

THE LAW OF
CONSTRUCTION
DISPUTES
THIRD EDITION

CYRIL CHERN

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THE LAW OF CONSTRUCTION DISPUTES

THIRD EDITION

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THE LAW OF CONSTRUCTION DISPUTES

THIRD EDITION

CYRIL CHERN

BArch, JD, AIA, RIBA, FCI Arb, FDBF, Barrister, Chartered Architect, Chartered Arbitrator

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PREFACE

The field of construction is constantly changing, with new model forms being developed and the courts forming new views on old traditional practices. The last edition of this book brought the subject matter current and it is the hope that this newest version will now bring the knowledge in this field current as of 2019. This third edition provides not only that update but also adds new material, thus giving all construction practitioners not just the “rule” but also the reasons behind the rule on recurring points of law in this field.

The purpose of this book remains as a helpful one-volume text covering the most recurring questions and points of law that arise in construction and the disputes that go with them: not all of the law relating to such disputes, but rather the most frequently encountered and the development of that law, the relevant cases and the thinking and holdings of the various courts. The list of matters discussed herein is not exhaustive but rather garnered from my experience of construction and disputes throughout the common law countries of the Commonwealth and North America, as well as some relevant discussion of other court systems, notably the civil law and Sharia law, as both play a very important role in the current development of and solution to such disputes which arise in a construction setting.

The intent of this book is to provide the experienced UK practitioner, as well as the international construction lawyer, with selections of some of the most common problem areas in construction law along with the current state of the law and, thus, to allow each to obtain a better mastery of the subject.

Cyril Chern
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CHAPTER 1

Introduction to construction disputes

Applicable principles of law

Construction by its very nature is a complex undertaking involving numerous trades and disciplines all working under what is usually a “tight budget” and with time constraints for completion – all of which lead to the possibility of conflict and disputes arising as to time, quality, delay, and a myriad other complications. The law relating to these “construction disputes” or, as more commonly known in England and Wales, “construction law”, arises from the fact that this particular field of endeavour tends to generate a large volume of disputes arising from the actual Works themselves, the performance of the professionals prior to the Works (e.g. architects, engineers, surveyors and then the contractor) and its interactions with both these professionals and the employer.

The underlying basis for this is that all construction works are created by contract, some verbal, some written and some implied. In turn these contracts are grounded in the law of the country in which the contract is executed (or the country agreed upon by the parties) and which ultimately governs its execution. For example, the FIDIC¹ contracts state specifically that: “The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender”. The major legal systems worldwide that govern contracts are the common law, civil law and additionally that of Sharia law.

Common law

Common law refers to law derived from the courts and is to be differentiated from statutory law or regulatory law. In most common law countries there are “statutes” which are enacted by the legislature and/or “regulations” which are enacted by the executive branch through various departments or agencies, which are invested with power from a legislature. The common law, however, comes from actual court decisions over hundreds of years or from quasi-judicial tribunals. It is these court decisions, without the benefit of any express statutory authority, which form the basis for the contract law upon which the enforcement of construction disputes rely.

In England and Wales, in Commonwealth countries and in most states of the United States of America, the basic law of contracts does not exist in statute, but only in common law that is modifiable by statute, e.g. the Uniform Commercial Code in the United States. In almost all areas of the law, statutes can state the general principles

¹ The International Federation of Consulting Engineers.

but any distinctions or definitions exist only in the common law. The “actual” law on a subject is thus the result of what is known as *stare decisis* (*stare decisis et non quieta movere*), which literally means “stand by decisions and do not move that which is quiet”, and under the common law one is bound by precedential decisions on the topic.

*History*²

Prior to the existence of the common law concept in England, i.e. before William the Conqueror, society both in England and throughout much of Europe, in particular the Germanic peoples, was subject to varied local customs that generally were unwritten, were not uniform and were enforced arbitrarily.

In 1154, during the reign of Henry II, the common law system in England was institutionalised into “a unified system of law” which was “common” to the country through incorporating and elevating local custom to the national level, which ended local control, eliminated arbitrary remedies and reinstated a system which resolved claims by evaluating common local knowledge.

Judges would be sent from the King’s central court to hear the various disputes throughout the country. These judges would then resolve disputes on an ad hoc basis according to what they interpreted the local customs to be. They would then return to London and would discuss their cases and the decisions they made with the other judges and before recording their decisions. Over time the rule mentioned earlier of *stare decisis* developed, where a judge would be bound to follow the decision of an earlier judge and would be required to adopt the earlier judge’s interpretation of the law and apply the same principles promulgated by that earlier judge, if the two cases had similar facts. By this system of precedent, decisions became useable and with it the pre-Norman system of disparate local customs was replaced by a consistent system of laws that was common throughout the whole country, hence the name, “common law”.

Stare decisis

The rule of *stare decisis* has two components. The first is that a decision made by a superior court is binding on a lower court. This is known as “binding precedent” or “binding authority”. Under the English system precedent is usually created by the decision of a higher court, such as the House of Lords, which has now become the Supreme Court of the United Kingdom after taking over the judicial functions of the House of Lords in 2009. This differs from civil law and pluralist systems, such as Scots law, where precedent is not binding but instead case law will be taken into account by the courts in rendering their decisions. The second component is that a court should not overturn its own precedents unless there is a strong reason to do so and should be guided by principles from lateral and lower courts as required under the circumstances. This also leads to what is known as “persuasive precedent”, which, while not binding on the particular court, is “advisory” in nature and something that can be ignored if necessary.

² See Cyril Chern, *Chern on Dispute Boards: Practice and Procedure*, 4th edn, Informa Publishing, London, 2019.

In the common law system, there are various levels of courts usually commencing with the trial courts, whose decisions can be reviewed by the intermediate appellate courts and thereafter by a supreme court, such as in the UK. The inferior courts, i.e. the trial courts, are where the matters commence and they are bound to obey precedents established by the appellate court for their jurisdiction and all Supreme Court precedent. It is interesting to note where arbitrations and adjudications fit into this picture. In most international adjudications, e.g. FIDIC contract-related, there is recourse to arbitration for an “appeal”-type process and from there to the “trial” court level and upwards from that point. As will be seen in later chapters, arbitrators may or may not be required to follow the law but for purposes of this chapter the “chain” of *stare decisis* would be from the Supreme Court down to the appellate court to the trial court to arbitration and then to adjudication.

One succinct explanation of this principle was set out in a North American case, where the Supreme Court of California³ wrote:

“[u]nder the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.”

While discussing this principle it is interesting to note that there are slight modifications in the various jurisdictions; however, generally this method of “filtering down” decisions from the Supreme Court is referred to as “vertical *stare decisis*”.⁴

This concept of vertical *stare decisis*, based upon the idea that a judge, for reasons of commercial and social stability, should be bound by judges of higher courts, has another facet and that is that a judge should also respect the decisions of earlier judges of similar or of a coordinate level. This is known as “horizontal *stare decisis*”.⁵

In the UK, the House of Lords was the court of last appeal before it evolved into the Supreme Court of the UK and until *London Street Tramways v London County*

³ *Auto Equity Sales, Inc v Superior Court*, 57 Cal 2d 450 (1962).

⁴ It is interesting to note that in the United States there are in effect two separate common law legal systems – the state system and the federal system. However, in the federal system the division between federal and local law can cause interesting problems to develop regarding *stare decisis* as state courts in the United States are not considered inferior to federal courts but rather constitute a parallel court system. There, state courts must follow decisions of the United States Supreme Court on issues of federal law, and Federal Courts must follow decisions of the highest courts of each state on issues of that state’s law. However, decisions of the intermediate Federal Appellate Courts (i.e. the Federal Circuit Courts) are not binding on any state courts, and vice versa. In practice, however, judges in one system will usually choose to follow relevant case law in the other system to prevent divergent results. Also, it should be noted that while the United States follows the English common law, one state, Louisiana, follows the civil law, having derived its original system from the Napoleonic Code.

⁵ Again with reference to the English common law as practised in the United States, there the Federal Court system and the intermediate appellate courts are divided into “circuits”. Each panel of judges on the Court of Appeals for a circuit is bound to obey the prior appellate decisions of the same circuit. Precedents of a United States court of appeals may be overruled only by the court *en banc*, i.e. a session of all the active appellate judges of the circuit, or by the US Supreme Court.

*Council*⁶ it was not strictly bound always to follow its own decisions. In that case the Earl of Halsbury LC wrote:

“... it has now been admitted that there is upon this very question a decision of this House ... My Lords, for my own part I am prepared to say that I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided.”

After this case, once the Lords had given a ruling on a point of law, the matter was closed unless and until Parliament made a change by statute. This rather strict view was modified after the Practice Statement of 1966, which allowed the House of Lords to adapt English law to meet changing social conditions. Although the House of Lords would treat its decisions as normally binding, it would depart from these when it appeared right to do so. It should be noted, however, that despite this the Practice Statement has been seldom applied by the House of Lords and then usually only as a last resort. This is one of the major differences between the *stare decisis* principle in the UK and in the USA. In the United States the Supreme Court can, and does, overrule itself. There, for example, the court wrote in *Burnet v Coronado Oil & Gas Co*:⁷

“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. ... But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. ... This is strikingly true of cases under the due process clause.”

The United States Supreme Court further wrote in *Smith v Allwright*:⁸

“[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.”

It is interesting to note that while in the UK the House of Lords rarely reverses itself, the United States Supreme Court in the period 1946–1992 alone reversed itself in about 130 cases.

Further, with the advent of the EU under section 3(1) of the European Communities Act 1972, decisions of the European Court of Justice are binding in matters of community law on all English courts despite the fact that it is not bound by its own previous decisions. Thus the new order of *stare decisis* in the UK is as follows:

- (1) European Court of Justice.
- (2) The Supreme Court of the United Kingdom (formerly the House of Lords).
- (3) Court of Appeal: Here the Court of Appeal is bound by decisions of the Supreme Court of the United Kingdom even if it considers them to be wrong.

6 [1898] AC 375.

7 285 US 393.

8 321 US 649.

In *Young v Bristol Aeroplane Co Ltd*, the Court of Appeal held that it was bound by its own previous decisions subject to the following three exceptions:

- (i) Where there are two conflicting decisions the Court of Appeal must decide which to follow and which to reject;
 - (ii) Where a decision of its own has been impliedly overruled by the House of Lords;
 - (iii) The previous decision was given by carelessness or mistake.
- (4) Divisional Courts: A Divisional Court is bound by the Supreme Court and the Court of Appeal and normally follows a previous decision of another Divisional Court.
 - (5) High Court: The High Court is bound by the Court of Appeal and the Supreme Court but is not bound by other High Court decisions. However, other High Court decisions are of strong persuasive authority in the High Court and are usually followed. Decisions of individual High Court judges are binding on the county courts.
 - (6) Crown Courts: Decisions made on points of law by judges sitting at the Crown Court are not binding, though they are of persuasive authority.
 - (7) County Courts and Magistrates' Courts: Decisions of these courts are not binding.

It should also be noted the effect of the European Court of Human Rights pursuant to the Human Rights Act 1998, where courts in the UK must now have regard to decisions of the European Court of Human Rights.

Further, as to the principle of *stare decisis*, it should be noted that only the actual statements of law are binding and these are the reasons for the decision or "*ratio decidendi*". All other reasoning within a judgment is known as "*obiter dictum*". If a statutory provision or precedent had not been brought to the previous court's attention before its decision, the precedent would not be binding. Also, if a court finds a material difference between cases then it can choose not to be bound by the precedent. Persuasive precedents are those that have been set by lower courts and, as already mentioned, while they may be persuasive, they are not binding. Most importantly, precedents can be overruled by a subsequent decision by a superior court or by an Act of Parliament.

Common law countries

The common law constitutes the basis of most former English speaking and/or British Commonwealth countries including:

• England & Wales	• Northern Ireland	• The Republic of Ireland
• Australia	• New Zealand	• USA (except Louisiana)
• Canada (except Quebec)	• South Africa	• India
• Sri Lanka	• Malaysia	• Pakistan
• Singapore	• Hong Kong	• Malta

Stare decisis, therefore, is not usually a doctrine used in civil law systems because, as will be seen in the next section, it violates the principle that only the legislature may make law. However, the civil law system does have *jurisprudence constante*, which is similar to *stare decisis* and dictates that the courts' decisions move in the direction

of maintaining a predictable result for the benefit of society and commerce. Thus, theoretically inferior courts are generally not bound to precedents established by superior courts. However, in practice the need for predictability dictates that inferior courts generally defer to precedents by superior courts. In a sense, the most superior courts in civil law jurisdictions, such as the Cour de Cassation and the Conseil d'État in France, are recognised as being bodies of a quasi-legislative nature.

The doctrine of *jurisprudence constante* also influences how court decisions are structured. In general, court decisions of common law jurisdictions are extremely detailed with lengthy speeches by the court providing reasoning behind the decision and how it was reached. This occurs to justify a court decision on the basis of previous case law as well as to make it easier to use the decision as a precedent for future cases.

By contrast, court decisions in some civil law jurisdictions, such as France, tend to be extremely brief, mentioning only the relevant legislation and not going into great detail about how a decision was reached. This is the result of the theoretical view that the court is only interpreting the view of the legislature and that detailed exposition is unnecessary. As a consequence, much more of the exposition of the law is done by academic jurists who provide the explanations, whereas in common law nations this would be provided by the judges themselves.

Court opinions in other civil law jurisdictions, e.g. Germany, tend to be much longer than in France, and courts will frequently cite previous cases and academic writing. However, some of these courts place less emphasis than do common law courts on the particular facts of the case, instead emphasising the discussion of various doctrinal arguments and finding what the correct interpretation of the law should be.

Civil law

Civil law is the predominant legal system in the world today. The original difference between the common law and civil law was that the common law developed through custom and practice, beginning before there were any written laws and continuing to be applied by courts after there were written laws, whereas civil law developed out of the Roman law of Justinian's *Corpus Juris Civilis*.

The civil law, over time, became codified as *droit coutumier* or customary law that was in effect “statutory-like” local compilations of legal principles recognised as normative. In the eighteenth century, during the Age of Enlightenment, attempts to codify private law began as an expression of both natural law and the ideals that began in the Enlightenment. Those ideals required the creation of certainty of law through the recording of law and through its uniformity. Gradually, the old Roman law, and its interaction with the customary and local laws, began to disappear, followed by the *Codex Maximilianeus Bavaricus Civilis* in Bavaria in 1756, the *Allgemeines Landrecht* in Prussia in 1794, and the West Galician Code in Galicia, which was then part of Austria, in 1797. It was not until after the French Revolution that “civil codes” with any lasting import began. These started with the Napoleonic Code and continued in other jurisdictions during the nineteenth century as the recording of the law that would eventually become applicable to the various nation states, such as Austria's *Allgemeines Bürgerliches Gesetzbuch (ABGB)*, Spain's *Código Civil*, the Netherlands' *Burgerlijk Wetboek (BW)*, and Germany with its *Bürgerliches Gesetzbuch* (or *BGB*).

The Napoleonic Code

The Napoleonic Code, known originally as the *Code Civil des Français*, is the French Civil Code, established in 1804 under Napoléon I, and originally drafted by four jurists. For its time, it was striking in that it forbade privileges based on birth, allowed freedom of religion and specified that government jobs go to the most qualified. While it was not the first legal code to be established in a European country with a civil legal system, it was, with its stress on clearly written and accessible law, a major step in establishing the rule of law. Historically, the Napoleonic Code was not based on earlier French laws but instead developed out of the various customs of France, notably the *Coutume de Paris* and this process of re-codification was inspired by Justinian's *Corpus Juris Civilis* in dividing civil law into:

- (1) the law of persons;
- (2) the law of property;
- (3) acquisition of property.

Before the code, France did not have a single set of laws but instead depended on local customs and often on exemptions, privileges and special charters granted by the kings or other feudal lords, which were removed during the French Revolution. Specifically, the many different legal systems used in different parts of France were to be replaced by a single legal code, the drafting of which was led by Jean-Jacques-Régis de Cambacérès, then the Second Consul under Napoleon.

In *ancien régime* France, law courts, which were then known as the “parlements”, often took a somewhat legislative role where the judge would either protest a royal decision, i.e. protest excesses of royal power, or, in some occasions, defend the privileges of the social classes to which the judges belonged. The latter was especially true in the final years before the French Revolution and as a result, the French Revolutionaries took a negative view of judges making law. This was reflected in the Napoleonic Code provisions, which prohibited judges from passing judgments exceeding the matter to be judged, because general rules were within the domain of the legislative not the judiciary power. As mentioned in the previous section, in theory there is no case law in France. Despite this the French courts had to fill the gaps in the laws and regulations. This resulted in a large body of jurisprudence being developed and although there is no actual *stare decisis* the decisions by important courts have become more or less equivalent to case law.

Key to all of this is that the code established certain important provisions regarding the rule of law. Laws could be applied only if they had been duly promulgated and only if they had been published officially, which meant that no secret laws were authorised. Additionally, *ex post facto* laws were also prohibited and importantly the code also prohibited judges from refusing justice on grounds of insufficiency of the law thus encouraging the courts to interpret the law and to give “case specific” decisions rather than handing down general judgments, which had functioned in the past as a substitute for the legislature.

In 1808, the *Code d'instruction criminelle* was published and is the basis of the modern “inquisitorial system” of criminal courts, used in France and in many civil law jurisdictions. Interestingly, in light of the current trend in the EU as to the European Court of Human Rights, the French Revolution's *Declaration of the Rights of Man and of the Citizen* almost 200 years earlier had taken up the banner of protecting

the weaker in society from the perils of a strong regime. Indeed, Napoleon remarked that care should be taken to preserve personal freedoms, especially when the case was before the Imperial Court as “these courts would have a great strength, they should be prohibited from abusing this situation against weak citizen without connections”. It should also be noted that while it was not until 1836 in England that prisoners charged with a major crime were allowed to have counsel, article 294 of the *Code d'instruction criminelle* allowed the defendant to have a lawyer before the Court of Assizes and mandated the court to appoint the defendant a lawyer if the defendant did not have one. Failure to do so would render the proceedings null and void.

Even though the Napoleonic Code was not the first civil code and did not represent the whole of his empire, it was one of the most influential. It was adopted in many countries occupied by the French during the Napoleonic Wars and thus formed the basis of the private law systems in countries including Italy, the Netherlands, Belgium, Spain, Portugal, and their former colonies. In the German regions on the left bank of the Rhine (Rhenish Palatinate and Prussian Rhine Province), the former Duchy of Berg and the Grand Duchy of Baden, the Napoleonic Code was in use until the introduction of the *Bürgerliches Gesetzbuch* in 1900 as the first common civil code for the entire German Empire. Indeed, the Napoleonic Code was in force in central Poland from 1808 to 1946, and was also adopted in 1864 in Romania (with some modifications) and which is still in force. Further, it was also adopted in Egypt as part of the system of mixed courts introduced in Egypt after the fall of Khedive Ismail.⁹ Other codes with some influence in their own right on the codification of the civil law were the Swiss, German and Austrian codes, but even there some influence of the French code can be felt, as the Napoleonic Code is considered the first successful codification. Thus, the Napoleonic Code has to different degrees influenced the civil law systems of the countries of modern continental Europe, with the exception of Russia and the Scandinavian countries.

Additionally, in the United States, the State of Louisiana's civil code has kept its Roman roots and some of its aspects feature influences of the Napoleonic Code, with the inclusion of both Roman and Spanish civil traditions. The term “Napoleonic Code” is also used to refer to legal codes of other jurisdictions that are influenced by the French *Code Napoléon*, especially the civil code of Quebec, which was derived from the *Coutume de Paris*, which the British continued to use in Canada following the Treaty of Paris in 1763. Most of the laws in Latin American countries are also based in the Napoleonic Code, such as the Chilean Civil Code and the Puerto Rican Civil Code.

Differences between common and civil law

Codification is not the only difference between civil and the common law. The important distinction between codes and statutes is the methodological approach taken by the courts. In civil law countries, legislation is seen as the primary source of law and the courts base their judgments on the provisions of codes and statutes from which solutions in particular cases are to be derived. Thus, courts have to reason extensively on the basis of general rules and principles of the code, often drawing

⁹ Having been translated into Arabic from the French by Youssef Wahba Pasha between 1881 and 1883.

analogies from statutory provisions to fill any gaps in the understanding of the statute and to achieve coherence. In the common law, cases are the primary source of law while statutes are seen only as incursions into the common law and, thus, interpreted narrowly.

Another difference between the common and civil law countries lies in the methods used by the judiciary. In the United States, judges are seen as balancing the power of the other branches of government. In civil law in France, however, the concept of separation of powers is accomplished by assigning different roles to the legislature and to the judges, with the judge as *la bouche de la loi*: “the mouth of the law”. That is why under the civil law the concept of binding precedent does not exist to the same extent that it does under the common law and certain civil law systems are based upon the inquisitorial system (similar to Dispute Boards) rather than the adversarial system of the common law countries.

Civil law countries

Civil or civilian law is a legal tradition which is the base of the law in the majority of countries of the world, including:

• France (and former colonies)	• Italy (and former colonies)	• Spain (and former colonies)
• Germany	• Austria	• Switzerland
• Greece	• Portugal	• Turkey
• Japan	• South Korea	• Republic of China (Taiwan)
• Denmark	• Norway	• Sweden
• Finland	• Iceland	• Louisiana (USA)
• Quebec (Canada)	• Puerto Rico (USA)	• Latin America
• China (a mix of civil and socialist law)	• Russia (a mix of civil and socialist law)	

Sharia – Islamic law

While most countries utilise either the common law or civil law, there is a third body of law which is applicable to construction dispute resolution via arbitration and/or adjudication and is used either directly or as an adjunct to the civil law and is prevalent in countries such as Saudi Arabia, Egypt and Iran.¹⁰

History

Historically, Sharia or Shari’ah is the body of Islamic law and the legal framework in Muslim legal systems that deals with aspects of both business law and contract law. Some Islamic scholars accept it as the body of precedent and legal theory established before the nineteenth century while other scholars view Sharia as a changing body and include Islamic legal theory from the contemporary period.

Before Islam, the Arabs resolved their disputes without the use of any formal court system. This was done either through arbitration or through conciliation and was administered through tribal chiefs or other respected tribal elders. The resolution of

¹⁰ The author would like to thank Mariam El-Awa for assistance with this section.

disputes during this period relied on the parties' first coming to an agreement as to the extent to which any resolution of their dispute would be binding upon them.

The coming of Islam brought with it the development of a legal system known as Sharia, which in effect recognised and upheld the earlier dispute resolution procedures. The ability to settle disputes amicably is seen in Sharia. Dispute resolution techniques, notably arbitration, are seen in all four sources of Sharia. This totality of Sharia is based upon the Quran (Koran); Sunna (the acts and sayings of the Prophet Mohammad (pbuh)); Idjma' (the consensus of opinion – which is similar to the concept of “common law”) and Qiyas (which is reasoning by analogy). Whether dispute resolution is binding or not is, of course, still dependent upon the intent of the parties and this can best be determined if the parties at the inception have an agreement as to whether any dispute resolution decision is final and binding upon them. Thus agreements for such dispute resolution methods as arbitration could be made binding, or even for Dispute Board decisions. Conciliation, similar to mediation, is permitted under Islamic law in civil, commercial, family and other matters as long as it does not permit acts against God's commands or the matter settled by conciliation falls in the ambit of rights of God, i.e. crimes and their sanctions. Again, this method of dispute resolution is also dependent upon the agreement of the parties to its being held as binding or not.

Sharia does not give detailed rules on any form of dispute resolution. The Quran sets out general principles, which govern individuals and, like in the common law countries, it is the jurists who are responsible for expanding and clarifying various aspects as necessary. The interpretation of the Quran, known as the “Ijtihad”, is where the Islamic jurists give their elaborations and deductions as needed by society and it is this area of Sharia that governs in matters such as dispute resolution. It is important to note that there are four major doctrinal schools of Islamic Sharia, each with a slightly different view on dispute resolution, in particular dealing with arbitration and conciliation. Both of these principles are also part of the adjudication processes such as Dispute Boards and as such become part of this discussion.

Hanafi Islamic Sharia

Hanafi Islamic Sharia places a great deal of emphasis on the agreement of the parties in the settlement of disputes, i.e. through arbitration, and finds that arbitration is similar to conciliation and that an arbitrator acts as the agent of the parties who have appointed him. Under this school of thought, any award of an arbitrator is not the same as a court judgment but rather similar to conciliation between the parties. However, the scholars that developed this school of Sharia law feel that the parties must accept the award made in an arbitration, if the parties have agreed in writing to be bound by the award.

Shafi Islamic Sharia

Under the principles of Shafi Islamic Sharia dispute resolution methods, such as arbitration, are a legal practice, whether or not there is a judge in place where the dispute has arisen.¹¹ The difference here is that arbitrators are held to be at a level

¹¹ Samir Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law*, Graham & Tortman, London, 1984 at p 22.

below that of judges because an arbitrator can be removed at any time prior to his issuing any award.

Hanbali Islamic Sharia

Hanbali Islamic Sharia is of the position that awards have the same stature and are as binding as a court's judgment. Here the one making an award must have the same qualifications as a judge and as such any awards made by an arbitrator are binding.¹²

Maliki Islamic Sharia

Maliki Islamic Sharia accepts that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one relies upon the conscience of the other party.¹³ The Maliki school also feels that whoever is acting as the dispute resolver, such as an arbitrator, cannot be revoked after the commencement of the arbitration proceedings.

All of these Schools of Islamic Sharia Law base their rules on the use of an agreement that confers the powers upon the dispute resolver to make a binding decision¹⁴ as well as the full consent of all of the parties.

Interestingly, whether or not any such agreement is to be written or oral is not decided by any school in Sharia. In the leading case between the Caliph "Ali Ben Abi Taleb" and "Muawya Bin Abi Sofian", the two parties agreed to appoint two arbitrators in a written deed which stated the names of the arbitrators, the time limit for making the award, the applicable law and the place of issue of the award.¹⁵ In this dispute the parties used arbitration to settle the dispute, but the arbitration clause was not effective.¹⁶ Here, the issue arose as to whether under Sharia a "future" dispute could be referred to arbitration or only disputes that had come into being. All four schools of thought dealt only with disputes that were already in existence and not with disputes that had not yet occurred. While this matter has been the subject of much debate, the underlying Sharia principle is that parties to a contract are allowed to contract for whatever they decide so long as whatever they decide is not against any of God's specific commands, such as adding contract provisions allowing interest.

Dispute resolution clauses, such as those dealing with arbitration, which are beneficial in allowing quick and reasonable solutions to complex commercial matters and which do not contravene any of God's commands, are considered valid.

The older view, that such dispute provisions are not truly binding and that such agreements are revocable options rather than contractual undertakings,¹⁷ led some classical jurists in Islamic countries to argue as to whether such agreements are binding,¹⁸

¹² Abdul Hamid El-Ahdab, *supra* note 10, at p 19.

¹³ See Samir Saleh, *supra* note 15, at 21; Abdul Hamid El-Ahdab, *supra* note 1, at p 21.

¹⁴ MI Abul-Enein, *supra* note 10, at p 5.

¹⁵ Walied, El-Malik, *Mineral Investment Under the Sharia Law*, Graham & Tortman, London, 1993 at p 127.

¹⁶ Although the two arbitrators in this case came to different conclusions and held different views, this arbitration was a very important instance, in history, of Islamic law and arbitration. See S Mahamassani, *International In the Light of Islamic Doctrine*, Académie de Droit International, Recueil des cours, 1967 at p 272.

¹⁷ Abdul Hamid El-Ahdab, *supra* note 7, at p 24.

¹⁸ The Hanafi, Shafi and Hanbali schools give each party the right to withdraw his consent for arbitration at any time. See, Al-Mawardi, Abu Al- Hassan, *Adab al-Qadi*, (Cairo: Saadah Publication 1327H) at p 383.

either at the start of the agreement or through to final completion. This was later incorporated in Al-Majala, which was later codified in the laws of the Ottoman Empire.¹⁹

Modern thinkers now take the view that the older concept of non-binding agreements to sort disputes is “obsolete, superficial and ill-founded”.²⁰ The current view under Sharia law is that any such dispute agreements (such as arbitration) are binding upon all of the parties once the agreement has been entered into and that the parties are also bound by any decision which flows from that agreement, e.g. the arbitrator’s award. Islamic scholars have taken the position that the binding nature of dispute resolution agreements flows from the Quran where it states “... and fulfil every agreement, for every engagement ...”.²¹ This meaning was stressed by the Prophet Mohamed (pbuh) where he said, “Believers should honour their engagements ...”. It is now widely held that, once entered into, such dispute resolution agreements, so long as freely made, will be upheld but, as the Quran does not mention rules and procedures, how dispute resolvers are to be selected and/or other matters, the parties themselves or the state are able to make these determinations. For example, the parties are free to agree on the manner and method of selection of arbitrators or any other dispute resolver(s). While the parties are free to agree a method to pick individuals or to define the dispute resolvers by the position they are to occupy, none of the four schools of thought talks about having anyone other than the parties to a dispute choose the person(s) who will act to resolve the matter. There is no mention of any third person making any selection or any entity. But despite no mention being made of how this would work, there is also nothing under Sharia law that prohibits the appointment of any dispute resolver by others than those involved with the dispute, i.e. some appointing body such as the ICC.

Additionally, none of the four schools of thought places any restriction on the number of dispute resolvers that may be used or appointed. It is left entirely to the parties to decide whether they want one or three or more acting as dispute resolvers or arbitrators and additionally, the number need not be an even number. However, a divergence of views occurs as to whether, once arbitration has started, the arbitrator can be removed unilaterally by either of the parties. Both Shafi and Hanafi allow the unilateral removal of an arbitrator at any time prior to his giving his award. The Maliki school, however, does not allow any unilateral removal once the procedure has commenced. Of course, under any of the schools of thought, any dispute resolver can be removed if all of the parties agree.

It should also be noted that if one of the parties to the dispute is not Muslim and a non-Islamic legal system/procedure is utilised, this will be recognised by Maliki, Shafi and Hanbali Islamic Sharia. Also, as several Muslim countries are signatories to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), they have, by doing so, approved of these Muslim/Non-Muslim methods of dispute resolution so long as the underlying rules do not violate the express rules of either the Quran or Sunna.²²

¹⁹ Article 1848.

²⁰ Abdul Razak Al-Sanhury, *Masader Al-Haq*, Vol 1, Dar Al-Nahza Al-Arbia, Cairo, 1968 at p 80.

²¹ Under Maliki Sharia once the parties have consented to arbitrate (at the time of the initial agreement), they are bound by their agreement and are not be permitted to negate the underlying agreement.

²² Prophet Mohammad (pbuh) in the case known as “Banu Quraydah” accepted the application of customary and Mosaic law in lieu of Islamic law.

The four schools of Islamic Sharia agree that the only matters which are not subject to dispute resolution by individuals such as arbitrators, etc., are matters relating to the “Rights of God”²³; in other words, areas of the law including family matters, criminal matters and areas of public policy must be referred to the Islamic Courts. Other than areas that are specifically prohibited, dispute resolution using arbitration, mediation, Dispute Boards, adjudication or similar processes can be used.

The Maliki, Hanbali, Hanafi and the majority of Shafi²⁴ Sharia schools hold that an arbitral award is as enforceable as a court judgment once a judge has reviewed the decision/award of the arbitrator and has ruled that it is enforceable. The Maliki, Hanafi, Hanbali and the Shafi majority also hold that if absent an obvious error on the face of the award or if it is “unjust” the judge is required to enforce an arbitral award and must do so even if that judge does not agree with the opinion contained in the award and further, the judge is not allowed to delve into the merits of the award itself nor the actual reasoning by the arbitrator. Indeed, one of the only reasons to set an award aside is if the award is in violation of public policy or Sharia law.²⁵

Sharia does not have a strictly codified uniform set of laws. In a way it is more similar to common law as it is a system of devising laws, based on the Quran, Hadith, and centuries of debate, interpretation and precedent.

Additionally, there are no specific rules of procedure in Sharia law. Every country chooses its own procedural law as it wishes. So, for example, the procedures in Saudi Arabia and Iran are very much similar to those in civil law countries, such as Egypt and France. In fact, the Saudi laws that have been enacted in the last 60 years are based on Egyptian laws. When it comes to court procedure, the procedure in Saudi Arabia and Iran is much less complicated than the procedure in Egypt, which is taken directly from the French Civil Law.

Due to this lack of specific procedure, any arbitration undertaken without resort to an appointing body or, for example, an adjudication, which is part of an ad hoc programme, needs to have as its contractual system as much detail as possible. This is necessary to avoid any ambiguity or procedural gaps that may lead to legal disputes before the courts and any potential resulting judicial intervention in interpreting the adjudication agreement. As always, a detailed contract is the best choice to prevent any judicial “over-interpretation”. This principle, that the contract is the “law of the parties”, is a Sharia principle as much as it is a worldwide-accepted concept.

ADR procedure

There are some procedural steps that should be set out in detail in any Alternative Dispute Resolution (“ADR”) contract that may have to later rely on Sharia Law. These are:

- Enforcement provisions

As far as enforcement is concerned, ADR decisions would be enforced via the courts in both Saudi Arabia and Iran according to the arbitration law of each country.

²³ Samir Saleh, *supra* note 15, at p 47.

²⁴ The minority of Shafi Sharia is of the position that the arbitral award cannot be binding and enforceable unless all parties accept it as part of the agreement to arbitrate.

²⁵ “Public policy” under Sharia refers to the overall intent and spirit of the law and its roots in the Koran and Sunna unless as it is said “they forbid what is authorized and authorize what is forbidden”.

The Saudi Arbitration Law (“SAL”) would take this decision to the Board of Mazalim jurisdiction “Diwan Al-Mazalim”.²⁶

The Commercial Circuit (“CC”) in the Diwan will revise the decision and decide whether it is enforceable in Saudi Arabia or not. The Commercial Circuit in Diwan Al-Mazalim could also revise any arbitration award or ADR decision sought to be enforced by the court’s coercive powers in Saudi Arabia — according to the substantive rules of Sharia as expressed in the Hanbali School of Law.²⁷ This revising power finds its base in article (39) of the implementation rules, which binds the tribunal to issue its award in accordance with Sharia law. The same also applies to Dispute Boards.

In Iran, according to the Iranian Arbitration Law (“IAL”) the competent court will play the same role. The main difference is that the Iranian Arbitration Law is based on the UNCITRAL Model Law while the Saudi Arbitration Law is not. The competent Iranian court will decide the enforceability of the award in Iran according to the requirements of article 33(1) of the Iranian Arbitration Law.

Enforcement of adjudication decisions versus arbitration awards

The contract between the parties should make clear whether the ADR decision is an arbitration award or advisory or binding adjudicatory decision, and if combined the distinction should be clear. Because, if any of these is not amicably enforced, it would be subject to substantive review in Saudi Arabia by the Commercial Circuit of Diwan Al-Mazalim. Additionally, the newest forms of ADR using Dispute Boards bring with them enforcement issues caused by the differences between recommendations and decisions. These are as follows:

Dispute Review Board decisions

- An ADR proceeding such as a Dispute Review Board could, for example, issue a recommendation, which is open to acceptance. In the recommendation situation, if neither of the parties sends a notice of dissatisfaction to the other party²⁸ this recommendation is considered a final and binding resolution to the issue in question. The parties are required to enforce it and it would not be subject to any further recourse.
- The party seeking to enforce the Dispute Review Board’s decision should refer the other party’s failure to agree to a binding form of ADR. If an arbitration award were issued in favour of the claimant, the claimant could seek enforcement in Diwan Al-Mazalim. The Diwan will revise the award. The dispute referred to arbitration will not be seen as the mere failure to

²⁶ Mazalim is an Arabic word literally meaning complaints. This jurisdiction is very similar on one hand to administrative jurisdiction in civil law countries and on the other hand it contains commercial and other circuits. *Diwan Al-Mazalim* was established in Saudi Arabia to avoid naming courts other than the Sharia court. Although some of the judges of the Diwan are only qualified in Sharia, most of them are qualified in law as well.

²⁷ Two main sects exist in Islam: *Sunni* sect in which there are four different schools of law, *Hanbali*, *Hanafi*, *Shafeay* and *Maliki* schools; and the *Shiite* sect in which there are two schools of law, *Zidi* and *Jafari* schools. There are two other schools of law in Muslim jurisprudence, which are the *Zahiri* and the *Ibadi* schools. The School followed in Saudi Arabia is the Hanbali School of Law. Its rules represent the main source of the Saudi legal system.

²⁸ According to the agreed procedure and time limits.

comply with the Dispute Review Board's decision, but the supervisory power of the Diwan will extend to include a substantive review of the Dispute Review Board's decision. The same will happen if the failure to comply with the Dispute Board's decision is by itself referred to the Diwan.

Dispute Adjudication Board decisions

- A Dispute Adjudication Board will issue a decision, which will be accepted by both parties and, thus, enforced amicably. Or the other party will serve a notice of dissatisfaction on one party. Consequently, the Dispute Adjudication Board's decision will be *temporarily binding* pending final resolution if either party so desires.
- A temporarily binding decision is not likely to be capable of enforcement in Saudi Arabia. A notice of dissatisfaction would have an effect of an accepted application for leave to appeal in the court's system – in suspending enforcement of the Dispute Adjudication Board's decision.

The form of the Dispute Board decision

No binding rule on the form of Dispute Board decisions is available in Sharia law. It should follow the form agreed upon by the parties. In the case of no agreement, it will take the form the board members deem proper. However, the Dispute Board decision must always be in writing and good practice dictates that if the form of the decision is not stated the parties should either agree a format or the Dispute Board members should set one out for the agreement of the parties as part of their Board procedure.

Particulars as to the Kingdom of Saudi Arabia

As mentioned above, the enforcement of a Dispute Board decision is likely to end up in the form of an arbitration award. Hence, the constraints relevant to Sharia law in the Saudi Arbitration Law ("SAL") are relevant to arbitration as they are to Dispute Board decisions. Also, some public order Sharia substantive principles will be of significant relevance. Most important in this regard is that no interest should apply to any amount of money to be paid. The right to be heard on all issues, natural law or due process and a fair hearing for both parties and their representatives, should be clearly shown by the decision in order to prove that fair trial has taken place.

On 8 June 2012, Saudi Arabia published its new Arbitration Regulation (Royal Decree No. M/34) (the New Arbitration Regulation "NAR") replacing the Arbitration Regulation of 1983 (Royal Decree No. M/46) and the Rules for the Implementation of the Arbitration Regulation of 1985 (Ministerial Resolution No. 7/2021/M) (the former law) – all of which affect the enforcement of Dispute Board decisions through arbitration. The NAR (which became effective on 7 July 2012) institutes a variety of reforms to Saudi Arabia's arbitration system.

Prior to this new law, all arbitrations in Saudi Arabia were subject to judicial oversight by the Saudi courts and under the former law were to be conducted in Arabic and awards could be modified, reformed and/or rejected at the discretion of the court.

Additionally, under the former law the court was responsible for appointing arbitrators if the parties did not do this and also for approving the parties' agreement

to arbitrate, and as there were no written requirements for arbitration agreements any decision as to whether to approve arbitration was in the court's discretion. It should be noted that under the former law the court also supervised and gave rulings on procedure and requests for injunctive and interim relief.

Most importantly, under the former law the courts had sole responsibility for the enforcement of arbitral awards (both foreign and Saudi) and were free to review the award specifically to make certain that the award was Sharia-compliant – the broad right to reverse, rewrite or vacate any award and then to award new damages as it deemed necessary.

The NAR now follows from the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, and as a result aligns Saudi law with international arbitration norms, allows more control to the parties, and provides greater clarity on several issues, which include:

- New written guidelines for determining whether an agreement to arbitrate may be enforced.
- Clear and detailed procedures for the appointment and/or recusal of arbitrators.
- Languages other than Arabic may be used if ordered by the arbitration panel or the parties agree (although awards must be translated to Arabic prior to enforcement).
- Government bodies are prohibited from entering into arbitration agreements, unless approved by the Prime Minister.
- The parties are now free to choose which law will apply. However, the new arbitration law affirms that Sharia is paramount and that arbitration awards may be enforced only if they are Sharia-compliant.
- It should be noted that while the New Law provides increased flexibility with respect to many matters it is all still subject to the Saudi courts' oversight and mandate to ensure Sharia compliance.

It is still for discussion whether under Saudi law women can now act as arbitrators.²⁹ If in any dispute or in any stage of a Dispute Board's decision is referred for enforcement, defence of nullity may face the party in whose favour the decision was. If the Dispute Board decision is used as evidence, this defence may not be raised, however. Additionally, the chairman of the board shall have sufficient knowledge of the Sharia principles.³⁰

To avoid the possibility of annulment of Dispute Board decisions, it may be advisable to use women and/or non-Muslims as experts and not as members of Dispute Boards, keeping the membership of the Dispute Boards to Muslim men.

²⁹ Although it is not expressly stated in the SAL that women cannot act as arbitrators in domestic arbitrations, it is an agreed opinion in the Hanbali School of Law which is followed in Saudi Arabia. The opinion held by the Hanbali School is that women cannot act as arbitrators. See Fatimah M El-Awa, *Arbitration Agreement in Sharia and Law – A study for Muslim jurisprudence codification and the effect of the Mejella*, Al-Maktab Al-Islamy, Beirut, 2002, pp 240–242. "Enforcement of Foreign Arbitration and Court Awards in Muslim Jurisprudence and its Conditions", Prof Wahba Azuhali, paper presented to "Arbitration in Sharia Law" conference held in Dubai, 2001, and "Arbitrator's Capacity in Muslim Jurisprudence", Mahmud Al-Khaledi, paper presented to the same conference.

³⁰ See above, note 9.

Further, if oral evidence is admitted, the testimony of two women will be considered equal to that of one man. Hence, on every issue on which oral evidence is given, the testimony of two men or one man and two women is required for this oral evidence to be admissible and effective.³¹ This is subject to article 31 of the implementation rules, which requires that witness statements shall be given pursuant to Sharia principles.

As for *Gharar*,³² it is more likely to appear in cases of bespoke contracts and not in standard forms with which Saudi Arabia courts are now quite familiar.

This review of Sharia-related issues in the Saudi Arbitration Law is necessary because arbitration, unlike the concept of Dispute Boards, has gained considerable recognition, understanding and familiarity in Saudi Arabia. Yet, the issues raised are still obstacles in the way of the Dispute Board-friendly environment in Saudi Arabia.

Particulars as to the Islamic Republic of Iran

The Iranian Arbitration Law is based on the UNCITRAL Model Law. No Sharia-related provisions are found in it, and hence any legal issues related to Dispute Boards would be secular provisions and not Sharia-based ones.

In principle, Dispute Boards are an acceptable means of dispute resolution under Sharia law, given that the parties are treated on an equal footing and that the general principles of adjudication are taken into consideration. The agreement to refer any dispute or difference to a Dispute Board, whether a Dispute Review Board or Dispute Adjudication Board, is a contractual agreement that shall be respected and to which the parties are bound as far as their contracts allow.

Dispute Boards under common, civil or Sharia law

Since Dispute Boards are governed by the law of the country in which the underlying contract is also governed, the basis of its decisions and rulings should follow those of the “host” country. Generally, this is governed by the underlying law of contract. To the extent that Dispute Board members are in need of assistance in this regard most standard Dispute Board provisions should provide for the member’s right to seek legal guidance as needed.

Additionally, as to the Dispute Board Decision, most contracts provide that if the decision is not accepted then the matter may go to arbitration, usually before a pre-agreed arbitration panel or to be determined by an internationally recognised arbitration group, such as the International Chamber of Commerce (ICC). In this regard the arbitration decision will be based upon the rule of law of that particular jurisdiction.

The historical development of dispute resolution in construction matters

The resolution of construction disputes relies either on the courts of the country named in the contract or, more likely, on some form of ADR (alternative dispute resolution) such as arbitration, mediation or adjudication by itself or through the use

31 The Holy Quran, Al-Baqarah Surat, verse 282: “When ye deal with each other ... get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her ...”

32 *Gharar* is an Arabic word, which means that a transaction contains elements of cheating, danger and unweariness.

of a Dispute Board. Traditionally, construction dispute resolution lies in the history of arbitration and the role of the arbitrator.

In England the first “official” mention of arbitration, or “Arbitrament” as it was then known, was in William Sheppard’s “*A Grand Abridgment of the Common and Statute Law of England*,” published in 1675. This was 23 years before the first arbitration legislation in the common law, and three centuries before the UNCITRAL rules. The statement of the law, as it then stood, was therefore a pure statement of the “common” law, as Sheppard understood it. He recorded, in the volume dealing with “*Arbitrament and Arbitrators*”, that:

“Arbitrament is an Award or Judgment made by one or more at the Request of some parties for the ending of some difference between them. An Arbitrator is he, or one of them so chosen, said to be an extraordinary Judge in matter of difference between party and party by their mutual consent, and their authority is given to them by the parties litigant to hear and determine the matter in difference between them to whose judgment they bind themselves to stand: It is called an Arbitrament, either because these judges may determine it ex bono viri Arbitrato, not being bound to the strict Rules of Law, or because they have submitted to them, not by compulsory means but ex libero Arbitrio. Terms ley, West Symb. 2 part. sect 21.”

“Arbitrament, some say, is General, but when it is an Award of all Actions, demands and differences between the parties upon such a Reference thereof unto them: or Special, where the Reference and Award upon it is only one or more matters of difference mentioned between them, but whichever it is it is called a Judgment. The Award also may be made and rendered, either in writing or by word of mouth.”

“An Umpire is the same in effect with an Arbitrator, for he is one chosen by the Arbitrators finally to order, and determine the matter in difference between them, if the Arbitrators cannot, or do not order by the day agreed upon between them.”

“For this take these things in general:

- (1) That there are five things incident to an Arbitrament; (1) Matter of Controversy: (2) Submission to the award of the persons chosen: (3) Parties to the Submission: (4) Arbitrators: (5) The making of an award by word or writing. Co.10.137. *Dyer* and 217.
- (2) That the Submission is the agreement by both parties to abide and submit to the order made by the Arbitrators: this is sometimes made between the parties reciprocally, and sometimes to the arbitrator. It is made between the parties sometimes by Bond, sometimes by Covenant, sometimes by Promise, and it may be good, either way. And so it may be without any of these by a bare Submission and agreement only to refer it to them: and an Obligation or Assumpsit to stand to the award of I.S. and I.D. hath in an Implicit Submission it to the Award. This is also sometimes absolute without reference to any time: and sometimes Conditional, as a Submission to their Award it if it be made by such a day. Co.10.131.5.78 20 H6.18 Trin 18 Jac. *Cyprian Salters* Case.
- (3) That if the award is Repugnant, insensible, incertain, against Law, not definitive, or on the one side only, it may be void. *Yelverton* 98. for it shall not have a favorable construction as a Deed or Will shall have to bring it to the intent of parties, for it is in nature of a Judgment and must be plain and complete. *Yelverton* 98. Croo.I.3, 4. Co.5.77.
- (4) That if it do not pursue, and be made according to the power given to them by the Submission, it will not be good. *Bendloes* 38. It may in not be larger nor narrower than the authority given thereby. *Jenk. Cent.3* case 6.
- (5) Arbitrators may not refer their Arbitrament to others, or to an Umpire, unless the Submission be so made to them, nor may they make their Arbitrament in their own Names, and the Name of a third person to whom no Submission was made; nor may they alter their Award once being made. *Jenk Cent 3. case 6.*”

It should be noted that the dispute resolution process Sheppard describes and labels as *Arbitrament*, could actually describe a number of processes. It is described as

“... an Award or Judgment made by one or more at the Request of some parties for the ending of some difference between them.”

While the concept that private parties under their agreements are bound to whatever dispute resolution agreements they enter into goes back to Roman times,³³ the underlying rules, as written by Sheppard, of how an *Arbitrament* should operate, and the rules an arbitrator is bound by, remain fundamental to modern concepts of arbitration.

The legal development of other dispute resolution methods

Over the past 300 years dispute resolution methods to resolve and/or prevent construction disputes have developed further. In both the common law and civil law jurisdictions the characteristics of arbitration have been solidified. Internationally, the recognition of the rights of private parties (as opposed to the rights of states³⁴) has been a recent development.

It may well be that this “categorisation” of arbitration led to the need to identify and regulate other dispute settlement devices that looked like, but did not exactly replicate, arbitration. Thus, civil and the common law jurisdictions also listed the characteristics of experts, and the process they embarked upon, with investigative/valuation processes in different industries being noted and categorised.³⁵ Lord Mustill has questioned the desirability of the process of separating and labelling dispute resolution methods.³⁶

The engineer/arbitrator as judge

After the Industrial Revolution in England, the courts became faced with the problem of how to deal with various dispute resolution clauses in contracts. The first of these decisions was in 1850 and dealt with the famous engineer Brunel.

33 See for example Reinhard Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, Oxford University Press, 1996, 511 and 526 *et seq.* See also Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration*, HOLO Books, 2004 The Arbitration Press, Oxford. The adjudicator/arbitrator *Bonus Vir* was the oldest form of known Roman (peaceful) dispute resolution. (*op cit* p 46) Mr Roebuck points out that the ancients were not too concerned with how modern legal scholars would classify the decision of the third party. *Supra* pp 11–21.

34 See Geneva Protocol On Arbitration Clauses, 1923: *Protocol On Arbitration Clauses Signed At A Meeting Of The Assembly Of The League Of Nations Held On The Twenty-Fourth Day Of September, Nineteen Hundred And Twenty-Three*:

“The undersigned, being duly authorized, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.”

35 Robert Knutson 2004, Paper given at DRBF conference Dubai, UAE.

36 Talk given at SJ Berwin international arbitration group launch party, 4 November 2004 at the Wellington Arch, London.

In *M'Intosh v The Great Western Railway Company*,³⁷ it was alleged that the engineer, IK Brunel, whose duty it was to measure and certify the value of certain works, had hidden the fact that he had a large shareholding in the railway, and had consistently under-certified the value of the Works or failed to certify. Fraud was alleged. The issuance of a certificate was argued to be a precondition to the contractual obligation of the company to pay. The defendants contended that Brunel was an agent while the plaintiffs contended that he was an arbitrator or judge. The Lord Chancellor did not refer to the allegation that Brunel was an arbitrator, but said that "... this is clearly a case in which the Plaintiff cannot obtain what he is entitled to at law (under the contract); and that his inability to do so has arisen from the acts of the Defendants, or their agent ...".³⁸

An additional view was taken in *Ranger v Great Western Railway*.³⁹ There, the contract provided that the decisions of the principal engineer (again, the shareholding Mr Brunel), on the whole range of issues from extensions of time to payment for additional works and certificates, would be final and without appeal during the progress and until completion of the Works. If any difference of opinion existed thereafter such dispute would be referred to and finally settled and concluded by arbitration of the principal engineer and one appointed by Ranger. If they could not agree, a third person was to be named with his decision being "final and binding on both parties". This was the same sort of two-tier dispute resolution clause, with the first tier being the engineer's decision and the second being arbitration, as found in *M'Intosh*. In *Ranger*, while executing the Works, the contractor encountered much harder rock than he had been told lay on the route and the railway company eventually gave the required notices and took possession of the Works. In giving judgment, the Lord Chancellor referred to the fact that a judge ought to be, and is supposed to be, indifferent between the parties but then decided:

"The Company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The Respondents stipulated that their engineer for the time being, whoever he might be, should be the person to decide disputes pending the progress of the works, and the Appellant, by assenting to that stipulation, put it out of his power to object on the ground of what has been called the indifference of the person by whose decision he agreed to be bound."

Lord Brougham admitted very considerable doubts, but in the end agreed and said:

"We have here the case not of a judge, nor indeed anything like a judge; the utmost he can be said to be is a kind of referee to whom certain matters were, by the agreement of the parties, to be referred, I will not say for his arbitration but rather for his report and decision. In some instances it is even found that he and the company are referred to in the alternative. However, looking at him in those matters in which he may, to some extent, be said to decide judicially, I consider that there he was the known officer of the Company, and his decision as such was accepted. He was not named personally as Mr Brunel, but as the "principal engineer for the time being"; ... I think, therefore, that there is no ground for considering that the position in which he was placed was a quasi-judicial position."

It is evident from these passages that both the methodology and the logic were employed as well as the potential fabrication. First, you should characterise the

37 19 Law J Rep (ns) Chanc 374.

38 Cases in Chancery 74 at 96.

39 (1854) HL Case 72.

function: is it judicial? If it is, the “judge” must be impartial. This arises from one of the oldest and most fundamental European-wide doctrines, *nemo sua judex in sua causa*. The potential for the “fabrication” comes from a combination of the arguments that the contractor freely, and with foreknowledge, agreed to be bound by the decisions of an agent who might be expected to be biased and in this case, as a judicial appointment is personal, the fact that the decision could be made by any principal engineer appointed from time to time meant that this could not have been intended to be a “quasi-judicial” appointment. Thus, if you undermine yourself with prior knowledge – *pacta sunt servanda*: promises must be kept.⁴⁰

The architect was the deciding party in *Pashby v The Mayor, etc., of Birmingham*,⁴¹ where the agreement provided:

“If any dispute or difference of opinion should arise with the contractor or contractors in any way relating to the contract and these conditions, connected with or relating to the proposed buildings and works, or if any question should arise between any of the several contractors relating to the proposed buildings and works, such dispute difference or question shall be settled by the architect, whose decision thereon shall be absolute and final.”

Here, after letters from the contractor complaining of late payment, the architect, at the request of the City, settled the amount he thought was due to the contractor without informing him he was doing it and without discussing the calculation with the contractor. The court held that:

“As to the second question, there was no dispute between the parties: it is clear there could be no *res judicata* where there was no *lis*.”

Compare this, however, to the decision in *Scott v The Corporation of Liverpool*,⁴² where the Lord Chancellor, influenced by *Scott v Avery*⁴³ decided only two years earlier, held that where the contract provides that there will be a determination of a contractor’s claims by the judgment of a particular person, until that chosen person has spoken, no dispute exists and, thus, no right arises in law or at equity, which might be enforced by the courts.

*The engineer as quasi-arbitrator*⁴⁴

The development of the doctrine that in certain circumstances engineers exercising their decision-making powers under a contract must act impartially was championed by the 1861 case of *Pawley v Turnbull*, concerning a rogue architect, who had also been made arbitrator under the contract and whose decision was to be final and binding. Without citing any particular authorities, the Vice-Chancellor noted, “[t]he position of the architect, in order to be just to both parties, required the exercise of great discretion and great fairness”.⁴⁵ He went on to hold that without imputing fraud to the defendants it was proved that the conduct of the defendant architect, Hey, was “not

40 Robert Knutson, Paper given at DRBF conference Dubai, UAE, 2004.

41 (1856) 18 CB 3.

42 (1858) 28 Chanc Cas (ns) 230.

43 (1856) 5 HL Cas 811.

44 Robert Knutson, *supra*.

45 At 82.

of that discreet, impartial and fair description which it ought to have been”⁴⁶ and so the Vice-Chancellor ignored the lack of a certificate from Hey to award the reasonable value of the builder’s work to him.

In the 1873 Equity Appeal case of *Sharpe v Sao Paulo Railway Co.*,⁴⁷ Sir MW James confirmed that the courts of equity would not entertain suits (one might still have been available at common law for damages) where the engineer’s certificate was to be final, if the engineer acted in good faith – “I myself should be very loathe to interfere with any such stipulation upon any ground except default or breach of duty on the part of the engineer”.⁴⁸ This contract said that the certificates of the engineer would be final and that all matters, except such questions as were to be determined by the company’s engineer, were to be referred to arbitration. In a separate concurring judgment, the court stated:⁴⁹

“Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is to be found due by an arbitrator, and there is no agreement to pay otherwise – that is to say in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with what the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied on.”

In the nineteenth century the scope of the services to be provided, and the quality of the decisions to be made by the engineer, were not as broad or as well defined as they may seem today. In fact, for quite some time, biased decisions of the engineer were difficult to overturn in the absence of fraud or bad faith. This was during a period when the standard forms in use provided for final and conclusive certificates of the engineer on measurement of final payment and termination for failure to proceed with due diligence. In appropriate cases the courts prevented injustice by not allowing engineers vested with the powers to decide all disputes under the contract to act as arbitrator proceeding with the reference. The court would refuse a stay of arbitration and decide the dispute itself⁵⁰ or decide that the engineer’s certificate was not within the scope of the relevant submission to his jurisdiction.⁵¹

Nonetheless, the possibility of unfair decisions on the part of engineers in the employ of the owners was clear and the next generation of judges began the reform of the law.

In *Re An Arbitration between Hohenzollern Actien Gesellschaft and the City of London etc.*,⁵² there were no real legally relevant factual differences with the *Sharpe* case, but the result was substantially different. The engineer refused to certify and the arbitrator said that money was due. If this case were *Clemence v Clarke*, the contractor would have lost, but Lord Esher MR, who had a wonderful career of talking negatively about the jurisdiction of arbitrators and then expanding their province, held that as the arbitrator had decided (rightly or wrongly) that the money was due (in the absence of a certificate, against well-received wisdom of the time) as long as the arbitrator acted

46 At 84.

47 (1873) 8 Ch App 597.

48 Sir MW James at 609.

49 At 612.

50 *Blackwell and Co Ltd v Derby*, Hudson’s Building Contract 4th edition, 1914 Volume II, p 401; see also *Nuttall v Manchester* 4 HBC II 203.

51 *Lawson v Wallasey Local Board* (1889) 11 QBD 229.

52 (1886) 54 LT (NS) 596.

within his jurisdiction, there was no appeal or redress. The fact that the contractor, a locomotive builder, was compensated for work actually done, was no doubt peripheral to this determination.⁵³

It is somewhat interesting that the *Law Times* headnote summarises the *ratio decidendi* as "... a dispute had arisen within the arbitration clause, and that, whether the arbitrator was right or wrong, as he had not exceeded his jurisdiction the court would enforce the award".

The editor of *Hudson's Building Contracts*, 4th edition,⁵⁴ who was a well-regarded construction barrister, stated in his headnote that the court held "that the absence of a certificate was not conclusive against the contractor's right to payment, and that a dispute as to the certificate was a dispute within the arbitration clause, and that the award made was valid".

In *Nuttall v Manchester*,⁵⁵ the Court of Appeal refused to stay a building dispute to arbitration because the city surveyor, who had had several disputes with Mr Nuttall, was the designated arbitrator and as such was thought to be too much of a judge in his own cause. This case was cited to the House of Lords in *Jackson v Barry Railway Company*, where at first instance the contractor had succeeded in obtaining an injunction against the engineer proceeding with a reference. The engineer had written a letter on the same day as the formal reference of the dispute to him repeating his former views. The court held that this was not sufficient evidence that he would be unable to keep an open mind in the reference. As an aside, it is interesting that the disputes clause, which simply said that all disputes would be referred to the engineer, whose decision was conclusive and binding, was held without demur to be a reference to arbitration.⁵⁶

In 1901, the Court of Appeal decided *Chambers v Goldthorpe*,⁵⁷ which stood as good law for 73 years for the proposition that, in ascertaining the amount due to the contractor, the architect was an arbitrator and, therefore, was not liable in negligence. This decision was eventually overturned in *Sutcliffe v Thackrah*,⁵⁸ but the juridical basis for it, that in exercising his skill and knowledge he was acting as a quasi-arbitrator, has remained largely untouched.

There is one very old and notable case, which puts the status of the engineer's decisions (particularly on the subject of ordering or failing to order variations) pending arbitration beyond reasonable doubt. In *Brodie v Cardiff*,⁵⁹ the majority of the House of Lords made it clear that an arbitrator's overturning of an engineer's decision (in this case a biased but not fraudulent refusal to admit certain works as extras under the variations clause) had retrospective effect and the engineer's decision stood until that overthrow. Incidentally, a refusal of the engineer to certify the variations at the time, when it was a precondition that all variations be in writing, had no effect.

The eventual judicial determination that third-party engineers were "quasi-arbitrators" resulted over time in the adoption, within England, of the view that in rendering certain types of decision, where he is not acting as an agent for the employer,

53 Knutson, *supra*.

54 Sweet & Maxwell, London, 2014.

55 *Nuttall v Mayor and Corporation of Manchester* 4 HBC II 203.

56 Compare *In Re Carus-Wilson and Greene*, (1886) 18 QBD 7 where a person valuing timber was held to be a mere valuer, so no application to set aside could be entertained.

57 [1901] 1 QB 624.

58 [1974] AC 727.

59 [1919] AC 337 at 351, 352 and 360, 361.

the engineer had to act “impartially”. This was as a result of the actions of English judges rather than any demonstration of even-handedness on the part of the contracts’ draughtsmen.⁶⁰

So we see in the early English cases some of the elements required for modern adjudication and other forms of ADR such as Dispute Boards – a multi-tier dispute resolution system, a high regard for the sanctity of contract and concern to ensure that decisions given were given fairly if required by the contract.

The development of non-statutory adjudication

In addition to the classical method of dispute resolution through arbitration, there have been other methods utilised, most notably the use of adjudication or expert determination or valuation. Lord Esher MR, who is cited here as understood by Longmore LJ in the *Wilson* case, stated:

“... Since it is just a matter of construction, not much assistance can be gained from authority, but the question whether an agreement is an agreement to arbitrate or merely to value as an expert has occasionally had to be decided, and Mr Bowdery has referred us to one such case *Re Carus-Wilson and Green* (1886) 18 QBD 7. There a contract for the sale of land provided that the timber was to be paid for at a valuation made by two valuers appointed by the parties, who were to appoint an umpire to decide if the valuers did not agree. The valuers did not agree, so the umpire decided. The aggrieved party applied to set that valuation aside on the basis that it was an arbitration award and, thus, according to the legislation then in force, could be set aside on certain grounds. The Court of Appeal refused to entertain the application.

The passage to which Mr Bowdery referred us is at page 9, where Lord Esher MR said this:

“The question here is whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person’s decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.”

In 1990, confusion arose as to what powers, if any, the courts were willing to give a body not operating under the Arbitration Act. The Court of Appeal decision in *Cameron v Mowlem*⁶¹ decided that an adjudicator sitting in judgment of a set-off claim under an English standard form of contract could not decide in total what sums were due under the contract (as he had purported to do) inferentially because the contract did not expressly give him the right to substitute his decision for that of the certifier.

⁶⁰ Knutson, *supra*.

⁶¹ (1991) 52 BLR 24.

This confusing situation was clarified in *Drake & Scull Engineering Ltd v McLaughlin & Harvey plc*,⁶² in which His Honour Judge Bowsher QC, on the same form of contract, issued a mandatory injunction to enforce the adjudicator's decision that money should be paid into a stakeholder account. The learned judge wrote:

"Accordingly, it seems to me to be plain that the defendants are under a contractual duty to comply with the orders of the adjudicator, and to do it before the arbitrator makes his decision."

One of the most recent English cases to consider these issues is the Court of Appeal judgment in *David Wilson Homes Ltd v Survey Services Ltd (in liquidation) and Anor*.⁶³ In that case the Court of Appeal had to consider whether or not a bare reference to a decision of a QC was arbitration or some more "ephemeral" sort of ADR. Longmore LJ wrote in part:

"... For my part, I prefer the arguments of Mr Phillips. There is no need for a clause, which deals with reference of disputes to say in terms that the disputes are to be referred to an 'arbitrator' or to 'arbitration'. The necessary attributes of an arbitration agreement are set out in the second edition of Mustill & Boyd, *Commercial Arbitration* at page 41. But, for present purposes, the important thing is that there should be an agreement to refer disputes to a person other than the court who is to resolve the dispute in a manner binding on the parties to the agreement. That is what this clause in my opinion does, and it is therefore an arbitration agreement within the meaning of section 6 of the Arbitration Act 1996."

Unfortunately, the judgment of Simon Brown LJ was of no assistance. He wrote in part:

"... As to the suggestion that this was some sort of non-binding ADR clause, that seems to me nothing short of absurd. The condition goes to the lengths of providing, if necessary, for the Chairman of the Bar Council to appoint a Queen's Counsel to deal with the reference. That, to my mind, is quite inconsistent with any suggestion that the process required by the clause is simply an optional extra in the contract. Rather it makes business sense only if it provides for a final and binding determination of whatever dispute or difference is referred – if, in short, it is an arbitration agreement.

... In the result, the appeal succeeds."

In equating a final and binding determination (only) to arbitration, Lord Justice Simon Brown was mischaracterising the history of private dispute resolution. The editors of the Building Law Reports commented:

"The claimant was somewhat unlucky. Nowadays it is well established that there is available a variety of dispute resolution processes ranging from adjudication (both binding and non-binding), expert decision (both binding and non-binding), mediation, conciliation and arbitration. At the very least, arguably, the clause in question was ambiguous as to the basis upon which the QC was to operate; given that it was an insurance policy and that the wording probably emanated from the insurance company in the first place, it might have been thought at the very least that the construction should have been against the resolution involving a binding result. That having been said, the court clearly were of the view that it was pointless referring such disputes and differences to an obviously impartial QC unless the decision was to be final and binding. Although this decision is binding when the same or comparable wording is used, it may be that it will not take much to convince other courts otherwise when the relevant wording is only slightly different."

62 (1993) 60 BLR 107.

63 [2001] EWCA Civ 34, [2001] 1 BLR 269.

In effect, the court was (incorrectly) saying that arbitration could be the only form of a final determination intended by the parties.

Further to *Wilson* in *Wilky Property Holdings Plc v London & Surrey Investments Ltd*,⁶⁴ the court held that the ADR clause was an agreement to refer a limited number of issues for expert determination and was not an arbitration clause for the purposes of the Arbitration Act and went on to state that *David Wilson Homes* and *Re Carus-Wilson* are not authority for the general proposition that a clause providing for binding determination of a dispute already arisen was necessarily an arbitration rather than an expert determination and wrote at 44:

“In short, I do not think that either member of the Court of Appeal [in *David Wilson Homes*] was intending to establish any prescriptive rule of general application as to the distinction between arbitrations and expert determinations, and the case contains no ratio decidendi to that effect. In particular, I do not think that the members of the Court of Appeal can be taken to have established a general proposition that clause providing for the binding resolution of a pre-existing dispute is necessarily an arbitration clause.”

Further, there was discussion in terms of allocation of costs to the effect that if the clause was intended to be an arbitration clause there would be no need to refer to the allocation of costs as the Arbitration Act deals with costs. If anything, the allocation of costs points to the clause being an expert determination, rather than an arbitration, clause.

The advent of Dispute Boards in England

The first case in England to, in effect, legitimise Dispute Boards was *The Channel Tunnel Group Ltd and another v Balfour Beatty Construction Ltd and others*⁶⁵ when the House of Lords held that the contractual dispute resolution mechanisms chosen by competent commercial parties should not be interfered with. The Channel Tunnel contract (a modified version of FIDIC Red Book 3rd edition) used a version of the contemporary “Panel”. This Panel was governed by contractual language, which was very similar to current Dispute Adjudication Boards under FIDIC contracts.

These “Channel Tunnel disputes” utilised procedures, which went on to be adopted by FIDIC for the first FIDIC procedures of this type. The description “Panel” was changed to “Dispute Adjudication Board” where the phrase that parties should “give effect” to the decision of the Panel until it was “revised by arbitration” was used. In that decision, Lord Mustill said:

“... I would endorse the powerful warnings against encroachment on the parties’ agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts ...”

During the argument of this case there was much discussion between their Lordships and Counsel about the nature of this clause and whether it was entirely an arbitration clause or a two-stage clause in which only the second part was arbitration. What became clear from the discussion (and is recorded in the judgment) was that there was no doubt that their Lordships took the view that the whole clause was binding on the

⁶⁴ [2011] EWHC 2226 (Ch); Official Transcript, Ch D; 17 August 2011.

⁶⁵ (1993) 61 BLR 1.

parties “unless it broke down”. Additionally, Lord Mustill indicated that a mandatory injunction for specific performance (in this case continuance of contract works in disputed areas) by the Panel would have had to be complied with. This is a much more radical measure than the order for payment asked for in most cases.⁶⁶

This decision of the House of Lords was on contract wording that is, for these purposes, identical to the wording of Clause 20 in the 1999 FIDIC suite of contracts. The case indicates very directly that Dispute Adjudication Board decisions should be given effect until revised in arbitration and that the courts should be loath to involve themselves in the Dispute Board process.

Extension to international cases

The entire field of Dispute Boards is so relatively new to the dispute resolution scene that very little case law exists which can be cited as precedent. However, the concept stated 300 years ago by Sheppard that “... an Award or Judgment made by one or more at the Request of some parties for the ending of some difference between them” should be upheld. In most English-speaking, common law countries this should not be any problem. There are exceptions, however.

In the 2003 South African case of *Welihockyj and Others v Advtech Limited and Others*,⁶⁷ the court was faced with a contractual provision stating that disputes would be resolved by “an independent person acting as expert and not as arbitrator”. The South African court held that whether arbitration or expert investigation is contemplated depends not only on the wording of the reference, but also on the manner in which the presiding officer arrives at a decision, the nature of the dispute and the extent of the dispute.

Here, there were references to fraud and a complicated, but apparently flawed, investigation was undertaken. The judge noted that there was nothing in the agreement that was counter-indicative, including the references to an “expert”, and held that the contract clause in question was actually an arbitration clause.

The problem was that the parties’ agreement created the third-party dispute resolver and gave him his powers. If he or she was qualified as an arbitrator, they may have had statutory powers as well. A reference of a matter to a person acting as expert and not arbitrator has for many years been understood to be a reference to an expert.

The legislation⁶⁸ in South Africa defines arbitration as “a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement whether an arbitrator is named or designated therein or not”. This broad definition is very similar to those in other Commonwealth countries. The judge in this case defined arbitration as reference to a dispute for *final* determination to someone other than the courts. This negative definition tends to prejudice the issue but is similar to the approach that succeeded in the English case of

⁶⁶ Knutson, *supra*.

⁶⁷ [2003] (6) SA 737 (W).

⁶⁸ Arbitration Act 1965 s 1.1. It should be noted however that currently and after the International Arbitration Act 2017 came into operation in South Africa on 20 December 2017, the 2017 Act incorporates the UNCITRAL Model Law on International Commercial Arbitration into South African law, and section 4(1) makes clear that the 1965 Act is not applicable to “an arbitration agreement, arbitral award or reference to arbitration” covered by the 2017 Act. The definition of “arbitration”, for the purposes of the 2017 Act, is “any arbitration whether or not administered by a permanent arbitral institution” (as per Article 2(a)). The 2017 Act is available at: https://www.gov.za/sites/default/files/41347_InternationalArbitrationAct15of2017.pdf.

*David Wilson Homes Ltd v Survey Services Ltd (in liquidation) and Anor*⁶⁹ discussed *supra*.

The *Welihockyj* case is probably best understood as an example of “hard cases making bad law”. The expert had undertaken an extensive but (so far as the court was concerned) inadequate investigation into certain allegations, including allegations of fraud, and apparently made the wrong decision.⁷⁰

Interestingly, in making its decision the court made reference to a host of English authorities, including Mustill and Boyd, *Commercial Arbitration*,⁷¹ and certain cases, including a 1985 English case about whether surveyors⁷² were arbitrators where the English judge held they were not and therefore were not immune from a lawsuit for negligence.⁷³

It is, no doubt, also important on the facts of this case that the “expert” chose to describe himself, and was addressed as, the “arbitrator”. This may be taken, if it was consensual, as a variation to the dispute agreement,⁷⁴ because if not there would be no excuse for overriding such a specific contractual provision. The reference to an expert is intended to do exactly this. It may have been the wrong decision, but the language about acting as an independent expert and not an arbitrator was intended to avoid having the dispute treated as arbitration. The South African court should not have gone against the expressed intentions of the parties but, given the state of the precedents, it is not too surprising.⁷⁵

So, it is relatively easy to understand how this confusion can come about. The characterisation approach is historically based and has for years been used by courts to import Arbitration Act-based solutions to particular disputes and occasionally determines that non-arbitrators could be sued for their negligence. While this involved a certain amount of desirable flexibility, the time has no doubt come for the parties’ agreements to always be respected.

The problem with the “characterisation” approach is obvious. It can, and did, create a lottery, as the recent English case of *David Wilson Homes Ltd v Survey Services Ltd (in liquidation) and Anor*⁷⁶ also shows:

“By not putting their minds to it, or avoiding the issue, the parties may end up with all the baggage of an arbitration without actually intending this to be the result. The form of dispute resolution should not depend on the procedure used or the claim made; it should depend on the form of agreement.”

Other Commonwealth countries have been keen to assist the establishment of ADR. Before the *Channel Tunnel* case, in the Australian case of *Hooper Bailie Associated Limited v Natcon Group Pty Ltd*,⁷⁷ the Supreme Court of New South Wales held that the court will give effect to an agreement to conciliate or mediate in the *Scott v Avery*⁷⁸ form by staying an arbitration commenced in breach of the agreement. To be enforceable, however, the court held that the agreement must provide sufficient

69 [2001] 1 All ER (Comm) 449.

70 Knutson, *supra*.

71 2nd edition, LexisNexis Butterworths, 1989.

72 Professional land valuers.

73 *Palacath v Flanagan* [1985] 2 All ER 161.

74 2003 (6) SA 737 at 746.

75 Knutson, *supra*.

76 [2001] 1 All ER (Comm) 449.

77 (1992) NSWLR 194.

78 *Scott v Avery* form is provision making the conciliation process a condition precedent of the right to go to arbitration or litigation.

certainty in the conduct required of the parties who are to participate in the ADR process. These are the thoughts found in the *Cable and Wireless* case in England a full ten years later.

The position in Australia was not achieved without some retrenchment.⁷⁹ The case of *Aiton Australia Pty Ltd v Transfield Pty Ltd*⁸⁰ dealt with a construction contract where the parties argued about whether or not the contractual mediation procedures had to be carried out prior to applications to the courts.⁸¹

It was argued that the mediation clause⁸² lacked sufficient certainty to be given legal effect as: (1) there were no provisions dealing with the remuneration to be paid to the

⁷⁹ Knutson, *supra*.

⁸⁰ (1999) 153 FLR 236.

⁸¹ Ian D Nosworthy BALLB FIAMA FCIArb AIPM Barrister Arbitrator Mediator in his paper for The Law Society of South Australia country update seminar: Choosing the right ADR, October 2004.

⁸² The clause provided:

“28.3 Expert

Where the Parties agree to submit a dispute or difference to the Expert Resolution Process, such dispute or difference shall be resolved in the following manner:

- (a) An Expert will be appointed by the Parties, or in default of Contract upon such appointment, either Party may refer the appointment to, in the case of financial matters, the President for the time being of the Institute of Chartered Accountants in Australia, in the case of technical matters, the President for the time being of the Institution of Engineers in Australia and, in the case of any other matters (including a dispute as to the interpretation of this Contract) the President for the time being of the Institute of Arbitrators in Australia. In all events, the Expert must have reasonable qualifications and commercial and practical experience in the area of Dispute and have no interest or duty which conflicts or may conflict with his function as an Expert.
- (b) The Expert will be instructed to:
 - (i) promptly fix a reasonable time and place for receiving submissions or information from the Parties or from any other Persons as the Expert may think fit;
 - (ii) accept oral or written submissions from the Parties as to the subject matter of the Dispute within 10 Business Days of being appointed;
 - (iii) not be bound by the rules of evidence, and
 - (iv) make a determination in writing with appropriate reasons for that determination within 20 Business Days of the date referred to in Subsection 28.3 (b)(ii).
- (c) The Expert will be required to undertake to keep confidential matters coming to the Expert's knowledge by reason of being appointed and the performance of his duties. ...
- (d) The Expert will have the following powers:
 - (i) to inform himself independently as to facts and if necessary technical and/or financial matters to which the dispute relates;
 - (ii) to receive written submissions sworn and unsworn written statements and photocopy documents and to act upon the same;
 - (iii) to consult with such other professionally qualified persons as the Expert in his absolute discretion thinks fit; and
 - (iv) to take such measures as he thinks fit to expedite the completion of the resolution of the dispute.
- (e) Any person appointed as an Expert will be deemed not to be an arbitrator but an expert and the law relating to arbitration including the Commercial Arbitration Act (SA) and the NSW equivalent, as amended, will not apply to the Expert or the Expert's determination or the procedures by which he may reach his determination.
- (f) The Dispute resolution will be held in Sydney, New South Wales unless the Parties otherwise agree.
- (g) In the absence of manifest error, the decision of the Expert will be valid, final and binding upon the Parties.
- (h) The costs of the Expert and any advisers appointed pursuant to Subsection 28.3 (c)(iii) will be borne by Purchaser or Supplier or both as determined in the discretion of the Expert taking into account the Expert's decision in the dispute.
 - (i) The Parties will give the Expert all information and assistance that the Expert may reasonably require. The Parties will be entitled to be legally represented in respect of any representations that they may wish to make to the Expert, whether orally or in writing.

mediator if agreed or appointed; (2) what was to happen if one or both of the parties did not agree with the fees proposed by any such mediator; and (3) what was to happen if the nominated or agreed mediator declined appointment for any reason? Here, the court held that:

“ADR clauses as a precondition to litigation generally (original heading in Judgment) ...

- (42) There is no legislative basis for enforcing dispute resolution clauses otherwise than those, which provide for arbitration: Commercial Arbitration Act 1984 (NSW). However, it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a precondition to commencement of proceedings in relation to the dispute: *Hooper Bailie*.
- (43) To achieve enforcement of such an agreement it is essential that the agreement is in the *Scott v Avery* form – that is, expressed as a condition precedent. Such a clause was seen not to offend the general tenet of law that it is not possible to oust the jurisdiction of the court as it acted, in effect, as a postponement of a party's right to commence legal proceedings until the arbitration was concluded, not as a prohibition against a party having such recourse: *Scott v Avery* (1856) 10 ER 1121. Further, as mentioned previously, the agreement is enforced, not by ordering the parties to comply with the dispute resolution procedures, but by forbidding them from using other procedures from which they have agreed to abstain until the end of the dispute resolution process.
- (44) The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced: *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.”

The judge paid very close attention to the obligation of good faith in this agreement, and noted its importance in establishing whether or not there was a sufficiently certain agreement to negotiate.⁸³

Specific regional differences and methods

Germany

The German courts⁸⁴ have, in effect, already ruled that Dispute Board-type procedures are enforceable. This is a very important development, not least because several of the world's major trading nations have laws inspired by the German model. These countries include Turkey, Greece and Russia.

Additionally, conciliation is common in Germany. A recent development in most of the Länder (federal states) is that conciliation proceedings are mandatory in certain circumstances. A claim made before the State Courts would be inadmissible if these mandatory conciliation proceedings had not concluded first. The Federal Supreme Court in Germany (*Bundesgerichtshof*) has ruled repeatedly that a claim brought before the court prior to a conciliation attempt that has been stipulated is inadmissible.

In a judgment in 1998, the Federal Court held that if an “M&A contract” for the takeover of a tax consultancy stipulates that in the event of a dispute a conciliation attempt before the competent Tax Consultant Board (a professional body for people in that profession like the Law Society or Bar Council) must first be made, a claim

⁸³ Knutson, *supra*.

⁸⁴ Knutson, *supra* and *infra*.

brought before the court prior to such a conciliation attempt is inadmissible. In this particular case, this did not apply, however, because the conciliation proceedings commenced by the claimant could not be conducted because the defendant refused to pay his share of the costs of the Board. The Federal Supreme Court ruled in this case that the defendant is consequentially barred from relying on the conciliation clause as it would be “*unzulässige Rechtsausübung*”, i.e. an inadmissible exercise of rights.⁸⁵

As to dispute boards, the Federal Court states that the dispute board clause has the same spirit and purpose, as well as the procedural effect, as an arbitration clause. The difference is that the arbitration clause permanently excludes the reference to the State Court. The Federal Court held that the inadmissibility of rights argument, which is part of the good faith objection, should be assessed as in cases regarding arbitration clauses. As early as November 1987, the Federal Court had ruled that the arbitration agreement obliges both parties to cooperate in the process of arbitration, in particular to share pro rata the advances usually required by the arbitration courts.⁸⁶ The same applied in this case where the parties concluded not an arbitration agreement, but a conciliation agreement.

This judgment is important on two issues. First, it reaffirms the Federal Supreme Court’s earlier judgments that as long as the conciliation attempt has not been carried out any claims brought before the State Courts in breach of the agreement are inadmissible. Second, by giving the conciliation clause the same procedural effect as an arbitration agreement, the Federal Supreme Court emphasises the importance of dispute resolution agreements generally and reduces the uncertainty that such clauses might engender.

This judgment overruled a prior judicial authority from the Higher Regional Court of Frankfurt am Main, which had ruled that it is a “natural impulse” of a party not to pay any advance if this party is the subject against whom the procedure is commenced.⁸⁷ Thus, the Federal Supreme Court’s intention obviously was to set policy on the effect of conciliation agreements.

France

The approach of the South African and Australian courts can be usefully compared with recent decisions of the French courts.

In the Cour d’Appel de Paris 1ère Chambre, section C, on 29 April 2003, a decision was rendered with respect to an ICC Pre-arbitral Referee decision, which completely and unequivocally supports the freedom of contract of parties with respect to their dispute resolution procedures. There, the National Petroleum Company of the Congo/ Republic of the Congo made an agreement about the sale of petrol with the Total Fina Elf E&P Congo Company that included an ICC Pre-arbitral Referee clause. In pursuance of the Pre-arbitral Referee procedure, the ICC appointed OM Pierre Tercier and he decided that the execution of the agreement could not be stopped unilaterally

⁸⁵ BGH, VII ZR 344/97, 18 November 1998; BGH, VII ZR 197/82, 23 November 1983, NJW 1984, 669.

⁸⁶ BGHZ 102, 199, 12 November 1987.

⁸⁷ OLG Frankfurt am Main, 24 U 248/95, 7 November 1997. Note that under German law the defendant which has not reacted to a statement of case in the State Court, because he might – to use the Frankfurt Higher Court’s language – have a “natural impulse” not to participate in a case he feels not to be the right defendant, will be confronted with a judgment by default. Pursuant to s 797a of the German Code of Civil Procedure decisions resulting from conciliation proceedings are enforceable.

as long as an arbitral tribunal had not given its award. This effectively forbade the party wishing to terminate the contract from doing so until the arbitral tribunal had judged the matter.⁸⁸

The claimant asked the Cour d'Appel to annul the decision of Maitre Tercier for non-respect of the scope of his mission (article 1502–3 NCPC) and added that the decision he gave was equivalent to an arbitral award.⁸⁹

The court held the “Pré-référé Arbitral” decision was valid as the system of the “Pré-référé Arbitral” had been agreed between the parties and article 6.6 of the ICC Rules on “Pré-référé Arbitral” provides that the parties are bound to execute without delay the “Pré-référé Arbitral” decision. Therefore, the Republic of the Congo and the SNCP's claim was inadmissible.

The Court of Appeal rejected the argument that the decision of the third party acting as referee was to be assimilated to an arbitral award and noted that the ICC had carefully avoided the characterisation of the Pre-arbitral Referee as arbitrator. It noted that the parties had agreed in the rules to execute without delay the order of the Referee and that the Order of M Tercier had the agreed authority given to it by the parties. The court, therefore, declared the application to be ill founded.

Similarly, the binding effect of a conciliation agreement was confirmed in the French courts by the Cour de Cassation (Chambre Mixte), Decision of 14 February 2003, in the case of *Poiré v Tripier*.

In this case, a peremptory calling of a bank guarantee was ruled to be void as the contract called for conciliation before any call was exercised. M Poiré had assigned to M Tripier his shares in the capital of a company. The contract of assignment provided a guarantee in favour of the assignee and another clause provided that all disputes regarding the contract would be first submitted to two conciliators before any legal action.

M Poiré (the claimant) called on M Tripier (the defendant) under the guarantee. The defendant argued that the claimant had not respected the preliminary conciliation clause and brought an action for a peremptory declaration of inadmissibility. The Cour de Cassation held the conciliation clause was enforceable and the calling of the guarantee was not admissible.⁹⁰

In a note⁹¹ on this and another decision⁹² with similar force handed down in the same period, Professor Charles Jarrosson mentions that the claim (of the claimant) is a decision “*en l'état*”, i.e. as long as the conciliation still has not taken place the claim is inadmissible, but once it has been carried out the judges will receive the claim.

Professor Jarrosson adds that this decision is important for arbitration cases where mandatory conciliation is a precondition to the effect of the arbitration clause. With

88 “*Leur interdit de faire obstacle à l'exécution du contrat de vente de pétrole conclu par les parties, et donc suspendre ou interrompre unilatéralement l'exécution, tant que les griefs de fond ne seront pas jugés par le tribunal arbitral compétent pour en connaître*” (extract from the Decision of the Court of Appeal).

89 Third Ground – failure by the arbitral tribunal to comply with the terms of the mandate conferred on it (articles 1484-3° and 1502-3 NCPC).

90 New Code of Civil Procedure (NCPC).

CHAPTER III PEREMPTORY DECLARATION OF INADMISSIBILITY

Article 122 – Shall constitute a plea seeking a peremptory declaration of inadmissibility one which, without an examination on the merits of the case, shall cause to render the opponent's claim inadmissible on the grounds that it does not disclose a right of action, a *locus standi* or an interest, or it is precluded by virtue of prescription, a determined time-limit or by the operation of *res judicata*.

91 Revue de l'arbitrage 2003 2 p 403 at 406.

92 Cour d'Appel de Paris in *SCM Port-Royal v Pebay et Samper*, 23 May 2001.

the solution for this case, the arbitral tribunal will be able to decide that a claim is inadmissible “*en l'état*” and that its mission is suspended until the cause of inadmissibility has disappeared, i.e. until it is shown that the conciliation process provided for in the contract has taken place and failed.

The arbitrator is not acting without jurisdiction (“*dessaisi*”) by a decision of inadmissibility “*en l'état*”. Professor Jarrosson notes that this case is similar to the English High Court case of *Cable & Wireless Plc v IBM UK Ltd*⁹³ of 11 October 2002, in which Mr Justice Colman adjourned court proceedings for declaratory relief and required the parties to complete the contractual requirements for ADR before continuing with their court actions.⁹⁴ Indeed, this solution is in effect similar to that which should be obtained in many common law jurisdictions.

Professor Jarrosson notes also that there is a limit to this principle as seen in the decision of the Cour d'Appel de Paris in *SCM Port-Royal v Pebay et Samper* of 23 May 2001,⁹⁵ where it was held that the claimant would not be limited by the preliminary conciliation clause and could make a claim before the *Juge de référés* in emergency cases.

It is also said that the French courts confirmed in 2003 that this approach, in favour of contractual dispute resolution procedures, applies also to mediation in the *Nègre* case.⁹⁶ In this case the parties had signed a contract where M Nègre would be the “adviser” (“*conseiller*”) for Vivendi to access the Chinese market. The dispute clause in the contract provided that all conflicts in relation to the contract would be “definitively decided in Paris, following the ICC Rules on Conciliation and Arbitration (or the French Commercial Tribunal) by one or more arbitrators named in accordance with these Rules and with the application of French law”. The parties also agreed without reservation to (judicial) mediation.

M Nègre wanted the Tribunal de Commerce to decide that the arbitration was not possible as the contract was not international (it was between two French citizens), that the clause was not clear, and it would be too expensive for him. The Cour de Cassation rejected all of these arguments and indicated the arbitration clause was still effective. The agreement to mediation would not be considered to be a renunciation of the agreement to arbitrate without an unequivocal demonstration that this was intended.

Forms of standard construction contracts

Most construction disputes are bound by the rules and procedures set out in the underlying contracts of which most, if not all, are based upon one standard form or another and all of which provide for various forms of dispute resolution.

93 [2002] EWHC 2059 (Comm).

94 The ADR clause provided in part:

“The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40. If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.”

95 Revue de l'arbitrage 2003 2 p 405.

96 Cour de Cassation (1ère Chambre Civile) 28 January 2003 (*M Nègre v Société Vivendi*).

There are many sources of standard form contracts in the construction industry. Internationally, there are those form contracts issued by the Fédération Internationale des Ingénieurs Conseils (FIDIC). This organisation publishes a wide range of forms for use in engineering projects. The most widely used is the *Conditions of Contract for Construction Works*, commonly referred to as the Red Book, which is a traditional remeasurement form where the works are designed by the employer's engineer. Additional forms include the *Conditions of Contract for Plant and Design-Build*, which is basically for the construction of an electrical and/or mechanical plant and for the design and execution of building or engineering works, where the contractor designs and provides plant or other works in accordance with the employer's requirements. This is known as the Yellow Book. There is also the Silver Book, entitled the *Conditions of Contract for EPC Turnkey Projects*. This is for use when one entity is fully responsible for the engineering, procurement and construction of an engineering project, providing a fully equipped facility, ready for operation at the "turn of the key".

This has been followed by what is referred to as the Gold Book entitled *Conditions of Contract for Design, Build and Operate Projects*, which covers what the Silver Book covers plus adds an operational aspect to the agreement. There is also a form entitled the *Harmonised Version*, which is a compilation basically restating the Red Book, but is used by the world's development banks for large international infrastructure projects. FIDIC also publishes a *Short Form of Contract*, which is for works of a relatively small capital value.

On a more local scale, in the UK, the most established series of construction forms in use are those published by the Joint Contracts Tribunal Ltd ("JCT") whose membership includes most of the professional construction bodies, including the Royal Institute of British Architects, the Royal Institution of Chartered Surveyors, the Local Government Association, the Association of Consulting Engineers Ltd, the Association of Consultant Architects ("ACA") and others.

The JCT has produced a standard form of building contract since 1909 and it also publishes a number of further forms, including the JCT Intermediate form of contract, its minor works contracts, a form of contract with the contractor's design, as well as a management contract.

The Institution of Civil Engineers ("ICE") publishes its own version of form contracts, mostly for use in civil engineering works, including a traditional remeasurement form (now ICE 7th edition), a *Design and Construct* form, and a form for minor works. The ICE also publishes the integrated suite of contracts, subcontracts, and appointment of consultants comprising the *New Engineering Contract* ("NEC") system.

Another group that publishes its own forms is the Association of Consultant Architects ("ACA") whose forms cover both contracts and subcontracts for building works. Further, there is a government form of contract for building and civil engineering major works, known as "GC/Works/1",⁹⁷ and there are also government forms for related subcontracts, for small works, for mechanical and electrical works, and for various other purposes. In addition to these, the Institution of Mechanical Engineers, the Institution of Electrical Engineers, as well as the Association of Consulting Engineers ("ACE"), publish their own forms of contract.

