org/agenda/2019/04/how-much-data-is-generated-each-day-cf4bddf29f/*, 17 April 2019.
2. *https://hbr.org/2020/09/are-you-ready-for-the-quantum-computing-revolution*, 17 September 2020.
3. FIDIC 2017 Sub-Clause 20.2 ("Contemporary Records"), NEC4 Sub-Clause 11.2(26)("Disallowed Cost"), NEC4 Sub-Clause 52.2, etc.
4. [2019] EWHC 454 (TCC)
5. [2017] EWHC 2061 (TCC)
6. [2020] EWHC 2484

commissioning and operation, some of these issues start to decrease. However, we must continue to remember the significance of data and factual evidence in proving a legal entitlement. Therefore, data and data management must remain at the forefront in order to achieve a successful project or, failing which, a successful outcome in a dispute.

Access to Data: do I have a legal right to it?

A further issue which parties must consider at the outset is their right to access data, either during the course of a project or in the future. With the use of the cloud-based, shared platforms which centrally locate project information for coordination, collaboration and the effective running of a project, issues of access can arise.

Whilst several years ago now, the first reported "BIM" case in the UK did not actually concern the BIM models or the process around BIM. Rather, the dispute was whether one party was entitled to access common data environment on ProjectWise. In *Trant Engineering Limited v Mott MacDonald Limited*[5], the parties disagreed over the contract terms and when Trant did not pay Mott MacDonald the sums it considered were due, Mott MacDonald denied Trant access to the servers hosting the ProjectWise design data by revoking the passwords that had been issued. The Judge ultimately awarded Trant access, but Trant first had to make a payment into Court of £475,000.

Whilst in the *Trant v Mott MacDonald* case Trant required access to the data so that it could progress the project, issue of access may also arise years after a project has been completed. Parties may be liable for six or 12 years after the completion of their respective contract or deed, depending on the limitation period. It may become critical to have access to data that once lived on a shared platform in order to evidence what happened.

In six or 12 years' time, where will the data be? Will you have a right to access it? Do you need a license to access it? These, and others, are important questions to take into account at the outset when data management strategies and platform ownership/licenses are considered.

Conflicting Data: which should I use?

Whilst some consider that data and the use of technology should lead to the "truth" of a particular situation, and therefore minimise and potentially eliminate claims and disputes, this can only happen if there is transparent communication and clarity and consistency in contract documentation at the outset of a project. All parties need to be "on the same page" and expectations of obligations and outcomes need to align.

Given the vast amount of data available on a project, parties need to agree what the data is intended to be used for and, if there are multiple sources of data for a given element, which one is to be used. In not, ambiguity may exist which might ultimately lead to a dispute.

For example, in the case of *Premier Engineering (Lincoln) Limited ("Premier") v MW High Tech Projects UK Limited ("MW"*[6], Premier provided labour to MW and charged on an hourly rate. A dispute arose regarding the number of hours the operatives had worked. Premier considered that it was underpaid by some £1.3m. MW considered that it had substantially overpaid. There were timesheet records and turnstile records, but these did not align. Premier then installed a biometric clock to record its operatives' hours. All three sources told a different story.

The Judge decided that an agreement had been reached between the parties that the timesheets and biometric clock would be used to calculate payments, and not the turnstile data.

Here, the parties tried, but failed, to reach an agreement during the course of the project, including in an alleged meeting that took place in a stairwell. It had not been agreed in advance and therefore a reminder that clarity is needed when entering into agreements as the risk of conflicting data is real. There are always two sides of a coin.

Conclusion

Clear, consistent and coordinated data and digital processes are fundamental, as is collaboration and teamwork between all disciplines at the inception of project, and indeed throughout the design, construction and commissioning, in order to minimise claims.

Parties need to be clear on what has been agreed in respect of data and digital processes, what are the deliverables, what are the requirements in respect of time, cost and quality, what are the conditions for getting paid, etc.

> With the management issues we see with big data and its exponential growth, will we soon have the "electronic tumble dryer of misinformation" in the Courts?

With a greater use of new technologies, new and different deliverables during design phases, and an emphasis on outcomes, it is even more important now that communication and clarity are at the forefront.

New technologies and digital processes are fundamental to the future of the construction and energy industries. We collaborate and advise right from the outset of projects through to completion, enabling parties to achieve greater efficiencies, productivity, safety, risk mitigation and ultimately a better built environment.

It's time to review your contract payment terms

There has always been an uneasy interaction between the payment provisions in the Construction Act and the need for parties to a construction contract to invoice one another. As **Martin Ewen** explains, a new Technology and Construction Court case heard earlier this year has closed a frequently used contractual "workaround" and made both clients and contractors look again at their standard terms.

A recent judgment has potentially significant ramifications for payment terms in construction contracts. A final date for payment in a construction contract must now be linked to the due date and be a set period of time rather than an event or mechanism. Consequently, a final date for payment cannot be linked to the provision of an invoice (e.g. payment due within 30 days of receipt of invoice) and any such provision will not comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996 (as amended) (the "Construction Act").

In those circumstances the relevant provisions of the Scheme for Construction Contracts 1998 (the "Scheme") will be imported. The effect of this is that the final date for payment is just 17 days from the date payment became due.

Given that the latest date for service of a pay less notice is normally a set period of time prior to the final date for payment, this could very well mean that a pay less notice is late and invalid. Accordingly, the sum stated as due in the payment notice must be paid. If no payment notice was issued, the sum applied for by the contractor (assuming it became a default payment notice) would be due and the opportunity to issue a pay less notice against it lost.

> The prevalence of construction contracts including clauses fixing the final date for payment to the submission of an invoice should not be underestimated

Rochford Construction Limited ["Rochford"] v Kilhan Construction Limited ["Kilhan"] [2020] EWHC 941 (TCC)

On 3 August 2018 a subcontract was entered into between Rochford and Kilhan under which Kilhan was to provide a reinforced concrete frame on a project at Richmond upon Thames College.

The dispute arose out of an adjudication dated 24 December 2019 in relation to a dispute between the parties over Interim Payment Application 9 ("IPA 9"). The Interim Payment Notice 9 ("IPN 9") was issued on 23 October 2019. The dispute concerned the validity of IPN 9, and whether it was issued late and failed to specify how the sum was calculated. The adjudicator defined the issues as whether the payment provisions were compliant with the Construction Act and if not, what terms were to be implied.

The adjudicator concluded that the due date of IPA 9 was 20 May 2019, being the date on which the notice was served, and that the final date for payment was 30 days from that due date, being 19 June 2019. He concluded that the Claimant had served neither a Payment Notice within five days of the due date nor a Pay Less Notice no less than seven days prior to the final date for payment. On that basis, the adjudicator found that the sum claimed was owing in default.

Rochford did not concur with the adjudicator's decision and brought proceedings in the Technology and Construction Court, also seeking a decision in relation to the due date and the final date for payment.

Rochford sought the following declarations (amongst others):

> *"In respect of the due date:*
>
> *a. Under the express terms of the Subcontract, the Defendant is obliged to serve any interim application for payment on the last day of each calendar month.*
>
> *b. As a result, no payment became due under the Subcontract in respect of the April 2019 payment cycle.*
>
> *In respect of the Final Date of Payment:*
>
> *c. Under the express terms of the Subcontract, the Final Date for Payment of any sum that has become due is 30 days from the date of service of a relevant invoice.*
>
> *d. Without prejudice to the fact that no sums had in fact become due, the Defendant did not serve an invoice until 7 January 2020.*
>
> *e. Insofar as the Claimant has served a payless notice more than 7 days prior to the Final Date of Payment, the Claimant is not obliged to pay the sums now claimed by the Defendant.*
>
> *Generally*
>
> *f. As a consequence of the above matters, the Claimant does not owe the Defendant the sums ordered be paid by the Adjudicator in his Decision."*

Rochford said that the adjudicator's decision was clearly wrong because he failed to give effect to two key expressed clauses in the subcontract: the date for

making a claim and the requirements for a final date for payment.

The subcontract stated:

"The brief description of subcontractor works to be carried out

Works are lump sum ... RCL will issue activity schedule to KCL, application date end of month ... commercial ... valuations monthly as per attached payment schedule end of month. Payment terms thirty days from invoice as per attached schedule. S/C payment cert must be issued with invoice."

No payment schedule was issued. As Mrs Justice Cockerill noted, had one been issued, *"it seems far less likely that this dispute would have arisen"*.

Section 110 (Dates for Payment) of the Construction Act stipulates that:

"Every construction contract shall –

(a) provide an adequate mechanism for determining what payments become 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."

If a construction contract does not satisfy section 110 of the Construction Act, the relevant provisions of the Scheme will be implied into the contract.

Due date

The contract particulars stated *"Application date end of month"*. Therefore, according to Rochford, it was clear that applications for payment had to be made on the last day of the month. When that date fell on a non-business day, Rochford submitted that the application would need to be submitted on the last business day of any month.

Kilhan noted that *"end of month" could mean "by the end of the month", "on the end of the month", "after the end of the month", "the final business day", or "the final calendar day"*.

Mrs Justice Cockerill concluded with little hesitation that Rochford's case on this issue was incorrect and unsustainable.

Paragraph 4 of the Scheme was therefore applicable and so the due date was 20 May 2019, the date on which the claim was made by Kilhan (IPA 9).

Payors should review their current construction contracts accordingly and, where payment periods under the Scheme are shorter, understand that they are at greater risk of a "smash and grab" adjudication.

Final date for payment

Mrs Justice Cockerill said that:

"Pegging the final date to service of an invoice, which itself is pegged to a payment certificate, is simply impractical. The best way of mending the misfire caused by the parties' incomplete drafting of the contractual documents, which is the position which one faces here, is effectively the one on which the adjudicator settled ... I would reach the conclusion that the statutory Scheme comes into play as regards the final date for payment."

She went on to say that:

"... while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a period of time, and not an event or mechanism."

The subcontract was unclear as to when the invoice triggering final payment was to be submitted. The subcontract referred to one of two items (the payment schedule or the payment certificate) neither of which existed, and so there was therefore no certainty as to when the invoice was to be issued, making it an unsuitable basis for determining the final date for payment.

As there was not an adequate mechanism for determining the final date for payment in the subcontract, the Scheme had to be implied.

Under the Scheme the final date for payment is 17 days from the due date. Consequently, Rochford's pay less notice was out of time and the full amount was due.

Rochford's claim for the declarations sought, and to order Kilhan to repay the sums paid by Rochford pursuant to the adjudicator's decision, was dismissed.

Commentary

The court's decision on this point is obiter (non-binding). Nonetheless, it will carry considerable force for most adjudicators and it is the first case to consider this point.

(i) Standard forms

The payment provisions in unmodified JCT standard forms of contract and the unmodified NEC suites of contracts generally comply with the Construction Act. However, payment provisions are very commonly the subject of amendment and so extra care must be taken when drafting these amendments to ensure that the final date for payment is linked to the due date and a set period of time. It has to be certain. If not, the consequences could be grave.

(ii) Bespoke forms of contract

Payment provisions in bespoke forms of contract arguably carry a greater risk of falling foul of the Construction Act. Again, care should be taken in the drafting to avoid linking the final date for payment to the provision of an invoice.

(iii) Pay less notices

Pay less notices run the real risk of being issued late and therefore being invalid if a final date for payment is only 17 days from the payment due date, as regularly a final date for payment is expressed as being greater than 17 days. This could result in the sum stated in the payment notice being due. In the absence of a valid payment notice, the sum in the application for payment could become due.

(iv) Beware the smash and grab adjudication

Paying parties should be wary that the timeframe for payment could be shorter than anticipated, thereby exposing them to a "smash and grab" adjudication. "Smash and grab" adjudications have become slightly less common following *Grove Developments Limited v S&T (UK) Limited* [2018] EWCA Civ 2448. However, given the continuing impact of COVID-19 on the construction industry and economic uncertainty, the opportunity to obtain potentially significant sums of money very quickly and on a straightforward contractual basis, could prove very tempting for payees.

For payers, payment must be made in compliance with an adjudicator's decision in a smash and grab adjudication before a "true value" adjudication can be commenced. In circumstances where the party in receipt of monies is in a perilous financial position, this could create a risk that even with success in a true value adjudication, there may be significant issues with clawing back some or all of the money.

> New construction contracts and standard forms should be updated and payors should consider ways to get valid VAT invoices from payees without contractually fixing it to the final date for payment.

(v) Right to suspend

A right to suspend performance of the works is triggered by a failure to pay a sum due by the final date for payment. A final date for payment of 17 days after the due date could catch parties out and entitle the payee to payment. If payment is not made, the right to suspend would arise. This could affect the overall progress of the works and incur liquidated damages up the contractual chain.

(vi) What if my construction contract falls foul of the Construction Act?

Parties to construction contracts should check the final date for payment provisions and consider their positions. If those contracts fall foul of the Construction Act then it may be sensible to adopt a final date for payment as being 17 days from the due date (care should also be taken in establishing the due date). Pay less notices should then be served with reference to a final date for payment being 17 days from the due date.

Statutory adjudication and the excluded industries

As **Ciaran Williams** explains, there has been much discussion about whether it is right that the adjudication legislation does not apply to a number of industries who are clearly a part of the construction industry as a whole. Has the time come for the exclusions allowed in the Construction Act to be amended or removed?

Introduction

Statutory adjudication is a valuable dispute resolution mechanism in the UK, but it is not available on all construction projects.

The Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act") introduced statutory adjudication over twenty years ago and it applies to any agreement for the carrying out of "construction operations" which is widely defined in section 105 (1). However, certain industries have been excluded from the benefits of statutory adjudication.

The excluded industries are listed in section 105 (2) of the Construction Act. They were excluded as a result of political pressure when the Housing Grants, Construction and Regeneration Bill was being debated. The excluded industries range from power generation to the production of pharmaceuticals.

There have been a number of cases over the past few years on the interpretation of section 105 (2) of the Construction Act and, in particular, its application to the energy sector. The exclusions have been narrowly construed by the courts which has limited their application; however, in several cases the courts have reluctantly decided that the Construction Act did not apply.

There has been much discussion on whether the exclusions are necessary and if they should be amended or removed. This article looks at the power generation exclusion and how it has been applied recently by the courts.

The section 105 (2) exclusions

Section 105 (2) of the Construction Act excludes the following construction operations in respect of the energy sector:

"(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork

for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is -

(i) nuclear processing, power generation, …"

The application of these exclusions has usually been challenged in circumstances where a party is seeking to resist the enforcement of an adjudicator's decision. The exclusions give rise to several interpretational issues such as the meaning of "*assembly, installation . . . of plant or machinery*" and *"primary activity"*.

Judicial criticism of the exclusions

The courts have considered the implications of narrow and wide interpretations of the exclusions and whether, for example, the construction of pipework that connected machinery and plant would be an excluded operation on a site where the primary activity is power generation. Accordingly, a body of case law has developed on the nuances of the exclusions. However, the interpretational issues still exist and the wording in section 105 (2) has been criticised by the judiciary. In the case of *Severfield (UK) Ltd v Duo Felguera UK Ltd* (2015) 163 Con LR 235 (TCC) Coulson J (as he then was) stated:

"All of the difficulties here, in both the old and the new proceedings, can be traced back to s.105 of the 1996 Act and the legislature's desire to exclude certain industries from adjudication."

Further, in *C Spencer Limited v MW High Tech Projects UK Limited* [2020] EWCA Civ 331 (CA), Coulson LJ commented that the Construction Act was not as comprehensive as it might have been[1] Coulson LJ referred to the parliamentary debates around the legislation and the suggestion of Lord Howie of Troon that the then government had yielded to the pressures of process industries and, in doing so, had lost sight of the aim of the Bill.[2]

> Coulson LJ has commented that the Construction Act is regarded as a blessing by the construction industry and it needed to be conferred on all those industries (such as power generation) which are currently exempt.

Recent case law on the interpretation of the exclusions

The interpretational issues surrounding the Construction Act exclusions continue to exist and the question of whether the "primary activity" is "power generation" at an energy from waste plant was considered in the recent case of *Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd* [2020] EWHC 1626 (TCC).

1. C Spencer Limited v MW High Tech Projects UK Limited [2020] EWCA Civ 331 (CA) paragraph 2.
2. C Spencer Limited v MW High Tech Projects UK Limited [2020] EWCA Civ 331 (CA) paragraph 2.
3. Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC) paragraph 76.
4. Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC) paragraph 77.
5. Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC) paragraph 75.
6. Severfield (UK) Ltd v Duo Felguera UK Ltd (2015) 163 Con LR 235 (TCC) paragraph 63.

The facts

Engie Fabricom (UK) Ltd ("Fabricom") was engaged by MW High Tech Projects UK Ltd ("MW") to carry out the installation of a fluidised bed gasification plant at Cleveland Street, Kingston upon Hull. Disputes arose between the parties as to payments due under the contract and Fabricom obtained adjudication awards in its favour.

MW resisted the enforcement of the adjudication decisions on the grounds that the works were not construction operations for the purposes of the Construction Act. MW claimed that the works were for the installation of plant on a site where the primary activity was power generation and that such works are excluded by section 105 (2) of the Construction Act. Accordingly, MW claimed that there was no right to statutory adjudication and that the adjudicator's awards were unenforceable.

Fabricom claimed that the works were for the installation of plant on a site where the primary activity was the disposal and thermal treatment of waste rather than power generation. Fabricom's position was that the electricity generated from the thermal treatment of processed waste was ancillary to the main activity of waste treatment.

The decision

The material test in this case was whether power generation was the "primary activity" at the site. The works would not fall within section 105 (2) of the Construction Act if power generation is "*merely a secondary or ancillary activity*".[3]

To identify the primary activity was a matter of fact,[4] and to reach its conclusion the court considered the factual and expert evidence in respect of a number of material factors including: the regulatory framework; the planning approvals; the Environment Agency's permit for the facility; the operations on the site; and the financial model for the plant.

The Court decided that the primary activity at the Energy Works Hill site was power generation based on the following reasons:

1. The contract was very strong evidence that the primary purpose of the plant was energy generation, rather than waste treatment. The overriding contractual requirement was for the facility to operate as a power plant.

2. Although the permit issued by the Environment Agency was for a waste incineration plant on the basis that the main purpose of the facility was thermal treatment, the permit allowed the operator to apply to change the status of the plant from disposal to recovery. MW was required under the contract to achieve recovery status and this was only possible if the principal purpose of the plant was energy recovery rather than waste disposal.

3. The factual evidence indicated that the plant was not developed or intended to be operated in furtherance of any particular waste or energy policy.

4. The planning permission identified that the project was developed as both a waste management facility and as a plant for power generation of renewable energy.

5. The funding model was a strong indication that the intention of the owner was to operate the facility for profit as a power plant.

On the proper construction of the contract and the Construction Act the Court decided that the works fell into the exclusions and therefore did not constitute construction operations for the purposes of the Construction Act and there was no right to statutory adjudication. The adjudicator did not have jurisdiction to determine the disputes and the awards were unenforceable.

> Whilst the exclusions have been narrowly construed by the courts which has limited their application; it remains the case that in several cases the courts have reluctantly decided that the Construction Act did not apply.

Conclusion

The case of *Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd* has provided further guidance on the factors that the courts will consider when interpreting the Construction Act exclusions.

However, it is clear that the exclusions will continue to be problematic as the Construction Act does not adequately define the excluded industries. O'Farrell J stated: "*There is a powerful argument for the ambit of the adjudication provisions in the 1996 Act to be reconsidered, following more than twenty years of statutory adjudication and having regard to developments in construction-related industries.*"[4]

This follows the sentiments of Coulson LJ who commented five years earlier that the Construction Act is regarded as a blessing by the construction industry and it needs to be conferred on all those industries (such as power generation) which are currently exempt.[6]

The Government recently conducted a consultation on possible amendments to the Construction Act but unfortunately the consultation did not include any proposed changes to section 105 (2). For the time being, contracting parties whose work relates to the excluded industries such as power generation should expressly agree in their contracts whether the provisions of the Construction Act apply to avoid complex arguments around section 105 (2).

Hopefully there will be another opportunity for section 105 (2) to be deleted or amended in later revisions of the Construction Act.

The Bresco story: insolvent claimants and adjudication

The question of whether or not a company in liquidation could ever enforce an adjudicator's decision in its favour has been one which has much exercised the courts over the past two years. In June 2020, the Supreme Court set out the definitive view. **Jeremy Glover** takes up the story.

Bresco in the TCC and Court of Appeal

Lonsdale and Bresco entered into a subcontract for electrical installation works. Bresco left the site in December 2014. Both Bresco and Lonsdale alleged wrongful termination against the other. In late October 2017, Lonsdale initiated a claim against Bresco for the direct costs of completing the works said to have been caused by this termination. Bresco, on the other hand, maintained that it was Lonsdale who owed Bresco money. However, on 12 March 2015, Bresco went into liquidation. On 18 June 2018, Bresco initiated an adjudication against Lonsdale in relation to a dispute under a contract for electrical installation works. Lonsdale invited the adjudicator to resign on the basis that he had no jurisdiction as a result of Bresco having become insolvent and placed into liquidation. The consequence of this, Lonsdale said, was that the relationship between the parties was now governed by the Insolvency Rules. The adjudicator declined to resign.

Lonsdale therefore issued Part 8 proceedings which led to Mr Justice Fraser having to consider the following question:

> *Can a company in liquidation refer a dispute to adjudication when that dispute includes (in whole or in part) determination of a claim for further sums said to be due to the referring party from the responding party?*

The Judge considered that the sums claimed to be due from Lonsdale to Bresco, and the sums claimed from Bresco to be due to Lonsdale, fell within the definition of "mutual dealings" under the Insolvency (England and Wales) Rules 2016 and were therefore caught by the requirement under the Rule. He concluded that a dispute in relation to the taking of an Insolvency Rules' account is not "a dispute arising under the contract"; it is a dispute arising in the liquidation. This meant that the adjudicator here did not have jurisdiction to determine the dispute referred to him. The dispute referred to him included both money claims and cross-claims, and an analysis of how much was owed to Bresco.

The case moved to the Court of Appeal[1]. Coulson LJ said that he could see no reason why, purely as a matter of jurisdiction, a reference to adjudication should be treated any differently from a reference to arbitration. If the contractual right to refer the claim to arbitration is not extinguished by the liquidation, then the underlying claim must continue to exist. That a reference to adjudication may not result in a final, binding decision could not mean that the underlying claim was somehow extinguished.

> *Overly-technical disputes, such as 'smash and grab' adjudications will rarely be susceptible to enforcement by way of summary judgment by a company in liquidation".*

However, there was a second issue: what is the utility (if any) to be derived from the adjudicator's theoretical jurisdiction, when the claiming company is in insolvent liquidation and the responding party has a cross-claim? Coulson LJ referred to the: *"basic incompatibility between adjudication and the insolvency regime. Adjudication is a method of obtaining an improved cash flow quickly and cheaply; the insolvency regime is 'an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors'."* Reviewing the existing authorities, the Judge noted that a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. Judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there was a cross-claim, would only be granted in an "exceptional" case:

> *"a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore 'an exercise in futility'".*

Accordingly, although LJ Coulson considered that it was wrong to say that the adjudicator had no jurisdiction to consider this claim, he agreed that Lonsdale were entitled to an injunction to prevent the adjudication continuing. In other words, whilst in theory it is possible for companies in liquidation to start an adjudication, it may well be the case that there will be good grounds to obtain an injunction to restrain or stop that adjudication.

Bresco in the Supreme Court

Lord Briggs' judgment[2] is important for a number of reasons. First, it is a significant endorsement by the Supreme Court of the value of adjudication. Lord Briggs noted the

1. [2019] EWCA Civ 27
2. [2020] UKSC 25
3. [2019] EWHC 2651 (TCC),
4. [2020] EWHC 796 (TCC),
5. [2020] EWHC 2451 (TCC).
6. Case No: G20CL072.

"chorus of observations, from experienced TCC judges and textbook writers" to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final. He also confirmed that adjudication has:

> *"as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication".*

These comments perhaps help to explain why the Supreme Court allowed the appeal by Bresco and decided that there is no incompatibility between the statutory adjudication and insolvency regimes. As a result of this judgment liquidators, both in this case and generally, will, subject to certain important qualifications, be able to pursue claims through adjudication. That said, whilst the Supreme Court held that adjudicators would have jurisdiction to consider disputes referred by insolvent companies, it also made clear that the TCC would continue to have discretion to consider whether or not to enforce the adjudicator's decision. Lord Briggs was clearly reaffirming the current position that:

> *"Where there remains a real risk that the summary enforcement of an adjudication will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment."*

In adopting this view, the Supreme Court took a similar position to two recent judgments, *Meadowside Building Developments Ltd v 12-18 Hill Street Management Co Ltd*[3] and *Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd,*[4] where the TCC seemed to accept that adjudications brought by insolvent companies could potentially proceed subject to proper security being provided to the potential responding party. Astec obtained funding from a boutique investment fund, which focused on construction insolvencies and had legal expenses and after the event insurance. Even so, the court would only allow the adjudications to proceed if adequate security was given in respect of the decision amount and any potential adverse costs orders (including enforcement and any subsequent action to bring about a final resolution of the dispute). This may well be the future way forward, as Lord Briggs also noted that in many cases the liquidator might not seek to summarily enforce the decision or alternatively might offer appropriate undertakings in terms of costs or to ring-fence any enforcement proceeds.

The *Wimbledon v Vago* principles too remain in place, which mean that adjudication decisions obtained by insolvent companies will still be vulnerable to applications for a stay. The key to how this all plays out was going to be the TCC as the court inevitably faces a temporary increase in enforcement challenges in this type of adjudication. And the first case came in October 2020.

> It is not the case that no company in liquidation could ever enforce an adjudicator's decision in its favour. Today, it depends on the nature of the security offered by the liquidators.

The first post-Bresco case

The case of *John Doyle Construction Ltd v Erith Contractors Ltd*[5] had actually been adjourned to be heard after that decision was handed down. JDC, who had been in liquidation since June 2013, made a claim for the summary enforcement of an adjudicator's decision. The claim was for sums JDC claimed to be due on its Final Account for hard landscaping works before the 2012 Olympic Games. (And, it should be noted, the Judge questioned whether the streamlined, fast-track TCC procedure for enforcement of decisions was designed to deal with issues that arise where decisions are, like this one, years, not months, old.) JDC commenced the adjudication in January 2018, claiming approximately £4 million, a sum the adjudicator reduced to £1.2 million.

In August 2016, the liquidators contacted Henderson Jones ("HJ") whose primary business was described as being to "purchase legal claims from insolvent companies". Mr Justice Fraser explained that following *Bresco*, the principles to be applied when considering summary enforcement in favour of a company in liquidation are:

- Whether the dispute is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.
- Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.
- Whether there are other defences available to the defendant that were not deployed in the adjudication.
- Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available. In Meadowside three mechanisms of security were considered: undertakings by the liquidators; a third party providing a guarantee or bond; and After the Event (ATE) insurance.
- Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

With particular regard to the first point, the Judge noted that small disputes, or tightly defined disputes which had been referred for tactical reasons, would not, if the referring party is in liquidation, be suitable. This would mean that:

"the type of overly-technical dispute concerned with services of notices within a particular number of days that are called 'smash and grab' adjudications would rarely if ever ... be susceptible to enforcement by way of summary judgment by a company in liquidation".

The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties. So where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment would potentially be available.

The mere fact that a responding party has a claim on another contract, or arising under other mutual dealings, against the party seeking to enforce its adjudication decision, was not itself sufficient to defeat enforcement. It would depend on the size of the claim. Here there was a small claim of £40k on another project. That was not enough. The "real battleground" here was whether there was a real risk that the summary enforcement of an adjudication decision would deprive the paying party of its right to have recourse to that claim as security for its cross-claim.

JDC sought to rely upon what was said to be a draft letter of credit from HJ's bankers, and an ATE policy. Mr Justice Fraser said that the primary concern, when considering whether there was a real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim, was recovery of the sum paid by way of satisfying the adjudicator's decision. A secondary concern was the costs incurred in winning the money back. Both of these concerns could, in theory at least, be met by appropriate safeguards.

Here, no undertakings at all were offered from the liquidators. No ring-fencing was available, so no security was offered by the liquidators in any respect. JDC relied upon security from HJ which was said to provide "reasonable assurances" to Erith that, should it successfully overturn the adjudicator's decision in later proceedings, JDC would be able to (i) repay the capital sum and (ii) meet any adverse costs orders.

> *"Where there remains a real risk that the summary enforcement of an adjudication will deprive the respondent of its right to have recourse to the company's claim as security for its cross-claim, then the court will be astute to refuse summary judgment."*

This security was said to be by way of letter of credit, and an ATE insurance policy. The former was to deal with recovery of the sum awarded in the adjudication; the latter was to deal with the litigation costs. Erith relied upon the agreements that JDC and the liquidators had with HJ under which HJ retained at least 55% of the sums recovered including any costs recovery. This prima facie would contravene Regulation 4 of the Damages Based Agreements Regulations 2013 and hence be unenforceable.

For the Judge, it was the quality of the security that was of central importance. Here, there was no letter of credit available. Instead there was "a so-called letter of *intent*" from HJ's bankers. This led to a number of difficulties. For example, the bank's letter required the whole judgment sum to be paid to HJ when about 45% of that belonged to the liquidator. There was no evidence of the bank's own detailed conditions for granting letters of credit, which HJ would have to satisfy. JDC were effectively accepting that no security was available but also saying that HJ would provide it. But HJ said it would only provide it if Erith paid over the money, and even then, all HJ could do was promise to apply for it.

This did not equate to any safeguard that sought to place Erith in a similar position to the one which it would be in were JDC solvent. The Judge then turned to the security said to be available in respect of Erith's costs. Here, the ATE cover available was not sufficient. Again, it would not place Erith in a similar position to that which it would occupy were JDC solvent.
The result of this was that the security available (or which was said to be potentially available, were the judgment sum to be paid to HJ) was insufficient and the summary enforcement application was refused.

Conclusion

Mr Justice Fraser, in the JDC case, stressed that this did not mean that no company in liquidation could ever enforce an adjudicator's decision in its favour. Liquidators may offer appropriate undertakings, such as to ring-fence any enforcement proceeds. These would be powerful points in a claimant's favour on an enforcement application. There were also a variety of different methods and models available to liquidators. Simply because one party to a construction contract is in liquidation, this does not entitle the other party to that contract to a windfall. The enforcement here fell on its own facts.

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Indeed, there was a second case in September 2020, this time in the London County Court. However, in *Styles & Wood (in administration) v GE CIF Trustees*[6], the facts were very different. S&W commenced an adjudication on 14 February 2020, but went into administration on 28 February 2020. The adjudicator awarded S&W some £700,000. Here, the administrators offered to ring-fence the adjudicator's award, and also offered an ATE policy as security for the potential arbitration costs. There was also no third-party funder. HHJ Partfitt granted summary enforcement and did not impose a stay. This was on the condition that the ATE policy was provided, and the sums to be paid over were ring-fenced as offered, with such ring-fencing to continue until the conclusion of any appeal process from the arbitrator's award.

Design life and meaning of building structure

It is a common occurrence in construction disputes for a party, generally the Employer, to allege that a building does not meet its intended design life. However, in reality, as **Jesse Way** discusses, it is not always easy to determine what the design life of a building (or a part of it) is intended to be.

In *Blackpool Borough Council v Volkerfitzpatrick Ltd & Ors* [2020] EWHC 1523 (TCC) the Court had to consider, amongst other things, the design life of components of the Starr Gate tram depot in Blackpool and which components formed part of the "building structure". The decision is lengthy so this article will only focus on these aspects of the decision.

Background

In 2009, the Blackpool Borough Council ("Blackpool") and Volkerfitzpatrick Limited ("Volker") entered into a contract by which Volker was to design and build a new tram depot at Starr Gate.

Volker completed construction of the tram depot in 2011 and it was brought into operation in 2012. However, Blackpool alleged that remedial works were required to the depot, said to cost in excess of £6 million. Specifically, Blackpool claimed that significant parts of the tram depot (a portal frame structure) did not meet their intended design life of 50 years and were not appropriate for the exposed coastal environment where the tram depot is located.

> *When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement.*

Blackpool claimed the following items required remedial works:

1. The galvanised steel cold formed components connecting the wall and roof sections to the portal frame, namely the purlins, the cladding rails and the connecting brackets (items 1–3 of the Scott schedule).
2. The galvanised steel internal components of the roof, namely rails, clips and spacers (item 4 of the Scott schedule).
3. The wall cladding panels to the north, east and south elevations (items 5–6 of the Scott schedule).
4. The soffit panels to the underside of the roof overhangs on the north, east and part south elevations (item 7 of the Scott schedule).
5. The decorative wave-form cladding panels affixed to the wall cladding panels to the east and part north and south elevations (item 8 of the Scott schedule).
6. The tram access doors, glazed side panels and supports and operating mechanisms in the north elevation (items 9–10 of the Scott schedule).
7. Other general defects to the depot building (items 11–80 of the Scott schedule).

Volker defended, claiming that the design life was either 25 years or 20 years (depending upon the element in question) and denying that the elements did not meet their design life or were unsuitable.

The Arguments: Design Life and Building Structure

Blackpool's case was that the contractual design life for the components of the tram depot was 50 years or, alternatively, 25 years. A key document relied upon by Blackpool was the Functional Procurement Specification (a contract document). This was because the Works Information provided that the design life should be 20 years except where specified otherwise in the Functional Procurement Specification (which required the building structure to have a 50-year design life).

Clause 3.3.1 of the Functional Procurement Specification entitled *"design requirements"* provided, under "(iii*) Design Life", that "[t] he design life of the building structure shall be a minimum of 50 years [142]"*. In relying upon this provision, Blackpool argued that the Functional Procurement Specification took priority over the contractor's Works Information in the event of any inconsistency.

Building structure was not defined in the contract; however, Blackpool's position was that all components the subject of the case formed part of the building structure. Blackpool argued:

"...in the case of a portal frame structure the building structure comprises three essential elements, namely the primary steel structure, the secondary steel structure and the external walls and roof, so that all are within the definition ... (a) the term building structure naturally includes all load bearing or load transmitting elements of the depot building; (b) the cold formed

1. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [200]
2. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [192]
3. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [202]
4. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [203]
5. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [215]
6. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [225]
7. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [238]
8. Blackpool Borough Council v Volkerfitzpatrick Limited [2020] EWHC 1523 (TCC) at [13]

components and the roof components are secondary structural elements within the building; (c) the wall cladding panels and cantilever soffits form part of the walls and the roof and, thus, form part of the building structure because: (i) as such, they are part of the overall structure of the building; and (ii) the walls and the roof transmit wind and other loads which bear on them as external structures."[1]

Volker's position was that the contractual design life of the wall cladding panels was 25 years and the contractual design life for the cold formed steel components, roof steel components and other components was 20 years (e.g. as per the default position in the Works Information). In support of its 25-year design life contention Volker relied upon item 1.9 of the RPS design log (part of the contractor's Works Information).

The RPS design log was a contract document entitled "*RPS technical design log tender development architecture civil & structure*". Its purpose was to "*optimise and integrate structural, civil and architectural solutions [and] clarify technical tender design assumptions and intent*". Item 1.9 of the RPS design log was entitled "*minimum design life*". The stated reason in the RPS design log for this item was "*to clarify assumptions and intent*". Item 1.9 provided:

"Structural frame and rail support structures = 50 years

** coating life to first maintenance o 20 years*

Substructure and foundation = 50 years

External shell = 25 years

Internal drainage = 50 years

Floor finishes within offices = 10 years

Floor paint within workshop / maintenance / stabling areas = 5 years."[2]

> There was a lack of clarity in the contractual documents as to what was included in the building structure. This helped to inform the Court's view that there was no inconsistency between the design log and the employer's Works Information.

As to the meaning of building structure Volker argued that because there was no express definition in the contract, building structure meant the primary structural frame as made from hot rolled steel (the columns, rafters and cross-bracing) which excluded:

"…(a) the cold formed components (on the basis that their only function is to connect the wall cladding panels and roof structure to the structural frame, so that they are not load bearing (as opposed to load transmitting) structures); (b) the wall cladding panels and everything forming part of the roof structure (on the basis that neither the walls nor the roof have any structural function)."[3]

Volker argued that if there was any ambiguity, the RPS design log responded in its favour because it was not inconsistent with the terms of the employer's Works Information or the Functional Procurement Specification (which Blackpool relied on).