⁹⁷ Whilst the GC Works suite is still available, however, it is no longer being updated by the UK Government, which has moved to the "New Engineering Contract".

Use of form contracts

The problem in using standard form contracts is that they leave open many areas where error can occur, particularly if lay individuals prepare them, i.e. those not experienced in the nuances of construction contracting. Thus, with the large number of standard form contracts in use, many times the parties will attempt to amend these standard forms and do so incorrectly or the parties will fill in the blanks incorrectly thus leading to disastrous results during the construction process. A dispute may arise due to some inconsistency in the modified contract because where one contract incorporates by reference a standard form along with particular conditions it can create problems where none should have ever existed.

Standard form provisions

Most standard construction forms contain provisions that dictate the extent of the contractor's liability for design along with the extent of the contractor's liability for defective work. In addition, these forms will provide a method and a procedure for how variations will be handled, the circumstances in which the contractor is entitled to be paid additional sums for these variations or for delay in progressing the Works, as well as how the contractor will be compensated in addition to the procedures for payments to the contractor. Additional clauses will undoubtedly cover the respective liability as to insurance and the circumstances in which either party may claim breach and/or terminate the contract.

The main provisions to be covered, however, are the "Conditions of Contract", which cover the basic general items dealing with the contractor's obligations regarding: the quality of work; the time for completion; variations; extensions of time; liquidated damages for delay; termination; and some form of dispute resolution, such as arbitration, mediation or a Dispute Board.

Other items needed in any such contract include the most obvious – i.e. the drawings, bills of quantities or approximate quantities and specifications. Of additional use is the contractor's "Method Statement" explaining the method(s) it intends to employ to complete the Works and a "Schedule of Rates" which are needed in case of variations, particularly when attempting to value the changes and especially so when there are no bills of quantities.

A good standard form agreement will also provide a method of resolving conflicts within the documents themselves by stating, for example, that the bills of quantities are subordinate to the articles, conditions and appendix to the contract and that discrepancies are to be dealt with by either the engineer or architect's decision. However, in the absence of such a conflict resolution procedure, the general rule is that all of the contract documents must be read together and, if possible, reconciled so as to result in a sensible interpretation. If this cannot be done, then those parts of the documents which may be presumed to express the authentic intention of the parties will be given precedence, such as where a custom-drafted provision will be given precedence over a printed one.

Methods of construction contracting

There are various methods by which a project is constructed. Issues include the availability of financing, the amount of risk the employer wants to undertake and

conversely how much risk any potential contractor wants to assume. Additional issues revolve around the location of the project, the materials to be used and what use is to be made of the completed project.

Over the years many methods of construction contracting have developed, all in one way or another varying the risks (and responsibilities) to be taken by either the employer or the contractor and these varying methods form the basis for many of the resulting disputes during construction. It should be noted that several distinct methods of contracting have evolved, dividing the risks and responsibilities of construction between employers and contractors in a variety of ways, e.g. the basis on which the contractor's work is to be priced and paid for as well as the extent of responsibility given to the contractor for the design and/or management of the project.

The form of contract to be used in each circumstance will involve a division of risk between the employer and the contractor (and subcontractors), as well as a determination of whether the contractor or the employer will be responsible for the design. Further complications arise where the contractor not only designs and builds the project but also is given the further responsibility of operating the project on the employer's behalf for a fixed period of time after completion.

The traditional method

In this method, the project is designed by the employer (usually the employer's architect and/or engineer). Here, it is the employer who obtains the design of its project independently of the contractor and its construction. This method has been commonly used for years and is the basis of most major civil engineering forms of contract such as the FIDIC Red Book. Once the design is received it is then converted into bills of quantities by the employer's quantity surveyor. The bills of quantities and the drawings/specifications are then put out for tender and various contractors can review the design/specifications and bills of quantities before tender. After selection the contractor is responsible for constructing the Works based upon the design, while the employer (and its designers) remain responsible for any defects in the design itself.

When the main contractor is selected it may subcontract some, or all, of the work to subcontractors who have been "nominated" in advance by the employer's design professionals or to "domestic" subcontractors selected by the main contractor. Frequently, these subcontractors have been selected for their specialisation and will be responsible for certain aspects of the design of their own work.

The design-build method

In this method of contracting, the employer contracts with the contractor who is then responsible for all aspects of the project, including both the design and construction, thus removing the employer from any design responsibility and leaving total construction liability on the contractor for any variations (not employer-based). Such contracts are sometimes referred to as "turnkey" contracts, i.e., the contractor does everything and turns over the "key" to the employer when completed.

In this method of construction the employer prepares the requirements needed and, based upon this list of requirements, the contractor takes care of the design and construction. Such contracts are generally lump sum agreements and this lump sum is a reflection of the employer's requirement.

The management contracting method

This method grew out of the traditional method. Here the “management contractor” takes over the position of main contractor in the traditional method but does not have any direct responsibility for the actual performance of the works contractors that it engages. While the employer still has its own professional design team (where often the management contractor acts in effect as a member of the employer’s professional team) the management contractor engages a number of subcontractors who actually carry out the construction work. The management contractor’s role is effectively confined to managing and coordinating the performance of its various subcontractors, who are usually referred to as “works contractors”. The management contractor is generally protected by contractual provisions, which in the event of a works contractor default make its liability to the employer no greater than whatever it can recover from the defaulting works contractor.

The management contractor is usually paid a fee for its services which is generally calculated by a formula based on the actual cost of the Works, thus making a management contract a cost reimbursement contract rather than lump sum.

The construction manager method

A variation of the management contracting method is what is known as “Construction Management”. Under this system the construction manager is removed from the Works contract chain and is just another construction consultant who is directly hired by the employer. Under this scenario the employer directly employs all the trades that would have been subcontractors to the main contractor under the traditional method with the construction manager being in charge of marshalling their efforts to complete the project. Thus, the construction manager’s responsibility, like that of the rest of the design team, is limited to the exercise of reasonable skill and care in the performance of its duties and it will not have any responsibility (unless otherwise agreed with the employer) for the actual performance of trade contractors.

Other methods

Over the years various other methods of construction have evolved. Most are based on a variation of the traditional methods and some combine various forms of existing relationships into a new format. Partnering is one such method. Here, the employer, the consultants, the main contractor and key specialists all sign the one partnering agreement. There is a collaborative finalisation of designs, prices and members of the supply chain. The agreement sets up a core group of individuals representing the partnering team members. The core group operates an early warning system for problems and undertakes regular reviews of progress and performance. Success is measured against key performance indicators (“KPI”s), and payment is usually tied to performance against the KPIs.

This type of arrangement is typically used for public sector projects where, for financial reasons, it is best to allow an experienced consortium to come together and build public projects such as schools, hospitals and prisons and not only design but also construct and maintain the completed project as well as provide the services set out in the agreement for the duration of the contract period, which may be 25 or 30 years.

Contractual operation and payment formats

The traditional lump sum or fixed price contract

The most traditional form of building contract is the lump sum or fixed price contract. This sort of contract is drafted so that the contractor carries out and completes certain specified work for a fixed sum which has been pre-agreed, i.e. a set price for a given amount of work, with both price and work being quantified at the beginning. This is sometimes referred to as an “entire contract” meaning that the contractor’s right to payment is dependent upon full completion of the Works. There is no room for discussion at a later date and for this sort of contract to work the drawings and specifications need to be full and complete as well as quantified before the work is put out to tender. This usually involves the precise description of work to be constructed and accurate bills of quantities, which are calculated according to a published standard method of measurement.

In this sort of contract any omissions from the drawings/specifications will result in the contractor being entitled to an additional sum of money over and above the original contract price. Additionally, should any variations to the contract occur due to the employer changing the scope of the Works, or any other unforeseen conditions arise, then any adjustments in the time for completion and/or costs incurred will result in an adjusted contract price and also entitle the contractor to reimbursement for any delay impacting the contract’s completion caused by matters under the control of the employer.

Another issue that arises in lump sum contracts has to do with changes in the cost of materials, inflation and other economic developments. In this regard many such contracts provide for a method of recalculating the rates and prices quoted to accurately reflect any inflation during the life of the contract and such “index-linking” will generally also include a way to sort out any fluctuation in such things as local and national tax rates, costs of labour/materials and related items.

The guaranteed maximum price contract

This form of contract is similar to a lump sum contract but in effect is really a form of cost reimbursement to the contractor. Its goal is to prevent cost overruns between the contractor and employer. This may be thought of as a particular type of cost reimbursement contract. In addition to providing a mechanism for controlling the level of the contractor’s fee, the contract imposes a maximum price on the amount the employer will have to pay for the entire project. The burden is thus put on the contractor to ensure that there are no errors in pricing or other details of the project. It should be noted, however, that this form of contract usually allows for the guaranteed maximum price to be altered by allowing changes in the maximum price for items that should not be borne by the contractor but rather are risks within the ambit of the employer.

The remeasurement type of contract

Another way to proceed is with a remeasurement form of contract. This differs from the lump sum contract in that the payment for work done is measured as completed

and payment is made accordingly. The benefit to the contractor in this circumstance is that it is paid when the work is completed – any work – and not just what was shown or even anticipated in the drawings/specifications. Such contracts are normally used in civil engineering situations where it would be difficult to fully determine the exact amount of work needed, such as where ground conditions cannot be fully ascertained. They are also used when the work cannot be fully quantified at the tendering stage, such as where the drawings are not fully completed. From an employer's point of view these can be beneficial in that estimated quantities can be used as to all tenderers, thus allowing the project to proceed even in the absence of completed drawings/specifications. Generally, the final calculation for payment is based upon "tendered unit rates" and frequently will also allow for fluctuations, variations, etc., as in a lump sum contract.

The cost reimbursement or cost plus fee contract

This form of contract reduces the risk to the extent that the contractor is paid its actual costs in doing the work plus (usually) a percentage on top of that for overheads and profit. This sort of contract is often used in government contracting not only for supply contracts but also works contracts and is very useful in situations involving lengthy development research situations.

In these sorts of contracts the contractor's fees can be calculated in many different ways. The most common way includes its actual costs plus a fixed fee where the fee is fixed as a lump sum or percentage rate by reference to the estimated overall cost of the Works. There is always an argument that by using such a form of contract the contractor has almost no incentive to keep costs to a minimum as it enjoys a percentage of the costs incurred. Yet another way is to pay for the costs plus a fluctuating fee to the contractor. Here, any initial lump sum or percentage fee is adjusted correlating with any significant increases or decreases in the actual cost of the Works and may be based either on some form of linear progression or by the use of threshold(s) which are compared to the original budgeted amounts for the project.

Target cost contracts

Target cost contracts are useful in that they give the contractor some incentive to control costs as the contractor's fee varies in inverse proportion to the difference between the actual final cost of the Works and the initial budgeted or targeted cost. In these situations the employer and contractor agree the target cost as an estimate for the Works and also agree a formula for payment of the incentive portion at completion. The parties can then adjust this fee while the work is in progress, if needed, to factor in variations and other matters. After completion the targeted cost as adjusted is compared to the actual final costs and the original agreed fee to the contractor is then varied according to the previously agreed formula.



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CHAPTER 2

The construction contract

Formation

All construction work is based upon contract, whether it be oral or in writing, but the first question to ask is whether there is in fact a contract at all. A building contract should define the relationship between the parties so that each knows what is going to be built, how long it should take and how much it is going to cost. In simple terms a contract is an exchange of promises, the breach of which results in a remedy at law. Thus, the essence of a building contract, like any other contract, is agreement. There has to be a point at which the parties are *ad idem*, i.e. of the same mind, as regards the terms of the contract they wish to agree and generally the contract will be formed when the parties reach that point.

Defining a contract

While this book deals with those situations arising in construction contracts which give rise to a remedy at law, it is essential that a review of the fundamentals of the law of contracts be completed first. The words “contract” and “agreement” are synonymous and it is in the word “agreement” that the true nature of contracts arises. “Has there been an agreement?” is the essence of all contract disputes because without the parties’ agreeing on what has to be done and for what price (consideration) there can be nothing to enforce, i.e. there can be no remedy at law. Building contracts do not enjoy any special status and the fundamental requirements for contract formation established by the common law apply to all contracts. Thus, any contract is considered as formed if there has been a proper offer, which was validly accepted and the contracting parties have legal capacity to enter into a contract, as well as having the requisite intention to enter into the contract. Once this is established it will be necessary to determine whether the contract is supported by consideration and, in certain limited circumstances, whether the contract is in writing. Finally, the issue arises as to whether the contract is for an illegal or legal purpose.¹

An agreement is reached when an offer, which is capable of “immediate” acceptance, is without qualification accepted. Further, the parties who are “doing the agreeing” must have the necessary capacity to contract and the contract must not be indeterminate, impossible or illegal. All contract law is based on the Latin principle *pacta sunt servanda*, i.e. that “pacts must be kept”, which is just another way of saying that agreements, once

¹ If illegal, then it will not be enforceable, e.g. an agreement to pay a bribe to a building official.

made, must be kept which in turn means that once an agreement (contract) comes into existence any breach is recognised and a remedy is available to the non-breaching party.

Generally, contracts need not be in writing in order to be enforced so long as the goods and/or services, which have been agreed, are legal. An oral agreement between two parties can constitute a binding legal contract. Needless to say, a written agreement is best in terms of showing what the parties agreed; however, most contracts are oral, such as when you buy a cup of coffee or a newspaper and you agree to pay an agreed price. While oral contracts are allowable under certain jurisdictions certain transactions must be in writing such as the purchase of property. But in essence a contract or agreement is nothing more than a way of setting forth the rights and obligations of the parties to the agreement so that what they have agreed upon can be enforced if either party ignores what has been agreed.

The law relating to contracts is not just a common law concept and is equally relevant in civil law and other countries with different rules applying depending upon the jurisdiction, e.g. Sharia law.

Offer and acceptance

Under the common law, the requirements for the creation of a contract are the actual offer and acceptance, which is the reaching of an agreement followed closely by the necessity for adequate consideration. Additionally, the parties must have the requisite intention to create a contract (rather than, say, to make a gift), the necessary legal capacity and finally, depending upon the jurisdiction, the necessary formalities (in writing, a deed, etc.). It should be noted that in civil law countries consideration is not necessarily as critical as it is in the common law jurisdictions.

Whether a contract has been formed was best discussed in the early case of *Carlill v Carbolic Smoke Ball Company*.² While not a construction case, it is still illustrative of the elements necessary for a valid offer and acceptance to exist, thus forming a contract. In that early case a medical firm advertised that its smoke ball would prevent those who used it, according to the instructions, from catching the flu and if it did not, buyers would receive £100. The Carbolic Smoke Ball Company then also stated that they had deposited £1,000 in the bank to show their good faith. Unfortunately, Mrs Louisa Elizabeth Carlill bought the smoke ball, used it and still caught the flu. Thereafter she promptly commenced proceedings against the company. Carbolic argued the advertisement was not to be taken as a serious, legally binding offer. It was merely an “invitation to treat” and a “mere puff”. The court held, however, that it would appear to a reasonable man that Carbolic had made a serious offer, primarily because of the reference to the £1,000 deposited into the bank. People had given good “consideration” for it by going to the “distinct inconvenience” of using a faulty product. The court further wrote: “Read the advertisement how you will, and twist it about as you will here is a distinct promise expressed in language which is perfectly unmistakable.”

Carbolic used the phrase “invitation to treat” which comes from the Latin phrase *invitatio ad offerendum*, meaning “inviting an offer”. In effect it is “an expression of willingness to negotiate. A person making an invitation to treat does not intend to be

² [1893] 1 QB 256.

bound as soon as it is accepted by the person to whom the statement is addressed”.³ This should be distinguished from what is referred to as a “binding offer” which, when accepted, becomes a binding contract.

The distinction between an offer and invitation to treat include newspaper advertisements, giving a price at an auction or, more importantly for the purposes of this book, in construction settings an invitation for tenders.

Another way of analysing this is to understand that when a product is advertised in a newspaper or magazine, while it can be considered an offer, more than likely it will be treated as an invitation to treat. In other words, an invitation to tender offers for acceptance by the advertiser. This concept goes back to *Partridge v Crittenden*,⁴ where the appellant advertised to sell wild birds but was not in fact offering to sell them. The court held that it did not make “business sense” for advertisements to be offers, as the person making the advertisement may find himself in a situation where he would be contractually obliged to sell more goods than he actually owned. In *Carbolic Smoke Ball*,⁵ the difference was that a reward was included in the advertisement.

What the courts are looking for is whether the parties really ever had what is referred to as a “meeting of the minds”. To capture the essence of this picture, let us consider two people haggling over the purchase of a donkey. The donkey owner says that he wants £100. The prospective purchaser says he will only pay £50 but will give the seller two chickens in addition to the money. The seller and buyer go back and forth until the prospective purchaser says he will pay £75 plus two chickens and will give the seller his shoes. The seller agrees – a meeting of the minds has occurred. Now take a more familiar situation. A contractor submits its tender offering to build a garage for £10,000. No mention is made of what the materials are to be, how long it will take to build, what the dimensions are to be. The owner rings back and says, “I accept!” Has there been a meeting of the minds? No, and for obvious reasons. Thus an agreement may be incomplete, as here, where the parties have agreed on the building of the garage but have not agreed on the other important points. While there are times the courts can imply the missing terms, if they are essential terms the agreement will fail. Additionally, there will generally be no contract if the parties agree “subject to contract” but never agree on the terms of the contract. A provision that certain terms are to be agreed from time to time, with no fallback as to what is to happen if agreement is not reached, may make an agreement so uncertain as to be unenforceable.

As can be seen from that example, the essential part of any contract is that the one making the offer must give sufficient detail so that once accepted it can be binding on both sides – a meeting of the minds of the parties concerned. Thus, there has to be some evidence that objectively the parties engaged in conduct manifesting their assent and a contract will be formed when the parties have met such a requirement. “Objective” in these situations is that the appearance of making an offer and/or accepting it is what counts, not a subjective view as to whether the parties really intended to enter into a contract.

As discussed in *Carlill v Carbolic Smoke Ball Co*,⁶ a “unilateral contract” obligation is only imposed upon one party upon acceptance by the performance of a condition

3 Andrew Burrows (ed), *Casebook on Contract*, Hart, Oxford, 2007.

4 [1968] 1 WLR 1204.

5 *Supra*.

6 *Supra*.

and this can be either by actually performing the requested act or by promising to perform the requested act in the future.

Implied agreements

Many agreements arise specifically by an offer being made which is then accepted. This can be expressed either orally or in writing. A great number of agreements arise by what is termed “implication”. This type of contract is referred to as an “implied contract” and is one in which some of the terms are not expressed in words. An implied contract can take two forms. A contract which is implied in fact is one in which the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, asking a brick mason to build a chimney to a house implies an agreement to pay for the work done at a fair price. So if the chimney is built and the owner refuses to pay he will be held liable for breach of an implied contract to pay for the constructed chimney.

This sort of implied contract is also referred to as a “quasi-contract”, because it is not in fact a contract. Rather it is a legal mechanism of creating a contract that can be the basis for collection of monies due, thus allowing the courts to remedy situations in which one party would be unjustly enriched by not strictly adhering to the law of contracts. For example, a contractor asks for a variation on a project because the amount of concrete actually used on site is 20 per cent higher than shown on the Bill of Quantities and the employer receives the benefit of this mistake. The employer has been enriched unjustly and will be held liable for payment. This sort of claim is also referred to as one for “quantum meruit”.

Capacity

An additional element to any contract is whether or not the parties have the capacity to contract. This is a key issue and there is an assumption that every individual adult, company, partnership or other legal entity has the right to enter into contracts of their own free will. The issue arises, however, as certain categories of individual are not regarded as having full capacity, such as undischarged bankrupts, minors, i.e. persons under 18 years of age, and persons of unsound mind. Additionally, companies, corporations and unincorporated associations may not, in accordance with their own internal rules, have the capacity to enter into certain contracts. Contracts entered into with individuals and/or entities lacking capacity may be unenforceable. Generally, issues relating to the contractual capacity of parties to building contracts are rare and generally relate to the identity of the contracting parties, e.g. when a subcontractor operates both as a sole trader and as a limited company or where the employer operates through an agent.

Consideration

The other main element of a contract is that, to be effective, it requires the proper intent, which is shown through what is termed “consideration”. This concept developed out of the need to differentiate contracts from gifts. A contract has binding consequences, i.e. damages can result from its breach. Damages do not normally arise from the making of a gift. In effect you have the right to rely upon a promise made

in a contractual setting but not necessarily in a gift setting. Thus, consideration is something of benefit to the person who has the obligation or who makes a promise – known as the “promisor” – to do, or forbear from doing something, or do something which is a detriment to the person who has the benefit of the promise or who wants to enforce the promise – known as the “promisee”. As long as some value is given for the promise, the courts will not consider whether “adequate” value is given and, thus, an agreement to transfer something valuable for say £1 is enforceable. However, if the promisee has already done the act that is said to be the consideration, that is usually “past consideration” and is not treated as being good consideration – this is discussed in more detail later. Further, the “consideration” must be given by the party who wants to enforce an obligation in the contract (but need not be provided to, or benefit, the promisor), thus a promise not to sue on a valid claim can be good consideration. The only other way to have an enforceable agreement, in the absence of consideration, is if the contract is made as a deed. A deed is a document under seal which either: (i) transfers an interest, right or property; or (ii) creates an obligation which is binding on someone or some persons; or (iii) confirms an act which transferred an interest, right or property. It should be noted, however, that not all documents under seal are deeds.⁷

Consideration is thus sometimes referred to as “the price of a promise”. While this was essential at early common law, over the years the necessity of actual consideration has become less strict, and some common law and civil law systems⁸ do not require consideration. Its original purpose was to show that both sides to a contract were in fact giving up something of value and usually equal value. Thus, the contractor who offers to build the garage and the employer who agrees to pay £10,000 for it are both willing to part with something of value. The contractor is giving up the materials and labour now for the promise of something of value in the future, i.e. the money. This concept arose in the common law in its current form from early in the nineteenth century where consideration was at the basis for the action of *assumpsit*, which was the action for breach of a simple contract in England and Wales until 1884, when the old forms of action were abolished. At this time the concept of the parties actually reaching agreement became the essential legal basis of contracts in all legal systems, having been discussed earlier in the eighteenth century by the French writer Pothier in his *Traité des Obligations*⁹ and was also reflected in the works of John Stuart Mill regarding free will – both together were added by jurists of the day to the traditional common law requirement for consideration as a basis for an action in *assumpsit*.¹⁰

Under civil law systems, an exchange of promises, or a concurrence of wills alone rather than an exchange of consideration, is the basis for a contract. Thus, if our contractor promised to build the garage and the employer accepted this offer without either promising to pay or giving anything in return, the contractor would have a legal right to the money and could not change his mind about building it as a gift. The way

⁷ There are special requirements on execution and delivery of deeds. A contract under seal is an example of a deed. No consideration is required for a contract contained in a deed. A person identified in the deed as someone to benefit from a promise in the deed can enforce a promise to pay money or can seek damages if the promise is not performed. However, it should be noted that equitable remedies (for example, specific performance of obligations other than to pay money) are not available if there is no consideration.

⁸ See e.g. Germany, § 311 BGB.

⁹ Maître Pothier, “*Traité Des Obligations – 1768 & Traité Des Retraits*” [1781].

¹⁰ See AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, OUP, Oxford, 1975.

this is dealt with at common law is through the equitable concept of “estoppel” which is used to create obligations during pre-contractual negotiations. It arises in the law when a party gives another an assurance and the other has relied on the assurance to its detriment. Over the years it has been debated whether the concept of consideration should be abandoned altogether, but because of its long history in the common law this is unlikely to happen, and rather it will be looked at with varying degrees of exactitude and on a case-by-case basis.

The concept behind consideration is that both parties to a contract must bring something to the bargain. A party seeking to enforce a contract must show that it conferred some benefit or suffered some detriment that is recognised by law. Consideration, for example, must be “sufficient” but need not be “adequate”, i.e. the consideration need not be a fair and reasonable exchange for the benefit of the promise. For example, as discussed earlier, agreeing to pay £1 for the garage may constitute a binding contract.¹¹

Other rules relating to consideration include that it must not be from the past or “prior consideration” and that consideration must move from the promisee. For instance, it is good consideration for person A to pay person C in return for services rendered by person B. If there are joint promisees, consideration needs only to move from one of the promisees. Also, consideration must not involve something one is already obliged by the general law to do – e.g. to refrain from committing a crime or to give evidence in court. There is another type of situation which arises and that is where person A promises to do something for person B if person B will perform a contractual obligation person B owes to person C. This will be enforceable as person B is “suffering” a legal detriment by making the performance of his contract with person C effectively enforceable by person A as well as by person C.

More importantly, as just mentioned, a promise to do something that one is already obligated contractually to do is not good consideration. For example, in the case of *Stilk v Myrick*,¹² a ship’s master promised to divide the wages of two deserters among the remaining crew if they would sail home from the Baltic shorthanded. This was held not to be valid consideration as the crew was already contractually obliged to sail the ship. Another example of this arose in *Foakes v Beer*,¹³ where the “rule in *Pinnel’s case*”¹⁴ was brought into the law of consideration. The House of Lords held that a smaller sum of money cannot be good consideration for the release of a larger debt, though if the smaller sum is accompanied by something non-monetary in addition, for instance “a horse, a hawk or a robe”, or payment is to be made early or in some special place or way, then there will be good consideration for the promise to discharge the debt. In other words some “new consideration” is needed and not just what had been previously promised. However, in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,¹⁵ the Court of Appeal held that a promise by a joiner to complete the contracted work on time, where this was falling behind, was good consideration for the contractor’s promise to pay extra money. The court’s decision was that the

11 See e.g. *Chappell & Co Ltd v Nestle Co Ltd* [1959] 2 All ER 701 in which the wrappers from three chocolate bars were held to be part of the consideration for the sale and purchase of a musical recording.

12 [1809] 2 Camp 317.

13 (1883) LR 9 App Cas 605.

14 [1602] Co Rep 117a.

15 [1991] 1 QB 1.

strict rule of *Stilk v Myrick*¹⁶ was no longer necessary, as English law now recognised a doctrine of economic duress to vitiate promises obtained when the promisor was “over a barrel” for financial reasons. Thus a promise to pay something extra could be seen as conferring a practical benefit on the promisor that could be good consideration for a variation of the terms.¹⁷

Intent to be legally bound

Another essential element of any contract is the intent to be legally bound to the terms of the contract, i.e. that the “agreement” was not made frivolously or without contractual intent. Indeed, there is a presumption that in the case of construction agreements, unless the parties expressly state that they do not want to be bound, it will be held that it was the parties’ intention to be legally bound. Indeed, a contract does not have to be set out in writing and can be made orally (or can be partly oral) and following amendments in 2009 to the Construction Act 1996, parties to oral “construction contracts” now have the right to adjudicate any dispute arising under them.

Further on this point is the recent case of *MacInnes v Gross*¹⁸ where the claimant, Bruce MacInnes, an experienced investment banker employed by Investec, met with the defendant, Hans Thomas Gross, an Austrian national and the principal figure behind the RunningBall group of companies, over dinner at a restaurant in Mayfair, London.

According to Mr MacInnes, it was agreed at that meeting that he would leave his employment with Investec and personally provide services to Mr Gross in relation to various aspects of RunningBall – in particular, growing the business to maximise any return on its sale – and that, in exchange, he would receive remuneration by being paid 15 per cent of the difference between the target price for RunningBall and the actual sale price. After the dinner, on 24 March 2011, Mr MacInnes emailed Mr Gross, outlining what he contended was an agreement between them on “headline terms”.

Mr MacInnes duly gave notice, but continued to work for Investec. In December 2011, when a possible sale of RunningBall began to materialise, he forwarded to Mr Gross a copy of his 24 March 2011 email, commenting that it was important that the parties were “completely aligned”. In reply on 7 December 2011, Mr Gross commented that, when they next saw each other, the parties needed to make “a proper contract”.

After RunningBall was sold, Mr MacInnes made a formal claim for payment based on the alleged oral agreement of 23 March 2011, demanding €13.5million. Mr Gross rejected Mr MacInnes’ claim, insisting that there was no binding contract between the parties, on the terms alleged or on any terms, and that, rather, the dinner in question was an informal one, at which no agreement was, or could have been, reached.

¹⁶ *Supra*.

¹⁷ The lack of consideration or put another way insufficient consideration is very important in relation to collateral warranties. So, for example, when a contractor or subcontractor is required to make a promise in respect of the quality of its work to someone other than the employer who is paying for it, i.e. the beneficiary, for example such as an incoming tenant or a funder, neither of whom will be offering any consideration in return, the requirement for consideration will not be satisfied. This can be rectified by making the collateral warranty a deed, which does not require consideration or to make the warranty the subject of a nominal payment (in receipt of the sum of £1 ...) from the beneficiary to the contractor.

¹⁸ [2017] EWHC 46 (QB).

Mr Justice Coulson, after considering the relevant authorities, was firmly of the view that Mr Gross' case was to be preferred, and that no binding contract was made between the parties on 23 March 2011 as there was not the requisite intention to create legal relations. First, there was no agreement on the critical issue of the nature of Mr MacInnes' remuneration. Second, the terms of the alleged contract were both too complex and too uncertain to be enforceable. And, third, there was no binding agreement as to the relevant parties or the relevant workscope.

In delivering his judgment, the Judge addressed directly the location and nature of the meeting of 23 March 2011, which, whilst not "decisive" of the issue, was considered "an important part of the background". He held:

"The mere fact that the discussion took place over dinner in a smart restaurant does not, of itself, preclude the coming into existence of a binding contract. A contract can be made anywhere, in any circumstances. But I consider that the fact that this alleged agreement was made in a highly informal and relaxed setting means that the court should closely scrutinise the contention that, despite the setting, there was an intention to create legal relations".

Accordingly, given the informal nature of the setting, and the fact that Mr MacInnes himself was only able to say in his email of 24 March 2011 that there was an agreement on "headline terms", Mr Justice Coulson found that there was no such intention to create legal relations – as further confirmed by Mr MacInnes' own failure to reply to, or otherwise correct, Mr Gross' email of 7 December 2012, in which he indicated that "a proper contract" still needed to be agreed.

Although Mr MacInnes' claim failed in this case – and it is submitted that, in the circumstances, the Judge's decision was plainly the correct one – it is nonetheless a reminder that contracts can in fact be concluded orally in an informal, relaxed setting. As Mr Justice Coulson put it, they can be made "anywhere, in any circumstances". Against that, however, it is clear that the courts will more closely examine purported agreements reached in such an environment, and that there is no substitute, therefore, for the drawing up of a written contract to reflect what has been agreed and to provide security and certainty. Indeed, Mr MacInnes was asked, during cross-examination, why he – an experienced investment banker – did not do so, and his answers in this regard, according to the Judge, were "unpersuasive".

Privity of contract

The general rule is that only the actual parties to the contract can enforce the contract. This is changing and at times those who are third-party beneficiaries of a contract may be allowed to recover damages for the breach of a contract to which they were not an actual party. Thus, if the contractor in the earlier example contracted to build a garage and the employer agreed to pay £10,000 for it but the garage was going to be for the benefit of a neighbour, i.e. a third party, it would be reasonable to assume that the neighbour could commence proceedings against the contractor for faulty construction. Thus, in such cases third-party beneficiaries have been considered parties of the contract for purposes of enforcing it.

Indeed the Contracts (Rights of Third Parties) Act 1999 (1999 c 31¹⁹) has changed the common law "Doctrine of Privity" with respect to the rights of third-party

¹⁹ See Appendix 4 to this book.

beneficiaries. The Act allows third parties to enforce the terms of a contract that benefits them in some way, or that the contract itself allows them to enforce. It also grants them access to a range of remedies if the terms are breached. The Act also limits the ways in which a contract can be changed without the permission of an involved third party. At the same time, it provides protection for the promisor and promisee in situations where there is a dispute with the third party and allows parties to a contract to specifically exclude the protection afforded by the Act if they want to limit the involvement of third parties.

Oral contracts

An exchange of promises can be as legally valid as a written contract and accordingly any contract that uses spoken words is a verbal contract. This is in comparison to a “non-verbal, non-oral contract”, also known as “a contract implied by the acts of the parties”, which can be either implied in fact or implied in law.

Most jurisdictions have rules of law or statutes which may render otherwise valid oral contracts unenforceable. This is especially true regarding oral contracts involving large amounts of money or real estate. For example, generally in the United States a contract is unenforceable if it violates the common law statute of frauds or equivalent state statutes, which require certain contracts to be in writing. An example of the above is an oral contract for the sale of a motorcycle for US\$5,000 in a jurisdiction that requires a contract for the sale of goods over US\$500 to be in writing to be enforceable. The point of a Statute of Frauds is to prevent false allegations of the existence of contracts that were never made, by requiring formal (i.e. written) evidence of the contract. However, a common remark is that more frauds have been committed through the application of the Statute of Frauds than have ever been prevented. Contracts that do not meet the requirements of the common law or statutory Statutes of Frauds are unenforceable, but are not necessarily thereby void and, thus, a party unjustly enriched by an unenforceable contract may be required to provide restitution for unjust enrichment. Statutes of Frauds are typically codified in state statutes covering specific types of contract, such as contracts for the sale of real estate.

In most of the countries that use the English common law and which provide for rules similar to the Statute of Frauds there is no requirement for the entire contract to be in writing.²⁰ In the UK certain kinds of contract must be in writing or they are void, for instance for the sale of land under section 52, Law of Property Act 1925.

With an oral contract the critical issue becomes: what exactly are the terms to be included? Normally, the terms of an oral contract are factual questions for the courts to determine based upon the evidence presented. Exceptions arise where any terms not expressly stated by the parties may be incorporated into the “oral” contract.

The first of these arises from a prior course of dealing between the parties. In this situation the parties have dealt with each other over time and the agreements reached were always in reference to certain external contractual terms. Thus, in *McCutcheon*

²⁰ However, for transactions dealing with property there must be a note or memorandum evidencing the contract, which may come into existence after the contract has been formed. The note or memorandum has to be signed in some way, and a series of documents may be used in place of a single note or memorandum. Further, the “note” must contain all material terms of the contract, the subject matter and the parties to the contract.

v MacBrayne,²¹ the court was of the mind that any new dealing between the parties should incorporate the terms formerly used between the parties into the new agreement between the parties even though they were not expressly mentioned. The decision was based on the fact that the parties must have intended the terms to be incorporated from their previous course of dealing.²²

The second situation arises from the common understanding between the parties (which can be readily ascertained) and, thus, in *British Crane Hire Corp v Ipswich Plant Hire Ltd*,²³ Ipswich hired a crane from British Crane Hire based upon an oral contract. Later printed conditions were sent to Ipswich for them to sign and one of these conditions made the hirer liable to indemnify British Crane against all expense in connection with the use of the crane. Needless to say, just before the conditions were signed the crane was sunk in boggy ground, without negligence on Ipswich's part, and accordingly, they claimed that they were not liable for the cost of retrieving the crane, because the conditions were not incorporated in the oral contract. The court found there was no course of dealing, nor any implied term that the conditions would apply, but nevertheless held the conditions incorporated in the contract, on the basis that both parties were of equal bargaining power and, since both parties were in the plant-hire business, they must have known that such conditions were normally imposed on the hiring of plant equipment.

Although much discussion has arisen as to whether this was a fair decision, as it was assumed that the parties were on equal footing, the question remains open as to whether the same outcome would occur if the crane had been hired by a builder instead of a plant-hire company. The key is that a common understanding of such standard conditions, which are normally used in a specific industry, will be a factor tending to establish that those conditions were incorporated in the contract.²⁴

Letters of intent

These are difficult areas to determine and the question whether or not a contract has been formed by issue of a letter of intent is usually resolved by analysis of several factors such as prior dealings of the parties, the extent that the letter is definite and certain, consideration, etc. Thus, if a letter of intent states only that the employer will at some future point in time award the contractor a contract for works not yet fully specified, this, in and of itself, is rarely interpreted as a binding contract owing to both a lack of consideration and lack of certainty. However, letters of intent issued in connection with building contracts are usually more substantial. Thus, letters of intent issued to contractors are usually based upon the need to get the initial stages of the Works underway while contractual negotiations continue and, as such, the initial works required and the amount to be paid for these works will normally be set out in some detail in the letter of intent or in appended or referenced documents. If the letter of intent contains sufficient detail of the Works, the price to be paid and a start date, it can result in a binding contract and a contract will be formed if the terms offered in the letter are accepted by the contractor.

²¹ [1964] 1 All ER 430, [1964] 1 WLR 125, HL.

²² In this regard see also *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA; and *Consarc Design Ltd v Hutch Investments Ltd* (2003) 19 Const LJ 91, HHJ Bowsher QC.

²³ [1975] QB 303, [1974] 1 All ER 1059, CA.

²⁴ See e.g. *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

Other contract issues – battle of the forms and related difficulties

In addition to the basic problem of offer, acceptance and consideration, further problems arise when dealing with pre-printed forms, especially in respect of whether a completed contract was ever actually agreed. A typical scenario is as follows:

“Four years back the contractor was invited to tender for a bridge project. The tender was submitted and discussed at several different meetings (where minutes were sometimes kept) and further negotiations were had via emails, telephone calls, site meetings, and other written correspondence between the employer and contractor. After several changes of architect, engineer and personnel the meetings subsided and construction actually began with the understanding that both sides had agreed or intended to agree a contract on one of the standard forms with the Articles signed, the Particulars filled in, the conditions amended by agreement and detailed specifications and drawings all marked ‘For Construction’ attached as appendices.”

Unfortunately, no actual written contract ever came to fruition and, some four years on, the parties became locked in a dispute and each side has its own version of what was agreed. In circumstances where the parties have not signed a contract or even agreed a contract document, whether or not a contract has been formed, or particular terms agreed, will depend on an objective analysis of the entire negotiations: was there an objective meeting of the minds and is there a mutually binding contract?

In these circumstances, the court will be faced with a dilemma and will have to consider objectively all the forms offered and the words used given their ordinary and common sense meaning. Thus, a party cannot rely upon what he thought he had written if that meaning is not objectively clear on the face of the document. Likewise, a party cannot rely upon points that, on the facts, were apparently not communicated to the other party. This is usually where the parties will seek to rely upon competing sets of terms and conditions for the form agreements being used, thus the term “battle of forms”. As a general rule it will be assumed that the last set of terms and conditions to be discussed are deemed to be those agreed if there is no further challenge to those terms. However, this general rule will not apply if it appears that the parties mutually intended some other result.²⁵ Additionally, a contract will have been formed if an offer can be found or can be shown to have been accepted by conduct, notwithstanding that acceptance is not otherwise communicated to the party making the offer. So, if a contractor submits a tender for works at the employer’s premises and the employer arranges for the contractor to be allowed access to the premises to carry out the Works without demurring from the terms of the tender, the offer represented by the tender will have been accepted by the employer’s conduct.

The real issue is whether any contract could possibly have been formed before the negotiations came to an end. If it appears that clear agreement was reached upon the essential terms at an earlier stage, the court may find that the subsequent negotiations varied the terms previously agreed or were simply irrelevant. In this regard it would be difficult for a party to deny contractual terms that appear to have been accepted and complied with throughout the course of the negotiations and the Works. Thus, a court would be unlikely to find that a contract has been formed if the facts show that the parties had agreed that they would not be bound into an agreement unless and

²⁵ “*Do I Have a Contract*” Ted Lowery, 17 April 2009, <https://www.fenwickelliott.com/sites/default/files/TEDLOWERY.pdf>

until a formal contract was agreed and signed. If, however, the parties' correspondence is labelled "Subject to Contract", then this is likely to be taken by the court as an indication that the parties intended that no agreement would arise unless and until a formal contract was completed.

The role of offer and acceptance fades in these circumstances especially where the parties have performed or largely performed the obligations that were the subject matter of their negotiations. In these circumstances the court will more readily conclude that an executory contract has come into being.

Finally, while negotiations may have been lengthy, there will usually have been a common understanding of what was required to be built, works will often have commenced before the contractual discussions have ended and the parties will have acted throughout as if there was a contract in place. In these circumstances the court will be reluctant to conclude that no contractual relationship was entered into.

In *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd*,²⁶ the court was faced with the refurbishment of the southbound bore of the Blackwall Tunnel. Fitzpatrick wanted to enter into a subcontract with Tyco for the design, manufacture and installation of the main M&E works in the tunnel. Subcontract negotiations commenced in October 2001 and continued until July 2002, but no formal subcontract was ever signed. Tyco commenced work during early 2002 but by August 2002, it seemed likely that disputes would arise between the parties over work scope and design delays. Fitzpatrick eventually submitted claims to Tyco for £19m, primarily comprising delay losses and incomplete and defective work. Tyco's initial position was that no subcontract had ever been agreed. However, when Fitzpatrick issued proceedings, in their defence Tyco accepted that a subcontract had been agreed on around 7 May 2002, but denied that some of the terms relied upon by Fitzpatrick were included within the subcontract. The court was therefore required to review the history of negotiations and decide when, or if, a contract had been formed and, if so, on what terms.

In its judgment the court made a number of findings including that: (i) When reviewing the document exchanges, the ordinary meaning of the words should be used and the court did not agree with the interpretations put forward by Tyco which it concluded were "contrary to commercial commonsense"; and (ii) the parties reached a basic agreement on the subcontract on 7 May 2002 whereby the identity of the parties, the price, work scope and programme were agreed (all essential terms), as was the incorporation of the main contract documents and the Civil Engineering Contractors Association Standard Form of Subcontract.

The court went on to find that the basic agreement of 7 May was varied as a result of subsequent discussions between the parties up to and including a meeting on 19 June 2002, which did not impact upon the essential terms, agreed on 7 May. The court further found that both Tyco and Fitzpatrick agreed that a subcontract had been formed at some point and dismissed an argument by Tyco that the parties had agreed that no contract would be formed pending the completion of a signed and sealed deed. The court found that the parties did not have a mutual intention that no legal relations would be created in the absence of a deed.

²⁶ [2009] EWHC 274 (TCC), [2009] All ER (D) 70 (Mar), [2009] BLR 144.

Thus, the court's overall conclusion was that Tyco's case simply did not fit with the factual history of the negotiations:

"I consider that, on analysis, Tyco's ... case is unsustainable. It is made by reference to one witness only, whose oral evidence is not only uncorroborated but, in my judgment, lacking credibility. It is contradicted by and/or wholly inconsistent with the contemporaneous documentation. It relies on an interpretation of the Letter of Award which is artificial and convoluted and requires deletions and modifications to the words used."

The court thus confirmed that the parties would face great difficulty in seeking to impose contract terms that they, with the benefit of hindsight, would have liked to agree, rather than those that they actually did agree.

It is important to note that, when a so-called "battle of the forms" scenario arises, it may well be a battle without a winner. This was the case in the more recent case of *Transformers and Rectifiers Ltd v Needs Ltd*²⁷ in which the court was asked to determine the terms of contracts made between the parties during a long course of commercial dealing – in particular, two contracts entered into for the purchase of nitrile gaskets, which it was alleged were faulty and not fit for purpose.

Here the claimant, Transformers and Rectifiers Ltd ("T & R"), argued that its terms and conditions applied, as they were printed on the back of its purchase orders. Whilst there was no reference on the face of such orders to the existence of the terms and conditions on the reverse, the defendant, Needs Ltd, accepted that its management was aware of those terms.

For its part, Needs Ltd contended that, on the contrary, its own terms and conditions applied, because they were referred to on its acknowledgment of order – which read "The quoted prices and deliveries are subject to our normal Terms and Conditions of Sale (copies available on request)" – and that any liability for breach of contract was limited or excluded by such terms.

Mr Justice Edwards-Stuart held, first, that T & R had failed to do what was necessary to incorporate its own terms and conditions into the contract. The great majority of its purchase orders were sent to Needs Ltd by fax or email – as was the case with the two orders in question – and only the front page was sent, with no copy of the terms included. Even though those terms and conditions were printed on the back of purchase orders which from time to time were sent by post, then, T & R did not make it clear, to a reasonable person in Needs Ltd's position, that it was seeking to rely on them. By contrast, the judge found that – given T & R did not follow a consistent practice of enclosing its terms with every purchase order, and in circumstances where that order did not, on its face, refer to any such terms and conditions – Needs Ltd was entitled to assume that T & R was not intending to rely on them.

However, Mr Justice Edwards-Stuart was also not persuaded that Needs Ltd had done enough to bring its own terms and conditions to T & R's attention. He held that a seller wishing to incorporate its terms by reference to an acknowledgment of order must, at the very least, refer to them on the face of that acknowledgment, in wording which makes it plain that they are to govern the contract, and – if the terms and conditions are not in a form that is in common use in the relevant industry – give reasonable notice of those terms by printing them on the reverse (or by sending a copy of them to the buyer). Since Needs Ltd neither printed its terms and conditions

27 [2015] EWHC 269.

on the reverse of its acknowledgement of order nor provided T & R with a copy of them – indeed, it was not suggested that T & R had ever even seen them – Needs Ltd had failed to bring those terms to T & R’s attention and thus had not turned its acknowledgement of order into a counter offer.

It followed that neither party’s terms were incorporated into the two relevant contracts. This decision highlights, therefore, the risk of having a set of terms and conditions but referring to them in something of a hit-or-miss fashion, and underlines the importance of consistency in the way in which such terms are used, and clarity in the way in which contractual documentation refers to terms and conditions, and of ensuring, too, that – whether the commercial relationship is long-running, as was the case here, or in its infancy – those terms are actually provided to the other party.

The construction tender

As has been discussed, in all contracts the fundamental concepts revolve around offer and acceptance. One side makes what is known as a “firm” offer, i.e. one that includes all terms and conditions and if accepted can be fully performed without recourse to any other information. A good example is an auction, where the auctioneer asks those present to make an offer on a specific item, which is accepted when no higher offer is made. In the construction industry an offer to perform or carry out works on a construction project is referred to as a “tender” and, like any other offer, for it to be valid it must be definite and certain, i.e. not ambiguous. If it does contain such terms its acceptance pursuant to those terms will be an enforceable contract between the parties.

Asking for tenders is the same as the auctioneer calling for bids. The choice and terms are those of the person inviting the bid. A problem in this regard arose in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*.²⁸ In this case the Blackpool Borough Council owned an airport and granted concessions regarding the operation of pleasure flights. In 1983, it invited the plaintiff and six other parties to tender for the next three-year concession. The invitation required tenders to be placed in an envelope provided, which was not to contain any identifying marks. Additionally, tenders received after 12 noon on 17 March 1983 would not be considered. The plaintiff placed its tender in the Town Hall letter box at 11 am on 17 March 1983, but the letter box was not cleared until 12 noon by council staff. As a result, the plaintiff’s tender was deemed late and excluded from consideration. Here, the court had to consider the council’s promise that any properly submitted tender would be considered. In this regards the court stated:

“A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited.

The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest (or,

²⁸ [1990] 3 All ER 25.

as the case may be, lowest). But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure (draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question and an absolute deadline) the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a mailer of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others. I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that.

It is of course true that the invitation to tender does not explicitly state that the council will consider timely and conforming tenders. That is why one is concerned with implication. But the council does not either say that it does not bind itself to do so, and in the context a reasonable invitee would understand the invitation to be saying, quite clearly, that if he submitted a timely and conforming tender it would be considered, at least if any other such tender were considered."

Alternative tenders are another concern and it is common in construction for one party to provide alternative tenders, as where one party submits both a fixed-price tender and a cost-plus tender. In *Peter Lind & Co Ltd v Mersey Docks & Harbour Board*,²⁹ the contractor submitted alternative tenders for the construction of a freight terminal, one on a fixed-price basis and the other on a "cost-plus" basis. The owner then accepted the "tender" but did not say which of the two had been accepted. The contractor then went ahead and performed the work and ended up by asking for payment on a quantum meruit basis. Here, the court held that there was no contract between the parties because the owner's claimed acceptance failed to specify which tender was accepted and, while this resulted in no contract being found, the fact that the work was performed and accepted by the owner led the court to allow payment to the contractor on a quantum meruit basis.

In this case, had the owner specified which of the two tenders had been accepted there would have been no issue and the court would have found that a binding contract did exist. Again the concept of quantum meruit is applied only to prevent an injustice where work has been performed. Usually the damaged party will only receive the fair value of the work performed and not the profit, which would have resulted had a true contract been entered into.

A similar situation arises where the contractor gives an estimate for work to be performed. An example of this situation can be found in the rather old case of *Crowshaw v Pritchard and Renwick*,³⁰ where the owner wrote to the contractor enclosing a drawing and a specification, and asked for the contractor to tender for some alteration work. The contractor in return wrote:

"ESTIMATE – Our estimate to carry out the sundry alterations to the above premises, according to the drawings and specifications, amounts to £1,230."

The next day the owner wrote accepting the contractor's "offer to execute" the Works, but the contractor later refused to go ahead. He contended that by using the

²⁹ [1972] 2 Lloyd's Rep 234.

³⁰ [1899] 16 TLR 45.

word “estimate” he did not intend it as an offer to do the work, and also that there was a trade custom that a letter in this form was not to be treated as an offer.

In this case the court was confronted with whether an “estimate” was in fact an offer which, having been accepted by the owner, would qualify as a binding contract. The court wrote:

“It has been suggested that there is some custom or well-known understanding that a letter in this form is not to be treated as an offer. There is no such custom, and, if there is, it is contrary to law.”

Another concept unique to contract law is that fairness and fair dealing will be implied into every contract. An example of this can be seen in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*.³¹ Here, during the original tendering process for a fenestration project at the new House of Commons building in Bridge Street, Westminster, CFEM Facades was the lowest tenderer at £40,479,469. All of the others were higher than expected so the specification was changed and again CFEM Facades was the lowest tenderer. This led to yet another round of tendering in which the tenderers were placed in a position of having to tender for different options. It turned out that the managers of the tendering process wanted the successful tenderer to be a British firm and eventually the contract was awarded to a consortium, which had a British element. Judge Humphrey LLOYD QC decided that the Corporate Officer of the House of Commons was in breach of its obligation to conduct the tendering process fairly and openly and as a result CFEM Facades was entitled to recover the wasted costs of tendering. He further found that since the Corporate Officer of the House of Commons contract could not be awarded lawfully, nor could the tender process begin anew, CFEM Facades was entitled to recover damages for its failure to be awarded the contract. In this regard he wrote:

“214. In my judgment it is clear from the *Blackpool*^[32] case and from the other authorities that there must be something more than a request for a tender which is to be submitted competitively along with others. An invitation to tender is by its nature not normally an offer; it solicits offers. It does not carry with it an obligation to accept any offer that is made in response to it. Even if the customary disclaimer is not made. It would be quite a change if the very fact that tenderers were informed that competitive tenders were being sought was treated in law as an offer that any tenderer who submitted a tender would expect to be treated fairly. It would intrude into the ordinary commercial freedom or discretion to accept or reject a tender or to negotiate with whoever seemed best in the eyes of the person seeking tenders. There must therefore be some good reason why obligations of the kind suggested by *Harmon* can arise.

215. In this instance tenders were sought using the restricted procedure under the 1991 Regulations which provides tenderers with some protection in as much as they should not be tendering along with anyone who was not considered to be qualified to carry out the work in question and had satisfied other requirements. The restricted procedure is intended both to provide the contracting authority with a mechanism whereby tenders are only sought from a selected short list and to provide the tenderers with the knowledge that the competition will come from true competitors. In addition tenderers who had not been selected can challenge that decision. The 1991 Regulations are seemingly comprehensive. They give disappointed tenderers rights to prevent the procedure from being abused and to obtain reasons and to question the award. The requirement to give reasons itself imports an obligation of fairness even if it were not grafted on by the decisions of the European

31 (1999) 67 ConLR 1.

32 *Supra*.

Court of Justice governing the interpretation of the parent legislation. I therefore consider that H of C is right in its primary submission.

216. On the other hand, the procedure of the 1991 Regulations was not followed. H of C did not inform the other tenderers it would be considering Seele/Alvis' option 82 Tenders and Estimates 19 alongside tenders based on the new specification. If I am right in my conclusion that H of C only sought alternative details then can Harmon complain of the decision to consider Seele/Alvis's tender on the basis that it offered an alternative design? The discussions in the autumn of 1995 deviated from the 1991 Regulations procedures in that they went beyond mere negotiations and clarifications. They entertained an alternative design of which the other tenderers were unaware (at least formally). If Harmon cannot complain of the result under the 1991 Regulations does this not mean that the 1991 Regulations are not as comprehensive as they might first appear – or that they do not effectively control deviations of the kind adopted by H of C? In my judgment by repeating the offer to consider alternatives, on 11 September and on 2 and 30 October 1995, it was to be implied in that offer that by submitting a tender any alternatives would be equivalent to the schemes or schemes for which revised tenders were being sought and would be options only in terms of refinements of detail design which would reduce cost, albeit confidential to the tenderer but falling short of different proposals which were more than matters of detail but ones of changes of design, of which tenderers were not informed and therefore were entitled to assume were not matters which they needed to take into account. In my judgment even though all tenderers accepted that they would not be entitled to see alternatives of detail which were considered to be commercially confidential to a given tenderer, H of C in soliciting new or revised tenders under the European public works regime (to which effect is given by the Regulations) impliedly undertook towards any tenderer which submitted a tender that its submission would be treated as an acceptance of that offer or undertaking and: (a) that the alternative submitted by any tenderer would be considered alongside a compliant revised tender from that tenderer, (b) that any alternative would be one of detail and not design; and (c) that tenderers who responded to that invitation would be treated equally and fairly.

These contractual obligations derive from a contract to be implied from the procurement regime required by the European directives, as interpreted by the European Court, whereby the principles of fairness and equality form part of a preliminary contract of the kind that I have indicated. *Emery* shows that such a contract may exist at common law against a statutory background, which might otherwise provide the exclusive remedy. I consider that it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly

217. H of C was in breach of all these obligations. In my judgment it also broke the implied duty to treat all tenderers fairly and equally by considering an alternative design without giving any other tenderer the opportunity of competing with it on its terms."

Unilateral versus bilateral contracts

Unilateral contracts are those where only one party gives its promise. Advertisements, for example, are typically unilateral contracts. In unilateral contracts the requirement that acceptance be communicated to the offeror is waived. The offeree accepts by performing the condition, and the offeree's performance is also treated as the price, or consideration, for the offeror's promise.

A bilateral contract is one in which there are duties on both sides, rights on both sides, and consideration on both sides. If an employer makes an offer such as "if you promise to pave my driveway, I will give you £5,000", this is a bilateral contract once the contractor accepts. Each side has promised to do something, and each side will get something in return for what it has done.

Uncertainty

If a contract is uncertain or incomplete, then it is impossible to enforce and the courts will find that no contract exists. Further, in such situations the courts will try to make a commercial contract work by construing a reasonable construction of the uncertain terms.

The courts can also resort to the use of external standards to make the contract work. Sometimes these standards are already listed in the contract itself, such as where some form of the performance is to be found in an appendix to the contract or in an external standard, such as by reference to a specification for a product compiled by its manufacturer. Additionally, the courts can add or clarify terms of the contract based upon an implied term such as adding a “reasonable” price for a non-unique item if the price has been left out. If a contract’s terms cannot be “adjusted” in this way, and all methods of resolution have failed, the court can “sever” the offending terms or clauses but only if the contract remains enforceable after the severance. This can usually be done only if the contract provides for such a situation through the use of “severability clauses”.

Two recent cases pursue the uncertainty issue further and in *Teekay Tankers Ltd v STX Offshore and Shipbuilding Co Ltd*,³³ the High Court concluded that a purported contract for the building of oil tankers was too uncertain to be enforced, because an essential term of that contract – relating to delivery dates for the vessels – was merely an “agreement to agree”.

By contrast, an agreement which provides for a formula, or other machinery, for determining the contractual price is not an “agreement to agree” and will not necessarily invalidate the contract – see *Secretary of State for Defence v Turner Estate Solutions Ltd*.³⁴

Conditions as terms of a contract

In order to determine whether a contract has been breached one must first decide if the operative parts are conditions or warranties. A condition is a term that can be considered to be the essence of the contract or, as some writers suggest, something that goes “to the very root of a contract”. The breach of such a term, in effect, repudiates the contract. The breach of a warranty, however, will allow the contract to continue though damages can arise under either situation. In some jurisdictions this difference is referred to as a major breach as compared to a minor breach.

Whether or not a term is major or minor is an objective matter of fact. A contractor’s obligation to complete construction on a certain date is a condition, the breach of which would be considered major or going to the root of the contract while its obligation to perform tasks in a certain order would be a warranty and, if not done as warranted, would be a minor breach which, though not terminating the contract, would entitle the employer to damages for any loss occurring.

Additionally, statutes such as the Sale of Goods Act 1979, section 15A, may also declare a term, or nature of term, to be a condition or warranty. The Act stipulates that terms as to title, description, quality and sample are conditions except in certain

³³ [2017] EWHC 253 (Comm).

³⁴ [2015] EWHC 1150 (TCC).

defined circumstances and any failure to provide the detail as set out becomes a major breach resulting in termination of the contract.

In the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,³⁵ the court created a new term – the “innominate” term. Under this concept, whether the breach of an innominate term goes to the root of the contract depends on the nature of the breach. Breach of these terms, as with all terms, gives rise to damages; however here, if the legal benefit of the contract has been removed from the non-breaching party then the contract is considered as repudiated and at an end.

Implied terms

A term may either be express or implied. An express term is one that is expressly written into the contract or expressly stated by the parties to an oral agreement. Implied terms are not stated by the parties but implied by the courts to form part of the contract.

Terms implied in fact

To determine whether the terms are implied in law or in fact it is necessary to review events occurring during the formation stage of the contract. In the Australian case of *BP Refinery Westernport v Shire of Hastings*,³⁶ the Privy Council proposed a five-stage test to determine situations where the facts of a case may imply terms. Traditionally, the test for this has been the “business efficacy test” and the “officious bystander test”. The former was proposed by the court in *The Moorcock*.³⁷ This test stipulates that a term can be implied only if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot, as reasonable businessmen, have intended. If applied, only the most limited term should then be implied – the bare minimum to achieve this goal.

The officious bystander test originated in the judgment of Lord Justice Scrutton in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*.³⁸ To determine whether a term of a contract can be implied in fact one must presume that an “officious bystander” was standing between the parties while they negotiated their contract. While listening to the contract negotiations the bystander suggests that they should include a particular term; the parties would “dismiss him with a common ‘Oh of course’”. Some writers question whether this is truly a separate test or just a description of how one might go about arriving at a decision on the basis of the business efficacy test.

Some jurisdictions, notably Australia, Israel, India and the United States, imply a term of good faith into contracts. Indeed, the United States adds a provision not only for good faith but also fair dealing.

Misrepresentation

In the English common law there is no duty of fair dealing; however, one who fraudulently, negligently or innocently misrepresents material facts so as to induce a party to enter into a contract and incur liability may be held responsible in damages.

³⁵ [1962] 1 All ER 474.

³⁶ (1977) 180 CLR 266.

³⁷ (1889) 14 PD 64.

³⁸ [1918] 1 KB 592.

Additionally, as there can be no true “meeting of the minds” in such circumstances (for had the deceived party known the true facts it would not have entered into the contract in the first place) the innocent party may be entitled to rescind the contract.

Misrepresentation means an untrue or false statement of fact made by one party to another party, which causes the party hearing it to enter into the contract. The statement must be unambiguous and cannot be a statement of future intention or opinion. Further, the statement must be known, and be relied upon, by the innocent party. A false statement of fact must be differentiated from that of opinion. “I think this is the finest ...” is different from “This is the finest ...”; however, that very distinction is the basis for much litigation. In *Gordon v Selico*,³⁹ the court held that it is possible to make a misrepresentation either by words or by conduct, although not everything said or done is capable of constituting a misrepresentation. Further, in *Bisset v Wilkinson and others*,⁴⁰ the court found that statements of opinion or intention are not statements of fact in the context of misrepresentation. However, if one party claims to possess specialist knowledge, their statement of opinion will more likely be a statement of fact and not just an opinion.⁴¹

The law recognises two different types of misrepresentation in contract law; one is referred to as *fraud in the factum* and the other as *fraud in the inducement*. *Fraud in the factum* refers to fraud that arises from matters such as disparity between the instrument intended to be executed and the instrument actually executed; e.g. leading someone to sign the wrong contract focuses on whether the party in question knew they were creating a contract. If the party did not know that they were entering into a contract, there is no meeting of the minds and the contract is void. *Fraud in the inducement* is, as the name suggests, the commission of an act that induces the other party to enter into the contract. Further, in cases where, had the party known the actual truth, they would not have entered into the contract, i.e. misrepresentation of a material fact, the contract becomes voidable.

Thus, depending upon the situation, statements or promises made by a party regarding the quality or nature of what is being contracted may constitute misrepresentation and, if so determined, will allow the aggrieved party the right to rescind the contract. Depending on the type of misrepresentation it may also allow for certain types of damages, including punitive damages for fraud. Before this threshold is reached it is necessary that the “innocent party” relied on the misrepresentation and the misrepresentation must have induced the innocent party to enter into the contract. If the false representation had no effect on the innocent party there can be no rescission nor damages. In *Bawden v London Edinburgh and Glasgow Assurance Co*,⁴² the court was faced with the situation where the innocent party was aware of the truth and the court found that where the true position is known, either personally or through an agent, the innocent party will not have any action in misrepresentation. It should be noted that “knowledge of the truth” is a defence to any action for fraud/misrepresentation. Additionally, as the court found in *Edgington v Fitzmaurice*,⁴³ any misrepresentation made does not need to be the sole inducement to entering into the contract but rather only a material inducing cause.

39 (1986) 18 HLR 219.

40 [1927] AC 177.

41 See e.g. *Esso Petroleum Co Ltd v Mardon* [1976] 2 Lloyd's Rep 305.

42 [1892] 2 QB 534, CA; e.g., see also *Malhi v Abbey Life Assurance Co Ltd* [1996] LRLR 237.

43 (1885) 29 Ch D 459.

Further, in situations where the innocent party tries unsuccessfully to ascertain the truth the courts generally find that the innocent party did not rely on the misrepresentation and, therefore, it could not be an inducing factor in entering the contract. But what does the contractor do in situations where the contract requires the contractor to verify either bills of quantities or site conditions during the tender stage, to satisfy itself that all is well? It should be noted that this, generally, places the contractor at a disadvantage as there is usually very little time to either price the bills as part of the tender or actually verify the true ground conditions, let alone verify that they comport with the drawings to any detail. The employer is, in effect, placing such provisions into the contract so that the contractor cannot rely on any statement in the bills to found an action based on misrepresentation unless it was fraudulent. When the courts are faced with a situation where the representation was in fact fraudulent, the party defrauded may be entitled to damages. For example, in the 1907 case of *5 Pearson & Sons Ltd v Dublin Corpn*,⁴⁴ plans were prepared by the employer, which showed a wall with its foundations nine feet deep. This wall was intended to be used to support part of the work. When these plans were prepared, however, the employer had no knowledge as to whether the nine-foot depth was true. The contractor tendered for the work but, due to the misrepresentation, the work was much more costly than originally planned. As a result, the contractor was entitled to damages and the court found that where the contractor had been directed by the employer to satisfy himself as to the accuracy of the plans, this did not protect the employer against fraudulent misrepresentation.

Additionally, in *Gordon and Teixeira v Seiko and Select Management Ltd*,⁴⁵ the court stated:

“Even if at the date of completion the plaintiffs had been fully aware of the fraudulent misrepresentation which had been made to them, this would not have precluded them from affirming the contract and seeking appropriate relief, though it would have prevented them from seeking to rescind.”

Distinctions

It should be noted that when a statement is false on its face no issue arises. The problem arises when partial truth is mixed with falsity. A good test for this was set out in the Marine Insurance Act 1906 which, states that a statement will be treated as true where it is “... substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer”. In the case of *Avon Insurance v Swire*,⁴⁶ the court took the position that the statement would be treated as true if the difference would not have induced a reasonable person to enter into the contract. A further distinction was set out in *Economides v Commercial Union Assurance Co Plc*,⁴⁷ where the court held that a statement of opinion, or of a future intention, is not a misrepresentation unless either the person making the statement does not truly hold the opinion or have the expressed future intention, or the statement of opinion or future intention plainly

44 [1907] AC 351, HL.

45 [1986] 1 EGLR 71.

46 [2000] 1 All ER (Comm) 573.

47 [1998] QB 587, [1997] 3 All ER 636, CA.

implies certain existing facts.⁴⁸ If those existing facts are false then there may still be a misrepresentation, for example, when the opinion given implies facts that are claimed to be existing or if the representation of belief includes a representation that there were reasonable grounds for the belief and if that belief was missing.⁴⁹ In such a case, a misrepresentation will have occurred if reasonable grounds for the belief were lacking.⁵⁰

Another situation develops when a representation is made that is true when made but later stops being true before the formation of the contract. The person making the representation must correct the representation and, if he does not, the failure to correct gives rise to a claim of misrepresentation.⁵¹

Express false representations

Simply put, for a statement to constitute fraud it must not only be made without an honest belief in the facts presented but must also be made knowing it to be false, or without belief in the truth of the false representation. Further, the court in *Derry v Peek*⁵² stated that “fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth or recklessly, careless whether it be true or false”. Here “careless” is taken to mean not just “negligently made” but rather “grossly negligent”, i.e. made recklessly where the party making the representation does so without care as to whether the representation was true or false. What makes fraudulent misrepresentations different is that when this is found to have occurred the court tries to return the innocent party to the position it was in, or would have been in, had the contract not been entered into, rather than looking to award damages for what would have happened had the misrepresentation been true. Thus, in *Doyle v Olby (Ironmongers) Ltd*,⁵³ the court held that when misrepresentation was found to have occurred, the innocent party may ask the court to rescind the contract and is entitled to receive damages in respect of all the losses incurred as a result of having entered into the contract. In other words, the innocent party receives damages to return him to the position he would have been in had he not entered into the contract, as opposed to awarding damages based on the position as if the representation had been true.

Further, where the court finds that there has been a fraudulent misrepresentation, the innocent party has a choice of rescission and/or damages. So, as the court found in *Moss & Co Ltd v Swansea Corp*,⁵⁴ where a building owner or employer makes

⁴⁸ See e.g. Daniel Shapiro, Chapter 2, “Misrepresentation”, *Emden’s Construction Law*, LexisNexis 2009.

⁴⁹ See e.g. *Smith v Land and House Property Corp* (1884) 28 Ch D 7; *Babcock v Lawson* (1880) 5 QBD 284, CA or *Wales v Woodham* [1977] 2 All ER 125, [1977] 1 WLR 199.

⁵⁰ See e.g. *Brown v Raphael* [1958] Ch 636, [1958] 2 All ER 79 and also see *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1993) 66 BLR 56 (Sup Ct Can), where the consulting engineers were found liable for negligent misrepresentation to the tendering contractors for economic loss caused by reliance on tender drawings produced by them.

⁵¹ See e.g. *With v O’Flanagan* [1936] Ch 575, CA, Lord Wright MR at 582 approving dicta of Fry J in *Davies v London and Provincial Marine Insurance Company* (1878) 8 Ch D 469 at 475. Also *Briess v Woolley* [1954] AC 333, HL, per Lord Reid at 349. See also Misrepresentation Act 1967, s 2(1).

⁵² (1889) 14 App Cas 337 HL.

⁵³ [1969] 2 QB 158, CA.

⁵⁴ (1910) 74 JP 351; see also e.g. *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *Glasgow and South Western Rly Co v Boyd and Forrest* [1915] AC 526, HL.

a fraudulent representation as to a material fact, and this misrepresentation then induces the contractor to submit a disadvantageous tender, the contractor may, on discovering the fraudulent misrepresentation, rescind the contract and/or claim damages. In such cases the measure of damages will be all losses flowing directly from the fraudulent misrepresentation. It makes no difference if these losses were reasonably foreseeable and they will include any lost opportunity⁵⁵ and/or wasted expenditure.⁵⁶

What should be kept in mind is that in construction contracts if deceit is prevalent then the fraudulent misrepresentation will sound in tort. So in *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd*,⁵⁷ the court found that where a fraudulent misrepresentation induced a profitable transaction, damages would also be awarded to represent the additional profits that would have been made but for the deceit; or, as in *East v Maurer*,⁵⁸ the standard measure of damages in cases where an innocent party was induced to enter into a contract for the purchase of property should take into account the market value of the property as at the date of transaction “although the standard measure will not be applied inflexibly”; or, as in *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd*,⁵⁹ where the innocent party entered into the contract in reliance on the misrepresentation and suffered damages for consequential loss, damages were also recoverable to fully compensate for its losses. Further, as was shown in *Thomas Saunders Partnership v Harvey*,⁶⁰ in company situations, for example construction companies, if the deceit sounds in tort, the liability for fraudulent statements can be attributable to both the company and personally to the officer of the company.

Implied misrepresentations

While express misrepresentations deal with intentional acts of misrepresentation, implied misrepresentations may also result in claims of misrepresentation. Such misrepresentations can arise both from implications drawn from what was written or said and also from the conduct of the party making the misrepresentation.⁶¹ For example, where a contractor orders a load of concrete from a supplier – the ordering implies that payment will be made and that the purchaser has the money to pay. A distinction arises in situations where nothing at all is said on a subject, i.e. non-disclosure, and, thus, there can be no implied representation as nothing was said, but as the court pointed out in *Curtis v Chemical Cleaning and Dyeing Co Ltd*,⁶² a partial disclosure is more likely to amount to a misrepresentation as the partial disclosure often carries an implied representation that there is no more to disclose.

⁵⁵ See e.g. *East v Maurer* [1991] 2 All ER 733 and also *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426.

⁵⁶ See *Doyle v Olby (Ironmongers) Ltd*, *supra* and also *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *Naughton v O'Callaghan* [1990] 3 All ER 191; and *Royscot Trust Ltd v Rogerson* [1991] 3 All ER 294, CA.

⁵⁷ [2001] QB 488, [2000] 3 All ER 493, CA.

⁵⁸ [1991] 2 All ER 733, CA.

⁵⁹ [1997] AC 254, [1996] 4 All ER 769, HL.

⁶⁰ (1989) 30 ConLR 103.

⁶¹ See e.g. *Ray v Sempers* [1974] AC 370, HL.

⁶² [1951] 1 KB 805.

Negligent misrepresentations

Intentional misrepresentations must be distinguished from negligent misrepresentations or misstatements of fact. These are representations that are made carelessly or without reasonable grounds for believing them to be true.⁶³ As per the court's decision in *Royscot Trust Ltd v Rogerson*,⁶⁴ the relief granted is that the innocent party can rescind the contract and receive damages as if the representation was fraudulent.

As with all torts, if there is a pre-contractual duty of care owing to the innocent party the negligent misstatement is actionable. However, this duty of care must be established and the innocent party is entitled only to the tortious measure of damages instead of those allowed under the Misrepresentation Act 1967.

Innocent misrepresentations

When the party making the misrepresentation does so in the absence of both fraud and negligence the main remedy is rescission; however, subject to section 2(2) of the Misrepresentation Act 1967 the court may award damages instead of rescission.

Misstatements of the law versus fact

It should be noted that an incorrect representation as to the law in and of itself is not actionable (other than perhaps for negligence if the person making it was a lawyer), unless the representation is made wilfully. For example, a representation as to the meaning of a contract is one of law. However, as the court in *Wauton v Coppard*⁶⁵ pointed out, a representation as to the contents of the contract is one of fact. Thus, a representation as to the meaning or content of an Act of Parliament is one of law, but in *West London Commercial Bank v Kitson Ltd*,⁶⁶ the court held that statements as to the contents of a *private* Act of Parliament were representations of fact. Further, the court in *Laurence v Lexcourt Holdings Ltd*⁶⁷ drew the distinction that it is a representation of law to say, for example, that a certain development did not require planning permission, but it is a representation of fact to state that the land was in an area zoned for office use, or that planning permission had been granted for housing development.⁶⁸

Many construction contracts require the contractor to satisfy itself as to the correctness of certain conditions, such as lot lines, layout of the site, some geological conditions, etc. The court in *Bottoms v York Corporation*⁶⁹ found that the person making the statements is not responsible except where there is an intention to deceive the contractor. In these circumstances, any such statements made as to site conditions, etc., are considered those of opinion. But often the employer will make a representation as to the site and its conditions or other elements of the contract and offer the contractor the opportunity to inspect for itself to determine the conditions, i.e. to check whether

63 See e.g. s 2(1) of the Misrepresentation Act 1967.

64 [1991] 2 QB 297.

65 [1899] 1 Ch 92.

66 (1884) 13 QBD 360, CA.

67 [1978] 1 WLR 1128, [1978] 2 All ER 810.

68 See further *Emden's*, *supra*.

69 [1892] 2 Hudson's BC (4th edn) 208, CA; see also *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335 and *Dillingham v Downs* (1972) 13 BLR 97.

what was said was true. The court in *Redgrave v Hurd*⁷⁰ found that if the innocent party does not take the time to determine the truth of the matter asserted after being offered an opportunity to do so, it still does not lose the remedies it may have as to misrepresentation.

Mistake

Simply stated, a mistake is an incorrect understanding by one or more parties to a contract, which may be used as grounds to invalidate the agreement. There are three types of mistakes that arise in contractual settings: unilateral mistake, mutual mistake and common mistake.

Unilateral mistake

A unilateral mistake exists when only one party is mistaken as to the terms or subject matter of the contract. In *Smith v Hughes*,⁷¹ after receiving a sample, Hughes, a racehorse trainer, ordered 40 to 50 quarters of oats from Smith. Sixteen quarters were sent to start with; however, when they arrived, Hughes said they were not the oats he thought they were. He had apparently wanted old oats and he was getting new, green oats. In fact, Smith's sample was of green oats. Hughes refused to pay and Smith sued for breach of contract, for the amount delivered and for damages for the amount for oats that were still to be delivered. The court held:

"In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor. And I also agree that where a specific lot of goods are sold by a sample, which the purchaser inspects instead of the bulk, the law is exactly the same, if the sample truly represents the bulk; though, as it is more probable that the purchaser in such a case would ask for some further warranty, slighter evidence would suffice to prove that, in fact, it was intended there should be such a warranty.

But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that ... If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

⁷⁰ (1881) 20 Ch D 1, CA; see also *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128.

⁷¹ (1871) LR 6 QB 597.

Then in *Lewis v Avery*,⁷² the court held that it was also possible for a contract to be void if there was a mistake in the identity of the contracting party. Here, the court held that the contract could be avoided only if the plaintiff could show that, at the time of agreement, the plaintiff believed the other party's identity was of vital importance. A mere mistaken belief as to the credibility of the other party was not sufficient.

When, however, a contractor makes a unilateral mistake in its tender price, due to mathematical errors for example, the contractor is still bound by such errors unless the employer, before accepting the tender, realises the unintentional error. This was the situation in *W Higgins Ltd v Northampton Corporation*,⁷³ where Higgins contracted with Northampton Corp to build 58 houses but his tender was not correct, the result being that he thought he was tendering for the erection of the houses at £1,670 a pair, when in fact it was £1,613. The court held that he was bound by his mistake and could not have the contract set aside or rectified and wrote:

"The result is very unfortunate for the plaintiff and an extreme hardship on him. But can I rectify the contract so as to make it give effect to what was undoubtedly his intention when he entered into the contract? It appears to me that I cannot. [In] my opinion the parties were not labouring under a mutual mistake. I think the contract expresses what the defendants intended it to express. At any rate, it has not been shown to me that the defendants were labouring under any mistake, and of course the onus is upon the plaintiff to prove that fact, if fact it were.

In these circumstances, with the utmost regret, I come to the conclusion that I cannot give the plaintiff the relief that he desires, and unless, even at the eleventh hour, the defendants can make some concession to the plaintiff, I am afraid that the ratepayers will have benefited by the bona fide and serious mistake made on the part of the plaintiff, which was really brought about by the carelessness of some official of the defendant corporation in drawing up the original bill of quantities. If he had made it clear in that bill of quantities, as he ought to have done, that the 50 yards of chimneys were already included in the 321 yards of wall, Mr Higgins would never have made the mistake that has resulted in this action."

But, as the court held in the Canadian case of *McMaster University v Wilchar Construction Ltd*,⁷⁴ if an employer discovers an error in the contractor's tender as to the terms of the offer itself, then it cannot create a contract by accepting the mistaken tender. Here, the contractor had failed to include the entire first page, which contained a clause delineating intended price fluctuations and the court found the contractor not liable and wrote:

"There is not the slightest doubt in my mind that the real reason the plaintiff purported to accept Wilchar's tender was in the hope that it might be able to recover the penalty of the bid bond, knowing full well as early as 3 October that Wilchar had made a mistake in its tender and that it would refuse to enter into a contract unless the mistake were remedied. To me this is patently a case where the offeree, for its own advantage, snapped at the offeror's offer well knowing that the offer was made by mistake.

[Counsel for McMaster] concedes that Wilchar had, by mistake, not included the escalator clause as a term of its tender, but he argues that this was not a mistake of a fundamental character such as to vitiate the tender and that it was a mistake merely in the motive or the reason for making the offer.

I am not prepared to accede to such an argument. In a construction contract the price is always a fundamental term of the contract. In fact it is the very quid pro quo of such a

⁷² [1971] 3 All ER 907.

⁷³ [1927] 1 Ch 128.

⁷⁴ (1971) 22 DLR (3d) 9 Ontario Province, High Court.

contract. In the instant case, for the contractor the mistake meant a loss of thousands of dollars as contrasted with a profit in its absence; for the contractee, it meant an advantage of some \$16,000.

Were it not that a provision or stipulation as to price were a fundamental term of a contract, then such decisions of the courts, ranging over a number of years, as in *Webster v Cecil* (1861); *Garrard v Frankel* (1862); *Hartog v Colin and Shields* (1939) and *Bennett v Adams River Lumber Co* (1910) have all been in vain.

In my view, this is truly a case of unilateral mistake. While perhaps inadvertent, it was an honest mistake, and one which Wilchar hastened to make known to the plaintiff as soon as it was discovered; one which was made known to the plaintiff long before the tender or offer was accepted. Moreover, I conclude that from the circumstances, the plaintiff must, in any event, be taken to have known of the mistake before acceptance of the offer. In this context, it should be stressed that one is taken to have known that which would have been obvious to a reasonable person in the light of the surrounding circumstances: see *Hartog v Colin and Shields* (1939).

With full knowledge of the mistake, and the evidence as to this is irrefragable, apart from the concession of counsel, the plaintiff purported to accept Wilchar's tender, despite the protest of Wilchar and its endeavour to amend it.

There can be little doubt that there was no real agreement between the parties and that this is but a bold attempt by the plaintiff to force the defendant Wilchar to fulfil a promise in a sense which the plaintiff knew that Wilchar did not intend it and to which its mind did not assent: and so I hold.

To put it simply, this is a case where one party intended to make a contract on one set of terms and the other intended to make it upon another set of terms, with the result that there is lack of consensus. The parties were not *ad idem*. The existing circumstances prevented the formation of a contract.

I further hold that in any event, the circumstances were such that it would be unconscionable, unfair and unjust to permit the plaintiff to maintain the contract in the light of the conduct of its project manager, conduct which I find was not only fraudulent in that more broad equitable sense of the word, but which went even further.

Wilchar would be entitled to the equitable right of rescission, in the event that a contract had been consummated, on the basis that under the circumstances, the contract was voidable for fundamental mistake in its formation. Under such conditions, such a mistake is a good defence to any action brought to enforce such an alleged contract or to obtain damages for its breach ...”

Mutual mistake

A mutual mistake occurs when both parties are mistaken as to the terms of the contract and each believe they are contracting for something different. The courts will try to uphold such mistakes if a reasonable interpretation of the terms can be found. *Raffles v Wichelhaus*,⁷⁵ often referred to as the *Peerless* case, is a leading case on mutual mistake. This case established that when both parties to a contract are mistaken as to an essential element of the contract, the court will attempt to find a reasonable interpretation from the context of the agreement before it will void it. In that case the plaintiff entered into a contract to sell “125 bales of Surat cotton ...” to the defendant. The contract specified that the cotton would be arriving in Liverpool on the ship *Peerless* from Bombay and wrote “to arrive ex *Peerless* from Bombay”. As it turned out there were two ships named *Peerless* arriving from Bombay, one departing in October and another departing in December. The defendant thought the contract was for cotton on the October ship while the plaintiff thought the contract was for the cotton on the December ship. When the December *Peerless* arrived, the plaintiff

⁷⁵ [1864] 2 Hurl & C 906 Court of Exchequer.

tried to deliver it; however, the defendant repudiated the agreement, saying that their contract was for the cotton on the October *Peerless*. The court held that:

“... There is nothing on the face of the contract to shew that any particular ship called the ‘Peerless’ was meant; but the moment it appears that two ships called the ‘Peerless’ were about to sail from Bombay there is a latent ambiguity, ... That being so, there was no consensus ad idem, and therefore no binding contract ...”

Though courts will strive to find a reasonable interpretation in order to preserve the agreement whenever possible, the Court in *Raffles* could not determine which ship named *Peerless* was intended in the contract. Consequently, as there was no *consensus ad idem*, the two parties did not agree to the same thing and there was no binding contract. Thus, the defendants prevailed and did not have to pay.

The situation also arises where the court may rectify the contract to state what the innocent party thought was the situation. This will happen only where one party takes unfair advantage of a mistake made by the other. As the court set forth in *George Wimpey UK Ltd (formerly Wimpey Homes Holdings Ltd) v VIC Construction Ltd (formerly VIC Components Ltd)*,⁷⁶ for this to happen it must be shown that the claimant erroneously believed that the contract contained a particular term (or did not contain a particular term) and that the defendant knew that the contract did not contain that term. Further, it must be shown that the defendant had knowledge of this in the sense defined in *Agip (Africa) Ltd v Jackson*,⁷⁷ in other words actual knowledge or wilfully shutting one’s eyes to the obvious, or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would. Further, it must be shown that the defendant failed to bring the mistake to the claimant’s notice and that the mistake benefited the defendant, or was detrimental to the claimant. In these circumstances the court is entitled to conclude that the defendant’s conduct makes it inequitable to allow him to resist rectification of the contract to give effect to the term that the claimant believed was in the contract, despite the fact that the mistake was not, at the time of the execution of the contract, a common mistake but only a mistake by one party.⁷⁸

Common mistake

A common mistake is similar to a mutual mistake but is where both parties hold the same mistaken belief of the facts. In *AL Gullinson & Sons v Corey*,⁷⁹ for example, both the employer and the contractor erroneously believed that the plans for the construction of a house would produce a house identical in appearance to an already-existing house; however, the court held that no such mistake was sufficient to nullify the contract.

The problem also arises in determining which mistakes are so fundamental to the contract as to justify vitiating the contract from the start. The facts of each case will make the determination clear, but of most importance is a determination of which characteristics of the subject matter were regarded by the parties as significant. As example, such a situation can be found in the next case, where the House of Lords did not consider the mistake made to be sufficient, thus demonstrating that the courts

⁷⁶ [2005] EWCA Civ 77, [2005] BLR 135, 103 ConLR 67, CA.

⁷⁷ [1990] Ch 265.

⁷⁸ See *Emden’s*, *supra*.

⁷⁹ (1980) 29 NBR (2d) 86.

will be reluctant to let parties escape the consequences of a bad bargain. The case that set the rule in this area is *Bell v Lever Brothers Ltd*.⁸⁰ Here Lever Brothers Ltd was a company trading in Niger, where trade was in trouble. Lord Leverhulme, the owner of Lever Bros, hired D'Arcy Cooper to be the chairman and manage the crisis. Cooper negotiated a loan from Barclays Bank, which insisted that professional management run the Niger subsidiary. So, Cooper hired his friend, Ernest Bell, a former senior Barclays manager as chairman and Mr Snelling, a tax consultant as vice chairman of the subsidiary.

Bell had wanted to run the new United Africa Company because he was too old at fifty-four to have a job in the city, and he agreed with Cooper that he would get a large compensation package (£30,000) and retire. Shortly after, it was revealed that Bell (and Snelling) had been part of a regional cocoa cartel, and used information on future price reductions to sell cocoa from his personal accounts. Lever Brothers Ltd therefore brought a claim for rescission of the compensation package on grounds of mistake of fact.

The jury found that Bell's illicit dealings breached the employment contract and that if Lever Brothers Ltd had known they would not have entered into the agreement. Furthermore, the jury found that at the time of the agreement Bell did not have in mind the illicit acts. The House of Lords found that there was no mistake and the contract could not be rescinded nor was it void on mistake. The court, however, identified the mistake as a common mistake and wrote:

"A mutual mistake as to some fact which, by the common intention of the parties to a contract, whether expressed or implied, constitutes the underlying assumption without which the parties would not have made the contract they did, and which, therefore, affects the substance of the whole consideration, is sufficient to render the contract void."

In effect such a mistake must nullify or negate consent of the parties in order for the agreement to be void and, in order for the contract to be void by mutual mistake, the mistake must involve the actual subject matter of the agreement and must be of such a "fundamental character as to constitute an underlying assumption without which the parties would not have entered into the agreements". Accordingly, the court found that the mistake was not sufficiently close to the actual subject matter of the agreement and that the parties got exactly what they had bargained for.

On occasion the last two types of mistake are combined thus, common or mutual mistakes can arise where there is a mistake in communication in either the terms, the subject matter or the identity of one of the parties to the contract with the essential element being that the parties are never *ad idem* and no effective contract is ever created, i.e. resulting in what is termed negative consent. Mistakes in communication may be on the part of both parties or the mistake may be that of just one of the parties. More importantly, it needs to be of such a fundamental nature, such as in *Associated Japanese Bank (International) Ltd v Credit du Nord SA*⁸¹ where the mistake was that the subject matter did not exist, or where the subject matter lacks some fundamental characteristic essential to its identity.⁸²

⁸⁰ [1932] AC 161.

⁸¹ [1988] 3 All ER 902.

⁸² See e.g. *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, CA where there was no fundamental mistake because although neither party to a contract for sale of development land realised that there was a sewer running beneath the land, the cost of diverting the sewer represented only a very small proportion of the purchase price.

In *OT Africa Line Ltd v Vickers Plc*,⁸³ the court noted that where both parties are mistaken as to the terms of the contract or where one party is mistaken as to the terms of the contract *and* that mistake is known or should have been known to the other party, no contract will be concluded. In a similar vein the court in *Hartog v Colin and Shields*⁸⁴ found that where a contract was made to sell goods at a stated price “per pound” but negotiations were based on the trade custom of the price “per piece”, and the value of the piece was about one-third that of a pound, the contract was void. Here, the court also found that the buyers had been aware of the seller’s mistake.

However, where the parties act upon the mistake the question whether or not it was known becomes the issue. For example, in *Page v Taunton UDC*,⁸⁵ a contract for the construction of sewerage works provided different classes of work would be paid at various rates, i.e. per yard or cubic foot. In this case, while filling in the schedule of prices £18 per hundredweight for cast-iron pipes was inserted, whereas the correct price was about 18s or less. The engineer did not notice the high price for this detail until a considerable amount of the work had been executed. He then attempted to force the claimant to do it at 18s and he refused to certify for a higher rate. Upon the claimant’s refusing to do the work at 18s per hundredweight, the defendant instructed his engineer to order as little as possible of this work. On completion the claimant sued for the balance due including the difference between 18s he had been paid and £18, the schedule price. The defendants pleaded that there had been an operative mistake. The court took the position that as the contract was in writing and unambiguous and in particular after they had instructed their engineer to order as little as he could, they could not now seek to rectify the contract.

In these settings the parties have failed to set forth their actual agreement; the courts can rectify the written agreement to reflect the true intent of the parties. This can happen when in the written contract there is a mistake common to both parties, the result of which is that the written contract is not an accurate reflection of what they thought they had agreed to.

Mistake versus frustration versus impossibility

There is a distinction between mistake as a way of avoiding a contract and that of frustration. If the contract is affected due to circumstances that pre-exist the contract, which makes performance impossible, the issue will generally be one of mistake. Compare this to where circumstances arise after the contract is made which make performance impossible – this is referred to as “frustration” or “frustration of purpose”.

In the case of *Krell v Henry*,⁸⁶ an individual rented a room for the purpose of watching the coronation procession of Edward VII. When the King fell ill, the coronation was indefinitely postponed. The hirer refused to pay for the room; the owner sued for breach of contract and the hirer then countersued for the return of his £25 deposit. The court determined that the cancellation of the coronation was unforeseeable by the parties and discharged the contract, leaving the parties as they were: the hirer lost

⁸³ [1996] 1 Lloyd’s Rep 700.

⁸⁴ [1939] 3 All ER 566.

⁸⁵ [1904] Hudson’s Building Contracts (7th edn) 126.

⁸⁶ [1903] 2 KB 740.

his one-third deposit and the owner lost the rest of the rent. In addition, the court also noted that the doctrine of “impossibility” could not be applied in this manner, because it would not technically have been impossible for the lessee (the renter) to take possession of the flat on that prescribed day and merely sit in front of the window and view the street where the coronation parade was to occur. In effect the illness of the King did not make the execution of the contract “impossible”, instead the cancellation of the parade frustrated the purpose of the contract.

The rule is that if, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances (of the contract) indicate the contrary.

It should be noted that it is not sufficient merely to show that the performance of the terms of the contract were more difficult and/or expensive than originally expected. This situation was faced in *Davis Contractors Ltd v Fareham Urban District Council*,⁸⁷ where the contractor agreed to construct 78 council houses within an eight-month period for a fixed price. Through no fault of either party, there was a scarcity of skilled labour and the work took 22 months to complete. The plaintiffs argued that, because of the shortage of labour, the contract had been brought to an end by frustration and that they were entitled to recover a sum in excess of the fixed price on the basis of a quantum meruit. Here, the court reviewed the circumstances and noted that the contract had not been frustrated and accordingly, the parties were held to the terms to which they originally committed. The court wrote:

“Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticised as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd v London and District Cinemas Ltd* (1951), per Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given ‘irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances’ ... The legal effect of frustration ‘does not depend on their intention or their opinions, or even knowledge, as to the event’. On the contrary, it seems that when the event occurs ‘the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence’ (*Dahl v Nelson* (1881), per Lord Watson).