The Decision

The Court adopted the usual principles of contractual construction in determining the design life issue stating:

"It is common ground that well-established principles of contract construction govern the approach which should be taken to answering this question. These, as recently and conveniently summarised by O'Farrell J in Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC) at [221], are as follows:

'When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It does so, having regard to the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

(i) the natural and ordinary meaning of the clause;

(ii) any other relevant provisions of the contract;

(iii) the overall purpose of the clause and the contract;

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and

(v) commercial common sense; but

(vi) disregarding subjective evidence of any party's intentions.

See: Arnold v Britton [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; Wood v Capita Insurance Services Ltd [2017] UKSC 24 per Lord Hodge at paras. [8] to [15].'"[4]

In the context of traditional brick-walled slate roofed structures the Court said the meaning of building structure was reasonably clear. However, it was not so clear in the case of modern structures such as the tram depot. The ordinary meaning could not answer the question and nor could reference to any established legal precedent. The Court considered the evidence of structural engineers, references to definitions of structure in various standards and specifications, legal textbooks, and the contract documents, but did not consider any of them to be decisive. Furthermore, the Court did not consider that "*building structure*" should be taken to mean *"building"* because it would require each and every part of the building to have a 50-year design life which was not intended by the inclusion of the word "structure" in the Functional Procurement Specification.

The Court ultimately agreed with Volker as to what formed part of the building structure stating:

"In my view the defendant is right to say that item 1.9 of the RPS design log provides the clearest guidance as to what is and what is not included with the definition of the building structure for this particular purpose. It is headed 'minimum design life'. It draws a clear distinction between the required design life of the 'structural frame' and the 'external shell', in the context of also making clear what is understood as being required as regards other items such as the substructure, the foundations and the floor finishes. It is information which one would expect a structural designer tasked with the design of a building such as the tram depot to produce."[5]

The Court's view was that "*external shell*" as used in the RPS design log included the wall cladding panels and the external aluminium roof trays. The Court said if they did not, the words "*external shell*" would not have any sensible meaning (which could not be correct). Furthermore, the Court was satisfied that each and every separate component forming part of the roof formed part of the external shell (on a sensible reading of item 1.9). Thus, they had a 25-year design life.

The conflict raised by Blackpool (i.e. the 50-year design life of the building structure against the 25-year design life of the external shell) assumed that the building structure included the external shell. The Court did not agree with this because there was a lack of clarity in other contractual documents as to what was included in the building structure. Accordingly, the Court held that no inconsistency arose between the RPS design log and the employer's Works Information or the Functional Procurement Specification. Furthermore, because the RPS design log was a contractual document it could not be ignored (Blackpool had said it was irrelevant). The Court was therefore satisfied that item 1.9 of the RPS design log should be given contractual effect.

> The Court did not consider that "*building structure*" should be taken to mean *"building"* because it would require each and every part of the building to have a 50-year design life.

The Court determined that the purlins, cladding rails and connecting brackets (i.e. the steel cold formed components) were not part of the "*structural frame*" (which was to have a 50-year design life) in item 1.9 of the RPS design log. In part, this was because they:

"...(a) would not be needed if there was no separate wall cladding or roof structure, since their only purpose is to connect the latter to the primary steel structure, so that there would be no obvious need to specify them as having a 50-year design life when the structures they are provided to support only have a 25-year design life; (b) are not part of the primary steel structure; and (c) are formed of cold formed rather than hot rolled steel".[6]

The Court also said it was plain from other sections of the RPS design log that the purlins and cladding rails were not regarded as structural steel as they were not specified as having the same minimum galvanised coating as the primary steel structures. Accordingly, they were not to be taken as being part of the *"structural frame"* in item 1.9. As such, the Court held that the design life for the cold formed components was 25 years.

The Court was also satisfied that:

1. The cantilever roof soffit panels and the wave-form cladding panels formed part of the external shell and were subject to the 25-year design life requirement.
2. The tram doors and supports and side panels had a design life of 20 years (as they were not part of the structure and it was not necessary to determine whether or not they formed part of the external shell).
3. The 20-year design life applied to the remainder of the items in the Scott schedule which were separate items not forming part of the building structure.

The Court then considered what was required in relation to the design life of the coatings for the components. For double-coated external facing components such as the wall cladding panels, tram doors, and the other coated external components including the remaining Scott schedule items, the Court held that the coating should be required to have the same design life as the underlying structure. This was because it was (a) implausible that it was intended for Volker to design and supply coatings which were sacrificial and incapable of lasting for the required design life; (b) it was implausible that it was intended that Volker could design and supply external coatings which could fail during the design life period leaving large sections of the roof and walls blistering, corroding and delaminating over an extended area for an extended period; (c) early and repeat repairs to the coatings would breach the maintenance obligation; (d) practical difficulties of undertaking major repairs to or recoating coatings whilst leaving the underlying structure in situ.

However, the Court did not consider that the same arguments applied to the cold formed components because they were not sited externally and did not have the same aesthetic importance as the other items. The Court said there was no need to repair or replace the cold formed components unless they could not perform their function of supporting the roof and walls and that there were thousands of such components which were concealed or not visible. Accordingly, Judge Davies said:

"...I do not consider that it could have been intended that the cold formed components would need to have been designed or supplied so as to ensure that they would not need major repairs to or full replacement of the galvanised coating within their 25-year lifetime even where that had no actual impact on the structural integrity of the tram depot."[7]

After deciding what the contractually required design life of the various components was, the Court went on to consider whether the components had achieved the required design life. Ultimately, Blackpool was awarded approximately £1.1 million, which was substantially less than the £6 million sought. Judge Davies stated:

"The principal reasons why the claimant has failed to recover a more substantial award are because: (a) I am satisfied that the design life obligation period is either 20 or 25 years rather than 50 years; (b) I do not accept that claimant's case that the cold formed components are inadequate for their design life or other unsuitable (nor in any event that they need replacement); (c) in a number of cases I am satisfied that limited replacement or repair rather than full replacement is required."[8]

Conclusion

It will not always be easy to determine the design life of complex modern structures or parts of them. In such cases, Courts will adopt the usual principles of contractual interpretation which, given the many documents normally included in construction contracts, could result in unexpected outcomes. The best way to head off such a risk, is to ensure that the contract is drafted appropriately from the start and ensure that key terms are defined or set out in appropriate detail so that there can be little argument down the track.

Termination: managing the way out of a contract

Whenever a party is considering termination, care must be taken to ensure that every step is implemented correctly. This is particularly the case in light of the new Corporate Insolvency and Governance Act 2020.

Karen Gidwani and **Lucinda Robinson** provide practical guidance on the issues you need to consider, whether the termination is at common law or under the contract.

Introduction

Typically termination clauses sit at the back of contracts. Perhaps because they spell the end of the project's story. Perhaps because termination is frightening, so it is a subject best hidden away. Certainly, a proposed termination is often met with a gasp of shock and rightly so, it is a dramatic step to take. Why is it so feared? Because it involves hard work and is expensive if it goes wrong. It is a nightmare! Or is it? Often the nightmare has already happened; the counter-party has become insolvent or has performed terribly. Termination can facilitate a way out of a bad situation and provide the best commercial outcome, but it must be implemented correctly. This article explains termination at common law and under a contract, practical steps to address if you plan to terminate and the implications of the Corporate Insolvency and Governance Act 2020.

> *Through CIGA, the Government has tried to give businesses facing financial difficulties some (what it calls) "breathing space" from creditors.*

Termination at common law

A breach of, or threat to breach, a fundamental term of the contract demonstrates an intention not to be bound by the contract's terms anymore. That gives the innocent party a choice. It can elect to carry on with the contract and claim damages. Alternatively, it can "accept" the repudiation, end the contract and claim damages. A straightforward concept, but one that poses a significant challenge.

If the party faced with a repudiatory breach elects to terminate, then it faces two significant risks. First, the purported termination will be wrongful and constitute a repudiatory breach in its own right, entitling the other party to terminate and claim damages, if the breach relied upon is not repudiatory. Second, if the innocent party affirms the contract then it will lose its right to terminate. In that event, a belated attempt to terminate will be a repudiatory breach. These risks must be considered as follows.

1. Ensuring the breach is "repudiatory".

   Unless the breach is so significant that it demonstrates a clear intention not to be bound by the terms of the contract, it will not justify termination. Repudiatory breaches include the contractor failing to start[1] or abandoning site[2] and the employer preventing the contractor from working by not giving possession[3] or instructing another contractor.[4] Not every breach will be sufficient. Delay is rarely a repudiatory breach by the contractor[5] and if payment is just late sometimes then that will not be a repudiatory breach by the employer.[6] It is always a question of fact and degree.

2. Acting quickly to terminate and avoiding any affirmation of the contract.

   The injured party does not have an unlimited time to decide whether to bring the contract to an end. It must act quickly or lose its right to terminate. Whilst considering its options it should not act in a way consistent with enforcing the contract, such as exercising a contractual right by calling a bond. Any such actions (such as issuing pay less notices) should be expressly "without prejudice" to the right to terminate and, additionally, all rights should be reserved pending a decision on termination.

If these challenges are overcome and the termination is effective, the parties must work out what happens next with regard to payments, securing the site, obtaining documents from the counter-party and so forth. The contract may not provide a map for navigating fallout from a common law termination.

Contractual terminations have an advantage because they tend to prescribe more, and more certain, grounds for termination and usually do clarify what happens next.

Termination governed by the contract

Termination often takes place where circumstances arise that change the commercial landscape for one or both of the parties, to the extent that it changes

1. Gold Group Properties v BDW Trading [2010] EWHC 1632 (TCC).
2. Galway City Council v Samuel Kingston Construction [2010] 3 IR 95.
3. Vivergo Fuels v Redhall Engineering Solutions [2013] EWHC 4030 (TCC).
4. Sweatfield v Hathaway Roofing (1997) CILL 1235.
5. J M Hill & Sons Limited v Camden LBC (1980) 18 BLR 31.
6. Alan Auld Associates Ltd v Rick Pollard Associates [2008] EWCA Civ 655.
7. [2019] EWCA Civ 230.

what they originally bargained for. These circumstances include issues such as insolvency, serious failure to perform services or continued failure to pay.

Most contracts, and indeed most standard forms, contain contractual provisions relating to termination. There are two main benefits to this. First, at the outset when negotiating the contract, the parties can identify risk which will alter the commercial position so fundamentally that they require a right to terminate. Secondly, when operating the termination clause, the consequences of the termination (and the type of termination) will be specified, giving parties more certainty as to the commercial and practical position after termination.

There are generally two types of termination provision: clauses that allow for termination for convenience or "at will" and clauses that allow for termination where there has been default on the part of one of the parties. In the default situation there is often a further subdivision: defaults that allow immediate termination, for example the reaching of a long stop date for delay, and defaults where notice of the default is given and the opportunity is provided for the default to be cured.

A circumstance that is generally included in the list of "defaults" in contract termination clauses is insolvency. There is no common law right to terminate in the event of insolvency but it counts as a significant commercial risk. Contractual termination clauses allow the parties to address this risk.

> On termination (whether under a contract or at common law) the obligation to perform the main contractual duties ceases. But whilst the parties are no longer bound to provide services or make payment, some provisions may survive.

Typically, the consequences of a termination for convenience and a termination for default will be different. For example, where an employer terminates for convenience you might have provision for the contractor to be paid its lost profit from the remainder of the contract. In a default situation this is unlikely to be the case.

Unless there are clear words to the contrary in the contract, the common law right to terminate continues to exist in parallel with the contractual right and it is open to a party to terminate on the basis of its contractual right or in the alternative at common law.

Contractual provisions are likely to allow for termination by either employer or contractor but the circumstances in which the right may be exercised will be different depending on who is exercising the right. It is not unusual for the contractor's right to terminate to be limited to insolvency or repeated failure to pay on the part of the employer, but for the employer's right to terminate to be referable to a much wider range of contractor defaults.

What to consider on termination

Termination should not be undertaken lightly. If you are considering termination then it is important to think through very carefully what needs to be done and the consequences of the termination, and whether in fact termination is the appropriate route on the facts of your particular case.

In the first instance, check the contractual provisions for termination. Identify what circumstances allow termination and ask: have they arisen? Are they likely to arise? What procedure is necessary to invoke termination?

Most termination clauses specify that notice of termination must be given. Again it is important to check the contractual provisions and ask: what sort of notice and in what form? You should check as to whether it is a two-stage process where notice of default must be given and a cure period allowed following which a further notice must be given, or whether one notice is enough. You should also check whether notice needs to be given to anyone else, for example lenders. Finally, check what the contract says in respect of the consequences of termination: what happens to the site, the plant, equipment and materials, what is the position on retention of title, can subcontracts be assigned, when and how does further payment occur?

With an understanding of the contractual framework and the entitlements and obligations of the parties you should then consider whether termination is the right course of action for your circumstances.

Particular considerations include:

- how termination will affect the commercial relationship with the other party;
- whether it is more profitable to continue with the contract;
- other remedies available, for example performance security such as a bond;
- whether the matters in contention can be resolved by negotiation or formal dispute resolution, including adjudication.

In summary, it is important not to rush into termination but to consider carefully all the surrounding circumstances and ramifications first.

Consequences of termination

The first important point to note is that on termination (whether under a contract or at common law) the obligation to perform the main contractual duties ceases. Therefore the parties are no longer bound to provide services or make payment.

However, it is always the case that some clauses of the contract will "survive" termination. Typically, these are clauses such as jurisdiction and dispute resolution. Where a contract sets out a scheme in relation to termination then often there will be a list of clauses set out which are said to survive termination.

In addition to clauses that survive, unless the contract expressly states otherwise, the parties will retain what are known as accrued rights. This is where a breach has occurred prior to termination and a right to damages has arisen. The wronged party retains its right to claim those damages regardless of the termination.

A question has recently arisen over the ability to view the right to be paid liquidated damages as an accrued right following termination of a contract. In the recent case of *Triple Point Technology Inc v PTT Public Company Limited,*[7] the Court of Appeal held that the employer was not entitled to the liquidated damages that had accrued to the point of termination but instead was entitled to general damages for delay. This decision is currently being appealed to the Supreme Court.

In a repudiatory breach situation, the wronged party will be entitled to damages for breach of contract. In the case of a contractor this will include loss of profit due to the lost contract, and in the case of an employer this will include the "extra over" costs to complete the works (that is, the amount it costs the employer to complete the works less the amount left in the contract price which would otherwise have been paid to the original contractor).

If a party terminates wrongfully then the other party may treat the contract as repudiated at common law. Alternatively, some contracts will specify the consequences that will arise as a result of wrongful termination. For example, the IChemE Red Book (5th edition) states that where an employer wrongfully terminates for contractor default then this is not to be treated as a repudiation and instead shall be considered to be the same as if the employer had terminated for convenience.

> Contractual terminations have an advantage because they tend to prescribe more, and more certain, grounds for termination and usually do clarify what happens next.

Corporate Insolvency and Governance Act 2020 ("CIGA")

CIGA came into effect in June this year as part of the Government's response to the COVID-19 crisis. The Government has tried to give businesses facing financial difficulties some (what it calls) "breathing space" from creditors. The idea being that this will help them trade through the difficult times or at least make a rescue more viable.

CIGA interferes significantly with contractual provisions that allow suppliers of goods and services to terminate on the basis of their customer's insolvency. These provisions are commonly included in contracts because, as stated above, you cannot terminate for insolvency at common law. They feature, for example, in the JCT 2016, NEC4 and FIDIC 2017 suites.

Section 14 of the Act introduces a new section 233B to the Insolvency Act 1986. This makes two important provisions:

1. If its customer becomes insolvent, a supplier cannot exercise a right to terminate that has arisen, but not been actioned, during the insolvency period.

2. The supplier cannot use contractual provisions to terminate on the grounds of its customer's insolvency. Any contractual provisions that allow them to do so will be inoperable.

In practice, this means that the main contractor cannot terminate the contract with its employer **because** the employer has gone into administration or insolvency. Nor can a subcontractor terminate its contract with an insolvent main contractor because of **insolvency**. Instead, the supply of goods or services should continue in line with the contract.

Conversely, the contractual rights of **the customer** to terminate if the supplier becomes insolvent remain intact. A word of caution here though. To terminate on the grounds of insolvency, the nature of the insolvency event being suffered has to fall within the contractual definition of insolvency. CIGA introduces a new insolvency procedure involving a moratorium, which may not be covered by the contractual definitions. Also, whilst a winding-up petition might provide grounds under some contracts, they are now temporarily banned by the Act, so that route cannot be relied upon.

From a supplier's perspective, this could pose a real challenge. Ultimately, the benefit of a contract to the supplying party is the right to be paid. The insolvency of its customer is going to impact on the likelihood of payment coming through. Not many contractors, subcontractors or suppliers are going to relish the prospect of incurring costs of labour, materials and everything else as they continue with their work, knowing that there is a good chance they will not recover their costs, let alone any profit. However, if they stop supply or leave site, then potential repurcussions could include:

1. paying damages for delay; or
2. giving the customer the opportunity to terminate for supplier default, or repudiatory breach, and to claim damages; and
3. falling foul of another new provision within CIGA, being that suppliers should not do "any other thing" on the grounds of their customer's insolvency.

What can suppliers do when faced with this dilemma? There are some options.

1. Act quickly. The contract might define insolvency more widely than the legislation does. If it includes early steps in a process that leads to what the contract defines as insolvency, then it might be possible to terminate before the insolvency as defined by CIGA occurs. An example might include the filing of a notice to appoint administrators.
2. Check if an exemption applies. Companies that meet two of the three criteria in section 15 of CIGA are considered small enough to be exempt and can rely on their contractual provisions. The criteria are (i) a turnover of under £10.2 million, (ii) net assets on the balance sheet of less than £5.1 million, and (iii) less than 50 employees.
3. Agree a termination with the insolvency practitioner. Termination is permissible if the insolvency practitioner agrees to it. Whether agreement is forthcoming will depend on the facts and circumstances, and the significance and cost of the supplies to the insolvent customer.
4. Application to the court on the basis of hardship. The supplier can apply to the court for permission to terminate on the basis that the continued supply will cause the supplier "hardship". This principle is not defined, there is no real guidance as to what it means and there is no case law. However, the threshold is likely to be quite high. A risk of non-payment alone will not be sufficient as that is inevitable if insolvency occurs. The values at stake will need to justify the time and cost of an application.
5. Rely on another ground for termination. Suppliers could rely on an alternative ground for termination provided that it arises post-insolvency. For example, the insolvency may lead to a default, which will provide a right to terminate.
6. Reduce costs. The supplier could look at reducing the cost of what it supplies and also the volume it supplies to the minimum possible without incurring additional risk (such as delay damages). How far that is possible will depend on the individual situation.
7. Prepare for the future. Looking ahead to future contracts, suppliers should do their due diligence on their customers' financial strength, be wary of contracting with those who may be a risk and consider breaking works packages into small contracts so the risk per contract is smaller. When negotiating the contracts, it would be worth including more grounds for termination by the supplier and ensuring that the definition of insolvency is wide enough to include early stages of the various processes so termination is possible before the customer is officially insolvent and the right to terminate is lost.

It is important not to rush into termination but to consider carefully all the surrounding circumstances and ramifications first.

Conclusion

Whilst termination may be seen as a last resort, it is an important remedy to have. Those entering into contracts should ensure that their termination provisions provide sufficient grounds for termination (taking CIGA into account), spell out who has to do what in the event of termination and are clearly drafted.

Those seeking to terminate must be sure that they can prove the grounds they rely upon have arisen; understand and prepare themselves to implement the practical steps needed to secure the site, obtain documents and arrange for subcontracts to be assigned; and ensure their notices are valid and correct in content, form and delivery.

Saudi Arabia's legal System continues to modernise: the new Commercial Courts Law

James Cameron explains what you need to know about the new Commercial Courts Law enacted within the Kingdom of Saudi Arabia.

For a number of years now there has been a continuing trend of progressive modernisation of the legal system in the Kingdom of Saudi Arabia. In 2012, the Kingdom conducted an overhaul of its arbitration law, and in 2016 established the Saudi Centre for Commercial Arbitration. This year, we have seen a similar overhaul of the Kingdom's Commercial Court system.

The new regime represents a big step forward, and implements a number of new initiatives such as mandatory pre-action protocols, e-filing procedures, procedures for expedited performance orders and limitation periods in an effort to streamline and revitalise the Commercial Courts and relieve the burden of unmeritorious claims and tactical litigants.

The new Commercial Courts Law (the "CCL") was enacted under Royal Decree No. M/93 dated 15/08/1441H (8 April 2020) and came into effect on 16 June 2020. The CCL governs the procedures of the Commercial Courts and applies to all disputes that fall within their jurisdiction.

> Reforming the Commercial Courts will surely be welcomed as a big step forward in modernising the legal system and providing more efficient access to the courts for commercial parties.

The Commercial Courts' jurisdiction is broad, and includes disputes between traders arising out of matters related to their business, suits under commercial contracts where the claim exceeds SAR 1,000 (US$266), disputes between partners of a Mudarabah agreement[2] and claims/violations arising under the Companies Law, Bankruptcy Law, Intellectual Property Laws and other commercial laws.

The key features of the CCL are as follows:

1. **Limitation period introduced for commercial claims:** the CCL has introduced a limitation period of five years in relation to commercial claims.

   A party will therefore lose its right to bring a claim if it has not done so within five years from the date on which the cause of action arose (although there are exceptions, for example where the defendant acknowledges the cause of action or the plaintiff has some acceptable excuse for having not brought its claim within the limitation period).

2. **Mandatory alternative dispute resolution:** the CCL encourages the parties to explore alternatives such as reconciliation and mediation before resorting to the Commercial Courts, and in some instances makes mediation a prerequisite to being able to bring an action.

3. **Electronic filing and procedure:** the CCL has introduced e-filing procedures and made allowance for certain other procedural matters to be dealt with electronically.

4. **Recognised addresses for service:** the CCL identifies various categories of address that will be considered valid for the purpose of effecting service, including email addresses used in a party's submissions to the court, residential addresses of natural/legal persons, and in the case of foreigners, any address used by that person in the Kingdom.

   Parties' lawyers may also be authorised to accept service on behalf of their clients.

5. **Private sector can be engaged to assist with administration:** the CCL allows the Commercial Courts to utilise public sector services in the administration of its work, including by way of mediation/reconciliation, notifying claims, delivery of judgments, managing hearings and the provision of expert evidence.

6. **More case-management powers:** Commercial Court Judges now have a wider range of powers to manage cases in a more efficient manner, including imposing sanctions on litigants who fail to meet court deadlines.

7. **Time limit for jurisdictional challenges:** any objection to the jurisdiction of the Commercial Courts must be decided within 20 days of the date of the challenge, which is targeted squarely at reducing the impact of tactical jurisdictional challenges.

8. **Urgent relief may be granted:** a party seeking an urgent injunction or similar must have its application determined within three business days of the application being filed with the Commercial Court.

1. I provided a summary of these two developments and what they meant for arbitrating in the Kingdom in last year's Review.

2. An Islamic profit-sharing contract where one party contributes the capital and the other party contributes the effort.

This may be of particular interest to contractors operating in the Kingdom, where urgent injunctive relief is often necessary to protect a party's rights.

9. **Parties can choose applicable rules of evidence:** the CCL allows parties to agree specific evidential rules that will then be applied to their disputes.

   This may be a precursor to the Kingdom implementing its own detailed suite of evidential rules, but in the meantime, parties may agree that the evidential rules of, for example, a foreign country or the International Bar Association will apply to their dispute.

10. **Judgments on small claims cannot be appealed:** where a judgment is for an amount less than SAR 50,000 (US$13,330) it cannot be appealed. Judgments exceeding SAR 50,000 can be appealed within 30 days.

11. **Payment orders can be obtained quickly:** where a party has obtained a judgment in its favour, it can now apply to the Commercial Court for a payment order, which must be determined within 10 days from the date of submission. A payment order can then be enforced against the judgment debtor.

The Kingdom's "Vision 2030" is an ambitious plan to reduce Saudi Arabia's reliance on the oil industry and cement the Kingdom's place as an economic powerhouse and important hub in the GCC region. Reforming the Commercial Courts is seen as a key part of that vision, and will surely be welcomed as a big step forward in modernising the legal system and providing more efficient access to the courts for commercial parties.

> The new regime represents a big step forward, and implements a number of new initiatives such as mandatory pre-action protocols and e-filing procedures, in an effort to streamline and revitalise the Commercial Courts and relieve the burden of unmeritorious claims and tactical litigants.

We expect that international contractors will still prefer to include arbitration clauses in their agreements, but for local contractors these reforms could allow parties to seek resolution of claims in a more timely fashion and provide a more effective means of enforcing judgments.

Vision 2030: an update

With the announcement at the end of last year of its alliance with one of Saudi Arabia's leading law firms, Fenwick Elliott continues to grow in the Middle East. In this article, **James Mullen** looks at the current status of Saudi Arabia's "Vision 2030", a plan which comprises some of the most exciting and ambitious construction projects ever undertaken on the global stage.

In November 2019, Fenwick Elliott took a significant step in its continued growth in the Middle East when it announced its new alliance with one of Saudi Arabia's leading law firms, Hammad & Al-Mehdar.

There are exciting times ahead in Saudi Arabia when it comes to construction, with the Kingdom's "Vision 2030" comprising some of the largest and most ambitious plans for construction, infrastructure and energy projects ever undertaken on the global stage.

Announced in 2016, Vision 2030 is the vision of Saudi Arabia's Crown Prince Mohammed bin Salman and is an ambitious long-term plan to diversify Saudi Arabia's economy to make it less reliant on oil, to encourage foreign investment and to improve key sectors such as energy, technology and tourism.

> Despite the need to deal with the financial consequences of the global coronavirus pandemic and low price of oil issues, the Kingdom of Saudi Arabia and Crown Prince Mohammed bin Salman remain committed to moving forward with the Vision 2030 giga-projects, including Neom.

Vision 2030 includes several "giga-projects" such as Qiddiya, a vast sports and entertainment complex to be constructed outside Riyadh with the aim of being the world's largest entertainment city which will include sports facilities, a motor race track, an arena, a safari park and a theme park. It is currently expected to cost more than US$15bn.

Other giga-projects include tourism and hospitality developments around the Red Sea, including the construction of resorts, hotels, villas, retail, marinas and commercial airports for the region. However, the centre piece of Crown Prince Mohammed bin Salman's Vision 2030, and perhaps the most ambitious of the giga-projects, is Neom which is being billed as a smart city for the future.

The Neom project was first announced in 2017 and takes its name from a combination of the Greek word for "new" and the Arabic term for "future".

Neom will be built in the Tabuk region of north-western Saudi Arabia on the Red Sea. It is intended to be 33 times the size of New York City and cover an area the size of Belgium, occupying a total of 26,500 km2 along 468km of waterfront. It will comprise various hyperconnected, cognitive towns and cities, ports, research centres, sports and entertainment centres and tourist destinations.

It has been reported that some of the more outlandish ideas for Neom include things such as a huge artificial moon, glow in the dark beaches, flying drone-powered taxis, robotic butlers to clean the homes of residents and a Jurassic Park-style attraction with animatronic lizards.

The intention is that Neom will be an international city. The Neom website says that due to its location, 40% of the world's population will be able to reach it in less than four hours. The plan is for there to be more than one million people, both Saudis and expatriates, living and working in Neom by 2030.

Perhaps to make them more appealing to foreigner investors, it has been said that the new economic cities that are to be constructed as part of Vision 2030, such as Neom, will be subject to their own judicial and regulatory systems. Precisely how economic cities such as Neom will be regulated remains to be seen but it seems that foreign investors will have input in the drafting of Neom's regulations and legislation.

The Neom website says that "NEOM will provide a regulatory framework that is conducive to investors' participation through their inclusion in the drafting of regulation and legislation" and that Neom will be "supported by a progressive law compatible with international norms and conducive to economic growth".

As one would expect, the Neom project is not going to be cheap. Saudi Arabia's Public Investment Fund (PIF) will be investing US$500bn into the Neom project although it is hoped that it will also attract foreign investment (which is part of Vision 2030's aim). The Neom website says that "while Neom is being driven and initially funded by Saudi Arabia, it is an international project that will be led, populated and funded by people from all over the world".

Therefore, Neom should represent potential opportunities for international construction companies.

Understandably, it has been questioned recently whether projects such as Neom are still viable in the current economic climate, with Saudi Arabia dealing with the financial consequences of the global coronavirus pandemic and low price of oil which remains the Kingdom's primary export.

Not withstanding these issues, it appears that Saudi Arabia and Crown Prince Mohammed bin Salman remain committed to moving forward with the Vision 2030 giga-projects, including Neom.

In July 2020, the Qiddiya project announced that it had issued a contract worth approximately US$187m to Saudi firm Shibh Al Jazira Contracting Company (SAJCO) for the construction of major stormwater drainage, roads and bridges.

Around the same time, the Red Sea development announced that it had awarded a contract to a joint venture between Saudi contractors Nesma & Partners Contracting Co. Ltd and Almabani General Contractors for the construction of airside infrastructure works at an international airport being designed by Fosters + Partners which is intended to serve one million tourists per year by 2030.

On Neom it was announced in August 2020 that global US construction company Bechtel had been hired for executive project management work for the development of Neom's primary base infrastructure. Bechtel's website says that the company has been selected to "oversee and create resource-efficient utilities and a highly advanced transport system to connect Neom's cognitive cities".

Other contracts recently issued for Neom include one with Saudi telecom giant, STC, for the establishment of a 5G network for the city and a US$5bn partnership with US-based Air Products and Saudi Acwa Power to develop the world's largest green hydrogen and green ammonia plant which it is hoped will be operational in 2025.

> Vision 2030 is the vision of Saudi Arabia's Crown Prince Mohammed bin Salman and is an ambitious long-term plan to diversify Saudi Arabia's economy to make it less reliant on oil, to encourage foreign investment and to improve key sectors such as energy, technology and tourism.

So for now it seems that Saudi Arabia is continuing with its Vision 2030 projects, notwithstanding the problems that it, like most countries, has experienced over the past year. It will be interesting to see the progress that has been made on the giga-projects, including Neom, Qiddiya and the Red Sea developments, this time next year.

The LCIA Arbitration Rules 2020: tweaks for a modern age

The updated LCIA Arbitration Rules came into force on 1 October 2020 and apply to LCIA arbitrations commenced after this date. The stated aim of the updates is to make the arbitration process more streamlined and clearer for both arbitrators and parties.[1] **Sana Mahmud** explains what you need to know.

Introduction

Whilst the 2020 rules do not depart significantly from the LCIA's last update in 2014, there are some notable changes of which users and practitioners should be aware. Some are likely to assist parties in the conduct of their disputes during the current COVID-19 pandemic; for example, the new rules emphasise the use of technology in the conduct of proceedings and expressly permit the use of virtual hearings. Other amendments include the codification of specific case management powers which provide the Tribunal with broad discretion to expedite proceedings, including the power to make an early determination where appropriate. The new rules also broaden the power of the LCIA Court and Tribunal to order consolidation and concurrent conduct of arbitrations.

> The changes represent a significant step towards ensuring that the LCIA's Rules meet the demands of current best practice and incorporate the use of available communication technology.

Virtual hearings and electronic communications

Under the new rules, all communications relating to the arbitration must be made electronically, including the filing of the Request and Response.[2] References to personal delivery, registered post and courier service have been deleted. Parties are no longer permitted to submit communications by any other means without the prior written approval of the LCIA Court and/or Tribunal, making electronic communication the default method.

There is also an express provision permitting arbitrators to sign an award electronically unless otherwise agreed by the parties, or otherwise directed by the Tribunal or LCIA Court.[3] Any award may also be signed electronically and/or in counterparts and assembled into a single instrument. Additionally, specific reference is made in the new rules to the use of technology that enables the use of virtual hearings.[4] Whilst the Tribunal must organise the conduct of any hearing in advance and in consultation with the parties, Article 19.2 makes clear that it may take place virtually "*by conference call, videoconference or using other communications technology*".

The purpose of these changes is to improve efficiency and reduce costs. The LCIA's emphasis on electronic communication reflects what is already standard practice in most arbitral jurisdictions. The inclusion of an explicit reference to the use of virtual hearings is a welcome addition in current circumstances where in-person hearings are not always possible. The amendments provide the parties with a degree of needed clarity on an issue that has been the subject of recent uncertainty and debate due to the impact of COVID-19.

Prior to the pandemic, procedural hearings were commonly conducted via telephone conference because typically everyone would be in different geographical locations. The use of remote hearings is therefore not a new concept; however, it remains to be seen whether hearings on merit that involve the presentation of substantial witness and expert evidence continue apace once COVID-19 restrictions are eased. The LCIA's approach suggests that they are of the view that virtual hearings will become increasingly common.

Expedited proceedings

The new rules seek to clarify the Tribunal's discretion in relation to case management powers. Under Article 14, the Tribunal retains the *"widest discretion"* to discharge its general duties; however, the new rules define this discretion to include the power to:

- limit the length, content and number of written submissions;
- limit the written and oral witness evidence;
- employ technology to enhance efficiency;
- decide the stage of the arbitration at which any issue(s) will be determined and in what order;
- dispense with a hearing; and
- exercise its powers of Early Determination.[6]

In relation to the last point, the Tribunal is given an express power to make an "Early Determination" under Article 22.1. On the application of a party, this provision allows the Tribunal "*to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")*". The new rules therefore make clear that a Tribunal has the authority to summarily dismiss claims that lack merit. Other institutional rules such as those of SIAC,[7] SCC[8] and HKIAC[9] already contained similar provisions. The ICC had also issued specific guidance[10] which confirmed that

1. https://www.lcia.org/lcia-rules-update-2020.aspx
2. LCIA Rules 2020, Article 4.
3. LCIA Rules 2020, Article 26.2.
4. LCIA Rules 2020, Articles 9.7, 14.3 and 19.2.
5. LCIA Rules 2020, Article 14.2.
6. LCIA Rules 2020, Article 14.6.
7. SIAC Rules 2016, Rule 29.
8. SCC Rules 2017, Article 39.
9. HKIAC Rules 2018, Article 43.
10. Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, Section VI C.
11. LCIA Rules 2014, Article 15.10.
12. LCIA Rules 2020, Article 15.10.
13. A v B [2017] EWHC 3417 (Comm) (21 December 2007).
14. LCIA Rules 2014, Article 22(ix).
15. LCIA Rules 2014, Article 22(x).
16. SIAC Rules 2016, Rule 8.1c.
17. SCC Rules 2017, Article 15(1)(iii).
18. LCIA Notes for Arbitrators, Section 8.
19. LCIA Rules 2020, Articles 14.9 and 14.10.
20. LCIA Rules 2020, Article 14.8.
21. LCIA Rules 2020, Articles 30.4 and 30.5(ii).
22. LCIA Rules 2020, Article 30.5(i).
23. LCIA Rules 2020, Article 30.6.
24. LCIA Rules 2020, Article 24.9.

the Tribunal has the power to dismiss unmeritorious claims under the broad scope of Article 22 of its 2017 rules.
Whilst it is arguable that these amendments do not confer any real new powers, the fact that they are now expressly codified may give otherwise reluctant arbitrators the assurance needed to deploy them, which should in turn reduce time and costs for parties.

There is one new change under Article 15. Under the LCIA Rules 2014, the Tribunal was obliged to issue an award "*as soon as reasonably possible*" after the last written or oral submission.[11] Under the new rules, the Tribunal must now endeavour to issue its final award no later than three months after the last written or oral submission.[12] It remains to be seen whether this amendment will have the desired effect in relation to large and/or complex disputes.

Composite requests

The addition of a new Article 1.2 allows a Claimant "*to commence more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements)*" and serve a composite request in respect of all such arbitrations. The purpose of this provision is to permit a party to commence a single arbitration in relation to disputes under multiple contracts.