... So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for

87 [1956] AC 696.

would render it a thing radically different from that which was undertaken by the contract. *Non haec infoedera veni*. It was not this that I promised to do.

I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work has begun shortly before the formal contract was executed and continued, with impediments and minor stoppages but without actual interruption, until the 78 houses contracted for had all been built. After the work had been in progress for a time the appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed; but the respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case."

Thus, under the doctrine of frustration, the parties' obligations may be terminated even though performance is not strictly impossible, if it has become fundamentally different from what was contemplated at the time the contract was made. In *Metropolitan Water Board v Dick, Kerr & Co Ltd*⁸⁸ in 1914, the contractor was to build a reservoir within six years, but then in February 1916, the Ministry of Munitions, acting under war-time powers, ordered the contractor to cease work, which they did. Here they could have continued to perform after the war as the engineers had the right to grant an extension of time. The court, however, held that a contract resumed after the war-time interruption would be fundamentally different from that before the interruption and wrote:

"On the whole matter I think that the action of the government, which is forced on the contractor as a vis major, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action."

The issue thus becomes, as usual, what exactly were the terms of the agreement. So in *Wong Lai Ying v Chinachem Investment Co Ltd*,⁸⁹ the respondents, who were building two blocks of flats in Hong Kong, entered into twenty-four contracts to sell the flats, as yet unbuilt, to the appellants. The contracts were entered into between March and November 1971. Work began in December 1971, the contractual date for completion was 17 May 1973, and time was made of the essence but with provision in certain circumstances for extension for not more than one year.⁹⁰ Then in June 1972, part of the hillside above the building site slipped, taking with it a 13-storey block of flats, the debris of which landed on the site, obliterating the building works already completed. Work stopped and, since it could not be recommenced within three months, the respondents' building permit came to an end. A new permit was not issued until November 1975.

Interestingly, while this set of facts would normally be sufficient for frustration of purpose the appellants argued that the contract was not frustrated and instead that

⁸⁸ [1918] AC 119.

⁸⁹ (1979) 13 BLR 81.

⁹⁰ See e.g. *Powell-Smith and Furmston's Contract Casebook*, 4th edn, Wiley-Blackwell, London, 2006.

they were entitled to specific performance because of Clause 22 of the contract which provided:

“It is further agreed that notwithstanding anything herein contained.... should any unforeseen circumstances beyond the vendor’s control arise whereby the vendor becomes unable to sell the said undivided share and apartment to the purchaser as hereinbefore provided, the vendor shall be at liberty to rescind the agreement forthwith and to refund to the purchaser all instalments of purchase price paid by the purchaser hereunder without interest or compensation.”

The court, however, held that this Clause 22 could not be read as applying to the kind of unforeseen disaster which had happened, and that accordingly the contract’s purpose had been frustrated. In this regard the court wrote:

“It was, however, urged that the language of clause 22 is wide enough to cover the event which happened. So it is. But the question is whether the general words of the clause are sufficient to support the inference that the parties must be presumed to have made provision for the event. In answering the question, the concurrent findings of fact by four judges, all of whom would be well aware of conditions in Hong Kong, must be respected by the board. The event was, admittedly, an ‘unforeseen natural disaster’, and [both the trial judge and the Court of Appeal] spelt out its consequences for the contract ... All of them were prepared to characterise it as a ‘frustrating event’: they differed only in their construction of clause 22.

The unforeseen character of the event is not in dispute. Clause 22 cannot, in their Lordships’ opinion, be construed as making provision for the possibility of this particular unforeseen contingency. The clause, coming at the end of the contract, replete with specific provisions and time limits, was plainly intended to confer upon the vendor a remedy of rescission if a dispute arose or it became clear he could not complete in accordance with the contract, provided he acted ‘forthwith’ to terminate the contract. It does not follow from the provision of a summary remedy avoiding litigation in such circumstances that the parties must have agreed that their contract would continue after an unforeseen natural disaster having the consequences analysed and assessed by the judges below. The Board agrees with the view expressed by Huggins J in the Court of Appeal that:

‘the inclusion of a clause such as clause 31 in the *Bank Line* charter-party [*Bank Line v Capel* (1919)] or clause 22 of the agreement in this case is ... not inconsistent with the operation of the doctrine of frustration and does not show an intention that the doctrine shall not apply.’

Strictly, the issue is not whether the doctrine of frustration is excluded but whether provision was made for an event causing the circumstances of performance to be radically different from that undertaken by the contract. The word ‘forthwith’ is an indication, if anything other than the context and circumstances of the contract is needed, that this ‘frustrating event’ was not contemplated; for a most significant feature of this event was that as a result of it ‘the position of the parties was clouded in uncertainty’ (Briggs CJ). Another indication is the bizarre consequences of holding the event covered by the clause. If the vendor should fail to act ‘forthwith’, and completion should become indefinitely delayed, the purchaser, exercising his right under clause 3(3), could wait as long as he pleased, collecting all the time his interest at the rate of one per cent per month. A further indication is the presence in the contract of clause 20. Requisition, if not provided for, could well be a frustrating event: indeed it is a classic instance in some circumstances of frustration. The parties by clause 20 made specific provision for it”



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CHAPTER 3

Design disputes and liability

Design professionals

Historically, the responsibility for design, and any disputes that subsequently arose, was that of either the architect or the engineer. Today, however, design liability can attach to an architect, an engineer, builders and their subcontractors, and can sometimes revert to the employer where it makes a choice during design. Liability may even attach to a supplier in circumstances where they may not have even thought they were doing any design work at all.¹

The underlying form of contract further complicates the issue. For example, some projects are what is referred to as “design-build”. This is where the contractor is responsible for both the design and the construction of the Works. Any problems arising from the quality of the design are the responsibility of the contractor and any claims arising from unintelligible drawings, etc. rest between the contractor and the architect/engineer rather than the owner/employer.²

Normally, it is the employer or owner that starts the process by contracting with the design professional, be it the architect or engineer, to procure the design and construction of a building. Traditionally, the process starts with the first contract between the employer and the design professional. This relationship results in the design of the project and the output being the drawings, specifications, bills of quantities and other necessary documents. After this phase is completed the employer enters into another contract with a contractor who agrees to construct the building in accordance with the architect/engineer’s design. Thereafter, the designer will either supervise the construction and/or act in some administrative capacity until completion and “turnover” to the employer.

There are many variations on both of these types of contractual arrangement which include the newer variant, “design-build-operate”, where the contractor not only designs the project, but also builds it and then operates it for a set number of years, after which it reverts to the employer. Another variant is where the architect designs the project but leaves certain specialist portions for the contractor to obtain other specialist subcontracts to “design-build” their portions of the project, e.g. air conditioning. It is always good practice to specify exactly who is responsible for what portions of the design to avoid liability ultimately resting in the wrong individual.

¹ See e.g. “Design Liability”, A talk given by Alexander Hickey, The Arbrix Conference, 6 October 2007, Leicester.

² See e.g. Michael Curtis QC, “Liability for Design”, *Emden's Construction Law*, 2009.

This may not always be straightforward. In the Australian case of *Cable (1956) Ltd v Hutcherson Bros Pty Ltd*,³ the employer wanted a bulk mineral storage and handling plant built, including two storage bins, each of 8,000 tons capacity. The employer engaged a consulting engineer who prepared a specification and drawings, but none of the drawings related to the foundations of the storage bins. The specification provided that “tenderers, irrespective of any information contained in this specification or associate drawings, shall take all responsibility for supply and erection ... of the project”. The contractor submitted a tender “for the design, supply and erection” of the above project in accordance with the drawings and specification prepared by the consulting engineer. The tender was accompanied by drawings, one of which showed a foundation design for the storage bins. These were modified in agreement with the consulting engineer, who ultimately approved drawings showing ring beam foundations.

The contract required the contractor to execute the works shown on the drawings and described in the specifications and obliged them to do so in a workmanlike manner. A further provision stated that the articles should, in case of conflict, override the specification. Unfortunately, it was later found that the foundations were inadequately designed and should have been formed by the use of pilings. The court held that the contractor undertook to do the work in the agreed drawings and not to produce a result and that the builder’s obligation was limited to carrying out the specified work in a workmanlike manner and did not extend to rendering him responsible for the deficient design.

In *Royal Brompton Hospital NHS Trust v Hammond (No 4)*,⁴ the issue was whether one of the consulting engineers and subcontractors of Hammond was obliged to provide coordination drawings showing the interrelation of pipe, electrical or other work at the site, so that the main contract could be complied with. It was argued that their obligation was to provide the drawings prior to tender, and when they did not do so their only duty then was to provide them with “reasonable diligence”, rather than being obliged to “exercise reasonable care and skill” in supplying the drawings.

The court held that they were obliged to provide the drawings using “reasonable skill, care and diligence” in time to allow Hammond to prepare installation drawings in order to complete the main contract.

As can be seen, who is the “designer” and who is “responsible” are the two preliminary issues for determination. Thus, one is left with having to decide whose duty it was to guarantee the result and/or to use reasonable care and skill in getting there.

In some situations the designers are under a duty to make sure that the design is reasonably fit for the intended purpose. This is another way of saying that they guarantee that the result will work. In other situations the designer is to use reasonable care and skill in doing the design and, so long as the designer does this, there will be no liability if the underlying concept/design is flawed.⁵

These concepts exist in both contract and in tort, i.e. negligence, or they can be in strict liability.⁶ “Fitness for purpose” is a strict liability concept and any negligence

3 (1969) 123 CLR 143, 43 ALJR 321.

4 [2000] BLR 75, 69 ConLR 170.

5 See e.g. “Design Liability”, a talk given by Alexander Hickey, The Arbrix Conference, *supra*.

6 In tort law, strict liability is the imposition of liability on a party without any finding of negligence or any tortious intent. The person who has suffered damage needs to prove only that the tort happened and that the defendant was responsible.

on the part of the designer need not be proved. This, of course, raises the interesting situation where the designer is also the builder as the concept of strict liability can tend to remove the distinction between proper design and quality workmanship. Generally, the design issues are contractual, i.e. does the work done by the designer comply with the contract and its requirement?

However, no matter whether the design issue is one of strict liability, negligence or contract and no matter which designer is involved, it is useful to review the general duties owed by design professionals starting with the traditional designers – the architect and engineer.

The design professional: architect/engineer's duty – tort versus contract

Design professionals may be liable to their clients and third parties for damage and loss caused by breach of contract and/or negligence. Also, to the extent that any individual, such as a contractor, acts in a “design capacity”, it too will be held liable under the same rules as set out herein. The first area to review is whether or not any claimed damages resulting from alleged negligence are recoverable in contract. Unfortunately, there are occasions where resort to a claim of breach of contract is unavailable to a damaged party, e.g. where there is no direct contractual relationship between the parties, or if the guilty party has become insolvent, the limitation period has lapsed, etc. Under these circumstances, a claim for negligence should be additionally reviewed. As is discussed in more detail in Chapter 12, to establish a claim for negligence it is necessary to show that the defendant owed the claimant a duty of care, that the conduct of the defendant fell below the standard of care thus resulting in a breach of the duty owed, and that there was a causal connection between the defendant's conduct and the damage suffered by the claimant.

But what exactly is the duty of care that is needed? While this topic is covered in more detail in Chapter 12 it is important to point out here that in the case of actual physical injury all that is needed is the reasonable foreseeability of harm occurring from one's actions. In a construction setting claims can arise for both physical and economic losses and this is where the courts have attempted, over the years, to reach a balance. In *Anns v Merton LBC*,⁷ the House of Lords provided a two-stage test setting forth when a duty of care, including a duty not to cause economic loss, is owed in tort. Lord Wilberforce expressed the test as follows:

“... in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.”

This was the “rule” for almost 12 years, but in 1990 the House of Lords changed its view in two cases: *Murphy v Brentwood District Council*⁸ and *Department of the*

⁷ [1978] AC 728.

⁸ [1990] 2 All ER 908.

Environment v Thomas Bates and Sons Ltd and others.⁹ Both cases concerned claims for economic losses arising from negligence, and the House of Lords denied them both. It is interesting to note what Lord Oliver in *Murphy* wrote:

“I have found it impossible to reconcile the liability of the builder propounded in *Anns* with any previously accepted principles of the tort of negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship.”

He then went on to explain that economic loss would not be recoverable in negligence where the loss was too remote or where it would be impossible to acceptably contain liability:¹⁰

“The critical question ... is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained ... The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such – or, to use the favoured expression, whether it is of sufficient “proximity” – that it imposes upon the latter a duty to take care to avoid or prevent that loss which has in fact been sustained.”

As will be discussed later, economic losses were not recoverable in tort¹¹ unless the claim arose out of “negligent misstatement” as per the ruling in *Hedley Byrne v Heller & Partners*.¹²

Fitness for purpose liability

In general, a professional designer’s contractual obligation to the client extends only to agreeing to conduct the designated services with reasonable skill and care. In certain circumstances the standard of care to be expected from specialist engineers may be more onerous than general practice engineers. Thus, in *Gloucestershire Health Authority v Torpy*,¹³ the Health Authority commissioned a waste management study and accepted the recommendation that a new incinerator be built at its hospital. Unfortunately, the plant installed never met the performance criteria and was eventually shut down as it was uneconomic. The court found against Torpy in both contract and tort and held that it was obliged to exercise that degree of skill and care ordinarily exercised by reasonably competent general mechanical and electrical building service consulting engineers, having not held themselves out as possessing any higher skill. The court further found that Torpy had failed to discharge its obligation, as it was reasonably foreseeable that the incinerator would never achieve the level of throughput required, and that it had put the project in the hands of someone who was not competent to handle it and who had not provided any appropriate level of supervision or support.

9 [1991] 1 AC 499, [1990] 3 WLR 457, [1990] 2 All ER 943.

10 This is often referred to as the “floodgates” argument.

11 It should be noted that despite these rulings the ability of a future occupier of a building to recover damages against a professional where the professional’s negligence caused personal injury or damage to other property was not affected, see e.g. *Baxall Securities Ltd v Sheard Walshaw Partnership* [2002] BLR 100 (CA).

12 [1964] AC 465 (HL).

13 (1997) 55 ConLR 124.

In trying to further increase the designer's liability beyond reasonable skill and care the implication of a term of "fitness for purpose" in a designer's retainer is highly unusual if all that the designer is supplying is professional advice or designs. In *Greaves & Co v Baynham Meikle & Partners*,¹⁴ the Court of Appeal held that the fitness for purpose test may apply but is dependent upon the facts of the case. In that case Greaves entered into a design and build contract with a client to build a warehouse. They subcontracted the design for the warehouse to Baynham Meikle, a firm of structural engineers who were made fully aware of the purpose of the warehouse, which included the storage on the first floor of oil drums, to be moved and stacked by forklift trucks. Baynham Meikle's design of the warehouse, however, did not take into account the vibrations caused by the forklift trucks with the result being that the vibrations caused the failure of the concrete floor. Greaves were found to be liable to their client for this failure and in turn sued Baynham Meikle for the cost of replacement of the floor.

The court held that Baynham Meikle were negligent and therefore liable, but went on to state that even without negligence on the part of the consultants, they would have been liable, as a fitness for purpose obligation could be implied into their contract with Greaves. The requirement of the client, which was accepted by Baynham Meikle, was for the design of a warehouse for a particular purpose and it was thus implied that the design would be fit for the intended purpose – a warehouse within which forklift trucks would operate. The court stressed, however, that the question of whether a consultant's design is subject to the fitness for purpose test will always depend upon the facts of the case.

It should be noted here that an express term in a consultant's contract would override the position, which may otherwise be implied by law. An express "reasonable skill and care" clause should, therefore, be a pre-requisite for any consultant. If the parties expressly agree to a clause where the consultant warrants that the design will be fit for its purpose, this will be binding. However, such a clause is likely to be of little use to a client. Professional indemnity insurance policies for consultants undertaking design protect the consultant only against a failure to exercise reasonable skill and care. Any fitness for purpose obligation upon the consultants will not traditionally be covered by the policy.

It is often assumed that design work undertaken by a consultant will be subject only to the test of reasonable skill and care. This is usually correct and the leading case authority is *George Hawkins v Chrysler (UK) Ltd and Burne Associates*.¹⁵ In that case it was held that, in the absence of special circumstances, it was not open to the court to extend the normal obligations of a professional beyond the obligation to take reasonable care. Here, the Court of Appeal rejected the attempt to make the engineer liable on a "fitness for purpose" basis and made it clear that the significance of the decision in *Greaves*¹⁶ should be confined to its special facts.¹⁷

The rule is that a design professional is under no higher obligation than a duty to take reasonable skill and care in the provision of its services and an attempt to impose

¹⁴ [1975] 1 WLR 1095.

¹⁵ (1986) 38 BLR 36.

¹⁶ *Supra*.

¹⁷ In this case this included a belated attempt by the defendant at trial to resile from a prior admission of the fitness for purpose term contended for by the claimant.

any warranty for fitness for purpose, as an implied term of the contract, requires special factual circumstances.¹⁸

Reasonable skill and care

What is “reasonable skill and care” is often referred to as the “*Bolam* test” after the name of the case, *Bolam v Friern Hospital Management Committee*¹⁹ where the court stated:

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is ... the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skills of an ordinary competent man exercising that particular art.”

Bingham LJ stated this in a slightly different way in *Eckersley vs. Binnie & Partners*:²⁰

“a professional man ... must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members would bring but need bring no more. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.”

From this we find that the liability of professional designers arises only if the defective design was due to negligence. Remember that this does not cover the concept of strict liability where professional designers may have strict design liability even if they were not negligent.

When an employer specifically engages an architect desiring greater skills than the norm²¹ it must do so by means of an express term in this regard. Further, the standard to apply is the professional standard at the time the design was carried out²² or, where there is a continuing obligation to review the design, the professional standard at the time of the review.²³ In making the determination of whether the design professional has met the appropriate standard the test to be applied is:

“... he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body ... skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take the contrary view.”²⁴

It should be noted, however, that this test is not the only method of deciding whether a professional has been negligent. There are instances in which a court is entitled to judge for itself what the appropriate standard of care is rather than defer to the standard of care set by a responsible body of opinion within the profession (or the

18 Needless to say this would be different if the designer had agreed a “design-build project” or had assumed such responsibility or has even agreed to assume the higher standard of care/warranty.

19 [1957] 1 WLR 582 at 586.

20 (1988) 18 ConLR 1.

21 See *Winpey Construction UK Ltd v Poole* [1984] 2 Lloyd’s Rep 499.

22 *Ibid.*

23 See *Dyson J in New Islington & Hackney HA v Pollard Thomas & Edwards* [2001] BLR 74.

24 See *Bolam v Friern Barnet Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582 at 586.

lowest of any such standards).²⁵ In *JD Williams & Co Ltd v Michael Hyde & Associates Ltd*,²⁶ the Court of Appeal stated that the test is subject to three qualifications:

“First, where the professional practice relied on by the architect cannot withstand logical scrutiny;

Second, where the judge is entitled to conclude that the evidence called by the architect does not establish the existence of a practice accepted as proper by a responsible body of architects; and

Third, where the task entrusted to the architect did not call for the exercise by him of any particular architectural expertise.”

A design professional, like any other professional, owes a duty to exercise reasonable care and skill in the performance of its work. In practice, for example, the architect’s contract often contains express terms regarding this duty, e.g. the RIBA Architect’s Appointment, Condition 3.1 or the ACE Conditions of Engagement 1995, Condition 2.4.

An interesting recent case dealing with a design professional giving advice is *Kellie v Wheatley & Lloyd Architects Ltd*,²⁷ where the court considered whether an architect was negligent in relation to advice given about potential designs and his supervision of the Works. The defendant architect advised the claimants not to build an aspect of their preferred design due to planning permission requirements. The claimants asserted the architect had been negligent as the development rights attached to the property meant that it could have permitted the building resulting in loss due to decrease in value to their house and it would have cost less to build in accordance with their preferred design. The court rejected the claimants’ allegations finding that they did not purport to make any stipulation or give a firm instruction in relation to their preferred design and the architect was entitled and required to exercise his professional judgment in respect of design and that his approach was consistent with that of the planning officer with whom he had preliminary discussions. The court found that the architect was entitled to express his opinion as he was providing practical rather than theoretical advice and, therefore, was not negligent.

It would thus appear that, in some situations, designers may be under a duty to ensure that their design is fit for the intended purpose, whereas, in others, designers are obliged simply to use reasonable care and skill in carrying out the design. In the recent case of *MT Højgaard A/S (MTH) v E.ON Climate & Renewables UK Robin Rigg East Limited*,²⁸ MTH was contracted to design, fabricate and install foundation structures for two offshore windfarms in the Solway Firth. Clause 8.1 of the contract provided that MTH should carry out the works so that it shall be “fit for its purpose as determined in accordance with the Specification using Good Industry Practice”; and that the designs shall be “wholly in accordance with this Agreement and any performance specifications or requirements of the Employer as set out in this Agreement”.

Those Employer’s Requirements further referred to certain technical requirements, including J101 – an international standard for the design of offshore wind turbines, published by Det Norske Veritas, an independent classification agency based in Norway, aimed at providing “an internationally acceptable level of safety by defining minimum

²⁵ *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2001] BLR 99.

²⁶ *Ibid.*

²⁷ [2014] EWHC 2212 (TCC).

²⁸ [2017] UKSC 59.

requirements for structures and structural components” – and to a requirement that the design of the foundation structures should “ensure a lifetime of 20 years in every aspect without planned replacement”.

MTH duly proceeded with the design and construction of the foundation structures, which were installed in the Solway Firth between 2007 and 2009. However, serious problems developed and they were found to be defective. Further, an equation included in the J101 standard turned out to be incorrect by a factor of about ten, meaning that the capacity of the grouted connections in the foundation structures had been substantially overestimated.

In order to ascertain who should bear the cost of the remedial works, estimated at around €20 million, the parties embarked upon court proceedings. In summary, MTH contended that it had exercised reasonable skill and care, and complied with all its contractual obligations, and so should have no liability. E.ON, however, argued that MTH had been negligent and was responsible for numerous breaches of contract, claiming declarations to the effect that MTH was indeed liable for the cost of the remedial works.

At first instance, Mr Justice Edwards-Stuart rejected the suggestion that MTH had been negligent, and dismissed a number of E.ON’s allegations of breach of contract. However, he found for E.ON, chiefly on the grounds that: (i) clause 8.1 of the contract required the foundations to be fit for purpose; (ii) fitness for purpose was to be determined by reference to the technical requirements; and (iii) those requirements demanded that the foundation structures be designed so that they would have a lifetime of 20 years.

The Court of Appeal, though, allowed MTH’s appeal. It accepted that, if one was confined to the technical requirements, there appeared to be a warranty on MTH’s part that the foundations would function for 20 years. However, the Court concluded that this was “too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations”, and that the other contractual provisions, some of which were inconsistent with this 20-year obligation, should prevail.

The Supreme Court – after consideration of other cases in which the courts have been called on to consider contracts which include two terms; one requiring the contractor to provide an article produced in accordance with a specified design, the other requiring the article to satisfy specified performance criteria (which could not be achieved by complying with the design) – unanimously allowed E.ON’s appeal, and restored the order made at first instance by Mr Justice Edwards-Stuart.

The Supreme Court found that MTH was indeed bound by the warranty, even though its design was carried out with reasonable skill and care. In the circumstances, MTH as the contractor was expected to take that risk. Moreover, the technical requirements provided only a minimum standard to be taken into account in the design, and stated that it was MTH’s responsibility to identify any areas in which the work needed to be designed to any additional or more rigorous requirements. It was that more rigorous or demanding standard, the Court held, which must prevail.

Further, the Supreme Court rejected the contention that the relevant provision of the technical requirements was too weak a basis on which to rest a contention that MTH gave a warranty of 20 years life for the foundations. The Court was not persuaded that that was an “improbable or unbusinesslike” interpretation, or that the fact that the obligation was found only in a paragraph of the technical requirements, rather than spelled out in the contract itself, and was somewhat “tucked away” in those requirements, was of any relevance.

“The contract in this case was a strange beast,” as Lord Justice Jackson put it, in the Court of Appeal, the contractual documentation was “of multiple authorship” and “containing much loose wording”. One has to be careful, then, in looking to the Supreme Court’s judgment for more general guidance. That said, however, the lesson for contractors appears to be relatively clear: sometimes, mere compliance with standards and design specifications, and the exercising of reasonable skill and care, will be insufficient.

These and similar issues of designer liability are dealt with in the sections that follow.

Concurrent negligence and contract duty

As discussed previously, professional designers owe a dual duty to their clients – one in contract and one in tort. In this regard *Henderson v Merrett Syndicates Ltd*²⁹ was the landmark House of Lords case establishing the possibility of concurrent liability in both tort and contract.³⁰ But this concurrent duty in tort is only a general rule as the duty itself does not arise out of the contractual relationship between the parties, but rather arises from what the design professional actually does in relationship to its client and whether it assumes (or should assume) responsibility for what occurs. Thus, design professionals (and this can be not just the architect/engineer but anyone who acts in that capacity such as a contractor designer in a design-build situation) ordinarily owe both their clients, and third parties, a duty of care in tort to take reasonable care to avoid causing the client/third party personal injury or damage to property other than the property that is the subject matter of their contract.

A distinction must be drawn between the duty of care owed in respect of defects in the quality of the property that is itself the subject of the work and/or services provided by an ordinary design professional and/or contractor on the one hand and a construction professional on the other. As per *Henderson vs. Merrett*, design professionals ordinarily owe their clients a concurrent duty of care in tort in respect of the quality of their work to the property which is the subject matter of their contract.

As previously mentioned, in relation to economic loss, in *Murphy v Brentwood*,³¹ the defendant local authority failed to inspect the foundations of a building adequately, with the result that that building became dangerously unstable. The claimant, being unable to raise the money for repairs, had to sell that house at a considerable loss, which he sought to recover from the local authority. His action failed, thus bringing to an end the explosion in liability for pure economic loss experienced over the preceding 20 years. As a result, contractors have not usually been considered to owe a duty in tort in respect of the quality of their work. A comparison should be drawn, however, to the case of *Barclays Bank v Fairclough Building Ltd (No. 2)*,³² where a specialist subcontractor, hired to clean asbestos cement off a roof, was found to owe a duty of care to the main contractor not to cause it economic loss by way of remedial works needed as a result of an asbestos slurry seeping into the building being worked upon. This was because, absent damage to another building or to a person, the loss caused

²⁹ [1995] 2 AC 145.

³⁰ It should be noted, however, that in certain circumstances the nature and extent of the tortious duty may be restrained by the terms of the contract see e.g. *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, PC.

³¹ [1991] 1 AC 398.

³² [1995] 76 BLR 1.

as a result of defective building work is purely economic and the previous test for the existence of a duty of care in respect of such losses was no longer considered a sufficient basis for the existence of such a duty. As a result of *Murphy*, it was generally thought that the scope for the imposition of a duty of care in respect of pure economic loss was severely restricted.³³

This seemingly contradictory situation was discussed in *Samuel Payne v John Setchell Ltd*,³⁴ where the court concluded that both a contractor and an engineer should ordinarily owe a tortious duty only to take reasonable care against causing their contractual client personal injury or damage to property other than to the building or construction work that is itself the subject of their work and/or services. This upheld the view taken in *Murphy* that no general duty of care is owed in tort in respect of defective construction work as it represents pure economic loss, not physical damage to property. The court went on to resolve this in *Henderson v Merrett*, where it recognised a rather limited concurrent duty of care in tort finding that, in certain circumstances, the professional as well as the contractor may assume responsibility, in a *Hedley Byrne* sense, for specific statements or advice provided to the client.

In *Payne v John Setchell Limited*,³⁵ the claimants were subsequent owners of properties that suffered damage as a result of defective foundation design, which had been prepared by the defendant structural engineer. The claimants took the view that the engineer owed them a duty of care since the original owners had the benefit of a claim in tort against the engineer for breach of his concurrent duty of care in tort in designing the foundations and in certifying their suitability. As subsequent purchasers, the claimants argued that they acquired an identical cause of action when they purchased the properties under section 3 of the Latent Damage Act 1986. Here, the claimants needed to show that the structural engineer owed them a duty of care in tort and that this extended to economic loss. The court chose not to follow *Storey v Charles Church Developments Limited*³⁶ and HHJ Humphrey LLOYD QC stated:

“In my judgment *Murphy* and *DOE v Bates* establish that, as a matter of policy, any person undertaking work or services in the course of a construction process is ordinarily liable only for physical injury or for property damage other than to the building itself but is not liable for other losses, ie economic loss. If any liability for such economic loss is to arise it must be for other reasons, e.g., as a result of advice or statements made upon which reliance is placed in circumstances which create a relationship where there is in law to be an assumption of the responsibility for loss, ie within the principle of *Hedley Byrne v Heller*... In my judgment a designer is not liable in negligence to the client or to a subsequent purchaser for the cost of putting right a flaw in a design that the designer has produced that has not caused physical injury or damage, just as a contractor is not liable.”

There has been much discussion as to whether or not *Payne v John Setchell Limited*³⁷ was correct law as it had proceeded based upon an incorrect construction of an earlier case, i.e. *Murphy v Brentwood District Council*;³⁸ this, however, was corrected in *Tesco Stores Limited v Costain Construction Limited*.³⁹ In that case Costain was the design-build contractor for a Tesco superstore. The design of the fire-stopping/inhibitors

33 See e.g. *Duties of Care in the Construction Field* – Vincent Moran, 21 March 2007.

34 [2002] BLR 489.

35 *Supra*.

36 (1995) 73 ConLR 1.

37 *Supra*.

38 [1990] 2 All ER 908.

39 [2003] EWHC 1487 (TCC).

was subcontracted out. When a fire broke out the lack of fire-stops caused more extensive damage than would have occurred had they been present. Tesco maintained that Costain was responsible to Tesco for the design and, thus, owed a duty of care comparable to its contractual obligations. The judge stated:

“I differ from the analysis of Judge Lloyd with great hesitation, but I have to say that it does not seem to me that *Murphy v Brentwood District Council* and the other authorities to which he referred do establish the proposition that a builder never owes a duty of care which extends to not causing economic loss, only that he does not do so in the absence of ‘a special relationship’... If the position now is, as I consider that it is, that anyone who undertakes by contract to perform a service for another upon terms, express or implied, that the service will be performed with reasonable skill and care, owes a duty of care to like effect to the other contracting party or parties which extends to not causing economic loss, there seems to be no logical justification for making an exception in the case of a builder or the designer of a building. My reading of the authorities does not require or permit the making of such exception ...”

However, following this in *Mirant Asia-Pacific v Ove Arup*,⁴⁰ the court declined to follow the reasoning in *Payne v Setchell* and instead found that the *Henderson* principles applied in the case of an engineer’s concurrent duty of care to his client in respect of economic losses referable to design errors.⁴¹

A recent restatement of the law regarding claims in tort for pure economic loss can be found in *Robinson v PE Jones (Contractors) Ltd*,⁴² where the court held that although a builder can, in principle, owe concurrent duties in tort and contract, in the case before it, however, the tortious duty had been excluded by the terms of the contract. It would appear that this case clarifies the court’s position as to the circumstances in which a builder might be liable in tort for pure economic loss suffered by the owner of a property in instances where there is a defect in the property. The majority finding that the law of tort imposes a limited duty of care on builders [at 68] states:

“Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first person to acquire the chattel or the building, but also towards others who foreseeably own or use it.”

In this case a builder (PE Jones) agreed to build off-plan and sell a house to Robinson in 1991. Completion and transfer took place in 1992. In 2004, it was revealed that the flues to the fireplaces had not been constructed in accordance with the building regulations in place at the time the property was built and, thus, one fireplace had to be disconnected. Robinson commenced proceedings against the builder in both contract and tort for the cost of remedial works. The claim in contract was found to be time-barred and only the claim in tort could proceed. In the first instance the TCC held “in principle a builder can owe a duty of care in tort to his client, concurrent with his duty in contract, in relation to economic loss”, but, in the instant case, no duty of care

40 [2005] PNLR 10.

41 It should also be noted that the approach taken in *Payne* was not followed by the court in *Tesco v Costain and others* [2003] CILL 2062. Reference should also be made to *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 96 where Schiemann LJ observed that in his view the builder in that case did owe a duty of care to the original owner of a property in respect of damage caused to the building itself.

42 [2011] EWCA Civ 9, [2012] QB 44 (CA (Civ Div)).

was owed because the conditions of contract successfully excluded liability in tort. On appeal, the court reviewed authorities (in particular *Murphy v Brentwood*, *Henderson v Merrett Syndicates* and *Hedley Byrne*) and concluded that the relationship between the builder/manufacture and the immediate client was primarily governed by the contract between the parties and, subject to the Unfair Contract Terms Act 1977, the parties were free to allocate risk under that contract as they saw fit. Further, provided there was no assumption of responsibility, tort imposes the different and more limited duty on the manufacturer or builder to take reasonable care to protect the client against suffering personal injury or damage to other property. This duty extends from the first owner to others who may foreseeably own or use it. In this case, the court found that there was no assumption of responsibility and the defendant's warranties and the claimant's remedies were contained within the contract. The contractual limitation of liability put the question of liability in tort beyond doubt as the parties had contracted to limit liability to the defendant to two years. The court found that to impose a duty of care in tort in excess of that which had been expressly agreed between the parties would be inconsistent with the contract.

"This crucial distinction also limits and defines the scope of the Hedley Byrne duty of care for economic loss and that claims for the cost of repairing defects in the quality or state of the very thing supplied, or the diminished value of the thing supplied, cannot be brought within the principle of reliance established by the Hedley Byrne case because there has to be damage to something other than the thing supplied before there can be said to be 'reliance' on that thing.

Lord Justice Jackson explained the difference between the responsibilities assumed by builders and professionals on the basis of their different relationships with their client and considered it understandable that professional persons are taken to assume responsibility for economic loss to their clients in the Hedley Byrne sense because they expect their clients and possibly others to act in reliance upon their work product (their advice, reports, accounts, plans and so forth) often with financial or economic consequences. Lord Justice Jackson said that builders, on the other hand, do not normally assume responsibility to their clients in the Hedley Byrne sense, although quite why this was the case is not made clear in the judgment."

Lord Justice Stanley Burnton went further and suggested that architects, who would normally be taken to have assumed responsibility to their clients in the *Hedley Byrne* sense, are also not liable to their clients in respect of defects in their work giving rise to purely economic loss:

"93. Thus the crucial distinction is between a person who supplies something which is defective and a person who supplies something (whether a building, goods or a service) which, because of its defects, causes loss or damage to something else. An architect owes a duty of care not in respect of the value of his drawings or specification, but in respect of the building that is to be constructed with them. The person who contracts with an architect cannot sue him in the tort of negligence simply because the plans turn out to be defective and therefore of no value or less value than they should be. The architect will be liable to his client in contract if his plans are worthless. The client can sue in tort (at common law, and apart from the duty imposed by the Defective Premises Act 1972) if he uses the plans and the building constructed with them is defective or causes him injury. The managing agents in *Henderson v Merrett Syndicates Ltd* owed a duty of care to their Names because they were managing the Names' assets.

94. It is important to note that a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The duty of care in contract extends to any defect in the building, goods or service supplied under the contract, as well as to loss or damage caused by such a defect to another building

or goods. The duty of care in tort, although said to arise from an assumption of liability, is imposed by the law. In cases of purely financial loss, assumption of liability is used both as a means of imposing liability in tort and as a restriction on the persons to whom the duty is owed. The duty of care in tort applies to damage to other property than that supplied, or to personal injury or death, caused by a defect in the property supplied. The provider of a service, such as an accountant or solicitor, owes a duty of care in tort to his client because his negligence may cause loss of the client's assets. I do not think that a client has a cause of action in tort against his negligent accountant or solicitor simply because the accountant's or solicitor's advice is incorrect (and therefore worth less than the fee paid by the client). The client does have a cause of action in tort if the advice is relied upon by the client with the result that his assets are diminished.

95. It follows in my judgment that the first instance decisions to which Jackson LJ refers in paragraph 52 of his judgment in which building contractors were held to have assumed a duty of care in tort in relation to financial loss resulting from defects in the building they constructed, in the absence of damage to other property, were wrongly decided."

It would appear that Lord Justice Stanley Burnton seems to have ruled out the possibility of a builder or professional being liable under a *Hedley Byrne* duty of care for economic loss arising from defects in the property or advice supplied and seems to say that a *Hedley Byrne* duty of care in tort applies only to damage to property other than that supplied.

A more recent case dealing with the dual duty owed by professional designers is *Wellesley Partnership LLP v Withers*,⁴³ where Wellesley brought proceedings against Withers, its legal advisers, for economic loss arising out of negligent advice in drafting a partnership agreement. Wellesley Partners ("WP"), a headhunting firm in the investment banking sector, instructed Withers, its solicitors, to draft a new partnership agreement to admit new investors, including a Bahraini bank known as Addax Bank BSC ("Addax"). WP agreed that Addax should have the option to withdraw half of its capital after 42 months. However, the agreement as drafted by Withers and as executed gave Addax that option at any time within the first 41 months. Addax duly exercised the withdrawal option, and the drafting error emerged. WP brought proceedings against Withers, seeking damages for profits it would have made by opening an office in the US (arguing that it would have relied on the investment to achieve as much).

At first instance, Mr Justice Nugee held that Withers was indeed negligent in drafting the agreement, and awarded damages for the US loss of profits claim. Before the Court of Appeal, Withers argued that the judge had incorrectly adopted the less restrictive tortious test for remoteness of damages and ought to have applied the more onerous contractual test. WP contended, *inter alia*, that Mr Justice Nugee had erroneously characterised its claim as one for loss of a chance.

The Court of Appeal, reviewing the authorities, observed that the "reasonable contemplation" test for remoteness, applicable in the law of contract, was indeed more restrictive than the "reasonable foreseeability" test in tort. Where contractual and tortious duties to take care in carrying out instructions existed alongside each other, as was the case here, the remoteness test should be the same, the Court concluded; namely, the contractual test.

The Court of Appeal reasoned that the basis for the contractual test for remoteness of damages was that the parties, by entering into a contractual relationship, had the opportunity to alert each other to certain circumstances; accordingly, they were

43 [2015] EWCA Civ 1146.

regarded to be contracting on the understanding that any liability would be limited to damage of a kind that was within their reasonable contemplation. There was no justification, the Court found, for allowing the concurrent duty in tort to upset that understanding; it could not be right, as Lord Justice Longmore put it, that a claimant could opt to recover the contractual measure of damages but then apply the more generous tortious rules of remoteness, by a sort of “pick and mix” arrangement.

That said, Withers’ appeal was not ultimately allowed. The Court of Appeal held that the damages awarded had been of a kind that was within the reasonable contemplation of the parties, at the time of contracting. Withers, after all, had known that WP wanted to expand in the US, and that was a way in which the investment was to be used to make profits. This suggests, then, that the courts will consider similar cases on their individual facts, and not allow meritorious claims, such as WP’s in this instance, to fail on remoteness grounds alone.

Negligence generally

Mere mistakes or errors in the design are not necessarily negligence, but sometimes a mistake or error is negligent or a flawed design is the result of a negligent approach. In order to prove actual negligence there must be expert evidence showing that there is no reasonable body of opinion, within the relevant profession, that would regard the designer’s acts or omissions as acceptable at the time of those acts or omissions. Or, put another way, in the same or similar circumstances, no reasonably competent designer would have acted in the way the particular designer did. An interesting point is that if a designer takes on a project that falls within the skills of a differently qualified professional he will be held to the same standard of the other qualified professional, even though that person is not himself qualified. If, for example, an architect designs a structural concrete slab, the architect can, and will, be held to the standards of a structural engineer, rather than of an architect. Further, if a particular designer claims to have a specific greater skill than ordinary practitioners in their field of endeavour, they will be held to a higher standard than the ordinary competent practitioner.⁴⁴

Indeed, on occasion, the professional will be held to have greater experience than it may in fact have and will be held to that standard. Under GC/Works/5, at Condition 10 it states:

“The Consultant shall perform the Services in accordance with all Statutory requirements and with the reasonable skill, care and diligence of a properly qualified and competent consultant experienced in performing such Services on projects of similar size, scope, time-scale and complexity as the Project.”

There is a problem that arises here in relation to the conflict between the standard that ordinary members of the particular profession regularly achieve compared to what they should be expected to achieve. In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*,⁴⁵ the court stated:

“... the extent of the legal duty in any given situation must, I think, be a question of law for the Court.”

⁴⁴ See e.g. *Wimpey Construction UK Ltd v Poole* (1984) 27 BLR 58.

⁴⁵ [1979] Ch 384.

Henry David Thoreau once wrote that “some circumstantial evidence is very strong, as when you find a trout in the milk”⁴⁶ and often the fact that a particular design fails is, in itself, sufficient evidence of a negligent design. Concrete does crack, but people do not expect it to crack and if it does crack too much it can be a design fault. Thus, a large grey area exists between what is non-negligent design and what is negligent and it falls to the court to decide. Of course there is a natural tendency to blame the professional designer for anything that even remotely looks improper but what if the design concerns something new or “cutting edge”? In *Turner v Garland*,⁴⁷ the court wrote:

“If you employ an architect about a novel thing, about which he has had little experience, if it has not had the test of experience, failure may be consistent with skill. The history of all great improvements shows failure of those who embark in them.”

This situation commonly develops in cases where the designer proposes an idea, which in effect is the “best” and most “unique” solution, but which is costly as compared to other riskier designs. Generally, the employer agrees and approves the design – but it later fails. In normal circumstances, the professional designer will not be relieved from liability merely by obtaining the employer’s approval. However, this would be different if the designer proposed the “best” design which in actuality was the best especially if it is known that other designs carry more risk even if cheaper. The professional designer has a duty to inform the employer and let the employer make the decision – so long as the designer imparts all knowledge of both the risks and the benefits and then leaves the ultimate decision to the employer. If the employer then goes with riskier design its “approval” may discharge the designer from liability.⁴⁸

The liability of the professional designer is not a static thing. This is particularly the case where the designer maintains a relationship with the employer. This can happen in cases where the designer also has a role during the construction process, be it supervisory or otherwise. So, when the architect or engineer also supervises the construction of their own design they are under a continuing duty to keep the design under review. In *Brickfield Properties v Newton*,⁴⁹ the court wrote:

“The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge.”

The question that quickly arose was whether this duty was “reactive”, that is to only review the design if some problem emerged that would put the designer on notice, or whether it was “proactive”. In a “proactive” setting the designer has to actively review the design to see if it complies with any changing criteria. The bigger problem, however, was for how long the duty continued.

The court in *London Borough of Merton v Lowe*⁵⁰ spoke of the subsequent discovery of a defect as reactivating or reviving the duty and imposed on the designer the duty to take necessary steps to correct the defect. Then, in *Tesco v Norman Hitchcox*

46 See Henry David Thoreau Journals (1838–1859): 11 November 1854, where he wrote referring to an 1849 dairymen’s strike, during which there was suspicion of milk being watered down.

47 *Turner v Garland and Christopher* (1853) cited in Hudson’s Building Contracts (4th edn, 1914) Vol 2, p 1.

48 See e.g. the Canadian case: *City of Brantford v Kemp & Wallace-Carruthers Ltd* (1960) 23 DLR 640.

49 [1971] 1 WLR 862.

50 (1981) 18 BLR 130.

Partnership,⁵¹ Judge Lewis QC held that the architects who designed the building and administered the works had a continuing duty until practical completion to see that the design of the building was appropriate and if defects came to their attention they had to remedy them. After this, in *J Sainsbury plc v Broadway Malyan*,⁵² Judge Lloyd QC held that the duty to review the design did not mean that he had to

“... keep previous work under constant review or to report a mistake that has been discovered, except where third parties may be affected ... but it does come into play when an architect has occasion to look again at the design e.g. where there is evidence of a possible deficiency or where, as here, the design itself is to be modified.”

Then the court in *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd*⁵³ rejected a submission that a professional had an implied duty to investigate and report to a client on the causes of defects due to his own deficiencies. The concept that design professionals had to “proactively” hunt down design defects was put forward in *Equitable Debenture Assets Corp Ltd v William Moss Group Ltd*⁵⁴ and Judge Newey QC held that architects had a continuing duty to check the initial design as the work proceeded up to practical completion and if necessary to take steps to correct the design. Then, following this, Judge Peter Bowshe QC in *University of Glasgow v William Whitfield*⁵⁵ suggested that where

“... an architect has had drawn to his attention that damage has resulted from a design which he knew or ought to have known was bad from the start, he has a particular duty to his client to disclose what he had been under a continuing duty to reveal, namely what he knows of the design defects as possible causes of the problem.”

This went beyond the concept of reacting to what occurs. Here, the designer was required to investigate and report on what he knows. Judge Bowshe QC also went on to write that there was no authority for the proposition that the continuing duty extends only until practical completion and he further saw no reason in principle why the duty should be so limited in time despite the fact that the architect’s right to require work to be done alters at that point.

In *New Islington & Hackney Housing Association Ltd v Pollard Thomas Ltd*,⁵⁶ new tenants reported complaints about the noise levels in blocks of flats after practical completion. The client asked the architects for details of their design for soundproofing insulation and whether it complied with the building regulations. The architects provided details as requested but did not review their soundproofing design. It was submitted that the architect was under a duty to review the design until the end of its retainer. Mr Justice Dyson held that the architect’s duty to check his design, and correct errors in the design, ceased on practical completion of the project. He held that the architect had not been notified of any problems with the design, which might have revived his duty or triggered a new one; there was simply a request for information. Mr Justice Dyson also held that:

“But it is necessary to consider the scope of that duty in a little more detail. What does the duty to review the design entail? In what circumstances will an architect be in breach of

51 (1997) 56 ConLR 42.

52 [1999] PNLR 286.

53 (1996) 82 BLR 92.

54 [1984] 2 ConLR 1.

55 (1988) 42 BLR 66.

56 [2001] 1 BLR 74.

that duty? I find it convenient to consider an example. Let us suppose that an architect is engaged on the standard RIBA Conditions of Engagement to provide the full service (as PTE were in the present case), including administering a building contract in a standard JCT form of contract. Suppose that he designs the foundations of a building (a large office block), the foundations are constructed in accordance with his design, and several years later, practical completion is achieved. Let us further suppose that the design of the foundations is defective and one which no reasonably competent architect would have produced: in other words, the architect was negligent. There can be no doubt that the architect commits a breach of contract when he completes the design and gives instructions to the contractor to construct the foundations in accordance with it. But in what sense and to what extent is the architect under a duty to review his negligent design once the foundations have been designed and constructed?

In my view, in the absence of an express term or express instructions, he is not under a duty specifically to review the design of the foundations, unless something occurs to make it necessary, or at least prudent, for a reasonably competent architect to do so. For example, a specific duty might arise if, before completion, the inadequacy of the foundations causes the building to show signs of distress; or if the architect reads an article which shows that the materials that he has specified for the foundations are not fit for their purpose; or if he learns from some other source that the design is dangerous. In such circumstances, I am in no doubt that the architect would be under a duty to review the design, and, if necessary, issue variation instructions to the contractor to remedy the problem. But in the absence of some reason such as this, I do not think that an architect who has designed and supervised the construction of foundations is thereafter under an obligation to review his design.

I do not accept that in every case where an architect has negligently introduced a defective design into a building, he is also by the same token in breach of a continuing breach of a contractual obligation to review his design. In *Midland Bank v Hett, Stubbs & Kemp* [1979] 1 Ch 384 ... Oliver J said:

‘It is not seriously arguable that a solicitor who or whose firm has acted negligently comes under a continuing duty to take care to remind himself of the negligence of which, ex hypothesi, he is unaware.’

In my view, that observation is as apt to apply to an architect as it is to a solicitor. The position is quite different where the architect (or solicitor) knows, or ought to know, of his earlier negligence. When that occurs, then he may well be under a contractual obligation to review his earlier performance, and advise his client honestly and competently of his opinion. Whether he is in fact under such a duty when he has actual or constructive knowledge of his earlier breach of contract will depend on whether the contract is still being performed. If the contract has been discharged (for whatever reason), then the professional person may be under a duty in tort to advise his client of his earlier breach of contract, but it is difficult to see how he can be under any contractual duty to do so.”

This line of cases generally dwells on the need for claimants to show that the designer had a continuing duty to review its design and is an attempt to overcome that the claim is more than six years later than the original implementation of the design. In the *University of Glasgow v Whitfield*,⁵⁷ the court spoke of the possibility that this continuing duty beyond practical completion in principle and in certain circumstances – the *New Islington* case, however, limited any chance of success in that regard. Some argue that it may still be possible to trigger the reactive duty of an architect where there is notification of a defect during the defects liability period.⁵⁸

⁵⁷ (1988) 42 BLR 66.

⁵⁸ See e.g. “Design Liability”, A talk given by Alexander Hickey, The Arbrix Conference, *supra*.

The issue of time-barred claims was raised in *Cheltenham Ladies College v The Oxford Architects Partnership*,⁵⁹ where the architects appealed an arbitrator's award holding that the college's claims in respect of works to the basement tanking and the design of fire doors were not time-barred.

The architects had agreed in article 5 of the RIBA Condition CE/95 to a contractual limitation period of "Six years from completion of the Architect's Services, or, where the Services specific to building projects Stages K-L are provided by the Architect, from the date of practical completion of the Project." The Works to the basement and the design of the fire doors took place earlier than practical completion. However, the arbitrator decided that the claims were not time-barred because the architects were bound to, and did, review their design up to practical completion and that parties had agreed to a contractual limitation period of six years from practical completion. It was argued, based on *New Islington*,⁶⁰ that the designer's duty continued until practical completion so that should be the date for accrual of the cause of action and that the parties had agreed limitation should be extended for six years from that date. On that basis the claims were made in time. In effect, it was said that the contractual limitation period extended the normal six-year rule from date of breach (contract claim) or date of damage (tort claim).

Here, Mr Justice Ramsey allowed the appeal and remitted the case back to the arbitrator in the light of his findings. He concluded that article 5 was merely an additional contractual time limit, which did not have the effect of extending the statutory limitation period. If that were to be done it would need clearly expressed words. Article 5 did not expressly exclude the architect's rights to rely on a statutory limitation defence. Mr Justice Ramsey did not consider that article 5 or *New Islington*⁶¹ could be relied on to define when a cause of action accrues.

Mr Justice Ramsey, however, went on to state that he was quite clear that an architect's duty depends on the terms of his engagement. Thus, if the designer is only engaged to carry out the design, it would be difficult for a continuing duty to arise. But if her engagement includes services during construction, there may be a continuing duty. Also, there is some confusion as to the meaning of continuing duty to review in this context and when the cause of action accrues. If the architect produces a design that is defective, the cause will accrue when the design is produced. Further, this continuing duty does not give rise to a continually accruing cause of action. Thus, a failure to review a design is different from a failure to design as these breaches occur on different dates. Finally, he agreed with the *New Islington*⁶² case as to the approach to be taken to the duty to review a design.

Thus, whether an architect or design professional is under any duty to continuously review its work, and warn the employer of actual or possible deficiencies in the performance of its own services, is subject to an express obligation to the contrary. A design professional will not normally be under any obligation to review its design after practical completion has been achieved unless something occurs that would put a reasonably competent design professional on notice that it ought to review its design. Further, aside from the design professional's duty to perform to a reasonable standard, the contractor has a duty to warn the employer of design defects.

⁵⁹ [2006] EWHC 3156 (TCC).

⁶⁰ *Supra*.

⁶¹ *Supra*.

⁶² *Supra*.

But does the professional designer's potential for design liability really end with the retainer? Often a professional designer will submit that the defective work complained of was not within its remit; in other words, the inspections or reviews or other such activities were not a part of their contract with the employer and that s/he owed no greater duty in tort outside that retainer.

In *Mirant Asia Pacific Construction (Hong Kong) Ltd v Ove-Arup & Partners*,⁶³ which was discussed earlier, Ove-Arup had responsibility for concept to preliminary and, finally, the detailed design of foundations for boiler units that were part of a coal-fired power station in the Philippines. Ove-Arup entered into two separate agreements with Mirant. One was a design agreement and the other a site services agreement. The design agreement had omitted a proposal to have technical site supervision, which included a role for a small team of engineers to confirm that the design intent was being fulfilled. The Court of Appeal held that this only meant to make sure the construction followed the design, rather than checking the design assumptions.

Ove-Arup carried out its initial design of the foundations in 1995 and early 1996. But it could not carry out a detailed ground investigation because the ground on which the foundations were to be laid needed to be blasted and excavated. It also had difficulties in getting the data to calculate the pressure tolerances for the boiler foundations on the ground. So Ove-Arup produced a provisional design based on an assumption that the relevant ground had a bearing capacity of 3MPa⁶⁴ and limited information to enable the initial design works to proceed. Ove-Arup recommended that a detailed ground investigation should be undertaken to verify the ground conditions before detailed design and construction works proceeded and assumed that this would be done when an inspection of foundations was performed on site.

In January 1996, Ove-Arup had expectations that it was going to be involved on site in two separate capacities. Firstly, to supervise the ground investigations, and secondly, in surface mapping and visual inspection to verify important assumptions relating to the geology of the site, including the bearing capacity of 3MPa. This did not happen.

The site services agreement was made in March 1996 and provided that Ove-Arup was to supervise the ground investigation work and fulfil the requirements of a site foundation engineer in matters including approving ground conditions for foundations. Although Ove-Arup did have a team on site during the foundation works, to approve the ground conditions for construction by surface examination, it was held that this did not involve work to verify the design assumptions, which required a more extensive investigation. Accordingly, the design was completed and construction commenced based on the unverified design assumptions.

The court considered whether Ove-Arup exercised due care and skill in the design of the boiler foundations and in the verification of the assumption on which the design was based; and whether it exercised due care and skill in the specification and supervision of the ground investigation. The court held that Ove-Arup failed to take any adequate steps to satisfy itself that the design assumption was properly verified or confirmed. Ove-Arup contended that it was good engineering practice to proceed with foundations on the basis of assumed allowable bearing pressures and to verify the assumption by the inspection of the foundations on site. The court held that Ove-Arup had breached its design agreement by failing to produce its design with

⁶³ [2005] EWCA 1585, [2006] 1 BLR 187.

⁶⁴ Megapascals.

reasonable care and skill and by failing to verify the preliminary design assumption upon which its design was based. Here, the judge found that Ove-Arup had not breached the site services agreement, which did not include an obligation to verify the design assumptions.

Ove-Arup appealed. One of the grounds of appeal was that the judge was wrong to hold that Ove-Arup had a duty under the design agreement to verify the 3MPa design assumption and that it was in breach of that duty. Mirant cross-appealed against the finding that Ove-Arup was not in breach of the ground investigation agreement (in case the appeal succeeded). The Court of Appeal dismissed Ove-Arup's appeal and held, among other things, that Ove-Arup was under an obligation to ensure work to verify the design assumption was undertaken. If the engineer's design is based on assumptions then it has an obligation:

"... to see to it that the requisite additional information is acquired to verify the assumptions. He does not necessarily have to get the additional information personally but he must see to it personally that someone does, and he must see to it that the client knows that the additional information has to be obtained."

The court further felt that, absent an explicit warning and disclaimer, it would not be sufficient for a designer, whose initial design was based on an unverified assumption, to leave it to the client to obtain and evaluate the additional information and that Ove-Arup's case supposed that verification of the foundation design assumption required only surface examination of the foundation such as a site supervisor would habitually do. Here, the court felt that while there might be many contracts for which this might be sufficient, it was not in the case of this contract and the evidence made it clear that more extensive investigation was needed.

The court went on to add that a foundation designer had to ensure, in appropriate circumstances, that his assumptions were verified to the extent that a reasonably competent design would require and that the judge had ample evidence to determine, as he did, what the required extent was in this case.

Thus, this case (*Mirant Asia*) represents a more stringent view as to the professional designer's pro-active duty to review a design than earlier cases. While the result may be right on the facts, the result in this case seems to suggest that designers may have implied into their contracts a duty to make sure that the design assumptions are still valid.

The need to continuously review the design was also brought up in *Dept National Heritage v Steensen Varming Mulcahy*,⁶⁵ where an experimental design or an unusual approach was said by the judge to impose on the designer a particularly high duty to keep his design under review.

There is another line of cases that extend the issue of designer liability past the boundaries of the contractual agreement between the designer and employer. For example, in *Hart Investments Ltd v Fidler*,⁶⁶ a structural engineer, Fidler, was appointed by Hart to design the permanent works to a house. The Works involved retaining the façade walls and excavating a deep basement. Fidler retained a role of inspecting the permanent works. The contractor needed to install propping as part of the temporary works needed to carry out the permanent works. Normally, the contractor is responsible for the design of any temporary works and such works do not form part of the designer's duty. Perhaps unusually, Fidler had actually designed

⁶⁵ (1998) 60 ConLR 33.

⁶⁶ [2007] EWHC 1058 (TCC).

the temporary works for the contractor under a separate retainer and this may have been ultimately significant in that case. However, the contractor failed to use props and, consequently, the façade walls fell down. It was found as a fact that the lack of props was something that Fidler should have noticed during a site inspection shortly before the collapse, when he should have appreciated the danger. Hart sued Fidler, both in contract and tort, with the issues being whether an engineer who is employed in relation to the permanent works had a duty to the employer to point out defects in the temporary works to the contractor and if the engineer failed to do so would he be liable in damages to the employer for the consequences. Fidler argued that it was not part of his contract and he owed no duty of care to the employer for economic loss for damage caused to the building.

The court considered that if an engineer employed by an owner in respect of permanent works observes a state of temporary works that is dangerous and causing immediate peril to the permanent works in respect of which he is employed, he is obliged to take such steps as are open to him to obviate that danger. The court found the case analogous to the solicitor's negligence case of *Credit Lyonnaise v Russell Jones and Walker*,⁶⁷ where the court rejected an argument that the solicitor's retainer was narrow and did not extend to advising on the meaning of the agreement or the law – if there was a plain and obvious danger it was the solicitor's duty to point it out, even if he was not strictly employed in relation to that danger. The court quoted the following passage:

“A solicitor is not a general insurer against his client's legal problems. His duties are defined by the terms of the agreed retainer. This is the normal case, although *White v Jones* [1995] 2 AC 207 suggests that obligations may occasionally arise outside the terms of the retainer or where there is no retainer at all. Ignoring such exceptions, the solicitor only has to expend time and effort in what he has been engaged to do and for which the client agreed to pay. He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing “extra” work for which he is not to be paid. He is simply reporting back to the client on issues of concern, which he learns of as a result of, and in the course of, carrying out his express instructions.... If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him.”

Here, the court found that Mr Fidler was in breach of a contractual duty to the claimant to point out an obvious danger to the permanent works that he himself observed when on site. Given the existence of that contractual duty the judge also concluded that there was a concurrent duty of care in tort sufficient to extend to the prevention of economic loss of the sort contemplated by the House of Lords in *Henderson v Merrett*.

Then, the court went even further and found that even if there was no contractual relationship, there was a duty of care in tort not to cause economic loss by reason of the special relationship between the parties:

“I would, if necessary, be prepared to find the existence of such a duty on the special facts of this case, as follows: It seems to me that in a closely allied respect, namely the permanent

67 [2003] PNLR 17.

works, Hart Investments were indeed relying upon Mr Fidler's pocket book. I refer most expressly to the reference to professional indemnity in the June letter. Second, it seems to me that on any view the tasks in this case in relation to temporary and permanent works were closely intertwined, they were undertaken by the same person, Mr Fidler. He had the same job number. He did not, as far as I can see, distinguish, and one would not expect him to distinguish precisely what he was doing when. Further, I do not consider that the claimant or anyone in a position of the claimant would analyse too closely exactly what it was that Mr Fidler was doing whilst on site. Plainly, as it seems to me, there would not be a duty to the claimant that the temporary works be undertaken in a particular way, but it does not seem to me that it would be a very limited extension to impose a duty in the circumstances of this case upon the engineer to prevent economic loss to a structure which he was himself seeking to safeguard for a considerable period of time. For those short reasons, I would, if necessary, have found the existence of a duty in respect of the second failing which I have identified, even if I had not found a contractual duty."

Duty to warn of retrospective danger

This represents a potential extension of the duty to warn of preventable disaster. In *Eckersley v Binnie & Partners*,⁶⁸ engineers were held liable for the consequences of a methane explosion in a pumping station some years after its completion, where the design had failed to take into account the possibility of methane build-up in a transfer tunnel. On appeal, the majority of the Court of Appeal held that Binnie was liable on the basis that the trial judge had been entitled to find on the evidence that there was a risk of methane being present which should have been taken into account in the design. In a strong dissenting judgment, Bingham LJ held that the evidence did not support any finding of negligence against Binnie. It should be noted that the trial judge had suggested that the designer might be under a continuing duty, after completion of the project, to advise on new information that might indicate a danger. In this regard Bingham LJ wrote:

What is plain is that if any such duty at all is to be imposed, the nature, scope and limits of such a duty require to be very carefully and cautiously defined. The development of the law on this point, if it ever occurs, will be gradual and analogical. But this is not a suitable case in which to launch or embark on the process of development, because no facts have been found to support a conclusion that ordinarily competent engineers in the position of the first defendants would, by May 1984, have been alerted to any risk of which they were reasonably unaware at the time of handover. There was, in my view, no evidence to support such a conclusion. That being so, I prefer to express no opinion on this potentially important legal question."

In *EDAC v Moss*⁶⁹ a defective curtain wall was designed, supplied and fixed by the nominated subcontractors, Alpine. The court held that Alpine's design and workmanship were defective, and then went on to consider the duty owed by the main contractors, Moss, to the developers, EDAC, i.e. was it a duty to warn of design defects and whether Moss was in breach of any and, if so, what were the contractual duties in respect of curtain wall defects. Interestingly, the court held that Moss was not responsible for the design and, as a result, their obligations were only to carry out the Works in accordance with the drawings and bills of quantities and to comply with the architect's instructions.

⁶⁸ [1955-95] PNLR 348.

⁶⁹ 1 Const LJ 131.

Despite this somewhat favourable position, the court did hold that a term should be implied into the contract between Moss and EDAC such that Moss should report design defects known to them and Moss owed a duty of care in the same terms to both EDAC and EDAC's architect, Morgans. The judge went on to find that during the course of the work it must have become apparent to Moss that the design of the curtain wall was not buildable and they should have reported this; indeed, the judge used the expression "must have known", and found as a matter of fact that Moss's employees did know of the defects but "pressed on regardless". The court wrote:

"I think that if on examining the drawings or as a result of experience on site Moss formed the opinion that in some respect the design would not work, or would not work satisfactorily, it would have been absurd for them to have carried on implementing it just the same. In my view, if the directors of EDAC and of Moss had been asked at the time when the contract was made what Moss should do in those circumstances, they would have agreed at once that Moss should communicate their opinion to Morgan. I think, therefore, that in order to give efficacy to the contract the term requiring Moss to warn of design defects as soon as they came to believe that they existed was to be implied in the contract."

The distinction here is whether the obligation to warn arises when the opinion that a "design would not work" is formed rather than an obligation to warn when the designer "should" have formed such an opinion. Put another way, the contractor's obligation is limited to warn of defects of which it had actual knowledge when the contractor "forms" an opinion that the design will not work (to a satisfactory standard) and, as such, goes beyond designs which the contractor knows are patently defective thus falling into the realm of designs where the contractor has an opinion or belief rather than actual knowledge.

This chain was amplified in *University of Glasgow v William Whitfield and John Laing (Third Party)*,⁷⁰ where Whitfield, as architects, designed an art gallery for the University, which leaked and suffered from condensation. As a result the University commenced proceedings against them. They in turn issued third-party proceedings on the basis that Laing (the contractor) owed both the University and Whitfield a duty of care in tort to warn them of any defects in the design. The court held that Laing owed no duty of care to the architects, Whitfield, to guard against damage as a result of being found liable to the University for defective design since the damage was pure economic loss and the case was not one of those exceptional *Hedley Byrne*⁷¹ cases where a duty to avoid pure economic loss existed. The court took the position that the decisions in both *EDAC*⁷² and *Victoria University*⁷³ were based on implied duties in contract between the employer and contractor and, therefore, did not support a duty of care in tort between the contractor and architect. Despite this, as they sought to impose any duty of care in tort, they could only stand insofar as they were cases where there was a special relationship between the parties.

The court further held that Laing owed no duty of care to the University because a duty in tort is limited to a duty of care to avoid acts or omissions which are liable to cause damage to persons, or to some property, other than the defective building being created. As to whether an implied term existed, the court held that an implied term that the contractor would warn the employer of defects in the design existed only

70 (1988) 42 BLR 66.

71 *Supra*.

72 *Supra*.

73 *Victoria University of Manchester vs. Wilson* (1984) 1 CLJ 162.

where the employer relied on the contractor in the matter of design was correct – but in this case it had not done so.

Following in this realm of a “duty to warn” is the case of *Oxford University Press v John Steadman Design Group*.⁷⁴ This judgment was thought to be the case that ended the issue of a “duty to warn” in both contract and in tort. The court considered the earlier cases and held:

“In the present case, OUP had a design prepared by architects. They were not relying on the judgement of NH as to the quality of the design. I cannot see any basis for the implication of a duty owed in tort by NH to warn of design defects unless it was a defect which might give rise to danger to the safety of persons or damage to some property other than that which was the subject matter of the design defect. Equally, there was a detailed building contract between OUP and NH. Again, I cannot see any room in that contract for the implication of a term that NH would warn OUP of design defects of which they became aware. I should add that, in matters of design, whether a design is sound or otherwise is very much a matter of skilled judgement and there is room for differences of opinion about the suitability of a design or a particular aspect of it. In my view, it would be undesirable, as it would give rise to practical difficulties, if builders were obliged to raise with their employer matters of design for which they had no express contractual responsibility where the employer has commissioned the design from an expert. I have dealt briefly with this matter as I respectfully adopt the reasoning of Judge Bowsher in *University of Glasgow*. I reject therefore the allegation that NH was in breach of a duty to warn OUP of design deficiencies.”

Unfortunately, the logic of this decision overlooked the earlier *EDAC*⁷⁵ decision in which it was clear that the contractual aspect did not depend on any reliance by the employer on the contractor but instead was based on the logical principle that a contractor had to warn the employer of defects in the design which it had discovered and particularly on the presumed intention of the parties. Thus, where the employer did rely on the contractor for this, a “duty to warn” could be implied into the contract, which seems to be acknowledged in the *Oxford University Press v John Steadman Design Group*⁷⁶ case. Logically, it would also appear that this duty applies even if the employer hires another professional to supervise the Works if the employer is still relying on the contractor to point out any defects in the design, which the contractor believes to exist, i.e. the contractor could not just “look away” from such defects. As a result of this, a court could imply a term – duty to warn – into the building contract.

This is carried further in *Lindenberg v Canning*.⁷⁷ The defendant, who was a builder, entered into an oral agreement to carry out preliminary demolition works in a block of flats. He was given a plan prepared by the plaintiff developer’s surveyor which was incorrect in that it showed nine-inch internal walls, including a chimney breast as non-load-bearing. The builder started to demolish these walls without propping the ceiling but the work was stopped and litigation eventually ensued. The developer contended that the builder was in breach of an implied contractual term in the agreement that he would do the work with skill and care and in a good and workmanlike manner and that it was negligent to demolish obviously load-bearing walls without propping. The court, in reviewing the facts, held that it was an implied term of the contract between the builder and the developer that, in carrying out his work, the builder should exercise

74 (1990) 34 ConLR 1.

75 (1988) 42 BLR 66..

76 *Supra*.

77 (1992) 62 BLR 142.

the care to be expected of an ordinary competent builder. The fact that an obviously important structural feature, such as the chimney breast wall, was indicated as non-load-bearing should have caused the builder to have grave doubts about the plan. The builder should have realised that the nine-inch walls were load-bearing and ought to have proceeded with the greatest of caution. At the very least he should have raised doubts with the developer's surveyor. Even if the surveyor had given assurances, the builder would have been prudent to put up temporary propping, but in the absence of such assurance he should undoubtedly have done so. The judge, accordingly, held that the builder behaved with much less care than was to be expected of the ordinary competent builder and was in breach of contract. The judge held that the surveyor was 75 per cent responsible and the builder 25 per cent.⁷⁸

This was finally resolved by the Court of Appeal in *Plant Construction plc v Clive Adams Associates & another (No. 2)*.⁷⁹ Plant Construction were the main contractors engaged by Ford for the installation of two engine mount rigs in pits at Ford's research station at Laingdon, Essex. JMH were subcontractors engaged by Plant Construction for various substructure works, including the installation of temporary propping, which subsequently failed. It was found that JMH were not contractually responsible to Plant Construction for the design of the temporary propping because JMH had been directed by the employer's engineer, who had the contractual authority to prop the roof at the positions and by the methods actually adopted by JMH, despite the fact that JMH and the main contractor recognised that the propping was inadequate. The judge at first instance found that JMH was under a contractual duty to warn the main contractor that the propping was inadequate and did not do enough to discharge that duty, albeit that the main contractor was contributorily liable to the extent of 80 per cent. The Court of Appeal held that the temporary works were, to the knowledge of JMH, obviously dangerous and there was an implied contractual obligation to warn of the danger.

Also, in *Aurum Investments Ltd v Avonforce Ltd*,⁸⁰ the court held that the duty to warn might be owed by a subcontractor to his contractor "client".

Thus, the state of the law can be summarised in the following cases:

- Where a contractor knows or believes that the design is defective in respects which may give rise to a danger to personal safety, it will normally be under an implied contractual duty to warn the employer of the danger (also note that an implied contractual duty to warn may be owed by a subcontractor to a contractor);
- This implied contractual duty arises out of the implied term that the contractor will carry out the Works in a good and workmanlike manner and/or with reasonable care and skill;
- Alternatively, it may be the subject of a specific term which is implied in order to give effect to the presumed intentions of the parties in the particular case or where the defect is one which may endanger personal safety in the absence of some factor clearly negating the implication of the duty;
- This implied contractual duty does not depend on the employer's reliance on the contractor and can be owed to the employer, even where the employer's

⁷⁸ See also *Emden's Construction Law*, LexisNexis Butterworths.

⁷⁹ [2000] BLR 137, CA.

⁸⁰ (2001) 17 Const LJ 145.

architect or engineer supervises the construction of the Works.⁸¹ However, whether this duty to warn arises in circumstances where the contractor did not know, but should have known, that the design was dangerous, will depend on all the circumstances, in particular, whether the employer has retained an architect or engineer for advice. It is unclear, however, whether a contractor is under an implied contractual duty to warn where there is a design defect, of which the contractor knows or ought to know, but which is not dangerous;

- The implied contractual duty is implied, not in law, but in the light of the facts of the particular case and whether or not such a duty will be found to exist in any particular case depends on all the circumstances. Relevant circumstances will include the nature of the Works, the experience of the contractor, the relationship between the employer and the contractor and the other parties in the construction process, including any architect or engineer retained by the employer and the nature of the defect;⁸²
- The overriding issue is whether it is reasonable to impose a duty to warn on the contractor. It should be remembered, however, that it remains unclear in what circumstances (if any), and to whom, a contractor may owe a duty to warn in tort. The answer depends on the nature of the risk, the nature of the damage suffered by the claimant and whether there was an assumption of responsibility.⁸³

Duty to others

When dealing with any duty that may be owed to third parties one must clearly determine the difference between purely economic losses and physical damage/personal injury sustained by a non-client third party. Purely economic losses are not recoverable in tort in the absence of a special relationship arising out of either proximity and/or the assumption of responsibility, which has been relied upon by the third party.⁸⁴

Purely economic losses

Thus, in *Jarvis & Sons Ltd v Castle Wharf Developments Ltd*,⁸⁵ the court held that a quantity surveyor could owe a duty of care to potential contractors who relied upon their representations. In other situations a duty of care in respect of pure economic loss owed by an architect/construction professionals to a third party outside of any contractual relationship will depend upon the application of the familiar assumption of responsibility/special relationship/reliance tests.

An example of this is the case of *Riyad Bank v Ahli United Bank*,⁸⁶ which involved the negligent valuation of operating leases of equipment. The claimant bank invested in a Sharia-compliant investment fund set up by the defendant bank as an intermediary to avoid the Saudi Arabian claimant having an obvious direct link, for political reasons,

⁸¹ Though the use of an architect/engineer is a factor that can be taken into account in determining whether the duty is implied in any particular case.

⁸² See *Emden's Construction Law*, *supra*.

⁸³ *Ibid*.

⁸⁴ See e.g. *Murphy v Brentwood* and *Bellefield v Turner* [2000] BLR 97 (CA).

⁸⁵ [2001] Lloyd's Rep PN 309.

⁸⁶ [2007] PNL R 1.

with the Kuwaiti defendant. The defendant provided the investment advice to be relied upon. The question arose as to whether the existence of a contractual chain between the claimant and the fund and the fund and the defendant (but in particular the deliberate decision of the parties to the action not to enter into contractual relations directly) prevented the imposition of a duty of care between the claimant and defendant.

The court considered that even where there is a direct contract between the parties, the imposition of a concurrent duty of care may not be appropriate. Where there is a chain of contracts between the parties, which may generally negate the existence of a duty of care in tort, would be just one circumstance relevant to the overall question whether the circumstances disclose the required assumption of responsibility. The court went on to note that the conscious refusal to enter contractual relations was neutral to the resolution of the legal question as to the occurrence of an assumption of responsibility sufficient to crystallise a tortious duty of care in respect of economic losses incurred.

Instead, what must be looked at are the terms of the relevant contracts, why the parties chose to structure their relationships in the way they did (and, in particular, why no contract was concluded between the claimant and alleged tortfeasor and what contact, communications and advice were provided or existed between the relevant parties). Further, the court noted that the suggestion of a two-stage approach to the question of the existence of a duty of care in such circumstances (i.e. first to consider whether a duty of care would exist apart from contractual considerations; and then secondly, whether the contract adopted by the parties obviated the initial conclusion) was acceptable and that the distinction between this two-stage test and a single overall test (i.e. one that simply asks “in all the circumstances, including the contractual context, should a duty of care be imposed?”) was considered as merely a terminological dispute – the real issue was whether, on the facts, the judge at first instance was right to conclude that a duty of care did exist between the parties. Thus, it can be expected that normal building contract relationships will tend to work against the existence of a duty of care crossing over contractual lines.

The court concluded that the decision was probably not significant as signalling any relaxation in the tests to be applied in determining whether or not a duty of care is owed in respect of pure economic losses outside of contractual relationships (especially in building cases) – thus emphasising the need to examine the facts of any particular case to arrive at the answer to the question.

Further, in *Commissioners of Customs and Excise v Barclays Bank Plc*,⁸⁷ the House of Lords considered the three accepted tests for the imposition of a duty of care in cases of pure economics to be: (1) voluntary assumption of responsibility; (2) the “threefold test” of (a) foreseeability, (b) proximity and (c) whether the imposition of a duty would be “fair, just and reasonable”; and (3) the incremental test.

Of these Lord Bingham concluded that: (1) the assumption of responsibility test was a sufficient precondition of the existence of a duty, but not a necessary one; (2) it was a test to be applied objectively (i.e. it does not require a conscious or knowing assumption of responsibility to a third party); (3) only if that test is answered negatively will further enquiry of the facts be required; (4) in novel cases there is no simple formula that can be applied; (5) the incremental test is of little use of itself; and

87 [2006] 3 WLR 1.

(6) ultimately, a close examination of the facts of a case is always required (and, in particular, the nature of the relationship between the relevant parties).

Miscellaneous matters: personal injury, latent defects and subsequent occupiers

When dealing with other than purely economic losses, i.e. personal injury, a designer of a building, or part of a building, ordinarily owes a duty of care to avoid personal injury to such a party or physical damage to such a party's "other" property. These losses go to the person directly affected by the design and, except for *Clay v Crump*,⁸⁸ where an architect who negligently permitted a dangerous wall to remain standing was held liable to an injured labourer employed by building contractors who subsequently came on site when the wall collapsed, there are no reported cases in which a remote purchaser has brought an action against a negligent designer for damages for personal injury caused by a design defect.

As to subsequent occupiers in *Baxall v Sheard Walshaw Partnership*,⁸⁹ the architects Sheard Walshaw had designed industrial units for a developer. The tenants of one of the units commenced proceedings against the architects alleging breach of a duty of care owed to them as subsequent occupiers, following flooding of the unit caused by a negligently designed drainage system. However, it was held that the defect was not a latent one, because it was reasonably discoverable by Baxall's surveyor prior to their taking an interest in the property and, therefore, that the architect did not owe a duty of care to the subsequent occupier of the building in respect of the incompetent design of the drainage system. The opportunity for intermediate inspection by the lessee's surveyor was crucial to the reasoning supporting the absence of a duty of care. Thus, a limited duty to subsequent purchasers in respect of damage to "other" property caused by a latent design defects resulted. This decision was further applied in *Sahib Foods Ltd v Paskin Kyriakides Sands*,⁹⁰ where the court found that, in the absence of evidence from a subsequent owner of property, the relevant defect would not have been spotted by a surveyor when it purchased the property in question, no duty of care had been established on the facts of the case against the defendant architects.

All of this aside, in *Pearson Education Limited v The Charter Partnership Limited*,⁹¹ five years after its decision in *Baxall*, the Court of Appeal encountered roughly similar facts. Here, the claimant was the lessee of a warehouse. A heavy rainstorm led to the flooding of the warehouse, causing substantial damage to a stock of books stored there by the claimant. The flooding was due to an inadequate drainage system designed by the defendant architects. The claimant had not been aware of the inadequate design. No pre-occupation survey had been carried out, but there was no suggestion that a survey should have taken place or that it would have revealed the defect.

Prior to the claimant's occupation of the warehouse there had been a similar incident of flooding, causing substantial damage to the lessee at that time. Loss adjusters instructed by the lessee's insurer discovered that the drainage system of the

⁸⁸ [1964] 1 QB 533 (CA).

⁸⁹ [2001] BLR 36, [2002] BLR 100 (CA).

⁹⁰ [2003] PNLR 585.

⁹¹ [2006] PNLR 14.

warehouse was inadequate, but they did not convey this information to the lessee nor were they under a duty to do so. The defendants in *Pearson* argued that the discovery of the defect in the aftermath of the first flood rendered the defect patent and, thus, excluded their liability for any damage subsequently caused by the defect. The Court of Appeal rejected this argument and held the defendants liable for the damage caused by the second flood.⁹²

Lord Phillips CJ, who delivered the judgment of the court, started by rejecting the argument made by the defendants, and indeed by the same court in *Baxall*, that *Donoghue v Stevenson*⁹³ supported the proposition that liability for creating a dangerous defect in a chattel or realty ceases as soon as there is a possibility of discovering the defect. That case, he said, “predated the statutory interventions that made provision for contributory negligence and joint tortfeasors”, and instead relied upon three cases decided after *Donoghue v Stevenson* which suggest that the possibility of discovering the defect prior to the accident did not automatically lead to a complete exoneration of the person creating the defect. Lord Phillips wrote:

“The decision in *Baxall* supports the following two principles, either of which can explain the result in that case:

- (i) Where it is reasonable to expect that an occupier will inspect a property before entering into occupation, no duty of care will be owed in respect of any defect that such an inspection should disclose.
- (ii) Where an occupier could reasonably have been expected in his own interests to carry out an inspection that would have revealed the defect, failure to carry out such an inspection, or to carry it out with reasonable skill and care, will break the chain of causation.”

Lord Phillips went on to explain that neither principle exonerated the defendants in the case at hand. The first principle did not, he said, because the defendants, when designing the inadequate drainage system, could not expect that the defect would be revealed by an inspection. The second principle did not exonerate the defendants, because the claimant had not known of the first flood and had thus had no reason to investigate the adequacy of the drainage system. He added: “[w]e can see no basis of principle or authority why the fact that a third party becomes aware of a latent defect should be deemed to make the defect patent to others who neither know, nor ought to know, of the discovery.”

Additionally, Lord Phillips noted the court’s dissatisfaction with the principles laid down in *Baxall*. He wrote that:

“if an architect who has the primary responsibility for producing a safe design produces a defective design, it is not obviously fair, just and reasonable that he should be absolved from any liability in tort in respect of its consequences on the ground that another professional could reasonably be expected to discover his shortcoming.”

He then went on to state that

“it is not obvious why a failure of a person, put at risk by a defective design, to take due care for his own safety or that of his property should break the chain of causation, rather than amount to contributory negligence.”

⁹² See Sirko Harder, “Is liability for defective buildings negated by a surveyor’s intervening negligence”, *Conveyancer and Property Lawyer*, 2007.

⁹³ [1932] AC 562.

Other issues

Beyond the “special relationship duty” to not cause economic loss, the duty of the professional designer to third parties is generally non-existent in respect of economic loss. In *Architype Properties Limited v Dewhurst Macfarlane & Partners (a firm)*,⁹⁴ Architype was retained by Arbco as the lead consultant for the design and construction of a group of associated buildings. Dewhurst was retained by Architype to act as its sub-consultant civil and structural engineers. During the construction, serious defects were discovered and as a result remedial works were carried out which were claimed to have delayed the project. Arbco assigned its claims against Dewhurst to Architype and, thus, Architype claimed damages both in its own right and as an assignee of Arbco’s claims against Dewhurst.

Here, Dewhurst denied a duty of care to Arbco but accepted that it had a special skill in civil and structural engineering and was aware that its engineering designs were done for the benefit of Arbco and that Arbco was relying on its skill as engineers. Despite its concessions, Dewhurst took the position that the matter was not in tort but rather a “straight chain of contracts case” and, as such, there was no privity of contract between Arbco and Architype and, therefore, no responsibility on the part of Dewhurst to Arbco.

Architype took the view that it was at least arguable that Dewhurst owed Arbco a duty of care as it held itself out as possessing a special skill and it was reasonably foreseeable that Arbco would rely on its special skill, in turn giving rise to a duty of care in accordance with the principles set out in *Hedley Byrne v Heller*⁹⁵ and *Junior Books*.⁹⁶

After reviewing the situation the court held that Architype’s position was unarguable in that *Junior Books* had to be confined to its own particular unique facts and, given that the facts of the present case were not identical to the facts in *Junior Books* (the present case concerned services not products, participation in the design team rather than a self-contained part of the work, and the engineers were not nominated by the employer), he was not obliged to follow *Junior Books*.

The court further held that in any event, the parties had structured their contractual relationship in such a way that was inconsistent with an assumption of responsibility between Dewhurst and Arbco. Also, the fact that the question of a collateral warranty was raised at the time of the formation of the subcontract but was not pursued was not essential to the argument but was an additional point in favour of his conclusion that there was no duty of care owed by Dewhurst to Arbco.

Following this view, in *Mirant Asia*,⁹⁷ the same judge, HHJ Toulmin CMG QC, also rejected a claim that the engineers owed a duty to prevent economic loss to a company (“SCC”) which was part of the same group of companies as the CEPAS (the company that had the contract with Arup) even though he held that SCC had, in fact, relied upon the engineers’ skill and care in the performance of their contract with CEPAS. The particular, intricate contractual chain was deliberately structured in this way (for tax reasons) and was, therefore, inconsistent with an assumption of responsibility. That point was not appealed.

94 (2003) 96 ConLR 35.

95 [1964] AC 465.

96 [1983] 1 AC 520.

97 [2005] EWCA 1585, [2006] 1 BLR 187.

Then, finally, in *Bellefield Computer Services v E Turner & Sons Limited*,⁹⁸ the contractor brought Part 20 proceedings against the architect to whom the contractor had subcontracted some of the design of a dairy, which caught fire causing loss to the subsequent owners. The builders were statute-barred from bringing a claim for damages pursuant to their contract with the architect. Accordingly, the contractor brought a claim for a contribution under the Civil Liability (Contribution) Act 1978. In order to succeed, the contractor had to show that the architect owed a duty of care to the subsequent owners of the dairy.

Here, the Court of Appeal, Lord Justice Potter writing the leading judgment, held that there were four principles governing the existence and scope of an architect's duty to a subsequent owner or occupier:

- “(1) An architect may in appropriate circumstances owe a duty of care in tort and be liable to a subsequent occupier of the building which the architect has designed and/ or the construction of which he has supervised in respect of latent defects in the building of which there is no possibility of inspection.
- (2) The question whether a particular defect comes within the scope of an architect's duty of care to a subsequent occupier will depend upon the original design and/ or supervisory obligations of the architect in question. The architect will not owe a duty of care in respect of defects for which he never had any design or supervisory responsibility in the first place.
- (3) If a dangerous defect arises as the result of a negligent omission on the part of the architect, he cannot excuse himself from liability on the grounds that he delegated the duty of design of the relevant part of the building works, unless he obtains the permission of his employer to do so.
- (4) The detailed duties of an architect in relation to his design function depend upon the application of the general principles above stated to the particular facts of the case, including any special terms agreed. The precise ambit of such duties will usually depend upon expert evidence from members of the profession as to what a competent, experienced architect would do in the circumstances.”

In this case the Court of Appeal applied the second and fourth principles on the facts with the result that the architects escaped liability because their duty was limited by the terms of their engagement by the design and build contractor. It was found that they had no obligation to provide a detailed design for the critical fire-resisting features and they had not agreed to supervise/inspect the Works during construction. It should be noted here that May LJ expressly reserved for future consideration the question whether, or to what extent, the scope of an architect's duty of care to a subsequent owner could extend to loss not associated with physical damage.⁹⁹

While there may be no duty to prevent economic loss, this situation must be compared to the situation where the designer has either some special circumstance that would create a “special” relationship, as in *Storey v Charles Church Developments Limited*,¹⁰⁰ where damages in contract and tort were claimed from a D&B contractor for the cost of underpinning required to correct structural defects which had occurred as a result of the defective design of the foundations.¹⁰¹ Here, HHJ Hicks QC applied

⁹⁸ [2003] Lloyd's Rep PN 53.

⁹⁹ In this regard see also *Sahib Foods Limited v Paskin Kyiades Sands (a firm)* [2003] PNLR 30, a claim which failed on the facts but where the *Baxall* approach was followed and *Pearson Education Ltd v the Charter Partnership* [2005] EWHC 2021 (TCC) a case very similar to *Baxall*, where a claim based on the designer's duty of care to subsequent owners in respect of a latent design defect was upheld.

¹⁰⁰ (1995) 73 ConLR 1.

¹⁰¹ It should be noted here that this case was brought on a concurrent duty of care in tort because the claimant's claim in contract was statute-barred.

Henderson v Merrett,¹⁰² finding that by contracting with the claimant the contractor assumed responsibility to exercise reasonable skill and care in design and the owner had relied upon it to do so. As a result, the *Hedley Byrne* principle applied, which meant that the claimant could recover for economic loss. The judge concluded that such duty was not affected because the designer in the case was also the builder.

The knowledge of others

A defence that has arisen is one in which the designer claims that it should not be held responsible for losses because of the knowledge or skill of another participant in the project. The basis for this defence is that the particular design professional has not breached its duty. Another variation of this is that the other participant's failures have broken the chain of causation between the professional's breach and losses suffered. It should be noted, however, that in each of these cases the defence has been unsuccessful. In the *Sahib* case cited earlier, the experts were agreed that not all reasonably competent architects would have been aware of the risk of fire spreading as a result of the use of the combustible panels. The defendants were, nevertheless, held to be in breach of duty because they, in fact, knew of that risk. The defendant sought to deny/avoid liability on the basis that the claimant had all the information that was available to the defendants and, therefore, also knew of the risk. HHJ Bowsher held that this provided no defence to the allegation of breach and wrote:

"A competent architect does not present a design that he knows to be deficient in an important respect and then discuss with the client whether the deficiency should be removed. Still less does he present such a design and say, I did not need to tell the client about that deficiency because the client already knew that such a feature was not required.

Take a simple example. An architect designs a house as a residence for a client who happens to be a surveyor and forgets to require a damp-proof course under a parapet wall. If after construction the client complains, it is no answer for the architect to say 'well you knew about the need for the damp proof course as well as I did.' The architect is employed to use his own skill and judgment. There is no duty on the client who happens to have a particular skill to examine the architect's designs and tell the architect where he has gone wrong. If I, as a lawyer, go to a solicitor for advice and pay him for it, I do not see why I should be criticised if I fail to do that solicitor's work all over again and check whether he has got it right."

The principal point here is that if a professional designer deals with any possibility of serious danger, and the designer is aware of such possible danger in her design, the designer must consider all the ways in which the danger may occur, including the carelessness of the client. If the designer is to avoid liability she has to bring the risks of the cost-cutting design clearly to the attention of the client, making sure that the client explicitly accepts such risks.

This principle is evident in *Six Continents Retail Limited v Carford Catering Limited*,¹⁰³ where a project manager had been retained to design and install kitchen equipment at a restaurant and the fixing of a rotisserie grill to a combustible wall caused fire damage. The project manager had warned the owner that the method of installation might create a fire risk. The claimant owner took no steps to respond to that letter. The Court of Appeal held that the warning given by the project manager was insufficient. It went on to hold that even if the project manager had given a sufficient

¹⁰² *Supra*.

¹⁰³ [2003] EWCA Civ 1790.

warning of a risk of fire it would still not have discharged its duty because the outcome was one which the project manager should have prevented from happening.

Thus, merely notifying the owners that a risk of fire existed did not discharge the duty of care owed by the project manager. It should also be noted here that the argument that the owner's failure to respond to the warning had broken the chain of causation between breach and loss was also rejected.

Then, in *Linden Homes South East Limited v LBH Wembley Limited*,¹⁰⁴ a claim was made against geotechnical and engineering consultants retained to investigate a site and to come up with an appropriate foundation design. A design was chosen, work began and only then was it determined that the chosen design was unsuitable. The consultants took the position that, although they had recommended the design, the final say on the foundation design lay with the client's specialist contractor and it was the choice of design by the specialist contractor that was the effective cause of loss. Mr Recorder Aylen QC disagreed with that line of argument and held that the specialist contractor had been entitled to rely upon the consultants' site investigation report in choosing the foundation design. The report had negligently failed to disclose matters, which meant that the design ultimately chosen would be ineffective.

Matters other than design

The duty owed by design professionals encompasses not just design but also the timely manner in which the design is carried out. In *Consarc Design Ltd v Hutch Investments Ltd*,¹⁰⁵ the court held that:

"Consarc's duty was to supply drawings and information within a reasonable time. In a fast track programme that is 'just in time'; *Neodox Ltd v Swinton and Pendlebury BC* (1958) 5 BLR 34 applied. 'Just in time' means that information is given to the contractor as and when he needs it on site. If there was no other evidence available it would be inferred that the dates for supply of information in the contractor's programme were reasonable. But as a matter of fact the dates were not reasonable, although it was reasonable of Consarc at the time to believe that they were reasonable. Under those circumstances Consarc could only be held to those dates if they had guaranteed them, which they had not."

The duty the architect owes extends to the architect's design work as it does to any other work the architect carries out under the terms of his retainer. Such a term has long been implied as a matter of law into a professional's contract of retainer; however, the existence of the implied contractual duty is now confirmed by the Supply of Goods and Services Act 1982, section 13.

The standard of care the architect must display in order to discharge this duty is the same standard demanded of other professionals in the discharge of their professional obligations, i.e. the standard of the ordinary skilled man exercising and professing to have that special skill. It is established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

New, novel and strict design standards

As discussed earlier in this chapter, on occasion the design professional may be asked to produce a design which is new to the field, novel in character and/or requires a

¹⁰⁴ (2003) 87 ConLR 180.

¹⁰⁵ (2003) 19 Const LJ 91.

higher than normal standard of care. The design professional, in these circumstances, must be able to show that proper consideration has been given to all possible modes of failure.¹⁰⁶ In certain circumstances the designer should be careful to watch and determine if such a design is possible at all rather than taking the chance that the design is beyond the realm of the designer's ability.

Of course, the employer and the design professional can always agree that the design professional will be subject to a stricter design obligation than the obligation to exercise reasonable care and skill. An example of this is where the parties agree that the design professional has an absolute obligation to design the project so that it is fit for the purpose intended by the employer.

Where a design professional undertakes such an obligation, and the project then does not meet the parameters set by the employer, i.e. it is not fit for the purpose intended, the designer will not be able to take the position that it exercised reasonable care and skill in the design. As was discussed in *George Hawkins v Chrysler (UK) Ltd & Burne Associates*,¹⁰⁷ such an obligation will not be implied as a matter of law. In this case Chrysler brought third party proceedings against engineers named Burne. The proceedings related to an injury caused to an employee of Chrysler through alleged deficiencies in the floor of a shower room. The room was part of an installation designed by Burne under an oral contract with Chrysler. Here, Burne were retained as engineers only and the floor was laid by a contractor engaged by Chrysler. Burne was charged with strict warranty in that the material specified for the floor would be fit for use in a wet shower room. Chrysler relied upon an answer given by one of the partners during cross examination, to the effect that he saw it as his job to provide a floor which would be safe when used by a large number of men in hot, wet and soapy conditions. The Court of Appeal refused to regard this answer as importing into the contract a strict obligation that the floor produced by the application of Burne's design would be fit and safe for use. In their opinion, the case fell squarely within the general principle that a professional owed only an obligation to exercise reasonable care and skill and did not undertake that its service would be successful in any event.

Fox LJ stated that the oral contract could "be given business efficacy quite adequate for its purpose by the ordinary obligation of a professional man to use reasonable care and skill in the execution of his work".

Further, Neill LJ stated that "... a warranty of fitness for purpose will not be implied as a matter of law where the consulting engineer is retained to advise or to design". While a warranty of fitness for purpose will not be implied as a matter of law against a design profession, it can be implied under the following conditions:¹⁰⁸

- it must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- it must be so obvious that it goes without saying;
- it must be capable of clear expression;
- it must not contradict any express term of the contract.

¹⁰⁶ See e.g. *IBA v EMI and EICC* (1980) 14 BLR 1.

¹⁰⁷ (1988) 38 BLR 36.

¹⁰⁸ See *BP Refinery (Western Port) Property v Shire of Hastings* [1978] 52 ALJR 20.

Liability for design of others

Generally, the architect is the design professional responsible for the entire process and it is this professional who calls in the related professionals, such as the structural engineers, mechanical engineers, geologists and others, each of whom is responsible for its part of the design.

In this scenario, it is the architect who bears responsibility for the entire design and, if there is any defect, the architect cannot avoid liability by claiming that the defects of others are their sole problem. In these situations, however, the employer and the architect can agree, as part of their contract, that the architect will have no liability for the defective designs of others.¹⁰⁹ This, however, leaves the architect open to the argument that it owes a duty of care to properly employ other design professionals, i.e. the architect must exercise reasonable care and skill in selecting the person to whom the task in question is delegated.

Various standard form contracts provide specific provisions as to the extent to which a professional adviser, retained by the employer, will be liable for work (including design work) carried out by other members of the professional team. An example of this can be seen in the various ACE agreements in which the engineer is responsible for the work of sub-consultants whom he engages, but not for the work of other consultants engaged directly by the employer. Also, the RIBA Architect's Appointment, Condition 3.6, provides that the architect will not be responsible for the work carried out by other consultants engaged by the employer. This would seem to imply that the architect would, however, be responsible for work carried out by sub-consultants it engages.

It should be noted that while the case of *Moresk Cleaners Ltd v Hicks*¹¹⁰ takes the view that generally the architect is the design professional responsible for the entire design and, if there is any defect, the architect cannot avoid liability by claiming that the defects of others are their sole problem. In these situations, however, the employer and architect can agree, as part of their contract, that the architect will have no liability for the design defects of others. This, however, leaves the architect open to the argument that it owes a duty of care to properly employ other design professionals, i.e. the architect must exercise reasonable care and skill in selecting the person to whom the task in question is delegated. Following on this in *Cooperative Group Ltd v John Allen Associates Ltd*,¹¹¹ the court gave guidance as to the factors to be considered in determining whether construction professionals had acted reasonably in seeking the assistance of specialists to discharge their duty to a client [at paragraph 180]:

- “1. In *Moresk v Hicks* the first argument was that it was an implied term of the architect's employment that he should be entitled to delegate certain specialised design tasks to qualified specialist sub-contractors. That implied term was rejected as was the alternative that the architect had implied authority to act as agent for the building owner to employ the contractor to design the structure and that the architect did just that. It was not argued that if the architect remained liable for the design then it was possible for the architect to discharge a duty to take reasonable care by relying on the advice or design of specialists provided that such reliance was reasonable.
2. That construction professionals can discharge their duty to take reasonable care by relying on the advice or design of a specialist provided that they act reasonably in doing so.

¹⁰⁹ See *Moresk Cleaners Ltd v Hicks* [1966] 2 Lloyd's Rep 338.

¹¹⁰ *Supra*.

¹¹¹ [2010] EWHC 2300 (TCC).

3. In London Borough of *Merton v Lowe* the architect's decision to use Pyrok was reasonable. In commenting on the decision in *Moresk v Hicks*, Waller LJ distinguished that case on the basis that the architect has virtually handed over to another the whole task of design and 'the architect could not escape responsibility for the work which he was supposed to do by handing it over to another'.
4. In *Sealand of the Pacific v McHaffie* the decision to use the specialist concrete had been based solely on representations and guarantees from the sales representative and a pamphlet which dealt with the use of the product in a different manner and for different purposes. Any other enquiries would have disclosed that the use of the product was not sound engineering procedure. The architect appreciated that the use of the material was somewhat experimental. It was held that further enquiries should have been made. In my judgment that is a case where the court held that the architects had not acted reasonably in relying on the sales representative and the pamphlet given the circumstances of the case. If the architect had made the further enquiries and those further enquiries had supported the use of the concrete it seems that the court would not have held the architects liable. That would be the case even if the enquiries led to advice which, unbeknownst to the architects, was negligent.
5. In *Surrey v Church* the architect knew of the instability in the soils and that placed a duty to have appropriate investigations made by an expert. He selected somebody not qualified as a soils expert and despite the fact that he knew that he could engage whatever competent specialists he needed and that there were firms specialising in soil testing he did not select such a specialist. The basis of contractual liability appears to have been fitness for purpose but it was also found that the architect was negligent. Again it seems that the basis upon which the architect was negligent was that, knowing there were problems with the soils, he should have had appropriate investigations carried out. However, instead of going to specialist soil testing engineers he went to ones who were not so qualified, even though he knew that the client would authorise him to engage those who were competent. In those circumstances it is evident that the architect did not act reasonably.
6. In *Richard Roberts v Douglas Smith Stimpson* Judge Newey QC evidently did not think that the architects had acted reasonably. Their investigations were limited to conversations and letters and some telephone conversations with potential suppliers. They do not seek help from other architects or professionals or competent research institutions or trade associations. The supplier's quotation was suspiciously cheap and was not properly considered. Alarm bells were not heeded and the proposals for the lining were put to the client without any warning whatsoever. Again the conclusion is not that, if the architects had made all the necessary enquiries, there would still have been liability but rather that, because they acted unreasonably in the way in which they chose the tank lining, they did not exercise the care to be expected of ordinary competent architects.
7. That in determining whether construction professionals act reasonably in seeking the assistance of specialists to discharge their duty to the client, the court has to consider all the circumstances which include
 - (a) Whether the assistance is taken from an appropriate specialist;
 - (b) Whether it was reasonable to seek assistance from other professionals, research or other associations or other sources;
 - (c) Whether there was information which should have led the professional to give a warning;
 - (d) Whether and to what extent the client might have a remedy in respect of the advice from the other specialist;
 - (e) Whether the construction professional should have advised the client to seek advice elsewhere or should themselves have taken professional advice under a separate retainer."

It would thus appear that *Cooperative Group* provides clear guidance on the current state of the law on assessing whether a construction professional has acted reasonably in delegating its design responsibilities to another.

CHAPTER 4

Site conditions

The site

The site is defined in most construction contracts as “... the places where the Permanent Works are to be executed including storage and working areas and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.”¹

Thus, issues arise as to whether the site has been turned over to the contractor, its condition at turnover, responsibility for unforeseen ground conditions, interference with the use of the site by the contractor, and a host of other problems, such as access to adjacent property that is not legally part of the “site”. Complicating matters is the fact that many construction contracts exclude liability for information given by the employer about the site and, while generally held to be reasonable, many problems ensue.

Right to access

The employer is generally under the obligation to permit access to the site as usually the contractor’s work is, by its very nature, to be performed at the site. Accordingly, most construction contracts provide, as a standard term, that the contractor will be able to occupy the site so as to allow the contractor to perform its obligations under the contract. This is usually written directly into the contract and not left for interpretation and is of such a critical nature that, even if not written into the contract, a similar term will be implied. This was shown in *Hounslow London Borough Council v Twickenham Garden Developments Ltd*,² where the court stated that:

“The [RIBA] contract necessarily requires the building owner to give the contractor such possession, occupation or use as is necessary to enable him to perform the contract”

Further, in *Freeman & Son v Hensler*,³ the court wrote:

“The contract clearly involves that the building owner shall be in a position to hand over the whole site to the builder immediately upon the making of the contract. I think there is an implied undertaking on the part of the building owner who has contracted for the buildings to be placed by the plaintiff on his land, that he will hand over the land for the purpose of allowing the (contractor) to do that which he has bound himself to do.”

¹ See e.g. FIDIC MDB 2006.

² [1971] Ch 233 at 257, [1970] 3 All ER 326.

³ [1900] 64 JP 260.

Possession by whom?

While the contractor is entitled to possession of the site for the performance of the Works and, as against the actual owner of the site, once the contract is signed and possession falls to the contractor it is the contractor who is “in possession”, but this is not the same as the concept of “legal possession” of property. In a construction setting the word “possession” is used to signify the use of the site in furtherance of the construction project and not strict legal possession which would defeat the rights of the true owner of the property. Thus, the contract may confer the right of possession upon the contractor but this does not conclude the relationship between the parties for anything other than the construction process. In this regard the court in *Hounslow*⁴ stated:

“I am not at all sure that the matter is determined by the language of the contract. It is a standard form, and may be used in a wide variety of circumstances. In some, the building owner may be in manifest occupation of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site ...

The contract necessarily requires the building owner to give the contractor such possession, occupation or use as is necessary to enable him to perform the contract, but whether, in any given case, the contractor in law has possession must, I think, depend at least upon what is done as upon what the contract provides”

Or as Edmund Davies LJ wrote in *English Industrial Estates v George Wimpey & Co Ltd*:⁵

“Taking possession of a building is one thing, taking possession of building works another. Whether the former has taken place is generally less likely to be debatable than the latter.”

The discussion of what exactly is “possession” in a construction contract continues into the realm of licenses. Some authorities feel that possession in a construction sense is really another way of describing a license given by the actual landowner to the contractor. In this regard in *HW Nevill (Sunblest) Ltd v William Press & Son Ltd*,⁶ the court held that although the contract used the word “possession” what it really conferred upon the contractors was the licence to occupy the site up to the date of completion. On completion the licence came to an end, and then the contractor has a right to re-enter to such an extent as was necessary to remedy defects pursuant to a schedule prepared or instructions given by the architect.⁷

This idea of licence was discussed further in *Surrey Heath Borough Council v Lovell Construction Ltd and Haden Young Ltd*,⁸ where the court cited a passage to this effect from *Hudson on Building and Engineering Contracts*⁹ and held that the contractors “had no interest in the site or works”.

Does the contractor have a licence to enter the site?

If the contract is validly terminated the employer can expel the contractor from the site and in the process revoke any previously held “licence”. However, if the employer

⁴ *Supra*.

⁵ [1973] 71 LGR 127, 7 BLR 122.

⁶ (1981) 20 BLR 78.

⁷ *Ibid* at 87.

⁸ 24 ConLR 1, 48 BLR 108, CA.

⁹ 10th edn, Sweet & Maxwell, 1979, p 681.

is acting in breach of contract, an injunction is available to the contractor to prevent his being expelled from the site. In the reverse, the employer, if acting under a valid breach of contract, can also obtain an injunction claiming that the contractor, the contract having ended, is now a mere trespasser.

Historically, unless a licence granted some proprietary interest to the contractor, the employer could revoke the licence at any time and the employer could then claim that the contractor was trespassing. The contractor was then left with the remedy of damages and that basically was all that could be done. Thus, in *Wood v Leadbitter*,¹⁰ the plaintiff had paid for admission as a spectator to Doncaster Racecourse but was later asked to leave and, not doing so, was expelled from the course by the officials. He commenced proceedings claiming an assault; however, the court held that the revocation of his licence rendered him a trespasser and that the defendants had used no more than reasonable force. Then, in *Cowell v Rosehill Racecourse Co Ltd*,¹¹ the High Court of Australia reached the same result. There, the court wrote:

“Similarly an ordinary building contract enables the building contractor to go upon land for the purpose of conducting building operations so that he can perform his contract and earn his expected profit. This right continues to exist even if the building owner wrongfully repudiates the contract. But the only remedy of the building contractor for an infringement of the right is in damages. If he goes on the land against the will of the owner he may be treated as a trespasser.”

But should not the contractor be entitled to an irrevocable licence to enter and perform according to the terms of its agreement with the employer? This issue was dealt with in *Hounslow London Borough Council v Twickenham Garden Developments Ltd*,¹² where the court found that a building owner who, under a building contract, grants a licence to a builder to enter on his land and do work there cannot terminate the licence other than in accordance with the contract.

Thus, under a building contract, the building owner was, in certain circumstances, entitled to determine the employment of the contractor if the contractor did not, within 14 days after being given notice by the architect, remedy his default in making progress with the work. The architect served the requisite notice and the plaintiff wrote to the contractor to determine his employment under the contract. The contractor denied the validity of the determination and continued with the work on the site. Having unsuccessfully attempted to eject the contractor from the site, the Council issued a writ claiming an injunction and damages for trespass. On a motion for interlocutory relief, it argued that it was entitled to determine the contractor's bare licence to remain on the site independently of the contractual position and that, alternatively, the contract had been validly determined. The contractor contended that it had a licence which could not be arbitrarily determined by the Council and that the contract had not been determined, *inter alia*, because in giving his notice the architect had not complied with the rules of natural justice and given the contractor an opportunity to be heard.

The court refused the motion and held the contract, in which the licence was granted, contained an implied obligation by the Council not to revoke the licence otherwise than in accordance with the contract while the contract was in force. Further, the

¹⁰ [1845] 13 M & W 838, 153 ER 351.

¹¹ [1937] 56 CLR 605.

¹² [1971] Ch 233, [1970] 3 WLR 538.

court would not assist the Council in breaking its contract by determining the licence if the contract was still in force, even if the contract was not specifically enforceable. The court further took the additional position that the requirements of natural justice did not apply to the architect's contractual duty but, on the facts, the Council had not shown that the contract had been validly determined with the degree of certainty making it right to grant a mandatory injunction in interlocutory proceedings.

The court then summarised the law relating to contractual licences in four propositions, which were:

- (a) A licence to enter land is a contractual licence if it is conferred by a contract: it is immaterial whether the right to enter the land is the primary purpose of the contract or is merely secondary;
- (b) A contractual licence is not an entity distinct from the contract, which brings it into being, but merely one of the provisions of that contract;
- (c) The willingness of the court to grant equitable remedies in order to enforce or support a contractual licence depends on whether or not the licence is specifically enforceable;
- (d) But even if a contractual licence is not specifically enforceable, the court will not grant equitable remedies in order to procure or aid a breach of the licence.

It should be noted that there were many critics of this decision who were concerned that if an employer loses confidence in the contractor, or simply changes its mind about proceeding with the project, it would be wrong for the contractor to be allowed to maintain an irrevocable licence to continue to occupy the site.¹³ Another argument is that there would be very few circumstances in which actual damages would not be sufficient for the contractor to recover its actual losses rather than being allowed to remain on site and complete the contract, especially if it were eventually determined that the determination was wrongful.¹⁴ Conversely, the loss to the employer if constrained to continue to work with an inadequate contractor up to completion of the project may not be recognised in purely financial terms.

These arguments were recognised in the New Zealand case of *Mayfield Holdings Ltd v Moana Reef Ltd*,¹⁵ where the contractors sought an injunction restraining the employers from entering the site to expel the contractors or their subcontractors and where a counterclaim was brought by the employers for possession of the site and for an injunction restraining the contractors from impeding the employer's completion of the work. The court followed *Hounslow* and held that the licence that a building owner grants to a builder, to enter its land in order to erect a building, is not ordinarily a licence coupled with an interest, so as to render it irrevocable in the absence of any lawful termination of the contract. The court, however, refused to discover any implied negative covenant on the part of the employer to the effect that he would not revoke the licence in breach of the building contract and in declaring that even if such a covenant *did* exist, equity would not restrain the breach of it by way of injunction. The court felt that to make such an award would be tantamount to granting the contractor specific

¹³ See e.g. *Hudson on Building and Civil Engineering Contracts* (11th edn), Sweet & Maxwell, para 12-097.

¹⁴ See e.g. Kim Franklin QC, Chapter 1, *Emden's Construction Law* Part II.

¹⁵ [1973] 1 NZLR 309.

performance of the contract and as such it “would offend the principle of mutuality”, because specific performance would ordinarily be denied to the employer himself.

It should be noted that the court in *Mayfield* suggests that the normal judicial policy of restoring possession to the employer should be limited to cases where there is a dispute amounting to an impasse relating to the construction of the Works, or where there is a complete or final breakdown in the contractual relationship or where the contractor’s departure from the contract terms is a matter of genuine controversy on the contractor’s part.

A situation develops where the contractor is given possession of the site and, while this is generally exclusive to the contractor, the owner allows others to enter the site to do work at the same time, or prior to and/or subsequent to the contractor. In the absence of a specific contractual provision (i.e. for the architect or the engineer to visit the site) no such right will be implied.¹⁶ Further, should such access be given to others, and if the contractor suffers any delay or loss, the contractor will be entitled to damages and/or time extensions.¹⁷

While the employer is free to allow others to work on the site independently of the contractor it must still give the contractor satisfactory possession of the site to allow the Works to be completed without interference from others on the site. This point was brought forth in *The Queen in Right of Canada v Walter Cabott Construction Ltd.*¹⁸ The case involved the construction of a hatchery building. Cabott’s contract was one of six contracts, which in total covered the entire project. As work progressed, other contractors interfered with Cabott by encroaching on the site. In an action for breach of an implied term, allowing for possession of the site, Cabott succeeded. The court reasoned that the clause in the contract explicitly stating that there were no implied terms was ineffective because providing “working space” was fundamental to a construction contract and that such working space should be provided “unimpeded by others”. The court wrote in this regard:

“The learned trial judge was correct in finding that the appellant was in breach of its contract with the respondent by denying the respondent a portion of the site of the work which she was obliged to furnish to permit compliance with the contract. The second breach found by the learned trial judge was that the appellant failed to observe an implied term that the respondent would have a sufficient degree of uninterrupted and exclusive possession of the site to permit it to carry out its work unimpeded and in the manner of its choice.

The appellant relied on general Condition 6 for demonstrating the alleged error of the learned trial judge. General Condition 6 reads as follows:

‘6. No implied obligation of any kind by or on behalf of Her Majesty shall arise from anything in the contract, and the express covenants and agreements herein contained and made by Her Majesty are and shall be the only covenants and agreements upon which any rights against Her Majesty are to be founded; and, without limiting the generality of the foregoing, the contract supersedes all communications, negotiations and agreements, either written or oral, relating to the work and made prior to the date of the contract.’

In my opinion, it has no application in the case at bar because it is fundamental to a building contract that work space be provided unimpeded by others. The proposition

¹⁶ See e.g. *R v Ulalter Cabott Construction Ltd* (1975) 21 BLR 42.

¹⁷ See e.g. *Holme v Guppy* (1838) 3 M & W 387.

¹⁸ Canadian Federal Court of Appeal (1975) 21 BLR 42.

of law is succinctly put by the learned author of Hudson's Building and Engineering Contracts, 10th edn (1970), at p 318, as follows:

'Since a sufficient degree of possession of the site is clearly a necessary precondition of the contractor's performance of his obligations there must be an implied term that the site will be handed over to the contractor within a reasonable time of signing the contract (see, e.g. *Roberts v Bury Commissioners* (1870) and in most cases it is submitted a sufficient degree of uninterrupted and exclusive possession to permit the contractor to carry out his work unimpeded and in the manner of his choice. This must particularly be so when a date for completion is specified in the contract document'

This statement of the law was adopted by Spence in the *Penvidic* case (1975). The learned trial judge was, therefore, in my opinion, clearly right when he found the second breach of contract."

The principle that the contractor is entitled to damages if it is wrongfully excluded from the site or if, as just stated, that possession is interfered with during the course of construction, must be differentiated on the basis of who is doing the interfering, i.e. if it is the owner, damages will follow. In cases where the interference comes from unrelated third parties, then damages do not flow from the employer. This was shown to be the case in *Porter v Tottenham Urban District Council*,¹⁹ where the contractor was stopped from progressing with a temporary road owing to the threats of an adjacent landowner who argued that the contractor was trespassing on his property while attempting to lay a temporary road. Here, the injunction failed but the contractor claimed damages against the owner for the delay caused by the third party's actions. The court held that the claim must fail because there was no implied warranty by the owner against the wrongful interference by any third parties.

A question that occurs from the previous situation was answered in *The Rapid Building Group Ltd v Ealing Family Housing Association Ltd*,²⁰ where the owner agreed to give the contractor possession but was unable to do so because of squatters on a portion of the site. The employer commenced eviction proceedings and the squatters were ultimately evicted resulting in an approximate nineteen-day delay in the contractor's occupancy of the whole site. The court dealt with the issue of whether the employers were in breach and held that:

"The learned judge found that the defendants were in breach of clause 21; he further found that the breach caused appreciable delay on the part of the plaintiffs. In my judgment, both those findings must stand. The first was plainly right; [clause 21 provides that on the date stated in the appendix] possession 'shall be given' to the contractor, and it seems to me unarguably that there was a clear breach of that term by the failure of the defendants, for whatever reason, to remove these squatters until an appreciable time after they had promised to give the plaintiffs possession of the site ... I would hold with the judge that there was a clear breach of the express term and that there is nothing inconsistent in that finding with ... *Porter v Tottenham Urban District Council* (1915), a case in which, in rather similar circumstances, but where there was no clause 21, this court held that there was no implied warranty that the site should be completely clear; nor is it in any way inconsistent with the case of *LRE Engineering Services Ltd v Otto Simon Carves Ltd* (1981), where Robert Goff J, as he then was, had to construe the contractual words 'affording access' – again something that is quite irrelevant to the construction of clause 21 in this case."

¹⁹ [1915] 1 KB 1041.

²⁰ (1984) 29 BLR 5.

Access and possession

An issue, which develops, is whether or not the contractor is entitled to full, undisturbed possession of the site. Many form contracts such as FIDIC provide that:

“The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Contract Data. The right and possession may not be exclusive to the Contractor. If, under the Contract, the Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Specification. However, the Employer may withhold any such right or possession until the Performance Security has been received.”

Thus, many contracts make clear that the possession is not necessarily exclusive but rather dependent upon other provisions and conditions. Accordingly, the extent to which the contractor is entitled to actual undisturbed possession of the site will depend upon the nature of the Works and the circumstances in which the Works are to be carried out. If, for example, the Works encompass an entirely new project on the site then, under most circumstances, the contractor is generally entitled to undisturbed possession of the entire site. But in circumstances where the Works encompass the refurbishment of an existing property the Works will generally have to be carried out while the property is occupied.

It should also be noted that employers frequently retain the right to bring other contractors on site to carry out specific works – even in new projects. However, unless there is an express term of the contract, which provides for “non-exclusive” possession by the contractor, the contractor could exclude other contractors from the site on the basis that their presence is a breach of the implied term of possession.

The employer’s obligation to turn over the site to the contractor generally becomes effective within either a specific time period per the terms of the contract or, failing such a provision, within a reasonable time after the signing of the contract.²¹ This right to possession will also generally continue until completion of the Works and beyond until the contract itself comes to an end. In this regard if the employer legally terminates the contractor then the contractor’s right to occupy the site ends, subject, of course, to a reasonable period of time for the contractor to remove its equipment. The problem arises, however, when there is an unlawful termination of the contract and whether the contractor still has the right to occupy the site.

Site access after completion

Once completion has occurred and the contract has ended, the contractor is generally relieved of further obligations other than corrective work under any existing warranty with the employer. The situation develops where the Works are completed and the project is sold or transferred to another thus raising the issue of whether the employer can assign its right to request performance thereafter by the contractor, and if so, can the employer still grant the contractor access even though the right to do this now vests in the purchaser or assignee. This issue was discussed in *Charlotte Thirty Ltd and Bison v Croker Ltd*,²² where the court held that although the employer had relinquished the power to “personally – key in hand” give admission, this did not mean that the

21 See e.g. *Roberts v Bury Improvement Comrs* (1869–1870) LR 5 CP 310.

22 (1990) 24 ConLR 46.

contractor could not be admitted to the site because the contract that was assigned to the new owner through a “management buy-out” (the “buy-out arrangements”) made it certain that the contractors would be admitted to the site and the employers did not have to perform the actual admission in person, “key in hand”.²³

Site conditions

The question is who has the responsibility for the site being fit for construction. Unless specified in the contract the employer does not warrant that the site is fit for the intended construction or that the contractor can even build the employer’s design on the site.

In the first instance we look at the situation where the site becomes unfit for use through no fault of either party. So, for example, in *Appleby v Myers*,²⁴ the contractor, Appleby, agreed to supply and erect machinery on the defendant’s premises, payment to be on completion. Part of the work had been completed when a fire accidentally broke out on the defendant’s premises, destroying both the premises and the Works. Since neither party was at fault, both parties were excused further performance. There, the court ruled:

“The whole question depends on the true construction of the contract between the two parties. We agree with the court below in thinking that it sufficiently appears that the work which the plaintiff agreed to perform could not be performed unless the defendant’s premises continued in a fit state to enable the plaintiff to perform the work ... [and] that if by any default on the part of the defendants these premises were rendered unfit to receive the work the plaintiff would have had the option to sue the defendants for this default or to treat the contract as rescinded, and sue on a quantum meruit. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit.”

What follows from this is what happens when the underlying soil conditions cause the contractor difficulties. In the early case of *Bottoms v Lord Mayor of York*,²⁵ the contractor, Bottoms, agreed to construct sewerage works but the soil turned out to be unsuitable, causing delay and extra costs. Upon application, the engineer refused a variation and Bottoms commenced proceedings for the extra costs incurred. In this case neither side had carried out soil investigations but the employer had informed Bottoms that its price was so low that he would surely lose money in the type of soil conditions expected. The court held that Bottoms’ claim failed, as the risk of adverse site conditions, whether they be known or latent, is with the contractor.

Unforeseen ground conditions

The issue of who should be responsible for ground conditions – employer or contractor – causes approximately 25 per cent of all construction and engineering project delays.²⁶

²³ In this regard see *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd*; *St Martins Property Corporation Ltd and St Martins Property Investments Ltd v Sir Robert McAlpine & Sons Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, (1992) 57 BLR 57 at 68, CA, per Nourse LJ; [1992] BLM (March) 1, [1992] BLM (April) 4.

²⁴ (1866–67) LR 2 CP 651.

²⁵ (1892) 2 Hudson’s Building Contracts, 4th edn, 208.

²⁶ Geoff Brewer, “Examining claims for unforeseen ground conditions”, <http://www.brewerconsulting.co.uk/cases/case.php?id=6194>, 7 March 2007.

The issue is really one of an inconsistent approach and it appears that there is no single rule among the international sets of construction contracts that effectively deals with the discovery of unforeseen ground conditions.

The problem with unforeseen ground conditions starts with who is responsible for the preparation of the initial, or preliminary, geological report on the site. Generally, the employer has investigated the site through its architect or engineer and rarely are the reports completed by the one doing the actual design or construction. For example, along a pipeline route there may be various borings, but not necessarily along the actual route itself, or in a tunnel situation boreholes are placed in a uniform pattern which completely ignores the actual tunnel route until later when the contractor discovers that the bore log bears little resemblance to the actual site conditions discovered. All of this contributes to an uncertainty over the allocation of the risk of adverse ground conditions, which pervades almost all construction contracts.²⁷ If the ground investigation has been carried out in this isolated and superficial manner, it is inevitable that its author will heavily qualify his findings and disclaim responsibility for any errors or omissions in the report. Plainly, in such circumstances, the value of the report will be minimal. Moreover, the contractor may be unable to carry out more extensive site investigations during the period available to prepare his tender.²⁸

The various standard form contracts are not of much assistance in this regard. For example, the FIDIC Red Book (employer's design) and the Yellow Book (contractor's design) use a reasonable foreseeability test as to any physical conditions on the site. Sub-Clause 4.10²⁹ specifically requires that (not later than 28 days prior to the submission of the tender) the:

“Employer shall have made available to the Contractor for its information, (prior to the Base Date) all relevant data in the Employer's possession on sub-surface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Base Date. The Contractor shall be responsible for interpreting all such data. To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):

- (a) the form and nature of the Site, including sub-surface conditions,
- (b) the hydrological and climatic conditions,
- (c) the extent and nature of the work and Goods necessary for the execution and completion of the Works and the remedying of any defects,
- (d) the Laws, procedures and labour practices of the Country, and
- (e) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and other services”.

Sub-Clause 4.11(b) then requires the contractor to have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10. In effect, under these two clauses, the employer is considered to have warranted the accuracy of the information it has provided and the contractor is only responsible for

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ FIDIC Red Book Sub-Clause 4.10 Site Conditions.

interpreting the data provided to it prior to tender. Needless to say, much litigation has ensued as to the interpretation of these provisions as, under Sub-Clause 4.10, the contractor is also deemed to have obtained all necessary information as to risks which may influence or affect its tender for the Works. The contractor is also deemed to have inspected and examined the site and reviewed all other available information. The issue, thus, becomes whether any such investigation was practical and/or required taking into account the costs and additional time necessary.

Sub-Clause 4.12 then sets out the allocation of risk between the parties. The employer carries the risk of physical conditions that could not have reasonably been foreseen by an experienced contractor at the date of the tender. Physical conditions are defined as both natural and man-made physical conditions and other physical obstructions and pollutants. This follows the well-established Clause 12 provisions of the ICE forms of contract. The use of the term “reasonable” creates difficulty in itself. Contractors will frequently argue that if the engineer’s design shows that the engineer did not envisage particular physical conditions, there is no reason why an experienced contractor should have foreseen them. Arguments will also be made concerning whether the “reasonable foreseeability” should attach to events which would be very likely to occur in the circumstances, or should apply only to very remote occurrences.³⁰

Obviously, a contractor cannot have some “inkling” of problems, leave them until discovered and then claim “unforeseen ground conditions”. The issue being what was “unforeseen” as against what was “unforeseeable” and, in particular, what was “unforeseeable” to an experienced contractor. By definition, however, the contractor will remain liable for all ground conditions encountered unless he can show that, no matter what investigations had been carried out, the conditions would not have been discovered until the Works were commenced.³¹

It should be noted that many, if not most, “unforeseen” ground conditions exist because the initial investigation of the ground did not either probe deeply enough or search out exact areas where the proposed construction was to occur, thus preventing a proper assessment of the existing situation on the site.

While the FIDIC Red and Yellow Books oblige the employer to make available to the tendering contractors all information in its possession concerning the site conditions, the FIDIC Silver Book, known as a “turnkey” contract, requires that the contractor be responsible for “verifying”, as well as interpreting, the data provided to him. Thus, under this particular contract, the employer is providing no warranty as to the sufficiency or completeness of the site information provided. Accordingly, under the terms of the Silver Book, the risk of adverse ground conditions ultimately lies solely with the contractor. To further establish this position its Sub-Clause 4.12 provides a statement in which ostensibly the contractor accepts responsibility for all problems arising and incurred costs in completing the Works.

In addition to the FIDIC contracts, Clause 12 of the ICE 6th Edition tries to reimburse the contractor for any loss caused by ground conditions that could not have been reasonably foreseen. Clause 12 also sets out a mechanism where, if the engineer feels that the ground conditions could not reasonably have been foreseen at the time of tender by an “experienced contractor,” the contractor will be reimbursed the cost of any extra works and, if necessary, granted an extension of time to complete the Works.

³⁰ *Ibid.*

³¹ *Ibid.*

Then, in the ICE 7th Edition the issue of ambiguity in Clause 11 of the ICE 6th Edition is dealt with. Clause 11 in the ICE 6th Edition provided that “the employer shall be deemed to have made available to the contractor before the submission of the tender all information on the nature of the ground”. The old Clause 11.2 then went on to deem that the contractor has “inspected and examined” both the site and the documents provided by the employer and has satisfied itself, so far as is practicable and reasonable, as to the form and nature of the ground.

The problem with this old Clause 11 of the ICE 6th Edition was that employers used the ambiguous wording to protect their position against the discovery of unforeseen ground conditions by withholding information and subsequently claiming that the contractor should be deemed to base its tender on such information, despite the fact that it had never been seen by the contractor.³² The ICE 7th Edition changed this by stating that a contractor will base its tender only on the documents that have been provided by the employer. Thus, an employer can no longer try to protect itself against the discovery of unforeseen ground conditions by withholding documentation from a contractor.

Contract provisions for unexpected ground conditions

In *C Bryant & Son Ltd vs. Birmingham Hospital Saturday Fund*,³³ the contract between the parties contained a clause, which stated:

“... the quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities, which bills, unless otherwise stated shall be deemed to have been prepared in accordance with the standard method of measurement last before issued by the Chartered Surveyors’ Institution.”

Here, the architect was found to have known that the site contained rock but failed to show this on any of the plans given to the contractor, nor was it referred to in the bills of quantities. However, the “Standard Method of Measurement” required that, where practicable, the nature of the soil should be described and attention drawn to any existing trial holes, and that excavation in rock should be given separately. The bills referred the contractor to the drawings, a block plan and the site, to satisfy himself as to the local conditions and the full extent and nature of the operations, but contained no separate item for the excavation of rock. When the contractor incurred further costs as a result of this unforeseen ground condition, the court held that the contractor was entitled to treat the excavation in rock as an extra and to be paid accordingly plus profit.

There are situations where the contract does not contain actual language as to unforeseen ground conditions, but nevertheless the documents may raise the issue that the description of the ground conditions are warranted to be as described and that this is an implied term of the contract. This was the case in *Bacal Construction (Midlands) Ltd v Northampton Development Corporation*,³⁴ where Bacal, as part of the contract documents, submitted sub-structure designs and detailed priced bills of quantities for six blocks of dwellings and ancillary works all with selected foundation conditions.

Here, the borehole information given by Northampton indicated that the site was a mixture of Northamptonshire sand and Upper Lias clay and, based upon these

³² See e.g. *James Duckworth – Andrew M. Jackson Solicitors Contract Journal*, 14 February 2007.

³³ [1938] 1 All ER 503.

³⁴ [1976] 8 BLR 88.

conditions, the foundations were designed (it should be noted that, had the borehole information been correct, the designs would have been satisfactory). However, during construction, tufa was discovered in several areas of the site necessitating the redesign of the foundations with attendant extra work. Bacal claimed that there had been a breach of an implied term or warranty by Northampton and damages were claimed. The court agreed and held that there was an implied term or warranty as claimed by Bacal entitling them to damages for its breach and stated:

“Bacal have submitted that there are strong commercial reasons for implying such a term or warranty in the contract as they have suggested. First, before designing the foundations for any building it is essential to know the nature of the soil conditions. Secondly, where the contract is for a comprehensive development of the kind here in question the contractor must know the soil conditions at the site of each projected block in order to be able to plan his timetable and to estimate his requirements for materials. These are matters which relate directly to the contract price. Thirdly, if the work is interrupted or delayed by unforeseen complications, the contractor is unlikely to be able to complete his contract in time. Clause 22 of the contract requires the contractor to pay or allow liquidated damages in such an event. The corporation have in fact retained a very substantial sum by way of liquidated damages to which they claim to be entitled because Bacal did not complete the contract within 65 weeks. Clause 23 of the contract makes provision for extension of the contract time in certain circumstances but the only provision of that clause which might possibly apply to the present case is subparagraph (c), which permits an extension of time if by reason of the architects’ instructions issued under clause 1(2), clause 11(1) or clause 21(2) the completion of the works has been delayed beyond the due completion date. The delay resulting from the discovery of tufa was not occasioned by any instructions issued by the architect and clause 1(2) cannot, in my opinion apply. Clause 11(1) can only apply where the architect has issued instructions requiring a variation or he has sanctioned a variation made by the contractor otherwise than pursuant to such an instruction. That sub-clause cannot apply in the present case if upon the true construction of clause 1(4) we are not concerned with any variation. Clause 21(2) only applies if the architect has issued an instruction postponing any work to be executed under the contract, which is not the present case. Accordingly in my opinion subparagraph (c) of clause 23 can have no application in the present case. The learned judge accepted Bacal’s argument and held that the corporation was liable on an implied term of warranty. I agree with him ...”

In the more recent case of *Van Oord UK Ltd v Allseas UK Ltd*,³⁵ the claimants brought disruption and prolongation claims arising out of the onshore laying of a gas export pipeline in the Shetland Islands. The contract provided that should the claimants encounter subsurface conditions different from those described in the contract documents – which an experienced contractor could not reasonably have been expected to foresee following an examination of those documents and data, and which substantially modified the scope of work, price or completion date – then notice should be given. In finding against the claimants (who had relied almost entirely on a probe survey which was not a contract document, and also failed to give proper notice), Mr Justice Coulson referred to the judgment of Mr Justice Akenhead in *Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar*,³⁶ as upheld by the Court of Appeal in 2015,³⁷ in which Mr Justice Akenhead rejected in the following terms the contention that, if the ground conditions were not expressly

³⁵ [2015] EWHC 3074 (TCC).

³⁶ [2014] EWHC 1028 (TCC).

³⁷ [2015] EWCA Civ 712.

identified in the geotechnical information provided pre-contract, the claimants had a claim for unforeseen ground conditions:

“I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise. In so doing not only do I accept the approach adumbrated by Mr Hall [the defendant’s geotechnical expert] in evidence but also I adopt what seems to me to be simple common sense by any contractor in this field.”³⁸

Misrepresentation of the site conditions

It is a fine line between comments about the condition of the site, or even documents reflecting the site conditions, which can easily drift off into the realm of negligent misrepresentation or even actual misrepresentation. In *Morrison-Knudsen International Co Inc v Commonwealth of Australia*,³⁹ the contractor claimed that the pre-tender information given it by the employer was:

“...as to the soil and its contents at the site of the proposed work was false ... inaccurate and misleading ... the clays at the site, contrary to that information, contained large quantities of cobbles”

The court held that:

“The basic information in the site information document appears to have been the result of much highly technical effort on the part of (the employer). It was information which the (contractors) had neither the time nor the opportunity to obtain for themselves. It might even be doubted whether they could be expected to obtain it by their own efforts as a potential or actual tenderer. But it was indispensable information if a judgment were to be formed as to the extent of the work to be done”

In the *Morrison-Knudsen* case the court was unable to preliminarily determine whether actual misrepresentation had taken place but was content to draw the conclusion that such information was indispensable at the pre-tender stage. But what if actual misrepresentation existed? This was dealt with in *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd*.⁴⁰ Although not a direct construction case, it is still relevant as there Ogden wanted to hire barges for use in connection with excavation work. During the negotiation phase Howard Marine’s manager misrepresented the barges’ deadweight by stating that the payload of each barge was 1,600 tonnes when in fact it was only 1,055 tonnes. The misstatement was based upon his incorrect recollection of a figure given in Lloyd’s Register and while he could have found the correct weight from Howard Marine’s own shipping documents, he chose not to do so. In this regard the court held that Howard Marine was liable in damages for the misrepresentation under section 2(1) of the Misrepresentation Act 1967 and stated:

“The first question then is whether [Howard] would be liable in damages in respect of [their manager’s] misrepresentation if it had been made fraudulently, that is to say, if he had known that it was untrue. An affirmative answer to that question is inescapable. The judge found in terms that what [the manager] said about the capacity of the barges was said with the object of getting the hire contract for the respondents, in other words with the intention that it should be acted on. This was clearly right. Equally clearly the misrepresentation was

³⁸ *Obrascon Huarte Lain SA* (n 10) at 215.

³⁹ High Court of Australia (1972) 13 BLR 114.

⁴⁰ (1977) 9 BLR 34.

in fact acted on by [Ogden]. It follows, therefore, on the plain language of the statute that, although there was no allegation of fraud, [the manager] must be liable unless they proved that [Howard] had reasonable ground to believe what he said about the barges' capacity.

It is unfortunate that the learned judge never directed his mind to the question whether [the manager] had any reasonable ground for his belief. The question he asked himself, in considering liability under the Misrepresentation Act 1967, was whether the innocent misrepresentation was negligent. He concluded that if [the manager] had given the inaccurate information in the course of the April telephone conversations he would have been negligent to do so but that in the circumstances obtaining at the Otley interview in July there was no negligence. I take it that he meant by this that on the earlier occasions the circumstances were such that he would have been under a duty to check the accuracy of his information, but on the later occasions he was exempt from any such duty. I appreciate the basis of this distinction, but it seems to me. With respect, quite irrelevant to any question of liability under the statute. If the representee proves a misrepresentation which, if fraudulent, would have sounded in damages, the onus passes immediately to the representor to prove that he had reasonable ground to believe the facts represented. In other words the liability of the representor does not depend upon his being under a duty of care the extent of which may vary according to the circumstances in which the representation is made. In the course of negotiations leading to a contract the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe."

An issue arises as to whether it is possible to draft the contract so that it is the contractor's responsibility to find any misrepresentations. This was dealt with in *S Pearson & Son Ltd v Dublin Corporation*.⁴¹ In that case the plans prepared by the corporation's engineers misrepresented a non-existing wall as existing and based upon this the contractor tendered a lower price. After discovering this misrepresentation later, the plans were revised and the contractor incurred substantial additional costs. The cleverly drafted clause, that was in issue, read:

"... the contractor is to satisfy himself as to ... all ... things so far as they may have any connection with the works in the contract, and to obtain his own information on all matters which can in any way influence his tender."

The court found for the contractor and wrote:

"It seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them ... [The corporation say] that, though a principal is liable for the fraudulent representation of his agent, yet that rule only applies where the representation has in fact been made by the agent. I cannot accept that contention. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge."

The site under the Housing Grants Act

Under the Housing Grants Act ("HGCRA 1996"),⁴² the site is defined in terms of what it is not rather than what it is. The Act thus excludes contracts for the assembly, installation or demolition of plant or machinery, and supporting steelwork, on a site where the primary activity is one of a list of excluded activities, such as nuclear processing, power generation, or the production of chemicals and pharmaceuticals.

⁴¹ [1907] AC 351.

⁴² Housing Grants, Construction and Regeneration Act 1996.

The HCGRA backs into this definition of site due to the fact that it first defines the construction agreement as one that carries out any one of three named functions – one of those being “construction operations”. These “construction operations”, which are included in the definition, are then further broadly set out in section 105(1) of the Act, which is then modified by section 105(2), which sets out the activities that are excluded from the scope of the Act and from adjudication itself. For a greater discussion of adjudication under the Act, see the chapter on Adjudication *infra*.

Because of this rather convoluted approach one must first make a determination of what “the site” is before making any determination as to its prime activity. In addition to this a determination must also be made of what the “plant” is in relation to the “site”. Frequently, parties who are seeking to prevent the use of the Act put forth the argument that, where a particular excluded activity is being done on the “site”, particularly if the activity is small and is being carried out on just a portion of the larger site, the activity should be excluded and, thus, fall within the exception to the Act. Public policy would seem to dictate that it is best to include, rather than exclude, any such operations and to uphold the Act wherever possible. In this regard, the courts have tended to review the entirety of the project and the Works in an attempt to uphold the Act.

In *ABB Power Construction Limited v Norwest Holst Engineering Limited*,⁴³ the court observed that it was necessary to identify the site, or location of the activity, in question to determine the primary, or dominant, activity since the activities listed in section 105(2) may be ancillary to the principal activity. In doing this the court was cognisant of the two specific objectives of the Act which are to quickly and provisionally resolve disputes and, thus, to also regulate interim payments.

Then, in *ABB Zantingh Limited v Zedal Building Services Limited*,⁴⁴ the court was faced with diesel-powered generation stations which were built on small distinct areas (each was surrounded by its own security fence). When the defendant, who installed the field wiring for the stations, sought adjudication the claimant challenged the adjudicator’s jurisdiction on the ground that the contract between the parties was not a construction contract as defined by the HGCRA 1996 and sought a declaration from the court to such effect.

The court held that it was necessary first to look at the nature of the whole site and determine what the primary purpose of the whole site was, which in this situation was a large printing plant operation. Thus, the primary purpose was printing and not power generation. The claimant’s application failed. Then, in *Conor Engineering Ltd v Les Constructions Industrielle de la Méditerranée*,⁴⁵ the court was faced with an incineration plant which generated a small amount of electricity. There, the parties agreed that the “site” meant the whole of the incineration site and could not be limited to the area where the claimant’s operations were performed.

Strengthening this concept the Scottish court moved in the same direction, as is seen in *Mitsui Babcock Energy Services Ltd*,⁴⁶ where the assembly contract was for a steam-generating boiler plant used to produce steam for a petrochemical complex. The plant was constructed on a site, which was under ownership from the complex itself and, despite this, the court found that the contract fell within the exception of section 105(2).

⁴³ (2001) 17 Const LJ 246.

⁴⁴ [2001] BLR 66, TCC.

⁴⁵ [2004] BLR 212, TCC.

⁴⁶ Ct of Sess, 13 June 2001, unreported.

Unfortunately, some contracts dealing with the exact same project may be governed by the Act while others are not. This was reviewed in *Comsite Projects Ltd v Andritz AG*,⁴⁷ where, in connection with one project, there were two different subcontracts between the parties: one for the installation of electrical wiring and the other for building works. Here, the problem first identified in *ABB Power v Norwest Holst*⁴⁸ seemed to be unavoidable, but looking to resolve the potential conflict, the court looked broadly instead to the actual nature of the work and found that it did not fall within the exception of section 105(2). It should be noted that in this case – in which the scope of section 105(2) of the HGCRA 1996 had been construed broadly – was not followed in *North Midland Construction Plc v AE&E Lentjes UK Ltd (formerly Lurgi (UK) Ltd)*,⁴⁹ in which Mr Justice Ramsey held that, in circumstances where section 105(2) had intentionally been drafted in terms of specific limited exclusions, a narrower approach to its construction – such as that adopted in *Palmers Ltd v ABB Power Construction Ltd*⁵⁰ – was to be preferred, so as to exclude only particular operations from the scope of the 1996 Act. The result of this was that a contractor's operations might fall within the exclusion, and outside of the definition of a construction operation, whilst a sub-contractor providing building, foundation, or painting for that sub-contractor's work would come within the definition of a construction operation.

Employer responsibility regarding possession

The employer's responsibilities include those mentioned above, such as giving possession of the site in a timely fashion to the contractor. Indeed, every building contract impliedly gives possession of the site to the contractor and that this should be done in sufficient time for it to complete its obligations under the contract. So, for example, in *Freemen & Son v Hensler*,⁵¹ discussed earlier, under a contract dated 4 July the contractor was to demolish old houses and to erect new ones within six months. Under its terms, all the brickwork for the new houses was to be built up simultaneously with no part being raised more than five feet higher than the remainder. At the defendant's request, the plaintiff agreed to a fortnight's delay from 4 July, but it was not until some weeks after the expiry of that time that possession of part of the site was given. It was nearly five months before the plaintiff got possession of the whole site. The plaintiff claimed damages for breach of contract and the court held that it was an implied term of the contract that the contractor would be given possession of the site immediately. The agreement between the parties had waived that obligation and substituted a reasonable time. As possession had not been given within a reasonable time, the plaintiff was entitled to damages for the loss, which he had sustained by reason of the delay. The court wrote that:

“The contract clearly involves that the building owner shall be in a position to hand over the whole site to the builder immediately upon the making of the contract. There is an implied undertaking on the part of the building owner, who has contracted for the buildings to be placed by the [contractor] on his land, that he will hand over the land for the purpose of allowing the [contractor] to do that which he has bound himself to do.”

47 (2004) 20 Const LJ 24, TCC.

48 *Supra*.

49 [2009] EWHC 1371 (TCC).

50 [1999] 8 WLUK 76.

51 (1900) 64 JP 260.

CHAPTER 5

The subcontractor

Types of subcontract

There are various different subcontracts depending upon the location and type of contract being used. Under the JCT and/or FIDIC standard forms, for example, there are different types of subcontractor:

- (1) Nominated subcontractor – here the employer nominates, selects or approves who will perform a subcontract or specialist trade role. The nominated subcontractor then enters into a subcontract with the main contractor and, thus, the employer retains some control over the selection of specialist contractor or supplier without necessarily becoming directly involved in detailed contractual arrangements with the specialist.
- (2) Domestic subcontractor (similar to a named subcontractor) – this is where the employer plays no part other than simply giving consent when required under the terms of the main contract. The appointment of the subcontractor is treated as something entirely for the benefit of the main contractor and, thus, a purely “domestic matter” and hence the name.

There is an additional distinction that comes about from the Standard Building Contract Sub-Contract 2005 regarding nominated subcontractors. Under this contract, there is what is referred to as subletting with consent¹ and subletting to a listed subcontractor,² which is already acceptable to the employer.

It should be noted that while the main contractor delegates performance of a part of the Works to its domestic subcontractors, the main contractor still has full responsibility with respect to the Works and the payments to the subcontractor and the employer do not underwrite the risk of subcontractor default.

A further form of subcontract is known as a back-to-back subcontract, in which the obligations of the main contractor are transferred either partially or fully to the subcontractor. Thus the subcontractor is bound to the main contractor as the main contractor is bound to the employer and, accordingly, guarantees the execution of its performance in the same way and under the same conditions to which the contractor is obliged towards the employer.

¹ JCT SBC 2005, cl 3.7.

² JCT SBC 2005, cl 3.7.1.

Relations with the contractor

The subcontractor's relationship with the contractor is the same as that enjoyed between the contractor and the employer, i.e. based upon the contract the obligations of the employer to the contractor are the same as those owed by the contractor to the subcontractor – access to the site, provision of electricity and water, not to impede performance, and related matters. However, unless the parties agree otherwise, the provisions of the main contract between the contractor and the employer are not automatically a part of the subcontractor's agreement and this is so even if the subcontractor has agreed to perform pursuant to the terms and conditions of the main contract. Thus, in the Canadian case *Smith and Montgomery v Johnson Bros Co Ltd*,³ the subcontractor agreed to perform its tunnelling subcontract "according to the dimensions and specifications as set forth in the contract between the City of Hamilton and the [main contractor]" and the issue became whether agreement with this term of the main contract also incorporated all of the main contract's terms and conditions into the subcontract. The Ontario High Court thought not, and wrote:

"It is, of course well established that plans and specifications, if not contained in a contract itself but referred to therein or annexed thereto, must be construed therewith when identified. Wherever the plans and specifications are referred to for a specific purpose only, however, they become part of the contract for that purpose only and should be treated as irrelevant for all other purposes. The covenant of the plaintiffs to do the tunnelling 'according to the dimensions and specifications as set forth in the contract between the City of Hamilton and the [Johnson company]' would undoubtedly require the plaintiffs to dig out a tunnel 10ft 6in by 12ft 6in, in dimensions, and any other provision affecting the physical characteristics of such tunnel no doubt would be applicable to and binding upon the plaintiffs, but I am not prepared to hold that the reference to the specifications as expressed in this context imports into the contract between the plaintiffs and the defendant, so as to make binding upon the plaintiff-subcontractors, who operate in a very small way, such sweeping and extraordinary powers as are exercisable by the city engineer. Only that part of the general specifications is to be read into the contract in question that relates to the specific purpose for which the same were referred to. Counsel have been unable to refer me to any authority in which all the general provisions of specifications forming part of a main contract became part of a subcontract, unless the latter by its terms made very clear the intention of the parties that all terms and provisions of the principal contract were to form part of the agreement between the principal contractor and the subcontractor. The general clauses under which the city engineer ordered a stoppage of the work and a change in the method of procedure are more in the nature of such provisions as one is likely to find in specifications furnished for the guidance of bidders for the original contract. It does not seem to me to be clear from the situation and the circumstances of the parties that it was their intention that, except in the restricted sense already mentioned, the specifications forming part of the original contract should be a part of the subcontract."

Employer insolvency and payments

The courts' decisions in this regard generally look to the underlying contract between the contractor and the subcontractor to form the basis for the responsibility of the subcontractor and do not automatically fall back to the main contract. In *A Davies & Co (Shopfitters) Ltd v William Old Ltd*,⁴ the defendant main contractor's contract with the employer allowed for the architect to nominate subcontractors. The plaintiff

³ [1954] 1 DLR 392.

⁴ (1969) 67 LGR 395.

tendered for this work and the architect instructed the defendant to accept, which they did, and then placed an order with the plaintiff using their standard form that contained a “pay when paid” clause. Thereafter, the plaintiffs performed but, unfortunately, the employer became insolvent before paying for all the work. The issue before the court was whether the plaintiffs should be paid for their work or if they were subject to the “pay when paid” clause. The court felt that the underlying contract between the contractor and the subcontractor was formed on the basis of the defendant’s pre-printed conditions, which had been accepted by the plaintiff. Accordingly, the court held that the defendant was required to pay the plaintiff for the work done only to the extent that the contractor itself had been paid.

Indeed, the courts have always had a reluctance to allow a subcontractor to collect payment directly from the employer. Where a subcontractor claimed that orders given by the employer were “extras” to its contract with the main contractor and claimed this amounted to a “collateral” contract, the court in *Eccles v Southern*⁵ disagreed and found that it had not sufficiently proved that the “extra” work was not included as part of the main contract and, thus, failed in its attempt to circumvent the subcontractor–contractor agreement. However, the issue of payments directly from the employer to the subcontractor is a lingering one. The argument is that such agreements are worthwhile, as they can prevent delay in performance if, for example, the main contractor becomes insolvent and/or otherwise fails to pay the subcontractor promptly. For without such provisions to this effect in the main contract, the employer has no right to direct subcontractor payments. To make matters worse, in *Re Holt ex p Gray*,⁶ the court found that not only could such payments not be made without an express clause in the main contract, but also that, if the main contractor defaults (and becomes insolvent) and one subcontractor receives payment in full (under a direct payment scheme), this is an unfair preference over other creditors and also over other subcontractors who do not have the benefit of such an arrangement. Where an employer paid a supplier of materials immediately after the contractor had gone bankrupt owing money to the supplier, it was held that the employer must pay the money again to the contractor’s trustee in bankruptcy, so that it would be “available to all the contractor’s creditors” and would still remain liable to the main contractor for the same work.

This concept was further amplified in *B Mullen & Sons (Contractors) Ltd v Ross*,⁷ where the court took the position that, even if the contract allowed for direct payments from the employer to the subcontractors, this would be invalid as being in conflict with the general principles of insolvency laws.

Default by subcontractor

Delay issues

Delay due to defective work becomes an issue when the subcontractor’s work is defective but is discovered only after apparent completion. So, where the subcontractor performs, hands over to the contractor and then a defect is found, which results in the subcontractor returning to the site to correct the defect, does this amount to a delay

⁵ [1861] 3 F&F 142, NP.

⁶ (1888) 58 LJQB 5.

⁷ (1996) 54 ConLR 163.

that can be claimed by the main contractor? Generally, delay cannot be claimed against a subcontractor if, by the subcontract date, it has reached sufficient completion so that the contractor is able to take over – this, despite any of the work being defective and any extra time taken for the subcontractor to return and fix the defective work, cannot be claimed by the main contractor as a delay.

This situation was faced by the House of Lords in *City of Westminster v J Jarvis & Sons Ltd and Peter Lind Ltd*.⁸ There, Jarvis was to construct a multi-storey car park with flats, offices, showrooms and ancillary works for the City of Westminster and Lind was the nominated subcontractor for the piling work. Lind completed the work per the completion date and left the site. Weeks later it was discovered that its work had been defective so it came back to the site to correct the defective work causing a delay to the main contract works of some 21½ weeks. As a result, Jarvis sought an extension of time on the main contract. The House of Lords was faced with what was a “delay” in this situation as the subcontractor’s works had apparently been completed by its due date. The House of Lords felt that “delay”, within the meaning of the contract, would occur only if, by the subcontract completion date, the subcontractor was not able to hand over to the main contractor – which was not the case here and after pointing out that:

“... ‘delay’ does not, as the appellant at one time contended, mean ‘sloth’ or ‘dilatoriness’ on the part of the sub-contractor. There are at least two good reasons against this meaning; in the first place, it would put an impossible burden on the architect if he were required to form an opinion that the sub-contractor had not worked as fast or diligently as he might have done, and to measure the extent to which time could have been saved had he done so. This part of the contract would, in practice, become unworkable. And, secondly, it is contractually irrelevant whether the sub-contractor could have worked faster: what matters is whether he has done what he agreed to do in the contractual time. If he has, it does not matter, for the purposes of the contract, whether he achieved his target by leisurely methods; if he has not, it does not matter with what feverish energy he set about his work.”

Lord Wilberforce then wrote:

“... It is only necessary to point to the fact that if the defects in the piles had been discovered before the sub-contract completion date, and work had been at once put in hand to remedy them – thereby producing a similar period of delay in the completion of the main contract, the clause would, it seems, have applied, but it does not do so if the work was ‘complete’ (though defective) on that same date so that the contractor could take over. One must set against this the advantage that, if the sub-contract work is apparently completed and handed over, and some defects appear very much later, but before the contract date, as they might in a large contract, this would not, on the employer’s construction, be a case of delay, though it might be so on the subcontractor’s. But even so the first type of difficulty is a very grave defect and a serious reflection on the clause: indeed, I cannot believe that the professional body, realising how defective this clause is, will allow it to remain in its present form. But in my opinion, though it is never agreeable to have to choose the lesser of two incongruities, we have to do so here and I find the employer’s version qualifies for this not very flattering description.

So finally, how does this construction fit the facts? It is common ground that the subcontractor ‘purported to complete’ the piling works by 20 June 1966, and left the site. We know, too, that ‘further construction work on the site was then carried out by the contractor’. On 13 July 1966, the architect wrote to the contractor a letter in which he said that ‘further to the completion of the [piling] work’ the sub-contractor might request the release of retention money against a guarantee. He did, it is true, go on to record suspicion

⁸ (1970) 7 BLR 64.

as to the soundness of the piles and to suggest an increase in the guarantee, but the letter was consistent only with his belief that the sub-contract work was ‘completed’. The sub-contractor had recorded that this was its position on 9 June 1966.

On 16 August 1966, after defects had been revealed, the architect wrote again to the contractor stating that ‘as the piling works ... have not been completed to our satisfaction within the period of the sub-contract’ they certified that they ought reasonably to have been completed within that time. This I do not consider alters the view of the matter which all concerned held on 20 June 1966, that the work was completed - though it might turn out to be defective: it is saying no more than that it is now seen to be defective and that the architect was not satisfied with it. The learned judge made no explicit finding but his judgment proceeded on the basis that the sub-contractor had achieved apparent completion, and handed over to the contractor on 20 June 1966. I think that this was correct in fact and in law.”

Whilst defective work by a subcontractor can lead to a delay in the main contract works, leading to a request for an extension of time, the recent case of *Carillion Construction Ltd v Emcor Engineering Services Ltd & Another*⁹ concerned delays in the construction of the Rolls Building in London – the home of the Technology and Construction Court, as well as the Chancery Division, the Admiralty and Commercial Courts – for which Carillion, the main contractor, blamed its subcontractors, including Emcor. A preliminary issue arose, namely whether – assuming Emcor was entitled to an extension of time – that extension should (i) run contiguously from the end of the current period for completion, so as to provide an aggregate period within which Emcor’s works should be completed (as contended for by Emcor); or (ii) fix further periods in which Emcor could undertake its subcontract works, which were not necessarily contiguous but reflected the period for which it had in fact been delayed (as contended for by Carillion).

The contract in question was based on the standard form of domestic subcontract DOM/2 (1981 edition). At first instance, Miss Recorder Nerys Jefford QC agreed with Emcor, ruling that the natural meaning of clause 11.3 of the contract was that any such extension would be added contiguously to the end of the current period for completion, so that it started on what was previously the due date for completion. The Court of Appeal agreed. It accepted that clause 11.3 might in some situations lead to an unsatisfactory result but stated that such anomalies were insufficient to displace the natural interpretation of clause 11.3, which was practicable, workable and in accordance with commercial common sense.

Defect issues

In the previous example the subcontractor’s work was defective and in those situations, aside from delay issues previously covered, the contractor has liability directly to the employer and will have a corresponding claim against the subcontractor. The employer may also have a direct action against the contractor either in contract, if a collateral warranty has been executed, or perhaps even in tort for negligence. In the House of Lords case of *Independent Broadcasting Authority v EMI Electronics and BICC Construction Ltd*,¹⁰ the main contractor contracted with the subcontractor for the erection of a 1,250-ft-high television mast, which was handed over in November 1966 and, unfortunately, collapsed in March 1969. The employer commenced proceedings

⁹ [2017] EWCA Civ 65.

¹⁰ (1980) 14 BLR 1.

against the main contractor, who immediately sued the subcontractor. At trial the court held that the cause of the collapse was primarily vortex shedding and, secondarily, asymmetric ice loading and that the subcontractor, who had designed the mast, was negligent in not having adequately taken these factors into account. After review Lord Fraser of Tullybelton wrote:

“... The contract was constituted by EMI’s tender and IBA’s acceptance. The main part of the tender consisted of a quotation for work which, as I have said, included the design of the mast. What IBA accepted was ‘your quotation’. Responsibility by EMI for the design was thus in my opinion, expressly made part of their contract with IBA. Moreover EMI’s references to ‘our’ line diagram drawing tend to show that they were putting forward the drawing as their own. The tender and acceptance superseded the original invitation to tender which I regard merely as part of the prior communings leading up to the contract. I therefore would agree with O’Connor J and with the Court of Appeal, both of whom held EMI were under a contractual obligation to IBA in respect of the design of the mast as well as of its supply and delivery.

If the terms of the contract alone had left room for doubt about that, I think that in a contract of this nature a condition would have been implied to the effect that EMI had accepted some responsibility for the quality of the mast, including its design, and possibly also for its fitness for the purpose for which it was intended. The extent of the responsibility was not fully explored in argument, and, having regard to the decision on negligence in the design, it does not require to be decided. It is now well recognised that in a building contract for work and materials a term is normally implied that the main contractor will accept responsibility to his employer for materials provided by nominated sub-contractors. The reason for the presumption is the practical convenience of having a chain of contractual liability from the employer to the main contractor and from the main contractor to the sub-contractor – see *Young & Marten Ltd v McManus Childs Ltd* (1969). Of course, as Lord Reid pointed out in that case, ‘No warranty ought to be implied in a contract unless it is in all circumstances reasonable’. In most cases the implication will work reasonably because if the main contractor is liable to the employer for defective material, he will generally have a right of redress against the person from whom he bought the material. In the present case it is accepted by BIC that, if EMI are liable in damages to IBA for the design of the mast, then BIC will be liable in turn to EMI. Accordingly, the principle that was applied in *Young & Marten Ltd* in respect of materials, ought in my opinion to be applied here in respect of the complete structure, including its design. Although EMI had no specialist knowledge of mast design, and although IBA knew that and did not rely on their skill to any extent for the design, I see nothing unreasonable in holding that EMI are responsible to IBA for the design seeing that they can in turn recover from BIC who did the actual designing. On the other hand it would seem to be very improbable that IBA would have entered into a contract of this magnitude and this degree of risk without providing for some right of recourse against the principal contractor or the sub-contractors for defects of design.”

Further, Lord Scarman added that the extent of the obligation owed should be determined as a matter of construction of the contract and that, in the absence of a clear, contractual indication to the contrary, he saw no reason why one who, in the course of his business, contracts to design, supply and erect a television aerial mast is not under an obligation to ensure that it is reasonably fit for the purpose for which he knows it is intended to be used. He then wrote:

“... The Court of Appeal held that this was the contractual obligation in this case, and I agree with them. The critical question of fact is whether he for whom the mast was designed relied upon the skill of the supplier (i.e. his or his subcontractor’s skill) to design and supply a mast fit for the known purpose for which it was required.

Counsel for the appellants, however, submitted that, where a design, as in this case, requires the exercise of professional skill, the obligation is no more than to exercise the care and skill of the ordinarily competent member of the profession. Although it might

be negligence today for a constructional engineer not to realise the danger to a cylindrical mast of the combined forces of vortex shedding (with lock-on) and asymmetric ice loading of the stays, he submitted that it would not have been negligence before the collapse of this mast: for the danger was not then appreciated by the profession. For the purpose of the argument, I will assume (contrary to my view) that there was no negligence in the design of the mast, in that the profession was at that time unaware of the danger. However, I do not accept that the design obligation of the supplier of an article is to be equated with the obligation of a professional man in the practice of his profession. In *Samuels v Davis* (1943), the Court of Appeal held that, where a dentist undertakes for reward to make a denture for a patient, it is an implied term of the contract that the denture will be reasonably fit for its intended purpose. I would quote two passages from the judgment of du Parcq LJ:

‘... if someone goes to a professional man ... and says: “Will you make me something which will fit a particular part of my body?” ... and the professional gentleman says: “Yes,” without qualification, he is then warranting that when he has made the article it will fit the part of the body in question.’

And he added:

‘If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered.’
I believe the distinction drawn by du Parq LJ to be a sound one.”

Problems with nominated subcontractors

Problems with nominated subcontractors can vary – of particular interest are situations where the subcontractor repudiates the subcontract and the issue becomes whether the employer is under any duty to renominate. When a nominated subcontractor leaves in the middle of its contract the employer must renominate and, thus, is responsible for any damages or other loss arising from any delay in renomination.¹¹ However, the question arises as to what happens if the nominated subcontractor does no work at all. Is the contractor required, or entitled, to do the nominated work itself? This issue was brought to light in the House of Lords case of *North-West Metropolitan Regional Hospital Board v TA Bickerton & Son Ltd*.¹² Here, Bickerton, as the main contractor, contracted with the Hospital Board, as employer, to construct buildings at their hospital. The employer put out for tender bills of quantities and drawings. With regard to the greater part of the work the bills were detailed and the contractor filled in its prices. But certain parts of the work were reserved for subcontractors to be nominated by the employer. With regard to these parts no details were given and sums, known as “prime cost sums”, were inserted by the employer as estimates of what those parts were likely to cost. Thus, the tendering contractor had no concern, either with the details of this work or the price to be paid for it. The work was to be part of the contract work, so the contractor’s tender was made up of the sums for which it offered to do its part of the work, together with the prime cost sums settled by the employer. The employer obtained tenders from specialists selected by them for the prime cost work and then, when they had made the contract with the contractor, they instructed the contractor to enter into a contract with the subcontractor whom they nominated in terms, which they dictated, having settled those terms with the nominated subcontractor. Then, if the sum to be paid to the nominated subcontractor differed from the estimated prime

¹¹ See *Faireclough Building Ltd v Rhuddlan Borough Council* (1985) 30 BLR 26.

¹² [1970] 1 All ER 1039.

cost sum, as it almost certainly would, the contractor's contract price for the whole work was adjusted to take account of this difference.

In due course the employer nominated a company called Speediwarm Ltd as the subcontractor who was to provide the heating system. Speediwarm then contracted with the contractor but very soon went into liquidation and the liquidator refused to carry out the contract. Then, without prejudice to their respective rights, the employer and contractor arranged that the contractor should do this work and, while there was no complaint about its work, the work cost substantially more than the subcontract price with Speediwarm. The employer contended that the contractor was only entitled to be paid Speediwarm's price. The contractor took the position that, when Speediwarm fell out, the employer ought to have nominated another subcontractor and paid its price and, as they did not do so, they should pay the contractor on a quantum meruit basis.

The contractor's contract with the employer included bills of quantities, contract drawings and the conditions contained in the RIBA form of contract of which Condition 1(1) stated:

"The Contractor shall upon and subject to these Conditions carry out and complete the Works shown upon the Contract Drawings and described by or referred to in the Contract Bills and in these Conditions in every respect to the reasonable satisfaction of the Architect/Supervising Officer."

The Works there include prime cost work to be done by nominated subcontractors so the principal contractor would be in breach of its contract with the employer if those works were not duly carried out and completed and, of course, would be able to sue the nominated subcontractor for breach of the subcontract.

Admittedly, the principal contractor is liable if the prime cost works are defective. How much farther its obligation goes must depend on the true interpretation of later conditions.

The RIBA contract's main condition dealing with nominated subcontractors was condition 27, the relevant portions of which stated:

"The following provisions of this Condition shall apply where prime cost sums are included in the Contract Bills, or arise as a result of Architect's/Supervising Officer's instructions given in regard to the expenditure of provisional sums, in respect of persons to be nominated by the Architect/Supervising Officer to supply and fix materials or goods or to execute work.

- (a) Such sums shall be deemed to include 2% per cent cash discount and shall be expended in favour of such persons as the Architect Supervising Officer shall instruct, and all specialists or others who are nominated by the Architect/Supervising Officer are hereby declared to be sub-contractors employed by the Contractor and are referred to in these Conditions as 'nominated subcontractors'. Provided that the Architect/Supervising Officer shall not nominate any person as a subcontractor against whom the contractor shall make reasonable objection, or (save where the Architect/Supervising Officer and Contractor shall otherwise agree) who will not enter into a sub-contract which provides (inter alia):
 - (i) That the nominated sub-contractor shall carry out and complete the subcontract Works in every respect to the reasonable satisfaction of the Contractor and of the Architect/Supervising Officer and in conformity with all the reasonable directions and requirements of the Contractor.
 - (ii) That the nominated sub-contractor shall observe, perform and comply with all the provisions of this Contract on the part of the Contractor to be observed, performed and complied with (other than clause 20[A])

of these Conditions, if applicable) so far as they relate and apply to the subcontract Works or to any portion of the same.

- (iii) That the nominated sub-contractor shall indemnify the Contractor against the same liabilities in respect of the sub-contract Works as those for which the Contractor is liable to indemnify the Employer under this Contract.”

Lord Reid, in reviewing all of this, then wrote:

“... The crucial problem is to discover the meaning of the first part of condition 27(a). ‘Such sums’ must refer back to ‘prime cost sums’ in the preceding sentence; ‘... such persons as the Architect ... shall instruct’ must be the same as ‘persons to be nominated by the Architect ... to execute work’, i.e. nominated sub-contractors. And no light is thrown on the problem by the initial words of condition 27(a) ‘Such sums shall be deemed to include 2½ per cent cash discount’. I did not understand any of that to be disputed in argument. So I can rewrite the crucial words – ‘prime cost sums shall be expended in favour of persons nominated by the Architect to execute work’. This is meaningless if ‘prime cost sums’ has its ordinary meaning of sums entered or provided in the bills of quantities for work to be executed by nominated sub-contractors. Such sums are never expended; they are only estimates of the sums which will later appear in the sub-contract between the contractor and nominated sub-contractors as the prices to be paid to the nominated sub-contractors for the prime cost work to be done by them. Once these sub-contracts are made, the prime cost sums have no further part to play except in accounting as provided in condition 30(5)(c).

In order to give this sentence an intelligible meaning, either ‘prime cost sums’ or ‘expended’ must be given an unusual meaning. It was argued for the employers that ‘expended’ could mean ‘allocated’. But that would not help, because prime cost sums are never allocated to a nominated sub-contractor or to anybody else, and in the end counsel for the employers were unable to suggest any word or phrase the substitution of which for the word ‘expended’ would make sense of this sentence. On the other hand, if ‘prime cost sums’ can be read as meaning the sums which become payable for prime cost work then the meaning of the sentence becomes clear. And that does not appear to me to be doing too great violence to the words in the clause. I would, therefore, read this clause as directing that sums payable in respect of prime cost work ‘shall’ be expended in favour of nominated sub-contractors and no one else. ‘Expended in favour of’ is a rather odd expression but it is, I think, accounted for by the fact that payments for work done by the nominated sub-contractor are paid in the first instance by the employers to the principal contractor, but they are earmarked and are then paid by the contractor to the nominated sub-contractor.

The RIBA form of contract makes no express provision for an event which cannot be very uncommon – that for one reason or another, the contract between the principal contractor and the nominated sub-contractor is terminated before the sub-contract work is completed. The problem is what is to happen in that event. There appear to me to be three possibilities, and no more were suggested in argument. The first is that the employers must then make a new nomination, or, if they do not wish the work to be continued, give an instruction to that effect by way of variation. If they do make a new nomination, then as in the case of the first nomination they must make a bargain with the new nominee and then instruct the principal contractor to make a subcontract in terms of that bargain. Then, if the price in the second sub-contract exceeds the price in the first sub-contract which has come to an end, the employers must bear the loss. That is the contention of the contractor. The second possibility is that, when the contract with the nominated sub-contractor is terminated, it becomes the right and duty of the principal contractor to do the prime cost work itself at the price fixed in the sub-contract which has been terminated. The third possibility is that the principal contractor must be held to have undertaken that the nominated sub-contractor will complete the work so that, when, by reason of the termination of the sub-contract, it becomes impossible for that obligation to be performed, there is an irremediable breach of contract by the principal contractor. The employers argued that one or other of these interpretations is correct.

It appears to me that there are insuperable objections to both of the employers' contentions. The scheme for nominated sub-contractors is an ingenious method of achieving two objects which at first sight might seem incompatible. The employers want to choose who is to do the prime cost work and to settle the terms on which it is to be done, and at the same time to avoid the hazards and difficulties which might arise if they entered into a contract with the person they have chosen to do the work. The scheme creates a chain of responsibility. Subject to a very limited right to object, the principal contractor is bound to enter into a contract with the employers' nominee, but it has no concern with the terms of that contract, for those terms are settled by the employers and their nominee. I can find nothing anywhere to indicate that the principal contractor can ever have in any event either the right or the duty to do any of the prime cost work itself. That would, I think, be contrary to the whole purpose of the scheme, and it would be strange if the contractor could have to do work for which it never tendered and at a price which it never agreed. Moreover, if I have correctly construed condition 27, its provision that payment for prime cost work shall be made in favour of nominated subcontractors and, therefore, cannot be made to the contractor on its own account necessarily involves the conclusion that the contractor is not to do prime cost work itself. So I reject the employers' first contention.

The employers' alternative contention involves similar difficulties. If they could establish that, under their contract, there can never be any duty on the employers to nominate a second sub-contractor if the first nominee drops out, then it could be said that, when the principal contractor undertook to complete the prime cost work – as it did in condition 1 – it undertook that it would be completed by the first nominated subcontractor, for it was not entitled to do the work itself. But if, on a proper construction of the contract, the employers are bound to renominate if the first nominee drops out, then there is no question of guaranteeing the first nominated subcontractor. The contractor's obligation is simply duty to hand over the completed work. If it does not do so, it is in breach of contract. If the fault is its own, it bears the loss, but if the fault is that of the nominated sub-contractor it can sue the sub-contractor for the damages it has to pay to the employers.

There is a further objection to this contention of the employers. If the contractor is bound to complete the prime cost work but cannot do it itself under the contract and it cannot be done by a nominated sub-contractor because the first has dropped out and there is no provision for a second, then there is deadlock. There is no way in which the work can be done under the contract. It is said that the contractor could then go in and do the work itself in order to mitigate damages. But then the work would not be done under the contract and the employers and their architect would lose all control over it. That cannot have been the intention, and I gravely doubt whether the contractor could have any such right. So, unless the contractor's contention is correct, there will be grave and perhaps insuperable difficulties when any nominated sub-contractor refuses to complete its contract.

But I see no great difficulty in holding that the contract requires a second nomination if the original nominated sub-contractor drops out. It is said that there is no express provision for this. But then neither is there any express provision for the first nomination. Indeed, the absence of any such provision has led to a view, which has attracted considerable support, that the employers have no duty to make any nomination but only have a right or option to do so. But that cannot be right. The contract provides that the prime cost work shall be done, and it may be that the contractor cannot do or at least cannot finish its own work until it is done. The prime cost work is not even defined until the nominated sub-contractor is brought in. No one suggests that the principal contractor has any concern with prime cost work until it is required to make a contract with a nominated sub-contractor. It would be a clear breach of contract by the employers if their failure to nominate a sub-contractor impeded the contractor in the execution of its own work.

Once it is accepted that the principal contractor has no right or duty to do the work itself when the nominated sub-contractor drops out any more than it had before the sub-contractor was nominated, then equally it must be the duty of the employers to make a new nomination when a nominated sub-contractor does drop out. For otherwise the

contract work cannot be completed. Moreover, condition 27 requires that payment for prime cost work shall be expended in favour of nominated subcontractors. So if the first drops out, no payment for the prime cost work still to be done can be made under the contract unless that work is done by a second nominated sub-contractor.

Perhaps I should add that there was an argument that, if my view is right, there will be grave difficulty if a contractor wrongfully terminates the sub-contract – it may be because it thinks erroneously that the sub-contractor is in fundamental breach of the sub-contract. Then, in my view, the contractor would be in breach of his contract with the employers. A new sub-contractor would have to be nominated. But the contractor would have to pay damages for its breach of contract including any loss caused to the employers by that breach.

Although I have come to a clear conclusion that there was in this case a duty to renominate, the provisions of the RIBA form of contract are so confused and obscure that no conclusion can be reached without a long and complicated chain of reasoning. The RIBA form of conditions sponsored by the Institute is in very common use. It has been amended from time to time. For a long time it has been well known that the question at issue in the present case has given rise to doubt and controversy. It could have been set at rest by a small amendment of these conditions. But the Institute have chosen not to do that, and they have thereby caused the long and expensive litigation in the present case. I would dismiss this appeal.”

Relations with employer

No privity

It should be remembered that there is no privity of contract between the employer and the subcontractor. As a result, the employer cannot directly commence proceedings against the subcontractor for any contractual matters arising from the work of the subcontractor, e.g. delay claims, defective work, etc., for those claims lie directly with the main contractor. The reverse is also true and the subcontractor cannot seek payment directly from the employer. This problem has been averted in two critical areas through the Contracts (Rights of Third Parties) Act 1999 and through court decisions, which have found that while there may be no privity under contract, there is liability under tort.

The Contracts (Rights of Third Parties) Act 1999

Under this Act a third party, such as the subcontractor, can take advantage of an exclusion clause but its rights can be no greater than if it had been a party to the contract in the first place. The Act gives subcontractors rights by which they can enforce beneficial terms of the main contract if they are direct beneficiaries of those portions of the main contract.

Liability in tort

An issue that arises is what duty of care does a subcontractor owe towards the employer? This was brought up in *British Telecommunications Plc v James Thompson & Sons (Engineers) Ltd*,¹³ where the issue before the House of Lords was whether a

13 (1998) 61 ConLR 1.

subcontractor owed an employer a duty of care in respect of fire caused to the building works. Here, Thompson was engaged as a domestic subcontractor working on the roof of premises owned by BT in Glasgow. It was claimed that due to negligent acts by Thompson, a fire was started which caused extensive damage to the roof and interior of the building. The problem was that no direct contract existed between BT and Thompson so BT commenced proceedings in negligence to recover its losses suffered as a consequence of the fire.

Here, the main contractor was bound under the standard JCT80 form of contract and the subcontract with Thompson had a provision, which stated:

“Your work shall be carried out to the same specification, terms and conditions of contract as those ruling between ourselves and our client. These conditions shall take precedence over any you may have in your offer.”

The main contract contained clauses such as Clause 22c, whereby the employer was required to take out and maintain an insurance policy in respect of the existing structures of the building, together with their contents, for the full cost of reinstatement, repair or replacement or loss or damage due to one or more of the specified perils. Thus, the employer was to insure against, and bear the risk of, damage by fire. Accordingly, Thompson took the position that they correctly proceeded in not obtaining a separate policy to insure the existing structures and their contents against the risk of fire due to any act or omission on their part – thus, they based their tender without such coverage.

Thompson took the position then that it would be neither fair, just nor reasonable to impose a duty of care on a subcontractor towards an employer in the context of a contractual arrangement whereby the employer had undertaken to place an insurance policy to cover such risks. Initially, the Inner House of the Court of Session in Scotland agreed with Thompson, i.e. that under the terms of the contract the main contractor and subcontractor were to have no liability in such circumstances, and, accordingly, it would not be fair, just and reasonable to impose a duty of care on the subcontractor. The case progressed to the House of Lords where their Lordships expressed doubt that the contractual scheme provided an arrangement whereby the insurance to be provided by BT would necessarily operate for the benefit of a domestic subcontractor. The clauses provided for the recognition of nominated subcontractors as insured under the policy, but made no direct mention of other subcontractors.

Their Lordships also considered that it was necessary to closely examine the nature of the insurance which the employer was required to take out under the contract and reviewed other cases where the court held that the employer was to take out insurance under the JCT minor works form for damage caused to the Works by specified perils (fire, lightning, explosion, storm, etc.), and found that such insurance would be required only in respect of perils which resulted from natural phenomena, i.e. acts of God. The clause in question, therefore, did not oblige the employer to insure against the risk of a fire caused by a contractor or subcontractor's negligence.

Based on this the ruling was that the subcontractor owed a duty of care to the employer that could not be negated by the insurance arrangements under the contract, and their Lordships wrote:

“In my view the contractual provisions reinforce, rather than negative, the existence of a duty of care towards BT by Thompson in the circumstances of the present case.”

Relations with architect and engineer

On occasion the subcontractor will claim that it, in reality, contracted with the employer because it was dealing with the contractor who, it is claimed, was the agent of the employer. If this is true the employer will be liable directly to the subcontractor, but for this to occur there has to be a specific agency relationship and it becomes the responsibility of the subcontractor to prove this agency relationship. Generally, as to specialist subcontractors, barring an explicit provision in its contract the contractor does not become the agent for the employer and this is the case even in circumstances where the employer selects the subcontractor and the subcontractor carries out its work under a provisional figure, which has been inserted in the main contract.

A case in point is the House of Lords case of *Hampton v Glamorgan County Council*,¹⁴ where the contractor agreed to construct a school to specifications and under the direction of the employer's architect. The contract price was £13,600 and the specifications contained provisional sums, which included the language: "Provide £450 for a low pressure heating apparatus". The architect directed the contractor to accept a plan submitted to the architect by a heating engineer, which provided a low-pressure heating system for £391. While the Works were underway, the contractor paid to the subcontractor engineer £200 on account, but was unable to pay the balance and the subcontractor engineer commenced proceedings against the Council for the balance. This claim ultimately failed because it was held that the contractor was to erect the school for a lump sum, including, if required, the heating apparatus up to a cost of £450 and that the contractor, in employing a specialist to put up the heating apparatus, was acting as a principal and not as the agent of the building owners.

Also, in *Vigers Sons & Co Ltd v Swindell*,¹⁵ there was the same result. Here, an architect instructed flooring subcontractors and to pay them pledged the employer's credit, but it was held that the employer had not authorised or ratified the credit arrangements and, therefore, the employer was not liable to the subcontractors, but instead the architect was held liable to the subcontractor for breach of warranty of authority. Thus, it would seem clear that unless a specific agency relationship exists, allowing the architect to contract with a subcontractor, the architect has no such implied authority.

¹⁴ [1917] AC 13.

¹⁵ [1939] 3 All ER 590.



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CHAPTER 6

Defences to construction disputes

There are many defences to the non-performance of a construction contract. Some have been touched upon earlier and they include fraud, misrepresentation and mistake. All of these “excuse” performance by one party to the contract and, in the case of mutual mistake, both parties. This chapter deals with the other defences to performance, most notably *force majeure* and frustration. As discussed earlier, in the UK, if a contract becomes impossible to perform, or is only able to be performed in a manner substantially different from that originally agreed between the parties, then the doctrine of “frustration” may apply and the contract can be terminated. This may not be in the interests of either of the parties who may wish the contract to be suspended, rather than terminated, for the duration of the frustrating event, or for a specific period. In contrast, where the delay or failure to perform a contract by a party for reasons beyond its control occurs, then the doctrine of “*force majeure*” may apply, which, instead of terminating the contract, generally results in suspension of contractual obligations while the uncontrollable event is in progress.

Force majeure

Force majeure provisions in construction contracts excuse performance if a specified event occurs and also allocate the risk of any unanticipated events. The concept of *force majeure* originated with the French Napoleonic Code and is frequently used in most construction contracts. For example, in the JCT contracts, *force majeure* is listed as a “relevant event” and under the common law a related concept is “commercial impracticability”. FIDIC contracts define it (in Sub-Clause 19.1) as:

“In this Clause, “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,
- (b) which such Party could not reasonably have provided against before entering into the Contract,
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,

- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

A *force majeure* clause sometimes expressly states that it is the exclusive remedy or may specifically assign the risk of some future unexpected event to one party. It should be noted, however, that if the clause does not state that this is the sole remedy then the affected party may also rely on the defence of commercial impracticability. Allocating all possible risks becomes burdensome and cannot cover the entire spectrum of possibility and, even if the contract does not include a specific event in the *force majeure* provision, a party may still be excused from performance if that specific event occurs. This is the reason why, for example, the FIDIC contract is worded as it is – to allow any manner of exceptional event to fall within the purview of the sub-clause.

In *Matsoukis v Priestman*,¹ the defendants agreed to build a steamer for, and deliver her to, the plaintiff on or before 28 February 1913. The contract contained the following exceptions clause:

"If the steamer isn't delivered entirely ready to purchaser at the above-mentioned time, the builders hereby agree to pay to the purchaser for liquidated damages, and not by way of penalty, the sum of £10 sterling for each day of delay and in deduction of the price stipulated in this contract, being excepted only the cause of force majeure, and/ or strikes of workmen of the building yard where the vessel is being built, of the workshops where the machinery is being made, or at the works where steel is being manufactured, for the steamer, or any works of any subcontractor."

Owing to the universal coal strike of 1912, the defendants could not obtain their materials and consequently could not complete the vessel in time. Accordingly, the plaintiff's steamer completion and delivery was late and the plaintiff claimed damages. The construction of the steamer was, in fact, delayed, not just by the coal strike, but also by events including bad weather, the absenteeism of workers because of a football match and the funeral of the shipyard manager. The court took the position that these causes were the "usual incidents interrupting work" so did not constitute *force majeure* but, as to whether the coal strike constituted *force majeure*, the court held that: (1) the general dislocation of the business of defendants, and of those from whom they obtained materials, operated indirectly on the completion of plaintiff's steamer and this constituted a case of *force majeure* within the meaning of the exceptions clause and, therefore, excused defendants in respect of the delay so caused; (2) as to delay due to breakdown of machinery it comes within the words "*force majeure*", which certainly cover accidents to machinery. The term "*force majeure*" cannot, however, in any view, be extended to cover bad weather, football matches or a funeral. These are the usual incidents interrupting work, and the defendants, in making their contract, no doubt took them into account. Here, the contract provided for liquidated damages except "the cause of *force majeure*" and certain types of strike.

The logic from this case suggests that *force majeure* means anything outside the control of the contractor and is not limited solely to acts of God. Indeed, the concept has had less than distinct borders over the years and some cases have suggested that the events which constitute *force majeure* should be set out in the clause itself and that phrases such as "usual force majeure clauses apply" are unenforceable as not being specific enough.

¹ [1915] 1 KB 681.

The term “*force majeure*” is, thus, either defined precisely, as in the FIDIC contract language described earlier, or the contract states what is to happen if an event of *force majeure* occurs. In some contracts, for example, *force majeure* is defined to mean certain specified events such as war, terrorism and nuclear and/or chemical contamination. Indeed, some contracts, like FIDIC, specify what must happen if there is a *force majeure* event.

Generally, such clauses allocate the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled. To determine whether this has been the case one must first determine whether the unanticipated event is defined in the contract as a *force majeure* event. Then, a review should be made of what evidence exists as to whether the unanticipated event was beyond the reasonable control of the party seeking the *force majeure* protection. Once this is done successfully, a determination must be made as to whether the contract can still be performed and a determination as to whether the contract included procedures for delay or other damages and whether or not these were adhered to.

It should be noted that most *force majeure* clauses set out the type of unforeseeable events that might excuse performance. Thus, the party relying on the *force majeure* clause bears the responsibility of showing that the event was: (1) beyond the party’s control; and (2) not a consequence of its own fault or negligence. A *force majeure* clause is not intended to insure against “normal risks” of a contract – bad weather, for example, or a change in market conditions.

Is the contract terminated?