In A v B [2017] EWHC 3417,[13] it was held that the LCIA Rules 2014 did not allow a party to commence one arbitration in respect of related claims under two separate contracts. The effect of this judgment was that a Claimant would need to issue multiple Requests and seek to have them consolidated under the LCIA Rules 2014. The inclusion of the new provision at Article 1.2 addresses this previous limitation. Under Article 2.2, the Respondent is permitted to file a composite Response. However, multiple arbitrations commenced under this provision are not automatically consolidated. The Claimant must include a request for consolidation with its composite Request, which will be determined by the Tribunal or the LCIA Court.

Consolidation and concurrent arbitrations

Following on from the above, the new rules also contain updated provisions relating to the consolidation and concurrent conduct of arbitrations under Article 22A. The LCIA Rules 2014 did contain provisions allowing the consolidation of an arbitration with one or more other arbitrations conditional on approval by the LCIA Court, and provided that all parties to the arbitrations agreed to the consolidation in writing.[14] Alternatively, the Tribunal could order consolidation with one or more arbitrations that were subject to the LCIA Rules and had been commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal had yet been formed for such other arbitration(s) or, if already formed, that such tribunal(s) was (were) composed of the same arbitrators. If no Tribunal existed at the consolidation stage, the LCIA retained those powers.[15]

Article 22.7(ii) of the new rules broadens the circumstances in which consolidation is permitted, and states as follows:

> *"The Arbitral Tribunal shall have the power to order with the approval of the LCIA Court, upon the application of any party, after giving all affected parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: …*
>
> *(ii) the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and* **either between the same disputing parties or arising out of the same transaction or series of related transactions***, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such arbitral tribunal(s) is(are) composed of the same arbitrators".* [Emphasis added]

The inclusion of proceedings arising out of the same transaction or series of related transactions (even if the disputing parties are different), is a new addition to the scope of the Tribunal's powers and reflects similar provisions already adopted in the SIAC[16] and SCC[17] Rules.

Article 22.7(iii) gives the Tribunal the power to order that two or more such arbitrations are conducted concurrently where the same Tribunal is constituted in respect of each arbitration.

These new provisions align with the LCIA's stated aim of streamlining the arbitration process, being designed to reduce costs that parties would otherwise have to incur in conducting multiple and/or concurrent arbitrations. Broadening the scope of the consolidation provisions also reduces the risk of parties having to deal with inconsistent awards. This is a common issue in relation to disputes arising out of different interrelated contracts on large construction projects and the LCIA's amendments in this regard provide welcome mitigation against that risk.

Other notable amendments

The new rules also include provisions governing the appointment and role of tribunal secretaries in Article 14A. These provisions are not wholly new; rather they arise out of detailed guidance for arbitrators previously issued by the LCIA in 2017.[18] Under these provisions, the tribunal secretary and the tasks they are to carry out must be approved by all parties and they must disclose any potential or actual conflicts of interest.[19] The Tribunal is not permitted to delegate its decision-making function to a tribunal secretary under any circumstances and must retain responsibility to ensure all tasks are performed to the standard required by the LCIA Rules.[20]

> It remains to be seen whether virtual hearings on merit that involve the presentation of substantial witness and expert evidence continue apace once COVID-19 restrictions are eased. The LCIA's approach suggests that they are of the view that they will become increasingly common.

Given the focus of the new rules on electronic communications and data, there are new provisions included under Article 30A relating to data protection that allow the LCIA to process personal data in accordance with applicable data protection legislation.[21] The Tribunal is also given powers to adopt specific information security measures to protect the physical and electronic information shared in the arbitration,[22] as well as to issue directions addressing information security or data protection. [23]

Article 24A contains new provisions dealing with compliance regulations in relation to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering, and economic or trade sanctions.[24] Lastly, the maximum hourly rate that can be charged by arbitrators has increased from £450 to £500 in the latest Schedule of Costs.

Conclusion

The new rules should be welcomed as they appear to go some way in achieving the LCIA's stated aim of making the arbitration process more streamlined. The changes described above are not a radical departure from the LCIA's 2014 Rules. They do, however, represent a significant step towards ensuring that the LCIA's Rules meet the demands of current best practice and incorporate the use of available communication technology, whilst at the same time retaining the necessary flexibility required by parties that choose to resolve their disputes through arbitration.

International arbitration: governing law

Following a fire in a power plant in Russia, Chubb Russia, the insurers of the plant's owners, brought proceedings in Russia against Enka, a subcontractor, who they said was responsible for the fire. Enka began proceedings of their own in England saying that the dispute was subject to an arbitration agreement under the contract to refer disputes to ICC arbitration with a London seat and seeking an order that Chubb Russia discontinue the Russian proceedings (otherwise known as an anti-suit injunction).

The dispute quickly went through the Commercial Court and Court of Appeal, then on 9 October 2020, the UK Supreme Court gave their keenly anticipated judgment. As **Jeremy Glover** discusses, the court had to consider issues relating to scope of the arbitration agreement, including the choice of law and seat.

At first instance, the High Court refused Enka's application. In doing so, it considered the correct interpretation of arbitration clauses in relation to the choice of law and choice of seat. Specifically, the court said that the appropriate forum to determine the scope of the arbitration agreement was the Russian court. On appeal, the Court of Appeal reversed that decision and held that the refusal to grant an anti-suit injunction was wrong in principle. The English court, as the seat of the arbitration, was necessarily an appropriate court to grant an anti-suit injunction.

Unless there had been an express choice of the law that was to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice. Here, there was no express choice of law and the arbitration agreement was therefore governed by English law. Chubb Russia appealed and on 9 October 2020, the Supreme Court by a majority dismissed that appeal.

> Where the parties have not specified the law applicable to the arbitration agreement, but they have chosen the law to govern the contract containing the arbitration agreement, it is this choice which will generally apply to the arbitration agreement.

The central issue was which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration. Does the law that governs a contract also govern an arbitration agreement which, though separable, forms part of that contract, or should the law of the chosen seat of the arbitration also govern the arbitration agreement?

Lords Hamblen and Leggatt introduced their majority decision by noting that where an international commercial contract contains an agreement to resolve disputes by arbitration, potentially at least three legal systems may be engaged if a dispute occurs: (i) the law governing the substance of the dispute (usually the law applicable to the contract from which the dispute has arisen); (ii) the law governing the agreement to arbitrate; and (iii) the law governing the arbitration process, which is generally the law of the "seat" of the arbitration, which is usually the place chosen for the arbitration in the arbitration agreement.

Issues may arise because these two systems of law may differ from each other and, indeed, may also differ from the law that governs the validity and scope of the arbitration agreement.They continued that as a matter of principle and authority there were strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract. They said this for a number of reasons:

- The approach provides a degree of certainty. The parties can be assured that an agreement as to the governing law will generally be an effective choice in relation to all of their contractual rights and obligations and to all of their disputes.
- It achieves consistency as the same system of law governs all the parties' rights and obligations.
- It avoids complexities and uncertainties. Where any relationship is subject to two systems of law, problems can arise. The court gave as an example multi-tier dispute resolution clauses. If the arbitration agreement is governed by a different system of law from the main body of the contract, provisions that require negotiation and/or expert determination in advance of arbitration may be governed by the law of the contract, not that of the arbitration agreement.
- It avoids artificiality. The principle that an arbitration agreement is separable is "one which is likely to be much better known to arbitration lawyers than to commercial parties. For them a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement".

One thing of interest here was that the construction contract did not contain a choice of governing law clause. There were 100 pages of primary text and 400 pages of appendices, but there was no provision which said that the contract shall be governed by or interpreted in accordance with a specified system of law. Given that such a clause would be entirely standard in any contract made between substantial organisations based in different countries, the likely reason for the omission was that the parties were not able to agree on a choice of the governing law.

Determining the choice of law

Lords Hamblen and Leggatt said that in the absence of any choice of the law that is to govern the arbitration agreement, it was necessary to fall back on the default rule and identify the system of law with which the arbitration agreement is most closely connected. This will generally be the law of the seat chosen by the parties. In the current case, this was London.

The Supreme Court then summarised the principles which govern the determination of the law applicable to the arbitration agreement in this type of situation:

> *"i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws …*
>
> *ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.*
>
> *iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.*
>
> *iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*
>
> *v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement …*
>
> *vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.*
>
> *viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.*
>
> *ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it."*

In the case here, the contract from which the dispute had arisen did not contain any choice of the law that was intended to govern the contract or the arbitration agreement. Accordingly, the validity and scope of the arbitration agreement was governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected.

This meant that the law applicable to the arbitration agreement was English law.

The anti-suit injunction

Although not a formal part of the decision, Lords Hamblen and Leggatt went on to note that by choosing a seat of arbitration the parties were choosing to submit to the supervisory and supporting jurisdiction of the courts of that seat over the arbitration. They stated:

"[A] well established and well recognised feature of the supervisory and supporting jurisdiction of the English courts is the grant of injunctive relief to restrain a party from breaching its obligations under the arbitration agreement by bringing claims which fall within that agreement in court proceedings rather than, as agreed, in arbitration. A promise to arbitrate is also a promise not to litigate."

When granting an anti-suit injunction, the English courts' intention is to uphold and enforce the parties' contractual bargain as set out in the arbitration agreement. In principle it should make no difference whether that agreement is governed by English law or by a foreign law. What matters is whether there has been a breach of the arbitration agreement and whether it is just and convenient to restrain that breach by the grant of an anti-suit injunction. By agreeing to arbitrate in London the parties were agreeing to submit to the supervisory and supporting jurisdiction of the English courts, including its jurisdiction to grant anti-suit injunctions.

This meant that if the agreement to arbitrate disputes contained in the construction contract had been governed by Russian law, it would have been necessary for the English court to determine whether under the law of Russia the agreement was valid and the claim which Chubb Russia was seeking to pursue in Russia fell within its scope. If those questions were answered in the affirmative, it would in any event have been appropriate to grant an anti-suit injunction. The injunction granted by the Court of Appeal to restrain Chubb Russia from proceeding against Enka in Russia was therefore properly granted.

There were 100 pages of primary text and 400 pages of appendices, but there was no provision which said that the contract shall be governed by a specified system of law.

Conclusion

The Supreme Court confirmed that when being asked to determine which system of law governs an arbitration agreement, an English court should apply the English common law rules for resolving conflicts of laws. Under that common law, the law applicable to the arbitration agreement will be either the law expressly (or perhaps impliedly) chosen by the parties or, in the absence of such agreement, the system of law most closely connected to the arbitration agreement.

Where the parties have not specified the law applicable to the arbitration agreement, but they have chosen the law to govern the contract containing the arbitration agreement, it is this choice which will generally apply to the arbitration agreement.

Where the parties have made no choice of the law to govern the contract containing the arbitration agreement, the court must determine the law with which the arbitration agreement is most closely connected. This will typically be the law of the seat of the arbitration. The seat is where the arbitration is to be performed and so it is likely to uphold the reasonable expectations of those who specify the seat without choosing the law to govern the contract. It also helps parties to predict which law will apply and so promotes certainty and reduces the likelihood of dispute.

Here, the contract containing the arbitration agreement had no choice of law. This meant that the arbitration agreement was governed by the law of the seat of arbitration as the law with which the dispute resolution clause was most closely connected. The seat of the arbitration was London which meant English law governed the arbitration agreement.

International developments in the penalties doctrine

Many in the construction industry who pay close attention to special conditions of contract may have noticed in recent years a subtle change to the wording of liquidated damages provisions. As **Sam Thyne** explains, a Contractor was previously often required to agree something to the effect that the liquidated sums represented "a genuine pre-estimate of the Employer's loss". This verbiage was part of an ongoing struggle for employers to ensure that liquidated damages provisions remained enforceable and were not caught out by the penalties doctrine.

The words "genuine pre-estimate of loss" reflect the long-standing test set out by the House of Lords in the 1915 case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79. If a sum within a contract that would be applied in instances where there was a failure to carry out an obligation was demonstrated to be a genuine pre-estimate of the wronged party's loss, then it would be considered liquidated damages. However, if it was not it would amount to a penalty or a "*terrorem on the offending party*".

Under the *Dunlop* approach a specified sum was either liquidated damages or a penalty. For the next hundred years parties attempted to ensure they remained on the correct side of that dichotomy by taking care that the sums stated were reflective of the loss anticipated, and for good measure stating in the contract that the sum was a genuine pre-estimate of loss.

The subtle change mentioned above was on account of a case in the United Kingdom Supreme Court, *Cavendish Square Holdings BV (Appellant) v Tatal El Makdessi (Respondent) (Cavendish)*, which established the current United Kingdom approach to penalties in 2015. After 100 years the dichotomy of liquidated damages versus penalties was done away with. It was the UK Supreme Court's view that this was too restrictive an approach as there were more interests besides compensation for loss that liquidated damages provisions aimed to protect. The new test as to what amounted to a penalty was whether it imposed a detriment to the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

Provisions agreeing that liquidated damages accurately represent the loss that may be suffered by another party may seem like a form over substance approach with little practical effect, particularly given the comment in *Dunlop* by Lord Dunedin where it was noted that parties to a contract can call the sum payable whatever they like but, while this may be helpful, what matters is whether the sum is in truth a penalty or liquidated damages. However, following *Cavendish*, special conditions were updated to state something to the effect that the parties agreed that the liquidated damages they were agreeing to were proportionate to protect the legitimate interest of the other party.

Cavendish has been law in the United Kingdom since 2015. The most recent development in the law of penalties has been in New Zealand where in June of 2020, the New Zealand Supreme Court released its long-anticipated decision in *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53 (*Honey Bees*). With it came some long-awaited clarity and an onslaught of bee-related puns in legal articles.

> None of the recent cases, about penalties, whether in the UK, New Zealand or Australia *relate to* construction projects.

Rather than concerning inner city apiary interests, *Honey Bees* was about a childcare facility located within a central Auckland high-rise. At the time of entering into the lease for the premises the parties agreed a collateral deed separate to the lease agreement. Under the collateral deed the landlord agreed that they would install a second lift to the building by a certain date, and if they did not then they would indemnify the lessee for rent and outgoings under the lease until it expired.

Needless to say, the second lift was not installed, and after several years of disagreement, and progress through the lower courts, the Supreme Court was asked to clarify the extent of the penalties doctrine in New Zealand.

The New Zealand Supreme Court determined that the test to be applied was that:

> *"A clause stipulating a consequence for a breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligation ... A consequence will be out of all proportion if it can fairly be described as exorbitant when compared with those legitimate interests."*

Sound familiar? New Zealand's new test draws heavily from developments in both the United Kingdom and Australia, with the New Zealand Supreme Court noting that the reasoning in both *Cavendish* and the Australian Federal High Court Decision of *Paciocco v Australia & New Zealand Banking Group Ltd* [2016] HCA 28 was persuasive as to the need to move beyond the old *Dunlop* dichotomy.

In the decision of the Court of Appeal on the same matter, the same essential test was used but with an additional cross-check requiring that an assessment of whether the predominant purpose of the impugned clause was to punish the promisor rather than protect the legitimate interests of the promise.

However, the Supreme Court did not adopt this safeguard, believing it was neither necessary nor desirable.

The New Zealand Supreme Court also provided further guidance in determining whether a clause was a penalty. The Court noted:

- The determination requires an objective exercise of construction, notionally undertaken at the time of contract formation and by reference to the terms and circumstances of the contract. The circumstances can include the broader commercial context within which the contract sits.
- The legitimate interest must be weighed when assessing the proportionality of the agreed consequence.
- A party's legitimate interests may extend beyond the loss caused by the breach as measured by a conventional assessment of contractual damages. They may extend to the impact of non-performance on the broader commercial interests the parties seek to achieve or protect through the contract. Those interests may extend beyond the four corners of the contract, for example if they relate to a system of business of which the contract forms a part.
- While legitimate interests will not include objectives unrelated to the performance interest, such as punishment, deterring breach can be a legitimate objective of a clause.
- The bargaining power of the parties will be relevant to determining the nature and extent of the innocent party's interest in performance of the primary obligation. There is a presumption that commercial parties dealing with each other on equal terms are able to assess the appropriate proportion between the legitimate interest in performance of the primary obligation and the consequence contracted for on breach. The fact that a party was legally advised as to the nature and effect of the transaction will also weigh in favour of upholding the bargain. But where there is evidence of unequal bargaining power, or where one party is not legally advised, a court will scrutinise more closely the innocent party's claims as to the interests protected, and also the issue of proportionality.
- It is not necessary in all cases for the court to assess the damages that would have been awarded at common law for breach, but there may be cases where such calculation is the measure of the performance interest. That is likely to be the case where the impugned clause purports to provide a pre-estimate of damage, or where the impugned clause appears in a contract where the only legitimate interest in performance is properly analysed as the monetary value of the losses which flow directly from that breach, and which are readily calculated.

In the *Honey Bees* case itself, the Court was satisfied the consequences were not out of all proportion to the legitimate interests of Honey Bees in performance of the obligation to install the lift. The indemnity was therefore enforceable.

Honey Bees had leased the premises on the basis that they would be able to expand their business to cater for 45 children; two lifts were a key component of this objective. Ultimately, the Court determined that the consequences were not exorbitant in the overall circumstances, one relevant circumstance being that the landlord was given ample time to carry out the installation.

> *A breach of a term of the contract will be an unenforceable penalty if the consequence is out of all proportion to the legitimate interests of the innocent party in performance of the primary obligations under that contract.*

So what does this mean for contractors in general in New Zealand and the United Kingdom? Has the death knell sounded across these jurisdictions any hope of rendering a contractual term unenforceable for being penal?

Resorting to the penalties doctrine to render a contract term unenforceable has never been a panacea for contractors. Where, as is often the case in construction contracts, the terms of a contract are heavily negotiated and the parties are well advised, even under the *Dunlop* approach it is difficult to demonstrate that a liquidated damages term is a penalty.

Across New Zealand and the United Kingdom, courts now require that a clause be "exorbitant", "unconscionable", or "extravagant". With such a high threshold, the door to arguing that a liquidated damages provision is a penalty is clearly almost closed – only in limited circumstances could you see this being successful.

There is still the remaining issue of whether deterring a construction contractor from finishing a project late is a legitimate interest in itself. While this may appear a straightforward answer given the broad indication of the various courts, of note is that none of the recent cases discussed, including *Cavendish, ParkingEye Limited v Beavis, Honey Bees and Paciocco v ANZ* are construction cases.