Typically, the contractor is given relief from liquidated damages and there is an option for either party to terminate the contract after a suitably lengthy period of time – under the FIDIC contracts Sub-Clause 19.6:

“If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor’s Equipment].

Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate, which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer’s disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor’s Equipment from the Site and the return of these items to the Contractor’s works in his country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor’s staff and labour employed wholly in connection with the Works at the date of termination.”

Also, if the *force majeure* situation is of such nature that work cannot proceed, the claimant party is entirely excused from further performance. A typical clause, such as the FIDIC Sub-Clause 19.7, states:

“Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and
- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6.”

It should be noted that this FIDIC Sub-Clause 19.7 includes more than just *force majeure* but also “any event or circumstance outside the control of the Parties (including, but not limited to Force Majeure) ...”. Additionally, the party alleging *force majeure* has the burden of proof, based upon the balance of probabilities, and it must also mitigate any losses and show that there was no other way of resolving the problem and moving forward with the Works.

Acts of God

Although the terms are sometimes used interchangeably, *force majeure* and “Acts of God” are different concepts. An Act of God excludes the concept of human agency, whereas *force majeure* does not. Traditionally, Acts of God included events such as tornados, lightning, floods, earthquakes, droughts and unusually severe weather conditions. *Force majeure* events typically include not only “Acts of God” but also human-made or human-caused events such as strikes, lockouts, riots, wars, explosions, sabotage and governmental acts. However, contracting parties are free to create, identify and bargain for their own *force majeure* events.

As mentioned earlier the term “*force majeure*” is derived from the French Napoleonic Code and is based on the concept that it is fair to allow a party to escape contractual obligations without fault when satisfaction of those obligations is made impossible. While *force majeure* may be universally applicable under French law, as mentioned earlier, under the common law it is a contractual right allowing one party to be relieved from liability upon the happening of certain defined events.

Force majeure should also be distinguished from the concept of “frustration of purpose”,² which occurs when, after a contract is made, a party’s principal purpose is substantially frustrated without its fault by the occurrence of an event that negates a basic assumption on which the contract was made. When this happens the remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. Additionally, although commercial frustration is akin to the doctrine of commercial impracticability, it is different in that performance remains possible but the expected value of the performance, to the party seeking to be excused,

² Discussed in Chapter 2 herein.

has been destroyed by an unanticipated event. Thus, if the frustrating event was foreseeable at the time of entering the contract the concept does not apply.³

*The purpose of force majeure clauses – historically and internationally*⁴

As previously mentioned, *force majeure* clauses exist to exclude liability where unforeseen events, beyond a party's control, prevent the performance of its contractual obligations.⁵ The Supreme Court of Canada gave a very good definition of *force majeure* in *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co*,⁶ where the purpose of *force majeure* clauses were described as follows:

“[A force majeure clause] generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.”

Internationally, *force majeure* events are also considered to be events “beyond the control and without the fault or negligence of the party excused”.⁷ Normally, these clauses contemplate wars, natural disasters and include “acts of God” and can also include commercial events such as supply failures, labour unrest and even equipment failure.

In *Jacobs v Crédit Lyonnaise*,⁸ the defendant shippers claimed *force majeure* after they failed to deliver shipments because of a war that had broken out in Algeria. Under the French law in force in Algeria at the time, the defendant would not have been subject to claims of damages “when, by means of a superior force (*force majeure*) or an accident, the obligor has been prevented from giving or doing that which he was bound to give or do”. The court found that while French law might have given relief, English law applied and there was no equivalent common law principle (including frustration) that could ground relief. While the intervening war had disrupted performance, it did not destroy the “entire subject matter” of the contract, or the underlying rationale for the bargain, as was required for relief under the doctrine of frustration. The contract did not provide for the concept of *force majeure* and the defendant shippers were held liable.

Needless to say, this result was not commercially acceptable and, as a result, it was not long before very specific *force majeure* provisions began to appear regularly in English contracts to provide assistance to parties where performance was impossible or unfeasible, but where the strict technical requirements for a defence of frustration were not available.⁹

Its use (and/or justification for its use) varies in the common law jurisdictions. In the United States, for example, it is more common for the doctrine of impracticability or impossibility of performance to be used instead. In the United States, if the parties do

3 See Chapter 2 herein, e.g. *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119.

4 See generally Philip Lane Bruner, “Force Majeure And Unforeseen Ground Conditions In The New Millennium: Unifying Principles And Tales of Iron Wars” [2000] ICLR 47.

5 See generally Jan van Dunné, “The Changing Of The Guard: Force Majeure And Frustration In Construction Contracts: The Foreseeability Requirement Replaced By Normative Risk Allocation” [2002] ICLR 162.

6 [1975] 56 DLR (3d) 409 (SCC).

7 *United States v Brooks-Callaway Co*, [1943] 318 US 120.

8 (1884) 12 QBD 589 (CA).

9 *Ibid* at 347.

not provide otherwise in their contract “... where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered”.¹⁰ There is also a line of thought which suggests that:

“the courts there have literally invented the concept of impossibility of performance so as to alleviate the difficulties encountered when the contracting parties did not quite anticipate, or provide for, what actually happened and this is a way to prevent unintended results. Thus, it becomes an equitable defence and as such the factors to be taken into account include the foreseeability of the event and whether the means of performance will be entirely different than that originally agreed to. Other factors include whether the risk of the event that occurred was allocated to a party, and whether the cost of performance will be substantially increased. Thus, the elements for impossibility of performance are the unexpected occurrence of an intervening act, which is of such a character that its nonoccurrence was a basic assumption of the agreement of the parties, and that occurrence made performance impracticable.”¹¹

Typical force majeure clause usage

Though the traditional rationale for *force majeure* clauses involved “unanticipated events” and “impossibility” of performance, more recent practice has been to use *force majeure* provisions as a broader risk allocation tool.¹² The structure of a “typical” *force majeure* clause should include a definition of the term and the results of what will happen if it is invoked. A typical *force majeure* clause should describe an event that renders the performance impossible and is beyond the parties’ control, as well as reasonably inevitable and unforeseeable. This should be followed by either a list of possibilities or a list of factual circumstances of *force majeure*, e.g. war, riots, armed conflict, natural disasters, labour disruption, disease, damage to assets, etc. A distinction should also be made as to whether interference or lack of performance by third parties, such as subcontractors or ancillary suppliers, qualifies as *force majeure*. Further, there should be delineation of, should *force majeure* arise, the requirements and procedures for notification and the evidentiary burden to prove the event.

FIDIC contracts, for example, define *force majeure* as “an exceptional event or circumstance that is beyond a party’s control” and it allows the scope of its application to be widened. Furthermore, in the event of contractual performance turning illegal or impossible, or if the parties are discharged from performing according to the applicable law, either party may terminate the contract by notification before the end of the 84-day period previously established in the FIDIC Form of Contract Book, i.e. the Red Book. The contractor, in this case, is reimbursed on the same terms as it would have been in the case of “full” *force majeure*.

Force majeure clauses may also be used to anticipate uninsurable risks, or that render performance merely inconvenient or uneconomical, as opposed to impossible.

¹⁰ *Dugan & Meyers Construction Co, Inc v State of Ohio*, 162 Ohio App. 3d 491 at 503. Also see e.g. William D Lyman, “To Pay or Not to Pay – To Stay or Not to Stay: Contractors and Subcontractors Right to Receive Payment for Work performed and the Contractual and Legal Obstacles to Receiving It” (Paper presented to the American Bar Association Forum on the Construction Industry, 12–13 October 2006, unpublished).

¹¹ *Ibid.*

¹² See Lowell A Westersund, *Force Majeure Clauses In Construction Contracts*, Fraser Milner Casgrain, LLP <http://www.mondaq.com/canada/x/65314/Building+Construction/Force+Majeure+Clauses+In+Construction+Contracts>.

In short, the clauses deal with risks deemed unacceptable by the parties. For example, problems associated with labour disruptions are often addressed through *force majeure* provisions, even though they may fall outside the traditional rationale of such clauses.¹³

The necessary requirements for force majeure

An effective *force majeure* clause should provide/require that:

- (1) The specified event is beyond the control of the claiming parties and a description of events that can trigger *force majeure*;
- (2) The event prevents or delays, in whole or in part, the performance of the contract and the terms that define the duration of that condition;
- (3) The event makes performance of the contract imprudent, substantially more difficult or substantially more expensive;
- (4) The event was not due to the fault or negligence of the claiming party; and
 - (a) The claiming party has exercised reasonable diligence to overcome or remove the specified *force majeure* event;
 - (b) It is also good to provide a notice provision describing how a declaration of *force majeure* is to be communicated; and
 - (c) A description of the effects that a *force majeure* event will have on the contractual obligations of the parties.

Further, it is good practice for the parties to also agree the consequences of the *force majeure* and provide details as to:

- the extent of the liability of the party claiming *force majeure*;
- whether the contract is to be terminated and, if so, what will then happen to the respective rights and obligations of the parties;
- whether there is to be an extension of the time for performance of the contract obligations as originally agreed, or whether they are to be varied;
- whether, in the event of an extension of the time for performance of the original obligations, the extension is to be open ended, or subject to a specific period before those obligations are waived, or the contract comes to an end;
- whether any sums under the contract should be paid immediately, or whether sums paid prior to the *force majeure* event should be repaid.

When does force majeure commence?

The common law generally provides a specific event or events that will enable a declaration of *force majeure*. “Acts of God”, flood, fire, war, civil disturbance, governmental or judicial orders or actions, sabotage, explosions, landslides, lightning, earthquakes, fires, storms, floods and washouts are commonly included as events that trigger *force majeure*.¹⁴ Further, in the common law jurisdictions it is also common to customise a *force majeure* to the type of project or industry to which it is being applied.

¹³ *Ibid.*

¹⁴ *Ibid.*

The duration of the condition

The duration of the *force majeure* condition must be defined within the contract. Usually it is expressed to correspond to the period during which the situation giving rise to it cannot be overcome. Any well-drafted *force majeure* clause will carry within it an express duty to mitigate. In most contracts, the party declaring *force majeure* must, so far as possible, remedy the situation with due diligence or “with all reasonable dispatch”. While the obligation clearly includes a duty to mitigate the *force majeure* event, what is less clear is whether the duty to mitigate also includes a duty to mitigate the effects of the *force majeure* event.¹⁵

While the duty to mitigate assumes that *force majeure* events (and their effects) are only temporary, the real issue arises if the condition becomes permanent, or nearly so. For instance, many *force majeure* clauses state that certain detrimental changes to statutory or regulatory environments can amount to *force majeure*. These events may be permanent and, if so, may effectively terminate the contract. In this sense, the terminology of “temporary” and “permanent” seems inapt because a law, regulation or order can always be repealed and is, therefore, never permanent in the literal sense. However, literal permanence is not required. In the United States case of *Commonwealth Edison v Allied-General Nuclear Services*,¹⁶ the court discussed the differences between temporary and permanent conditions in *force majeure* clauses and held that:

“The point of distinguishing between temporary and permanent conditions constituting impossibility or impracticability or force majeure is merely to prevent the promisor from walking away from the contract because of some transitory impediment to performance. When conditions preventing performance persist throughout the life of the contract, they are permanent enough to excuse liability. It would be neither efficient nor fair to impose on the promisor a perpetual duty of readiness to perform if and when the regulatory ban was lifted.”

The concept is clear, but at what stage a *force majeure* condition has sufficient permanence and impact to allow abandonment of all contractual obligations is not. The court in *Commonwealth Edison* found that the applicable duty to mitigate did not require performance if, after a temporary *force majeure* moratorium was lifted, performance would be “materially more burdensome” than if the *force majeure* event had never occurred.

When should notice be given

Notice of the event, giving rise to the condition, is an essential element that provides the condition precedent to a declaration of *force majeure*. When notice is properly given, *force majeure* protection normally commences (retroactively) from the time of the triggering event itself. In many instances, *force majeure* clauses will treat a failure to give notice within a particular time frame as a barrier to valid declaration – even where a *force majeure* triggering event has been known to occur (such as a hurricane, for example). The logic to providing a reasonable notice period after the triggering event is to give a party an opportunity to cure or mitigate the *force majeure* event without

¹⁵ *Ibid.*

¹⁶ 731 F Supp 850 (ND 111 1990).

necessarily having to make a declaration. In some instances, the “Acts of God” and other events enumerated within a *force majeure* clause may not have a major impact upon operations, and in such instances, declarations of *force majeure* may prove to be counter-productive to the party entitled to make such a declaration.¹⁷ Further, any failure to properly give notice will prevent a defence based upon a *force majeure* clause.¹⁸

Strict adherence to notice requirements is usually necessary. For example, in the United States case of *International Minerals & Chemical Corp v Llano, Inc.*,¹⁹ a buyer notified the seller that its gas consumption would be reduced because of testing, but not that its reduced consumption would be permanent. The buyer argued that the notice was sufficient to allow a permanent reduction in volumes under the *force majeure* clause. The United States Court of Appeal found that this was not proper notice within the meaning of the *force majeure* clause, which required that “the party whose performance ... is so affected shall immediately notify the other party of all pertinent facts ...”. The notice did not indicate the pertinent fact that reduced consumption would be permanent.²⁰

Force majeure's effect

Depending on the drafting of the contract, a *force majeure* clause, and the resulting actual event, may cause the contract to be ended, suspended or just merely altered. Thus, it is necessary to make a determination of which contractual obligations will remain in force throughout the event (if any) and which will be suspended or just modified. Additionally, if the underlying contract provides for obligations that are time-contingent, one should carefully look to determine whether the *force majeure* clause addresses the effect any consequential suspensions might have on these time periods. Although the protection of *force majeure* is intended as temporary protection against unavoidable events, the passage of key time frames (such as an expiration or termination date) while a party is within the protection of *force majeure* may lead to unintended consequences unless directly contemplated and addressed within the clause. For example, one would not necessarily want an operational failure or labour strike to warrant the same relief from performance obligations as might otherwise be appropriate in an earthquake.²¹

Frustration

If the original purpose of the contract has been brought to an end by external forces, then the “doctrine of frustration” will apply. This doctrine was originally applicable when events arose during the performance of the contract which were unexpected and made the continued performance of the contract impossible. As this concept developed

17 See Lowell A Westersund, “*Force Majeure Clauses In Construction Contracts*”, *supra*.

18 See e.g. the US cases *International Minerals & Chemical Corp v Llano Inc*, 770 F2d at 885; *Resources Investment Corp v Enron Corp*, 669 F Supp. 1038 at 1043–44 (D Colo 1987); *Superior Oil Co v Transo Energy Co*, 616 F Supp. 98 at 108–109, WD I-a. 1985.

19 *Ibid*.

20 See e.g. the United States case of *Sabine Corporation v ONG Western Inc*, 725 F Supp 1157 at 1169, WD Okla 1989.

21 *Ibid* at 360.

it expanded to situations where the performance of the contract was not the issue, but rather where performance, if continued, became fundamentally different from that originally bargained for between the parties. For example, in the 1918 House of Lords decision in *Metropolitan Water Board v Dick, Kerr & Co Ltd*,²² Dick, Kerr & Co contracted in July 1914 with the Water Board to construct a reservoir to be completed within six years, subject to a proviso that, if by reason of (inter alia) any difficulties, impediments or obstructions whatsoever and howsoever occasioned, the contractors should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of the time for completion. By a notice given by the Ministry of Munitions in February 1916, in exercise of the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were required to cease work on their contract and they ceased work accordingly. The contractors claimed that the effect of the notice was to put an end to the contract. The court held that the provision for extending the time did not apply to the prohibition of the Ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract, when resumed, a different contract from the contract when broken off and that the contract had ceased to be operative. Lord Dunedin wrote that:

“... the action of the Government, which is forced on the contractor as a *vis major*, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action.”

Here, the concept of frustration can be clearly seen and was due to a supervening party and could not have been contemplated by the parties at the commencement of the contract. Merely being more difficult to perform, or even being more costly, would not be sufficient as both could easily have been within the contemplation of the parties. In this regard the House of Lords case of *Davis Contractors Ltd v Fareham Urban District Council*²³ is illustrative. There, the contractors entered into a building contract to build 78 houses for a local authority for a fixed sum within a period of eight months. They had attached to their form of tender a letter, dated 18 March 1946, stating that it was subject to adequate supplies of labour being available as and when required. Owing to unexpected circumstances, and without fault of either party, adequate supplies of labour were not available and the work took 22 months to complete. The contractors contended that the contract price was subject to there being adequate supplies of labour available by reason of the letter of 18 March 1946 and that the contract was frustrated, and claimed to be entitled on a quantum meruit to a sum in excess of the contract price. The court held, however, that the letter of 18 March 1946 was not incorporated in the contract and that the contract had not been frustrated. The fact that, without the fault of either party, there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated, was not a ground for relieving the contractors of the obligation which

²² [1918] AC 119.

²³ [1956] AC 696.

they had undertaken and allowing them to recover on the basis of a quantum meruit. In this regard Lord Reid wrote:

“In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one’s fault that may be in the contemplation of the contract, and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.”

When reviewing the event(s), which are claimed to have frustrated the purpose of the contract, the court will also look at the actual terms of the contract to make its determination. This was the situation in *Wong Lai Ying v Chinachem Investment Co Ltd*.²⁴ There, the Privy Council were faced with a situation where the respondents intended to develop a site in the mid-levels of Hong Kong Island by constructing thereon two blocks of flats to be known as “University Heights”. Before they started work they sold leasehold interests of the proposed flats to the appellants. Each of the contracts with the appellants was on substantially the same terms. Each appellant paid the purchase price in full on signing the contract of sale. The respondents agreed to complete the flats within 18 months from the date of issue by the building authority of the buildings ordinance permit. Time was expressed to be of the essence in the contract. Of special interest was Clause 2, which provided:

“It is further agreed that notwithstanding anything hereon contained should any dispute arise between the parties touching or concerning this Agreement or should any unforeseen circumstances beyond the vendor’s control arise whereby the vendor becomes unable to sell the said undivided shares and Apartments to the Purchaser as hereinbefore provided, the Vendor shall be at liberty to rescind this Agreement forthwith and to refund to the Purchaser all instalments of purchase price paid by the Purchaser hereunder without interest or compensation and upon such rescission and upon repayment of the instalments of purchase price this Agreement shall become null and void as if the same had not been entered into and neither party hereto shall have any claim against the other in respect thereof.”

The respondents obtained the buildings ordinance permit on 17 November 1971 and the work started on 11 December 1971. On 18 June 1972, part of the hillside near the Po Shan Road, above the building site, slipped down the hill and debris from collapsed buildings and many hundreds of tonnes of earth obliterated the building works already completed. As a result, the work could not continue and the buildings ordinance permit lapsed. The flats were eventually built some time later. The respondents contended that the contract had been frustrated.

The Privy Council held that the landslide was a frustrating event, interrupting the performance of a contract, and was an event of such a character and duration as to make the contract, when resumed, a different contract from the contract when broken off. Accordingly, the effect of the event should have been considered at trial as it had to be considered by the parties when they came to know of the cause and the probabilities of delay and had to decide what to do. Further, the clause in question

24 (1980) 13 BLR 81.

could not be construed as making provision for the possibility of this particular unforeseen contingency. It was a general clause, which came at the end of a contract replete with specific provisions and time limits and conferred upon the vendor a remedy of rescission if a dispute arose, or if it became clear that he could not complete in accordance with the contract provided he acted “forthwith” to terminate the contract. It did not follow, from the provision of a summary remedy avoiding litigation in such circumstances, that the parties must have agreed that their contract could continue after such an unforeseen natural disaster.

Here, an unforeseen natural disaster caused the doctrine of frustration to be applied. In situations where the delay is caused by acts of the public there can also be frustration. This was seen in the Australian case of *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales*,²⁵ where a rail authority commissioned the construction of a railway. Codelfa agreed to excavate two tunnels for the Authority, at a price calculated on the basis that excavation work would proceed around the clock, seven days per week. The work was authorised by the City and Suburban Electric Railways (Amendment) Act 1967 NSW, which provided that Codelfa would not be restrained from blasting or causing a nuisance. The contract was made on the explicit understanding that the work could proceed on this basis, even though it involved considerable noise and vibration, because the parties believed that the Authority was immune by statute from actions for nuisance. The local council and residents, nevertheless, brought an action and an injunction was granted. Codelfa’s undertaking not to carry out noisy work at night or on weekends settled the litigation. As a result it incurred extra costs in carrying out the work.

In the written contract, Codelfa acknowledged that it knew all the conditions involved in carrying out the Works and would carry them out regardless of their difficulty. However, after the injunction was issued, Codelfa claimed compensation for the extra costs and argued that there was an implied term in the contract entitling them to this, if the work was impeded by an injunction. It also argued that the contract was frustrated from the time of the injunction and they were entitled to be paid for the value of the work done afterwards, on the basis of a quantum meruit.

The issue related to whether the effects of the injunction resulted to a totally different situation based on the true construction of the contract. As to the contract, it was agreed upon that the project should be completed within 130 weeks. Similarly, the contract assumed that an injunction would not affect the operations of the construction company as agreed upon, which is a three-shift six-day workweek and without restrictions on Sundays. Here, the judge declared that the situation was significantly and radically different from the original agreement considered in the contract and that the contract had been frustrated by the injunction.

Thus, in this case the contract was discharged by frustration. The existence of frustration is tested in a couple of ways. One is the implied term theory as stated in *Taylor v Caldwell*.²⁶ In this case Caldwell concurred to let a music hall to Taylor so that four performances could be held there. The court stated that the claim for breach of contract had to fail in view of the fact that it had become impracticable to accomplish. The contractual obligation was reliant upon the sustained subsistence of a specific entity. It should be noted here that the theory appears to be that, in agreements in

²⁵ (1982) 149 CLR 337.

²⁶ [1863] 3 B&S 826.

where performance relies on the sustained existence of a specified person or thing, it is implied that the unfeasibility of performance being caused by the perishing of the individual or thing shall forgive the performance.

Another test is characterised by the radical change in obligation. This is presented in the case of *Davis Contractors v Fareham UDC*.²⁷ In that case, Lords Reid and Radcliffe asserted that the “radical change in the obligation” test required the court to interpret the contractual stipulations in the light of the agreement and immediate state of affairs at the moment of its conception. It is also necessary to scrutinise the new conditions and come to a decision on what would transpire if the presented conditions were applied to it.

In the *Codelfa* case, there was an established frustrating event, the injunction provided by the court. To this end, the contract is discharged right there and then. This means everything that the company, Codelfa, had completed, with regard to their obligations, continued to be binding; however, the moment the injunction was served, the obligations performed by the company became non-binding. Thus, frustration takes place at any time when the law acknowledges that, devoid of the non-payment of either party, the obligation has become incapable of being carried out since the situation has been radically different from the original contract and that the demanded obligation is impossible to carry out. Moreover, the courts have also taken into account, in the context of deciding on a contract being frustrated, the extrinsic evidence on the surrounding material circumstances.

27 [1956] AC 696.



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CHAPTER 7

Issues regarding contractors' rights and obligations under standard form agreements

It often seems that there are as many standard forms of construction contract as there are builders – the Royal Institute of British Architects (RIBA), the Royal Institute of Chartered Surveyors (RICS), the Institution of Civil Engineers (ICE), and the International Federation of Consulting Engineers (FIDIC), just to name a few, have their forms, and the list continues to grow.

The use of standard forms has many benefits, which include not having to negotiate individually each and every contract, along with a rather large amount of common knowledge about the contracts in the general construction public, the legal profession and the courts. Most importantly, the majority of standard forms have attempted to equalise the elements of risk between the employer and the contractor.

A study¹ by the Dispute Board Federation (Geneva) found that close to 95 per cent of the world's infrastructure work, i.e. bridges, dams, highways, etc., used standard form agreements. Of the many forms of construction contract that are available the most widely used are the JCT, NEC and the FIDIC forms of contract.

Generally, the various standard forms can be segregated into four main categories: (1) "build-only" forms, which are used for both building and civil work; (2) forms for "design and build" projects in both the building and civil areas; (3) forms for either mechanical, electrical and/or process facility projects; and (4) forms for small projects, which are sometimes referred to as "short forms".²

The major forms of standard contract where the employer does the design and the contractor does the building³ are the "JCT Standard Building Contract", the "JCT Intermediate Building Contract", the "JCT Management Contract", the "ICE Form" (7th Edition),⁴ the "FIDIC Red Book", the "NEC3 Engineering and Construction Contract" and the "GC/Works/1 Building and Civil Engineering Form". The other end of the spectrum includes the short forms for relatively small capital value building or engineering work. These "short form" contracts can also be used for larger projects, especially so if the work contemplated includes simple or repetitive work and/or work of short duration. In these forms, the contractor is typically given the design by the employer and then constructs the Works in accordance with that design. These can also be used for situations involving contractor-designed works.

1 Use of Standard Form Agreements in Infrastructure 2004–09: The Dispute Board Federation Geneva, Switzerland, DBF Press 2009.

2 See Keith Pickavance, "Standard Forms of Contract II", *Construction Law and Management*, Informa, 2007.

3 It should be noted that, even when the employer is responsible for the design, the forms listed also envisage that there may be some elements of the project which involve contractor design.

4 Which is no longer in much use following the advent of the NEC contract endorsement in 2009 by the ICE Council.

The short forms include: the “JCT Minor Works Building Contract”, which is used for building works only; the “ICE Short Form”, for civil engineering work only; and the “FIDIC Short Form”, also known as the Green Book, for building and/or civil engineering works.

In addition to the major forms of standard contract for where the employer does the design and the contractor does the building,⁵ there are also mechanical, electrical and process plant forms where the Works are to be designed by or on behalf of the employer, but the Works may also include some elements of contractor-designed work. These forms include the “FIDIC Plant and Design-Build”, also known as the Yellow Book, and the form published by the Institution of Chemical Engineers, the “ICHEME Lump Sum”, also known as the “Red Book”, (not to be confused with the FIDIC Red Book). Here, the contractor both designs and constructs plant or other works such as civil and/or mechanical or electrical works.

Design-build form contracts

Most formats of design-build contract provide that, while the employer will provide its ideas and requirements regarding the finished project, it is the contractor who will develop this into the actual detailed design upon which the project will be constructed. Thus, it is the contractor who assumes the risk and design responsibility, and this is usually in return for a lump sum. With the design comes responsibility, which carries with it the requirement that the contractor uses reasonable care generally, especially in the design, and that the finished project is fit for the purpose intended by the employer. This applies to “turnkey” types of project and EPC (“engineer, procure and construct”) contracts. Here, the contractor, with little or no involvement by the employer, takes full responsibility to determine the necessary elements of the project, completes the design (or has it completed), and finally procures, installs and commissions the plant thus leaving the employer with a fully equipped and operational facility ready to commence operations.

The issue that arises in this context relates to the level of care that the contractor is required to adhere to. As mentioned earlier in this book, “reasonable care and skill” is the duty imposed by the court on professional designers such as architects and engineers. Whether this level has been met is subject to proof and is based upon what a reasonable designer in the same position would have done in similar circumstances. If such a “reasonable third-party designer” would not have acted in the same way, then the designer has committed professional negligence. Only if “professional negligence” can be proven is the consultant liable for breach of duty. As mentioned earlier, the difference between professional negligence for failing to use reasonable care and skill and fitness for purpose is that, under fitness for purpose, the standard required to prove professional negligence is only that the final product built by the contractor is not fit for what the employer originally wanted and what the contractor so understood. The standard design-build forms also provide different standards of care on the part of the contractor. So, for example, while “fitness for purpose” is imposed upon the contractor in the “FIDIC Plant and Design-Build Yellow” book and in the “FIDIC

⁵ It should be noted that, even when the employer is responsible for the design, the forms listed also envisage that there may be some elements of the project which involve contractor design.

Turnkey Silver” book.⁶ This has now changed, and whilst the old FIDIC Yellow Book (the 1999 edition) contained an express fitness for purpose provision (Sub-Clause 4.1), the 2017 edition of the FIDIC Suite of Contracts has retained and modified this so that the “purpose” must be set out in the Employer’s Requirements (as compared to just anywhere in the contract) and adds the additional requirement that if no such purposes are set out then the Works must be “fit for their ordinary purposes”. As to the other two new versions of the FIDIC Red and Silver Books, you find a similar provision in only the Silver Book but not the Red Book, which keeps its former language dealing with any design work, with the requirement that fitness for purpose shall be “as specified in the Contract”. This more specific obligation for fitness for purpose is now in the Yellow and Silver books, and is dealt with by the addition of the need for the contractor to indemnify the employer for any failures of either the Works or any item of plant not being fit for purpose (see Sub-Clause 17.4).

As to the other forms of standard contract the standard of “reasonable care and skill” is imposed in several of the JCT contracts, such as the Major Projects form contract and the Design-Build contract. This standard is also imposed in the ICE Design and Construct form. Indeed, many of the form contracts provide that the architect/engineer is the one who prepares the design drawings and specifications under the employer’s direction, with the result that the contractor has no responsibility for the design of the Works save for those matters dealing with selection of materials, where the materials selected must be fit for their purpose – thus, the contractor is to build only what is delineated in the contract documents.

In *Rotherham v Haslam*,⁷ Haslam was a sub-structure contractor for different phases of the new civic offices for Rotherham and was to provide imported fill material to the level approximately of the underside of the ground floor slab. The specification dictated that “granular hard-core shall be graded or uncrushed gravel, stone rockfill, crushed concrete or slag or natural sand or a combination of any of these”. Years later, damage to the building was found to have been caused by the expansion of the underlying imported fill materials resulting in cracking of the reinforced concrete slabs. It was logical here for the subcontractor to use the local steel slag produced in Rotherham as it was a steel-producing area, but what the parties did not know at the time was that such fill would be entirely unsuitable in a confined location under a concrete slab. Only later was it made known to the industry that steel slag could expand when wet and that it was not to be recommended for fill or hard-core purposes.

The lower court took the position that the bill items left unspecified matters regarding the suitability of fill materials. Accordingly, such unspecified matters, such as the expansive or inert qualities of a proposed material, were thus left to the judgment, skill and knowledge of the contractor and it became the contractor’s responsibility to select and supply the most suitable material for use as fill material in the confined conditions beneath the ground floor slab. The court’s position was that whenever there were gaps

⁶ In the new 2017 edition of the FIDIC Contract documents specific provision has also been made for insurance to indemnify the contractor against fitness for purpose obligations where this is required in the Contract Data. Indeed, the fitness for purpose obligations also carry the need for professional indemnity insurance – see Sub-Clause (Sub-Clause 19.2.3) which requires that if set out in the Contract Data, the Contractor’s insurance policy must indemnify it against its liabilities for failure to achieve the fitness for purpose requirements.

⁷ See *Rotherham Metropolitan Borough Council v Frank Haslam and Co* (1996) 12 Const LJ 333.

to be found in a specification, the employer relied upon the skill, care and judgment of the contractor and, accordingly, the contractor, by implication, warranted the fitness for purpose of the finished item.

The problem is that, while this may be the case where the contractor is hired for the design, here it was the employer and its professional designers who designed and specified the product(s) to be used. On appeal the Court of Appeal looked at this critical question as to whether Rotherham was entitled to rely on the contractors' skill and judgment.

The Court of Appeal found that the Bills of Quantities contained all the stipulations that the architect thought necessary to ensure the provision of suitable fill material. To the extent that there were no stipulations and the supplier was free to choose, the freedom was accorded not in order to enable the supplier to exercise some supposed skill and judgment but because the architect believed that no further stipulations were necessary. In his judgment the extent of the contractors' obligation was to provide hard-core answering to the description in the Bills of Quantities. The court further held that the contractors were not designers, and as such the employer was not justified in relying on their skill and judgment and no term was to be implied into the contract that they should warrant the fitness for purpose of the hard-core fill they had imported for the project.

Thus, the issue of whose "risk" it was as to any post-contract design depends upon whether the contract is a design-build form and whether any further design development falls to the contractor or whether it remains a change to the employer's requirements, and thus a variation. In *Skanska v Egger*,⁸ the issue was whether steelwork, which was later constructed, was simply a design development on which Egger was entitled to provide information. Further, if this was the case, the issue became whether this instruction given by the employer later in the process, showing a change in its requirements, was a risk the contractor took. The Court of Appeal held that the additional process plant steelwork required due to this later drawing provided by the employer was further design development on which the employer was entitled to provide information. Here, it appeared that the tender drawings indicated that the possibility existed for the employer to further develop its requirements and that this risk was accepted by the contractor, i.e. that the employer's requirements would be perfected at a later stage.

Particular provisions: contractor to scrutinise employer's requirements for errors

The new FIDIC Forms (2017) have also made changes to the need for the contractor to scrutinise the employer's requirements for errors – see Sub-Clause 1.9 of the Yellow Book. Where the payment provisions applicable if an "experienced contractor would not have found those errors at the relevant time" have been changed and the variation provisions applicable to the measures the contractor is required to take to deal with the error along with the fact that the contractor will also be able to claim 'Cost Plus Profit' if it incurs cost as a result of such error is a significant change.

⁸ See *Skanska Construction UK Ltd v Egger (Barony) Ltd* [2002] EWCA Civ 1914.

Extension of time clauses

Extension of time (EOT) clauses are common in most standard form contracts. The reason for this is that if there were no mechanism in the contract to extend time and a delay occurred which was the employer's fault, or at least not the contractor's fault, then time would be at large. When time is "at large" the contractor would then have a reasonable time to carry out its works and the employer would not be entitled to any resulting or liquidated damages.

The FIDIC contracts, for example Sub-Clause 8.4 of the FIDIC Red Book, provide that the contractor is entitled to an EOT if completion is adversely affected by numerous factors such as a variation or other substantial change in quantity, or exceptional adverse climatic conditions, or other occurrences which include unforeseen shortages in personnel or goods caused by epidemic or government actions; or even such all-encompassing wording as any delay, impediment or prevention caused by or attributable to the employer, the employer's personnel or the employer's other contractors on site.

This is important because it is with the extension of time that the contractor avoids liability for liquidated and ascertained damages also sometimes referred to as "LAD". However, most standard form contracts provide no indication as to the circumstances in which the contractor can be given more time or be compensated for events caused by the employer or other conditions. Worse yet, some forms give only a brief list of such situations or have a single clause that, in effect, cross-references all the circumstances which can make up provisions changing the terms of the duties under the contract. Thus, in the JCT Minor Works Building Contract there is no list as to all the circumstances that would allow the contractor to be excused, or compensated, for change other than language to the effect that the contractor is generally excused for any cause beyond its control.

The new FIDIC 2017 editions have EOT issues as to when a contractor can claim an extension of time. These are now set out in Sub-Clause 8.5, and other than some new material relating to "exceptionally adverse climatic conditions" and providing an "extension of time for delays caused by private utility companies as well as public authorities" are basically the same as the earlier versions. However, an additional paragraph has now been added at the conclusion of that sub-clause which provides for concurrent delays, i.e. that if there are any delays caused by matters for which the employer is responsible, which are concurrent with delays caused by matters for which the contractor is responsible, they are to be dealt with in accordance with the rules and procedures set out in the Particular Conditions or, if there are no relevant Particular Conditions, "as appropriate taking due regard of all relevant circumstances".

Additionally there are now new "advance warning" provisions included in Sub-Clause 8.4 which mandate that each party notify the other and the engineer of any known or probable future events which could adversely the work of the contractor's personnel or the performance of the Works once completed, or increase the contract price, or delay completion.

The engineer can then request the contractor to submit a proposal for a variation to avoid or minimise the effect of any such event. It should be noted that this is similar to what is contained in the NEC suite of contracts, i.e. the "early warning" provisions found therein, but unlike the NEC contracts FIDIC does not set out any provisions as to what happens as a result of the contractor's failure to comply nor what the impact would be of any requested additional payment.

EOT “sweeping-up” clauses

One solution used in many standard form contracts is that, rather than listing specific events or giving a short list of events, there is a “sweeping-up” clause that attempts to incorporate any possible scenario and is usually worded “... and any other cause referred to in these conditions”. An example of this type provision can be found in the ICE Form (7th edition) at Clause 44(1), which allows the contractor an EOT if the Works cannot be completed on time due to any cause of delay referred to in the conditions of contract or any variation order, any increased quantities, bad weather that is exceptional, any delay, impediment, prevention or default and it then goes on to add the usual type of “sweeping-up” provision which states: “... other special circumstances of any kind whatsoever which may occur”.

The other major forms of contract

Before discussing the various differences and similarities between the major standard forms, a review of the recent changes to the JCT forms of contract is in order.

The JCT forms of contract

In the United Kingdom, the most prevalent set of standard form construction contracts are those produced by the Joint Contracts Tribunal, which are known as the JCT forms of contract.

Prior to 1998, the JCT was an umbrella organisation for 11 industry bodies that operated by way of unanimity in their approach to drafting the suite of JCT contracts. The JCT, as an umbrella organisation, was established in 1931 and over the past 70 years has produced standard forms of contract, guidance notes and other standard documentation for use in the construction industry. The current constituent bodies of the JCT are: the British Property Federation; Build UK Group Limited; the Contractors Legal Grp Limited; the Local Government Association; the Royal Institute of British Architects; the Royal Institution of Chartered Surveyors; and the Scottish Building Contract Committee Limited.

Modern-day JCT contracts came into existence when the 1963 Standard Form of Building Contract was published. The 1980 edition followed this, and the consolidated current version is contained in the 1998 edition. The JCT has now published the JCT 05 suite, which largely supersedes the 1998 forms. The JCT forms currently include the:

- Standard Building Contract
- Intermediate Building Contract
- Minor Works Building Contract
- Design and Build Contract
- Major Project Construction Contract
- Adjudication Agreement⁹
- Framework Agreement 2007
- Pre-Construction Services Agreement¹⁰

⁹ There are currently two Adjudication Agreements; one general agreement, and another for a named adjudicator. See <https://www.jctld.co.uk/category/agreements>.

¹⁰ There are currently two Pre-Construction Services Agreements; one “General Contractor” agreement, and another “Specialist” version. See *ibid*.

- Consultancy Agreement (Public Sector)
- Standard Building Sub-Contracts
- Intermediate Building Sub-Contracts
- Major Project Sub-Contract
- Design and Build Sub-Contract
- Collateral Warranties
- Home Owner Contracts¹¹
- Prime Cost Building Contract
- Management Building Contract
- Repair and Maintenance Contract
- Measured Term Contract
- JCT – Constructing Excellence Contract
- Construction Management Contract.

It should be noted, also, that the most recent edition of the various JCT forms is the 2016 edition. Previous editions include the 2011, 2005 (as amended in 2009, via Revision 2) and 1998 editions. This means that the Construction (Design and Management) Regulations 2015 and RICS New Rules of Measurement are now incorporated into the JCT forms.

Of these forms the most commonly used forms within the JCT family of contracts is the JCT 05 Standard Building Contract, which has superseded the JCT 98 Standard Form of Building Contract and is intended for larger projects where the employer has engaged a professional consultant to advise on, and to administer, its terms.

Then there is the JCT 05 Major Project Construction Contract that has superseded the JCT 98 Major Projects Form and is intended for larger projects being carried out by experienced users, and knowledgeable contractors who require limited procedural provisions. This is followed by the JCT 05 Design and Build Contract, which has superseded the JCT WCD 98 Standard Form of Building Contract With Contractor's Design and is intended for projects where the contractor designs and builds the works for an agreed lump sum.

Other forms of the JCT contracts include the JCT 05 Intermediate Building Contract, which has superseded the IFC 98 Intermediate Form of Building Contract and is intended for projects in the range between those for which the JCT 05 Standard Form of Building Contract and those for which the JCT 05 Agreement for Minor Building Works Contract would be used. It should be noted that this particular form is most suitable for simple content works without any building service installations of a complex nature.

Then there are the JCT 05 Intermediate Building Contract with Contractor's Design, which is intended for use where specific portions of the work are to be designed by the contractor; and the JCT 05 Minor Works Building Contract, which superseded the JCT 98 Agreement for Minor Building Works and is intended for smaller projects of a relatively simple nature. It should also be noted that there is also a version with contractor's design.

These new contracts also include two "Framework Agreements", which are to be used for the procurement of both construction and engineering works and are for use

¹¹ The contracts known as "Home Owner Contracts", are designed specifically for people looking for the benefits and protection of a contract when appointing consultants or contractors to carry out their building work. See <https://www.jctltd.co.uk/category/home-owner-contracts>.

with a series of individual contracts, which may be entered into between the client and contractor or “service provider” and which contain clauses covering framework objectives such as teamwork, decision-making, risk assessment, structure of the organisation and other matters.¹²

Some of the forms have been renamed, for example, the Standard Form of Building Contract with Contractor’s Design is now the Design and Build Contract, and the Major Project Form is now the Major Project Construction Contract, while the Construction Management Documentation is the Construction Management Contract and the Standard Form of Management Contract is the Management Building Contract.

The JCT is also publishing a wide range of subcontracts and warranties. Included among them is a Standard Building Contract with Subcontractor’s Design, for use with SBC05 where the subcontractor undertakes design, and the Design and Build Sub-Contract, for use with the Design and Build Contract.

Of all of the JCT form contracts the most used has always been the Standard Form of Building Contract and thus a more in-depth analysis of the differences between the old “98” JCT contract and the “05” version is in order.

JCT 98 Standard Form of Building Contract (JCT 98 SFBC)

This was the core non-design and build contract produced by the JCT and was available in a number of forms including the Private Version (for use by the private sector) and Local Authorities Version. It was produced in a “With Quantities” option, a “With Approximate Quantities” option (thus making it a remeasurement contract) and a “Without Quantities” option, which in effect was a specification and drawings contract.

The “Private With Quantities” version was a traditional lump sum contract where the employer was responsible for producing the design and providing it to the contractor. This particular contract required the preparation of a full bill of quantities, which set out detailed breakdowns of the various equipment, materials, plant and labour required, which was then priced by the contractor thus arriving at a lump sum which then became the contract sum. Here, the contractor had no design responsibility unless the parties chose to use what was called the “Contractor’s Design Portion Supplement” (CDP) which provided for specific areas of design responsibility to be passed to the contractor, such as where the contractor either designs certain mechanical and/or electrical parts of the Works or subcontracts these to others.

The changes made in the SBC05

In the “05” version, the major change has been in the removal of the nominated subcontractor and nominated subcontractor provisions. The JCT took the position that:

“... there appears to have been little use of the provisions for Nominated Sub-contractors and little appropriate use of the Nominated Supplier Provisions. The provisions of JCT98 for listing of sub-contractors have been retained and, in the JCT’s view, the specifying of a supplier is a matter generally better dealt with in the Contract Bills or other Contract Documents.”¹³

¹² See e.g. Sarah Lupton, “JCT Standard Forms of Building Contract, 2005 Editions, Part 1” [2006] ICLR 90.

¹³ See SBC05 Guide, p 1.

In the old “98” version these listing provisions were set out in Clause 19.3, but under the “05” version they are now contained in Clause 3.8. Now, the employer can provide a list of subcontractors in the bills and mandate that the contractor select from this list subcontractors who can then carry out work that has been “measured or otherwise described” in the bills and priced by the contractor, thus making the contractor responsible for the subcontractor’s performance. It should be noted that now the employer has to list a minimum of three subcontractor firms, after which the contractor is entitled to add to the list and then go back to the employer who can also add more. A problem arises in this scenario if the contractor wants to make any additions and/or refusals as any such refusal must be justified, as the form clearly states that such suggested additions by the contractor “shall not be unreasonably delayed or withheld”.¹⁴

Additional matters in the “05” include two subcontracts which are specifically for use with SBC05, the Standard Building Sub-Contract, and the Standard Building Sub-Contract with Sub-contractor’s Design, although there is no requirement in the main form for the contractor to sublet on these terms.¹⁵

The “98” version contained a statement that said:

“... provided where and to the extent that approval of the quality of materials or of the standard of workmanship is a matter for the opinion of the Architect, such quality and standards shall be to the reasonable satisfaction of the Architect”.

This statement has been combined with the obligation to carry out and complete the Works into a new Clause 2.3.1, which notes:

“Where and to the extent that the quality of materials or goods or of the standard of workmanship are a matter for the opinion of the architect, such quality and standards shall be to his reasonable satisfaction. To the extent that the quality of materials and goods or standards of workmanship are neither described ... nor stated to be a matter for such opinion or satisfaction they shall in the case of the Contractor’s Designed Portion be of a standard appropriate to it and shall in any other case be a standard appropriate to the Works.”

Thus, in the “98” version the requirement to achieve a standard “appropriate to the Works”, in the absence of any specified standard, applied only to workmanship¹⁶ but this has now been broadened to include both materials and goods. In many instances the obligation to provide something “fit for purpose” might have been implied but, as a result of the change, it will no longer be necessary to argue for an implied term in cases where, for example, the specification of the particular material or good is (inadvertently or deliberately) incomplete.

Another area of difference in the “05” is that the Works the contractor must carry out and complete includes “the design and construction of the Contractor’s Designed Portion” which arises from the assumption, in the new form, that the contractor submitted design solution(s) as part of its tender under the category “Contractor’s Proposals” in response to the “Employer’s Requirements”.

A procedure for this has also been developed which allows for the fact that, at the tender stage, the design element on the contractor’s part may not be fully developed but the administrator of the contract must have a way to ensure that the employer’s requirements will be met. As a result, when the contractor provides the contract

¹⁴ See Clause 3.8.2.

¹⁵ See Sarah Lupton, “JCT Standard Forms Of Building Contract, 2005 Editions, Part 1”, *supra*.

¹⁶ *Ibid*.

administrator with its design documents, the contract administrator has to give the contractor a response within 14 days. This can be either by returning the documents marked “A”, without comments, which allows the contractor to proceed with the designed work or they can be returned marked “B”, with comments. If marked “B”, the contractor may proceed but the contractor must then incorporate these comments into the design and the work. The contract administrator can also mark the documents “C”, which requires the contractor to restudy and resubmit the proposed design – it cannot proceed until it receives either an “A” or a “B” on the resubmitted work.

If the contract administrator does not give the design an “A” it must then identify, by means of written comments, why it considers the design not to be in accordance with the contract.¹⁷ It should be noted that the contractor may object to the comments and, if it does, must explain why their incorporation would give rise to a variation. Thus, the contract administrator has the ability to monitor and comment on a developing design but other than this it has no ability to influence the development of the design without issuing a variation to the requirements.

Clause 2.19.1, in setting liability for design states:

“Where there is a Designed Portion ... insofar as the design is Comprised in the Contractor’s Proposals and in what the Contractor is to complete in accordance with the Employers Requirements and these Conditions ... the Contractor shall in respect of any inadequacy in such design have the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer.”

It would appear that the contractor’s designed portion requires only “reasonable skill and care” instead of the more onerous requirement of providing a finished product which is “fit for purpose”. Thus, the issue of design liability for any other contractor designs remains open. In the “05” version, the “Performance Specified Work” provisions have been removed for, as the JCT stated in its Guide, “... they were seldom used, and where they were used it was often where the Contractor’s Designed Portion provisions would have been more appropriate”. It should be noted, however, that despite the removal of the Performance Specified Work provisions, the contract specification or bills containing performance specification requirements can be easily added to the contract. However, if a performance-specified element has not been described as part of the contractor’s designed portion with regard to the reworded clauses above, the argument arises as to whether the contractor’s obligation to provide this work falls under the concept of strict liability or is limited to the use of reasonable skill and care.¹⁸

It should be noted that whilst the changes made to the JCT Standard Form of Building Contract by the move from the 1998 edition to the 2005 edition are detailed above, there have been some significant additional changes made by the 2016 edition to the 2011 edition. The goal of the most recent changes was to make the contracts more straightforward and user-friendly.¹⁹ The principal changes were:

- introduction of common “Interim Valuation Dates” which will apply throughout the contract chain including at subcontract and sub-subcontract tiers;

¹⁷ See Clause 4 to Schedule 2.

¹⁸ *Ibid* at 7.

¹⁹ See <https://www.womblebondnickinson.com/uk/insights/articles-and-briefings/recapping-jct-2016-changes>.

- introduction of a procedure for prompt assessment of loss and expense claims;
- consolidation in a single subsection of the payment notice requirements of the Construction Act;
- consolidation within the main text of the general provisions of Insurance Options A, B and C and ability to adapt bespoke existing structures requirements;
- flexibility in relation to adoption of Fluctuations Provisions (if used);
- inclusion of provisions for the grant of Performance Bonds and Parent Company Guarantees;
- inclusion as an option of third-party rights instead of collateral warranties for subcontractors;
- updating of the wording of Clause 1.8 (Effect of Final Certificate) to bring JCT Design and Build into line with amendments already been made to other JCT contracts in the 2011 editions;
- inclusion of a new Clause 1.10 to eliminate the need for multiple repetitions of the requirements for consents and/or approvals not to be unreasonably delayed or withheld;
- inclusion of the Public Contract Regulations 2015 for public sector works; and
- minor updating of the intellectual property provisions.

Payment

The only real change is that, in respect of pricing variations, the old “13A quotation” provisions, which required the contractor to submit a price as well as an extension of time and loss and expense assessment if requested to do so, are now termed a Schedule 2 quotation in the “05” version. However, the old provisions, which allowed the contractor to submit a “price statement”, have been deleted.

Further changes include a change from 5 per cent to 3 per cent as to the default retention, and where a bond is to be provided in lieu of retention it now has, in common with the Advance Payment Bond and the bond in respect of payment for off-site goods and materials, the ability to be from a surety provided by the employer. Another point to note is that Clause 30.1.1.5 has been reworded (under Clause 4.13.5) so that the amount to be paid if no “withholding notice” is issued is the amount shown in the Interim Certificate (and not “the amount due pursuant to Clause 30.1.1.10”), reflecting the equivalent provision for the Final Certificate (Clause 30.8.4).²⁰

It should also be noted that, whilst the discussion above relates to the differences in terms of the payment provisions between the 1998 edition and the 2005 edition, the 2016 edition has added some significant changes in its revised interim payment regime²¹ which is its Interim Valuation Date, established at pre-contract stage, specified in the main contract, which is the date by which the contractor or subcontractor must submit their payment application. This date will be the same each month, and the same Interim Valuation Date is then incorporated into all subcontracts and sub-subcontracts with room built into the timescales for due dates (i.e. seven days after the Interim Valuation Date) to assist with cash flow. Where there is no application, no

²⁰ *Ibid* at 7.

²¹ For a fuller explanation of the new payment provisions in the 2016 edition, see <https://corporate.jctltd.co.uk/jct-design-and-build-contract-2016-simply-fair/>.

payment becomes due. Under the standard form subcontracts and sub-subcontracts, meanwhile, a selection should be made as to whether to require the subcontractor or sub-subcontractor to submit such a payment application; where there is no such requirement, the contractor must issue a payment notice regardless.

Additionally, whilst in the 2011 edition interim payments would occur monthly prior to practical completion and every two months thereafter, under the 2016 edition interim payments will continue on a monthly basis after practical completion.

Insurance issues

An addition is that where the project includes a contractor's designed portion the contractor is required to carry professional indemnity insurance and the insurance must be taken out immediately following execution of the contract. There is also a provision for inserting a level of cover for pollution or contamination claims, and if none is inserted the level is the same as the level of cover inserted in the contractor particulars.

The other insurance provisions remain largely unaltered with only a few minor changes which include the removal of Clause 22D provisions for employer's insurance for loss of liquidated damages and the deletion of the limitation to damage caused by "fire and explosion" in the definition of terrorism cover.

Again, it should be noted that another change between the 2016 and 2011 editions is to the "All Risks" insurance provisions, in particular Option C (which relates to works to existing structures). Under Option C, the employer is to maintain insurance of existing structures and contents. The new version, however, enables the parties to agree to alternative insurance arrangements. That said, it does not provide precedent drafting for such alternative insurance arrangements, and so parties will have to negotiate and draft on a case-by-case basis.

Commencement, progress and completion

While the overall system dealing with commencement, progress and completion has remained the same, there is now provision for sectional completion, thus allowing the work to be split into sections, each with its own start and finish date. Accordingly, any of the provisions which relate to things, such as issuance of certificates, now apply separately to each section, but are tied together in that there can be only one final certificate.

Other changes include the new heading "Adjustment of completion date" which replaces the old heading "Extension of time", thus reflecting the facility under new Schedule 2 for acceleration to the contract. Further, upon any delay notification from the contractor, Clause 2.27.3 now clearly states that "the Contractor shall forthwith notify the Architect/Contract administrator in writing of any material change in the estimated delay". It should also be noted that the qualification of "reasonably necessary" in Clause 25.2.3 of the "98" version has been dropped and the obligation to keep the architect informed is now mandated. Further, Clause 2.28.2 relating to the time limits for reaching a decision has been changed so that the contract administrator must now decide "as soon as is reasonably practicable and in any event within 12 weeks" and, where the completion date is less than 12 weeks away, must "endeavour to do so prior to the completion date"; this should be compared to the former language

which required a decision “not later than the completion date”. Further, Clause 2.28.3.1 requires the contract administrator to apportion time to each relevant event and relevant omission (this replaces Clauses 25.3.2 and 26.3, i.e. the obligation is no longer limited to those events which relate to loss and/or expense claims).²²

Another interesting change has been in the development of a “general event” category that can be best described as an all-encompassing event clause, which covers any default or omission by the employer and can be found in Clause 2.29 of SBC 2005. Since its intent seems to be a blanket event to cover many of the old “98” specific events, such as “failure of the contract administrator to supply information”, “execution of work not forming part of contract by employer”, “supply of materials and goods by employer” and “failure to provide ingress and egress to the site”, (which events, for example, have been dropped in the “05” version). Most significantly, the old provision that “... the Contractor’s inability for reasons beyond his control and which he could not reasonably have foreseen ... to secure labour” has also been deleted.

Warranties/third-party rights

Under the new “05”, the contractor may provide collateral warranties to a funder, or to purchasers/tenants, and further, the contractor may obtain warranties from its subcontractors to either of these or to the employer. It should be noted that, as to warranties from subcontractors to the employer, the form of warranty is specified in the contract documents and in all cases the details of the intended beneficiaries who may be identified by name, as a member of a class, or as matching a description, are to be set out in Part 2 of the Contract Particulars.

Further, as to subcontractor warranties,²³ the Clauses 7E and 7F recite:

“... where Part 2 of the Contract Conditions provides for the giving by any subcontractor of a collateral warranty ... the Contractor shall within 21 days of receipt of the Employer’s notice identifying the relevant sub-contractor ... comply with the requirements as set out in the Contract Documents as to obtaining such warranties.”

The main update, however, has to do with the alternative to collateral warranties. This is dealt with by new provisions for granting “third party rights”, relying on the facility offered by the Rights of Third Parties Act 1999, thus conferring rights on any beneficiaries, which include those identified in Part 2 of the Contract Particulars, and who can be either specifically named, or identified as a member of a class, or as matching a description. The rights, which the contractor agrees to grant, are set out in Schedule 5 and are largely similar to those set out in the equivalent collateral warranties.

Termination

The change here is that the provision for automatic termination in the event of the contractor’s insolvency or bankruptcy has been removed. Also, any reference to “a 17.5.2.1 agreement” or a continuation or novation agreement and to “interim arrangements” have also been dropped.

²² *Ibid.*

²³ It should be noted there is no requirement mandating the contractor to obtain any warranties, nor is it a requirement to use reasonable endeavours to obtain them, the only requirement being that the subcontractor must comply with any requirements as they are set out.

Dispute resolution

There have been some changes to the dispute resolution provisions. The reference to mediation, which was formerly in a footnote, has now been incorporated as a clause in the form, but remains an enabling provision, as there is no requirement to engage in a mediation process. There are also no details as to the method of appointing a mediator or the procedure to be followed. In relation to the statutory right to adjudication, the JCT provisions for adjudication have been almost entirely dropped, and the procedure set out in the secondary legislation, “the Scheme for Construction Contracts”, will now apply. The form has retained the provisions relating to the naming and appointment of an adjudicator, as have those relating to cases of opening up and testing.²⁴

A major change, however, is that litigation (subject of course to adjudication) has replaced arbitration as the default method of dispute resolution. There is now an article 9, which states that “the English courts shall have jurisdiction over any dispute or difference between the Parties which arises out of or in connection with this Contract”.

The ICE conditions of contract

The ICE produces several forms of contract, including the ICE Measurement Version, the Design and Construct, the Minor Works and the ECC Form of Contract. These all have updated current versions, such as the Measurement Version 7th Edition. However, more recently the ICE Conditions of Contract have now been withdrawn from sale and are longer published. They have been replaced by the Infrastructure Conditions of Contract which are managed by the Association for Consultancy and Engineering and the Civil Engineering Contractors Association (who previously co-sponsored the ICE conditions of contract). However, outside of some specialist engineering sectors, the Infrastructure Conditions of Contract are not widely used. For those still using the earlier versions the following discussion deals with the more relevant issues.

Measurement Version 7th Edition

This form of contract was designed for use in large civil engineering projects where the employer’s professional designers carry out the design. Further, the ICE 7th Edition, like the JCT With Approximate Quantities Contract, is not a lump sum contract. Instead, the final amount payable to the contractor is based on remeasurement of the Works in place. Here, the tender is based upon approximations and the final price for the Works is subject to recalculation once the actual amount of work has been completed.

Like the FIDIC form contracts, in the ICE Conditions the employer appoints the engineer who acts as a contract administrator and initial dispute resolver.

ICE Design and Construct contract

This form of contract is a design and build format and is also used on major civil engineering projects. Here, the contractor bears the main duty to design, construct and complete the Works using all reasonable skill, care and diligence.

²⁴ *Ibid* at 7.

ICE Minor Works contract

Again, as this form of contract is from the Institution of Civil Engineers, it is also meant for civil engineering works with the difference that it is for use on projects where the Works contemplated are fairly simple and non-complicated. As a result, any risks involved are small. Here, the contractor has no design responsibility other than possibly design of a specialised nature that would normally be undertaken by a specialist subcontractor or supplier. Two other main provisions, which make this different, are that the contract value does not exceed £500,000, and that the period for completion does not exceed six months. Here, the contractor is required only to exercise reasonable skill and care and the completion of the Works.

*Time and cost issues under the Measurement Version, Design and Construct, Minor Works***The Measurement Version**

Under this form of contract, the contractor is obliged to start the Works as soon as is reasonably practical after the Works commencement date and, once started, it must proceed with the Works without delay in accordance with the contract. However, under Clause 42, the employer is allowed to set out which sections of the site can be used/accessed and to restrict the availability and nature of access provided. Further, the employer is able to prescribe the order of construction.

The Works must be completed within the stated time, i.e. substantially completed, and the use of the wording "including any section required to be completed within a particular time as stated in the appendix to the form of tender" allows for sectional completion.

As to any EOT, Clause 44 provides that the contractor, within 28 days after the cause of any delay has arisen or as soon thereafter as reasonable, must notify the engineer and provide full and detailed particulars justifying the extension so that it may be investigated contemporaneously with the actual delay. This Clause 44 allows the engineer to assess the delay and to grant an interim extension of time which is subject to review once the Works or relevant section of the Works have been completed. Further, Clause 44(5) requires that within 28 days of the issue of the certificate of substantial completion for the Works, or for any section thereof, the engineer must review all the extensions of time so as to fully determine and certify the overall extension of time for which the engineer considers the contractor entitled.

Any delay in completion then makes the contractor liable under Clause 77 for liquidated damages for delay in substantial completion of either the whole or a specified section of the Works. Additionally, there is a way to cap the maximum amount of liquidated damages in Clause 47(4) that allows a limit on the maximum amount of liquidated damages to be inserted in the appendix to the form of tender. However, if no such limit is stated, then there is no limit to the amount of liquidated damages.

Here, the contract is not a lump sum contract but a remeasurement contract, thus, the contract does not refer to a contract sum but rather it refers to a tender total (which represents the approximate quantities multiplied by the agreed rates) and the contract price, which is the final ascertained amount when the actual quantities have been multiplied by the rates.

As to payments and certification, Clause 60.1 requires the contractor to submit monthly statements to the engineer, which should include the estimated contract

value of the permanent works carried out up to the end of that month. After this, the certification of payment is issued by the engineer and must occur within 25 days of the date of delivery of the contractor's monthly statement with payment by the employer three days later, giving a total of 28 days from the date of the submission for payment.

Changes to the contract as a result of alterations, additions and/or omissions are dealt with in Clause 61, which gives the engineer a wide range of variation possibilities. As to retention monies, the rate and the limit of retention are included with 50 per cent retention being released on the certificate of substantial completion and the remaining half at the end of the defects correction period.

The Design and Construct Version

The only real differences between the Design and Construct Version and the Measurement Version are that references to the engineer are replaced with references to the employer's representative. It should also be noted that the Design and Construct Contract is not by its terms a remeasurement contract as the tendering process allows for a lump sum or other sum as may be ascertained in accordance with the contract conditions. Under this form of contract, the contract price includes the design, construction and completion of the Works and the payment provisions are very similar to those of the Measurement Version.

The Minor Works Contract

The Minor Works Contract can be either a lump sum contract or a measurement contract using a price bill of quantities and, in keeping with its nature, provides that the start date is either specified in the Appendix or notified by the engineer with the contractor then having to start as soon as reasonably possible after the start date.

There are EOT provisions in Clause 4.4 but these cover a very limited number of relevant events and, as to practical completion, this occurs when the Works reach a state where they can be taken, or are fit to be taken, into use or possession by the employer – this, by the way, is notwithstanding any defects or outstanding items which may still exist. Here, liquidated damages arise for a delay in completion per Clause 4.6.

Interestingly as to payments, there is no provision made for any price fluctuations. This is because the Minor Works Contract is intended for periods of less than six months.

As to any claims, the contractor is required to provide monthly statements and, per Clause 7.2 and Clause 7.3, the engineer is to certify any claims within 25 days of receipt of the monthly payments, and, thereafter, to pay such claims within days.

The NEC3 – the New Engineering Contract Engineering and Construction Contract – NEC ECC and the new NEC 4 changes

The ICE launched the NEC in 1993 followed by the 2nd Edition in 1995 and the 3rd Edition in 2005. Then in June 2017, the NEC4 Suite of Contracts was published. According to the NEC website, these new contracts “have been updated and streamlined following feedback from the industry, considering Government priorities and emerging best practice” resulting in “a contract suite with improved flexibility, clarity and which is easier to use”. The old NEC3 and the new NEC4 are now considered the most widely used contract in UK civil engineering. It is often used by

government departments such as the Highways Agency and by local authorities. It has been used on major projects and procurement initiatives such as the Channel Tunnel Rail Link, Heathrow T5, NHS Procure 21 and the Eden Project.

Overview – NEC3

The most striking thing about the NEC3 is that it is written in “plain English” and appears to be based on a more informal style than other standard forms.²⁵ Further, the contract places into use a more “pro-active” form of project management throughout the running of the project and deals with potentially troubling situations in the same manner, e.g. the main contract terms provide that, if no programme is identified in the Contract Data, one-quarter of the price is retained until the relevant programme is submitted. The contract also requires the project manager to give early warnings of any situation that could cause delay or increase prices to the contractor as well as requiring the project manager to give instructions resolving ambiguities between contract documents and similar “helpful” activities.

Another factor that makes the NEC3 different is that it allows for a more varied way of selecting the various modular clauses. The main contract clauses – the “core clauses” – apply across the board to all the options and on top of this there are six main pricing options:

- Option A – a lump sum based on an activity schedule;
- Option B – a combination of lump sums and rates based on quantities in a bill of quantities;
- Option C – a target contract with activity schedule;
- Option D – a target contract with bill of quantities;
- Option E – a cost reimbursable; and
- Option F – a management contract.

Some important provisions

Clarifications

There has been much effort put forward to make the contract easier to understand and to work with, and this is evident in little changes such as the definition of “Working Areas”, which is contained in Clause 11.2(18), and which clarifies that working areas mean only those parts of the working areas identified in the contract data which are necessary for “Providing the Works” and used only for work in this particular contract. This allows, for example, to define “Working Areas” to include areas of land to be used temporarily for the purposes of the contract.

Also in this vein, the possession and use of the site is clarified as the contract in Clause 33 now gives access to and use of the site rather than possession of the site, thus preventing an assortment of potential problems.

Further in this regard is the new definition of “Subcontractor” as seen in Clause 11.2(17). Now the subcontractor is a person “or organisation” that has a contract to construct or install part of the Works or provide a service or to supply plant and equipment.

²⁵ See e.g. Martin Bridgewater and Andrew Hemsley, “NEC3: A Change For The Better Or A Missed Opportunity?” [2006] ICLR 39.

An important item deals with compensation events, with the contractor now having eight weeks from becoming aware of the compensation event within which to notify the project manager. The contract now also makes notification of the compensation event a condition precedent to the contractor's entitlement to time and/or money. The intent of any such notification is so that the employer can hopefully mitigate the situation as well as gather sufficient evidence to properly respond to any claims. Under NEC3, there is an early warning procedure in Clause 16 which requires each party to serve an early warning notice as soon as it becomes aware of any matter that could increase the total of the prices, delay in completion, delay in meeting a key date or impair the performance of the Works in use. It is open to the project manager, when determining the contractor's entitlement to time and/or money in consequence of a compensation event, to take into account any breach of such obligation by the contractor if, for example, such delay in notification has resulted in mitigation measures not being taken.

Adjudication

The NEC3 now provides two options regarding adjudication of disputes arising under the contract. Option W1 is basically non-UK compliant under the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") and allows for mandatory two-to four-week periods prior to the referral of a matter to adjudication. The theory behind this is that the NEC form contract is for use internationally where the HGCRA adjudication provisions do not apply, and if one wants the UK HGCRA provisions then Option W2 is the provision to use as it is intended for use on UK contracts to which the HGCRA does apply.

While the NEC3 moves forward in promoting adjudication and, in its option W2, provides a HGCRA-compliant adjudication process, the JCT has chosen to go the other route and has removed the special JCT adjudication rules, instead incorporating the adjudication procedure contained in the statutory Scheme for Construction Contracts.²⁶ Under the NEC3, the adjudicator's decision, rather than being binding until a final determination in arbitration, litigation or mutual agreement, is now final and binding immediately and remains so unless either party issues its notice of dissatisfaction with the decision within four weeks of the decision's being made. This also puts it in a similar category to that provided for in the FIDIC form contracts.

Capping contractor liability

Another new provision allows the parties to put a cap on a contractor's liability for specific situations, such as for indirect or consequential losses as well as for the contractor's total liability to the employer.

The risk register

Clause 16 provides for a risk register, which is meant to encourage good project management and promote pro-active approaches to the management of the project itself. Thus, at the start of the project, and as part of the Contract Data, the parties create a risk register by noting the risks they identify as having the potential to raise the total cost. The guidance notes to the contract suggest items such as design problems,

²⁶ More on the distinction can be found *infra*, in Chapters 14 and 15.

unexpected ground conditions or potential delay in the supply of materials or plant. In addition to such events, the project manager has the increased responsibility to also put in the risk register “any matter” of which the contractor gives him early warning, that may increase total cost. In a further move to create interaction between the contractor and the project manager, each may also instruct the other to attend risk reduction meetings and to review any already noted risks with the culmination that the project manager keeps the risk register up to date and continually revises it after each meeting. Further, if at one of these risk reduction meetings the parties agree on a point that, for example, constitutes a compensation event under Clause 60.1(1) for the contractor, the decision should be reflected in the revised risk register issued to the contractor. After this occurs, a change to the Works Information must then be instructed by the project manager under Clause 16.4.

Prevention Clause 19

What is new and different is the Prevention Clause 19 and its associated compensation event Clause 60.1(19), which follow the wording of the existing “unforeseen physical conditions” compensation event, but provide wider time and/or money relief for the contractor in circumstances which stop the contractor from completing the Works, either by the date shown in the accepted programme, or at all, provided the event could not have been prevented by the contractor and was an event that 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.²⁷ When this situation develops, the project manager is allowed to instruct the contractor on what should be done to cope with the changed events.

The concept of Key Dates

The NEC3 makes use of “Key Dates” which allow the project manager to manage the work of different contractors working on the same project within the programme. Here, the project manager sets “Key Dates” which provide for the time for completion of specific defined activities or parts of the Works, thus allowing other contractors, or the employer, to proceed with works that follow. It should be noted that the guidance notes state that Key Dates differ from Sectional Completion in that completion and taking over are not required to fulfil the condition. In this regard Clause 25.3 states that if a Key Date is not met, and as a result the employer incurs additional cost by either carrying out the work itself or employing others to do so, the contractor will bear the cost, thus allowing set-off between the different contractors.

Design liability

Unfortunately, under the NEC3, there is no clear answer to whether the contractor's liability for its design is based on fitness for purpose or reasonable skill and care. Under Option X15, there is an inclusion of a limitation of the contractor's design liability to use reasonable skill and care only but this is not stated expressly and all of the relevant

²⁷ See e.g. Martin Bridgewater and Andrew Hemsley, *supra*.

provisions refer only to the contractor's obligation to ensure that its design complies with the Works Information.

Payment for defective work

Whether the contractor has to be paid for defective work depends on the option chosen; this varies from option to option. For example, under the "lump sum" options, options A and B, work, which is "... without defects which would either delay or be covered by immediately following work" (i.e. work that is defective but does not fall under this limited description) has to be paid for by the employer.

Then, under "non-lump sum" contracts, the project manager can disallow the cost of "correcting Defects after Completion"²⁸ and can also deduct monies for "correcting Defects caused by the Contractor not complying with a constraint on how he is to provide the Works stated in the Works Information". But if the defective work does not fall within these two categories allowed to disallow cost, the contractor is paid for the work.

Overview – NEC4

Following from the NEC3, the NEC4 has in effect "refreshed" the NEC3 with some new amendments as the NEC3 contained some rather contentious areas, e.g. accepted programmes. The majority of these amendments are aimed at assisting in contract administration, for example in the new NEC4 ECC the "Employer" becomes "Client", and "Works Information" becomes "Scope" – the goal being to bring this contract into sync with language used throughout the industry. Or, for example, the changes to programming as set out in Clause 31.3, allowing for "treated acceptance" of the contractor's programme in situations where the project manager does not respond to a programme issued by the contractor for acceptance, "or to a reminder".

One key change has to do with early warnings, and the change from the NEC3 to NEC4 finds that the "Risk Register" has been renamed the "Early Warning Register" to help separate it from the project risk register, which is generally used in a different context, and the NEC4 has established "default periods" for "early warning meetings". A major change is that contractors must now submit applications for payments, rather than the project manager being "obliged to assess if they don't".

One welcome change is that dealing with disputes and how they are handled and the NEC4 now provides for an early option "for a four-week period for escalation and negotiation of a potential dispute, which takes place prior to any formal proceedings", requiring a nominated senior representative of each party (named in the Contract Data) to meet and try to reach a negotiated solution.

Additional provisions changes in ECC NEC4 include the following:²⁹

- Collaboration – In secondary option X12, "Partnering" has been amended to "Collaboration" to better reflect the intent, i.e. that collaboration is a key provision within the suite of contracts.

²⁸ However, this does not cover defects discovered after completion.

²⁹ See Jonathan Shaw, *NEC3 to NEC4: Key Changes to the Engineering and Construction Contract*, 2 October, <https://www.fgould.com/uk-europe/articles/nec3-to-nec4-key-changes-to-the-engineering-and/>

- Retention – The secondary option X16 for retention now includes the optional provision of a retention bond instead of having money retained.
- Fee percentage – There is now only one fee percentage, with no separate fee percentage for subcontracted works. This reduces confusion when adding fee percentages for those putting together tenders and quotations/compensation events, and those assessing said submissions.
- Schedule of cost components – These changes have been made to simplify this section, and under options C, D and E the Short Schedule has been removed in its entirety and is only used for option A and B.
- Core Clause 4 Quality Management – A requirement has been introduced for the contractor to prepare and issue a quality management system and plan. This will be seen as good practice across the industry, and will assist the project manager and client throughout the duration of a project. This replaces the testing and defects core clause.

The FIDIC Forms of Contract

The three main FIDIC Forms of Contract

FIDIC publishes eight “Forms of Contract”; these include the White Book, which is the “Client Consultant Model Services Agreement”, and the Green Book, which is its Short Form of Contract. There is also an additional specialty contract known as the Blue Book, which is for dredging and reclamation works.

The main construction contracts, however, are the Red Book, which is the “Conditions of Contract for Construction”; the Yellow Book, which is the “Conditions of Contract for Plant and Design-Build”; the Silver Book, which is the “Conditions of Contract for EPC/Turnkey” projects; the Gold Book, which is its newest form of contract for “Design, Build and Operate” projects; and the Pink Book, known better as the “Multilateral Development Bank” or “MDB Harmonised Contract”. These main forms will be discussed herein.

In comparison to other standard forms of contract such as the JCT or NEC, which can be used across a multitude of projects, the FIDIC forms are intended for large, complex and substantial projects lasting over many years and are generally best suited for large infrastructure projects, i.e. hydroelectric projects, dams, highways, bridges and the like.

The concept of risk allocation is the basis for all of the FIDIC contracts and FIDIC has sought over the years to create a fair division of responsibility where the person best able to control or deal with the risk takes on that obligation. The aim is that contractors would not put large contingency figures into their tenders and, if an unexpected risk did later arise, the employer would pay at that time rather than requiring it to pay a premium for price certainty on a lump sum contract.

Since the last edition of this book FIDIC has published new editions of the Red,³⁰ Yellow³¹ and Silver³² books which now place the emphasis on the construction programme as a tool to be used in the construction management process and which have

30 FIDIC Conditions of Contract for Construction, 2nd edn 2017 (Red Book)

31 FIDIC Conditions of Contract for Plant & Design Build, 2nd edn 2017 (Yellow Book)

32 FIDIC Conditions of Contract for EPC Turnkey Projects, 2nd edn 2017 (Silver Book)

also clarified certain areas and methodologies which had been open for interpretation over the years (and much litigation), and have added new procedures and “deeming” provisions to accomplish this goal. Of interest is the fact that these new changes make the new version of these FIDIC contracts more akin to the approaches taken in the NEC forms. In summary, the new FIDIC forms of contract revolve around what is termed “three main themes”, which include “liability and risk management”; “enhanced contract management processes”; and “emphasis on the dispute avoidance process”.

The proper form

Employer design of the project

The FIDIC forms vary based upon how the project is going to be designed and by whom. For example, if the employer is responsible for the general design, i.e. it has hired the engineer/architect and that design professional reports directly to the employer and where this design professional will then also administer the project’s progress and certify payments as well as approve any variations, then the Red Book is the proper form to use.³³

Contractor design of the project

Contractor designs and employer supervises

Here, the situation is reversed: the employer provides the contractor with its requirements and/or outline specifications and the contractor designs the project to meet those requirements and specifications. Under these circumstances, the Yellow Book is more appropriate as it allows the contractor to control costs to a greater degree. Here, too, as in the “Red Book”, the employer’s engineer administers the project’s progress, against the employer’s requirements and specifications, and certifies any payments due.³⁴

Contractor designs, procures and builds

One step further removed is where the contractor is in charge of everything from design through to full completion and handing over the key to the front door of the project. Upon turning over control the employer can operate immediately. In such cases, the Silver Book is the proper form to use. Here, the price is guaranteed as the contractor is fully responsible for everything and, as a result of this responsibility, there is no engineer to supervise progress other than to determine whether specification criteria are being met. This sort of form is used in manufacturing facilities, i.e. plant situations where the engineer would also monitor the plant performance.³⁵

33 The Red Book is FIDIC’s “traditional procurement” employer-design contract. It is a re-measurement contract, though with the alternative of lump sum payment. Contract administration is undertaken by the engineer.

34 The Yellow Book has a dual function. It is FIDIC’s “design-and-build”/contractor-design contract; it can also be used specifically for mechanical/electrical plant. The contractor designs and builds the Works according to the employer’s requirements. This is a lump sum contract and is also administered by the engineer..

35 The Silver Book is FIDIC’s EPC/Turnkey Contract. It is also a lump sum design-and-build contract, but the contractor accepts a much greater allocation of responsibility and risk than under the Yellow Book. The new Silver Book is to be administered by an Employer’s Representative.

Contractor designs, procures, builds and operates

A variant on the Silver Book is where the employer not only wants the contractor to design, procure and build the facility, but also wants it to operate the facility for a set number of years with the asset reverting to the employer at a specified date. In these circumstances, the proper form to use is the new Gold Book.

Who has the risk?

It should be noted that allocation of risk is a fundamental concern. Under the Red Book, risk is shared equally between the contractor and employer, while under the Yellow Book, the contractor has more risk because it must complete the project and at conclusion the project must be fit for the intended purpose. The other end of the risk scale can be found in the Silver Book, where all of the risk (with very few exceptions) belongs to the contractor.

Common issues between the forms

The role of the engineer

Although employed by the employer, the engineer, while carrying out several of its functions, is required to act in an independent capacity. There is no “engineer” under the Silver Book, but the Red Book and the Yellow Book have changed the role so as to deal with the potential conflict.

In both books the engineer is deemed to be acting for the employer and in this regard Sub-Clause 3.1(a) states:

“...whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer”.

The question that arises is: how can the engineer make fair determinations when he is deemed to act for the employer? This has led to much discussion (and litigation) and has resulted in such language as, where reference to Sub-Clause 3.5 is made, the engineer must make “a fair determination in accordance with the contract, taking due regard of all relevant circumstances”. The problem that arises in administration of FIDIC contracts thus becomes whether the engineer is also required to make a “fair determination” in matters other than claims such as in the payment and variation clauses of the contract.

This, too, has changed in the new 2017 edition and now, when carrying out its duties under the Agreement or Determination Sub-clause 3.7, “the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer”. This is a new concept in FIDIC – a “neutral Engineer” – and what was intended was that although the engineer is appointed by the employer and acts for the employer in most other respects under the contract, when acting under (Sub-Clause 3.7) the engineer is to treat both parties “even-handedly, in a fair-minded and unbiased manner”.

It should be noted here that in the Silver Book, there is still no engineer appointed, leaving that with the employer, and whilst the 1999 Silver Book mandated that, when exercising discretion under the Determinations provision, “the Employer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances”, with the employer being allowed (entitled) to appoint or have an Employer’s Representative act on its behalf under the contract.

This, too, has changed in the 2017 edition of the Silver Book, and the employer is now obliged to appoint (“shall appoint”) an Employer’s Representative, who is “deemed to act on the Employer’s behalf under the Contract”. And now it is not the employer but the Employer’s Representative who has a duty to “make a fair determination of the matter or Claim”, as well as in carrying out duties under the Agreement or Determination provisions “the Employer’s Representative shall not be deemed to act for the Employer”.

But note should be taken that the 2017 Silver Book does not mandate the Employer’s Representative to be “neutral”.

Another difficulty is that the employer can replace the engineer under Sub-Clause 3.4 and the contractor can only give a “reasonable” objection “with supporting particulars”.

Additionally, other “Engineer” provisions have been modified in the new 2017 version of the FIDIC Red, Yellow and Silver books and in particular in the Yellow Book now requires, for example in Sub-Clause 3.1, that a professional engineer not only to have suitable qualifications, experience and competence in the main engineering discipline but also to be fluent in the ruling language (as defined in Sub-Clause 1.4). Further, an Engineer’s Representative has also been introduced. Sub-Clause 3.3 now provides that the engineer can appoint a representative and delegate to it the authority necessary to act on the engineer’s behalf at the site, except to replace the Engineer’s Representative. Most significantly, however, are the engineer’s determination provisions in Sub-Clause 3.5 of the “old” Yellow Book, which have now changed, and further information has been added to deal with situations where the contractor believes an engineer’s instruction constitutes a variation (but has not been stated to be so) and a mechanism has been put in place to allow the contractor to give notice to the engineer with reasons why he cannot execute the variation expeditiously or at all.

Contractor incentives

The Red, Yellow and Silver books all provide for the contractor to share any benefits derived through better or more cost-efficient methods of construction. This is sometimes referred to as “value engineering”. The provisions under the Red Book, however, are different from the Silver and Yellow books because they give incentive to the contractor to devise better (and more cost-effective) ways of working, especially if the reward to the contractor is 50 per cent of the net benefit to the employer. Under the Yellow and Silver books, any “value engineering” proposals are considered as variations only.

Variations

Generally, the engineer may instruct variations at any time prior to the issue of the Taking-Over Certificate, either by instruction or by a request from the contractor for a proposal. The difference is that under the Red Book the contractor is required to comply with the variation unless it is unable to obtain the goods and, if that is the situation, it must so inform the engineer who is then required to either cancel the variation or either confirm or vary the instruction.

Under the other FIDIC books, where the contractor has some design obligations, the contractor is bound by the variation unless it gives notice that it is unable to obtain

the goods for the variation or that in doing the variation it will reduce the safety or suitability of the Works, or that it will affect the performance guarantees or the schedule of guarantees.

It should be noted that neither the Yellow Book nor the Silver Book specifies what is to happen if the contractor fails to warn the employer that the performance guarantees or schedule of guarantees will not be met, thus causing the Works to comply with any performance requirements under the contract. The situation can, therefore, arise where the employer orders a variation that unfortunately affects the performance and then has no recourse.

Under the new 2017 editions, the provisions re variations relating to omissions now provide that the parties can agree an omission in order for the omitted work to be carried out by others, and if so the contractor will be entitled to loss of profit and other losses/damages it may suffer as a result of the omission. Further valuations of varied works and of omitted works have also been expanded and clarified in Sub-Clause 13.3. One other significant change has to do with changes in the law during the progress of the Works which, whilst being retained, have now been altered, e.g. changes in permits etc. obtained by the employer or the contractor under Sub-Clause 1.13, or changes in the requirements for any such permits etc. are also to be treated as changes in law and although the change in law provisions have always stated that the "Contract Price may be reduced to take account of any decrease in Cost as a result of change in law", there is now also a process included whereby the employer can request a reduction in the contract price as a result.

Contractor's rights and obligations

Rights

Under the main FIDIC contracts, the contractor has greater power to force the employer to pay and have responsibility for payment and, if it does not pay, the contractor can stop work entirely. As an example, financing charges are recoverable and, additionally, the contractor can suspend work for non-payment and/or for late payment of interim certificates. Thus, where the engineer fails to certify a payment, or the employer fails to make a payment, the contractor, on giving not less than 21 days' notice, may suspend work or reduce the rate of work.

The contractor can require the employer to show reasonable evidence that financial arrangements are in place that will enable the employer to pay the contractor the contract price. It should be noted that a failure by the employer to comply with this requirement is an act of default that entitles the contractor to suspend all or part of the Works or to terminate the contract. While there is consensus that this is a reasonable clause to include, there may be some debate about what amounts to "reasonable evidence".³⁶

Also, the employer must comply with the claims provisions and is not allowed to make arbitrary deductions from any sum otherwise payable, with the exception of services requested by the contractor and other deductions allowed under the contract. Additionally, any right to set-off is excluded unless the employer complies with certain requirements.

³⁶ See e.g. Edward Corbett, "FIDIC's New Rainbow – An Overview of the Red, Yellow, Silver and Green Test Editions" [1999] ICLR 41.

Obligations

Under the Red Book, the contractor is required to design (to the extent specified in the contract), execute and complete the Works in accordance with the contract and the engineer's instructions. They are also required to remedy any defects in the Works.

However, under the Yellow and Silver books, there is a fitness for purpose obligation that states:

"The Contractor shall design, execute and complete the Works in accordance with the Contract, and shall remedy any defects in the Works. When completed, the Works shall be fit for the purpose for which the Works are intended as defined in the Contract."

Additionally, these books require the contractor to state in its tender that it has:

"examined, understood and checked these documents [including the Employer's Requirements] and have ascertained that they contain no errors or other defects".

This not only puts the burden on the contractor to really understand what is needed but, because of the different nature of the Yellow and Silver books, the contractor is also required to produce a result rather than just avoiding negligence in the execution of the Works. Accordingly, the contractor cannot avoid liability by arguing that the design was novel or that it used universally accepted standards or tried and tested components – either it works or it does not – if it does not, the contractor is liable.

It should be noted that, under the Yellow Book, the contractor has an obligation to review the employer's requirements upon receipt of the notice to commence the Works but will be relieved from responsibility for errors in the employer's requirements and will be awarded time and costs if:

"... an experienced contractor exercising due care would not have discovered the error before submitting when scrutinising the Employer's Requirements under Sub-Clause 5.1".

Under the Silver Book, the contractor's responsibility for errors in the employer's requirements has certain exceptions, e.g. the contractor has no responsibility for the intended purposes of the Works and the performance criteria. Indeed, it is expressly stated that:

"The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information..."

Because of the nature of the obligations on the contractor in the Silver Book the majority of risk is placed on the contractor and it expressly states:

"... by signing the Contract, the Contractor accepts total responsibility for having foreseen difficulties and costs of successfully completing the Works."

Additional obligations and issues

Under all of the books, the contractor has an obligation to provide progress reports that must be submitted with supporting documentation when applications for payments are made.

As to any claims by the contractor there is a 28 days' notice requirement and in the event that such a notice is not given:

“... the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged for all liability in connection with the claim”.

Termination issues

Termination for convenience

Termination for convenience is provided for upon 28 days' notice. When this occurs the contractor is to be paid for work done and demobilisation but receives no other compensation. The actual wording additionally states:

“The Employer shall not terminate the Contract ... in order to execute the Works himself or to arrange for the Works to be executed by another.”

The new 2017 edition also provides for “a new carve out” for losses incurred following termination for convenience under what is now Sub-Clause 15.7, and also for losses incurred in respect of omissions of work to give it to third parties – although there is still no carve-out for the employer's termination losses following a default-based termination (even though there is for the contractor's termination losses).

Impossibility of performance

As mentioned earlier, the Red, Yellow and Silver books provide for the termination of the contract if a situation arises which makes the performance of the contract impossible. Impossibility will relieve the contractor of further performance of its contractual obligations and the FIDIC contracts state:

“If an event or circumstance outside the control of the Parties ... arises which makes it impossible or unlawful for either or both parties to fulfil its or their contractual obligations.”

Force majeure

As already discussed, *force majeure* is defined quite broadly in the FIDIC contracts so that events that are beyond a party's control, and which could not have reasonably been provided for and now cannot be avoided, are treated as *force majeure*. The contracts provide a list of events that are intended to be illustrative, rather than determinative, of the matters that can be considered as *force majeure*. The contractor is entitled to an extension of time for the *force majeure* event if that *force majeure* event will delay completion.

As to the recovery of costs, the situation is more complicated. “Cost” is a defined term within the FIDIC contracts, meaning all expenditure reasonably incurred by the contractor on or off site, including overheads and similar charges, *but does not include profit*. Thus, one must look at the provided list as the contractor can recover cost for the listed items (i) to (iv) which include war, terrorism-related events, strike and contamination by radioactivity. The contractor, however, does not receive “Cost” for “natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity”. Also, with the exception of “war, hostilities (whether war be declared or not), invasion, act of foreign enemies” the *force majeure* event must occur in the country where the Works are taking place.

FIDIC 2017 edition changes

The 2017 edition has provided some additional specific provisions regarding “best practice” e.g. the contractor can ask the employer (and the employer can ask the contractor) to remove persons engaged in fraud, corruption and similar practices (Sub-Clauses 2.3 and 6.9) and fraud/corruption etc. has been added to the list of conduct which now allows for termination as set out in Clauses 15 and 16. But the largest number of termination changes in this area deal with new “trigger” items, such as:

The contractor

- a. Failure to comply with a final and binding engineer’s determination (subject to such failure amounting to a “material” breach of contract).
- b. Failure to comply with any DAAB decision (whether final and binding or not) (subject to the same materiality test referred to above).
- c. If the delay damages cap (if one is specified) is exceeded. The employer simply has to demonstrate that this is the case and does not have to have deducted or recovered delay damages up to the cap before this trigger comes into effect.
- d. If the contract is “is found, based on reasonable evidence” to have engaged in corruption, fraudulent, collusive or coercive practices in relation to the contract (this replaces the previous more limited termination trigger for bribery).
- e. The old trigger for a failure by the contractor to comply with a Notice to Correct has been qualified by the materiality test referred to above.
- f. The list of events in respect of which immediate termination is possible (rather than requiring 14 days’ notice) has now been extended to include breach of assignment and sub-contracting obligations.
- g. The employer’s right to terminate for convenience has been significantly modified by requiring it to pay loss of profit and other losses and damages suffered by the contract as a result of the termination. The contractor’s entitlement in this regard is also carved out of the indirect and consequential loss exclusion and could therefore represent a very significant exposure to the employer.

The employer

The 2017 editions also provide for new and/or altered “triggers” for termination by the employer:

- a. A failure by the employer to comply with a final and binding engineer’s determination and a failure to comply with any DAAB decision (whether final and binding or not) (subject to the same materiality test referred to above) has been included in the list of triggers for termination by the contractor.
- b. The trigger for substantial failure by the employer to perform its obligations under the contract is now subject to the materiality test referred to above.
- c. An additional new trigger has also been included – such that if the contractor does not receive a Notice of the Commencement Date within 84 days after receiving the Letter of Acceptance the contractor has the right to terminate. This has been added to prevent a situation where a contractor has committed to prices and timescales for the project but there is then a prolonged delay to the start.

In addition, a new Sub-Clause 1.16 (Silver Book Sub-Clause 1.15) has been included. This provides that (unless any mandatory law provides otherwise) termination of the contract under a given sub-clause requires no action of any party other than as set out in that sub-clause. This is probably to be read³⁷ as relating to the act of termination itself, i.e. to the extent possible, no additional formalities are to be required (unless mandatory under the governing law) in order to effect termination and does not extend to the consequences of termination – although this is not entirely clear.

Unforeseen conditions

The Red and Yellow Books

Under these books, a contractor can claim time or cost for unforeseeable physical conditions and the relevant sub-clause states:

“... ‘physical conditions’ means natural physical conditions and man-made and other physical conditions and pollutants, which the Contractor encounters at Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.”

The sub-clause continues:

“If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.”

It should be noted, however, that the contractor must also provide information as to why it considers the conditions unforeseeable and, despite this, the contractor is still required to continue to execute the Works.

If there are unforeseeable physical conditions, and the contractor suffers delay and incurs cost, then it is entitled to an extension of time and its cost. However, in respect of the payment of cost, the engineer is allowed to have regard to other physical conditions in “similar parts” of the Works and, if the conditions found are more favourable than could reasonably have been foreseen, the engineer may reduce the award of cost.³⁸

The Silver Book

Because of the different nature of the Silver Book, and the reliance by the employer on a “complete” project under this book, the contractor takes on responsibility for ground conditions and is also required to verify and interpret any data provided by the employer, with the only exceptions being:

“portions, data and information which are stated to be in the Contract as being immutable or the responsibility of the Employer, definitions of intended purposes of the Works or any part thereof, criteria for the testing and performance of the completed Works, and portions, data and information which cannot be verified by the Contractor, except as otherwise stated in the Contract.”

Other than perhaps relying on the concept of impossibility of performance, the contractor thus takes on almost all risk regarding the ground conditions.

³⁷ See e.g. CMS Guide to the FIDIC 2017 Suite, www.cms-lawnow.com.

³⁸ *Ibid.*

Damages

Delay/damage claims by the employer

Any claim for damages starts with notice being given by either the employer or the engineer who “shall give notice *and particulars* to the contractor”. The “particulars” should cover the basis for the claim of damages and give a substantiated amount. Thereafter, the engineer must consult with each of the parties – the employer and the contractor – in an attempt to reach some agreement and, thereafter, the engineer is required to give its determination with supporting details and particulars. The employer can no longer just set off any claim for delay damages against monies owed to the contractor. Additionally, it should be noted that, as stated in the FIDIC contracts³⁹ as to any default, such as noncompliance with the time for completion and any resulting damages to the employer:

“delay damages shall be the only damages due from the Contractor for such other than in the event of termination [by the employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.”

Damage claims by the contractor

Claims for damages by the contractor have a prerequisite of proper notice under the Red, Silver and Yellow books and if a contractor chooses to make a claim for either time or additional money it must give 28 days’ notice; the exact requirement reads:

“If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply ...”

This provision must be strictly adhered to and, if the contractor does not comply with the 28-day period, then the time for completion “shall not be extended” and the contractor “shall not be entitled to additional payment”. Thus, the court and/or arbitrator and/or dispute board will treat this 28-day notice period as a condition precedent to bringing the claim. Needless to say, this provision can lead to many problems. The issue that arises is whether an innocent contractor should be precluded from collecting if the notice period was not complied with owing to the fault of the employer. This is sometimes referred to as the “prevention principle” and basically states that a party should not benefit from its own breach of contract⁴⁰ and/or its own wrongdoing.

Thus, if the employer fails to do something it is required to do under the contract, and as a result the contractor suffers delay or other damages, the employer should not be relieved from paying the contractor for its losses or granting an extension of time

³⁹ See Sub-Clause 8.7.

⁴⁰ See e.g. *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

solely because the contractor missed the 28-day notice period and, equally important, the employer should not be able to deduct any delay damages against the contractor. Despite this, the 28-day notice period stands. In the new FIDIC Gold Book, the contractor will not only give notice of a claim within 28 days of becoming aware of the relevant event or circumstance, but also give particulars within 42 days in order to prevent the claim from becoming lapsed.

It should be noted, however, that the principle in *Alghussein*⁴¹ is a principle of construction that can be displaced by express terms in the contract – see, for example, *IBM UK Holdings Ltd v Dagleish*⁴² and *BDW Trading Ltd v JM Rowe (Investments) Ltd*.⁴³ The court in the IBM case citing BDW notes:

“It is to be emphasised, however, that the principle exemplified in *Alghussein Establishment v Eton College* is a principle of construction. As such, it can be displaced by the express terms of a contract. ... In order to displace this principle there must be ‘a clear contractual intention to be gathered from the express provisions of the contract’.”

However, in 2017 in *IBM UK Holdings Ltd v Dalgleish*,⁴⁴ the Court of Appeal allowed IBM UK’s appeal (and dismissed the beneficiaries’ cross-appeal, in which they had argued that IBM UK had used the scheme’s powers to exclude members for a collateral and improper purpose, such that the proposals were invalid). The Court of Appeal found that, as was clear from *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*,⁴⁵ to avoid breaching the duty of good faith, an employer had to take into account all the circumstances at the date of its decision; and the adverse trading conditions affecting IBM UK were a relevant factor. Whilst Mr Justice Warren had acknowledged as much, he had incorrectly held that the beneficiaries’ reasonable expectations had an overriding significance and had to prevail unless there was no other way for IBM UK to achieve its business aims. The correct approach, rather, was to apply a reasonableness test, equivalent to that in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,⁴⁶ to decide whether IBM UK’s decision was valid and lawful, given the implied duty of good faith and its contractual duty.

41 *Supra*.

42 [2015] EWHC 389 (Ch) at 108–109.

43 [2011] EWCA Civ 548 at 31.

44 [2017] EWCA Civ 1212.

45 [1991] 1 WLR 589.

46 [1948] 1 KB 223.



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CHAPTER 8

Termination of contract

Termination versus determination

A construction contract can be terminated where one of the parties has acted in a way that is so wrongful that the law allows the other to end the contract, i.e. the contract has been breached. Termination can happen two ways – by either a common law determination, where the guilty party must have committed a fundamental, or repudiatory, breach and the innocent party must have, by word or action, elected to accept the repudiation, or a contractual determination where a party may lawfully determine the contract by exercising powers to the effect expressly provided for in a contractual termination clause.

Under English law, a party can terminate or repudiate the contract when the other party clearly shows that it has no intention of performing, or has committed such a major breach of the contract that it will be treated as having no intention to perform under the terms of the contract and, thus, will be treated as having repudiated the contract. Under either scenario, the non-breaching party can either affirm that the contract exists, and require that the promised obligations be upheld and seek damages accordingly, or accept the repudiation and “bring the contract to an end”.¹ Put another way, repudiation of the contract by one party entitles the other to consider that the contract has been discharged.² Under “repudiation”, both of the parties have no further contractual obligations and further performance is excused, leaving only those contract provisions necessary to allocate liability, assess damages and sort out any ADR provisions, such as arbitration.

Termination, however, should not be confused with “determination” of the contract. Determination clauses are contained in many construction contracts and allow for just that; determination of certain rights, duties and related matters under specific circumstances. It should be noted that not all of these, on their own, amount to a sufficiently serious breach to justify “termination”. Indeed, for example, provisions requiring determination related to notices are not classified as breaches in the contract at all. Usually such “determination” provisions allow for certain procedures that must be followed for the “determination” to be effective.³ The case of *Lockland Builders Ltd v Rickwood*⁴ illustrates the differences. Here, Rickwood purchased a plot of land and contracted with a builder to build a house on the plot. Rickwood in turn was to convey

¹ See e.g. John Murdoch, *Construction Contracts: Law and Management*, Routledge-Cavendish, London, 2007.

² *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL.

³ *Ibid.*

⁴ (1995) 77 BLR 38, 46 ConLR 92.

a part of the plot to the builder who was to build a second house and sell it for the builder's advantage and Rickwood was to make further cash payments to the builder. This arrangement was formalised in two contracts. One was between Rickwood and Lockland (a company with which the builder was closely associated), providing for the sale of the plot to Lockland. The other agreement, the building agreement, between Rickwood and the builder provided that if Rickwood was dissatisfied with the progress, or quality, he might follow a certain procedure and, having done so, determine the agreement, enter upon the Works and call upon another builder to complete the Works. Without following the specified procedure, Rickwood excluded the builder from the site. Lockland issued proceedings seeking implementation of the contract for the sale of land and Rickwood sought damages from the builder for defective work. The trial judge held that Rickwood had not been entitled to determine the builder's employment and Rickwood appealed. The court reviewed the facts and dismissed the appeal. It held that:

- “(1) The absence of saving words in the determination clause preserving the common law rights and remedies had the effect of impliedly precluding Rickwood from terminating the contract otherwise than by exercise of his rights under the express provisions, save for cases such as where the builder had refused to continue the work or where the contravention displayed a clear intention not to be bound by the terms of the contract. Rickwood was limited to the rights of determination he had under the contract, (citing) *Architectural Installation Services Ltd v James Gibbons Windows Ltd* (1989) 46 BLR 96, [1990] CLY 421 not followed and
- (2) In any event, the builder had not been in repudiatory breach when Rickwood excluded him from the site.”

Thus, in effect, the court held that where a contract sets out a specific procedure for determination, this implies that any common law right for “termination” is excluded, except where the “breaching party” shows intent not to be bound by the contract, e.g. some form of repudiatory breach.⁵

There are many types of repudiatory breach that can entitle either party to terminate the contract. The most common is the employer's failure to pay the contractor on time, which justifies the contractor in terminating the contract.⁶ It should be pointed out that while failure to pay the contractor on time usually qualifies as a repudiatory breach, failing to pay on “another” contract is not so likely to qualify as repudiatory.⁷ Most construction contracts contain provisions regarding determination for non-, short or continued late payments, which in and of themselves may not be repudiatory but their continued existence amounts to a repudiation.

In *CJ Elvin Building Services Ltd v Noble*,⁸ the court, after finding that the defendants were in serious breach of contract for failing to pay a significant outstanding sum, turned to whether the claimant was entitled to suspend work and wrote:

“... The undoubted reason why the claimant did suspend work was that the defendants were not paying sums which were due. The claimant was not willing to continue with the work and complete it unless further sums due were paid.

Although it is not alleged by the claimant that the defendants repudiated the contract let alone that the claimant accepted any such repudiation, it is my view that the defendants

⁵ *Ibid.*

⁶ See e.g. *Mersey Steel and Iron Co (Limited) v Naylor, Benzon & Co* (1883–84) LR 9 App Cas 434.

⁷ See e.g. John Murdoch, *Construction Contracts: Law and Management*, Taylor & Francis, Routledge-Cavendish, 2007.

⁸ [2003] EWHC 837 (TCC).

were in repudiatory breach of the contract. They were in breach of what to the claimant was a most important term of the contract, namely that reasonable sums due should be paid at reasonable intervals. Not only were the defendants in breach of contract by late October 2001 for not paying, they were threatening (in breach of contract) not to pay any further sums until the works were completed. Although the claimant was financially able to complete the works, it is undoubtedly the case that the claimant's suspension was brought about directly as a result of the defendants' breach of contract in failing to pay. In those circumstances, the claimant was entitled to suspend the work. It certainly cannot be said that the suspension triggered as it was by the defendants' own breach was itself repudiatory. The defendants cannot rely upon its own breach to justify a contention that the Claimant was itself in repudiatory breach.

Reliance has been placed by the defendants on an unreported case, *DR Bradley (Cable Jointing) Ltd v Jefco Mechanical Services Ltd* (1998), referred to in the footnote in Chitty on Contracts, 28th Edition, para 37–199. I have been unable to find or obtain a copy of this case. I am not convinced that the learned editors' statement in the book ("non-payment by the employer is not generally a breach which will entitle the contractor to treat the contract as at an end") is correct or, at least, unconditionally correct. Failure or refusal to pay sums due under a building contract can amount and often does amount to repudiatory conduct on the part of the employer. This will obviously depend upon the terms of any construction contract. Many construction contracts have termination clauses which, invariably, permit the Contractor to terminate under the provisions of the contract on the grounds of non-payment by the Employer. The obligation to pay on the part of the construction contract employer is one of the most important obligations which the Employer has. A refusal to honour payment obligations, at least insofar as it relates to a relatively sizeable sum of money due or the threat not to pay further sums due in accordance with the contract must be capable of being repudiatory."

Another type of repudiatory breach is where the employer fails to give possession of the site. Needless to say, just interfering with possession does not amount to a repudiation of the contract, but full refusal would qualify, as would removal of the contractor from the site, i.e. ejection. Again, this can all be seen as a sliding scale with the more onerous conduct qualifying as repudiation. Also included in employer repudiatory breaches is where the certifier, i.e. the engineer, architect or contract administrator, fails and/or refuses to certify, or does so negligently, or under-certifies repeatedly; these constitute repudiatory breaches on the employer's part – again, the seriousness of the conduct is what counts.

From the employer's perspective there can be many acts by the contractor which qualify as repudiatory. These include unjustified walking off the job or suspension of the work. It is necessary to carefully review the underlying contract to make sure that there are no contract provisions covering the contractor's right to leave or suspend work. However, if the contractor's work is defective the employer cannot generally terminate the contract, but rather seek damages for the costs to correct. It should be noted again that if the defective work is of such a character as to amount to a total lack of performance, then the employer is justified in claiming repudiation. In *Sutcliffe v Chippendale & Edmondson (A Firm)*,⁹ the court was faced with many small defects none of which would qualify on its own as a repudiatory breach but accumulated together they did qualify, and the court wrote:

"... [The Contractor's] manifest inability to comply with the completion date requirement, the nature and number of complaints from sub-contractors and their own admission that ... the quality of work was deteriorating and the number of defects was multiplying".

9 (1982) 18 BLR 149.

In the totality of the situation this was sufficient to allow the employer to terminate the contract and order the contractor off the site. While there are other reasons that justify the employer in terminating the contractor, delay is undoubtedly one of the major ones that arise. But the delay must be substantial if it is to justify repudiation in and of itself. The employer must show, for example, that the contractor had no fundamental intention to be bound by the terms of the contract and the contract itself must clearly state, or make sufficiently clear, that “time is of the essence”. If the delay occurs, the employer must notify the contractor that “time is of the essence” and give reasonable time to comply – if the contractor fails to do so, a repudiation has occurred.

If either party acts rashly and claims that repudiation has occurred it can then be held liable for wrongfully terminating the contract. In this regard, the Hong Kong case of *Lee Chau Mou v Kin Sing*¹⁰ is illustrative. In that case the plaintiff, Lee Chau Mou, the principal contractor, entered into a contract in January 2002 with the Water Supplies Department (“WSD”) to conduct construction works in respect of water supply in Hong Kong. The Works involved laying exposed and buried water mains and constructing concrete supports for the exposed water mains. The contract sum was HK\$19,245,850 and the Works were to be completed by September 2003. In March 2002 the principal contractor subcontracted the Works to the defendant, Kin Sing.

The issue dealt with Clause 5 of the contract between the principal contractor and the subcontractor that stated:

“Upon receiving notice or warning for slow progress of works or other no[n] compliances, if no improvement and no rectification is made or continuous occurrence of slow progress of works or even deliberately cease works without acceptable reasons, [the Principal Contractor] shall have the rights to terminate this Contract and all cost incurred from the damages made shall be solely responsible and liable by [the Subcontractor] without objection.”

After several disputes between the principal contractor and the subcontractor, the principal contractor, in January 2003, exercised its right under this Clause 5 to terminate the subcontract and re-enter the site.

The issue was whether Clause 5 could be invoked only if the subcontractor failed to remedy the delay or other non-performance that was so substantial or fundamental in nature that it amounted to a repudiation of the subcontract. The court reviewed the facts and found substantial delay by the subcontractor throughout the execution of the Works. The facts showed that, during the period from April 2002 to January 2003, monthly progress meetings were held and attended by WSD, the principal contractor and, on occasions, the subcontractor. The meeting minutes showed that WSD frequently commented that progress was behind schedule, insufficient resources were deployed and targets were not being met. During this period the principal contractor issued four “warning letters” to the subcontractor, stating that if the cited delays persisted, the principal contractor would terminate the subcontract.

The delays that occurred were found to be the fault of the subcontractor and included the continued replacement of poor site agents, insufficient deployment of workmen and cash-flow problems. The subcontractor argued that a term should be implied into Clause 5 that allowed the principle contractor to terminate the subcontract only where the subcontractor committed a repudiatory breach. The subcontractor relied on the

¹⁰ HCCT3/2006.

UK decision of *Rice (trading as Garden Guardian) v Great Yarmouth Borough Council*.¹¹ In *Rice*, the Great Yarmouth Borough Council argued that an express termination clause allowing the council to terminate Mr Rice's four-year employment contract as gardener for "a breach of any of his obligations under the Contract" should be applied literally, unless those breaches were trivial. The Court of Appeal, however, felt that the clause which "would entitle the council to terminate a contract such as this at any time for any breach of any term, flies in the face of commercial common sense". The court felt that despite the reference to a breach of "any obligation", there had to be either a single breach serious enough to be repudiatory on its own or an accumulation of breaches that together could be described as repudiatory.

The court felt that the underlying issue was whether the council was deprived of substantially the whole benefit of its bargain over a given period and it held that this was not the case and as such the council was not entitled to terminate.¹²

Applying this to *Lee Chau Mou*, the court agreed with the principal contractor finding that the term alleged by the subcontractor could not be implied. This was found on the basis of the well-established proposition that, given an express contractual termination clause, it is not necessary to establish that the breach or event, on which the clause is expressly conditioned, is of the fundamental repudiatory character required for a common law determination. Rather, it will be sufficient that it has been contractually defined or nominated as a ground for contractual determination.

Put another way, in *Lee Chau Mou* the subcontract provided for express termination so long as the requirements under that provision were met and the court found the principal contractor was justified in terminating as there was substantial delay. Here, it was not necessary to determine whether the subcontractor's breaches were so fundamental as to be repudiatory (a common law determination), nor to imply a term into the subcontract. From this it would appear, that the express termination provision in *Rice* was too broad and, as a result, the court was faced with a situation where it had to resort to the common law for a solution, whereas *Lee Chau Mou*'s more specific termination clauses allowed the court to find for the principal contractor.

It should be noted that, in actuality, the distinction between the common law determination and contractual determination can blur, especially when the construction contract is drafted to allow for termination (contractual determination) based upon serious breaches that would also qualify as a common law determination.

Common law repudiation versus determination

It is of significance that contractual determination can exist in the absence of an actual breach of contract. For example, the FIDIC Red Book Sub-Clause 15.2 (Termination) reads in part:

"15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct],

¹¹ [2000] App LR 06/30.

¹² The court took into account a drought which occurred during the summer and the council's own behaviour which had contributed to Mr Rice's inability to perform all of his obligations.

- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,
- (c) without reasonable excuse fails:
 - (i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or
 - (ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,
- (d) subcontracts the whole of the Works or assigns the Contract without the required agreement,
- (e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events”

These provisions are very similar to what is found in most form construction contracts and, it should be noted, that any of these could cause the employer to terminate the contractor without any real breach having occurred, with the only real requirement being the proper service of notice and a chance to correct the problem, if it can be corrected. On occasion contractual termination and common law repudiation can occur together, as in *JM Hill & Sons Ltd v London Borough of Camden*.¹³ In this case the court dealt with the combined issue of whether the contractor’s slowing work was a repudiation of the contract and whether it had properly been given notice of the determination. Then, in *Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd*,¹⁴ the court dealt with the situation where the subcontractor was not proceeding diligently and continued not to do so even after it was given a notice to correct this breach – the court held that it had committed a repudiatory breach of contract by failing to conform to the terms of the notice.

Can suspension be repudiation?

In *Mayhaven Healthcare Ltd v Bothma*,¹⁵ Bothma, the contractor, suspended work because of non-payment; however, in fact, payment had been properly made. Mayhaven treated the suspension as a repudiatory breach of the contract and accepted this as such. The issue before the court was: Does the wrongful suspension of works amount to a repudiatory breach? Bothma accepted that the suspension was improper based on non-payment, because it had been paid the relevant sums. The court noted that:

“... whether a contractor’s wrongful suspension of the works amounts to a repudiatory breach will depend on the terms of the contract, the breach or breaches of contract and all the facts and circumstances of the case. The question is not capable of a simple answer, as a matter of general principle.

... there is no magic in the words ‘fundamental breach’; the expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case.”¹⁶

¹³ (1980) 18 BLR 31, CA.

¹⁴ (1995) 75 BLR 1, HL (Sc).

¹⁵ [2009] EWHC 2634 (TCC).

¹⁶ See *Suisse Atlantique Societe d’Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 HL.

In this case the arbitrator, who had first dealt with the matter, referred to the decision of the House of Lords in *Woodar v Wimpey*¹⁷ and, in particular, the following passage in the speech of Lord Wilberforce:

“I would add only that it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations.”

Here Mayhaven took the position that Bothma’s wrongful suspension was a clear breach of an obligation in the contract to proceed regularly and diligently with the Works and that such breach permitted immediate termination of the contract or went to the root of the contract, as it entailed a refusal to carry out the work, or an abandonment of the work without lawful excuse. The court, in this regard, stated:

“I do not accept Mr Pennicott’s submission that a wrongful suspension of the work under clause 4.4A of the contract which gives rise to a failure to proceed regularly and diligently under clause 2.1 amounts to a breach of a condition or fundamental term so that every such breach amounts to a repudiation of the contract. A wrongful suspension which gives rise to a failure to proceed regularly and diligently will vary in seriousness, depending on the circumstances. I do not accept that every wrongful suspension which leads to a breach of clause 2.1 will automatically be a repudiatory breach. Rather, whether such a suspension and a consequent breach does amount to a repudiation depends on the breach and the facts and circumstances of the case.”¹⁸

Whilst Mayhaven dealt with the question whether a wrongful suspension of works amounts to a repudiatory breach, two recent cases from Australia and Hong Kong serve as reminders of the dangers of a wrongful suspension of works under a construction contract, and the risk that it will lead to termination of said contract.

In *Wesiak v D&R Constructions (Aust) Pty Ltd*,¹⁹ a builder entered into a written contract with the owners of a residential property to carry out building works. The builder submitted an interim invoice which the owners refused to pay, arguing that there was still substantial work to be done and that they had already paid more than they were contractually required to. The builder gave notice that it was suspending the works and that, unless payment was made within 10 days, it would terminate the contract. Before the New South Wales Court of Appeal, both parties agreed that the contract had been terminated, but each contended that the termination was by reason of the other’s repudiatory breach. The Court found that the builder’s conduct was contractually unlawful. Whilst the contract did enable the builder to suspend the works where the owners had failed to pay a sum which was due, the sums claimed via the interim invoice were not, in fact, due, as some of the works for which payment was sought were substantially incomplete. Thus, the wrongful suspension amounted to a repudiation of the contract, entitling the owners to terminate and claim damages.

Then in *Ipson Renovation Ltd v The Incorporated Owners of Connie Towers*,²⁰ a contractor entered into a contract with the owners of Connie Towers, an apartment

¹⁷ *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 283.

¹⁸ For further detail see Peter Sheridan, “Construction Act Review (March)” *Construction Law Journal*, 2010.

¹⁹ [2016] NSWCA 353.

²⁰ [2016] HKCFI 2117.

block development in Hong Kong, to carry out repair and maintenance works at the property. However, a number of the owners, dissatisfied with the project, prevented the contractor from entering and bringing scaffolding, materials and tools onto site. Following this initial disruption, the owners suspended the works until further notice and sought to reduce the contract price by removing certain items of work from the contract's scope. The Hong Kong Court of First Instance held that, whilst the initial prevention of access was the conduct of a few disgruntled owners and could not be considered attributable to the body representing all of them, the suspension of the works did constitute a repudiation of the contract, which the contractor was entitled to rely upon as a basis for termination. The Court cited a number of factors, namely that (i) the contract did not give the owners a general right to suspend; (ii) the suspension was indefinite; (iii) the owners had not indicated to the contractor that it would be granted any extension of time or compensation, as a result of the suspension; and (iv) the owners sought to descope much of the contractor's work despite not having any contractual basis for doing so.

Anticipatory repudiation

Anticipatory repudiation or, as it is sometimes referred to, anticipatory breach of contract, arises when one of the parties acts in such a manner as to show its intention not to perform, or is unable to properly perform when the time arrives. It should be noted that until this point no actual breach has occurred.

In *Hochster v De La Tour*,²¹ De La Tour agreed in April 1852 to employ Hochster as his courier for three months from 1 June 1852, to go on a trip around the European continent. On 11 May, De La Tour wrote and told Hochster that he was no longer needed. On 22 May, Hochster commenced proceedings against De La Tour and De La Tour argued that Hochster could not yet do so, as he was still under an obligation to stay ready and willing to perform until the day when performance was due and, therefore, could not commence proceedings before that date.

The court held that Hochster did not need to wait until the date performance was due to commence the action and awarded damages. The court stated:

“... If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage ... If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract ... So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them ... One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry

²¹ [1853] 2 E&B 678.

are affianced to one another during the period between the time of the engagement and the celebration of the marriage.

In the present case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Elderton v Emmens* 4 I L Ca which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1 June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise “to start with the defendant on such travels on the day and year,” and that he must then be properly equipped in all respects as a courier for a three months’ tour on the continent of Europe.

But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant’s assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.

...

... upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action: and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.”

Thus the effect of repudiation before performance is due is that the non-breaching party can consider that the contract is ended immediately and not wait to see whether the breaching party “changes its mind”.

A repudiation need not be accepted

The non-breaching party does not have to accept the repudiation of the contract and may choose to continue with the performance or insist upon performance and then later commence proceedings to recover any damages incurred. Should this happen, the non-breaching party keeps the contract alive for the benefit of both parties and, thus, the repudiating party can later benefit from the terms of the contract. The issue that arises when a non-repudiating party chooses to affirm a contract rather than accept the repudiation is whether that party is absolved from performing its obligations under the contract until the repudiating party is ready to perform its contractual obligations. This matter was dealt with in *Fercometal SARL v MSC Mediterranean Shipping Co SA* (The “Simona”).²² Here, charterers entered into a charterparty with the owners

²² [1989] AC 788, [1988] 2 All ER 742, HL.

for carriage of steel from Durban to Bilbao in the *Simona*. The charterparty gave the charterers an option to cancel should the vessel not be ready to load on or before 9 July 1982. On 30 June the owners advised the steel shippers that the vessel had been renominated to load on 13 July–16 July, with an arrival estimate of 7 July and departure estimate of 17 July. The owners requested an extension of the cancelling date from the charterers. The reply stated that the proposed loading dates were unacceptable and that the agreement was cancelled. The owners then told the charterers that the vessel would start loading on 8 July. On that date, the vessel arrived and tendered notice of readiness to load although she was not ready to load the steel. The charterers commenced loading on a substitute vessel and rejected the notice of readiness. On 9 July the owners told the charterers that the vessel was ready to load their cargo. On 12 July the charterers sent a further cancellation notice. In arbitration proceedings the owners succeeded in a claim for dead freight. Leggatt J, whose decision was affirmed by the Court of Appeal, overturned that. The owners appealed and the court dismissed the appeal, holding that a party repudiating its contractual obligations before the time for performance left the other party with a choice of affirming the contract or accepting the repudiation. The non-repudiating party could not affirm the contract and be absolved from tendering further performance until the repudiating party was ready and able to fulfil its obligations. As the owners had not accepted the charterer's first cancellation, the charterer's option to cancel was not lost. That clause became operative when the vessel was not ready by 9 July.

In contracts for construction, for example, if the employer denies access to the site to the contractor this may amount to anticipatory repudiation, or in other situations where the employer retains an engineer to administer the project, there is a mutuality of cooperation between the employer and contractor. This was dealt with in *Hounslow London Borough Council v Twickenham Garden Developments Ltd*,²³ where the court found that the principle entitling the innocent party to continue to perform did not apply where cooperation between the parties was required for this purpose. However, despite this the non-breaching party cannot go on with the contract if it has no legitimate interest in performance. This was the situation in *The Alaskan Trader*,²⁴ where the court felt that while the innocent party generally has an absolute discretion as to whether to accept the repudiation of a contract, where the situation is such that it has no legitimate interest in performing the contract, rather than claiming damages, the court will not allow it to enforce its full contractual rights. In *The Alaskan* the owners chartered a vessel to charterers under a two-year time charter. About one year into the period of charter the vessel suffered a serious engine breakdown, which would clearly take several months to repair. The charterers informed the owners that they had no further use for the vessel, but the owners had the repairs completed at a cost of £800,000. On completion of the repairs on 7 April 1981, the owners informed the charterers that the vessel was once again fit for service, but the charterers refused to give the master any orders. The owners refused to accept this conduct as repudiation of the contract and kept the vessel at readiness, fully crewed. The question arose whether the owners were entitled to treat the contract as subsisting and receive hire, or whether they should have accepted the repudiation and sued for damages. The court held that the general rule is that the innocent party in a repudiation may elect to accept or reject

²³ [1970] 3 All ER 326.

²⁴ [1984] 1 All ER 129.

the repudiation as it pleases. In an exceptional case, however, the court would exercise its general equitable jurisdiction and refuse to permit the innocent party to insist on his strict legal rights. In this case it was determined that the owners had no legitimate interest in continuing to perform the contract and should have accepted the charterers' repudiation within 24 hours of the vessel's being ready for service. Accordingly, the charterers would not be liable for hire, but they would be liable in damages.

Rescission

Repudiation must be distinguished from rescission. Rescission is a right conferred upon the parties allowing them to treat the contract not just as terminated, but fully extinguished as if it had never been entered into in the first place. Rescission occurs where a party has been induced to enter into a contract on a false representation. The law in this area is regulated by the Misrepresentation Act 1967. The right to rescind is subject to certain restrictions. In particular, the court has the discretion to grant damages instead of rescission, and rescission will not generally be available where it is no longer possible to put the parties back in their original pre-contract positions.

Rescission, of course, can also occur when the parties so agree to either change the terms of the contract or to end it altogether, i.e. rescind it, and the consideration necessary comes from the fact that each side is giving up any remaining rights it may have under the contract. Occasionally the rescinded contract is followed by a whole new agreement.

In *Morris v Baron & Co*,²⁵ the court was faced with the issue of whether a contract had been varied or rescinded and it held:

"... The difference between variation and rescission is a real one and it is tested to my thinking by this: in the first case there are not such executory clauses in the second arrangement as will enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect or, because of the second dealing with the same subject matter as the first but in a different way, it is impossible that the two should both be performed."

Thus, the effect of rescission is that, by agreement of the parties, the original contract is discharged, cannot be brought back to life²⁶ and is, in effect, fully completed. It should be noted that if the contract is rescinded owing to the parties entering into a new substituted contract, as in *Morris*, the effect of the rescission does not depend on whether the substituted contract has been performed. Nor is it essential that the substituted contract should amount to a legally enforceable agreement.²⁷

Release

Another method of discharging a contract is for the parties to agree to release each other from any further performance. This situation should be viewed from several positions, the first being whether the contract has been partly or fully performed or whether it is still unperformed. If the contract is still partly (or wholly) unperformed on both sides, there is no problem and the parties can release each other. Problems

²⁵ [1918] AC 1, HL.

²⁶ See e.g. *Andre et Cie SA v Marine Transocean Ltd* [1981] QB 694, [1981] 2 All ER 993, CA.

²⁷ See e.g. *Emden's Construction Law – Discharge by Rescission*, Chapter 1, Part III, LexisNexis Butterworth.

arise when one of the parties to the contract has performed in full and the parties agree that the other need not perform at all.

The situation that arises is where a contractor has done the work, which was agreed but is not paid in full, and agrees to release the employer from payment in full so long as it receives some partial payment instead. Here, the issue is whether this is valid for lack of consideration and will not usually be binding unless there is new consideration or it is given as a deed, i.e. under seal. The court in *D & C Builders Ltd v Rees*²⁸ was faced with such a situation. The plaintiff, D & C Builders Ltd, had completed work for Mr Rees, which totalled £732. Mr Rees had paid only £250 and £482 was owing. D&C were facing bankruptcy if they were not paid. Mrs Rees telephoned to complain that the work was bad, and refused to pay more than £300. The defendants also told the plaintiffs that if they did not accept the offer to settle they would get nothing – effectively holding the builders to ransom. The plaintiffs accepted the cheque and issued a receipt stating that it was “in completion of the account” and turned around and commenced proceedings for the balance owed to them. The court found in their favour and wrote about the principle of equitable estoppel:

“... [This principle] has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then *the creditor* will not be allowed to enforce payment of the balance when it would be inequitable to do so. This was well illustrated during the last war. Tenants went away to escape the bombs and left their houses unoccupied. The landlords accepted a reduced rent for the time they were empty. It was held that the landlords could not afterwards turn round and sue for the balance ...

In applying this principle, however, we must note the qualification: The creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

In the present case, on the facts as found by the judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments, and she knew it. When the creditor asked for payment of the £480 due to him, she said to him in effect: ‘We cannot pay you the £480. But we will pay you £300 if you will accept it in settlement. If you do not accept it on those terms, you will get nothing. £300 is better than nothing.’ She had no right to say any such thing. She could properly have said: ‘We cannot pay you more than £300. Please accept it on account.’ But she had no right to insist on his taking it in settlement. When she said: ‘We will pay you nothing unless you accept £300 in settlement,’ she was putting undue pressure on the creditor. She was making a threat to break the contract (by paying nothing) and she was doing it so as to compel the creditor to do what he was unwilling to do (to accept £300 in settlement); and she succeeded. He complied with her demand. That was on recent authority a case of intimidation: see *Rookes v Barnard* (1964) and *JT Stratford & Son Ltd v Lindley* (1964). In these circumstances there was no true accord so as to found a defence of accord and satisfaction: see *Day v McLea* (1889). There is also no equity in the defendant to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation.

In my opinion there is no reason in law or equity why the creditor should not enforce the full amount of the debt due to him. I would, therefore, dismiss this appeal.”

28 [1966] 2 QB 617.

In this case Lord Denning MR wrote the opinion above and was joined by Winn LJ who added that:

“... In my judgment it is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law, and I do not think that any such agreement can be so binding unless it is either made under seal or supported by consideration. Satisfaction, viz performance, of an agreement of accord, does not provide retroactive validity to the accord, but depends for its effect upon the legal validity of the accord as a binding contract at the time when it is made: this I think is apparent when it is remembered that, albeit rarely, existing obligations of debt may be replaced effectively by a contractually binding substitution of a new obligation.”

The court in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*²⁹ then went on to modify the law in this regard. There, the defendant contractors contracted to refurbish a block of 27 flats and subcontracted the carpentry work to the plaintiff. About halfway through the course of construction the plaintiff found itself in financial difficulties, partially owing to the fact that it had tendered at too a low price and also owing to lack of proper supervision. Here, the defendants were very concerned about the plaintiff's completion because, if it did not complete, they faced substantial danger of being late in their own completion and would risk liquidated damages. To sort out this potential problem the defendants agreed to pay the plaintiff an extra £10,300 at the rate of £575 per flat on completion, to which the plaintiff agreed and went on to complete another eight flats. Later, the plaintiff sued for payment and defendants took the position that they were not liable as the second agreement was not supported by any consideration. The court reviewed the situation and held that the defendants were obliged to pay the extra money as agreed, and wrote:

“... Accordingly, following the view of the majority in *Ward v Byham* and of the whole court in *Williams v Williams* and that of the Privy Council in *Pao On v Lau Yiu* the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding ... ”

It is interesting to note that the court in this case expanded the rule concerning consideration and it would appear from the logic used that, unless the contractor (or subcontractor) is guilty of some sort of economic duress, an employer who agrees to pay more to the contractor to complete the previously agreed upon works will probably end up having to pay and will not be able to hide behind the doctrine of consideration.

Accord and satisfaction

Accord and satisfaction is a concept about the purchase of the release from a debt or other obligation. The payment is typically less than what is owed and is not paid by the actual performance of the original obligation. The concept has two parts, with

29 [1990] 1 All ER 512.

“accord” being the agreement to discharge the debt or obligation and the “satisfaction” being the new “consideration”, which binds the parties to the agreement. Like a waiver, it acts as a defence to an action and the party who is sued over an alleged debt or obligation bears the burden of proving the affirmative defence of accord and satisfaction.

A valid accord does not discharge the prior contract; it suspends the right to enforce it in accordance with the terms of the accord contract, in which satisfaction, or performance of the contract, will discharge both contracts (the original and the accord). If the creditor breaches the accord, then the debtor will be able to bring up the existence of the accord in order to enjoin any action against him and, in addition, the non-offending party has the right to sue under either the original contract or the accord agreement.

In *British Russian Gazette and Trade Outlook Limited v Associated Newspapers, Limited*,³⁰ the court defined accord and satisfaction as:

“Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged, and the satisfaction is the consideration which makes the agreement operative. It is not necessary that the consideration should be executed; the consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable at law.”

Waiver and promissory estoppel

Waiver is the voluntary relinquishment or surrender of some known right or privilege. Mostly, waiver is in writing but sometimes it can be inferred by a person's actions. An example of a written waiver would be a disclaimer, which becomes a waiver when accepted.

Generally, a waiver situation can develop only if one party to the contract voluntarily “forebears” from enforcing its rights under a contract or makes representations to the other party that it will not enforce its rights and that these representations are relied and acted upon. Waiver is closely related to the concept of promissory estoppel, which prevents one party from withdrawing a promise made to a second party if the latter has reasonably relied on that promise. There is no need for the reliance to be to the detriment of the promisee. It is also frequently referred to as waiver by estoppel.

The case of *Hughes v Metropolitan Railway Co*³¹ was of minor importance until Lord Denning in the case of *Central London Property v High Trees* used it³² in his development of the doctrine of promissory estoppel. The case was the first known instance of the concept of promissory estoppel (waiver). In the *Hughes* case Mr Hughes owned property leased to the Railway Company in Euston Road and was entitled to require that the tenant repair the building within six months of notice. Notice was given on 22 October 1874, allowing the tenants until 22 April to finish the repairs. On 28 November, the tenant railway company sent a letter proposing to purchase the building from Hughes. Negotiations began and continued until 30 December, at which point nothing was settled. Once the six months had elapsed the landlord sued the tenant for breach of contract and tried to evict the company. After much litigation

³⁰ [1933] 2 KB 616.

³¹ [1877] 2 AC 439.

³² [1947] KB 130.

the House of Lords ruled that with the initiation of the negotiations there was an implied promise by the landlord not to enforce their strict legal rights with respect to the time limit on the repairs, and the tenant acted on this promise to their detriment. Lord Cairns LC wrote:

“My Lords, it is upon those grounds that I am of opinion that the decision of the Court below is correct. It was not argued at your Lordships’ Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed.”

In *High Trees* the Court reaffirmed the doctrine of promissory estoppel in contract law in England and Wales. Denning J held estoppel to be:

“... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on.”

Subsequent cases have made it clear, however, that for waiver or promissory estoppel to be valid, the representation made from one party to the other must be both clear and unequivocal.³³

It should be noted that the concept of waiver, whether it be by promissory estoppel or waiver by estoppel, cannot be used proactively but rather only as a defence of a claim.

In *Rees and Kirby Ltd v Swansea City Council*,³⁴ the plaintiff was to construct a housing estate for the defendant using the JCT standard form. During construction the plaintiff was delayed owing to variations and late instructions and, accordingly, claimed for its losses and expenses. During the practical completion period from 1974–79, the plaintiff and defendant tried to negotiate a settlement of the claims, but this was to no avail. Then, in 1979, the plaintiff wrote to the defendant for the first time asking for financing charges as part of its loss and expense due under the contract. Also, in 1979, the architect certified a sum in respect of the plaintiff’s claim for loss and expense but refused to certify anything either in respect of interest in general or in respect of financing charges in particular. As a result, the plaintiff commenced proceedings in which it claimed financing charges for the whole period. The court held that a written application made under Clauses 11(6) and 24(1) of the contract in relation to financing charges must make some reference to the fact that the contractor has suffered loss or

³³ See e.g. *Woodhouse AC Israel Cocoa Ltd CSA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271.

³⁴ (1985) 30 BLR 1, CA.

expense by reason of being out of his money in respect of the relevant variation or late instruction or whatever. Further, the court held that the defendants were estopped from challenging the timeousness of the application because the parties had entered into a course of negotiations and that practical completion was not a cutoff point in relation to financing charges which could constitute direct loss or expense raised by a variation, etc. until the date of the last application made before the issue of the certificate issued in respect of the primary loss or expense incurred by reason of the relevant variation. But the court denied the financing charges, which accrued during the period of negotiations, as not being recoverable because the period of delay to which they referred was due to an independent cause, i.e. the negotiations, but that financing charges were recoverable upon the basis of compound interest. The court wrote:

“... Here, as soon as the respondents raised the question of a claim under either clause 11(6) or clause 24(1)(a), the parties entered into the negotiations for an ex gratia settlement, negotiations which lasted over a period of years. Even after those negotiations had come to an end, appellants expressed no objection to the respondents instructing their own quantity surveyors to prepare their claim, nor did they give any notice to the effect that they intended to resume their right under either clause to require a written application within any particular period of time. Furthermore, once the respondents had submitted their claim as prepared by Messrs Ivor Russell [the respondents quantity surveyors] on 30 June 1978, they had given what I regard to be a sufficient intimation of the fact that they were out of pocket by reason of delay in payment of their claims under the two clauses, they continued periodically thereafter to give further intimations of that fact almost up to the date of the issue of the final interim certificate.”

Thus, promissory estoppel requires:

- (1) An unequivocal promise by words or conduct;
- (2) Evidence that there is a change in position of the promisee as a result of the promise (reliance but not necessarily to their detriment); and
- (3) Inequity if the promisor were to go back on the promise.

As to waiver and promissory estoppel, the recent case of *PM Project Services Ltd v Dairy Crest Ltd*³⁵ may therefore be of interest. The claimant entered into a contract with the defendant to project manage the defendant's construction of two new food manufacturing facilities. The project ran into delays in 2015 and the parties entered into a deed of variation, providing that the claimant would be entitled to a further payment of £784,661 which was to be paid on the earlier date of completion or October 2015. At a meeting in September 2015, it was agreed that the claimant would defer that payment. The claimant believed that it was deferred until the date of completion, but the defendant believed that it was deferred until three months after completion. The claimant issued an invoice for the payment in December 2015, but the defendant argued that it was premature.

Mr Justice Edwards-Stuart held that this was clearly a case in which the claimant did not agree to forgo its entitlement to the payment entirely; rather, it stated that it would suspend the implementation of its right to issue an invoice for it until a particular event occurred. There was no reason, he found, why the claimant should not have been entitled to withdraw that promise on reasonable notice. Mr Justice Edwards-Stuart thus confirmed that, as estoppel is a creature of equity, equity will also allow a waiving party to go back on its waiver – provided that reasonable notice is given to the other party.

³⁵ [2016] EWHC 1235 (TCC)

CHAPTER 9

The certification process

“... I accept the importance of ‘cash flow’ in the building industry. It is the very lifeblood of the enterprise...”

Lord Denning MR

Certificates

Originally, under English law, when a contractor contracted with an employer for a fixed price, the contractor was not due any payment until the whole of the Works had been completed, at which time the contractor was due full payment of that fixed price. In earlier times this may have worked, and still does on very small projects but when one is dealing with large infrastructure projects, or commercial building projects that can last many months and even years, cash flow becomes the issue. In order to provide cash flow to the contractor, the original concept of no payment until completion was modified by agreement between the parties to allow for interim payments to be made as the work progressed and culminating in a final payment at completion.

Interim payments can take many forms, with some of the most common ones being payments of predetermined amounts to the contractor at regular intervals, or payments of amounts at regular intervals calculated by detailed valuations as the work proceeds, or stage payments, which are payments of predetermined amounts when the work reaches predetermined stages of completion.

Most construction contracts provide a mechanism for the payment of the contractor and this usually involves the certification of work done by a third party, i.e. not the employer. This third party, however, is usually either the architect who drew the plans, or the engineer who was involved in the engineering design portion of the project. Indeed, on most international infrastructure projects, it is the engineer who has the responsibility to give its “independent” opinion as to the quality of the work completed or on other related issues. The certificates issued may be interim certificates or final certificates or a combination, depending upon what the contract between the parties sets out. In either case the certificate’s function is to record the factual situation existing at a point in time during the progress of the Works and for the certifier to give, in effect, its opinion on the item being certified, i.e. the value of work performed to a certain point in time.

As to what a certificate should contain, in *Minster Trust Ltd v Traps Tractors Ltd*,¹ the court wrote that it should have some regard “to the factors of ‘form’, ‘substance’,

¹ [1954] 1 WLR 963, [1954] 3 All ER 136.

and ‘intent’”. This was amplified by the court in *Token Construction Co Ltd v Charlton Estates Ltd*.² In this case, the contract provided a date for completion of 31 October 1967. Under the terms of the contract Clause 2(e) the architect could, at the request of the contractor, grant an extension of time for any one of eight reasons. Clause 16 provided that in the event the contractor failed to complete by the date specified, and the architect certified in writing that in his opinion the work ought reasonably to have been completed, the employer could deduct liquidated damages of £800 per week. Under the contract Clause 21(a) the architect was authorised to issue certificates of payment and the employer was required to pay to the contractor the value thereof within 14 days after issue. The architect sent a letter to the employer on 9 January 1970, which enclosed an interim certificate for £16,347 which stated that the difference between the contract completion date plus an agreed extension and the agreed practical completion dates was 24 weeks. The employer sought to set off against the £16,347 certificate the sum of £19,200, being the amount of liquidated damages for 24 weeks’ delay. After a review of this situation the court held that the architect’s letter did not constitute the grant of an extension of time within the meaning of Clause 2(e), as it was neither unambiguous nor an expression of the architect’s opinion that delay had been caused by one of eight specified reasons. The court further held that the letter did not purport to be a certificate under Clause 16 and did not contain the expression of the architect’s opinion that the Works ought reasonably to have been completed by a certain date, and so it did not constitute such a certificate.

It can be seen that a certificate’s effect is limited to what the parties have previously agreed it should be, and can be conclusive if that is the intent of the parties. Most construction contracts provide for two types of certificate: “interim” and “final”.

As an example, a typical certification provision in the FIDIC Red Book provides in Sub-Clause 14.6 – Issue of Interim Payment Certificates:

“No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

- (a) if any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or
- (b) if the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer’s acceptance, approval, consent or satisfaction.”

² [1980] 1 BLR 48.

Certificate requirements

A certificate must clearly express the opinion of the certifier whether that be the architect, engineer or other professional. It must also be in a form that shows that the opinion given by the professional is what is required by the terms of the contract and further that it addresses *only* the matters called for. Importantly, it must also be, on its face, clear and unambiguous. These three things are often referred to as the “form, substance, and intent” test of certificates. In situations where this test is not met, or worse, where the certificate is not clear and unambiguous, resort will be made to other contemporaneous documents which were either produced with, or provided during, the certifying process to show the certifier’s intent so long as that additional document is properly to be regarded as being issued as part of the certificate.³

The trouble is that if the certificate was not the product of the engineer or professional certifier it will not then be considered as an expression of the engineer’s own intent. Thus, for example, if the necessary measurements and valuations needed by the certifier to make its certification are wholly delegated to a subordinate or subcontracted to a quantity surveyor, who had no authority under the contract to undertake an independent role in valuations, the resulting certificate will not be an “expression of opinion” of the certifier but rather that of someone entirely different. If such a delegation had occurred, the resulting final certificate would not be, in intent, that required by the contract.

Errors

A question can arise as to a certificate’s validity if it contains an obvious error or departs from the contractual requirements. In *P&M Kaye Ltd v Hosier & Dickinson Ltd*,⁴ the final certificate was initially issued with the employer named as Transloyd Ltd because of an erroneous belief that that company was to be treated as the successor of the employer. That certificate was invalid and a subsequently issued certificate in the name of Kaye was treated as the final certificate. Then, in *Emson Contractors Ltd v Protea Estates Ltd*,⁵ the certificate referred to the contractors as Emson Construction Ltd, whereas the contract was, in fact, with Emson Contractors Ltd. Moreover, the certificate recited that the date of the contract was 16 October 1984, whereas it had, in fact, been 23 October 1984. The court found that these errors were immaterial and did not mislead, nor would reasonably have misled, anyone. The validity of that final certificate was, in consequence, upheld.

Based on this, an error or a departure from the contractual requirements in a certificate will invalidate the certificate only if its nature or effect is such that it is no longer clearly and unambiguously the required certificate in form, substance or intent or if, applying an objective standard, the error does not mislead, or does not have the potential of misleading, the parties to whom it is addressed as to its form, substance or intent.

The construction of any certificate, as well as any other document that needs to be read with it for completion, is subject to the same rules of construction as any commercial contract. Accordingly, the construction exercise is to be undertaken

³ *Ibid.*

⁴ [1972] 1 WLR 146.

⁵ (1987) 13 ConLR 41.

against the factual background surrounding its issue as is known to both parties. This is because both parties have agreed to be bound by, and abide by, the terms of the final certificate issued by a third party, namely the architect or engineer. This construction exercise is to be undertaken as part of a consideration of the meaning and effect of the certificate as a whole, of any parts of it, and of any potential error or omission that it might contain.⁶

However, if after issuance of the certificate there are any disputes as to the content of the (interim or) final certificate or the makeup of the adjusted contract sum, particularly with regard to any valuation, to any allowance for defects, to any decision it records as to the quality of workmanship or to extensions of time, most standard contracts provide for a specific period of time immediately following the issuance of the final certificate in which either party may take the matter to a dispute board or adjudicator and/or commence arbitration or other proceedings and, if this is not done, the final certificate is conclusive.

It should be noted, however, that the persons doing the certification are similar to arbitrators in that they are entitled to exercise the function of certifier only once per certificate and, thereafter, are *functus officio* and have no further duty as to that certificate. In England the courts have treated certificates as effective even though they were patently wrong. However, if the certifier makes an error on any particular certificate, this may be corrected in a subsequent certificate by one of the parties requesting the certifier to make an appropriate adjustment or, if the certifier declines to do so, by taking the dispute to adjudication, arbitration or the courts, depending upon the dispute resolution language of the underlying contract. Despite being like an arbitrator in regard to *functus officio* the certifier is plainly not acting in an arbitral role and, consequently, is not obliged to give reasons for the content of any certificate or to follow the rules of natural justice in allowing both parties to state their case.⁷

Interim certificates

During the course of the project “interim certificates” are issued periodically to identify the quantities of work carried out and to ascertain the amount of money owing to the contractor. Thus, interim certificates act as a condition precedent to payment from the employer. Accordingly, the contractor will have no entitlement to payment in the absence of such a certificate, save for some limited exceptions, such as where the certifier acted improperly in withholding the same due to collusion with the employer. In these circumstances the certifier would be disqualified and the contractor would be entitled to recover payment in the absence of a certificate.⁸

Impartiality of the certifier

Usually the certifying party is the architect or engineer on the project who has been retained by the employer. Thus, the architect or engineer has a dual role, one as the agent of the employer and the other as an “independent” certifier. When acting as

⁶ [1974] AC 727.

⁷ *Ibid.*

⁸ See e.g. Tim Kinney, “Entitlement to Be Paid? Certificates and Set-Off”, Arthur Cox Solicitors Newsletter, 1 September 2008.

the certifier the architect or engineer will be expected to act in an impartial, fair and unbiased fashion.

In this regard the court in *Sutcliffe v Thackrah*⁹ wrote that:

“The employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill he will act in a fair and unbiased manner in applying the terms of the contract.”

Further to this, the court in *Cantrell v Wright and Fuller Ltd*¹⁰ wrote:

“In undertaking these functions, the architect does not act as the agent of the employer but, since he is engaged by the employer, he has a contractual obligation to act fairly, impartially and in accordance with the powers given to him by the conditions. The employer may not interfere in the timing of the issue of any certificate but is not himself in breach of contract if a particular certificate is not issued or is erroneous unless he is directly responsible for that failure. However, if and when it comes to his notice that the architect has failed to comply with his administrative obligations, by for example failing to issue a certificate required by the contract, the employer has an implied duty to instruct the architect to perform that function in so far as it remains within the power of the architect to perform it and the employer is in breach of the contract with the contractor to the extent that he does not intervene to arrange for the correct or a correcting step to be taken by the architect. The architect’s powers in relation to these administrative steps are derived exclusively from the conditions of contract, he has no power to act in any other way than as defined by the conditions and once the last step, the issuing of the final certificate, has been taken, his authority to act and his role under the contract cease. He then becomes, in traditional language, *functus officio*.”

It should be clear that, in acting as the certifier, the architect or engineer or other professional does not act as the agent of the employer but, since he is engaged by the employer, he has a contractual obligation to act fairly, impartially and in accordance with the powers given by the conditions. It should be noted that the employer may not interfere in the timing of the issue of any certificate and further, if any particular certificate is not issued or is erroneous, the employer has no liability unless the employer is directly responsible for the failure to issue the certificate. However, if and when it comes to his attention that the engineer has failed to comply with its administrative obligations, by, for example, failing to issue a certificate required by the contract, the employer has an implied duty to instruct the engineer to perform that function insofar as it remains within the power of the architect to perform it. The employer is in breach of the contract with the contractor to the extent that he does not intervene to arrange for the correct or a correcting step to be taken by the engineer. The engineer’s powers in relation to these administrative steps are derived exclusively from the conditions of contract; it has no power to act in any other way than as defined by the conditions. It is now well established that if the employer exerts pressure on the engineer, which results in the engineer’s judgment being influenced, then its decision is subject to being held invalid and being set aside.

In *Hickman & Co v Roberts*,¹¹ the contract contained provisions that the decision of the architect as to payment was to be final and that payment was to be made to the contractor on the basis of the architect’s certificates. The contractor claimed that he was owed certain sums but the architect had failed to issue a certificate in his favour.

9 [1974] AC 727.

10 (2003) 91 ConLR 97, [2003] EWHC 1545 (TCC).

11 [1913] AC 229.

When challenged by the contractor, the architect stated that his clients, the owners, would not allow it: “in the face of their instructions to me I cannot issue a certificate whatever my own private opinion in the matter”. The House of Lords held that he had improperly allowed the owners to influence him and that the owners could not rely on the absence of a certificate as a reason not to pay the contractor.

One question that can arise, in this context, is whether the employer can substitute himself, or an employee, into a certifying role if he dismisses the certifier or the certifier becomes unavailable.

In the recent case of *Imperial Chemical Industries v Merit Merrell Technology Limited*,¹² the employer tried to substitute its own employee as the project manager, after the original project manager quit following the employer’s decision to limit some of its powers. Mr Justice Fraser rejected the contention that an employee of the employer could be used to fulfil the project manager’s role, holding that “It is contrary to the whole way in which the contractual mechanism is structured, and intended to work, to have the employer seek to appoint itself (or one of its employees, or an employee of its parent) as the decision maker ... Such a situation is so unusual that an express term is required.”

Certifier liability

History

Historically, it was an established principle in England that the certifier was acting in an arbitral role and was thus protected against civil proceedings based upon a form of quasi-judicial immunity.¹³ However, in 1974, the House of Lords in *Sutcliffe v Thackrah*¹⁴ established that an architect owes a duty of care towards his client in the performance of all duties, including contract administration, and specifically certification, and could be liable for negligence in the performances of those duties.

The question becomes whether the certifier has any liability to the contractor for either improperly disallowing a claim or for failing to certify. In *Pacific Associates v Baxter*,¹⁵ it was alleged that the certifier engineers had improperly rejected the contractor’s claims and refused to certify in their favour, and the issue arose of whether the certifier owed a duty of care. The Court of Appeal refused to impose on the engineer a duty of care to avoid economic loss being suffered by the contractor, holding that in order to succeed in such a claim a duty would have to be imposed on the contract administrator to take care to prevent the contractor suffering economic loss and it rejected the imposition of any such obligation. Here, the employer engaged the engineer and the contractor could arbitrate against the employer to recover the sums, which should or should not have been certified.

Following on this line of thought, the Hong Kong Court followed *Pacific Associates* in *Leon Engineering and Construction Co Ltd v Ka Duk Investment Co*¹⁶ when it refused an application to join architects as defendants in an action brought by a contractor who alleged that the architects’ failure to certify promptly and impartially was a breach of its duty of care. The court disagreed and held that no such duty of care was owed.

¹² [2017] EWHC 1763 (TCC)

¹³ See e.g. *Chambers v Goldthorpe* [1901] 1 KB 624.

¹⁴ [1974] AC 727.

¹⁵ [1990] 1 QB 993.

¹⁶ (1989) 47 BLR 139.

In another example of this situation, the Australian Court in *John Holland Construction v Majorca Projects*¹⁷ also followed *Pacific Associates*. There, the contractor alleged that it had been substantially underpaid and commenced proceedings against the employer and architect, claiming that the architect owed it a duty of care to act fairly and impartially as certifier and that this duty was breached when the architect received representations from the employer without the contractor's being given a chance to answer them and consequently with his suffering economic loss. The court held that the architect owed no duty to avoid the contractor's suffering economic loss. There was no reliance by the contractor or assumption of responsibility by the architect that would justify "grafting an obligation" on the certifier in tort. Thus, assuming the standard contractual relationships between contractor, employer and certifier, the certifier does not owe a duty of care to the contractor with regard to certification.

However, there may be circumstances in which the certifier may become liable to the contractor in tort. An example of this arose in the New Zealand Court of Appeal case of *Day v Ost*,¹⁸ where, after the main contractor was unable to pay the subcontractor, the subcontractor stopped work. The certifier in that case was the employer's architect who believed that the main contractor had funds for payment and, based upon this, he persuaded the subcontractor to recommence work, assuring the subcontractor that it would be paid. The subcontractor went back to work but, unfortunately, the main contractor went into liquidation leaving the subcontractor underpaid. The court held that the architect was liable for negligent misstatement under the rule in *Hedley Byrne v Heller*,¹⁹ particularly as the architect was in a position to know that the main contractor had financial problems and by giving gratuitous advice to recommence work the architect had assumed a responsibility to the subcontractor.

Despite the ruling in this case, the general rule is that between the contractor, employer and certifier, the certifier will not owe a duty of care to the contractor with regard to certification.

Further along this line is the recent case of *Hunt v Optima*,²⁰ a first instance decision of Mr Justice Akenhead in the Technology and Construction Court (TCC) where the defendant developers, Optima, were found liable for breach of contract to the claimant purchasers for various defects in their flats located in Peterborough. Then, as to the second defendant architects (Strutt & Parker (S&P)) the judge found that they owed the claimants a duty of care for negligent misstatements contained in certificates they issued and decided these certificates also amounted to collateral warranties.

The defendants appealed against the first instance decision of Mr Justice Akenhead asserting that he erred in his findings that S&P were liable to the claimants for negligent misstatement, in his findings of a duty of care arising from their inspections and that the architect's certificates amounted to contractual warranties.

The Court of Appeal held they were correct and as a result that:

1. No liability for negligent misstatement was established by six of the eight claimants as the certificates containing the (negligent) statements were despatched to the claimants after they completed the purchase of their flats and therefore could not be relied upon;

17 (2000) 16 Const LJ 114.

18 [1973] 2 NZLR 385.

19 [1964] AC 465.

20 [2014] EWCA Civ 714, [2015] 1 WLR 1346 (CA(Civ Div)).

2. There was no separate duty of care in tort to the claimants for negligent inspection by S&P.
3. S&P's certificates did not amount to contractual warranties as they did not contain the essential elements of a contract, contrary to the findings of the first instance judge. The court referred to the Council of Mortgage Lenders' Handbook, which stated that if collateral warranties were required from any professional adviser, it would be stated specifically in the mortgage instruction.

The court also pointed out that Mr Egford, who was the architect acting on behalf of S&P, could not have assumed a responsibility to the claimants as to the accuracy of statements made in the draft certificates which were not yet signed or issued and could have been amended or withdrawn by him. There was, therefore, no assumption of responsibility by the defendant or reliance on the unsigned draft certificates.

Here, the fact that the final certificates were issued after completion of the majority of the flats was the basis for the court's determination that reliance was absent. "In order to succeed in a claim for negligent misstatement a claimant must demonstrate reliance on the negligent statement and that it had suffered a loss as a result of that reliance. The claimants in this case could not have relied on S&P's certificates because they did not exist at the date of purchase." LJ Clarke wrote: "... reliance must follow representation and cannot be retrospective. If the representation is the signed Certificate it cannot be relied on before it comes into existence...."

Further, while reviewing the facts the court found that the certificates did not amount to contractual warranties. The certificates were representations as to the matters contained within them; they were not promises, warranties or guarantees.

The main point here is that, although S&P owed Optima a contractual duty to undertake inspections of the properties in order to produce certificates, it did not similarly owe such a duty in tort to third parties – thus, the only cause of action open to the claimants was in negligent misstatement, which failed.

The question, however, continues as to whether the employer is liable for the certifier's errors such as when the certifier fails to grant a proper extension of time or even certifies less money than the contractor is entitled to receive. Generally, the answer is "No", so long as the certifier is performing independently and impartially. This can change if the employer is aware of the certifier's error and does nothing to correct it or just ignores it.

In the House of Lords case of *Panamena Europea Navigacion Compania Limitada v Frederick Leyland & Co Ltd*,²¹ Leyland was under an obligation to repair Panamena's ship and payments for this were to be made upon certification by Panamena's surveyor. Here, the surveyor had to determine, in its certificate, "that the work has been satisfactorily carried out". The surveyor took the incorrect position that he was able to investigate and certify not just the quality of the Works done, but also the amount and value of the materials and labour actually used in the repair and, consequently, he refused to issue certificates unless he was supplied with this further information. The Court of Appeal found that the surveyor misunderstood his duties and, as a result, the certificate issued by him was invalid. However, the other question

²¹ [1947] AC 428, (1943) 76 Lloyd's Reports 113.

was whether Panamena was in breach of its contract because of its surveyor's incorrect certification. Scott LJ wrote as follows:²²

"It seems to me plain that if the shipowners had known that he was departing from his proper function under the contract, it would have been their duty to stop him and tell him what the function was for which the contract provided. In those circumstances I think that the court ought to imply an undertaking by the owners that in the event of its becoming known to them that their surveyor was departing from the function which both parties had agreed he was to perform, they would call him to book, and tell him what his real function was."

This position was further amplified in the Australian case of *Perini Corporation v Commonwealth of Australia*,²³ where the contract contained a provision that the certifier could extend the time for completion "if he thinks the cause sufficient ... for such period as he shall think adequate". The contractors applied to the certifier for extensions of time, some of which were refused as being against department policy. Here, the certifier was the director of works who, while being entitled to rely on information presented to him by others, also had certain duties imposed on him under the contract. One of these duties was the discretion to grant or deny an extension of time within a reasonable time and he was not entitled to defer this duty. Further, he was allowed to take departmental policy into account, but this consideration was not to control his decisions. It should also be noted that here certain terms were implied into the contract, e.g. that the employer would not interfere with the director's duties as certifier and that the employer would ensure that the director did his duty as certifier. The court adopted the approach of the Court of Appeal in *Panamena* but was faced with the situation where a governmental department's employee was acting as the "independent certifier" on a construction contract. Here, the difficulty was the certifier; rather than using his own opinion, he had used the "Departmental Policy" of the employer as the reason for not granting an extension of time. The court wrote:

"... The argument was principally founded upon *Hickman & Co v Roberts* (1913), and *Panamena Europea Navigacion Compania Limitada v Frederick Leyland & Co Ltd* (1947). It was argued that these authorities decided that if there had been a wrongful, in the sense of unauthorized, exercise of the powers by a certifier with the knowledge of the employer of the certifier, the employer being the other party to the contract pursuant to which the certifier was appointed, the only right of the contractor was that he was entitled to disregard the provisions of the agreement with respect to time and either to sue for the price or resist a claim for liquidated damages by way of penalty: *Dixon v South Australian Railways Commissioner* (1923). While it is, in my opinion, the law that a contractor is entitled to disregard the provisions of the agreement with respect to time ... it does not follow, nor has it been decided that if the contractor has otherwise suffered damage he is not entitled to sue upon an implied term ... I was referred to the decision of the Court of Appeal in *Panamena* ... In that case the certifier adopted a wrong understanding of his functions and his employer, which was the other contracting party, adopted and encouraged the understanding of the certifier. In the result the certifier did not issue his certificate and the claim of the plaintiff was for the contracted price, or in the alternative, for damages in the same amount. The claim of the plaintiff was based in the alternative upon the implication of a term in the agreement that the defendant, building owner, would not encourage or influence the certifier wrongly to withhold the issue of his certificate. The defence was that a certificate had not been issued and that in its absence and in accordance with the provisions of the agreement the plaintiff was not entitled to

²² This quote is taken from the judgment of the Court of Appeal decision: (1943) 76 Lloyd's LR 113.

²³ Supreme Court of New South Wales (1969) 12 BLR 82, 2 NSW 350.

recover ... Scott LJ, said that the problem for decision called for answers to two questions which he stated as follows:

- (1) 'What is the scope of the function assigned to the certifying third party by the agreement of both the contracting parties?
- (2) What, if any is the contractual undertaking, express or implied, of the party whose servant, or agent, or nominee such third party expert is?'...

... I will now consider the affirmative aspect of the term which ... the plaintiff argued must be implied in this agreement. Fundamentally he argued it is essential to consider this aspect against the background that the Director of Works was at all times a servant of the [government]; that the position he occupied as certifier was part of the machinery set up by the agreement of the [government] and the plaintiff for certifying applications for extension of time. As such a servant of the [government] the Director of Works was obliged by law to obey all lawful orders of [his employer] ... If, for example, the [government] were to say to the Director: 'You are ordered to act in a particular manner', and if that order constituted a breach of the contractual mandate conferred on him by clause 35, the Director would none the less be still obliged to act in compliance with the [government] order. Against this background I will assume that the certifier, with the knowledge of both parties to the agreement, acted in breach of his obligation. Could the [government] in those circumstances say: 'I will not do anything to insure that he carries out these duties'? In my opinion an application of the test stated in *The Moorcock* (1889), would require the answer that the [government] was contractually bound to order him to carry out his duties. In my opinion the plaintiff and the defendant, being the parties bound by his agreement, are bound to do all co-operative acts necessary to bring about the contractual result. In the case of the defendant this is an obligation to require the Director to act in accordance with his mandate if the defendant is aware that he is proposing to act beyond it. In *Mackay v Dick* (1881) Lord Blackburn said:

'I think I may safely say as a general rule that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'

I am accordingly of the opinion that a term must be implied in the present agreement binding the defendant to insure that the Director of Works, its servant, performs his duties under clause 35 in accordance with this mandate."

Thus, the rule from this case is that, when considering extensions of time, the employer has a duty not to interfere with the proper performance of the certifier's duties and a further specific duty to make sure that the certifier is exercising its duty properly if it becomes aware that the certifier was going to act improperly. Thus, as the court stated, the employer has "an obligation to require the Director to act in accordance with his mandate if [it] is aware that he is proposing to act beyond it".

Further, the employer may also have liability for any delay by the certifier in issuing interim certificates. In *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd*,²⁴ the Singapore Court of Appeal was faced with a situation involving whether an employer was liable for the late certification by the architect. Here, the court found that there was no reason for such a term to be implied owing to the independent nature of the certification function of the architect under a building contract and that it was

24 (2000) 82 Con LR 89.

not the duty of an owner/employer to oversee the architect in the discharge of that function. The court wrote:

“... We entirely agree with the learned judge that the employer could be liable for the default of the architect in issuing the interim certificates but only if the employer was aware of such default. This proposition of law is amply supported by authorities: *Frederick Leyland & Co Ltd v Cia Panamena Europea Navigacion Ltda* (1943) 76 LI L Rep 113 and *Perini Corp v Commonwealth of Australia* (1969) 12 BLR 82. The prerequisite of knowledge is essential before an employer is required to act to ensure that his architect complies with the terms of the building agreement between the employer and the contractor ...

The rationale for this rule is obviously to take into account the special position of the architect in a building contract, even though he is employed and paid by the employer. When an architect acts as a certifier under a building contract for interim payments, he is to act fairly and impartially between the parties, and the employer is not to interfere with the architect's exercise of this function. The arbitrator, in fact, recognised this point in his award. Such functions of the architect, among others, must be exercised by him independently as an expert. It would be unreasonable to expect a lay employer to warrant the performance of the architect in respect of such functions without establishing that the employer knew the architect had gone wrong: see *Lubenham Fidelities and Investment Co v South Pembrokehire DC* (1986) 6 ConLR 85 at 99.

From the reasoning of the arbitrator (the underlying case in this matter) which we have cited above, it is clear that the arbitrator has laid down the duties of an employer in too wide a term when he said that ‘the employer is thus liable for any breach of this (certifying) duty on the part of the architect’. The issue is not simply whether there could be implied a term under which the appellants as employers could conceivably be liable for the architect's default, but more specifically, what is the nature and/or extent of that implied obligation.

The respondents do not in substance dispute the foregoing, for they accept that the implied duty was premised on knowledge. However, they submitted that the appellants had failed in their duty, as they knew that no interim certificates had been issued and they did nothing to ensure that the architect issued the certificates on time. The arbitrator must have taken this into account, as had the learned judge (who referred specifically to the need for knowledge on the part of the employer in para 14 of his grounds of judgment).

With respect, we think this argument ignores the clear basis on which the arbitrator made his findings. The implied term as formulated by the arbitrator would render the employer liable for any of the architect's breaches. Thus, the sentences in the award read:

‘I find it hard to give due consideration to the fact that the act of repeated late issuing by the architect, and late honouring of interim payment certificates by the respondents could possibly have been acquiesced to by the claimants, since such late payment pattern was one that appeared to have been rather consistent. There was clearly no evidence to support the respondents' seemingly inexcusable repeated delays in honouring the interim payment certificates. It is therefore not open to the respondents to deny that they are in breach of clause 30(1) of the building contract.’

The reference to the consistent pattern of late payments on the part of the appellants was to counter the argument that the respondents had acquiesced in the late payment, not the appellants' knowledge of the wrongful delay or decision on the part of the arbitrator in the issuance of the interim certificates. The arbitrator had not made any finding that the appellants knew that the architect had wrongfully delayed the issue of interim certificates or that the architect had wrongfully certified.

Indeed, the mere fact that there was a consistent pattern of late interim certificates does not necessarily imply that the appellants must have known that the architect was in default of clause 30(1). Although the arbitrator has found that the architect was in fact in breach of clause 30(1), it is a separate question whether the appellants were aware of this. There is correspondence to suggest that it appeared to the appellants that the delay in issuing

interim certificates was attributable to the respondents' consistently improper submission of claims, resulting in certification delays by the quantity surveyor, or at least because there were disputes between the architect, quantity surveyor and respondents over the sums to be certified."

It would thus appear that the employer was neither to interfere with the discharge of the architect's duty as certifier nor was it under any obligation to tell the architect what to do and, accordingly, even if the employer was aware of the architect's defaults, it was not liable for those defaults. This position has been discussed and criticised²⁵ because the express language of the contract in *Hong Huat Development* required that the employer provide an architect who was ready and willing to give a certificate – unfortunately, this was not fully regarded by the court. Here, too, the Singaporean position seems that if the employer becomes aware that the administrator is not correctly carrying out his functions, it must do something to ensure that the function is properly carried out and this position appears to contradict those of the courts in *Panamena*, *Perini* and *Penwith*.

A clearer view of how this is to operate, however, can be found in *BR and EP Cantrell v Wright and Fuller*,²⁶ where the court wrote:

"In undertaking these (contract administration) functions, the Architect does not act as the agent of the Employer but, since he is engaged by the Employer, he has a contractual obligation to act fairly, impartially and in accordance with the powers given to him by the conditions. The Employer may not interfere in the timing of the issue of any certificate but is not himself in breach of contract if a particular certificate is not issued or is erroneous unless he is directly responsible for that failure. However, if and when it comes to his notice that the Architect has failed to comply with his administrative obligations, by for example failing to issue a certificate required by the contract, the Employer has an implied duty to instruct the Architect to perform that function in so far as it remains within the power of the Architect to perform it and the Employer is in breach of the contract with the Contractor to the extent that he does not intervene to arrange for the correct or a correcting step to be taken by the Architect."

This position has also been introduced in most FIDIC forms of contract where it is acknowledged that the certifier, i.e. the Engineer, belongs to the "Employer's Personnel". While there is no stress on his being an independent party, when the engineer makes a decision there will be no more stress on impartiality but he is still required to be fair. This concept of fairness, etc., has been reviewed by the courts and, in the *Borough of Hounslow* case,²⁷ the court pointed out that there was no general obligation to "observe the rules of natural justice, giving due notice of all complaints and affording both parties a hearing". However, the court went on to point out the general requirement that the certifier (the architect in this case) "must throughout retain his independence" in exercising his professional judgment.

This position on independence is changing, however, and in *Beaufort Developments Ltd v Gilbert Ash NI Ltd*,²⁸ it was observed that:

"... the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit

²⁵ See e.g. Tim Elliott QC, "Contract Administrators: The Obligation of Impartiality and Liability for Incorrect Certification", Keating Chambers Seminars, 20 October 2006.

²⁶ [2003] BLR 412.

²⁷ *Supra*.

²⁸ [1998] 2 WLR 860, [1998] UKHL 19, [1999] AC 266, [1998] 2 All ER 778.

himself to be bound by his decisions subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the nineteenth century and the early part of this one in which contracts were construed as doing precisely this ... But the notion of what amounted to a conflict of interest was not then as well understood as it is now ... today one should require very clear words before construing a contract as giving an architect such powers.”

This position was further amplified in *Amec Civil Engineering Ltd v Secretary of State for Transport*,²⁹ where Amec was responsible for renovation works to the M6 motorway. After discovering defects in the roller bearings, the employer asked Amec to accept liability. Amec declined the offer to accept liability and, as a result, the dispute was referred to the engineer for its determination pursuant to Clause 66 of the contract where a decision of the engineer was required before the commencement of any arbitration. A complicating factor here was that a limitation period was about to expire and, as a result, the engineer only took a few days to decide that Amec was liable for the defects without Amec’s being given an opportunity to make a submission. Needless to say, Amec challenged this decision in arbitration where it took the position the arbitrator was without jurisdiction, as the engineer’s decision was reached without fair process and as such was invalid. The Court of Appeal held that the engineer’s duty was to act independently, honestly and fairly – but importantly, it did not have to apply the rules of natural justice. There was some disagreement by the court with Rix LJ taking the position that the engineer’s role under the particular clause of the contract (i.e. Clause 66) did differ from its other roles and that he had been wrong not to have heard both sides before reaching his decision on the dispute. In effect he was of the view that the engineer was obliged to comply with the rules of natural justice when determining a dispute under Clause 66. However, the disagreement between the justices did not affect the outcome of the appeal.

Further, in *Costain Ltd v Bechtel Ltd*,³⁰ the contract for the Channel Tunnel High-Speed Rail Link Project provided that the project manager was responsible for determining how much the contractor should be paid. Here, the contract Recitals included the provision that:

“The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.”

The project managers took the position that the contracts, which had been adapted for this project, were special in that the project manager was not given broad discretion and its duties were very specific and detailed; so there was “no need, and indeed no room for an implied term of impartiality” and, importantly, the availability of the dispute resolution procedures under the contract would have “the effect of excluding any implied term that the project manager would act impartially”. They further took the view that the project manager’s role under this contract was “not analogous to an architect or other certifier under conventional contracts” as the project manager was specifically employed to act in the interests of the employer. The court also felt that the contractual terms excluding any term implied by custom would “prevent any implied term arising that the project manager will act impartially”.

²⁹ [2005] BLR 227.

³⁰ [2005] EWHC 1018.

The court, per Jackson J, held that although the contract they were adapting (the NEC) was more specific and objective than other standard construction contracts:

“there are still many instances where the project manager has to exercise his own independent judgment ... When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in *Sutcliffe* do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor.”

The court further held that it was “unable to find anything which militates against the existence of a duty upon the project manager to act impartially in matters of assessment and certification” and was unable to accept that the addition of dispute resolution procedures obviated the necessity for the project manager to act impartially in matters of certification.

The court went on to state that:

“... in discharging many of its functions under the contract, the project manager acts solely in the interests of the employer ... Nevertheless, I do not see how this circumstance detracts from the normal duty which any certifier has on these occasions when the project manager is holding a balance between employer and contractor”. He could not see how a clause excluding any term implied by custom could be relevant: “The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom.”

This case is further amplified by the holding in *Scheldebouw v St James Homes (Grosvenor Dock) Ltd*,³¹ where the employer decided to remove its construction manager and put themselves in that position and took the view that:

“There is no reason why we cannot appoint ourselves as the construction manager. This is a construction management contract whereby the construction manager, whoever that is, acts on our behalf to manage the works in relation to the contracts entered into between us and the trade contractors. Under construction management, as opposed to management contracting, the construction manager acts entirely as our agent to protect our interests. The construction manager is not appointed as some quasi-independent certifier, as you imply, such as is the position of an architect, for instance, under a JCT contract ... there is no obligation on us to act independently and impartially”

The court took the position that the construction manager performed two different functions, one being an “agency function”, such as when instructing variations, and the other being a “decision-making function”, such as occurs when dealing with additional monies or extensions of time. The court pointed out the traditional cases such as *Panamena*, *Perini*, *Hounslow*, *Sutcliffe*, and *Amec* and held:

- (i) The precise role and duties of the decision-maker will be determined by the terms of the contract in question.
- (ii) Generally the decision-maker is not and cannot be regarded as an entity wholly independent of the employer.
- (iii) When performing his decision-making function, the administrator (in this case a construction manager) is required to act in a manner which has variously been described as independent, impartial, fair and honest. These words connote that the decision-maker must use his skill and best endeavours to reach the right decision as opposed to a decision which favours the interests of the employer.
- (iv) The contract did not allow the employer to appoint himself as construction manager. It was not envisaged that the role of the decision-maker should be

31 [2006] BLR 113.

exercised by the employer himself. The whole structure of the contract was that the decision-maker should be a separate entity from the employer.

- (v) The concept of the employer carrying out the functions of the independent decision-maker were so unusual that it would require express words in the contract to bring this about (as was the case in *Balfour Beatty Civil Engineering v Docklands Light Railway* (1996) 78 BLR 42). There were no such words in this contract.”³²

It is clear that no matter who is responsible for the management of the project, the certification process will require the certifier to play two different roles depending on the exact terms of the contract in question. These two roles are acting as the agent for the employer, in terms of giving instructions to the contractor, and acting as the decider of events, such as the certification of payments and other duties per the contract. If the certifier is acting in the second capacity it must do its job fairly and as impartially as possible – not favouring either the employer or the contractor but instead relying on the facts presented to arrive at a fair and just decision and ultimate certification, even if the rules of natural justice may not apply. However, if the employer causes the certifier to become partial or to lose its independence (such as it is) then the certification may be held invalid. Similarly, if the employer has reason to know that the certifier is not acting properly and fails to correct this problem, then it may be liable to the contractor.

Further, if the certifier under-certifies it will have no liability to the contractor, but if it over-certifies negligently in the contractor’s favour it can be held liable to the employer for whom he really works. There is also the possibility that this liability will run in favour of others to the contract such as lenders and subcontractors.

Variations

Like all contracts, construction contracts are subject to change. The major difference is that in most construction contracts there is a provision for changes to be instituted in an orderly manner through the process of a variation request. Thus, most of the standard forms include provisions where the employer or its representative, i.e. the architect or engineer, is allowed to issue an instruction to the contractor to vary the Works. Normally, one finds that the programme, design changes, extensions of time for completion, etc. are covered under the variations provisions of most contracts. As an example the FIDIC Red Book provides in Sub-Clause 13.1:

“13.1 Right to Vary

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request for the Contractor to submit a proposal.

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that the Contractor cannot readily obtain the Goods required for the Variation. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

Each Variation may include:

changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation),

³² See also Tim Elliott QC, “*Contract Administrators: The Obligation of Impartiality and Liability for Incorrect Certification*”, Keating Chambers Seminars, 20 October 2006.

changes to the quality and other characteristics of any item of work,
changes to the levels, positions and/or dimensions of any part of the Works,
omission of any work unless it is to be carried out by others,
any additional work, Plant, Materials or services necessary for the Permanent Works,
including any associated Tests on Completion, boreholes and other testing and
exploratory work, or
changes to the sequence or timing of the execution of the Works.

The Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation.”

Without such clauses any changes sought by the employer would be very difficult and the contractor could either refuse to carry out the work or undertake the work and insist upon payment on a quantum meruit or other type of valuation basis. In the worst-case scenario the contractor could hold the employer to ransom and demand an exorbitant price for the new work.

Is it a variation or a separate contract?

This issue arises in varied circumstances, even where the contract provides for an orderly variation procedure. Historically, the case of *Thorn v Mayor and Commonalty of London*³³ set the standard when the court held that if the additional or varied work was so peculiar, so unexpected and so different from what any person reckoned or calculated upon to the extent that it is not contemplated by the contract, it would constitute a separate contract. Indeed, some variations can fall outside the standard variations clause. In *Blue Circle Industries v Holland Dredging Co.*³⁴ the Works involved dredging in Larne Lough in Ireland to enable larger vessels to dock. The tender referred to the dredged material being deposited in areas approved by the public authorities so that the discharged material could be placed in suitable areas in the Lough. This proved to be a problem and an alternative plan was agreed, to use the excavated material to form an artificial bird island. The contractor took the position that this was not a variation but a whole separate contract in its own right. The court took the view that a variation is something that bears some relationship to the current contract works, and accordingly, any directed variations must be “of a character and extent contemplated by, and capable of being carried out under, the provisions of the contract”. Accordingly, the court held that:

“... Because the construction of the island was work wholly outside the scope of the original dredging contract, Holland would not, had they been unwilling, have been obliged to accept the work as a variation. Therefore the construction of the island was not a variation of the dredging contract but was the subject of a separate agreement.”

The benefit of this argument falls to the contractors who, when faced with unpleasant prices, can argue that the employer’s proposed changes fall outside the variations clause thus allowing them to contend that the payment for the change should be on a quantum meruit basis and not per the terms of the existing contract.

³³ (1876) 1 App Cas 120.

³⁴ (1987) 37 BLR 40.

In addition to making a determination of whether it is a variation or a separate contract the other key issue is to decide whether what is claimed as a variation is really just part of what was originally intended between the parties. Indeed, it may be simply a case of the contractor already having agreed to do all that is necessary to complete the Works. In this regard the case of *Sharpe v San Paulo Brazilian Railway Co*³⁵ is helpful. There, the contractor was to construct a railway for a fixed amount and the parties agreed that in no circumstances were they liable to pay more than the agreed amount with the engineer's certificate at the end of the project being "final and conclusive" as to amounts paid, due, and/or owing to the contractor. The contractor agreed to this and not only to perform as promised, but also to do all the specified work and provide all of the specified materials as determined by the employer's engineer to be necessarily and reasonably implied in and/or inferred from the specifications, plans and other details of the drawings. After the project was completed the contractor claimed entitlement for extra works which had been directed by the engineer. The contractor claimed that this work had been done on good faith based upon an alleged promise that it would be paid. The court took the view that, as the parties had agreed a specified sum of money, the contractor was held to this sum even if the amount of work was understated in the specification. Additionally, any claim as to promises made by the engineer was unenforceable as the engineer was without any power to alter the terms of the contract and, in the absence of fraud, his certificate as to final payment was conclusive, as stated in the contract. The court wrote:

"The first contract was that the line should be completed for a fixed sum. But the plaintiffs say they are, upon several heads, entitled to a great deal more than that sum. The first head is that the earthworks were insufficiently calculated, that the engineer had made out that the earthworks were two million and odd cubic yards, whereas they turned out to be four million and odd cubic yards. But that is precisely the thing which they took the chance of. They were to judge for themselves. There was no fraud; it is not alleged that [the engineer] had wilfully made miscalculations for the purpose of deceiving them; and if so, that would be the personal fraud of [the engineer] himself. But he made the calculations apparently to the best of his ability, and calculated that the earthworks would be of a certain amount. The plaintiffs say it is quite clear that this was a miscalculation. But that was a thing the contractors ought to have looked at for themselves. If they did not rely on [the engineer's] experience and skill as an engineer, they ought to have looked at the consequences and made out their own calculations. I think probably they did look at it, and satisfy themselves to some extent. I do not know whether they calculated it over again, or whether they did not take 5s a cubic yard, which seems a large sum for earthworks, for the purpose of covering them in all possible contingencies in that respect. But that is one of the things, which, in my mind, was clearly intended to be governed by the contract, the company virtually saying, 'Whether the earthwork is more or whether it is less, that is the sum we are to pay'.

Then there was a considerable item as to the inclines ... but every statement in the bill, it seems to me, puts the plaintiffs completely out of Court as to that. The bill says that the original specification was not sufficient to make a complete railway, and that it became obvious that something more would be required to be done in order to make the line. But their business, and what they had contracted to do for a lump sum, was to make the line from terminus to terminus complete, and both these items seem to me to be on the face of them entirely included in the contract. They are not in any sense of the words extra works.

Then it is alleged that the engineer, finding out that this involved more expense than he had calculated upon, promised that he would make other alterations in the line, making a corresponding diminution so as to save the contractors from loss on account of that

35 (1873) 8 Ch App 597.

mistake. And then in the vaguest possible way it is said that all these promises of the engineer were known to and ratified by the company. I am of opinion you cannot in that way alter a contract under seal to do works for a particular sum of money. The plaintiffs cannot say that the company is to give more because the engineer found he had made a mistake and promised he would give more, and the company verbally, or in some vague way, ratified that promise.

To my mind it was a perfectly *nudum pactum*. It is a totally distinct thing from a claim to payment for actual extra works not included in the contract.”

Generally, the contractor is required to complete the work as specified in the contract. Where, as in *Sharpe*, the contract is for a fixed or lump sum, the full extent of the work to be performed is included in the plans and specifications and will thus be part of the full contract price and the contractor will not receive any extra monies to carry out whatever that work amounts to. It should be noted that in *Sharpe* the parties were quite clear that the contract sum was all that was to be paid and they also allowed the engineer to make further determinations of what the scope of work was to be. Needless to say, a contemporary view of this would mandate that anything that is not clearly a part of the necessary works and/or inferred to be so will qualify as a change to the scope of work and would justify a change to the contract price.³⁶

This is different from the situation in *Wilmot v Smith*³⁷ from which we learn that where the contractor on its own and without any instruction from the employer voluntarily does something extra, it will not have any right to increased compensation nor would a subcontractor have any claim against its contractor. It should be remembered, however, that if the employer gives its assent to a request from the contractor this does not automatically make a variation. In *Tharsis Sulphur and Copper Co v M'Elroy & Sons*,³⁸ the court was faced with a lump sum contract under which the contractor had to increase the specified thickness of various girders so that they could be manufactured and obtained permission from the engineer accordingly. The court held that the contractor was not able to claim for the additional weight.

Following along this line, in *Ministry of Defence v Scott Wilson Kirkpatrick*,³⁹ the court took the position that, if a contract provides for variations, then the procedure must be followed and, if not, a contractor cannot claim for extra monies just because either the engineer or architect knew, “or ought to have known”, about the changes. In a similar vein, if the contract provides that variations are to come from the engineer or architect, then requests by the employer directly to the contractor for additional work would not entitle the contractor to any payment for the work carried out.⁴⁰

An interesting situation arises where a change in the Works is authorised and may be a variation entitling the contractor to payment, as in *Simplex Concrete Piles Ltd v Borough of St Pancras*,⁴¹ where the contract authorised the architect to issue variation instructions and specifically provided that if compliance “involves the contractor in loss or expense beyond that provided for in ... this contract, then, unless such

³⁶ See e.g. *Williams v Fitzmaurice* (1858) 3 H & N 844 and *C Bryant & Sons Ltd v Birmingham Hospital Saturday Fund* [1938] 1 All ER 503 (it should be noted that in this case the parties differed as to whether the work was an extra but what decided the matter was that the bills of quantities incorporated the Standard Method of Measurement which required excavation in rock to be given separately).

³⁷ (1828) 3 C & P 453.

³⁸ (1878) 3 App Cas 1040, HL.

³⁹ [2000] BLR 20, CA.

⁴⁰ *Tan Eng Hoe v Liang Hooi Kiang* (1961) 27 MLJ 119.

⁴¹ (1958) 14 BLR 80.

instructions were issued by reason of some breach of this contract by the contractor, the amount ... shall be added to the Contract Sum". Another contract provision was that Simplex, who were to perform pile-driving work, "shall be liable to make good at his own cost any failure or inadequacy of the work ... due to faulty design, materials or construction irrespective of any approvals that may have been given".

As was the case, during construction, tests showed that the piles were unlikely to be able to carry the working load specified and Simplex made the suggestion to the architect that they should employ a third party to install bored piles at extra cost and wrote to the architect for "instructions and views as to the extra cost which will be involved". The architect replied that the client was "prepared to accept your proposal that piles supporting Block 'A' should be of the bored type in accordance with the quotations submitted by" the third party. Simplex proceeded to use bored piles and claimed the extra cost involved on the basis that the architect's letter was a variation instruction and that in the absence of that letter they would have been in breach. The court reviewed this situation, finding that the architect's letter was sufficient to be construed as a variation instruction and wrote:

"... [It was] submitted that, unless the letter amounted to a variation, the plaintiffs cannot succeed, whatever the architect may have thought about the matter. In my judgment, it is not immaterial that the architect intended to authorise a variation, thought he was authorising variation, and thought further that, as the employers were being rendered liable, he must check on the extra expense involved, all of which factors I find were present in [the architect's] mind when he wrote his letter.

On these findings, the one question that remains is: Was it a variation which, under contract, the architect was empowered to authorise? If it was, then the liability of the defendants would appear to be clear.

From clause 1 of the general conditions it is clear that the architect's instruction does not necessarily involve any variation at all. [Counsel] submitted that a variation must involve either (1) the doing of something extra which (in the absence of instruction) the contractor is not required to do, or (2) the omission of something which he would otherwise be obliged to do, or (3) a combination of both (1) and (2), but that the 30 July letter merely gave the contractor precise instructions as to the mode of doing that which he had already bound himself to do by clause 3(a) of the general conditions and preliminaries. He relied strongly upon clause 7 thereof, requiring the contractor:

'to make good at his own cost any failure or inadequacy ... due to faulty design, materials or construction irrespective of any approvals that may have been given,'

... and I accept that the piles driven by the plaintiffs were gravely inadequate by reason of 'faulty design' or 'construction' or a combination thereof, and I have already said that in my view the plaintiff company would have had no defence to an action for breach of contract when on 16 July they made it clear that their original design of 164 driven piles had proved in the circumstances to be an impracticable and inadequate proposition. On any view of the case, they were accordingly very fortunate in finding so amenable and co-operative an architect ...

[Counsel] is clearly right in his submission that an architect (whatever he himself may think) has in law no power to instruct or authorise as an extra something which the contractor is already bound to perform, but is that the correct way to describe what this particular architect did? I think not. In my judgment, it is an oversimplification of the case to say that, following upon the 30 July letter, the plaintiffs did no more than they were contractually bound to do and that, accordingly, they cannot claim extra payment. If they failed to carry out the Section 'A' works, their liability was in damages, which might as events turned out be substantial or small, according as to what alternative arrangements the defendants might have been able to make. What the contract did not oblige them to do was to get the work done by others in a wholly different way at considerable extra expense.