This means that the courts have not had the opportunity to consider the broad range of considerations that impact construction projects. What is clear is that the courts will look beyond the four walls of the contract at the broader circumstances, and it may be that within these broader circumstances the proportionality of a liquidated damages provision will still be challengeable.

Case law update

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

Second, there is the *Construction Industry Law Letter* (CILL), edited by Fenwick Elliott's Karen Gidwani. CILL is published by Informa Professional. For information on subscribing to the *Construction Industry Law Letter*, please contact Kate Clifton by telephone on +44 (0)20 3377 3976, or by email: kate.clifton@informa.com

Adjudication, application for a stay & Covid-19

Broseley London Ltd v Prime Asset Management Ltd

[2020] EWHC 944 (TCC)

BLL is a small family-run company, specialising in the building and refurbishment of properties and listed buildings. PAML contracted with BLL to carry out refurbishment works at one such property. On 11 July 2019 BLL made a payment application, Valuation 19, for the net sum of £485k. No payment notice was given and the pay less notice was late, something confirmed in an adjudication. Two adjudications followed, one in relation to payment certificate 20 and a second which held that BLL had lawfully terminated the contract. On 17 March 2020, PAML accepted that the first decision should be honoured, but sought a stay of execution for the entire judgment sum of about two months in order to allow a "true value" adjudication to take place. PAML said that a proper evaluation of the account would result in a substantial sum being due to PAML from BLL.

The Judge was prepared to accept that there was a genuine dispute as to the amount of the final account, but he had to set that against the length of time which had passed since the first adjudication decision (September 2019), during which little had been done by PAML to seek to resolve the true state of accounts. The Judge drew attention to the last sentence of paragraph 17.28 of Coulson on Construction Adjudication which says: "*a failure by the defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution*".

Here, there was no dispute that once the application for payment in Valuation 19 had been affirmed by the adjudicator in September 2019, the effect of the CA decision in *S & T (UK) Ltd v Grove Developments* (Dispatch Issue 222) was that PAML, not having paid the amount due as held in Adjudication No. 1, could not itself start a "true value" adjudication as to Valuation 19 but had to commence litigation in order to establish the true value, a course which it had not yet taken.

This raised the question whether PAML could now raise a "true value" final account adjudication without first paying the sum awarded in Adjudication No. 1. PAML suggested that the answer to that question was "yes" because of Adjudication No. 3 and because the "true value" adjudication is of the final account post-termination. However, the basis of Decision No. 3 was that PAML had failed to pay sums due to BLL, including the amount found due in Decision No. 1. The Judge was clear that this would amount to a "*remarkable intrusion into the principle established in S & T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what [the CA] said ... would not be permitted to happen*".

Although this dealt with the application, the Judge went on to consider the question of whether it was improbable that BLL would be able to repay the judgment sum at the end of the trial of the underlying issues between the parties. The Judge was clear that it was for PAML to make out this ground.

The Judge had a list of BLL's current projects and projects which BLL had won. The turnover suggested by that list seemed to him to render it likely that if those contracts were executed BLL would be able to repay the judgment sum in its present financial position. However, the Judge did accept that the Covid-19 emergency measures might well have an impact upon whether all these projects would continue or commence, as the case may be. This made the assessment of BLL's position more difficult, but the Judge could not say whether because of Covid-19 BLL would in due course be unable to repay the judgment sum. Given where the burden of proof lies, that made PAML's position difficult. The PAML application failed. All the Judge could say was that:

"if PAML had moved with due diligence and in accordance with S & T, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on my findings, have been able to repay".

Adjudication & severance

Dickie & Moore Ltd v McLeish & Others

[2020] CSIH 38

This was an appeal from the decision discussed in Dispatch Issue 234. As Lord Drummond Young said, the critical question at issue was the extent to which and the basis on which a court may enforce an adjudicator's award where part of that award is outside the adjudicator's jurisdiction because the dispute purportedly considered in that part had not crystallized. Lord Drummond Young also stepped back like Lord Briggs in *Bresco* to review the adjudication process. He was of the opinion:

"that the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay caused by lengthy dispute-resolution procedure."

The Judge continued that:

"the fundamental point is that the procedures used are intended to be simple, straightforward and immediately effective. Those considerations should in our view guide the approach to interpretation of the Scheme. In relation to an adjudicator's award that is partially valid and partially invalid, the valid part should in our opinion be enforced if that is realistically practicable ... in approaching severance we consider that the court should adopt a practical and flexible approach that seeks to enforce the valid parts of the decision unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts."

Lord Drummond Young was of the view that if an adjudicator erroneously adjudicates on one dispute and validly adjudicates on another dispute, the latter will be enforced "*unless it is simply not possible verbally or mathematically to identify what his decision*" on the other matter was. The Judge described this as the adoption of "*a strong practical test*".

Whilst the adjudicator's extension of time award, of 13 weeks, and the associated award for loss and expense of £63,093.47 could not stand, because the dispute had not crystallized, there were other elements of the adjudicator's decision that could properly be enforced, as they were "untainted" by the decision and reasoning in relation to extension of time and loss and expense. For example, the court could not see why the treatment of a claim for extension of time and its consequences should have a bearing on other matters, say payments for measured work or additional works. Those were for work actually performed, not the increase in costs caused by delay. The court therefore agreed with the decision at first instance: the key question was whether there existed a "core nucleus" of the adjudicator's decision that could safely be enforced.

Adjudication: date of service of the notice of adjudication

Flexidig Ltd v M&M Contractors (Europe) Ltd

[2020] EWHC 847 (TCC)

This was an application to enforce an adjudicator's decision, where Flexidig, a subcontractor had been awarded some £225k. One of the objections taken by M&M was that the Referral was served late. The adjudication notice was attached to a covering letter dated 20 November 2019, the underlying notice was dated 22 November, but it was common ground it was created by no later than 20 November so as to accompany the letter bearing that date. It was further common ground that the notice was received on 22 November and certainly no earlier.

M&M said that the adjudicator had no power to act at all because the referral was out of time. M&M said that the true date of the notice was 20 November 2019 because that is when it was sent. It was not disputed that the adjudicator received the reference on 29 November. Mr Justice Waksman said that if the date of the "giving of the notice of adjudication" was the date of the document when it was sent, the subsequent referral would be out of time. On the other hand, if the relevant date was the date of actual or deemed service of the notice, the referral was in time.

Here, the date of giving notice was the date when it came to the attention of the addressee depending on the circumstances and other provisions that may apply. That might be the actual day it came to their attention or, if earlier, some deemed date. Here, under contract, any notice to be "given" shall, if posted, be deemed to be 48 hours after the posting. Here it was posted and it is accepted it was received on 22 November.

The Judge could see no reason, on the basis of authority, principle or language, to say that the giving of notice here meant the sending of it without the consequent receipt, nor is there any practical reason otherwise so to interpret the clause. Equally, for the dispute to be referred to adjudication, the adjudicator must have received the referral. So time does not run until the addressee receives or is deemed to receive the notice. There the key date was 22 not 20 November, and the referral was served on time, namely seven days after receipt of the notice.

Adjudication & Part 8 applications

ISG Construction Ltd v Platform Interior Solutions Ltd

[2020] EWHC 847 (TCC)

after, Deputy Judge ter Haar QC granted Platform summary enforcement of an adjudicator's decision, ISG then sought declarations under Part 8 that the decision of the adjudicator was: "*wrong and beyond rational justification in that the adjudicator's assessment of sums due to Platform was inconsistent with the terms of the Sub-Contract*". The purpose of the declarations was to prevent enforcement of the adjudicator's decision.

Platform started the adjudication enforcement case on 31 January 2020; ISG started the Part 8 case on 27 February 2020. On 10 March 2020, the TCC said that there was insufficient time to timetable the Part 8 Claim for hearing together with the enforcement case which raised: "*different issues for determination*". Platform's case was heard on 24 March 2020 and ISG's on 24 April 2020.

The Judge accepted that the arguments raised serious issues as to whether the approach adopted by the adjudicator was correct as a matter of construction of the contract between the parties. However he did not hear full argument on the proper approach to the contract and so he did not determine the issue.

The Judge and the parties looked at the case of *Hutton Construction Ltd v Wilson Properties Ltd* [2017] EWHC 517 (TCC) which set out the conditions that must be satisfied by a defendant who seeks to resist enforcement proceedings via a Part 8 application. There must be a short and self-contained issue which arose in the adjudication that the defendant continues to contest; the issue must require no oral evidence or any other elaboration beyond that which is capable of being provided during the time allowed for the enforcement hearing (usually about 2-3 hours); and the issue must be one which on a summary judgment application it would be unconscionable for the court to ignore.

In addition, the onus will be on the defendant to promptly issue a Part 8 application that clarifies exactly what relief/declarations it seeks. The Judge here noted that those principles were applied by Mrs Justice Jefford in *Seadown Developments Ltd v SMCC Construction Ltd* (unreported, 3 November 2017) who said that:

"It does not simply follow from the fact that the adjudicator's decision is wrong that it will not be enforced, save in the sort of particular or exceptional circumstances identified by Coulson J. in Hutton for the very reason that normally the fact that the adjudicator may be wrong does not render his decision unenforceable."

The Judge here considered whether or not the Part 8 proceedings brought by ISG raised a "*short and self-contained issue which arose in the adjudication*". As we mentioned last month, in the enforcement decision, the Judge noted that the parties were agreed on the way in which the adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the sub-contract. The problem was that the result of that approach produced a result which the Judge suspected neither party had expected. It was this which gave rise to the legal issues raised in the Part 8 proceedings as to the proper approach to the adjudicator's conclusions about valuation. Therefore ISG were raising in the Part 8 proceedings a point not raised in the adjudication.

An exception to this approach might be if there was an admitted error. There was not. In addition, there was a further issue against the Part 8 process. ISG argued that the adjudicator fell into error in that she did not determine the question of what sum was due to Platform by reference to or in accordance with the particular provisions of the contract, and, in particular, did not assess Platform's entitlement, if any, on the value of the works up to the date of termination. To make this argument good, ISG needed valuation evidence. It was no longer a short point of construction.

Finally, the declaration as sought by ISG went as far as contending that the adjudicator's construction of the contract was beyond any rational justification. However, in the Judge's view, it was impossible for ISG to succeed on that case where the adjudicator had done what she had been asked to do by both ISG and Platform.

Whilst the Judge noted that it might be possible for ISG to seek to apply to amend the Details of Claim in the Claim Form in order to request slightly different declarations, something that might be opposed, for the present purposes, the Judge simply held that:

"to grant the declarations sought with the purpose and effect of preventing enforcement of the Adjudicator's Decision would be wrong."

Failing to honour adjudication decisions and starting TCC claims

Kew Holdings Ltd v Donald Insall Associates Ltd

[2020] EWHC 1862 (TCC)

DIA was retained to provide architectural services to Kew. In February 2019, DIA obtained a court order against Kew summarily enforcing the decision of an Adjudicator in the sum of £210k. Kew did not pay, but in March 2020 commenced a TCC claim for damages of approximately £2 million. DIA issued an application seeking that the claim be either struck out unless KEW pay DIA the sums ordered by the court until the £210k was paid or stayed.

In the case of *Anglo-Swiss v Packman Lucas* (see Disaptch Issue 115) Mr Justice Akenhead had had to consider whether an established refusal to honour or satisfy a previous adjudication decision and court judgment would justify the stay of separate legal proceedings concerning the same subject matter, pending payment. He said:

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

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

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

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

Unsurprisingly therefore, Kew did not oppose the application to stay proceedings pending payment of the sums ordered in February 2019. The strike out application was opposed. Mrs Justice O'Farrell noted that:

"There is nothing in the HGCRA or in the above authorities that would render the current proceedings unlawful or an abuse of process as submitted by the Defendant. The HGCRA provides that an adjudication award is binding only until the dispute is finally determined by legal proceedings, arbitration or by agreement. Therefore, it expressly contemplates the commencement of legal proceedings to establish the parties' rights and obligations by way of a final binding determination. Unlike the adjudication provisions, which are subordinate to the payment provisions in the HGCRA, the right to bring legal proceedings to determine rights and obligations and seek remedies is more fundamental."

Kew said that there was no reason why it should not be entitled to pursue its claim once payment of sums due under the February Order had been paid. DIA was relying on the "pay now, argue later" regime of the HGCRA to justify the application for a stay. However, to strike out the claim would be contrary to that regime since it would deprive Kew of the ability to "argue later". The Judge found in favour of Kew:

"I am satisfied that the Claimant is in deliberate and persistent breach of the Order dated 5 February 2019. The Claimant's repeated promises to pay the outstanding sum indicate that it could satisfy the judgment but has chosen not to do so. The commencement of these proceedings without honouring the adjudication award and the judgment, in flagrant disregard of the "pay now, argue later" regime of the HGCRA, amounts to unreasonable and oppressive behaviour. However, I accept the submissions by Mr Smith that striking out the claim at this stage would be too draconian; the Defendant is entitled to the protection afforded by a stay of proceedings unless and until the judgment has been satisfied but the Claimant should be allowed to pursue its claims once it has paid the outstanding judgment sum."

Kew was also ordered to provide substantial security for DIA's costs.

Adjudication & COVID-19

MillChris Developments Ltd v Waters

[2020] 4 WLUK 45

MillChris, a contractor, sought an injunction to prevent a homeowner from proceeding with an adjudication saying that it would not have sufficient time to prepare its defence properly. MillChris noted that its solicitor had been forced to self-isolate at home which made it difficult to obtain evidence. MillChris also noted that a site visit had been arranged which the solicitor would not be able to attend and further that it could not currently appoint an independent surveyor. MillChris had made similar submissions to the adjudicator saying that it was unable to comply with the timetable because of the COVID-19 outbreak, but the adjudicator had decided that the proceedings should continue but gave the contractor a two-week extension to respond.

One current trend that comes out of the recent court judgments as well as comments from arbitrators is a desire to try and proceed where possible and practical. Here Mrs Justice Jefford refused to grant an injunction. This was not a case where there would inevitably be a breach of natural justice if the adjudication went ahead.

For example, the papers could be transported or scanned to the solicitor and extra time had been given to contact the witnesses. The Judge also held that there was no need for both parties to be present at the site visit. The adjudicator could conduct the site visit alone. The visit could be recorded, and the contractor could prepare a list of issues for the adjudicator in advance.

Obviously, each case will turn on its own facts, but the case (and only a summary of the judgment has been reported on Lawtel) suggests that adjudication business should, by and large, continue as usual. The TCC, as always, will expect parties to be sensible, practical and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply.

Adjudicator's fees & natural justice

Platform Interior Solutions Ltd v ISG Construction Ltd

[2020] EWHC 945 (TCC)

This was an application by Platform to enforce an adjudicator's decision in the sum of £420k plus VAT. In the adjudication, ISG had challenged Platform's case that ISG had repudiated the subcontract, saying instead that Platform's own purported rescission of the subcontract was unlawful with the result that ISG's termination was itself valid. Both ISG and Platform set out their cases on the amounts said to be due. The adjudicator found in favour of ISG on termination and went on to decide the value of any sums payable as a result of that decision.

ISG replied to Platform's demand for payment, noting that they had received advice that the decision was unenforceable. ISG also wrote to the adjudicator saying that whilst they were arranging payment of her fee:

"For the avoidance of doubt payment of your invoice does not constitute agreement that your decision is correct nor does it constitute agreement or acceptance that your decision is valid or enforceable. Accordingly we fully reserve all rights available to us to challenge the validity and enforceability of your decision and all rights available to us to resist any attempt to enforce the same."

Before Deputy Judge ter Haar QC, Platform submitted that by paying the adjudicator's fees ISG had waived any right to challenge the validity of the Decision. In *PT Building Services Ltd v ROK Build Ltd* (see Issue 105), Mr Justice Ramsey had held that in the absence of any circumstances to the contrary, by making the payment of the fee, ROK elected to treat the decision as being valid. Here, the Judge considered that there was strong authority that payment of an adjudicator's fees may amount to an election to treat an adjudicator's decision as valid. However, here it would be wrong to do so. ISG's primary challenge to the Decision was on the basis that the adjudicator had made a "fundamental error" in the Decision. That complaint only arose after the adjudication process had ended with the issue of the Decision. Further, ISG's letters had made it clear that ISG regarded the Decision as invalid and reserved their position.

ISG's position was that in determining the sums that may be due, the adjudicator had decided to take into account the saving that ISG achieved by the termination. This was an error and, further, neither party in the adjudication had contended that that approach could be adopted. The Judge referred to the case of *Roe Brickwork Ltd v Wates Construction Ltd* (see Issue 163) where it had been held that there was:

"no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator."

The adjudicator decided a point of importance on the basis of the material before her, but on a basis for which neither party had contended. The point was one of contractual construction and the adjudicator was perfectly entitled to reach the conclusion that she did. She was not bound to accept only one of the two alternatives put to her by the parties. Questions of contractual interpretation will often (if not usually) be capable of more than two possible answers, and so the correct answer may not have been expressly proposed by either party. Here, the parties were agreed on the way in which the adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the subcontract. The problem was that, in the view of the Judge, "the result of that approach produced a result which I suspect neither party had expected". This may have led to separate Part 8 proceedings, but did not mean that there had been a breach of natural justice.

Without prejudice correspondence in adjudication

Transform Schools (North Lanarkshire) Ltd v Balfour Beatty Construction Ltd and Anr

[2020] CSOH 19

BB had been carrying out work at a number of schools in North Lanarkshire. A dispute arose about latent defects at one of the schools. The dispute was submitted for adjudication, where the adjudicator found in favour of Transform. During the adjudication, BB had said that the claim had prescribed (i.e. was time barred). The adjudicator disagreed, considering that a series of letters between the parties' solicitors showed that the prescriptive period had been extended.

At an enforcement hearing, BB said that the adjudicator had referred to certain letters which had been marked "without prejudice". Lord Ericht said that he was only considering that "limited issue" of whether the adjudicator's decision should be enforced by the court. He was not therefore to be taken as expressing a binding and final view as to whether the adjudicator was correct in his conclusions on prescription or on admissibility of the "without prejudice" letters. He was looking at the case from the point of view of natural justice. The traditional "without prejudice" rule, in the UK, is that based on public policy and the idea that parties should not be discouraged, when negotiating, by the knowledge that anything they may say may be used to their prejudice in the course of any court proceedings.