By clause 1 of the general conditions:

‘The architect may in his absolute discretion ... issue written instructions ... in regard to (a) the variation or modification of the design quality or quantity of the works or the addition or omission or substitution of any work.’

Accordingly it is not right to say that a variation must involve an addition to or omission from the contracted works. The contractor’s detailed specifications (Schedule I) here are for 32ft long, 18-inch diameter Simplex Cast Insitu driven piles, and such specifications constitute or describe in part the ‘design’ or ‘quality’ of the works. I regard as immaterial the fact that such ‘design’ emanated from the contractor rather than from the employer, just as I do the fact that the first suggestion of bored piles also came from the contractor. I agree with [counsel for the plaintiffs], that the architect’s letter of 30 July contained an instruction involving a variation in the design or quality (or both design and quality) of the works which the plaintiffs were being instructed to perform, and I have already indicated my view that he did so in circumstances in which he was accepting on the employers’ behalf that they would be responsible for the extra cost involved. Such an action fell, in my judgment, within the ‘absolute discretion’ vested in him by clause 1 and was motivated by his great desire ‘to get the job moving’, as he put it, and regardless of the legal position of the plaintiffs under their contract. It was an action which led to the plaintiffs doing something different from that which they were obliged to do under their contract, and it was an action which involved the defendants in responsibility for the extra expense which it entailed.”

Thus, such a document on behalf of the employer may amount to a variation and entitle the contractor to payment even though the contractor is in breach of contract.

Implied variations

As discussed earlier, the case of *The Moorcock*⁴² tells us that a court will most likely consider whether it was the intent of the parties to allow for an implied obligation to order variations especially if to do so will help move the contract forward to completion such as in *North West Metropolitan Hospital Board v TA Bickerton & Son Ltd*,⁴³ where it was necessary to imply such a duty to replace a nominated subcontractor who had gone into liquidation. Aside from these cases it is difficult for a contractor to take the position that an implied obligation exists to order a variation.

Ordering variations

The court in *Cowey v Liberian Operations Ltd*⁴⁴ made clear that variations are just that: A change in the terms of a contract which requires the consent of the parties, i.e. one cannot unilaterally vary the Works. As pointed out earlier, any contract can be varied so long as the parties agree and there is sufficient new consideration or the parties can agree at the start that some person is given the power to order variations, such as the engineer. Absent such express power in the contract the contractor is not required to agree any variation.

The issue of new consideration arises when the employer offers or promises to pay for extra work but the contractor is already obliged to do that work. As has been described, in fixed sum/lump sum contracts the contractor is required to perform all

42 (1889) 14 PD 64.

43 [1970] 1 All ER 1039, [1970] 1 WLR 607.

44 [1966] 2 Lloyd’s Rep 45.

the Works that are necessarily part of the scope of works. There may be times during the course of works in which the employer wants the work done either faster or in a different sequence and offers to pay for the work being done in this way. When the contractor agrees it falls to the court to decide whether the contractor was promising to do work it was already obliged to perform. Unfortunately, such a promise is not binding, as there is no new consideration to the employer, i.e. the contractor was required to perform anyway. This view has been changed by the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,⁴⁵ where it was held that if the employer derives a genuine benefit from the performance of the contractor's existing obligations, for example, by the contractor promising to complete those works expeditiously and thereby avoiding financial penalties accruing to the employer, and if the promise to pay was not made under duress, such performance by the contractor constitutes sufficient new consideration thus requiring the employer to pay as though a variation had been ordered.

Failure to order a variation

Following this there are situations where the employer's agent's failure to order a variation may constitute a breach by the employer. In *Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation*,⁴⁶ the court was faced with a situation where the nominated subcontractors began installation of window assemblies, which failed to keep rainwater out due to defects in design and workmanship. The subcontractor accepted liability either under the subcontract or under a theory of warranty. The architects were of the view that the defects were due to bad workmanship and that the main contractor should put forward the subcontractor's remedial proposals as their own. The main contractor disagreed and took the position that the defects were due to faulty design and that it was impossible to complete the contract without a variation of the design. The architect refused to issue a variation order thus making it impossible for either the main contractor and/or subcontractor to complete the Works. The court reviewed the situation and wrote:

"... In my view, [the architects], by their failure to issue a variation instruction, made it impossible for [the subcontractor] to complete their sub-contract, and made it impossible for [the main contractor] to complete the main contract so far as the windows are concerned.

From then onwards, [the architect] kept up a public face of disapproval of [the subcontractor] proceeding with installation of windows to a revised design, shown by the seeming clause 6(4) notices while from 6 May 1974 they permitted [the main contractor] to proceed with finishes, which were wholly dependent on the efficacy of the remedial measures, and repeatedly offered to issue a variation instruction if only [the main contractor] would recommend the changes in design. What can only be described as the hypocrisy of [the architect]'s position is demonstrated by what happened at Gurnos, where Douglas, more accommodating than [the main contractor], gave their support to [the subcontractor]'s identical proposals and a variation instruction followed.

It is quite clear from [the architect]'s internal memoranda and from Mr Keegan's remarks at the inspection on 27 September 1978, that [the architect] were satisfied that [the subcontractor] had by the 1974 and later changes in the windows, overcome both defects in design and workmanship, although they quite properly wished to preserve WHTSO's right to complain if any further defects in workmanship manifested themselves. The promise

45 [1991] 1 QB 1, [1990] 1 All ER 512.

46 (1982) 18 BLR 80.

made by Mr Pickup at the meeting of 8 September 1977 that, subject to water penetration being eliminated, he would instruct [the architect] to release money to [the main contractor] indicates that he, representing the mind of WHTSO themselves, was of the same view.

I think that [the architect]'s failure to issue a variation instruction in 1974 rendered [the main contractor]'s and [the subcontractor]'s obligation to supply windows pursuant to the entire contracts into which they had entered impossible of performance.

[The subcontractor] went on to provide windows 'at their own risk', meaning that, if the windows should still leak, no payment would be made to them, but in the expectation that, if the windows did not leak, they would be paid. In my view, [the architect] and WHTSO, by their words and conduct, agreed to that arrangement. I think that the result was a new contract between [the subcontractor] and WHTSO, to which [the main contractor] were not parties, that, in consideration of [the subcontractor] providing window assemblies for the hospital, WHTSO would pay to them a quantum meruit.

[The architect]'s failure to issue a variation instruction when defects in design had become apparent, when they had come to believe that [the subcontractor] remedies were overcoming the defects and when they had no alternative proposals of their own, may possibly be excused on the grounds that they were labouring under a mistake of law as to [the main contractor]'s responsibilities. However, I find it impossible to believe that architects in charge of a great building project, which has been brought to a stop by an unexpected difficulty, are entitled to adopt a passive attitude, as [the architect] did in this case. [the architect]'s failures were ones of omission rather than of commission, but I think that they none the less amounted to breach of contract.

The same conclusion as I have reached in regard to the issue of a variation instruction applies, I think, to the grant to [the main contractor] of an extension of time."

Here, it was clear that the employer had design responsibility. Through its agent, the architect, it was required to issue a variation correcting the design defect even though this may have been embarrassing to the architect. In contracts where the contractor is performing the design work, such as the FIDIC Yellow Book, or where the contractor does have some design responsibilities, there will be no obligation to issue a variation as the contractor is required to correct its defective design.⁴⁷

Removing work

The issue becomes whether the engineer has the authority under a variation provision of a contract to take work away from a contractor. This faced the court in the Australian case of *Carr v JA Berriman Pty Ltd*.⁴⁸ There, the contractor was to build a factory and the contract provided for the free issue of steel by the plaintiff and its fabrication by the contractor to the architect's instructions. The architect subsequently wrote to the contractor informing it that the fabrication contract for the steel had been awarded to another company. The question thus arose as to whether the architect's letter constituted a variation order. The court held that such a letter was outside the powers conferred by the variation clause and, therefore, amounted to a breach of contract entitling the defendant to terminate the contract. The court wrote:

"... The relevant part of clause 1 of the conditions ... is contained in the words: 'The Architect may in his absolute discretion and from time to time issue ... written instructions or written directions ... in regard to the ... omission ... of any work ... The Builder shall forthwith comply with all Architect's Instructions.' Clause 1 is part of a printed form, and the powers conferred upon the architect extend to the giving of directions on a great

⁴⁷ See e.g. *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 55 BLR 1.

⁴⁸ (1953) 27 ALJR 273.

variety of matters in addition to the ‘omission of any work’. The clause is a common and useful clause, the obvious purpose of which – so far as it is relevant to the present case – is to enable the architect to direct additions to, or substitutions in, or omissions from, the building as planned, which may turn out, in his opinion, to be desirable in the course of the performance of the contract. The words quoted from it would authorize the architect (doubtless within certain limits, which were discussed in *R v Peto* (1826) to direct that particular items of work included in the plans and specifications shall not be carried out. But they do not, in my opinion, authorise him to say that particular items so included shall be carried out not by the builder with whom the contract is made but by some other builder or contractor. The words used do not, in their natural meaning, extend so far, and a power in the architect to hand over at will any part of the contract to another contractor would be a most unreasonable power, which very clear words would be required to confer.”

A similar situation arose in another Australian case entitled *Commissioner for Main Roads v Reed & Stuart Pty Ltd*,⁴⁹ where the road works contract provided that if there was insufficient topsoil on site, “the Engineer may direct the Contractor in writing to obtain top-soil” from other locations and it would be paid at a certain rate. Unfortunately, the engineer did not use this provision of the contract and, instead, instructed a third party to bring the needed soil to the site. The court felt that such conduct was a breach of contract on the employer’s part and while the employer was allowed under the contract to omit work, it did not entitle it to take away work and give it to another contractor. In this regard the court stated:

“... The interaction of two factors, the shortage of on-site top-soil and the underestimation of the total amount of material required to carry out all necessary top-soiling, necessarily produced, in the case of a contract such as the present, an acute conflict between the interests of the respective parties to it. The underestimation meant that the contractor had, for the same lump sum reward, to perform considerably more top-soiling than was contemplated when tendering; but if, because of the shortage of on-site top-soil, it could invoke the fourth paragraph of clause B3.03 the entire financial position would alter, it would then be paid at what was apparently a profitable rate, for all imported top-soil needed to make good that shortage and this regardless of the initial underestimation.

When the shortfall of top-soil manifested itself the contractor sought to, but the commissioner refused to, invoke these provisions of the contract which were designed to deal with that eventuality; instead the commissioner adopted a quite different course. The commissioner’s Engineer decided that, rather than incur the rate of £3 per cubic yard, he would instead, by the exercise of what he regarded as powers available to him under the contract, arrange for the work of importing top-soil onto the site to be done by a third party, no doubt at cheaper rates.

Were he legally entitled to do so it would, I think, run counter to a concept basic to the contract, namely that the contractor, as successful tenderer, should have the opportunity of performing the whole of the contract work. By the contract the contractor had covenanted that for the bulk sum of almost £5 million it would perform the works and supply all the materials shown in the other contract documents. That this included the placing of all top-soil called for by the contract drawings is clear from those drawings, from the definition of ‘Works’ in the general conditions of contract and from the concluding words of clause A1.22 of the specification, which expressly includes in the contract work the placing of top-soil as shown in the contract drawings. Consistently with this the second paragraph of clause B3.03 provides that top-soil shall be placed by the contractor ‘on batters, medians and at other locations shown on the Drawings or as determined by the Engineer...’. Then the third paragraph of clause B3.03 gives meaning to the figure of 49,700 cubic yards of top-soil appearing in the schedule to the tender by describing it as the estimated quantity of top-soil required in place within the limits of the completed Works. Finally, to meet the

49 (1974) 12 BLR 55.

contingency of a shortfall in on-site top-soil, there appears the fourth paragraph of clause B3.03, which I have already set out in full.

The engineer sought to rely upon two provisions of the contract to attain his purpose. He regarded the fourth paragraph of clause B3.03 as conferring upon him, or rather, in his words, upon ‘the Department’, an option and initially told the contractor that in exercise of that option separate arrangements would be made for the supply of the shortfall of top-soil. He at the same time told the contractor that the Department would ‘relieve your company of the responsibility of undertaking any further part of the work required under clause B3.03 of the specification’ and that a deduction from the lump sum price would be made, at the rate of 15s per cubic yard, in respect of the difference between the quantity of on-site top-soil already spread and the quantity, as estimated at time of tender, of 49,700 cubic yards; he relied upon clause 18 of the general conditions of contract for this action.

Clause 18 is a common enough provision to be found in engineering contracts and permits of the omission from time to time by the proprietor of portions of the contract works. What it clearly enough does not permit is the taking away of portions of the contract work from the contractor so that the proprietor may have it performed by some other contractor: *Carr v JA Berriman Pty Ltd* (1953). Yet this was what the engineer sought to do in the present case in relation to spreading of top-soil.

The commissioner was, in my view, in breach of his contractual obligations under the contract. First there was the failure of the engineer to direct the contractor to obtain additional top-soil from outside the site once it was decided that the contract work of spreading top-soil to the extent shown in the contract drawings should proceed despite the shortfall of on-site top-soil. Secondly, there was the closely allied act of taking away from the contractor the balance of top-soil placement work, using imported topsoil, and, in consequence, the deduction from the lump sum price of an amount calculated by reference to the uncompleted portion of the originally estimated cubic yardage of top-soil required to be placed on site.

The shortfall having become apparent and it having been decided that all the originally contemplated top-soil spreading should nevertheless be carried out, the engineer, by failing to give a direction under the fourth paragraph of clause B3.03, rendered it impossible for the contractor to perform its contractual obligations; without such a direction it was confined to the use of on-site top-soil of which there was insufficient. The resultant situation is not dissimilar to that which arose on the facts in *Carr v JA Berriman Pty Ltd*, where there had been a failure to give possession of the building site to the contractor, thus constituting a breach of contract, and see *Freeman & Son v Hensler* (1900), where the members of the Court of Appeal, in separate judgments, each regarded as a term necessarily to be implied into a building contract the giving of possession of the site to the contractor. As Lord Atkin said, in a quite different context, in *Southern Foundries (1926) Ltd v Shirlaw* (1940), there is ‘a positive rule of the law of contract that conduct of either promiser or promisee which can be said to amount to himself “of his own motion” bringing about the impossibility of performance is in itself a breach’.

What is the basis for payment and value of the variation?

Assuming that the work performed by the contractor is held to be extra, entitling the contractor to payment, the contract must be also reviewed to determine an appropriate basis. In the case of *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works*,⁵⁰ a contract to erect an ordnance factory for the defendants defined the “work” to be carried out as “including all modified extra or additional works and all obligations performed under the contract”. As the operations proceeded, a supplementary contract was, in 1937, entered into providing for a maximum and a minimum profit to the contractors calculated on actual cost. By the time the work was completed in

50 [1950] 1 All ER 208.

1940, its total value and the actual cost to the contractors had greatly exceeded the estimate made in 1937. The court held that, as it was not within the contemplation of the parties when entering into the supplementary contract that there should be such a large increase in cost, the contractors were entitled to be paid for the excess work on a quantum meruit as being work outside the supplementary contract. Applying *Bush v Whitehaven Trustees* (1888) 52 JP 392,⁵¹ the court wrote that:

“... The question in this appeal is whether the original contract between the parties, as varied by the deed of August 18, 1937, is to be read as producing this extraordinary result, namely, first, that in no circumstances may the contractor's profit exceed £300,000, but, secondly, that nevertheless, after he has earned that profit, the Commissioners are entitled to require him to perform further additions and variations till the end of time, without paying him an extra penny in respect of them. For brevity, I will call such variations and additions ‘extras’. I propose to consider, in its bearing on this problem, first the construction of the original contract and, secondly, the effect of the superimposition on it of the deed of August, 1937.

Under general condition 33 of the original contract, read literally, the commissioners were entitled to require the contractor to carry out ‘extras’ without limit of quantum or time. They could require him to erect a series of buildings on the site, pull them down, and put them up again, with or without alterations, as often, and for as long, as they chose. When the original contract alone was concerned, this was not such an unreasonable stipulation as on its face it appears, since two factors would in practice militate against the abuse by the commissioners of their strict legal rights. First, under that contract they would have to pay for all extras under either subclause (a) or subclause (b) of condition 35 and, secondly, pay for them out of public funds. The contractor might feel some legitimate confidence that, whatever their strict rights, the commissioners would not in practice choose, or perhaps in a democratic country be allowed, to waste the taxpayers’ money wantonly. A further consideration suggests some doubt whether such a course of conduct would even be within their strict legal rights. There is a note to item 57 of the first bill of quantities. (The bills of quantities are among the documents in which the original contract was embodied.) The note in question, which my Lord has read, but which I will repeat, reads as follows: ‘It is probable that further work to the value of approximately £500,000 will be ordered on a measured basis under the terms of the contract.’ So far as the original contract is concerned, it is not suggested that this note was per se a term of that contract, in the strict sense that the commissioners were undertaking to order not less or not more than about £500,000 by value of ‘extras’. The very words ‘it is probable’ rule out any such construction, for they necessarily imply that, in less probable events, the commissioners may order less (or more) than this quantum of extras, a possibility which would not exist if they were not entitled to do so. It was, however, suggested that the presence of this note is indirectly relevant as supporting an implied limitation of the literal scope of condition 33, a limitation to extras on some such scale as £500,000, and at all events precludes so literal a reading of condition 33 as would entitle the commissioners to require extras to be carried out to the tune of, say, £100,000,000 or indeed £2,000,000. It is not necessary to decide this point. If it were, I should for myself feel serious doubt whether any such limitation could validly be implied.

When, however, the original contract is read subject to the overriding effect (where the two are inconsistent) of the deed of August, 1937, the case for reading condition 33 as subject to an implied restriction on its literal tenor is much stronger. Two new considerations here intervene, the first derived from the terms of the deed itself; the second derived from the circumstances which surrounded and led up to its execution. To deal with these in turn,

⁵¹ In *Bush v Whitehaven Trustees* (1888) 52 JP 392, Lord Esher observed: “If the first contract was gone, if the state of circumstances with regard to which it was made were really no longer in existence as between the parties, if the one did work for the other upon the new state of circumstances which the other accepted, knowing that it was being done on the terms of being paid for, that gives rise to a quantum meruit.”

first, if the original contract plus the deed are read without any implied limitation on their literal meaning, the result, as indicated above, is that after £300,000 profit has been earned by the contractor, he can be compelled to labour like the Danaids without reward or limit, on any further ‘extras’ which the commissioners may elect to exact from him, ‘til the last syllable of recorded time’. The restraining practical factor that such ‘extras’ will have to be paid for, and paid for out of the taxpayers’ funds, no longer operates, because of the proviso to clause 4 of the deed imposing a maximum profit. Only the most compelling language would induce a court to construe the combined instruments as placing one party so completely at the mercy of the other. Where the language of the contract is capable of a literal and wide, but also of a less literal and a more restricted, meaning, all relevant circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it.”

This case has also been cited in similar situations, most notably in the Canadian case of *Cana Construction Co Ltd v The Queen*,⁵² where the main contractor was required to enter into a subcontract for the installation of the mail-handling equipment with a Crown-selected subcontractor. All tenderers were required to include figures for overheads, supervision and profit on installation but were told not to include supply and installation costs for the mail-handling equipment itself. The invitation to tender showed that the estimated cost of the installation was CAN\$1,150,000. As it turned out, the main contractor was instructed to enter into a subcontract with the selected installer at a price of CAN\$2,078,543 and, accordingly, it requested a variation order for CAN\$2,171,398 which amounted to the subcontract tender plus 10 per cent of the difference between the subcontract tender and CAN\$1,150,000 to cover overheads and profits. This request was refused. The court felt that the main contractor was entitled to a payment for overheads and profits calculated on the real subcontract price and not on its tender figure, which was based solely on the estimate and it wrote:

“... Applying this same method of interpretation [i.e., that of Asquith LJ in *Parkinson*] to the present case, I have come to the conclusion that when the parties entered into the original contract then it was on the basis that the appellants would be required to enter into a sub-contract for the installation of the mechanical handling equipment at a cost of about \$1,150,000 and that therefore their bid should include overhead, supervision and profit for that amount. As it turned out, the appellant was required to enter into a sub-contract for an amount of over \$2,000,000 and therefore the overhead, supervision and profit on that larger amount was not within the contemplation of either party. None of the authorities cited by the respondent during the argument have convinced me that I should not approach the interpretation of this business contract in a fashion which I regard as business-like reaching the result which I have reached.”

Value

In practice many disputes arise as to how variations are to be valued. The standard forms of construction contracts contain necessary provisions in this regard; however, the challenge arises when the contract itself refers to rates being agreed. In *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*,⁵³ Henry Boot was to perform civil engineering works for Alstom and the parties’ contract was based upon ICE

⁵² (1973) 21 BLR 12.

⁵³ (2000) 69 ConLR 27.

Conditions, 6th edition. In the contract the provision dealing with variations and their price was Clause 52(1) which provided:

“The value of all variations ordered by the Engineer in accordance with clause 51, shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles.

[Rule 1]^[54]

- a. Where work is of similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable

[Rule 2]

- b. Where work is not of a similar character or is not executed under similar conditions or is ordered during the Defects Correction Periods the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable failing which a fair valuation shall be made.

[Rule 3]

Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation, the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly.”

Here, the contract required that post-tender exchanges be incorporated into the agreement and on that basis Boot tendered that the cooling water pipe system would be installed throughout the site at a depth of 4.45m above datum. Alstom then lowered the system to 3.35m above datum and, accordingly, via faxes between the parties, Boot submitted a price of £250,880 for additional and different temporary works, which was accepted by Alstom.

Boot’s amount of £250,880 was claimed to be for “for additional and different temporary works only, required in the turbine hall”. If this were to be used it would equate to a square metre rate of £89. After this it turned out that a large amount of extra work was done outside the turbine hall and if one applied this rate, the amount Boot was entitled to became £2,284,128.

In the arbitration that followed the arbitrator found that the exchange of faxes was incorporated into the contract and although Boot was mistaken in its calculations he was without any power to correct this valuation and instead went on to apply a “fair” valuation to the claim. This led to an appeal and the court agreed that the rate of £89 should be applied, and wrote:

“... Although Lord Neill’s argument was presented with all his usual skill, I am not persuaded. The meaning of Rule 2 does not, I think, admit of much doubt. It provides a half-way house between Rule 1 and Rule 3. Like Rule 1, Rule 2 is mandatory. It applies when the work covered by the variation order is of a different character from the work priced in the bill of quantities, or is executed under different conditions. If the differences are relatively small, the engineer is obliged to use the rates set out in the bill of quantities as the basis for his valuation, making such adjustment as may be necessary to take account of the differences. But the differences may be very great, as, for example, where the variation order calls for the excavation of foundations in solid rock, instead of clay. In those circumstances, the engineer may take the view that it would not be ‘reasonable’ to base his valuation on the rates contained in the bill of quantities. He is then thrown back on Rule 3. That is the sole function of the words ‘so far as may be reasonable’ in Rule 2. They call for a comparison between the work covered by the variation order and the work priced in the bill of quantities. They do not enable the engineer to open up or disregard the rates on the

54 The [Rule] is inserted for ease of understanding as referenced in the Court’s decision later.

ground that they were inserted by mistake. As Beldam LJ put it in the course of argument, it is the use of the rates in the changed circumstances brought about by the variation order that must be reasonable, not the rates themselves.

Lord Neill argued that it would be wrong to regard the rates as immutable; he gently derided the learned judge's use of the word 'sacrosanct' in that connection. But it seems to me that that is exactly what the proviso to clause 55(2) requires:

'Provided that there shall be no rectification of any errors, omissions or wrong estimates in the descriptions, rates and prices inserted by the contractor in the Bill of Quantities.'

Clause 52(2) on which Lord Neill relied, provides an exception. But it is an exception which proves the rule. It applies 'if the nature or amount of the variation relative to the nature or amount of the contract work is such as to make it unreasonable to apply the contract rates to the variation. In such a case, the engineer may fix a reasonable rate'. Thus, clause 52(2) creates a limited exception to Rules 1 and 2 where the scale or nature of the variation makes it unreasonable to use the contract rates. It certainly does not justify displacing the rates themselves because they were inserted by mistake or are too high or too low or otherwise unreasonable.

The same applies to another provision on which Lord Neill relied, namely, clause 56(2). It enables the engineer to increase or decrease the rates where 'the actual quantities executed in respect of any item [is] greater or less than those stated in the Bill of Quantities'. These limited exceptions underline the basic rule that the rates themselves are not subject to correction.

Any other view would have far-reaching consequences. If the engineer were free to open up the rates at the request of one party or the other because they were inserted in the bill of quantities by mistake, it would not only unsettle the basis of competitive tendering, but also create the sort of uncertainty in the administration of building contracts which should be avoided at all costs.

For the above reasons, and the reasons set out in Judge LLoyd's admirable judgment, with which I am in complete agreement, I would dismiss the appeal, and remit the award to the arbitrator in accordance with para 2 of his order. I can well understand the arbitrator's reluctance to extend the effect of the mistake in the bill of quantities. But having held correctly, as I have said, that he had no power to correct the mistake, he should have carried his reasoning through to its logical conclusion. He was bound to disregard the mistake when applying Rule 2. The language of Rule 2 does not permit of any other construction. It follows that in failing to apply Rule 2 the arbitrator erred in law."

Standard methods of measurement

To relieve any problems that may arise in describing the details of extra work, professional bodies in the construction sector have devised standard methods of measurement. Thus, we find the former Standard Method of Measurement of Building Works ("SMM") which has now been replaced by the New Rules of Measurement volume 2 ("NRM2"), as published in 2012 by the RICS Quantity Surveying and Construction Professional Group and operative from 1 January 2013⁵⁵ and by the Royal Institute of Chartered Surveyors and the Building Employers Confederation along with the Civil Engineering Standard Method of Measurement ("CESMM") published by the Institution of Civil Engineers. Their purpose is to develop and promote a standard way of measurement for use in contract tenders. This is done so that it can be used, along with bills of quantities, to fully define the scope of the Works and, ultimately, determine what is part of the contract and what qualifies as a variation.

⁵⁵ NRM2 is also accompanied by two additional volumes, namely NRM1 (providing guidance on the quantification of capital building works for the purpose of preparing cost estimates and cost plans) and NRM3 (giving guidance on the quantification and description of building maintenance works for the purpose of preparing initial order of cost estimates).

In this regard many of the standard forms that utilise quantities expressly require that bills be deemed to be prepared in accordance with the appropriate standard method, unless the contrary is expressly stated in respect of all items or any particular item.⁵⁶ Accordingly, contractors may use such standard clauses to base their claims for extra payment. In *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund*,⁵⁷ the bills under the 1931 JCT contract were deemed to have been prepared in accordance with the then current SMM2, which stated that: “Where practicable the nature of the soil shall be described and attention shall be drawn to any existing trial holes. Excavation in rock shall be given separately.” However, they did not have a separate item for excavation in rock and, of course, the contractor encountered rock during excavations. This particular JCT contract mandated that errors and omissions in the bills were to be rectified and treated as variations and, accordingly, it was held that the contractor was entitled to an extra for the excavation despite the provision in the contract requiring it to first satisfy itself as to the site conditions and nature of the operations to be carried out. What is interesting from this interpretation is that it seems to encourage contractors to rely on their bills at tender instead of checking out matters as required in the contract.

The SMM and CESMM impose general duties of disclosure on the employer who prepares the bills. For example, the employer may be required to fully and accurately represent the Works. The interpretation that was given to the contemporary counterparts of such provisions in *Bryant* suggests the duty is a high one.⁵⁸

Errors

Under the JCT form, for example, if there are any errors in the bills they are to be corrected and the resulting corrections are treated as variations. Unfortunately, as was noted in *MV Gleeson Ltd v Sleaford UDC*,⁵⁹ this provision does not apply to contractor-generated errors in the pricing of the bills of quantities, such as if the contractor failed to price part of the bill. But in *Wilkie v Hamilton Lodging House Co*,⁶⁰ the court found that a contractor’s arithmetical errors on a schedule of rates could be corrected under the terms of the particular contract involved.

Final certificates

The effect of final certificates on variations works to limit the contractor’s ability to claim any extra payment for variations and also stops the employer from raising any variation sums. Most contracts provide that the final certificate is “final” and “conclusive” between the parties as to all sums and works to bring closure to the project. This is the case so long as the particular clause in question is broad enough to encompass any question of extras and if so, the final certificate acts as a bar to the contractor or employer bringing up any evidence to alter or vary any of the variations taken into account in the final certificate.

⁵⁶ See e.g. JCT 98, cl 2.2.2.1 and ICE 7th edition, cl 57.

⁵⁷ [1938] 1 All ER 503.

⁵⁸ See e.g. *Emden’s Construction Law*, Chapter 5 “Variations”.

⁵⁹ [1953, unreported], per Vaisey J: see e.g. *Emden’s Construction Law*, Chapter 5 “Variations”.

⁶⁰ [1902] 4 F (Ct of Sess) 951.

Final Account Statements

A somewhat related matter has to do with the Final Account Statement, which, although having no real status under most types of contract, is still commonly used between the employer and the contractor to settle their accounts and represent the full and final settlement of all claims between them. The issue, which unfortunately frequently arises, is where, after a “Final Account Statement” has been agreed, one of the signatories later decides that it does not wish to be bound by the terms set out in the document.

In *Hurst Stores & Interiors Ltd v ML Europe Property Ltd*,⁶¹ Hurst had entered into a contract with ML for the refurbishment of office toilets. Under the contract the fixed trade contract price could be adjusted by measured variations or extensions of time in respect of delays that properly affected the progress of the Works. Provision was made for the negotiation of disruption costs to Hurst where ML required variations. Although the contract made assessment of disruption costs a precondition of execution of any additional works, it had been accepted by both parties that they could be assessed after the Works were completed. ML issued many variations (CMIs), some of which provided for substantial additional works. The project manager, listing the CMIs and costing them for labour and materials but not disruption costs, prepared interim statements of account. The contract provided that Hurst should submit, on a monthly basis, priced “interim final accounts” on a standard ML interim statement of account (ISA) form. The ISA form contained the words:

“... we agree ... the values shown represent the full and final value of all ... work ... instructed and nothing further remains to be charged against them. The total (for the list of instructions) represents the full and final value of our contract works at the date of this statement.”

Six months before the completion of the project, ML provided a variant of the ISA form, which identified the statement as being “final” (not “interim”) and replaced the standard wording reference so that it read:

“In consideration of the agreement that final payment is to be made by the Client, we hereby agree that payment to us of THE FINAL PAYMENT will be accepted by us in full and final settlement of all our claims ... arising out of or in connection with the Trade Contract Works which have accrued up to and including the date of this statement”

Hurst’s Project Manager, who routinely signed and dated the monthly interim statements, signed this variant of the ISA form also. Although Hurst’s Project Manager had authority to deal with all matters concerning payment and finance, prior to signing the variant of the ISA form he did not understand that he was being requested to deal with all contractual claims or to allow for them. He was not advised of the revised wording (which he himself had overlooked) and he did not appreciate that by the “full and final settlement” terms Hurst was being invited to forgo claims (e.g. loss and/or expense claims).

Then, some seven months after the variant of the ISA form had been signed by Hurst’s Project Manager, Hurst prepared a Final Account which included for “additional preliminaries” and for “disruption”.

61 [2004] EWCA Civ 490.

ML refused to accept this Final Account on the basis, among other things, that there was already an agreed and signed final account statement (i.e. the variant to the ISA form signed by Hurst's Project Manager).

Hurst referred its Final Account disputes to an Adjudicator who found that, because of the signed Final Account Statement, Hurst was prevented from making further claims for additional costs that had accrued up to the date of the signed Final Account Statement. Hurst sought a declaration through the court that the signed Final Account Statement was not binding because:

- (i) There was a unilateral mistake by Hurst's Project Manager.
- (ii) Hurst's Project Manager did not have authority to make a binding compromise in the terms of that document.
- (iii) The document was not supported by consideration.
- (iv) That ML was estopped from contending that the document was binding because they had never previously made that contention.

At trial the recorder Mr Recorder Colin Reese found that:

- (i) There was a unilateral mistake by Hurst's Project Manager and that rectification to that document should be made to delete the reference to full and final settlement of all claims etc because there was knowledge (but not necessarily proven actual knowledge) by the other party of the unilateral mistake.
- (ii) The introduction of a previously un-contemplated type of final accounting document involved a variation of the trade contract for which Hurst's Project Manager did not have authority to bind Hurst.
- (iii) There was ample consideration.
- (iv) There was no estoppel applicable."

It followed from the facts, which supported the unilateral mistake, that the judge felt able to rectify the Full and Final Account Settlement document by, effectively, deleting those terms which indicated that it related to a Full and Final Settlement. ML appealed against a decision granting Hurst rectification of a document and also a declaration that the project manager did not have authority to sign the document. At first instance the judge had found that the project manager was mistaken as to the content of the document, believing it to be an interim account of costs agreed to date rather than a final settlement and that it had no authority to agree a final account which amounted to a variation of the trade contract. ML, however, submitted that the judge had failed to give weight to the fact that the project manager had referred to his initial account as a "final account" and that under the contract, the valuation of the CMIs was required to include disruption costs and the valuations and the document must be taken to include them. Further, that the judge had erred, in the absence of oral evidence from the construction manager, in finding that the construction manager knew of the project manager's mistake and that the Final Statement of Account fell within the terms of the trade contract and that the project manager had authority to sign documents falling within the contract.

The court dismissed the appeal, holding that the term "final account" was a misnomer and the judge had been entitled to find no significance in the use of the term. Further, on the evidence, direct disruption costs had not been included in the valuation of the CMIs and further, Hurst's claims were not only for direct disruption caused by the CMI variations but for extra expense incurred by ML's incompetent management

of the Works as a whole. Additionally, the project manager's attention had not been drawn to the fact that the FSA prepared by the construction manager, in containing the term "excluding future claims", differed from previous documents passed between the parties. The wording within the document also did not reflect agreements reached between the parties as to the basis of the valuations of the CMIs. In the circumstances an explanation was called for and ML's failure to call the construction manager as a witness was at their peril. The Court of Appeal found that the judge was entitled to find that the construction manager had "shut eye" knowledge of the project manager's mistake and, thus, insofar as the Final Statement of Account purported to be a binding undertaking that Hurst would not make claims in respect of the period up to the date of signing, it was a departure from the valuation process envisaged by the trade contract. The project manager did not have actual authority to vary the terms of the trade contract, and as such the ruling in *Sharpe v San Paulo Railway Co*⁶² applied and, accordingly, there was an entitlement to a declaration rectifying the agreement contained in the document as the circumstances were such that the representative had been mistaken as to the contents of the document and the construction manager had possessed knowledge of the mistake and acted upon it unconscionably.

62 (1872–73) LR 8 Ch App 597.

CHAPTER 10

Types of claim

Claims for money

In construction works, if the work as completed is defective, late or incomplete, the employer is entitled to the benefit of its bargain with the contractor and is entitled to be placed in the situation it would have been in had the contractor performed properly and/or to a sum of money to accomplish the same thing. Historically, in tort or breach of contract arising from property damage, damages are based on the diminution in the value of the property itself.¹ This is changing and, lately, where damages are sought against a contractor (or other professional) for defective work, the measure of damages has become the cost of reinstatement and/or repair of the work, the view being that this is a more just measure, as the result will have been the foreseeable consequences of the defective work.² Clarke LJ in the *Maersk Colombo*³ case wrote:

“... where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimants and the defendants.”

Thus, damages are intended to put the innocent party in the position it would have been in had the contract been performed as agreed.⁴ It is beyond the scope of this chapter to delve into the realm of punitive or exemplary damages, which are meant to punish the wrongdoer, as the goal in most construction contract proceedings is solely to put the claimant in the position it should have been in, plus any costs and loss of interest or other monetary claims related to the actual loss itself. The corollary of this is that if the wronged party has not actually suffered any real loss then no real amount of damages will be awarded, and even if they are awarded they will be nominal at best.

In any construction scenario the sorts of claim for loss can vary from the nominal, as just mentioned, through claims for actual money lost, claims for full performance, non-monetary claims, such as for extensions of time to complete and claims for liquidated damages. Other types of claim deal with the difference in value between the building as it was built and as it should have been, had the contractor performed properly under the contract.

In addition to claims for money damages, the issue arises as to whether the contract allows the defaulting contractor the right (or the employer to request the contractor) to remedy the defective work. These types of clause are usually covered in those

1 See e.g. *Jones v Goody* [1841] 8 M&W 146, 151 ER 985.

2 See e.g. *East Ham BC v Bernard Sunley & Sons Ltd* [1996] AC 406; *Darlington Borough Council v Wiltshier Northern Limited* [1995] 1 WLR 68 at 79.

3 [2001] 2 Lloyd's Rep 275 at 281.

4 See e.g. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, (1880) 7 R (HL) 1.

portions of the construction contract dealing with “the defects liability period”. The real issue is usually whether the employer even wants the contractor, whose work has already proven defective, back on the site at all, which leads to the issue of claims for money damages for the defective work.

So far, the types of claim mentioned all relate to work under the contract, but there is another form of claim that arises for damages outside of the contract, such as claims in tort to third parties.

The general point of view, as set out in *Robinson v Harman*,⁵ is that the innocent party should be rewarded for the value of what was promised and what actually happened and this shows the distinction between contract and tort claims, for in tort claims the goal is to put the innocent party in the position it was in to start with, before the tort occurred.

The issue of causation

In this regard no contract text would be complete without a discussion of *Hadley v Baxendale*.⁶ Here, a shaft in Hadley’s mill broke, rendering the mill inoperable. Hadley hired Baxendale to transport the broken mill shaft to an engineer in Greenwich so that he could make a duplicate. Hadley’s servant told Baxendale’s clerk that the shaft must be sent immediately and Baxendale promised to deliver it the next day. Baxendale did not know that the mill would be inoperable until the new shaft arrived. Baxendale was negligent and did not transport the shaft as promised, causing the mill to remain shut down for an additional five days. Hadley had paid £2 sterling and 4s to ship the shaft and sued for £300 damages due to lost profits and wages. The jury awarded Hadley £50 in damages and Baxendale appealed on the grounds that he did not know that Hadley would suffer any particular damage by reason of the late delivery.

The Court of Exchequer Chamber refused Hadley’s claim for the recovery of lost profits, deciding that Baxendale should only be held liable for losses that were generally foreseeable, or if Hadley had mentioned his special circumstances in advance. The fact that a party is sending something to be repaired does not necessarily mean that it would lose profits if it were not delivered on time. The court suggested various other circumstances in which Hadley could have entered into the contract that would not have presented such dire circumstances, noting that where special circumstances do exist, provisions can be made in the contract to impose extra damages for a breach. The court wrote:

“Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly

⁵ (1848) 1 Ex 850.

⁶ (1854) 9 Exch 341, 156 ER 145.

unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract ...

...
But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract.”

The rule becomes that consequential damages are linked to knowledge and foreseeability at the time of contracting and deal with the recovery of damages for loss other than those arising naturally. The real issue today, however, is not an implied agreement but rather the foreseeability of the damage at the time of contracting. What is reasonably foreseeable at the time of contracting requires further evidence as to the circumstances in which the parties entered into the contract and what each knew about any potential risks inherent in the contract’s performance. This “knowledge” can be imputed to them from customary construction trade practices.

In principle, a breaching party could be held liable for all losses flowing from its breach even if the link between the breach and the damage incurred is tenuous at best, and unlikely or even remote in time. The case of *South Australia Asset Management Corporation v York Montague Ltd* and *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*⁷ arose from the property crash in the early 1990s, where banks were suing valuers for overpricing houses in order to recover the lost market value. Here, a valuer had (in breach of an implied term to exercise reasonable care and skill) negligently advised his client bank that property, which it proposed to take as security for a loan, was worth much more than its actual market value. The question was whether he should be liable not only for losses attributable to the deficient security but also for further losses attributable to a fall in the property market. The House of Lords decided that he should not be liable for this kind of loss and wrote:

“In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. As in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting. The contractual duty to provide a valuation and the known purpose of that valuation compel the conclusion that the contract includes a duty of care. The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking.

Here, though the losses were foreseeable in that property values go both up and down and that the losses had been caused by the negligent valuation, nevertheless it was excluded on the ground that it was outside the scope of the liability which the parties would reasonably have considered that the valuer was undertaking, and so there must be

7 [1997] AC 191.

very convincing evidence for a defendant to be held to be the “insurer” of the claimant’s losses. The rule then becomes that, for a loss to be recoverable, it must be both factually *and* legally caused by the guilty party’s breach and must not be too remote.”

Then, in *John Grimes Partnership Ltd v Gubbins*⁸ and in contrast to SA Assest Corp, (which was considered by the Court of Appeal but determined to be irrelevant on the basis that it did not deal with delay) a consulting engineer was liable to pay damages to a developer for the diminution in the market value of a development whose completion had been delayed by the engineer’s breach of contract. The loss had been reasonably foreseeable at the time of contract, relevant to the point made regarding extending the scope of the duty so as to make a professional the underwriter of what is ordinarily a business risk.

In this case Grimes was engaged to design a road by March 2007. Mr Gubbins terminated Grimes and by April 2008 engaged a new engineer. Grimes sought outstanding fees and the client refused to pay. Grimes then commenced proceedings and Gubbins lodged a counterclaim on the basis that Grimes’ works were defective and were not complete by March 2007. The damages claimed resulted in a reduction in the values of the units and a reduction in the offer from the Housing Association, as well as an increase in building costs.

The court found a causal link between Grimes’ breach and the loss and held that while property markets rise and fall they do so over a prolonged period and it was the “egregious” delay of Grimes that caused the extent of the loss. On appeal the court emphasised that *Hadley and Baxendale* in the case of *The Heron IP*⁹ the House of Lords had focused on what the contract breaker at the time of making of the contract ought reasonably to have contemplated would result from a breach of the contract. In Lord Reid’s view the type of loss was not too remote if the defendant had realised that it was “not unlikely” to result from the breach. Other members of the House of Lords had referred to “a real danger” or “a serious possibility”. Accordingly, if the type or kind of loss was, at the time of contract, reasonably foreseeable by the defendant as not unlikely to result from his breach (had he contemplated a breach) then such type or kind of loss was not too remote.

This rule as to causation, however, has many possibilities that change its dynamic. One of these is “remoteness”, which means that the damage must be both direct and proximate to the act occasioning it. The court in *Lamb v Camden LBC*¹⁰ was faced with the situation where Lamb rented out a furnished house to a tenant. The council caused flooding while replacing the sewer on the street in front of the house, which resulted in both damage to the house and the loss of the tenant. Lamb had the damage to the house repaired and went away leaving the house unoccupied. The unoccupied house attracted squatters who came into the house twice and caused £30,000 in damages. Lamb commenced proceedings against the council both for the damage caused by the sewer damage and for the damages caused by the squatters, but succeeded only for the claim for flood damages, the court holding that the damage caused by the squatters was too remote. The court wrote:

“The truth is that all these three – duty, remoteness and causation – are all devices by which the courts limit the range of liability for negligence ... All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.”

⁸ [2013] EWCA Civ 37, [2013] BLR 126 (CA (Civ Div)).

⁹ [1969] 1 AC 350.

¹⁰ [1981] QB 625.

The general rule in these situations is that the defendant will be held liable for the damage caused to the claimant only if the claimant's damage would not have occurred "but for" the negligent act(s) of the defendant. Put another way, the defendant will not be held liable if the damage would or could, on the balance of probabilities, have occurred anyway, regardless of the defendant's negligence. There is a distinction, therefore, between cause and a "precondition" for the actual happening of the events. This was brought out in the *South Australia Asset Management Corporation* case mentioned earlier where Lord Hoffmann gave the classic example:

"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."

Here, while climbing a rock, the climber slips and falls down the mountain and ends up with an injured knee. Although, because of the doctor's negligence, the mountaineer did something he otherwise would not have done, this will not be sufficient causation to cause liability to the doctor as the doctor's duty of care was to protect the mountaineer against injuries caused by the failure of the knee, not by falling rocks. Even though the injury might have been reasonably foreseeable, the doctor is not liable. Another way to approach this can be seen in the case of *The Empire Jamaica*,¹¹ where the ship's owners used officers who were not properly licensed. The pilot fell asleep and a collision at sea occurred and, while the pilot was generally competent, he was negligent at the time. Here, it is clear that sending the ship to sea was "the cause" of the collision but was it *the* cause? The court looked at the situation objectively and made a determination of what would have happened if the ship's owners had acted lawfully finding that, although they sent the ship to sea without licensed officers rather than with licensed officers, the actual cause of the collision was a failure to navigate a safe passage. The court found in favour of the shipowners because the pilot's lack of a licence did not bear on his general competence. "The significant factor was the pilot's negligence at the time, and the pilot's lack of license made no difference there. Had the pilot been licensed, he would have been no less likely to sleep. The license would not have awoken him."

Thus, in all tort claims the damages incurred must be shown, on the balance of probabilities, to have been a factual cause of the loss. It should be noted also that the Civil Liability (Contribution) Act 1978 allows apportionment of liability between various causes. In addition, the principles of joint and several liability make each "tortfeasor" liable to the claimant for the full extent of its loss. Further, under the Law Reform (Contributory Negligence) Act 1945, claims may be reduced if the loss is partly the fault of the claimant itself.

This becomes an issue in construction claims as there may be more than just one cause of loss. Under such circumstances, if there are several causes of the claimant's loss, it is wise to consider whether or not the defendant's acts materially contributed to the claimant's loss. In *IBA v EMI and BICC*,¹² EMI were main contractors employed by IBA for the construction of the Emley Moor Television mast in Yorkshire. BICC were specialist subcontractors nominated by IBA for the design, supply and erection of the mast. The completed mast broke and collapsed following harsh weather conditions.

11 [1955] 1 All ER 452.

12 (1980) 14 BLR 1.

The House of Lords held that BICC had been negligent in the design of the mast and that EMI were under a contractual liability to IBA for the design of the mast encompassing responsibility for the negligence of BICC. Two forces of stress on the mast, in fact, caused the collapse, but BICC were liable only in respect of one of them. The other stress, for which BICC were not liable, was “by far the more important cause” of the collapse. Lord Fraser commented:

“They were, in my opinion, therefore negligent in failing to take precautions against one of the two causes which materially contributed to the collapse. The case is one to which the following statement by Lord Reid in *McGhee v National Coal Board* 1973 SC (HL) 37 at 53 applies:

‘It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury’.”

It should be noted here that in tort claims an objective public policy standard is applied to determine actual and proximate causation. Where there are concurrent causes in tort and the claimant causes none of them, the claimant will be able to recover against a defendant if it can be shown that the cause for which the particular defendant is responsible actually caused or materially contributed to the claimant’s loss.

So, for example, in *Bonnington Castings v Wardlaw*,¹³ Wardlaw contracted pneumoconiosis because of breathing in silica particles while employed at Bonnington Castings. Here, the particles could have been caused by either a pneumatic hammer and/or from swing grinders. The court found that Bonnington was liable only for the grinder dust despite the fact that it was clear that two sources had clearly contributed to Wardlaw’s disease. Lord Reid wrote:

“... I cannot agree that the question is: which was the most probable source of the respondent’s disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree.”

This issue was also brought up in *McGhee v National Coal Board*,¹⁴ in which the House of Lords held that a material increase in the risk of injury was equivalent to a material contribution to the damage and wrote:

“It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of those causes arose from the fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.”

It should be noted that in the recent case of *Heneghan v Manchester Dry Docks Ltd*,¹⁵ the court interprets both *Bonnington Castings* and *McGhee* in relation to dust diseases. However, the text goes on to acknowledge that most contractual claims in causation arise out of an express provision in the contract; therefore, any modification may not be strictly relevant/necessary and may require further analysis.

¹³ [1956] AC 613.

¹⁴ [1973] 1 WLR 1.

¹⁵ [2014] EWHC 4190 (QB).

It should be noted here that in *Bonnington* it was held that because swing grinders at the factory at which an employee worked materially contributed a quota of silica dust which was not negligible to that employee's lungs, and helped to produce the disease that he suffered, his employer was liable. Then, in *Thaine v London School of Economics*,¹⁶ an employee appealed against the level of compensation awarded to her in respect of sex discrimination that she suffered at the hands of her employer, and relied upon the case of *Bonnington Castings Ltd* in support. However, the Employment Appeal Tribunal in *Thaine* held that such reliance was misconceived. In *Bonnington Castings Ltd*, there had been no claim for apportionment; the employer had argued, albeit unsuccessfully, that they should not be held liable at all. Thus, *Bonnington Castings Ltd* was of no application in *Thaine*, in which the tribunal below had quite properly discounted the compensation awarded by a percentage on account of the fact that the employee's loss was caused by a combination of factors (only some of which amounted to unlawful discrimination for which the employer was liable).

In contractual claims causation can be different, as most claims arise out of an express contractual provision that is determinative of causation just as when an express agreement takes precedence over the general rules of the common law. In *Tennant Radiant Heat v Warrington Development Corp*,¹⁷ there were two competing claims, one in tort and the other in contract. Here, the claimant succeeded on its tort claim, and the defendant on its contract-based counterclaim – there was an apportionment of damages. The Court of Appeal regarded the apportionment as “a problem of causation”. It should be noted that the counterclaim was based on a strict contractual duty and as such the Law Reform (Contributory Negligence) Act 1945 was not to be applied. The court mentioned, however, that despite this the Act would have produced the same result.

Contribution

The issue of who bears responsibility for damages to the claimant can also be looked at in the reverse. In construction claims the claimant will, on many occasions, have claims against more than one defendant. Thus, if the roof leaks, the employer may have claims against the roofing material manufacturer, the installer and others involved in the entire finished product. In these cases the employer can commence proceedings against any one of these parties or all of them, as it so chooses. This usually leads to the claimant suing the defendant with the best ability to pay for the loss or the most perceived liability. Unfortunately, the matter does not always end there and the first defendant sued will often pursue any and/or all of the other defendants involved in the loss. So, in the example just given, if the employer sues the main contractor for the leak it will, in turn, come after the subcontractor roof supplier who will probably seek relief from the manufacturer of the roofing materials. This is all governed by the Civil Liability (Contribution) Act 1978. The most important provisions of the Act are as follows:

“1. Entitlement to contribution

- (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

¹⁶ [2010] 7 WLUK 190

¹⁷ [1988] 1 EGLR 41, CA.

- (2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought.
 - (3) A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.
 - (4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.
 - (5) A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.
 - (6) References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales.
2. Assessment of contribution
- (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.
 - (2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
 - (3) Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to
 - (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred;
 - (b) any reduction by virtue of section 1 of the Law Reform (Contributory Negligence) Act 1945 or section 5 of the Fatal Accidents Act 1976; or
 - (c) any corresponding limit or reduction under the law of a country outside England and Wales;the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."

The main issue that arises from the Act is the definition of what is "the same damage" as set out in section 1(1). In *Royal Brompton Hospital NHS Trust v Hammond*

(No 3)¹⁸ this was one of the issues. Here, as a result of construction works between 1987 and 1990, claims arose and the main contractors, Taylor Woodrow, claimed against the hospital with the hospital bringing a counterclaim. This ended up in an arbitration, which was settled by the hospital agreeing to pay Taylor Woodrow £6.2 million and the hospital agreeing to indemnify Taylor Woodrow against any other proceedings. Then in 1993, after the settlement, the hospital commenced an action against its architects, structural engineers, electrical engineers, mechanical engineers and project managers. The architects then sought contribution from Taylor Woodrow, and Taylor Woodrow claimed that they were covered by the indemnity agreement with the hospital. However, this indemnity was not binding on the architects as they were not parties to the agreement. The issue was that even if the architects could show that Taylor Woodrow had been wrongly successful in the arbitration, the primary damage to the hospital would have been the wrongful delay in practical completion whereas the damage in the claim against the architects was that their behaviour had weakened the prospects of success in the arbitration and this was not the same damage. The House of Lords agreed and Lord Bingham wrote:

“... It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B’s claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A. I find nothing in section 6(1) (c) of the 1935 Act or in section 1(1) of the 1978 Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words ‘in respect of the same damage’, emphasise the need for one loss to be apportioned among those liable.

When any claim for contribution falls to be decided the following questions in my opinion arise:

- (1) What damage has A suffered?
- (2) Is B liable to A in respect of that damage?
- (3) Is C also liable to A in respect of that damage or some of it?

At the striking-out stage the questions must be recast to reflect the rule that it is arguability and not liability which then falls for decision, but their essential thrust is the same. I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of ‘damage’ or of ‘loss’ or ‘harm’, provided it is borne in mind that ‘damage’ does not mean ‘damages’ (as pointed out by Roch LJ in *Birse Construction Ltd v Haiste Ltd (Watson and Anor, third parties)* (1995) 47 ConLR 162 at 170, [1996] 1 WLR 675 at 682) and that B’s right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not.

Approached in this way, the claim made by the architect against the contractor must in my opinion fail in principle. It so happens that the employer and the contractor have resolved their mutual claims and counterclaims in arbitration whereas the employer seeks redress against the architect in the High Court. But for purposes of contribution the parties’ rights must be the same as if the employer had sued both the contractor and the architect in the High Court and they had exchanged contribution notices. The question

18 (2002) 81 ConLR 1.

would then be whether the employer was advancing a claim for damage, loss or harm for which both the contractor and the architect were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether the employer was advancing separate claims for damage, loss or harm for which the contractor and the architect were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two. It would seem to me clear that any liability the employer might prove against the contractor and the architect would be independent and not common. The employer's claim against the contractor would be based on the contractor's delay in performing the contract and the disruption caused by the delay, and the employer's damage would be the increased cost it incurred, the sums it overpaid and the liquidated damages to which it was entitled. Its claim against the architect, based on negligent advice and certification, would not lead to the same damage because it could not be suggested that the architect's negligence had led to any delay in performing the contract."

Lord Steyn also wrote:

"... A description of the claims

The characterisation of the employer's claim against the contractor is straightforward. It is for the late delivery of the building. This is not a claim which the employer has made against the architect. Moreover, notionally it is not damage for which the architect could be liable merely by reason of a negligent grant of an extension of time. It is conceivable that an architect could negligently cause or contribute to the delay in completion of works, eg by condoning inadequate progress of the work or by failing to chivvy the contractor. In such a case the contractor and the architect could be liable for the same damage. There are, however, no such allegations in the present case.

The essence of the case against the architect is the allegation that his breach of duty changed the employer's contractual position detrimentally as against the contractor. The employer's case is that the architect wrongly evaluated the contractor's claim for an extension of time. It is alleged that by negligently giving an extension of time in respect of an unmeritorious claim by the contractor, the architect presented the contractor with a defence to a previously straightforward claim by the employer for breach of contract in respect of delay. The employer lost the right under the contract to claim or deduct liquidated damages for the delayed delivery of the building. The contractor committed no wrong by retaining the money until the extension of time had been set aside in an arbitration. The detrimental effect on the employer's contractual position took place when the extension of time was negligently given. In such a case the employer must go to arbitration in order to restore his position. He has the burden of proof in the arbitration and has to face the uncertain prospect of succeeding in what may perhaps be a complex arbitration. The employer's bargaining position against the contractor is weakened. A reasonable settlement with the contractor may reflect this changed position: a case with a 100% prospect of success may become, for example, a case with only a 70% prospect of success."

Money damages but at what cost

Generally, a claimant is entitled to the reasonable cost of the remedial works. There is no requirement for the claimant to show that the Works were damaged by the acts of the contractor (defendant), nor to show how the damages, once collected, will be spent. This is based upon the general rule that a claimant can do whatever it chooses with the money received in damages. An interesting case in this regard is *Ruxley Electronics and Construction Ltd v Forsyth*.¹⁹ In this case the construction contract provided that

¹⁹ (1995) 45 ConLR 61.

a swimming pool was to be built to a depth of 7ft 6ins at a cost of £70,000. The 7-foot 6-inch depth was an express term. The pool as constructed was 9 inches less and the depth was thus 6ft 9 inches. To reconstruct it to the proper depth would cost an extra £21,500. The contractor accepted the fact that its failure to provide the required depth was a breach. The contractor was not paid in full and commenced proceedings for the balance due under the contract and Forsyth counterclaimed for breach of contract. The trial judge awarded £2,500 general damages for loss of pleasure and amenity but awarded no special damages on the ground that the pool, built at 6ft 9 inches, was safe for diving from the side of the pool and there was no difference in value between what had been contracted for and what was built, i.e. the pool as built and the pool as contracted for. The trial court took the position that the damages sought by the claimant were dependent upon showing that the remedial work was going to be done and that such work was reasonable and this was not shown at trial. Forsyth appealed. Before ending up at the House of Lords, the Court of Appeal held that it was unreasonable to claim for an expensive remedy especially if a cheaper one was available but that if there was no alternative which would provide what the claimant required or none which would cost less, then the claimant would be entitled to the cost of repair or replacement even if that was more expensive. Mr Forsyth was, therefore, entitled to the cost of the remedial work. The real question was how loss ought to be measured in such cases – the cost of remedying or the effect of the defective work on the building taken as a whole? The House of Lords wrote:

“... there would indeed be something wrong if, on the hypothesis that cost of reinstatement and the depreciation in value were the only available measures of recovery, the rejection of the former necessarily entailed the adoption of the latter; and the court might be driven to opt for the cost of reinstatement, absurd as the consequence might often be, simply to escape from the conclusion that the promisor can please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price. Having taken on the job the contractor is morally as well as legally obliged to give the employer what he stipulated to obtain, and this obligation ought not to be devalued. In my opinion, however, the hypothesis is not correct. There are not two alternative measures of damage, at opposite poles, but only one: namely the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the ‘consumer surplus’ (see e.g. the valuable discussion by Harris, Ogun and Phillips, ‘Contract Remedies and the Consumer Surplus’ (1979) 95 LQR 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognise it and compensate the promisee if the mis-performance takes it away. The lurid bathroom tiles, [for example] ... may be so discordant with general taste that in purely economic terms the builder may be said to do the employer a favour by failing to install them. But this is too narrow and materialistic a view of the transaction. Neither the contractor nor the court has the right to substitute for the employer’s individual expectation of performance a criterion derived from what ordinary people would regard as sensible. ... [T]he test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer. But it would be equally unreasonable to deny all recovery for such a loss. The amount may be small, and

since it cannot be quantified directly there may be room for difference of opinion about what it should be. But in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.

... once this is recognised, the puzzling and paradoxical feature of this case, that it seems to involve a contest of absurdities, simply falls away. There is no need to remedy the injustice of awarding too little by unjustly awarding far too much. The judgment of the trial judge acknowledges that the employer has suffered a true loss and expresses it in terms of money. Since there is no longer any issue about the amount of the award, as distinct from the principle, I would simply restore his judgment by allowing the appeal ...

... In building cases, the pecuniary loss is almost always measured in one of two ways: either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess.

This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract. But it is not the only measure of damages. Sometimes it is the other way round. This was first made clear in the celebrated judgment of Cardozo J giving the majority opinion in the Court of Appeals of New York in *Jacob & Youngs Inc v Kent* (1921) 230 NY 239. In that case the building owner specified that the plumbing should be carried out with galvanised piping of 'Reading manufacture'. By an oversight, the builder used piping of a different manufacture. The plaintiff builder sued for the balance of his account. The defendant, as in the instance case, counterclaimed the cost of replacing the pipework even though it would have meant demolishing a substantial part of the completed structure, at great expense ...

Cardozo J's judgment is important because it establishes two principles which I believe to be correct and which are directly relevant to the present case: first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the good to be obtained, and secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award ...

I fully accept that the courts are not normally concerned with what a plaintiff does with his damages. But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate. Suppose in the present case Mr Forsyth had died, and the action had been continued by his executors. Is it to be supposed that they would be able to recover the cost of reinstatement, even though they intended to put the property on the market without delay? ...

In the present case the judge found as a fact that Mr Forsyth's stated intention of rebuilding the pool would not persist for long after the litigation had been concluded. In these circumstances it would be mere pretence to say that the cost of rebuilding the pool is the loss which he has in fact suffered. This is the critical distinction between the present case and the example given by Staughton LJ of a man who has had his watch stolen. In the latter case, the plaintiff is entitled to recover the value of the watch because that is the true measure of his loss. He can do what he wants with the damages. But if, as the judge found, Mr Forsyth had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any"

Despite this House of Lords decision, the general proposition remains that the cost to correct or remedy the defect is the ordinary measure of damages, but if the actual cost of remedying the defective work is out of proportion to what is sought to be

corrected, then the damages should be measured by what the value of the building would have been had it been properly constructed less the actual value as built.

Along this vein is *Birse Construction Ltd v Eastern Telegraph Ltd*.²⁰ In this case, the defendant built a residential training college, which contained defects. The difference here was that the claimants were planning on selling the college without first repairing the defects but wanted to recover the cost of recovery in any event. The court did not agree and wrote:

“If a building owner disposes of property with defects attributable to some breach of duty by the defendant and for which the cost of reinstatement was the appropriate measure but does so without any reduction or loss on account of its condition then the loss that the law supposes is avoided and no damages are recoverable”

Reasonableness

The history of “reasonableness” would not be complete without mentioning *Board of Governors of the Hospitals for Sick Children and another v McLaughlin & Harvey Plc and others*,²¹ where negligent modifications to the piling design by the engineer resulted in defective foundations. Here, there was agreement that remedial work was necessary but an issue arose regarding the expert advice given as to the remedial work to be performed. The matter was heard in the TCC and Judge Newey wrote:

“The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the cost which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount which, with hindsight, it could be held would have sufficed. When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it ...

The independent cause may take the form of an event which breaks, that is to say, brings to an end, a chain of causation which he sustains after the event. The event may take the form of negligent advice upon which the plaintiff has acted. Another way of expressing the matter might be that the defendant could not reasonably have foreseen that the plaintiff would not act on negligent advice. Advice which is not negligent will not by itself break the chain.

....

If at the date of trial no remedial works have been carried out by the plaintiff, then the court has, in order to assess damages, to decide what work should be done. The parties are entitled to put forward rival schemes and the court has to choose between them or variants of them ... The assessment has to be made on the basis of what the plaintiff can reasonably do.

Contrary to Mr Potter QC’s submissions, in my view where works have been carried out, it is not for the court to consider de novo what should have been done and what costs should have been incurred either as a check upon the reasonableness of the plaintiff’s actions or otherwise.”

According to this decision (which is known as the “*Great Ormond Street* principle”) if the claimant relies on “expert advice” it is entitled to the work thus performed even if the “advice” was flawed. However, if this was the case, then the defendant was able to, in effect, go behind the advice and show that it was negligent and, thus, negate

20 [2004] EWHC 2512.

21 (1987) 19 ConLR 25.

the reasonableness of the repair work done. The theory behind this was that if the expert advice was negligent such advice would be the basis of a separate claim for negligence and as such would be an intervening act breaking the chain of causation discussed earlier.

In this regard, and in effect moving in a slightly different direction, is the case of *Skandia Property UK Ltd v Thames Water*,²² where the issue was whether flooding to a basement caused by the defendant was “reasonably repaired” by works that made the basement fully watertight. Here, experts had advised the claimant that the “Sika” tanking system was the only practical way to protect the flood-damaged building; the claimants agreed and acted upon this advice. Unfortunately, at the time the advice was given, the experts were not aware that prior to the flood the building had undergone a pressure grouting treatment and thus, in fact, the flood had not damaged the integrity of the building, which meant that the “Sika” system was not needed. Upon review by the court the claim for the cost of the “Sika” system was denied without the necessity of showing any negligence. The Court of Appeal upheld this view and Waller LJ wrote:

“If there has been an escape of water that causes some physical damage then prima facie it is only the cost of reinstatement of that physical damage which is recoverable. If the claimant is to recover damages for something beyond the cost of reinstatement of physical damage then he must on any view show that it was reasonable to incur expenditure beyond that quantifiable figure ... What should be emphasised is that it must be rare if ever that a plaintiff will be able to establish the reasonableness of any assumption of damage to something which is accessible and inspectable ...”

Here, the *Great Ormond Street* principle was not cited or relied upon and Waller LJ went on to write:

“Certainly, simple reliance by a plaintiff on an expert cannot be the test as to whether a plaintiff has acted reasonably in making an assumption, albeit, provided the plaintiff has provided the expert with all material facts and the expert has made all reasonable investigations, the advice will be a highly significant factor...”

However, in *McGlenn v Waltham Contractors Limited & Others*,²³ Mr Justice Coulson considered the *Great Ormond Street* principle and *Skandia*. Here, the claimant had a house called “Maison d’Or” built which took three years and was substantially complete by January 2002 when the contractors left. Thereafter, it remained empty for the next three years while investigations by experts and other contractors were carried out as to claimed defects and deficiencies. Then, in early 2005, the house was demolished and, by the time of the underlying proceedings, had not been rebuilt. The claimant took the position that Maison d’Or was so badly designed and built that he was entitled to demolish it and start again and he claimed damages for breach of contract and/or negligence against the building contractors, the architects, the structural and mechanical engineers and the quantity surveyors/project managers. The damages claimed were to recover the actual cost of demolition and for £3.6 million, which was the estimated cost of rebuilding the whole house. The claimant also took the alternative position that he was entitled to £2.5 million being the estimated cost of repairing the individual defects. The justification for this was that his decision to demolish Maison d’Or was taken on expert advice and, as there was no question as

²² [1999] BLR 338. See further: *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC).

²³ [2007] EWHC 149 (TCC).

to the negligence of this expert advice, he was entitled to the costs, or a proportion of the costs of demolition and rebuilding as against each of the defendants in accordance with the *Great Ormond Street* principle.

Here, the *Great Ormond Street* issue was specifically brought up for discussion and the Judge dealt with it in detail at section K²⁴ of his judgment and distinguished *Great Ormond Street* on the facts. Here, however, the defendants had expressly asked for a ruling that *Great Ormond Street* was wrongly decided and should not be followed. The judge rejected this invitation but stated, however, (at paragraph [827] of the judgment):

“... it might well be said that his (Judge Newey’s) decision is authority for the relatively narrow proposition that, if two remedial schemes are proposed to rectify a defect which is the result of the defendant’s default, and one scheme is put in hand on expert advice, the defendant is liable for the costs of that built scheme, unless it could be said that the expert advice was negligent. For what it is worth, I consider that, subject to one potential vital qualification, set out below, this narrow proposition is generally in accordance with other authority and correct in law ... The important qualification that needs to be made is outlined by Waller LJ in *Skandia* to this effect: although reliance on an expert will always be a highly significant factor in any assessment of loss and damage, it will not on its own be enough, in every case, to prove that the claimant has acted reasonably”

In essence the court ruled that the *Great Ormond Street* principle was narrow at best. Applied to the situation where two remedial schemes are set out to correct a defendant’s default and one of these schemes is adopted upon expert advice, the defendant will be liable for the costs unless it can show that the expert advice was negligent. However, this narrow principle was subject to *Skandia* in that, while reliance on an expert’s opinion and advice will be a significant factor in assessing damages, expert opinion alone will not be enough to always prove that the claimant acted reasonably. Further, the court wrote that the “reasonableness” of any decision made upon expert advice “does not require proof of conduct amounting to professional negligence or something of that sort”.

Additionally, this issue was also considered in *Axa Insurance UK Plc v Cunningham Lindsey United Kingdom*,²⁵ where a claim was brought against loss adjusters for negligent services and/or breach of contract arising from a claim for subsidence. The court held that Mr Justice Coulson’s statement of the law was correct and Mr Justice Akenhead went on to write:

“...whilst the advice of an expert may well (if not invariably) assist in establishing the reasonableness of a decision to adopt one remedial solution rather than another it will rarely, if ever, justify the recovery of the cost of remedial works relating to putting right a default or defect for which the defendant is not culpable.”

Contract versus tort damages

The rule relating to damages in tort is quite different from that in contract and imposes a wider liability. A defendant in tort is liable for any type of loss and/or damage that is a reasonably foreseeable result from the act or omission committed. In tort

²⁴ See paras 787–848.

²⁵ [2007] EWHC 3023 (TCC). Note that this case is interesting in that the court considered the valuation of claims for distress, inconvenience and physical discomfort caused by breaches of contract where there were no actual physical symptoms nor illness and held that in such cases damages would not generally exceed £2,500 per person or less.

reasonable foreseeability is the basis upon which liability is determined and can cause the defendant to be responsible for something that, although reasonably foreseeable, may have been highly unusual, i.e. not likely to occur and/or in a much greater amount than anticipated. It is different in contract because if one party wants to protect itself against an unusual risk it can bring this “extra” risk to the other party’s attention before the contract is entered into.

A recent case highlights this situation. In *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*,²⁶ the original time charter, dated 22 January 2003, was to cover a period of time (five to seven months) at a daily rate of US\$13,500. This was then changed by an addendum, dated 12 September 2003, to a rate of US\$16,750 for an additional five to seven months with the date for redelivery being no later than 2 May 2004. During this extended period of time the market rates had gone down and delivery of the vessel to the new charterers was re-set for 8 May 2004. If delivery could not occur by that date, the new charterers could cancel.

Then, with less than two weeks left on the original charter, the charterers fixed the vessel under a subcharter to carry coals across the Yellow Sea, to which the owners made no objection. Unfortunately, despite finishing the additional voyage, the vessel was delayed and was not redelivered to the owners until 11 May 2004, which was three days after the cancellation date. As it turned out, by 5 May 2004 the new charterers and the owners had agreed an extension of the cancellation date to 11 May but, since the rates had fallen, the new agreed daily rate was reduced to US\$13,500. The owners claimed damages in the sum of US\$1,364,584.37 for the loss of the difference between the original rate and the reduced rate over the period of the new charter. The charterers took the position that the owners were entitled only to the difference between the market rate and the charter rate for the nine days during which they were deprived of the use of the ship, which amounted to US\$158,301.17.

The matter was arbitrated and the majority²⁷ found for the owners, holding that the loss on the new fixture fell within the first rule of *Hadley v Baxendale*²⁸ as arising “naturally, i.e., according to the usual course of things, from the breach of contract itself”. It fell within the rule because it was damage of a kind which the charterer, when the contract was made, ought to have realised was not unlikely to result from a breach of contract by delay in redelivery,²⁹ i.e. that a broker in a similar “commercial situation” could have contemplated that the “not unlikely” results arising from late delivery would include such items as missing dates for a subsequent charter, a dry docking or the sale of the vessel and, accordingly, they felt that, as a matter of law, damages for these types of loss were recoverable. The award was appealed and the Court of Appeal upheld the arbitrator’s majority decision then the House of Lords allowed the charterers’ appeal.

²⁶ [2009] 1 AC 61.

²⁷ It should be noted that the dissenting arbitrator agreed that it was likely that the owners would have entered into another fixture during the course of the original one and that late delivery would have caused a loss in that regard. However, he felt that a reasonable man in the position of the charterers would not have appreciated that the type of risk they were assuming was for the loss claimed by the owners, as the general understanding in the shipping industry dictated that liability was restricted to the difference between the market rate and the charter rate for the overrun period and he also took the position that deviating from this established industry practice could cause “serious commercial uncertainty” which would not be good for the industry.

²⁸ (1854) 9 Exch 341.

²⁹ See *The Heron II* [1969] 1 AC 350.

Lord Hoffmann, referring back to his decision in *South Australia Asset Management Corp v York Montague Ltd*,³⁰ held that the “starting point” was not whether the purpose of damages was to put the innocent party back in the position it would have been in had the contract been performed but that one must first decide “whether the loss for which compensation is sought is of a ‘kind’ or ‘type’ for which the contract breaker ought fairly to be taken to have accepted responsibility”, i.e. that it is not sufficient to just determine whether the type of loss was “foreseeable” or in “the usual course of things” under the first limb of *Hadley v Baxendale*.

While this “first limb” normally went to the intention of the parties, here the circumstances showed that the charterers could not reasonably have assumed responsibility for the unquantifiable loss that occurred. It would appear that, in effect, he is introducing into the law of contract the tort concept of scope of duty. He wrote:

“What is true of an implied contractual duty (to take reasonable care in the valuation) is equally true of an express contractual duty (to redeliver the ship on the appointed day). In both cases, the consequences for which the party will be liable are those which ‘the law regards as best giving effect to the express obligations assumed’ and ‘[not] extending them so as to impose on [the contracting party] a liability greater than he could reasonably have thought he was undertaking’.”

While he also noted that a contracting party will be liable for damages for losses that are unforeseeably large, so long as it fell within the rule in *Hadley v Baxendale*, he also pointed out that it was an inclusive principle due to the fact that if losses of that type are foreseeable damages they will include compensation for losses no matter what the size. However, the application of other cases such as *South Australia Asset Management Corp v York Montague Ltd* showed that it was an exclusive principle and that a defendant may be found not liable if the “foreseeable losses” were not of the type or kind for which it assumed responsibility and further wrote:

“If, therefore one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter a forward fixture, they would have no idea when that would be done or what its length or other terms would be. If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it. What this shows is that the purpose of the provision for timely redelivery in the charterparty is to enable the ship to be at the full disposal of the owner from the redelivery date. If the charterer’s orders, will defeat this right, the owner may reject them. If the orders are accepted and the last voyage overruns, the owner is entitled to be paid the overrun at the market rate. All this will be known to both parties. It does not require any knowledge of the owner’s arrangements for the next charter ...

In my opinion, the findings of the arbitrators and the commercial background to the agreement are sufficient to make it clear that that the charterer cannot reasonably be regarded as having assumed the risk of the owner’s loss of profit on the following charter.”

Further, Lord Hope felt that, while the arbitrators took differing approaches, they shared a common starting point by asking “what should fairly and reasonably

30 [1997] AC 191.

be regarded as having been in the contemplation of the parties at the time when the contract was entered into". He felt that one could conclude that both parties must have contemplated that late delivery might occur and that late delivery would result in missing the date for a subsequent fixture. From this the critical question then became whether it must be assumed that the parties contracted with each other on the basis that the charterers were assuming responsibility for the consequences of the event and that this assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, "is determined by more than what at the time of the contract was reasonably foreseeable".

Here, it was within the parties' contemplation that damages arising from the late delivery would be the loss of use at the market rate, as compared with the charter rate, during the relevant period and the court wrote:

"This was something everybody who deals in the market would know about and could be expected to take into account. The charterers could not however know if – as was not unlikely – there was a subsequent fixture how the owners would deal with the new charterers. This was something over which they had no control and, at the time of entering the contract, was completely unpredictable."

"Here neither party had control over the state of the market. In the ordinary course of things the rate of the market would fluctuate so it could be presumed that the party in breach had assumed responsibility for any loss caused by the delay which could be measured by comparing the charter rate with the market rate during that period. There could not however be any presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which could not."

Thus, in Lord Hope's opinion, a party cannot be expected to assume responsibility for something that it cannot control and, because it does not know anything about it, cannot quantify it. "It is not enough for him to know in general and on open-ended terms that there is likely to be a follow-on fixture. What he needs is some information that will enable him to assess the extent of any liability."

It would appear that Lord Hope agreed with Lord Hoffmann on these points, the issue being whether the parties contemplated not just this type of loss when the contract was entered into but also whether they contemplated and agreed liability for this type of loss in the first place.

Following on this Lord Walker felt that foreseeability of the loss by itself was not sufficient and that what was needed was to determine whether the parties felt that such a loss was reasonably likely to result from, i.e. naturally to flow from, the breach of contract, or was of the kind which should have been in the defaulting party's contemplation. He wrote:

"Ultimately [the majority arbitrators] accepted and applied the owners' submission that 'what mattered was that the type of loss claimed was foreseeable': para 18 of the majority reasons. That was in my opinion too crude a test, and it was an error of law to adopt it. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that in the event of a relatively short delay in re-delivery an extraordinary loss, measured over the whole term of renewed fixture, was, in Lord Reid's words, 'sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation'. Lord Mustill's dictum in *The Gregos* indicates that that would not have been the common intention of reasonable contracting parties, and I respectfully agree."

Lord Rodger was in substantial agreement with Lords Hoffmann and Walker and concluded that the loss was not foreseeable under the first limb of *Hadley*. He wrote:

“... I am satisfied that, when they entered into the addendum in September 2003, neither party would reasonably have contemplated that an overrun of nine days would ‘in the ordinary course of things’ cause the owners the kind of loss for which they claim damages. That loss was not the ‘ordinary consequence’ of a breach of that kind. It occurred in this case only because of the extremely volatile market conditions which produced both the owners’ initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture. Back in September 2003, this loss could not have been reasonably foreseen as being likely to arise out of the delay in question. It was, accordingly, too remote to give rise to a claim for damages for breach of contract.”

Finally, Baroness Hale took the position that she was not keen to introduce scope of duty into the law of contract and held that, if the appeal was to be allowed, then she “would prefer it to be allowed on the narrower ground identified by Lord Rodger, leaving the wider ground to be fully explored in another case and context”.

Based on the foregoing, the issue on “remoteness of damages” is basically open as to whether an “assumption of responsibility” or “common intention” test should be applied to claims for breach of contract. In this regard *AIMS Limited v TTMI Ltd* (“*The Amer Energy*”)³¹ is of particular interest as it was one of the first cases to provide judicial consideration of the decision in “*The Achilles*”. Here, Mr Justice Flaux, in the Commercial Court, had to consider whether a shipowner’s request for permission to appeal from an arbitral award would be granted pursuant to the Arbitration Act 1996.

At the time, the arbitrators had not considered the then very recently decided case of *The Achilles* before publishing their July 2008 award and, while the owners invited the arbitrators to reconsider their award immediately after its publication, the charterers had not agreed and the tribunal declined to engage in any discussion about the award or its contents.

Flaux J took the view that the majority of the House of Lords in *The Achilles* had not intended to lay down a completely new test for recoverability of contractual damages and had not departed from the classic rule in *Hadley v Baxendale* as it had been revisited in subsequent cases, in particular the House of Lords’ decision in *Czarnikow Ltd v Koufos* (“*The Heron II*”).³²

As just mentioned, in *The Achilles* there appeared to be confusion in the analysis of the second limb of *Hadley*, which stated as to limbs one and two that:

“The two limbs of *Hadley v Baxendale* are that recoverable damages are those which:

- (1) “... should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself,
- or
- (2) such as may reasonably be supposed to have been in the contemplation of the both parties, at the time they made the contract, as the probable result of the breach of it ...”

Some of their Lordships considered whether the large losses resulting from the refixture of the vessel through delayed redelivery were in the contemplation of the

31 [2009] 1 Lloyd’s Rep 293.

32 [1967] 2 Lloyd’s Rep 457, [1969] 1 AC 350.

parties, whereas others strayed into the realm of foreseeability. Here, Flaux J was of the view that if “Lord Hoffmann had purported to lay down some new test as to recoverability of damages in contract, he had been in a minority and had recognised, in any event, that any departure from the normal principles of remoteness of damage would be unusual”. Although Lord Hope had adopted a similar analysis, he had done so essentially by way of application of established principles. Mr Justice Flaux did not consider that Lord Hoffmann intended that in all shipping cases (as opposed to the type of time charter case under consideration in *The Achilles*) the rule in *Hadley v Baxendale* would no longer apply.

Here, Mr Justice Flaux held that the tribunal had correctly applied the rules of remoteness of damage as derived from *Hadley* and, importantly, the House of Lords decision in *The Achilles* had not changed the law. The arbitrators could not be criticised for having adopted the approach they did.

The most recent Supreme Court authority on this principle is *BPE Solicitors v Hughes-Holland*.³³ Richard Gabriel had agreed to lend £200,000 to a friend, Peter Little – a builder and developer – assuming that Mr Little would use it to redevelop a disused tower at substantial profit. That assumption was wrong. The tower belonged to Mr Little’s operating company, subject to a charge securing a £150,000 bank loan, and Mr Little intended to use Mr Gabriel’s money to buy the tower, through a special purpose vehicle, and to discharge the bank loan and other debts. Unaware of this, Mr Gabriel instructed his solicitors to draw up a loan facility agreement. In so doing, the solicitors mistakenly inserted terms indicating that the loan was to be used to fund the development, thereby confirming Mr Gabriel’s erroneous assumption. Ultimately the tower was not developed, and Mr Gabriel lost his money. He successfully sued his solicitors for negligence, the judge at first instance holding that had he not been misled by their mistake he would not have made the loan to Mr Little, and was awarded damages representing the full loan amount. The Court of Appeal, however, reduced his damages to nil, finding that, even if the £200,000 had been spent on developing the tower, its value would not have increased and Mr Gabriel would still have lost his money. Mr Gabriel’s trustee in bankruptcy, Peter Hughes-Holland, appealed to the Supreme Court.

The Supreme Court dismissed the appeal. First, it held that the Court of Appeal was entitled to substitute its determination as to the viability of the development for the judge’s, and was correct to conclude that the project was never viable and Mr Gabriel would have lost his money even if it had all been spent on developing the tower. Second, the Supreme Court considered and affirmed the principle established in *South Australia Asset Management Corp* – namely, that a professional under a duty to take reasonable care in relation to the provision of information will, if negligent, be responsible only for the consequences of that information being wrong, and not for all of the consequences of the course of action taken by the client who received the information – and emphasised, too, the need to distinguish between (i) cases in which a professional provides information (or supplies material) which the client then uses to assess whether to enter into a transaction; and (ii) cases in which the professional actually provides advice to the client as to whether or not to enter into the transaction.

³³ [2017] UKSC 21.

Claims for performance

Occasionally, the wronged party does not want money but rather wants performance of the contract. The governing issue is whether the performance sought is of a unique nature such that money damages will not provide appropriately for the loss. So, for example, in a contract for an original Picasso painting, of which there is only one, failure to perform the contract and sell the painting to the buyer could perhaps be compensated for by money damages but more likely the buyer wanted the specific painting and so the court may enforce the contract and require the defaulting party to specifically perform. The same would apply to the sale of a parcel of land, as each parcel is also unique. At common law, specific performance was not a remedy and the wronged party could only collect damages. With the advent of the court of equity the remedy of specific performance instead of damages developed. As claims for specific performance come under equity, the party seeking such relief is limited and may not be granted in circumstances where: specific performance would cause a severe hardship to the defendant; the contract was unconscionable; the performance itself is one of personal service; the contract's performance would require constant supervision, or it lacks mutuality or was without consideration, as well as many other factors including one that dictates that the claimant has come to court with "clean hands", i.e. is not guilty itself of any wrongdoing. Further, in the UK under section 50 of the Senior Courts Act 1981, the High Court has discretion to award a claimant damages in lieu of specific performance (or an injunction). Such damages will normally be assessed on the same basis as damages for breach of contract with the goal being to restore the claimant to the position it would have been in had the contract been performed as promised.

In the UK orders for specific performance of obligations to build are generally rare, but, in *Airport Industrial GP Ltd v Heathrow Airport & Another*,³⁴ the High Court made such an order – before any actual breach of contract had occurred. The tenant of a site at Heathrow Airport was contractually obliged to build a car park, providing 280 spaces, by 22 October 2016. It could have met this obligation by building a surface car park, but that would have been unprofitable and would possibly have made the tenant insolvent. The landlord, though, had no right to carry out the works itself or forfeit the lease, and its only remedy was to seek specific performance.

The court made an order for specific performance, requiring the tenant to build a car park. In so doing, it effectively varied the contract to allow the tenant an extra two years to build its preferred and more profitable option of a multi-storey – on the conditions that it compensated the landlord for the delay, by way of damages, and that, if it failed to meet planning and construction milestones, it must build a surface car park instead. Overall, however, damages were not considered to be an adequate remedy, hence why the tenant was ordered – before the contractual deadline – to perform its obligations. It should be remembered, though, that specific performance is an equitable remedy, and that the courts therefore have significant discretion as to whether it is an appropriate order to make (and may be reluctant to take on a burdensome supervisory role).

Internationally, the rule varies as to when, and on what basis, specific performance will be granted. In the United States, for example, article 2 of the Uniform Commercial Code provides that if goods are identified in the contract, and these goods are in the

34 [2015] EWHC 3753 (Ch).

possession of the seller, a court may require those goods be delivered to the buyer upon payment of the price. The traditional theory of specific performance also applies under the Code, which allows a court to order specific performance where “the goods are unique or in other proper circumstances”.

In civil law countries the concept of specific performance is considered the norm and the basis from which money damages actually flow. Thus, it is money damages that are given as a “substitute for specific performance”.

Liquidated damages and claims for extensions of time

Under the law in the UK, courts may enforce contract provisions which predetermine the amount of damages which will be payable from the defendant in the event of a breach – so long as these provisions are not oppressive or punitive in nature but rather have been agreed, in advance, between the parties who were in an equal bargaining position. In *Philips Hong Kong Ltd v A-G of Hong Kong*,³⁵ Lord Woolf wrote:

“Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time that the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages. As the Law Commission stated in Working Paper No 61 (page 30): ‘The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made of the probable loss.’ A difficulty can arise where the range of possible loss is broad. Where it should be obvious that, in relation to part of the range, the liquidated damages are totally out of proportion to certain of the losses which may be incurred, the failure to make special provision for those losses may result in the ‘liquidated damages’ not being recoverable. However, the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld. Any other approach will lead to undesirable uncertainty, especially in commercial contracts.”

A contractual liquidated damages provision allows the parties to “pre-set the damages” recoverable by the non-breaching party in the event of a listed breach by the other party. Such clauses/provisions make the actual determination of damages simpler and easier to enforce in that the party seeking to enforce such a provision only needs to show that the relevant breach has occurred and, most importantly, does not need to prove actual loss nor is there any duty to mitigate its loss which, of course, is required for general claims for money damages.

The problem is that a liquidated damage provision, if it is to be upheld by the courts, needs to be a somewhat accurate estimate of the potential damage to be suffered from a breach by the defendant. In effect the parties are agreeing that the calculation of actual losses is difficult and that they would prefer to sort out an anticipated amount prior to any such occurrence and to be bound by that amount in the event a breach actually does occur. Further, the court needs to find that this “estimate” of actual

35 (1993) 61 BLR 41.

damages is fair and reasonable and specifically not a “penalty” for non-performance or breach. Thus, under English law, if a provision of the contract concerns liquidated damages, it will be enforceable but if it is a penalty or is taken to be punitive in nature it will not be enforceable.

Thus, the actual purpose of the provision must be determined, as the main purpose must be to compensate the non-breaching party for its losses and not to “apply undue influence or force” on a party to perform the contract. If it is determined that the purpose of the provision is to force performance, then the provision will be construed as an unenforceable penalty.

One aspect reviewed is whether the amount set forth as the liquidated damage amount is a genuine estimate of the possible loss that will be suffered. Needless to say, if the amount shown is very high, or “extravagant and/or unconscionable” when compared with the actual loss that could be suffered as a result of the breach, then such a clause will be construed as a penalty clause. It should be noted, however, that the liquidated damage sum does not need to match the actual damages incurred by the non-breaching party so long as the amount is a “genuine” estimate of that amount.

The reason that penalty-type clauses are not allowed flows from the general view that damages are compensatory. Allowing a provision which, in effect, grants more than the actual loss incurred would be wrong and would tend to act as a deterrent rather than act as an incentive to secure actual performance. In *Export Credits Guarantee Department v Universal Oil Products Co.*³⁶ Lord Roskill wrote:

“... one purpose, perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant.”³⁷

This was further amplified in *Murray v Leisureplay Plc.*³⁸ where the court found:

“... So far as pre-determined damages clauses are concerned, English contract law recognises that, if the parties agree that a party in breach of contract shall pay an unjustifiable amount in the event of a breach of contract, their agreement is to that extent unenforceable. The reasons for this exception may be pragmatic rather [than] principled.

... I make no attempt,^[39] where so many others have failed, to rationalise this common law rule. It seems to be *sui generis*. The court has no general jurisdiction to re-form terms of a contract because it thinks them unduly onerous on one of the parties – otherwise we should not be so hard put to find tortious constructions for exemption clauses, which are penalty clauses in reverse; we could simply refuse to enforce them ...

... But however anomalous it may be, the rule of public policy that the court will not enforce a ‘penalty clause’ so as to permit a party to a contract to recover in an action a sum greater than the measure of damages to which he would be entitled at common law is well established, and in these days when so often one party cannot satisfy his contractual hunger à la carte but only at the table d’hôte of a standard printed contract, it has certainly not outlived its usefulness.”

It should be noted that, in determining whether a liquidated damages clause is an estimation of the actual damages that may be suffered or a penalty, the fact that determining an exact estimate of the potential damages may be difficult does not make

36 [1983] 2 All ER 205, [1983] 1 WLR 399, 23 BLR 106.

37 *Ibid.*

38 [2005] EWCA Civ 963.

39 Citing from *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, [1966] 3 All ER 128 CA.

the clause a penalty clause. Indeed, in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,⁴⁰ Lord Dunedin wrote: "... that is just the situation when it is probable that pre-estimated damages was the true bargain between the parties." He went on to also differentiate the differences between liquidated damages and penalties and wrote:

"... but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:—

- (1) Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
- (2) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ...
- (3) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.
- (4) To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
 - (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
 - (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable ... is probably more interesting than material.
 - (c) There is a presumption (but no more) that it is penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'

On the other hand:

- (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

In *Alfred McAlpine Capital Projects v Tilebox*,⁴¹ the court considered earlier cases, in particular what had been said by Lord Woolf in *Philips Hong Kong Ltd*, and made several observations:

- (1) "There seem to be two strands in the authorities. In some cases judges consider whether there is an unconscionable or extravagant disproportion between the damages stipulated in the contract and the true amount of damages likely to

⁴⁰ [1915] AC 79, HL.

⁴¹ [2005] EWHC 281, [2005] BLR 271, 104 ConLR 39 TCC.

be suffered. In other cases the courts consider whether the level of damages stipulated was reasonable. ... I accept, that these two strands can be reconciled. In my view, a pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable.

- (2) Although many authorities use or echo the phrase ‘genuine pre-estimate’, the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one, even though the court has some regard to the thought processes of the parties at the time of contracting.
- (3) Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.
- (4) Looking at the bundle of authorities provided in this case, I note only four cases where the relevant clause has been struck down as a penalty. These are *Commissioner of Public Works v Hills* [1906] AC 368, *Bridge v Campbell Discount Co Limited* [1962] AC 600, *Workers Trust and Merchant Bank Limited v Dojap Investments Limited* [1993] AC 573, and *Ariston SRL v Charly Records* (Court of Appeal, 13 March 1990). In each of these four cases there was, in fact, a very wide gulf between (a) the level of damages likely to be suffered, and (b) the level of damages stipulated in the contract.”