It is the content that matters. Just using the words "without prejudice" does not automatically mean that correspondence is protected. Here, the significance of the "without prejudice" letters lay in relation to the question of whether the obligation to make payment had prescribed. Lord Ericht noted that the issue of whether or not he could refer to the letters in question was raised by the adjudicator not the parties.

The adjudicator decided that the use of the words "without prejudice" was intended to convey that by offering to carry out the works proposed, BB were not admitting liability, not that the correspondence was to be regarded as without prejudice in the sense of not being referable to in subsequent proceedings. The adjudicator looked at the correspondence as a whole over a 23-month period. He took the view that it was possible for a court, and thus an adjudicator, to conclude that words in a letter such as "without prejudice to liability" do not, when considered in the wider relevant context, necessarily mean what they appear to say.

Here, the adjudicator had to decide whether or not the claim was time-barred. To do that he had to make a decision as to whether the "without prejudice" letters were admissible; he decided that they were admissible and took the letters into account in making his decision.

The current case was not a situation where the adjudicator was improperly made aware of an irrelevant and collateral "without prejudice" offer to settle which might have an influence on his thinking. The question of the admissibility of the "without prejudice" letters was one which the adjudicator had to decide as one of the central issues in the adjudication. Lord Ericht concluded that the adjudicator in this case may or may not have been right to decide they were admissible. But if he was wrong, then that was an error of law, and errors of law on the part of the adjudicator do not justify this court in refusing to enforce the adjudicator's decision. It could not be said that "the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias".

Other cases: *Construction Industry Law Letter*

Right to rectify – Injunction – Restraint of works – Inducing breach of contract – Damages as an adequate remedy *Flexidig Ltd v A Coupland (Surfacing) Ltd*

Technology and Construction Court; Before Mr Simon Lofthouse QC; judgment delivered 29 August 2019

The facts

By way of a subcontract entered into in or around March 2017 ("the subcontract"), M&M Contractors Europe Ltd ("M&M"), as main contractor to Virgin Media Ltd and Lincolnshire County Council, engaged Flexidig Ltd ("Flexidig") as subcontractor to carry out civil engineering works connected with the installation of fibre optic cable in Louth.

Clause 6 of the subcontract stated that Flexidig was to make good any defect or damage in the subcontract works at its own cost for a period of two years from completion of those works. M&M had the option to engage another subcontractor to make good defects where the defects or damage were not made good by Flexidig and recover any monies paid to the other contractor from Flexidig.

The parties fell into dispute and adjudication proceedings were commenced resulting firstly in an award of approximately £185,000 to Flexidig in respect of works undertaken and, secondly, an award of £462,000 against Flexidig on account of alleged defects. Neither sum was paid and enforcement proceedings were commenced in late 2018. In January 2019, the parties agreed to adjourn the enforcement proceedings to allow Flexidig to return to site to correct the defects.

In February 2019, however, M&M issued a stop notice to Flexidig in respect of those works because of its concerns over the standard of work being carried out. Following this, further assurances were given by Flexidig to M&M and works recommenced. However a further stop notice was issued by M&M in May 2019, again related to the standard of work. M&M then engaged A Coupland (Surfacing) Ltd ("Coupland") to undertake the rectification works.

Flexidig considered that it had the right to perform the remedial works under cl 6 of the subcontract. Coupland had provided rates to carry out the works to M&M on 1 July 2019. On 30 July 2019, Flexidig notified Coupland of its position as to its right to carry out remedial works. Flexidig submitted that, on that basis, in continuing to comply with M&M's instructions to undertake work, Coupland's actions amounted to the tort of procuring a breach of contract.

As a result, Flexidig issued proceedings seeking to restrain Coupland from performing the remedial works.

Issues and findings

Was Flexidig entitled to an order restraining Coupland from carrying out the rectification works?

No. It was difficult to see how Coupland's actions could amount to an inducement to breach the contract. Further, even if there was a serious issue to try (the judge held that there was not), damages would have been an adequate remedy.

Was Flexidig entitled to undertake the rectification work?

The subcontract did not necessarily create a right for Flexidig to be offered the opportunity to rectify defects in all cases. In this regard it was noted that the main contractor could terminate for convenience and having done so, engage others to complete the rectification works.

Commentary

This short case raises some points of interest. Most construction contracts provide a mechanism for the rectification of defects by the contractor at its own cost for a period post-completion. The law relating to the contractor's right to return and rectify is considered well settled, including the consequences for the employer should it not provide the contractor the right to return (see, for example Pearce & High v Baxter and Baxter [1999]). Here, the subcontractor sought a restraining order against the incumbent subcontractor, a request that was rejected outright by the court.

In considering the matter, the court found that the main contractor could well have been in breach of contract in not providing Flexidig the opportunity to return and rectify. Notwithstanding, the court was reluctant to characterise this as a situation where injunctive relief would be available. In the first instance the claim failed because Flexidig could not demonstrate that Coupland had in fact committed the tort complained of. The claim against Coupland rather than M&M may have been guided by forum as Flexidig's contract with M&M was subject to Northern Irish law and Flexidig did not want to bring the injunctive proceedings in the Northern Irish courts. However, on the face of it, it would be more logical to seek to restrain the employing party rather than the new contractor.

However, even if Flexidig had done this it seems unlikely that the court would have provided the relief sought. The court determined that the right to rectify in this case was not absolute and further that damages would have been an adequate remedy in any event. This latter point in particular is likely to be a strong argument against injunctive relief in such circumstances.

Homeowner building defects insurance – Maximum liability cap *Manchikalapati and Others v Zurich Insurance plc (t/a Zurich Building Guarantee & Zurich Municipal) and Others*

Court of Appeal; Before Lord Justice McCombe, Lord Justice Coulson and Sir Rupert Jackson; judgment delivered 5 December 2019

The facts

In 2007, JCS Homes Ltd ("JCS") developed two blocks of flats known as "New Lawrence House" in Hulme, Manchester.

Zurich Insurance plc ("ZIP") accepted JCS as an approved builder and it was agreed that ZIP's associated company, Zurich Building Control Services Ltd ("ZBC"), would provide inspection services during the construction period and that ZIP would issue Zurich polices to the purchasers of the flats.

From March 2007 onwards, individuals started to buy long leases of 125 years of flats in the development "off plan". ZIP in due course issued a Zurich policy to each leaseholder. Section 1 of the policy provided cover during the construction period. Section 2 provided cover during the first two years post-construction. Section 3 provided cover during years three to 10.

The Zurich policy contained a provision limiting the amount that would be paid under the policy (the maximum liability cap) as follows:

> *"… for a New Home which is part of a Continuous Structure, the maximum amount payable in respect of the New Home shall be the purchase price declared to Us subject to a maximum of £25 million.*
>
> *Where the combined value of all New Homes within a Continuous Structure exceeds £25 million, the total amount payable by Us in respect of all claims in relation to the New Homes and the Continuous Structure shall not exceed £25 million."*

Construction was completed by 2010 and there were 104 flats in the development in total.

During 2012 and 2013 it became apparent that there were serious defects in the building. On 13 March 2013, one of the leaseholders submitted a claim to ZIP on ZIP's standard claim form, listing the defects. In April 2013, the freehold of the building was sold to Zagora Management Ltd ("Zagora").

Negotiation took place between Zagora, the leaseholders, ZIP and ZBC. Neither ZIP or ZBC were willing to meet the costs of the substantial remedial works that were required. Accordingly, 26 leaseholders ("the claimants") and Zagora issued proceedings in the High Court against ZIP. East West Insurance Company Ltd ("East West") had taken over the liabilities of ZIP and were therefore also made a party to the action.

In the High Court action, the claimants made claims for damages against ZIP, ZBC and East West, seeking to recover the estimated cost of remedial works and related loses on a variety of bases, including deceit by ZBC, an alleged oral agreement by ZIP to rectify and ZIP's liability under s3 of the Zurich policy.

On 30 January 2019, the trial judge gave judgment in favour of the claimants against ZIP and East West for sums totalling £3,634,074.65. The sums awarded to each of the claimants ranged from £99,995 to £304,378.20 depending on individual circumstances.

The judge found that the structural steelwork lacked fire protection and that this was "major physical damage" and "present or imminent damage to the physical health and safety of the occupants" as set out in the Zurich policy.

The cost of fireproofing the structural steelwork was in the range of £4.734m. However the judge capped the amount to be paid to the claimants at the total purchase price of all the claimants' flats, which was £3.634m. Other defects were alleged but in light of these findings these claims were of academic interest only and dealt with quite shortly by the judge. The judge did make findings that there were other defects but did not quantify those claims.

He did however state that the total cost of remedial works would be in the range of £9.7m plus VAT. The judge also awarded interest.

The claimants appealed in relation to the finding on the maximum liability cap, contending that the proper interpretation of the policy was that the cap was the total purchase price of all new homes in the block, subject to a maximum of £25m. The total of the purchase prices of all new flats in the block was £10,846,076. ZIP contended for the interpretation of the trial judge; that the cap was the purchase price of the insured's new home (or insureds' new homes if several insureds were claiming under the policy), subject to a maximum of £25m. ZIP also cross-appealed on a number of issues which are not considered in his report (and all of which were ultimately unsuccessful).

Issues and findings

Did the maximum liability cap stand to cap damages at the individual purchase price of each flat?

No.

Commentary

From the judgment, it appears that on appeal the claimants changed the emphasis of their argument on the maximum liability cap. Giving the leading judgment on this issue, Sir Rupert Jackson accepted the argument made by the claimants and held that the maximum liability cap should be considered by reference to the purchase price of all the flats in the block, not just those of the individual claimants.

In coming to this conclusion, Sir Rupert held that the sub-clause setting out the maximum liability cap was ambiguous. It was therefore necessary to look at the other provisions of the policy. It was also a case where, on the basis of the dicta in Impact Funding Solutions Ltd v Barrington Support Services Ltd (reported as Impact Funding Solutions Ltd v AIG Europe Insurance Ltd [2016] UKSC 57), the court should consider the obvious commercial purpose of the insurance policy (where narrow construction can be applied to exclusions). Having regard to these factors, the claimants' interpretation was favoured.

Vesting certificates: delivery up
(1) VVB M&E Group Ltd & Anr v Optilan (UK) Ltd

Technology and Construction Court; Before His Honour Judge Russen QC; Judgment delivered 7 January 2020

The facts

In 2015, VVB Engineering Ltd ("VVB Engineering") was engaged as subcontractor by Costain to carry out the design and construction of mechanical, electrical and public health works for the 13 stations on the eastern section of the Crossrail project and their related infrastructure.

By a sub-subcontract dated 10 September 2015 VRL engaged Optilan (UK) Ltd ("Optilan") to provide telecommunication systems upgrades to 12 of the stations so as to provide a Station Infrastructure Surveillance System ("SISS") that was joined up with other sections of the Crossrail network. There was significant design delay on the project. On 31 May 2018 Costain, acting on the instruction of the ultimate employer, Network Rail, instructed VRL to cease works. This instruction was passed down to Optilan on 29 August 2018.

The sub-subcontract contained provisions for the vesting in VRL of goods and materials before they were delivered to the relevant SISS delivery location. This could either be at the request of Optilan or at the direction of VRL and was to be "with a view to securing payment under clause 60.1" (cl 60.1 being the relevant contract provision for payment).

On 16 July 2018, Optilan issued its Application for Payment No 37 identifying a total value of "Vested Material" as being £1,856,808.70 of which materials with a value of £1,005,123.92 were stated as being held at Optilan's Coventry premises.

On 14 August 2018, VRL issued Payment Certificate No 37 which certified the £1,005,123.92 claimed for the Vested Material in Coventry. Due to other differences in the certification of the amounts applied for the overall certification was less than applied for.

On 17 August 2018, Optilan issued vesting certificate number 12 in respect of the "Materials as scheduled embedded in Interim Application No 37". The vesting certificate was issued in consideration of VRL agreeing to include in the next interim payment under the subsubcontract the sum of £1,005,123.92 in respect of those materials and the certificate also stated that property in the materials would unconditionally vest in Network Rail upon receipt of that interim payment.

On 18 September 2018, VRL made that next interim payment by paying Optilan under Payment Certificate No.37. Also on 17 August 2018, Optilan issued Application for Payment No.38. The sum applied for in respect of "Vested material – Coventry" had risen from £1,005,123.92 to £1,270,443.03.

On 7 September 2018, VRL issued Payment Certificate No 38. Again, whilst not certifying for payment the whole of the sums applied for, included within the sums certified was a sum for the vested materials held in Coventry, this time with the slightly higher value of £1,397,317.71.

The certificate assumed that the value of £1,005,123.92 included within Payment Certificate No 37 was an amount previously paid (although payment of that Certificate did not take place until 18 September 2018).

On 13 September 2018, Optilan submitted Application for Payment No 39. The total value for the vested materials held in Coventry was stated to be £1,549,304.

On 18 September 2018, Costain and VRL entered into a final account settlement agreement under the terms of which VRL agreed to accept a sum in full and final settlement of the final account payable under the terms of the subcontract. That agreement included a schedule of materials that had been delivered to Optilan but which had not been delivered to either VRL or to any of Crossrail sites. Under the final account settlement it was agreed that VRL would provide the materials to Costain, deliver them to a location to be agreed with Network Rail and would ensure that the materials were adequately insured, protected, stored and transported. The schedule was headed "Materials to be vested for Network Rail". The materials listed in the schedule were divided into those that were "Coventry Stock" and those that were "in build" in Coventry.

On 21 September 2018 VRL sent forms of vesting certificate to Optilan. These were signed and dated 20 September 2018. The first vesting certificate was for materials in the sum of £636,655.25 and the second vesting certificate was for materials in the sum of £784,066.17. As before, the consideration given by VRL in return for the proposed vesting was the agreement to include in the next interim payment under the sub-subcontract the sums in the vesting certificate. The vesting certificate provided that the property in the materials would unconditionally vest in Network Rail upon receipt of that interim payment.

On 1 October 2018, VRL made payment under Payment Certificate No 38 of only half the amount certified. The payment was made late and included contractual interest. The second half was paid on 9 November 2018.

On 4 October 2018, VRL issued Payment Certificate No 39. This certified the net payment due to Optilan at nil. The Payment Certificate did include sums certified in respect of the vesting materials, but at a slightly lower valuation than in the two vesting certificates, being £632,027.43 in respect of materials in the Coventry stores intended for Network Rail and £667,993.56 in respect of materials in the Coventry workshop intended for VRL. However, Payment Certificate No 39 also stated that the sums of £665,644.14 and £731,673.57 had been "previously paid" against these values. The certification of no payment due reflected a contra-charge by VRL against Optilan.

On 11 October 2018, VRL issued a pay less notice in respect of interim payment no 39. In respect of the materials, the pay less notice contained certifications of £632,027.43 for the stores materials and £789,947.37 for the workshop materials, with the same amounts for "previously paid" as given in Payment Certificate No 39. The pay less notice still certified the overall payment due to Optilan as nil.

After VRL went into liquidation, VVB M&E Group Ltd ("VVB") acquired its business and assets, although it did not take on VRL's liabilities under the subsubcontract with Optilan. Optilan refused to deliver the materials to VVB on the basis that ultimately ownership had not transferred. Optilan claimed that the trigger for unconditional vesting of the materials had not been met given the undervaluation of materials in Payment Certificate No 39, the alleged nullity of the subsequent pay less notice (on the basis it was not required where there was already a nil valuation) and the shortfall in VRL's payment of Payment Certificate No 38.

VVB brought proceedings for a declaration that the materials be delivered up.

Issues and findings

Had the materials been transferred?

Yes.

Was the pay less notice a nullity?

No.

Should the materials be delivered up?

There was no need for a mandatory order. The parties had agreed to an order that the materials should be retained at Optilan's premises in Coventry pending making them available for collection.

Commentary

This judgment ultimately turned on the terms of the vesting certificates; however some interesting observations were made. Optilan argued, for example, that the pay less notice was a nullity given that a payment certificate certifying nil had already been issued. The judge did not agree. The judge also made clear that the promise on the part of VRL was not to make payment of the sum relating to the materials but to include that sum in the next interim valuation, which is what was done.

Optilan's position may have been influenced by VRL's insolvency. The materials were of value and could be held against monies owed which may not be recovered. The judge, however, found that the vesting certificates could not operate to ring-fence the value of the materials in this way.

Part 36 offers – Validity of offer exclusive of interest

Mr Francis King v City of London Corporation

Court of Appeal;
Before Lord Justice Newey, Lord Justice Coulson and Lord Justice Arnold;
judgment delivered 18 December 2019

The facts

On 15 February 2013, Mr King and the City of London Corporation ("the City") agreed a consent order settling Mr King's claim against the City. The order provided for the City to pay Mr King £250,000 plus costs to be assessed if not agreed on the standard basis.

Mr King served his bill of costs ("the Bill") on the City and detailed assessment proceedings ensued. On 12 December 2017, Mr King's costs consultants wrote to the City's solicitors. The letter was headed "Part 36 offer" and stated that Mr King would accept the sum of £50,000 in full and final settlement of the costs detailed in the Bill. The letter went on to say that the offer related to the whole of the claim for costs within the Bill and any counterclaim but that it excluded interest.

The City did not accept the offer. On 13 June 2018, Mr King's Bill was assessed by a Deputy Master at £52,470 excluding interest. Mr King claimed that the consequences of Part 36 should apply. The Deputy Master disagreed on the basis that the offer made by Mr King was not a valid Part 36 offer as it excluded interest. Mr King appealed, and the judge dismissed the appeal, upholding the decision of the Deputy Master.

Whilst there was some conflicting case law on the subject, the Deputy Master and the Judge both relied on the drafting of Part 36.5(4) which states that a Part 36 offer will be treated as inclusive of interest.

Mr King appealed the judge's decision to the Court of Appeal. First, Mr King argued that Part 36 allowed offers to be made exclusive of interest.

In particular, that Rule 36.5(4) was not a mandatory requirement, merely a deeming provision, and that regardless, Part 36 allows offers to be made in respect of only part of a claim, and therefore interest can be excluded. Secondly, if that was not the general position, then offers relating to detailed assessment of costs were allowed to be made exclusive of interest given the guidance that was provided in Practice Direction 47. Finally, and in any event, the offer should be treated as inclusive of interest.

Issues and findings

Is a Part 36 offer valid if it excludes interest?

No.

Is the position different if the Part 36 offer is made in respect of detailed assessment?

No.

Commentary

There had been some conflicting caselaw in this area and therefore this clarification from the Court of Appeal that Part 36 offers (whether in the substantive claim or at detailed assessment) cannot be made exclusive of interest is helpful.

Although all three judges, agreed that the appeal should be dismissed, readers should note the judgment of Lord Justice Arnold. Not only did he come to the conclusion reluctantly that the appeal should be dismissed, he noted that the issue merited consideration by the Civil Procedure Rules Committee.

In particular, Lord Justice Arnold considered that there were arguments in favour of permitting Part 36 offers to be made which were exclusive of interest, at least in assessment proceedings if not in the general run of claims. Further, that if the Civil Procedure Rules Committee were to decide that offers exclusive of interest should not be permitted then he suggested that r 36.5 be amended to say so in terms or Practice Direction 47 should be revised.

Fiduciary duty of loyalty – Injunction to prevent services being provided

A Company v (1) X (2) Y (3)Z

Technology and Construction Court;
Before Mrs Justice O'Farrell DBE;
Judgment delivered 3 April 2020

The facts

The claimant company ("the Company") was a developer of a petrochemical plant ("the Project"). In 2012 the Company entered into two EPCM contracts with third party group companies ("the Third Party") in connection with the Project and further a parent company guarantee and coordination deed with another third party group company in respect of those contracts. In 2013, the Company entered into two contracts with a contractor ("the Contractor"), Package A and Package B, for the construction of facilities in connection with the Project.

Disputes arose between the Company and the Contractor concerning delays to the Package A and Package B works. The disputes were referred to arbitration ("the Works Package Arbitration"). The Company's position was that if, and to the extent that, it was liable to pay additional sums to the Contractor as a result of the Third Party's late issue of IFC drawings then the Company would seek to pass on those claims to the Third Party.

The Company approached an expert witness company ("X") in Asia with a view to engaging it to provide delay analysis expert services in connection with the Works Package Arbitration. On 15 March 2019 the Company and X signed a confidentiality agreement. By a letter dated 13 May 2019, the Company engaged X to provide delay analysis expert services in connection with the Works Package Arbitration, and on 26 May 2019, a formal letter of instruction was issued. The delay expert in question was K. K started work on the Works Package Arbitration from about June 2019, and at the time of this case X had invoiced approximately US$700,000 for the work carried out.

Further disputes as to payment and delay arose between the Company and the Third Party, and in the summer of 2019 those disputes were referred to arbitration in London by the Third Party ("the EPCM Arbitration").

In October 2019, X, Y and Z (being different offices of the same firm providing expert services) were approached by the Third Party to provide quantum and delay analysis expert services in connection with the EPCM Arbitration. X wrote to the Company explaining that it was a European office that had been approached, as distinct from the Asia office carrying out the services for the Works Package Arbitration. Further, that the parts of the Project under consideration would be different. X explained that it did not believe there was a strict legal conflict and could manage the matter with physical and electronic separation between the teams. The proposed quantum expert from the European office was M.

In February 2020, solicitors for the Company and the Third Party entered into discussions in relation to the scope of issues in the EPCM Arbitration. As a part of these discussions, the Third Party's solicitor indicated that the Third Party was in the process of instructing M as its quantum expert. The Company raised the fact that it had engaged K and intended for K to work on the EPCM Arbitration. The company reserved its right to challenge the Third Party's expert appointment and asked that the appointment be suspended pending a more thorough consideration of the issue.

The Third Party refused saying that there was no real conflict given the difference in discipline and location of K and M and the confidential information barriers in place within the expert witness firm.

On 20 March 2020, the Company issued an application to injunct the Third Party from using the expert services of M. Interim relief was granted and a return date given for a full hearing on 31 March 2020. The Company's position was that an injunction should be granted on the ground that provision of the expert services to the Third Party in connection with the EPCM Arbitration would be a breach of the rule that a party owing a fiduciary duty of loyalty to a client must not, absent informed consent, agree to act or actually act for a second client in a matter which is inconsistent with the interests of the first. X, Y and Z opposed the injunction on the basis that independent experts do not owe such a duty to their clients and there was no conflict of interest.

Issues and findings

Do independent experts engaged to provide advice and support in arbitration or legal proceedings in addition to expert evidence owe a fiduciary duty of loyalty to their clients?

Yes.

Would there be a breach of that duty if the experts in this case were to act for the Third Party?

Yes.

Commentary

In construction and engineering litigation and arbitration there are a number of well-known consultancy firms that provide expert witness services. Over the past decade many of the smaller, also well-known, firms have been acquired by larger global organisations, making the pool of consultancy firms smaller. This judgment is of some significance in this context. Many firms will operate on the basis that work carried out in different countries by different parts of the group and by different people should not create conflicts for the consultancy organisation. O'Farrell J found directly against this proposition. Here, where a global consultancy was to be engaged in connection with the same project, an injunction was successfully obtained against the provision of services to one of the parties. The foundation for this decision lies in the fiduciary duty that was found to be owed by experts to their clients.

Disclosure Pilot – Obligations in respect of adverse and known adverse documents

Castle Water Ltd v Thames Water Utilities Ltd

Technology and Construction Court; Before Mr Justice Stuart-Smith; judgment delivered 29 May 2020

The facts

Castle Water Ltd ("the Claimant") and Thames Water Utilities Ltd ("the Defendant") entered into a Transfer Agreement and an Operating Agreement on 18 July 2016. Disputes arose under the agreements which led to the issue by the Claimant of court proceedings with both the claim and counterclaim in the region of £40 million.

The Disclosure Pilot (PD 51U) applies to the proceedings. The parties had agreed many of the Disclosure Issues and Requests as required under the Disclosure Pilot but had referred certain matters to the court for resolution.

In considering the principles applicable arising from the Disclosure Pilot, the court provided clarification in relation to the parties' obligations in respect of "adverse" and "known adverse" documents. Pursuant to paragraph 3.1(2) of PD 51U, each party is under any obligation to disclose known adverse documents regardless of any order for disclosure made, unless they are privileged.

Issues and findings

What is the extent of the obligation on the parties' obligations to discover whether it has known adverse documents to disclose?

A party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them.

Commentary

The judge in this case wished to bring some clarity to the obligations surrounding the disclosure of known adverse documents including the continuing nature of that obligation.

It was held that a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them. These checks should take place at the outset of the case but may then be subject to review should circumstances change.

The judge acknowledged that what will be "reasonable and proportionate" will depend on the facts of any particular case. However he also noted that it will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or the controlling mind of an organisation, unless the issue in question is irrelevant to others.

Remoteness of damage – Loss of profit

Attorney General of the Virgin Islands v Global Water Associates Ltd

Judicial Committee of the Privy Council; Before Lord Hodge, Lord Wilson, Lord Lloyd-Jones, Lady Arden and Lord Sales; judgment delivered 13 July 2020

The facts

On 19 September 2006, the Government of the British Virgin Islands ("the Government") entered into two contracts with Global Water Associates Ltd ("GWA") relating to a proposed water reclamation treatment plant at Paraquita Bay in

Tortola. The first contract was a Design Build Agreement ("the DBA") and the second contract was a Management, Operation and Maintenance Agreement ("the MOMA").

Pursuant to the DBA, GWA was to design and build a 250,000 US gallons per day water reclamation treatment plant ("the Plant"). Pursuant to the MOMA, GWA was to manage, operate and maintain the Plant for a period of 12 years from the date when the Plant was first capable of achieving the level of water processing for which the Government contracted in the DBA.

In breach of the DBA, the Government failed to provide a prepared project site to enable the installation of the Plant. As a consequence, the Plant was not built. As a result of this, GWA was not able to earn the profits that it would have made from managing, operating and maintaining the Plant during the 12-year term of the MOMA.

GWA validly terminated the DBA and then referred to arbitration its claim for damages for breach of the DBA.

On 18 August 2014, the arbitrators delivered their award in which they rejected GWA's claim. The arbitrators found that the Government had breached the DBA in failing to provide a prepared site but that the damages claimed, loss of profit arising from failure to proceed with the MOMA, were too remote to be recoverable. The arbitrators found that damages for breach of the DBA were confined to sums payable for the performance of works under the DBA and did not extent to profits which would have been earned under the MOMA.

GWA applied to the BVI High Court on the ground that there were errors of law on the face of the arbitration award, seeking an order to remit the award to the arbitrators or to set it aside.

On 1 February 2016, the BVI High Court gave judgment in GWA's favour and the award was remitted to the arbitrators. The Government appealed to the BVI Court of Appeal. On 13 February 2013, the Court of Appeal allowed the Government's appeal. The Court of Appeal rejected the claim under the DBA, holding that the damages claimed were too remote in law. The Court held that if GWA terminated the DBA because of the Government's breach then Government could have had a treatment plant built by a third party which it could have then offered to GWA to operate. As a result, the parties could not reasonably have foreseen that the breach of the DBA would have the result that the operation of the Plant under the MOMA would not commence.

GWA appealed to the Privy Council.

Issues and findings

Was the claim for loss of profit too remote?

No. The claim for loss of profit was within the reasonable contemplation of the parties.

Commentary

A claim for loss of profit as damages often gives rise to questions of remoteness. Here, the question arose as to whether the loss of profit under the MOMA was reasonably contemplated by the parties.

Following a useful summary of the key principles, the JCPC concluded that on the facts of this case, objectively construed, lost profit under the MOMA was recoverable as damages.

In construction contracts it is not unusual to see clauses seeking to exclude claims for loss of profit or exclude such claims in respect of certain types of breach. In this case there appear to have been no such exclusions in the DBA, thus opening the position to the claim that was made by GWA.

The Fenwick Elliott Blog

The Fenwick Elliott blog, headed by Andrew Davies can be found at https://www.fenwickelliott.com/blog.

The aim of our blogs is to provide everyone with short updates on topical legal or other issues in the industry, to share our opinions on a wide variety of subjects and to engage with you and share thoughts and ideas on these various matters through the comments facility. Your comments are very welcome.

In October 2020, Laura Bowler wrote:

In July 2020, when COVID-19 still seemed like a relatively new topic, I published an article that set out in detail the reforms brought in by the Government – partly to try to tackle the impact of COVID-19 – in the Corporate Insolvency and Governance 2020 ("CIGA").

CIGA introduced a mixture of temporary and permanent measures that were intended to provide "breathing space" to businesses who were struggling financially (possibly as a result of the COVID-19 crisis). winding-up petitions cannot be presented until after 31 December 2020 and small suppliers remain exempt from the prohibition on termination clauses until 30 March 2021.

Recap on the key points of CIGA 2020

There is a mixture of temporary and permanent provisions in CIGA. I focus on two of these:

Temporary measures – winding-up petitions

Schedule 10 of CIGA (as updated) has placed a temporary restriction on the ability to commence winding-up proceedings based on a statutory demand that was served on a company in the period between 1 March 2020 and 31 December 2020. A winding-up petition may not be presented unless there are "reasonable" grounds for believing that (1) Coronavirus has not had a financial effect on the company, or (2) that the relevant grounds for the petition would apply even if Coronavirus had not had a financial effect on the company.

Permanent measure – ban on termination for insolvency clauses in supply contracts

The new provision means that suppliers of goods and services to an insolvent company are no longer able to rely on a contractual right to terminate or to "do any other thing" that arises because the company that it is supplying has become subject to a "relevant insolvency procedure" (defined at 233B (2) IA 1986 to include administration, liquidation and a new "moratorium" procedure). Further:

- the supplier is also prevented from terminating if the right to terminate had arisen before the company entered into the relevant insolvency procedure; and
- a supplier is prohibited from making payment of outstanding charges a condition of any further supply of goods and services when the company becomes insolvent.

It is easy to see that, in a construction context, subcontractors and suppliers will fall within the definition of being "suppliers of goods and services" to companies immediately above them in the supply chain. Unless they fall within the limited scope of exemptions to the ban which have been extended until 31 March 2021, they will be forbidden from using their contractual right to terminate in the event that the company they are supplying enters into an insolvency procedure (as will be seen below, such rights are usually reciprocal under the common standard forms). This leaves the subcontractor or supplier in a position where they have to keep working or supplying goods and materials to a company that they know is insolvent. In a cash-tight industry, this is not an attractive prospect.

Note, however, that CIGA does not prevent a party higher up the supply chain from exercising its contractual right to terminate in the event that one of its suppliers enters insolvency. For example, a main contractor can still rely on a contractual termination clause in relation to its insolvent subcontractor, but if the main contractor becomes insolvent, its subcontractor cannot terminate. An interesting question, which has yet to come before the courts, will be how this ban on terminating or doing "any other thing" by reason of the receiving company's insolvency interacts with the statutory right of suspension for non-payment under the Construction Act.

What have we learnt over the past few months?

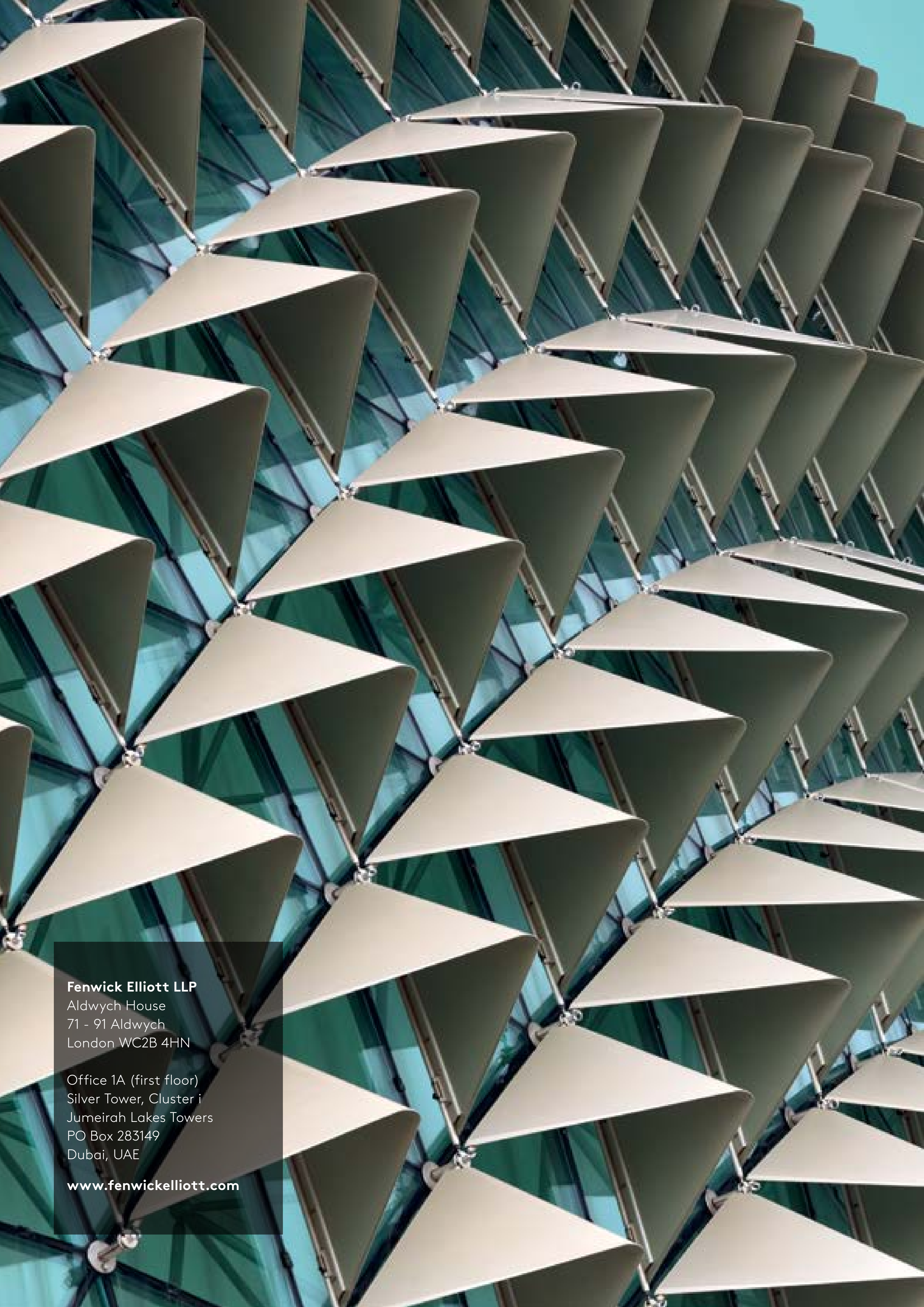
There can be no denying that CIGA will have had an impact on the financial viability of some companies, and the temporary restriction on winding-up petitions is likely to have helped buy them some time.

The unreported case of Re: Tundrill Limited may be some relief to many creditors worried about the broad nature of the restrictions on winding-up petitions introduced by CIGA and the latest extension of their application. In that case, a petition was issued on 1 May 2020 by a creditor. Whilst this petition was eight weeks before the formal introduction of CIGA, the retrospective nature of the Act meant that, at the time the petition was presented, the petitioner did not meet the requirements under CIGA for the petition to be presented. However, the petitioner argued that although the underlying debt had only been assigned to the petitioner in March 2020, the debt itself dated back to April 2019. As a result, the debt pre-dated the Coronavirus pandemic and, by reference to filed accounts, the business had been insolvent since 2018. The Company disputed this but was ultimately unsuccessful.

In giving his judgment, Judge Mullen acknowledged CIGA and the restrictions it imposed, noting that he could only order a winding-up petition where Coronavirus had had no financial effect on the company, or the grounds for winding-up would have existed in any event. He concluded that in this case the Company should be wound up. This at least shows that, in the right cases, winding-up petitions can still be used.

Conclusion

The commercial effect of the Coronavirus pandemic is difficult enough to assess even without continual changes to the legislative landscape. At the time of writing, there is every possibility that the temporary restrictions imposed by CIGA could be extended again. With suppliers having lost one of their key contractual tools for protecting them against insolvent customers (termination on insolvency) and being unable to contract their way out of the effects of CIGA, close cash and credit control will be more important than ever. Going forward, suppliers will have to spend more time at tender stage considering payment periods and ensuring stringent credit checks and due diligence are carried out in respect of their customers.



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