Further, in *Temloc Ltd v Errill Properties Ltd*,⁴² it was felt that a valid liquidated damages provision is an exhaustive remedy for the specified breach, even if the sum stipulated is “nil”. In that case Temloc were building contractors employed upon the terms of the JCT Standard Form of Building Contract to erect three retail units. In the appendix to the form of contract under the term “Liquidated and ascertained damages” to be awarded under Clause 24.2 “at the rate” the figure had been filled in as “GBP nil” and the period over which the payment was to be made had been left blank. Errill alleged that Temloc were late in completing the contract and that they were entitled to “unliquidated” damages, contending that the effect of “GBP nil” was that Clause 24 was, in effect, to be excluded from the contract altogether. Temloc contended that the entry meant that the damages for delay were simply to be GBP nil.

The court took the position that no damages for delay could be recovered by Errill because Clause 24 had been left in entirely and was expressed to apply in the negative, resulting from the way the appendix was filled in by the two parties. Accordingly, Clause 24 was found to be a proper express delay damages provision and that the court would not imply any further terms to entitle any unliquidated damages to be determined.

Following upon this line of thought, in *Chattan Developments Ltd v Reigill Civil Engineering Contractors Ltd*,⁴³ Chattan appealed against a decision by an arbitrator on a preliminary issue arising out of an award made following a dispute between it and the respondent Reigill. The parties had entered into an agreement for the construction of homes and associated site works on a particular site. Chattan claimed damages for delay in completion. The arbitrator had previously made an award in which he found that the terms of the contract between the parties were concluded at a meeting between them and were referred to in a subsequent letter from Reigill to Chattan. He had also found that the contract incorporated certain terms of the JCT Standard

⁴² (1987) 39 BLR 30, CA.

⁴³ [2007] EWHC 305 (TCC).

Form of Building Contract 1980 Edition Private with Quantities with Amendments 1–18 inclusive. The arbitrator determined that, on the facts of the case, the exclusion of liquidated and ascertained damages from the contract prevented Chattan from recovering unliquidated damages from Reigill due to the delay. Chattan then took the position that their oral agreement, which was reached at the meeting, meant that certain provisions of the JCT Standard Form of Building Contract were retained and, thus, Chattan retained its right to claim unliquidated damages under Clause 23 of the JCT standard form for a breach of contract. Reigill, however, did not agree and took the position that Chattan failed to take into account the arbitrator's findings of fact, which were determinative of the question in the preliminary issue. Chattan also took the further position that the arbitrator had made an error of law in agreeing that it was necessary to write in a right to unliquidated damages. The court dismissed the appeal and held that the arbitrator had made the relevant findings of fact and applied the correct principles of law in coming to the conclusion that it was more likely that the parties intended that there should be no right to damages at all for late completion than that there would be a right to unliquidated damages and that *Temloc Ltd v Errill Properties Ltd*⁴⁴ applied. The question whether unliquidated damages could be recovered was a matter of interpretation of the agreement from which it was possible to find a clear intention to exclude that remedy. Given the background and the facts as to the meeting found by the arbitrator, it was not necessary for there to be express reference to, or exclusion of, unliquidated damages.

Here, it had been argued that a written agreement between the parties existed and that a right to unliquidated damages under Clause 23 of the JCT contract existed because of Lord Diplock's comments in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*,⁴⁵ and the court here in *Chattan* wrote:

“... when there is a valid and enforceable liquidated and ascertained damages clause within an agreement, those damages are the sole remedy for the particular breach to which they relate, commonly delay in completion. Unliquidated damages are not recoverable because the parties' agreement of liquidated damages replaces the remedy which would otherwise be available for breach. As can be seen from *Temloc*, the question of whether unliquidated damages could be recovered was a matter of the interpretation of the agreement from which it was possible to find a clear intention to exclude that remedy. In the case of a written agreement, that clear intention can be usually derived by construing the terms of the written agreement as a whole. For example, it was not necessary in *Temloc* for there to be an express exclusion clause to preclude the remedy of unliquidated damages.

... [further, the court wrote] in Reigill's letter of 11 July 2002 to Chattan no mention is made of unliquidated damages. I would concur that the position could have been put beyond argument if that letter had expressly stated that unliquidated were also excluded. However, I do not accept that because no statement to that effect was included, it is fatal to Reigill's case. As has been argued for Reigill, the letter was intended to record the terms of the Contract but that is not the contract itself. I would also observe the fact of there being no mention in the letter of 11 July 2002 of unliquidated damages is consistent with ... evidence ... of it being necessary in the circumstances of this case to write them in.

In the case of a written agreement, that clear intention [to exclude the unliquidated damages remedy] can usually be derived by construing the terms of the written agreement as a whole.”

44 (1987) 39 BLR 30 CA.

45 “But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.”

Then, in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*,⁴⁶ the same judge (Ramsey J) was faced with a situation where Biffa took the position that a valid and enforceable liquidated damages clause was an exclusive remedy for breach only of the obligation to complete on time. It was argued that it was not applicable to breach of other obligations that, while causing delay, were not obligations dealing with the need to complete on time. It was argued that such breaches allow an entitlement to unliquidated damages.⁴⁷ After reviewing the situation, the court wrote:

“...the general position [is] that a liquidated damages clause in a contract covers ‘all the damages for non-completion’ or constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of the failure to complete the works on time ...”

It would appear that, under the circumstances, a proper liquidated damages provision becomes the *only* remedy for delay no matter what caused the delay in the first place, i.e. defective construction, “going slow” or otherwise. Thus, a properly prepared, or properly construed, liquidated damages clause in a construction contract will act as the sole basis for any claim for delay and the reason for the delay becomes immaterial.

It would appear generally that for liquidated damages provisions to be upheld by the courts they need to be an “in advance” somewhat accurate estimate of the potential damage to be suffered from a breach by the defendant in the future. As previously mentioned the parties are, in effect, agreeing that the calculation of actual losses is difficult and that they would prefer to sort out an anticipated amount prior to any such occurrence and to later be bound by that amount in the event a breach actually does occur, no matter what the actual losses. Necessary to this is the fact that the court needs to find that this “estimate” of actual damages is fair and reasonable and specifically not a “penalty” for non-performance or breach. Thus, under English law, if a provision of the contract concerns liquidated damages, it will be enforceable but if it is a penalty or is taken to be punitive in nature it will not be enforceable and, importantly, it does not need to match actual losses so long as it is a “genuine” estimate.

The case of *Azimut-Benetti SpA v Healey*⁴⁸ is perceived to be an update in the area of liquidated damages cases and involved a liquidated damages clause in a contract for building a yacht, which enabled the builder to terminate the contract and recover 20 per cent of the contract price should the employer default on regular payments, but did not amount to an unenforceable penalty because it was commercially justifiable. The court considered whether, if the clause was a penalty, the owner of the employing company would have been liable for the payment where he had provided a personal guarantee.

Then, the case of *In Talal El Makdessi v Cavendish Square Holdings BV and Team Y&R Holdings Hong Kong Ltd*⁴⁹ is perceived as a possible extension of *Murray*.⁵⁰ Here, the court provided guidelines for considering whether a liquidated damages provision which can be triggered by a number of breaches of differing obligations is penal. Furthermore, the court suggested a shift from the classic test of deciding whether the clause is a genuine pre-estimate of loss or a penalty to a broader approach of considering whether there is a commercial justification for the clause or whether its dominant

46 [2008] EWHC 6 (TCC).

47 See also Hamish Lal, “Liquidated Damages”, *Construction Law Journal*, 2009.

48 [2010] EWHC 2234 (Comm).

49 [2013] EWCA Civ 1539, [2014] 2 All ER (Comm) 125 (appeal outstanding as of this writing) see *infra*.

50 *Supra*.

purpose is deterrence. Clarke LJ proposed guidelines to determine whether a clause is a genuine pre-estimate of loss where there is a range of possible loss attributable to the breach or breaches upon which the liquidated damages become payable.⁵¹

The court indicated that other factors were taken into account, including the reluctance of courts to view a clause in a commercial contract as penal, especially in circumstances where the parties are of equal bargaining power; and that courts generally recognise the benefit of liquidated damages clauses and finding them penal is an interference with freedom of contract.⁵²

Clark LJ commented that the dichotomy between a “genuine pre-estimate” and a penalty was too rigid and gave consideration to a “new approach” or a broader test of whether the clause was “extravagant and unconscionable with a predominant function of deterrence”. Courts would not hold a clause penal where there was a “commercial justification” for the clause.

Later in (*Talal El Makdessi v Cavendish Square Holdings BV and Team Y&R Holdings Hong Kong Ltd* [2013] EWCA Civ 1539)⁵³ the Court of Appeal had held that, under the doctrine of penalties, the courts would grant relief against the enforcement of provisions for payment where – as here – the amount was out of all proportion to the loss attributable to the breach and acted as a deterrent.

However, on appeal the Supreme Court concluded that the relevant clauses were not unenforceable penalty clauses, and so allowed Cavendish’s appeal. In so doing, the Supreme Court rejected the idea that the penalty rule should be abolished, and held, rather, that the true test was whether the impugned provision was a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. In this instance, the relevant clauses were not secondary provisions but primary obligations, which could not be treated as invalid without rewriting the contract and of which the parties, rather than the courts, were the best judges.

Of further interest is *Unaol Ltd v Leighton Offshore Pte Ltd*,⁵⁴ which provides a more recent application of the *Makdessi* test: In this case the court found that the liquidated damages claim was a penalty as the contract price had been reduced from US\$75 million to US\$55 million, making it clear that US\$40 million could no longer be a genuine estimate of loss and the question whether the clause was penal was to be judged at the date of amendment. After the amendment it was extravagant and unconscionable.

In a new turn in the continuing saga of liquidated damages the combined cases of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis*,⁵⁵ the Supreme Court provided a new test on such penalties to replace the former test of whether the relevant clause was a “genuine pre-estimate of loss”. The Court held that the new test is whether the clause “is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”. If so, it will be penal and unenforceable. This new, more flexible approach therefore recognises that, in certain circumstances, a party may have a legitimate interest in enforcing performance (for example, reputational risk) which goes beyond simply being compensated for losses resulting from the breach.

⁵¹ See paras [71], [82].

⁵² At para 82.

⁵³ *Cavendish Square Holdings BV v Talal El Makdessi* [2015] UKSC 67.

⁵⁴ [2014] EWHC 2965 (Comm).

⁵⁵ [2015] UKSC 67.

Contractors will need to be aware, then, that if an employer can demonstrate a legitimate reason why its actual loss suffered, as a result of the contractor's breach, would not be sufficient compensation, then the employer should be entitled to the liquidated damages as claimed.

Delay versus disruption

Another interesting area of dispute, which arises in connection with delay claims and liquidated damages, is whether a claim for disruption and its related costs is part of the liquidated damages or can be a separate claim. It should be noted that, while delay claims are basically time related, disruption claims are, in effect, organisation and productivity related, causing the progress of the Works to become less efficient than before or as planned. Despite the holding of the court in *Pillar PG Ltd v DJ Higgins Construction Ltd*,⁵⁶ where it held that such a distinction could not be had and which appeared to be based on rather unclear reasoning and independent of time, suggestions have been made that "if one is able to distinguish and dissect those losses due to disruption from those related to delay, it is possible and logical to construct a case for the recovery of such losses in addition to liquidated damages for the delay".⁵⁷ Further, it is argued that:

"where there is an express liquidated damages clause as well as an express 'due diligence' term, or where there are express intermediate completion dates stipulated in the contract which the contractor has failed to meet, intermediate delays by the contractor prior to completion will 'of course' be a breach of contract for which such damages of the owner will be recoverable."⁵⁸

In *Greater London Council v Cleveland Bridge & Engineering Co Ltd*,⁵⁹ while the contractor met all of the key dates, the owners took the position that the contractors had unnecessarily prolonged certain later and minor processes at the end of the manufacturing period so as to increase production costs. There was a liquidated damages clause, but only for late completion of the whole of the Works and not for the intermediate key dates. There was no express due diligence clause, thus, leading the court to grapple with whether a due diligence obligation should be implied into the contract. At the Court of Appeal, Staughton J and Parker LJ came to the view that a due diligence term could not be defined except in terms of any contractual or extended dates for completion and concluded that it was not possible to imply a due diligence clause in the form suggested by the owners on the ground that it was "abstract" and not related to the "objective". It would appear from this that the claim would have succeeded had there been an express due diligence clause.⁶⁰ Staughton J wrote:

"If there had been a term as to due diligence I consider that it would have been, when spelt out in full, an obligation on the contractors to execute the work with such diligence and expedition as was reasonably required in order to meet the key dates."

⁵⁶ (1986) 10 ConLR 46 CA.

⁵⁷ See e.g. Jonathan Hosie, "The Ascertainment of Damages for Delay in Construction Contracts: Liquidated and Unliquidated Damages" (1994) 10 Const LJ 214. See also Hamish Lal, "Liquidated Damages", *Construction Law Journal*, 2009.

⁵⁸ See e.g. *Hudson's Building and Engineering Contracts*, 1995, para 9.033.

⁵⁹ (1986) 34 BLR 50, 8 ConLR 30 CA.

⁶⁰ See also Hamish Lal, "Liquidated Damages", *Construction Law Journal*, 2009.

Extensions of time

Needless to say, liquidated damages provisions follow closely upon claims for extensions of time as well as who should make them and how they should be determined.⁶¹ In *The Royal Brompton Hospital National Health Service Trust (Brompton) v Frederick Alexander Hammond et al*⁶² series of cases the claimant⁶³ contracted with Taylor Woodrow Construction in 1987 to build a new hospital in Chelsea for approximately £20 million. There were ultimately 16 different defendants comprised of approximately three professional firms including Project Management International (PMI), who were the project managers, Watkins Gray International UK (WGI), the architects and Austen Associates (AA), who were the mechanical and electrical engineering services consultants. There was a 303-day delay in completion and an additional payment of approximately £5 million was made to Taylor Woodrow regarding claims for additional work and for extensions of time that had been granted. Despite this, Taylor Woodrow commenced an arbitration which was ultimately decided in their favour in 1995 with them receiving an award of approximately £6.2 million, following which Brompton commenced proceedings to recover the £11.2 million it had paid in total to Taylor Woodrow from the three professional firms engaged under the project. The issue that arose was whether the architect, WGI, and the project manager, PMI, had been negligent in granting certain extensions of time to Taylor Woodrow. The court took into account the *Bolam* Test⁶⁴ and wrote:

“... What I cannot do, as it seems to me, is to substitute my own view for that of a professional person of the appropriate discipline on any matter in respect of which any special skill, training or expertise is required to make an informed assessment. Thus, in the present case, as it seems to me, it is not open to me myself to decide what activities were or were not critical to the completion of the Works as a whole: the making of an assessment of the critical path of activities on a construction project is, on the evidence which I have heard, and to which I refer later in this judgment, something which requires a familiarity with the methods by which such an assessment is usually made. Again, other than in the most straightforward case, the assessment of the impact of the occurrence of a particular event on the progress of a construction project seems to me to be something which requires, if not special skill, at least experience which the Court does not possess”

The court then went on to write:

“An issue which needs to be considered before addressing the claims made against WGI and PMI in detail is the question of the circumstances in which it is proper to grant an extension of time under clause 25 of the Standard Form. The answer, in my judgment, depends upon the proper construction of that clause ...

... In my judgment, it is necessary, in order to address sensibly the question of whether to grant an extension of time for completion of works the execution of which is governed by a contract in the Standard Form, to have an understanding of the provisions of clause 25, ...

... it was plain from the evidence called at the sub-trial on behalf of the claimant, in particular that of Mr Gibson, who, of course is a programming expert, that there are a number of established ways in which a person who wishes to assess whether a particular

⁶¹ See e.g. Bevis Mak, “Extension of time: A contract administrator’s perspective”, *Construction Law Journal*, 2007.

⁶² See e.g. 76 ConLR 148.

⁶³ Here, the claimant was the successor to the Board of Governors of the Royal Brompton National Heart and Lung Hospital.

⁶⁴ See *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

event has or has not affected the progress of construction work can seek to do that. Because the construction of a modern building, other than one of the most basic type, involves the carrying out of a series of operations, some of which, possibly, can be undertaken at the same time as some of the others, but many of which can only be carried out in a sequence, it may well not be immediately obvious which operations impact upon which other operations. In order to make an assessment of whether a particular occurrence has affected the ultimate completion of the work, rather than just a particular operation it is desirable to consider what operations, at the time the event with one is concerned happens, are critical to the forward progress of the work as a whole. On the evidence of Mr Gibson and Mr Luder the establishment of the critical path of a particular construction project can itself be a difficult task if one does not know how the contractor planned the job. Not only that, but the critical path may well change during the course of the works, and almost certainly will do if the progress of the works is affected by some unforeseen event. Mr Gibson frankly accepted that the various different methods of making an assessment of the impact of unforeseen occurrences upon the progress of construction works are likely to produce different results, perhaps dramatically different results. He also accepted that the accuracy of any of the methods in common use critically depends upon the quality of the information upon which the assessment exercise was based. All of this does, of course, emphasise the vital point that the duty of a professional man, generally stated, is not to be right, but to be careful”

The standard forms

Most standard forms provide a range of reasons for an extension of time and require the contractor to timeously notify the engineer or contract administrator if it considers that the progress of works has been, or is likely to be, delayed. The FIDIC forms of contract provide, for example, in the MDB Harmonised Edition Sub-Clause 8.4 (Extension of Time for Completion):

“The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking-Over of the Works and Sections] is or will be delayed by any of the following causes:

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract,
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
- (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personnel, or the Employer’s other contractors.

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor’s Claims]. When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.”

It is commonly considered that the contractor bears the financial risk while the time risk falls to the employer (as the default must be caused by the employer) and, in certain circumstances, any extension of time will be considered as payment in full against any other damages either sustained or sustainable by the contractor in connection with any extension. In *Henry Boot Construction Ltd v Central Lancashire New Town Development*

Corp,⁶⁵ Henry Boot entered into the JCT 1963 edition contract with the local council to build 296 dwellings and 77 garages in 1978. Completion was delayed due to delays by the statutory utility undertakers “hired” by the Corporation to lay the utilities. Henry Boot sought compensation from the Corporation due to this delay. The court found that in the circumstances the statutory undertakers were contracted by the Corporation to carry out work, and not carrying out statutory duties. The court wrote:

“... But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls. But in other cases the employer has to compensate the contractor in respect of the delay, and that category ... one would think, clearly be composed of cases where there is fault upon the employer or fault for which the employer can be said to bear some responsibility.”

Who determines the extension

The person determining whether or not the extension qualifies is usually the contract administrator, e.g. the engineer or architect. The various standard form contracts usually state that the contract administrator is to determine whether the delay has been caused by one of the listed causes and then to “fairly assess any extension due”. It is this “fairness” that most often comes before the court or adjudicator/arbitrator. In *Northern RHA v Derek Crouch Construction Co Ltd*,⁶⁶ where the court was faced with reviewing an architect’s decision, Dunn LJ wrote:

“It was accepted in this court that the court retains ultimate control in seeing that the architect acts properly and honestly and in accordance with the contract”

To this Browne-Wilkinson LJ added:

“in my judgment the court’s jurisdiction would be limited to deciding whether or not the certificate or opinion was legally invalid because given, for example, in bad faith or in excess of his powers.”

Then, following along this line, in *John Barker Construction Ltd v London Portman Hotel Ltd*,⁶⁷ the court was faced with an architect’s determination as to an extension of time. Here, Barker carried out refurbishment work to a hotel and, while there was no actual contract, the parties considered that the JCT 1980 conditions applied and with the standard arbitration clause removed and replaced by “The proper law of the agreement shall be English and the English court shall have jurisdiction”. During the construction, delays occurred and, after the architect granted some extensions of time, the contractor sought additional extensions along with costs. Mr Recorder Toulson QC reviewed the situation and the way the architect went about making its determinations, and wrote:

“... There was cogent evidence that these matters caused delay, and in not taking them into account when granting his extension of time, [the architect] failed to take into account relevant matters ... However, in my judgement his assessment of the extension of time due to the Plaintiffs was fundamentally flawed in a number of respects, namely:

- (1) [The architect] did not carry out a logical analysis in a methodical way of the impact which the relevant matters had or were likely to have on the plaintiffs’ planned programme.

⁶⁵ (1981) 15 BLR 1.

⁶⁶ [1984] QB 644.

⁶⁷ (1996) 83 BLR 31.

- (2) He made an impressionistic, rather than a calculated, assessment of the time which he thought was reasonable for the various items individually and overall. (The defendants themselves were aware of the nature of [the architect's] assessment, but decided against seeking to have any more detailed analysis of the plaintiffs' claim carried out unless and until there was litigation).
- (3) [The architect] misapplied the contractual provisions, as more particularly set out above. Because of his unfamiliarity with SMM7 he did not pay sufficient attention to the content of the bills, which was vital in the case of a JCT contract with quantities.
- (4) Where [the architect] allowed time for relevant events, the allowance which he made in important instances (such as the items relating to the walls or the cutting of pockets in the bathroom screeds) bore no logical or reasonable relation to the delay caused.

All in all, I am satisfied that the plaintiffs have established that, although there was no bad faith or excess of jurisdiction on the part of the architect, his determination of the extension of time due to the plaintiffs was not a fair determination, nor was it based on a proper application of the provisions of the contract, and it was accordingly invalid."

Thus, as mentioned in earlier chapters, the individual making the extension assessment must have not only the "proper knowledge of the content and intent of the various documents and application of the rules of the contract" but also a "recognition of the effects of constructive change and relevant events". It would also be wise to use a "logical analysis in a methodical way to assess impact of the relevant events on the contractor's programme" and to have all "calculation based on facts, rather than impressionistic assessment, of the extension fairly due".⁶⁸

Float

The question of "float", in particular who owns the "float", frequently arises. Normally, a contractor builds in a certain amount of excess time into its schedule to allow for unplanned events, both of its own making and those of others, so that at the end of the project it can complete on time. The problem arises when the employer causes some delay, and because of the contractor being careful and allowing extra time, i.e. float, the delay caused by the employer has no effect on the completion, but rather only "eats up" some of this built-in float. The question thus becomes who "owns" this float? In *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*,⁶⁹ Ascon was one of Alfred McAlpine's subcontractors. McAlpine's programme showed five weeks of float but completion was delayed for more than five weeks and McAlpine levied liquidated damages on Ascon for the full period of the delay, keeping the five-week float period for itself. Ascon commenced proceedings to recover. The court felt that the float should be equally shared between the subcontractors who contributed to the delay collectively, and wrote:

"... The main contractor, not having suffered any loss of the above kinds, cannot recover from sub-contractors the hypothetical loss he would have suffered had the float not existed, and that will be so whether the delay is wholly the fault of one subcontractor, or wholly that of the main contractor himself, or spread in varying degrees between several sub-contractors and the main contractor. No doubt those different situations can be described,

⁶⁸ See Bevis Mak, "Extension of time: a contract administrator's perspective", *Construction Law Journal*, 2007.

⁶⁹ (2000) 66 ConLR 119.

in a sense, as ones in which the ‘benefit’ of the float has accrued to the defaulting party or parties, but no-one could suppose that the main contractor has, or should have, any power to alter the result so as to shift that ‘benefit’. The issues in any claim against a sub-contractor remain simply breach, loss and causation.

I do not see why that analysis should not still hold good if the constituent delays more than use up the float, so that completion is late. Six sub-con, each responsible for a week’s delay, will have caused no loss if there is a six weeks’ float. They are equally at fault, and equally share in the ‘benefit’. If the float is only five weeks, so that completion is a week late, the same principle should operate; they are equally at fault, should equally share in the reduced ‘benefit’ and therefore equally in responsibility for the one week’s loss. The allocation should not be in the gift of the main contractor.

I therefore reject McAlpine’s ‘float’ argument. I make it clear that I do so on the basis that it did not raise questions of concurrent liability or contribution; the contention was explicitly that the ‘benefit’, and therefore the residual liability, fell to be allocated among the parties responsible for delay and that that allocation was entirely in the main contractor’s gift as among subcontractors, or as between them and the main contractor where the latter’s own delay was in question.”

This was followed by another of the *Royal Brompton* matters,⁷⁰ where the court stated:

“... All activities have potential or theoretical float (even if the period is negative). What is required is to track the actual execution of the works. On a factual basis this part of the case requires no further discussion. In addition, clause 25 refers to ‘expected delay in the completion of the Works’ and to the need for the Architect to form an opinion as to whether because of a Relevant Event ‘the completion of the Works is likely to be delayed thereby beyond the Completion Date’. Under the JCT conditions, as used here, there can be no doubt that if an architect is required to form an opinion then, if there is then unused float for the benefit of the contractor (and not for another reason such as to deal with p.c. or provisional sums or items), then the architect is bound to take it into account since an extension is only to be granted if completion would otherwise be delayed beyond the then current completion date. This may seem hard to a contractor but the objects of an extension of time clause are to avoid the contractor being liable for liquidated damages where there has been delay for which it is not responsible, and still to establish a new completion date to which the contractor should work so that both the employer and the contractor know where they stand. The architect should in such circumstances inform the contractor that, if thereafter events occur for which an extension of time cannot be granted, and if, as a result, the contractor would be liable for liquidated damages then an appropriate extension, not exceeding the float, would be given. In that way the purposes of the clause can be met: the date for completion is always known; the position on liquidated damages is clear; yet the contractor is not deprived permanently of ‘its’ float. Under these JCT Conditions the Architect cannot revise an extension once given so as to fix an earlier date (except in the limited circumstances set out in clauses 25.3.2 and 25.3.3). Thus to grant an extension which preserved the contractor’s float would not be ‘fair and reasonable’. Under clause 23.1 the employer is entitled to completion on or before the Completion Date so the employer is ultimately entitled to the benefit of any unused float that the contractor does not need. Few contractors wish to remain on a site any longer than is needed and employers are usually happy to take possession earlier, rather than later, and, if they are not, they have to accept the risk of early completion. In practice, however, architects are not normally concerned about these points and may reasonably take the view that, unless the float is obvious, its existence need not be discovered”

The conclusion is that there is no contractual basis for extending the contract period just to preserve “float”.⁷¹

⁷⁰ *Royal Brompton Hospital NHS Trust v Hammond (No 9)* [2002] EWHC 2037 (TCC).

⁷¹ See Bevis Mak, “Extension of time: a contract administrator’s perspective”, *supra*.

Concurrent delay

When a delay is the result of a mix of responsibilities, i.e. some the contractor's fault and some the employer's, the issue becomes one of sorting out this concurrent delay. Over the years the courts have used three different approaches: (1) "The Dominant Cause Approach", i.e. which cause is the most dominant cause of the delay; (2) "The Devlin Approach", where the damage has resulted from two separate and approximate equal causes; and (3) "The Burden of Proof Approach", where if there is more than one cause of damage then the claimant, if it was responsible for any of the damage, must then prove how much of the claimed damage was caused by others.

The Dominant Cause Approach method first arose in *H Fairweather & Co Ltd v Wandsworth LBC*,⁷² where late instructions and variations caused delays, the responsibility for which fell to the employer. Then a labour strike ensued, which, though not the fault of the employer, caused more delay. The architect, as certifier, allowed 81 weeks' delay and took the position that the labour strike was the main cause of the delay; however, the contractor claimed that of the 81 weeks, 18 had been due to variations and should have been cited accordingly. Unfortunately, the architect refused based upon its position that it could only grant time extensions based on the dominant cause of delay. The court rejected the architect's dominant cause approach and wrote:

"... 'Dominant' has a number of meanings: 'Ruling, prevailing, most influential.' On the assumption that condition 23 is not solely concerned with liquidated or ascertained damages but also triggers and conditions a right for a contractor to recover direct loss and expense where applicable under condition 24 then an architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct. But I have held earlier in this judgment that the assumption is false. I think the proper course here is to order that this part of the interim award should be remitted to Mr Alexander for his reconsideration"

Then in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*,⁷³ the dispute revolved around what caused the delay as to the critical path. The court stated:

"... it is agreed that if there are two concurrent causes of delay, one of which is a Relevant Event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the Relevant Event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on the site for a week not only because of exceptionally inclement weather (a Relevant Event), but also because the contractor has a shortage of labour (not a Relevant Event), and if the failure to work during that week is likely to delay the Works beyond the Completion Date by one week, and if he considers it fair and reasonable to do so, the Architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."

Further, in determining whether a relevant event was likely to cause delay to the Works beyond completion under Clause 25 of JCT:

"... It is impossible to lay down hard and fast rules. In my judgment, it is incorrect to say that, as a matter of construction of clause 25, when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events."

⁷² (1987) 39 BLR 106.

⁷³ (1999) 70 ConLR 32.

In this regard the court in *Royal Brompton Hospital NHS Trust v Hammond (No 7)*⁷⁴ expressed it in this way:

“... However, if Taylor Woodrow was delayed in completing the works both by matters for which it bore the contractual risk and by Relevant Events ... in light of the authorities to which I have referred, it would be entitled to EOT by reason of the occurrence of the Relevant Events notwithstanding its own defaults.”

Stated another way, the rule becomes that if two concurrent events occur, either of which may have caused the delay to the progress of the Works, an extension of time should be granted despite the fact that the contractor could also be in default at the same time.⁷⁵

When contemplating these situations it should be noted that concurrent delay situations should not be confused with those where one of the events has occurred before the other existed. In this regard the court in *Brompton Hospital NHS Trust v Hammond (No 7)* went on to clarify:

“... However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, ‘the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date’.

The Relevant Event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay. It was circumstances such as these that Dyson J was concerned with in the passage from his judgment in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* at paragraph 13 on page 37... Dyson J adopted the same approach as that which seems to me to be appropriate to the first type of factual situation which I have postulated when he said, at paragraph 15 on page 38 of the report:

‘It seems to me that it is a question of fact in any case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J in the *Balfour Beatty* case’.

Following these cases is *Walter Lilly & Co Ltd v Mackay*,⁷⁶ which addressed concurrent delay in circumstances where one of the causes of delay the employer and the other is not, concluding:

- Where there are two or more causes, one of which is a relevant event entitling the contractor to an extension of time (“EOT”) the contractor is still entitled to a full EOT for that event. This conclusion is based on the logic that many relevant events would otherwise amount to acts of prevention and it would be wrong to deny the contractor a full EOT in such circumstances.
- Regarding the interpretation of the clause of the parties’ contract: the relevant event can be shown to have delayed the Works, the contract is entitled to an EOT for the whole period of the delay caused by the relevant event

⁷⁴ (2001) 76 ConLR 148.

⁷⁵ See Bevis Mak, “Extension of time: a contract administrator’s perspective”, *supra*.

⁷⁶ [2012] EWCA Civ 1265 (CA (Civ Div)).

and nothing in the clause suggests that the EOT ought to be reduced if the contractor is partly responsible for the delay.

- The apportionment approach from Scottish case *City Inn*⁷⁷ is not a part of English law.

This case then confirms the preferred approach to assessment of causation in cases of concurrent delay as that derived from *Henry Boot Construction v Malmaison Hotel*.⁷⁸ Also note that in *Adyard Abu Dhabi v SDS Marine Services*,⁷⁹ the court preferred the causative rather than prevention principle approach. The approach in *Adyard* was approved by Coulson J in *Jerram Falkus v Fenice*.⁸⁰

In *Jerram* Coulson J held that the prevention principle did not apply to cases of concurrent delay, holding:

“for the prevention principle to apply the contractor must be able to show that the employer’s acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor’s own default, the prevention principle will not apply.”

It should be noted that there has been some negative academic commentary on this approach.⁸¹ This can be contrasted to the earlier case of *De Beers UK Ltd v Atos Origin It Services UK*.⁸² In *De Beers*, the court emphasised the prevention principle while *Adyard* emphasised causation.

Diminution in value

In construction contract cases the courts will measure damages either by the diminution in market value at the time of the breach or by the cost of making the performance perfect and as bargained for between the parties. Undoubtedly, there are problems with the diminution in value approach to ascertaining damages because, while this approach is an objective one, its main drawback is that it does not put the parties into the position they would be in if proper performance of the contract had occurred. As an example of the difficulty encountered, consider the following example: A home is built to plans drawn by the architect but the contractor makes some unapproved changes and deviates from the drawings by changing both the location and size of some of the rooms, yet the total size of the home remains unchanged. Such a breach does not necessarily diminish the market value of the home, yet damage to the homeowner does exist even if only subjectively.

In the case of *Philips v Ward*,⁸³ Philips, the plaintiff, paid in 1952 the sum of £25,000 for a house and 137 acres of land based upon a surveyor’s report, which turned out to have been negligent as the surveyor had failed to notice that the timbers of the house were rotten. The necessary repairs would have cost £7,000 at 1952 prices, but the court found that the actual value of the property in 1952 was £21,000. In 1956, the cost of

⁷⁷ *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190.

⁷⁸ *Supra*.

⁷⁹ [2011] BLR 384, 136 Con LR 190, (2011) 27 Const LJ 594.

⁸⁰ *Supra*.

⁸¹ See, for example, J Marrin, “Concurrent Delay Revisited”, SCL Paper 197.

⁸² [2010] EWHC 3276.

⁸³ [1956] 1 WLR 471.

repairs would have cost appreciably more than £7,000. The court held that the proper measure of damage was the difference between the value of the property in its assumed good condition (£25,000) in 1952 and its value in the bad condition (£21,000), which should have been reported to Philips and he was, therefore, entitled to recover £4,000.

This decision was reviewed in *Watts v Morrow*,⁸⁴ where the Wattses, prior to purchasing a holiday home, made an offer of £177,500 with closing contingent on Morrow's carrying out a full structural survey of the property. The court found that Morrow's survey and report was negligent and awarded the Wattses damages of £33,961.35, based on the cost of repairs carried out together with interest at 15 per cent, as well as general damages for distress and inconvenience in the additional sum of £8,000. Morrow appealed on the basis that it was wrong in law to award damages based on the cost of repairs and that the award should have been on the basis of diminution in value or excess purchase price paid, i.e. £15,000, and further, that any award for distress and inconvenience was also wrong and/or that the award of £8,000 was excessive. The court on appeal took the position that the appropriate measure of damages in the case of a negligent survey was the diminution in value of the property together with interest thereon. The task of the court was to award to the plaintiff that sum of money, which would, as far as possible, put the plaintiff into as good a position as if the contract for the survey had been properly fulfilled, which in this case was £15,000. However, the court felt that the Wattses were entitled to recover general damages for mental distress caused by physical discomfort or inconvenience resulting from the breach, the award was excessive as only modest compensation was recoverable and the amount of £750 was substituted. In this regard Gibson LJ wrote:

"The decision in *Philips v Ward* was based upon that principle: in particular, if the contract had been properly performed the plaintiff either would not have bought, in which case he would have avoided any loss, or, after negotiation, he would have paid the reduced price. In the absence of evidence to show that any other or additional recoverable benefit would have been obtained as a result of proper performance, the price will be taken to have been reduced to the market price of the house in its true condition because it cannot be assumed that the vendor would have taken less.

The cost of doing repairs to put right defects negligently not reported may be relevant to the proof of the market price of the house in its true condition: see *Steward v Rapley* [1989] 1 EGLR 159; and the cost of doing repairs and the diminution in value may be shown to be the same. If, however, the cost of repairs would exceed the diminution in value, then the ruling in *Philips v Ward*, where it is applicable, prohibits recovery of the excess because it would give to the plaintiff more than his loss. It would put the plaintiff in the position of recovering damages for breach of a warranty that the condition of the house was correctly described by the surveyor and, in the ordinary case as here, no such warranty has been given ...

It is clear, I think, that the judge was regarding the contract between these plaintiffs and the defendant as a contract in which the subject matter was to provide peace of mind or freedom from distress within the meaning of Dillon LJ's phrase in *Bliss's* case [1987] ICR 700 at 718 cited by Purchas LJ in *Hayes v James & Charles Dodd* [1990] 2 All ER 815 at 826. That, with respect, seems to me to be an impossible view of the ordinary surveyor's contract. No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the

84 (1991) 26 ConLR 98.

case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract. Since the judge did not attempt to assess the award on that basis this court must reconsider the award and determine what it should be ..."

Then, as to the damages for distress and inconvenience, Bingham LJ added:

"A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired, I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered. I agree with the figures which Ralph Gibson LJ proposes to substitute ..."

As noted above, in *Philips v Ward*⁸⁵ reference is made to the measurement of damages by the diminution in market value. Recently the judgment of Mr Justice Birss in *Moore & Another v National Westminster Bank*,⁸⁶ applying *Philips*, provides clarity in this area. The claimants applied for a mortgage in order to purchase a flat, specifically requesting that the bank arrange a survey. The bank failed to do so but approved the loan. Consequently, the claimants falsely believed that a survey had been prepared and had concluded the property was sound. Following purchase, the claimants discovered the property was in need of around £115,000 worth of repairs, which rivalled the purchase price. They successfully sued the bank for breach of contract at first instance, Mr Recorder Andrew Willetts assessing the damages to be the full cost of repair rather than the diminution in value (given that, had a survey been carried out and the poor condition of the property been revealed, the property would not have been purchased in the first place, such that cost of repair was a fair measure of loss). The bank appealed.

Mr Justice Birss accepted that *Philips* applied, regardless of whether a purchaser would have withdrawn from, or proceeded with, the transaction upon receipt of a survey revealing defects, and that the Recorder had therefore been wrong to distinguish between negligent surveyor cases such as *Philips* and the present matter (in which the bank had failed to provide any report at all). However, he dismissed the appeal, and agreed that the true extent of the loss was cost of repair, rather than diminution in value; the Recorder had rightly recognised that diminution in value is not an invariable rule. In this instance, the cost of repair represented the only practical indicator of the diminution in value; the only quantum evidence advanced by the bank was that the claimants' loss could not have been more than £15,000, a figure which the Recorder was entitled roundly to reject as he did.

⁸⁵ [1956] 1 WLR 741.

⁸⁶ [2018] EWHC 1805 (TCC).

It is clear from *Moore & Another v National Westminster Bank* that, whilst diminution in value may prima facie appear to undercompensate purchasers who would not have bought defective properties but for negligent surveys, it remains the default measure of loss and *Philips v Ward* remains good law. The case also illustrates the risk of taking extreme positions on damages, as the bank did; where a defendant does not provide any credible alternative quantum evidence as to the extent of a purchaser's loss, the courts are entitled to assess diminution in value in the same sum as the cost of repair (even if they sense the former is less than the latter).

But what should the valuation date be for diminution? In *Charlton v Northern Structural Services Ltd*,⁸⁷ a structural inspection was necessary due to some cracking at the rear of a property that Charlton was in the process of purchasing. Northern Structural Services was retained in 2000 to undertake a structural inspection. The inspection showed signs of structural movement in the premises and recommended the removal of any large trees within at least four metres of the house. Thereafter, Charlton completed the house purchase and removed the trees as advised by Northern. Unfortunately, over the next couple of years, further cracking became apparent and Charlton instructed a different structural engineer in 2001 to investigate the extent and cause of the cracks. Ultimately, Charlton was advised that the house was suffering from clay heave, occasioned by the removal of trees, i.e. the trees, before their removal, had used up the excess moisture in the ground and kept it dry but after they were taken out the clay became rehydrated and expanded causing upheaval structural movement. A period of monitoring, which ended in 2004, showed that the structural movement had stopped. Charlton brought proceedings against Northern in May 2006, accepting that remedial work to the house was inappropriate and it was not necessary as the movement had stabilised and the premises were structurally sound. Further, rectification works could themselves cause further damage through differential settlement. Therefore, the claimant sought damages for the diminution in value to the premises, resulting from the stigma of the house being susceptible to structural problems that could not be remedied. The claimants relied on a valuation carried out in autumn 2007 that recorded a £20,000 diminution in value.

The court took the position that Northern had negligently failed to identify the nature of the subsoil around the house. As a result the defendant failed to pinpoint the cause of the cracking and negligently recommended that all trees in the near vicinity be removed. When this recommendation was acted upon, it resulted in damage to the property; namely, the appearance of further cracks, and as a result Charlton was awarded £20,000 compensation for diminution in value (together with £5,000 for inconvenience and distress). This diminution figure was arrived at on the basis of the claimant's expert valuer's evidence, which stated that the house was worth £20,000 less as at autumn 2007 than it would have been had the trees not been removed causing damage and uncertainty. The court wrote:

"There is nothing inherently wrong in principle in valuing a diminution in value loss at a later date than the date of breach. The guiding principles are that the based date of the valuation must be one which is reasonable, is one which gives rise to a loss which is directly linked to the breach, is one which results from no break in the causal chain and is one which does not arise and is not attributable to any failure to mitigate."

87 [2008] EWHC 66 (TCC).

In this case the difficulty was with the valuation date being 2007 rather than 2000 when Charlton first relied on the negligent advice from Northern. Normally, the date used is the one at which the breach took place and retrospective valuation evidence is used to calculate the diminution as at that date. The difference in this case was that while Northern took the position that the increased diminution in value resulting from a calculation based upon 2007 (rather than 2000) figures was attributable to the claimants' failure to mitigate their loss and to pursue their claim without delay, the court took the view that a significant period of crack monitoring had been necessary and that it was understandable that the claim had proceeded slowly given Charlton's means.⁸⁸

It should be noted that the facts in this case led to an unusual result, which would not be the norm. Despite this the court held there is nothing inherently wrong in using a date later than the date of the breach in question in order to calculate diminution in value and the principles involved thus become whether or not it is reasonable in the circumstances and a determination of whether or not the valuation date is one that gave rise to a loss directly linked to the breach and without any break in causation. Further, the date chosen must be one that is not attributable to any failure on the part of the claimant to mitigate its loss.

Another issue came to light in *Farley v Skinner*,⁸⁹ where Farley, in 1990, retained a surveyor to inspect and give a report on a house he was about to purchase. Farley was particularly concerned about the noise from aircraft and was advised by the surveyor that he thought it unlikely "that the property will suffer greatly from such noise". Unfortunately for Skinner, he had failed to note that aircraft used a point near to the house as a staging area prior to landing at Gatwick and so negligence was found and held that while the purchase price coincided with the open-market value of the house taking into account aircraft noise, he nonetheless awarded Farley £10,000 as damages for distress and inconvenience. Skinner appealed and won, which led Farley to appeal to the House of Lords, which allowed the appeal, holding that Skinner's obligation to investigate aircraft noise had been an important part of the contract and that his failure to properly investigate that aspect had prevented Farley from making an informed choice as to whether or not to buy the property. That had, in turn, led to mental distress and disappointment for which damages had been sought. Here, the guidance in *Watts* was still valuable in the context of determining whether damages were available for breach of contract, but there was no reason in principle and policy why the scope of recovery in the exceptional category should be "dependent on the object of the contract as ascertained from all its constituent parts". It was enough that an important object of the contract was to give "pleasure, relaxation or peace of mind" and that it had been breached, thus Farley had not forfeited his right to damages by remaining at the property, given that he had acted reasonably in making the best of the situation, and that his decision not to move had prevented a larger claim against Skinner. Lord Steyn wrote:

"...The examination of the issues can now proceed from a secure foothold. In the law of obligations the rules governing the recovery of compensation necessarily distinguish between different kinds of harm. In tort the requirement of reasonable foreseeability is a

⁸⁸ It should be also noted that Northern did not adduce any retrospective valuation evidence. Therefore, even if he had wanted to use a 2000 diminution in value figure, the judge was unable to do so.

⁸⁹ [2002] 2 AC 732, [2001] 3 WLR 899.

sufficient touchstone of liability for causing death or physical injury: it is an inadequate tool for the disposal of claims in respect of psychiatric injury. Tort law approaches compensation for physical damage and pure economic loss differently. In contract law distinctions are made about the kind of harm which resulted from the breach of contract. The general principle is that compensation is only awarded for financial loss resulting from the breach of contract (*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn). In the words of Bingham LJ in *Watts v Morrow* (1991) 26 ConLR 98 at 126, [1991] 1 WLR 1421 at 1445, as a matter of legal policy ‘a contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party’. There are, however, limited exceptions to this rule. One such exception is damages for pain, suffering and loss of amenities caused to an individual by a breach of contract (see *McGregor on Damages* (16th edn, 1997) pp 56–57 (para 96)). It is not material in the present case. But the two exceptions mentioned by Bingham LJ, namely where the very object of the contract is to provide pleasure (proposition (2)) and recovery for physical inconvenience caused by the breach (proposition (3)), are pertinent. The scope of these exceptions is in issue in the present case. It is, however, correct, as counsel for the surveyor submitted, that the entitlement to damages for mental distress caused by a breach of contract is not established by mere foreseeability: the right to recovery is dependent on the case falling fairly within the principles governing the special exceptions. So far there is no real disagreement between the parties.

...

I reverse the order in which the Court of Appeal considered the two issues. I do so because the issue whether the present case falls within the exceptional category governing cases where the very object of the contract is to give pleasure, and so forth, focuses directly on the terms actually agreed between the parties. It is concerned with the reasonable expectations of the parties under the specific terms of the contract. Logically, it must be considered first.

It is necessary to examine the case on a correct characterisation of the plaintiff’s claim. Stuart-Smith LJ thought ((2000) 73 ConLR 70 at 79) that the obligation undertaken by the surveyor was ‘one relatively minor aspect of the overall instructions’. What Stuart-Smith and Mummery LJ would have decided if they had approached it on the basis that the obligation was a major or important part of the contract between the plaintiff and the surveyor is not clear. But the Court of Appeal’s characterisation of the case was not correct. The plaintiff made it crystal clear to the surveyor that the impact of aircraft noise was a matter of importance to him. Unless he obtained reassuring information from the surveyor he would not have bought the property. That is the tenor of the evidence. It is also what the judge found. The case must be approached on the basis that the surveyor’s obligation to investigate aircraft noise was a major or important part of the contract between him and the plaintiff. It is also important to note that, unlike in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1, the plaintiff’s claim is not for injured feelings caused by the breach of contract. Rather it is a claim for damages flowing from the surveyor’s failure to investigate and report, thereby depriving the buyer of the chance of making an informed choice whether or not to buy resulting in mental distress and disappointment.

The broader legal context of *Watts v Morrow* must be borne in mind. The exceptional category of cases where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation is not the product of Victorian contract theory but the result of evolutionary developments in case law from the 1970s. Several decided cases informed the description given by Bingham LJ of this category. The first was the decision of the sheriff court in *Diesen v Samson* 1971 SLT (Sh Ct) 49. A photographer failed to turn up at a wedding, thereby leaving the couple without a photographic record of an important and happy day. The bride was awarded damages for her distress and disappointment. In the celebrated case of *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71, [1973] QB 233, the plaintiff recovered damages for mental distress flowing from a disastrous holiday resulting from a travel agent’s negligent representations (compare also *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468). In *Heywood v Wellers (a firm)* [1976] 1 All ER 300, [1976] QB 446, the plaintiff instructed solicitors to bring

proceedings to restrain a man from molesting her. The solicitors negligently failed to take appropriate action with the result that the molestation continued. The Court of Appeal allowed the plaintiff damages for mental distress and upset. While apparently not cited in *Watts v Morrow*, *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474 was decided before *Watts v Morrow*. In the *Chrysler Acceptances* case the claim was for damages in respect of a motor car which did not meet the implied condition of merchantability in section 14 of the Sale of Goods Act 1893. The buyer communicated to the seller that one of his reasons for buying the car was a forthcoming touring holiday in France. Problems with the car spoilt the holiday. The disappointment of a spoilt holiday was a substantial element in the award sanctioned by the Court of Appeal.

At their Lordships' request counsel for the plaintiff produced a memorandum based on various publications which showed the impact of the developments already described on litigation in the county courts. Taking into account the submissions of counsel for the surveyor and making due allowance for a tendency of the court sometimes not to distinguish between the cases presently under consideration and cases of physical inconvenience and discomfort, I am satisfied that in the real life of our lower courts non-pecuniary damages are regularly awarded on the basis that the defendant's breach of contract deprived the plaintiff of the very object of the contract, viz pleasure, relaxation, and peace of mind. The cases arise in diverse contractual contexts, eg the supply of a wedding dress or double glazing, hire purchase transactions, landlord and tenant, building contracts, and engagements of estate agents and solicitors. The awards in such cases seem modest. For my part what happens on the ground casts no doubt on the utility of the developments since the 1970s in regard to the award of non-pecuniary damages in the exceptional categories. But the problem persists of the precise scope of the exceptional category of case involving awards of non-pecuniary damages for breach of contract where the very object of the contract was to ensure a party's pleasure, relaxation or peace of mind.

An important development for this branch of the law was *Ruxley Electronics and Construction Ltd v Forsyth* (1995) 45 ConLR 61, [1996] AC 344. The plaintiff had specified that a swimming pool should at the deep end have a depth of 7ft 6ins. The contractor failed to comply with his contractual obligation: the actual depth at the deep end was the standard 6ft. The House found the usual 'cost of cure' measure of damages to be wholly disproportionate to the loss suffered and economically wasteful. On the other hand, the House awarded the moderate sum of £2,500 for the plaintiff's disappointment in not receiving the swimming pool he desired. It is true that for strategic reasons neither side contended for such an award. The House was, however, not inhibited by the stance of the parties. Lord Mustill and Lord Lloyd of Berwick justified the award in carefully reasoned judgments which carried the approval of four of the Law Lords. It is sufficient for present purposes to mention that for Lord Mustill ((1995) 45 ConLR 61 at 71, [1996] AC 344 at 360) the principle of *pacta sunt servanda* would be eroded if the law did not take account of the fact that the consumer often demands specifications which, although not of economic value, have value to him. This is sometimes called the 'consumer surplus': see Harris, Ogus and Philips 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581. Lord Mustill rejected the idea that 'the promisor can please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price'. Lord Keith of Kinkel and Lord Bridge of Harwich agreed with Lord Mustill's judgment and with Lord Lloyd's similar reasoning. Labels sometimes obscure rather than illuminate. I do not therefore set much store by the description 'consumer surplus'.

But the controlling principles stated by Lord Mustill and Lord Lloyd are important. It is difficult to reconcile this decision of the House with the decision of the Court of Appeal in the present case. I will in due course return to the way in which the majority attempted to distinguish the *Ruxley Electronics* case. At this stage, however, I draw attention to the fact that the majority in the Court of Appeal ((2000) 73 ConLR 70 at 79) regarded the relevant observations of Lord Mustill and Lord Lloyd as obiter dicta. I am satisfied that the principles enunciated in the *Ruxley Electronics* case in support of the award of £2,500 for a breach of respect of the provision of a pleasurable amenity have been authoritatively established.

Counsel for the surveyor advanced three separate arguments each of which he said was sufficient to defeat the plaintiff's claim. First, he submitted that even if a major or important part of the contract was to give pleasure, relaxation and peace of mind, that was not enough. It is an indispensable requirement that the object of the entire contract must be of this type. Secondly, he submitted that the exceptional category does not extend to a breach of a contractual duty of care, even if imposed to secure pleasure, relaxation and peace of mind. It only covers cases where the promiser guarantees achievement of such an object. Thirdly, he submitted that by not moving out of Riverside House the plaintiff forfeited any right to recover non-pecuniary damages.

The first argument fastened onto a narrow reading of the words 'the very object of [the] contract' as employed by Bingham LJ in *Watts v Morrow* (1991) 26 ConLR 98 at 126, [1991] 1 WLR 1421 at 1445. Cases where a major or important part of the contract was to secure pleasure, relaxation and peace of mind were not under consideration in *Watts v Morrow*. It is difficult to see what the principled justification for such a limitation might be. After all, in 1978 the Court of Appeal allowed such a claim in the *Chrysler Acceptances* case in circumstances where a spoiled holiday was only one object of the contract. Counsel was, however, assisted by the decision of the Court of Appeal in *Knott v Bolton* (1995) 45 ConLR 127 which in the present case the Court of Appeal treated as binding on it. In *Knott's* case an architect was asked to design a wide staircase for a gallery and impressive entrance hall. He failed to do so. The plaintiff spent money in improving the staircase to some extent and he recovered the cost of the changes. The plaintiff also claimed damages for disappointment and distress in the lack of an impressive staircase. In agreement with the trial judge the Court of Appeal disallowed this part of his claim. Reliance was placed on the dicta of Bingham LJ in *Watts v Morrow* (1991) 26 ConLR 98 at 126, [1991] 1 WLR 1421 at 1445.

Interpreting the dicta of Bingham LJ in *Watts v Morrow* narrowly, the Court of Appeal in *Knott's* case ruled that the central object of the contract was to design a house, not to provide pleasure to the occupiers of the house. It is important, however, to note that *Knott's* case was decided a few months before the decision of the House in the *Ruxley Electronics* case. In any event, the technicality of the reasoning in *Knott's* case, and therefore in the Court of Appeal judgments in the present case, is apparent. It is obvious, and conceded, that if an architect is employed only to design a staircase, or a surveyor is employed only to investigate aircraft noise, the breach of such a distinct obligation may result in an award of non-pecuniary damages. Logically the same must be the case if the architect or surveyor, apart from entering into a general retainer, concludes a separate contract, separately remunerated, in respect of the design of a staircase or the investigation of aircraft noise. If this is so the distinction drawn in *Knott's* case and in the present case is a matter of form and not substance. David Capper 'Damages for Distress and Disappointment – The Limits of *Watts v Morrow*' (2000) 116 LQR 553 at 556 has persuasively argued:

'A ruling that intangible interests only qualify for legal protection where they are the "very object of the contract" is tantamount to a ruling that contracts where these interests are merely important, but not the central object of the contract, are in part unenforceable. It is very difficult to see what policy objection there can be to parties to a contract agreeing that these interests are to be protected via contracts where the central object is something else. If the defendant is unwilling to accept this responsibility he or she can say so and either no contract will be made or one will be made but including a disclaimer.'

There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind. In my view *Knott's* case was wrongly decided and should be overruled. To the extent that the majority in the Court of Appeal relied on *Knott's* case their decision was wrong.

... That brings me to the second issue, namely whether the plaintiff's claim is barred by reason of the fact that the surveyor undertook an obligation to exercise reasonable care and did not guarantee the achievement of a result. This was the basis upon which Hale LJ

after the first hearing in the Court of Appeal thought that the claim should be disallowed. This reasoning was adopted by the second Court of Appeal and formed an essential part of the reasoning of the majority. This was the basis on which they distinguished the *Ruxley Electronics* case. Against the broad sweep of differently framed contractual undertakings, and the central purpose of contract law in promoting the observance of contractual promises, I am satisfied that this distinction ought not to prevail. It is certainly not rooted in precedent. I would not accept the suggestion that it has the pedigree of an observation of Ralph Gibson LJ in *Watts v Morrow* (1991) 26 ConLR 98 at 122, [1991] 1 WLR 1421 at 1442: his emphasis appears to have been on the fact that the contract did not serve to provide peace of mind, and so forth. As far as I am aware the distinction was first articulated in the present case. In any event, I would reject it. I fully accept, of course, that contractual guarantees of performance and promises to exercise reasonable care are fundamentally different. The former may sometimes give greater protection than the latter. Proving breach of an obligation of reasonable care may be more difficult than proving breach of a guarantee. On the other hand, a party may in practice be willing to settle for the relative reassurance offered by the obligation of reasonable care undertaken by a professional man. But why should this difference between an absolute and relative contractual promise require a distinction in respect of the recovery of non-pecuniary damages? Take the example of a travel agent who is consulted by a couple who are looking for a golfing holiday in France. Why should it make a difference in respect of the recoverability of non-pecuniary damages for a spoiled holiday whether the travel agent gives a guarantee that there is a golf course very near the hotel, represents that to be the case, or negligently advises that all hotels of the particular chain of hotels are situated next to golf courses? If the nearest golf course is in fact 50 miles away a breach may be established. It may spoil the holiday of the couple. It is difficult to see why in principle only those plaintiffs who negotiate guarantees may recover non-pecuniary damages for a breach of contract. It is a singularly unattractive result that a professional man, who undertakes a specific obligation to exercise reasonable care to investigate a matter judged and communicated to be important by his customer, can in Lord Mustill's words in the *Ruxley Electronics* case (1995) 45 ConLR 61 at 72, [1996] AC 344 at 360: '... please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price'. If that were the law it would be seriously deficient. I am satisfied that it is not the law. In my view the distinction drawn by Hale LJ and by the majority in the Court of Appeal between contractual guarantees and obligations of reasonable care is unsound.

... The final argument was that by failing to move out the plaintiff forfeited a right to claim non-pecuniary damages. This argument was not advanced in the Court of Appeal. It will be recalled that the judge found as a fact that the plaintiff had acted reasonably in making 'the best of a bad job'. The plaintiff's decision also avoided a larger claim against the surveyor. It was never explained on what legal principle the plaintiff's decision not to move out divested him of a claim for non-pecuniary damages. Reference was made to a passage in the judgment of Bingham LJ in *Watts v Morrow* (1991) 26 ConLR 98 at 126, [1991] 1 WLR 1421 at 1445. Examination showed, however, that the observation, speculative as it was, did not relate to the claim for non-pecuniary damages (see the criticism of Professor MR Furmston 'Damages – Diminution in Value or Cost of Repair? – Damages for Distress' (1993) 6 JCL 64 at 65). The third argument must also be rejected."

Following next, along the lines of diminution in value and other claims/damage handling issues, comes the concept of abatement versus set-off.

Abatement versus set-off

In a construction setting there are times where the employer, as a defence to a claim by the contractor, can reduce the amount owed due to defects in the work. There are two approaches to this: one is "set-off" and the other "abatement". Set-off, which is a form

of counterclaim, has to do with the deduction of damages caused by, for example, a contractor's breach of contract and can be used to reduce or extinguish payments otherwise due from the employer under the contract. Abatement, however, deals with the right under the common law to reduce sums otherwise payable by asserting that the sum claimed has not been earned.⁹⁰

It should be noted that damages sought as part of a counterclaim, or advanced as part of a set-off, generally have to do with the cost of either correcting defective works or the effects of liquidated damages and their costs while abatement deals only with the resultant reduction in value of the work as a result of any defects.

In *Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd*,⁹¹ a dispute arose out of the construction of the steelwork for the new Wembley stadium by Cleveland Bridge with resulting claims of extensive defective work by Multiplex which it had listed in a series of schedules (e.g. Schedule 1A comprised 90 claims in respect of the defects in the work, Schedule 1B set out a further 380 alleged defects and Schedule 1D listed 259 alleged defects).

Here, Mr Justice Jackson, in the TCC, took the position that, to the extent that Multiplex would be able, in due course, to prove the existence of these defects it would be entitled to apply an abatement against the sums claimed by Cleveland. The correct measure of that abatement would be calculated by reference to the cost of the remedial works necessary as a consequence of the defects. He felt that it would be inappropriate to consider the market value of the partially completed steelwork since, in the conventional sense, the steelwork erected at Wembley had no market value except to Multiplex who were under a contractual obligation to complete the stadium. He then reviewed all of the abatement cases put forward and, in arriving at his decision, the judge provided a very helpful review of the principal cases dealing with the law of abatement. Cases, for example, such as *Mondel v Steel*,⁹² in which it was held that a shipowner could obtain a reduction from the price to be paid to the shipbuilders as the ship had not been built in accordance with the specification. It was interesting to note that here the shipowner could also have commenced a separate action to recover the cost of subsequent repairs to the ship, as these two actions were different in their legal nature.

Then, *Gilbert Ash (Northern) v Modern Engineering*⁹³ clarified the matter by stating that a main contractor was entitled to set-off its claims for defects and delays against sums certified as due to a subcontractor. The law on this subject was then further explained in *Acsim v Danish Contracting*,⁹⁴ where the court confirmed that work which had not been properly executed was capable of being a matter of pure defence rather than of counterclaim or set-off. Further, *Mellowes Archital v Bell Projects*⁹⁵ brought out the distinction between claims in respect of defective work and those in respect of delay in performance. Thus, where there was a claim for damages resulting from delayed performance, recovery would have to be by way of set-off or cross-claim

⁹⁰ It should be noted that pursuant to the provisions of the Housing Grants Construction and Regeneration Act 1996, a party is required to issue a compliant notice of withholding in order to be permitted to apply a set-off against an amount otherwise due. If a party seeks to apply an abatement, no notice of withholding is required insofar as a party is only obliged to pay the amount properly due.

⁹¹ [2008] EWHC 2220 (TCC) but see also the most recent appeal at [2010] EWCA Civ 139.

⁹² (1841) 151 ER 1288.

⁹³ [1974] AC 689, [1973] 3 WLR 421.

⁹⁴ (1992) 47 BLR 55.

⁹⁵ (1997) 87 BLR 26, 58 ConLR 22.

complying with the terms of the contract as abatement could only be made in respect of the difference in value of the work itself.

After this review he ruled that in a contract for the provision of labour and materials, where performance has been defective, the employer is entitled at common law to maintain a defence of abatement. Further, the measure of abatement is the amount by which the product of the contractor's endeavours has been diminished as a result of that defective performance. He also felt that the method of assessing diminution in value depends upon the facts and circumstances of each case and, in some cases, diminution in value may be determined by comparing the current market value of what has been constructed with the value of what should have been constructed. In other cases, it may be determined by the cost of the remedial works and that would be either in isolation or in conjunction with other factors for determining diminution in value. However, he noted that the measure of abatement can never exceed the sum that would otherwise have been due to the contractor as payment, and that abatement is not available as a defence to a claim for payment in respect of professional services. Further, he found that claims for delay, disruption or damage to anything other than that which the contractor has constructed could not feature in a defence of abatement.



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CHAPTER 11

Collateral warranties

Over the years the courts have started to show a readiness to award damages for the negligence of designers and/or contractors, even if the claimant did not have a direct contract with the contractor, i.e. was not in privity of contract, thus expanding the area of negligence claims beyond the original employer. However, in the late 1980s the courts took a more stringent position, finding that it was not possible to recover damages for negligence in relation to defects in buildings as such damages were economic losses, which are not recoverable in tort. The two key decisions in this regard were the House of Lords' decisions in *D&F Estates v Church Commissioners*¹ and *Murphy v Brentwood District Council*.² After these two cases it was clear that owners and those occupying buildings, such as tenants, needed a contractual method to claim damages against the designers and/or the contractors. Such claims had to be based in a breach of contract and, as they had no privity of contract with either the designer or contractor, such claims would fail. This problem extended not just to subsequent owners and occupiers but also to those providing the funds, other purchasers, and those who had any other interest in the building or project. The development of collateral warranties created the contractual relationship needed.

In some cases collateral warranties also seek to restrict liability by the addition of what are known as “net contribution clauses”. In the Scottish case of *Glasgow Airport Limited v Messrs Kirkman & Bradford*,³ Glasgow brought a claim against Kirkman, the structural engineers, after it had entered into a lease agreement for a unit at Glasgow airport, under which Glasgow undertook to carry out “landlord’s works” in terms of a building contract for the premises. It then entered into a building contract with main contractors for design work in relation to the floor slab. The main contractor then engaged Kirkman with liability limited to £2 million. Later, after the tenants had problems with a defective floor slab, Glasgow commenced proceedings to recover the £2 million as damages for breach of a collateral warranty. It was claimed that Kirkman failed to exercise reasonable skill and care in its work, which was denied, and in return Kirkman claimed that any liability to Glasgow under the collateral warranty was limited to costs and did not extend to damages that Glasgow was required to pay to third parties. Kirkman took the position that the collateral warranty should be construed by reference to its own terms and that the reference to “liability for costs” was confined to any sums which Glasgow was required to pay in respect of repair or reinstatement of the floor slab and did not extend to

1 [1989] AC 177, HL.

2 [1991] AC 398, HL.

3 [2007] CSIH 47, 2007 WL 1623394.

consequential losses. Needless to say Glasgow took the position that Kirkman's liability under the warranty was unrestricted and that it was entitled to recover all losses arising from its breach.

The court took the position that it made commercial sense for the words "liability for costs" to describe Kirkman's "whole liability" under the warranty. The question of construction was to be resolved by considering the express terms of the "sub-consultant's liability for costs" in relation to the general warranty as to reasonable care and skill. The court found nothing that would suggest an intention to restrict Kirkman's liability from that which would otherwise flow from the terms of the agreement, especially since there was no express provision that its liability was limited to costs. Accordingly, the warranty entitled Glasgow to recover all losses directly caused by Kirkman's breach, subject to the rules of remoteness.⁴ Accordingly, the collateral warranty meant that Kirkman's liability for costs was given the wider meaning, which had been Glasgow's contention in the first place and also included consequential losses arising from Kirkman's breach.

Thus, in *Glasgow*, without collateral warranties Glasgow Airport would not have been able to recover either its own or its tenant's losses directly from Kirkman. Here too it should be noted that liability was found not to have been limited to direct costs as liability was limited by a clause contained in the main contract, which was capped at a maximum of £2 million.

One recent case of note is *Swansea Stadium Management Company Ltd v Swansea City and County Council*,⁵ in which Mrs Justice O'Farrell granted summary judgment and struck out part of the tenant's claim against a contractor, Interserve Construction Limited, under a collateral warranty, finding that it had no real prospect of success as it was statute-barred under the Limitation Act 1980. In so doing, she applied established principles, but her judgment is of interest in that she confirmed, in line with previous authorities, that the relevant collateral warranty had retrospective effect. This is notable because collateral warranties are often entered into after the building contract; an alternative finding would mean that such warranties were unable to achieve the purpose for which they were created.

Collateral warranty provisions

Typically, most collateral warranties contain some sort of promise to be responsible for the obligations of the one giving the warranty under the primary contract along with a "no greater liability" clause. In effect this limits the warrantor's liability to an amount not greater than the amount of liability which could have arisen under the primary contract. Other provisions usually include language requiring the party to maintain insurance and supply further warranties if necessary, a listing of any prohibited materials and a clause allowing the assignment of the warranty. If a lender is involved it is also common to find provisions which allow the funder to take over the role of the employer in the event of any difficulty and, in effect, to act as the employer would under the primary contract. Further, in collateral warranties dealing with tenants, there are also provisions dealing with limitations of liability (or exclusions),

⁴ This apparent liability was then made subject to a net apportionment for the responsibility of others, any rights in defence that Kirkman had against Glasgow and a 12-year limitation period.

⁵ [2018] EWHC 2192 (TCC).

net contribution clauses and prohibitions on recovering consequential losses and liability caps, for example.

It should be noted that where the main contractor has any design responsibility, collateral warranties are generally required from the main contractor as well as from anyone involved with the design of the works. The problem is that the designers are, perhaps, able to insure their own negligent design but not able to prevent negligent work from being constructed, thus there is an argument against obtaining collateral warranties from those who have had no design responsibility like subcontractors.⁶

In *Safeway Stores Limited v Interserve Project Services Limited (formerly known as Tilbury Douglas Construction Limited)*⁷ Safeway found itself the recipient of a defective store and car park, developed by an independent developer, Chelverton, with the cost to correct being slightly in excess of £400,000. Unfortunately, the developer was insolvent, so Safeway commenced proceedings against the contractor, Interserve, by way of a collateral warranty. The contractor, however, was still owed over £1 million from the developer and took the position that they were covered by Clause 3.3 of the warranty which stated:

“... the contractor shall owe no duty or have any liability under this deed which are greater or of longer duration than that which it owes to the developer under the building contract.”

The court, however, took the position that while Safeway was not involved in the contractor's non-payment, its position was contractually linked to that of the insolvent developer, i.e. the developer's debt to the contractor could not be disregarded and would potentially reduce or eliminate the money due to Safeway even if it proved its case. The court wrote:

“... In this case, absent clause 3.3, Safeway could have proceeded against Interserve without any consideration of parallel liability to Chelverton. However, in my judgment, the purpose of clause 3.3 is clear: it is to restrict Interserve's liability to Safeway to its equivalent liability to Chelverton under the building contract. It still provides a direct route for Safeway to bring proceedings against Interserve, but it ensures that the extent of that liability is no greater than the liability of Interserve to Chelverton.”

The Contracts (Rights of Third Parties) Act 1999

With the advent of the Contracts (Rights of Third Parties) Act 1999 there is now a method of changing the reliance on separate collateral warranties by incorporating them into the main contract. As an example, under the JCT forms parties can either offer third parties a traditional collateral warranty or have third-party rights contained within the main contract.

The Contracts (Rights of Third Parties) Act 1999, in effect, abolishes the privity of contract issue, thus enabling non-parties to a contract (third parties) to enforce the terms of that contract so long as the contract expressly provides that they may do so, or purports to confer a benefit upon the third party. The third party must be expressly identified in the contract, either by name or as a member of a class, or by a particular

⁶ Additionally, main contractors and/or design consultants can be found to take full responsibility for their design as well as that of their subcontractors or subconsultants, so that such additional warranties may not be necessary.

⁷ [2005] EWHC 3085 (TCC).

description, but importantly the third party does not need to be in existence at the time the contract is executed.

As to the requirement that for a third party to enforce a term of a contract to which it is not a party, that third party must be expressly identified in the contract the recent decision of the High Court in *Chudley v Clydesdale Bank plc (t/a Yorkshire Bank)*⁸ is of interest.

Traditionally, the courts have interpreted this requirement for identification strictly. For example, in *Avraamides v Colwill*,⁹ a contract to buy all the shares of a building company included the promise “The purchasers undertake ... to pay in the normal course of time any liabilities properly incurred by the company as at 31 March 2003”. A married couple had a claim against the company, for failing to renovate their bathrooms properly, which could have been said to be a liability “properly incurred by the company”. However, as the clause did not expressly identify who should benefit from the right to payment, the Court of Appeal found that no enforceable right under the Contracts (Rights of Third Parties) Act 1999 arose.

In *Chudley*, however, the High Court adopted a rather more flexible approach (albeit obiter) than that previously taken. The claimant investors contended that they were entitled to enforce terms of a contract between the defendant bank and an investment company. Christopher Hancock QC held that the document in question was not intended to be legally binding, and so the claim failed. However, he held that, if there had been a binding contract, the claimant investors would have been entitled to enforce it, as it was permissible for the Court to identify a class of claimants, for the purposes of section 1(3) of the 1999 Act, by virtue of a process of construction of the express terms of the agreement. In this instance, reference to a client account, and thus to clients who paid into that account, would have been sufficient to identify the claimant investors as persons intended to benefit under the contract.

Further, under the Act, the remedies given to a third party are the same as those available had they been a party under the contract and importantly the actual parties to the contract are also prohibited (without the third party’s consent) from varying and/or adversely changing the contract in any way which would adversely affect the third party’s right to enforce the contract.

Importantly, in section 1 the Act sets out the circumstances in which a third party has a right to enforce a term of the contract and then, in section 2, it covers the situations in which such a term may be varied or rescinded. Section 3 provides the defences available to the promisor when the third party seeks to enforce the term. Sections 4 and 7(1) point out that section 1 does not affect the promisee’s rights, or any rights that the third party may have which are independent of the Act. The provisions of the Act do not apply to any contract entered into before 11 November 1999.

For a third party to enforce a term of a contract to which it is not a party, the following must apply:

- (1) The contract must expressly provide that the third party can do so; or
- (2) The term of the contract purports to confer a benefit on that third party.

It should be noted that this provision (b) does not apply if on a proper

⁸ [2017] EWHC 2177 (Comm).

⁹ [2006] EWCA Civ 1533.

construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

- (3) Additionally, the third party must be expressly identified in the contract:
 - (a) by name; or
 - (b) as a member of a class; or
 - (c) as answering a particular description. However, such party need not be in existence when the contract was entered into.

It should be noted that pursuant to the Act, third parties are only given the right to enforce a term of a contract subject to, and in accordance with, any other relevant terms of the contract. It is open to the parties to the contract to limit or place conditions on the third party's right. Thus, where the contract provides for arbitration of disputes, a third party must enforce its rights by way of arbitration and not litigation.

Accordingly, when a third party enforces a right under the contract it may be awarded any remedy that would have been available to it in an action for breach of contract if it had been a party to the contract. Thus, all rules relating to damages, injunctions, specific performance, etc. all apply accordingly, and this is done so that the burden regarding causation and remoteness are on the third party, and also require the third party to mitigate its loss. It should also be noted that the Act allows a contract term that excludes or limits the promisee's liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee's "agents or servants or sub-contractors" and is to be enforceable by these groups.

Enforcing variation and rescission of contract

The term "variation" in the Act means a variation to the terms of the agreement by further agreement between the original parties but it does not affect the terms of a "construction contract, which allow one of the parties to unilaterally alter, or 'vary', the details of the work to be carried out. Such a variation' is made 'under' the contract, not 'to' the contract".

Thus, once a third party acquires the right to enforce contract terms the original contracting parties cannot, by agreement, rescind or vary the contract in any way that may affect the third party's rights without the third party's consent but this is only if:

- (a) the third party has communicated its assent¹⁰ to the term to the promisor either by words or conduct and if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him;
- (b) the promisor is aware that the third party has relied on the term; or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

The Act does, however, provide the original contracting parties with the opportunity to rescind or vary an agreement but only where the agreement contains an express term permitting them to do so without the consent of the third party. Alternatively, the agreement may contain terms which specify the circumstances in which the consent of the third party is required before the agreement can be either rescinded or varied.¹¹

¹⁰ The Act provides certain powers to the court or arbitral tribunal to dispense with any consent that may be required under certain circumstances. In such an event the payment of compensation to the third party may be ordered if the tribunal thinks it fit.

¹¹ Contracts (Rights of Third Parties) Act 1999, para 2(3)(b).

Defences

In any claim by a third party against the promisor, the promisor may rely on any defence or set-off it may have arising out of the contract and relevant to the term being enforced, which would have been available to it, had the claim been by the promisee. The promisor may also rely on any defence or set-off, or make any counterclaim, where this would have been possible had the third party been a party to the contract.

There are three groups of recognised defences:

Defence 1

The promisor can use as either a defence or set-off any matter that arises from, or in connection with, the contract and is relevant to the term and would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee. For example, if the promisor and promisee agree that the promisee will construct a structure for the promisor so long as the promisor pays the contract price to a creditor of the promisee (the third party) and the creditor commences proceedings against the promisor, the promisor would be entitled to set-off or extinguish the claimed amount to the extent of any damages it had for shoddy construction.

Defence 2

The promisor can use any defence or set-off any matter if an express term of the contract provided for it to be available to the promisor in proceedings brought by the third party and it would have been available to the promisor by way of defence or set-off if the proceedings had been brought by the promisee. Thus, in the same scenario as above, the promisor and promisee agree as to an express term in the contract which provides that the promisor can raise against the creditor any matter which would have given the promisor a defence or set-off to a claim by the promisee, such as that the promisee had already paid off a portion of the money claimed by the creditor.

Defence 3

The promisor can use as a defence or set-off any matter, and by way of counterclaim any matter not arising from the contract, that would have been available to him by way of defence or set-off or, by way of counterclaim against the third party if the third party had been a party to the contract. So again, assume the earlier scenario but this time the promisor agrees to pay the promisee's creditor £50,000, but it turns out that the creditor already happens to owe the promisor the sum of £10,000. As such the promisor has a set-off to the creditor's claim and so the promisor has only to pay the creditor £40,000. Another way to approach this is if the creditor had, by misrepresentation, caused the promisor to enter into the contract with the promisee, without the promisee's having any knowledge of the misrepresentation, the promisor would have either a defence and/or counterclaim for damages against the creditor. It should be noted that this same defence would not have been available to the promisee.

The promisee's enforcement of the contract

The promisee's right under the Act to enforce the terms of the contract are not affected by the rights of the third party. "But where the Promisee has recovered either

an agreed sum or damages from the Promisor in respect of either the Third Party's loss or the Promisee's expense in making good that loss, the court or arbitral tribunal shall reduce any award to the Third Party enforcing a term in accordance with the Act to take account of the sum already recovered",¹² thus preventing the promisor from paying the same damages twice.

Further, should the promisor and promisee settle the dispute between themselves, this does not prevent any action thereafter by the third party. The settlement of a dispute between the contracting parties in respect of an obligation owed to a third party does not provide the promisor with a defence against a subsequent action by the third party. However, there are several exceptions, which exclude the rights of third parties in respect of several matters as follows:

- (1) a contract on a bill of exchange, promissory note or other negotiable instrument;
- (2) a contract binding on a company and its members under section 14 of the Companies Act 1985;
- (3) any term of a contract of employment against an employee;
- (4) any term of a worker's contract against a worker (including a home worker);
- (5) any term of a relevant contract against an agency worker;
- (6) a contract for the carriage of goods by sea;
- (7) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention.

It should also be noted that the Act prevents a third party from invoking section 2(2) of the Unfair Contracts Terms Act 1977 to contest the validity of a term excluding or limiting the promisor's liability under the Act to the third party for negligently caused loss or damage other than personal injury or death. Additionally, the Act is clear that the third party shall not be considered as a party to the contract for the purposes of any other Act and, in the event that the contract under which the third party is enforcing a right contains an arbitration agreement, the third party shall be treated as a party to that arbitration agreement. This provision applies where the arbitration agreement is in writing for the purposes of Part I of the Arbitration Act 1996.

Opting out of the Act

Section 1(2) of the Act states: "if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party", then the provisions of the Act will not apply, and thus the parties can, either by express words or by implication, choose to contract out of the provisions of the Act.

¹² Contracts (Rights of Third Parties) Act 1999, para 5(b).



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CHAPTER 12

Non-contract liability

Negligence

The concept of negligence and duty has been discussed in earlier chapters, particularly in a construction setting, and encompasses just one of various forms of non-contract liability.

In *Anns v Merton LBC*,¹ the local council in 1962 approved building plans for a block of flats and construction was completed that year. Then, in 1970, structural movements led to the walls cracking and other damage. Two years later the lessees commenced proceedings against the council, alleging negligence in failing to inspect the building walls properly to ensure that the foundations were built to the appropriate depth as shown on the approved plans. Upon hearing the council's appeal concerning whether the actions were statute-barred, the House of Lords agreed to consider whether the council was under a duty of care. The court held that under the Public Health Act 1936 the council had a power, as opposed to a duty, to inspect building work to ensure compliance with the bylaws, and that the failure to carry out inspections would not render the council liable unless two things were proved: (1) that it had failed to properly exercise its discretion not to make an inspection; and (2) that it failed to exercise reasonable care to ensure compliance with the bylaws. It was further held that where such inspections were carried out, the council retained a discretion as to the manner in which such inspections were performed and if such discretion was not bona fide exercised, the council might be liable in negligence for failure to take reasonable care.

Indeed, this was the applicable law in the UK for about ten years but then, in 1989, the House of Lords took a different direction in *D & F Estates Ltd v Church Commissioners for England*.² In this case the Church Commissioners owned a block of flats, which had been constructed between 1963 and 1965. D & F leased one of the flats for 98 years commencing on 25 March 1963 and took possession at that time. Then, in 1980, part of the plaster from the ceiling of one of the bedrooms fell to the floor, which was found to have been caused by faulty work by the plastering subcontractor. The trial court held that the original contractor, Wates, had acted reasonably in subcontracting the plastering work and in selecting the subcontractor, but had failed adequately to supervise the work. The court accordingly awarded damages to D & F for the cost of remedial work undertaken and for the estimated cost of future remedial works, as well as damages in respect of loss of rent while the future remedial works were carried out. The court also awarded £500 each to the plaintiffs in respect of loss

¹ [1978] AC 728.

² [1988] 3 WLR 368, [1988] 2 All ER 992, 41 BLR 1, 15 ConLR 35.

of amenity during the period in which they were occupying the flat while remedial works were done.

However, the Court of Appeal reversed the judge's decision, primarily because the original contractor, Wates, employed competent subcontractors to carry out the plastering work and as such owed no further duty of care to the plaintiffs in relation to the execution of the work by the subcontractors. The Court of Appeal also held that Wates was not liable for damages in tort in respect of the cost of the future remedial work not yet carried out, since it represented pure economic loss. The plaintiffs appealed and the House of Lords dismissed the appeal taking the position that the cost of replacing the defective plaster itself, either as carried out in 1980 or as intended to be carried out in future, was not an item of damage for which the original builders could possibly be held liable in negligence. To make them liable would be to impose upon them, for the benefit of those with whom they had no contractual relationship, an obligation of providing a warranty as to the quality of the plaster in regard to materials, workmanship and fitness for purpose. Further, it was held that Wates, as the original contractor, was also not vicariously liable for the negligence of its subcontractor nor did it owe a duty to future lessees and occupiers of the building to take reasonable care that it contained no hidden defects to persons or property and, finally, that it was not under any duty to supervise the work of its subcontractors to ensure that the subcontracted work was not negligently performed so as to cause such latent defects. Of particular interest is what Lord Bridge of Harwich wrote and his summation³ of the existing case law:

"I do not intend to embark on the daunting task of reviewing the wealth of other ... authority which bears, directly or indirectly, on the question whether the cost of making good defective plaster in the instant case is irrecoverable as economic loss, which seems to me to be the most important question for determination in the present appeal. My abstention may seem pusillanimous, but it stems from a recognition that the authorities, as it seems to me, speak with such an uncertain voice that, no matter how searching the analysis to which they are subject, they yield no clear and conclusive answer. It is more profitable, I believe, to examine the issue in the light of first principles.

However, certain authorities are of prime importance and must be considered. The decision of your Lordships' House in *Junior Books Ltd v Veitchi Co Ltd* (1982) has been analysed in many subsequent decisions of the Court of Appeal. I do not intend to embark on a further such analysis. The consensus of judicial opinion, with which I concur, seems to be that the decision of the majority is so far dependent upon the unique, albeit non-contractual relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict. The dissenting speech of Lord Brandon of Oakbrook on the other hand enunciates with cogency and clarity principles of fundamental importance which are *clearly* applicable to determine the scope of the duty of care owed by one party to another in the absence, as in the instant case, of either any contractual relationship or any such uniquely proximate relationship as that on which the decision of the majority in *Junior Books* was founded. Lord Brandon said:

'My Lords, it appears to me clear beyond doubt that, there being no contractual relationship between the respondents and the appellants in the present case, the foundation, and the only foundation, for the existence of a duty of care owed by the defenders to the pursuers, is the principle laid down in the decision of your Lordships'

³ See also Michael Furmston, *Powell-Smith & Furmston's Building Contract Casebook* 4th Edition, Blackwell Publishing, 2006.

House in *Donoghue v Stevenson* (1932). The actual decision in that case related only to the duty owed by a manufacturer of goods to their ultimate user or consumer, and can be summarised in this way: a person who manufactures goods which he intends to be used or consumed by others, is under a duty to exercise such reasonable care in their manufacture as to ensure that they can be used or consumed in the manner intended without causing physical damage to persons or their property.

While that was the actual decision in *Donoghue v Stevenson*, it was based on a much wider principle embodied in passages in the speech of Lord Atkin, which have been quoted so often that I do not find it necessary to quote them again here. Put shortly, that wider principle is that, when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission.

It is, however, of fundamental importance to observe that the duty of care laid down in *Donoghue v Stevenson* was based on the existence of a danger of physical injury to persons or their property. That this is so, is clear from the observations made by Lord Atkin with regard to the statements of law of Brett MR in *Heaven v Pender* (1883). It has further, until the present case, never been doubted, so far as I know, that the relevant property for the purpose of the wider principle on which the decision in *Donoghue v Stevenson* was based, was property other than the very property which gave rise to the danger of physical damage concerned’.”

Later, Lord Brandon, having referred to the well-known two-stage test of the existence of a duty of care propounded by Lord Wilberforce in *Anns*, asked himself, at the second stage, “whether there are any considerations which ought, inter alia, to limit the scope of the duty which exists”. He continued:

“To that second question I would answer that there are two important considerations which ought to limit the scope of the duty of care which it is common ground was owed by the appellants to the respondents on the assumed facts of the present case. The first consideration is that, in *Donoghue v Stevenson* itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat of danger, arises. To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority.

The second consideration is that there is no sound policy reason for substituting the wider scope of the duty of care put forward for the respondents for the more restricted scope of such duty put forward by the appellants. The effect of accepting the respondents’ contention with regard to the scope of the duty of care involved would be, in substance, to create, as between two persons who are not in any contractual relationship with each other, obligations of one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them.

In the case of a manufacturer or distributor of goods, the position would be that he warranted to the ultimate user or consumer of such goods that they were as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them. In the case of sub-contractors such as those concerned in the present case, the position would be that they warranted to the building owner that the flooring, when laid, would be as well designed, as free from defects of any kind and as fit for its contemplated purpose as the exercise of reasonable care could make it. In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.

It is, I think, just worthwhile to consider the difficulties which would arise if the wider scope of the duty of care put forward by the respondents were accepted. In any case where complaint was made by an ultimate consumer that a product made by some persons with whom he himself had no contract was defective, by what standard or standards of quality would the question of defectiveness fall to be decided? In the case of goods bought from a retailer, it could hardly be the standard prescribed by the contract between the retailer and the wholesaler, or between the wholesaler and the distributor, or between the distributor and the manufacturer, for the terms of such contract would not even be known to the ultimate buyer. In the case of subcontractors such as the appellants in the present case, it could hardly be the standard prescribed by the contract between the sub-contractors and the main contractors, for, although the building owner would probably be aware of those terms, he could not, since he was not a party to such contract, rely on any standard or standards prescribed in it. It follows that the question by what standard or standards alleged defects in a product complained of by its ultimate user or consumer are to be judged remains entirely at large and cannot be given any just or satisfactory answer.'

The reasoning in these passages receives powerful support from the unanimous decision of the Supreme Court of the United States of America in *East River Steamship Corp v Transamerica Delaval Inc* (1986). Charterers of supertankers claimed damages from turbine manufacturers resulting from alleged design and manufacturing defects which caused the supertankers to malfunction while on the high seas. The court held *inter alia*, that:

'whether stated in negligence or strict liability, no products-liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss'

This appears to undermine the earlier American authorities referred to by Richmond P in the New Zealand case of *Bowen v Paramount Builders (Hamilton) Ltd* (1977). The opinion of Lord Brandon of Oakbrook in *Junior Books Ltd v Veitchi Co Ltd* (1982) and that expressed by the Supreme Court of the United States of America are entirely in line with the majority decision of the Supreme Court of Canada in *Rivtow Marine Ltd v Washington Iron Works* (1973) that the damages recoverable from the manufacturer by the hirers of a crane which was found to have a defect which made it unsafe to use did not include the cost of repairing the defect.

These principles are easy enough to comprehend and probably not difficult to apply when the defect complained of is in a chattel supplied complete by a single manufacturer. If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v Stevenson* (1932) principle. The chattel is now defective in quality, is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.

If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring. I do not find it necessary for the purpose of deciding the present appeal to express any concluded view as to how far, if at all, the ratio decidendi of *Anns v Merton London Borough* (1977) involves a departure from this principle establishing a new cause of action in negligence

against a builder when the only damage alleged to have been suffered by the plaintiff is the discovery of a defect in the very structure which the builder erected.

My example of the garden wall, however, is that of a very simple structure. I can see that more difficult questions may arise in relation to a more complex structure like a dwelling-house. One view would be that such a structure should be treated in law as a single indivisible unit. On this basis, if the unit becomes a potential source of danger when a hitherto hidden defect in construction manifests itself, the builder, as in the case of the garden wall, should not in principle be liable for the cost of remedying the defect. It is for this reason that I now question the result, as against the builder, of the decision in *Batty v Metropolitan Property Realization Ltd* (1978).

However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to 'other property', and whether the argument should prevail may depend on the circumstances of the case. It would be unwise and it is unnecessary for the purpose of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract. I should wish to hear fuller argument before reaching any conclusion as to how far the decision of the New Zealand Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd* (1977) should be followed as a matter of English law. I do not regard *Anns v Merton London Borough* (1977) as resolving that issue.

In the instant case the only hidden defect was in the plaster. The only item pleaded as damage to other property was 'cost of cleaning carpets and other possessions damaged or dirtied by falling plaster; £50'. Once it appeared that the plaster was loose, any danger of personal injury or of further injury to other property could have been simply avoided by the timely removal of the defective plaster. The only function of plaster on walls and ceilings, unless it is itself elaborately decorative, is to serve as a smooth surface on which to place decorative paper or paint. Whatever case there may be for treating a defect in some part of the structure of a building as causing damage to 'other property' when some other part of the building is injuriously affected, as for example cracking in walls caused by defective foundations, it would seem to me entirely artificial to treat the plaster as distinct from the decorative surface placed upon it. Even if it were so treated, the only damage to 'other property' caused by the defective plaster would be the loss of value of the existing decorations occasioned by the necessity to remove loose plaster which was in danger of falling. When the loose plaster in [the flat] was first discovered in 1980, the flat was in any event being redecorated.

It seems to me clear that the cost of replacing the defective plaster itself, either as carried out in 1980 or as intended to be carried out in future, was not an item of damage for which the builder of [the flats] could possibly be made liable in negligence under the principle of *Donoghue v Stevenson* or any legitimate development of that principle. To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose. I am glad to reach the conclusion that this is not the law, if only for the reason that a conclusion to the opposite effect would mean that the courts, in developing the common law, had gone much farther than the legislature were prepared to go in 1972, after comprehensive examination of the subject by the Law Commission, in making builders liable for defects in the quality of their work to all who subsequently acquire interests in buildings they have erected. The statutory duty imposed by the Act of 1972 was confined to dwelling-houses and limited to defects appearing within six years. The common law duty, if it existed, could not be so confined or so limited. I cannot help feeling that consumer protection is an area of law where legislation is much better left to the legislators.

It follows from these conclusions that, even if Wates themselves had been responsible for the plaster-work in [the flat], the damages recoverable from them by *D & F Estates* would have been a trivial sum and [the plaintiffs] could have established no claim for damages for disturbance. But, as already indicated, the Court of Appeal's primary ground for

allowing Wates' appeal was that they had properly employed competent sub-contractors to do the plaster work for whose negligence they were not liable, and it is to this issue that I must now turn. The submission in support of the appeal was put in three ways which amount, as it seems to me, to three alternative formulations of what is, in essence, the same proposition of law. Expressed in summary form the three formulations are (i) that Wates were vicariously liable for the negligence of their subcontractor; (ii) that Wates as main contractors responsible for building [the flats] owed a duty to future lessees and occupiers of flats to take reasonable care that the building should contain no hidden defects of the kind which might cause injury to persons or property and that this duty could not be delegated; (iii) that Wates as main contractors owed a duty of care to future lessees and occupiers of flats to supervise their sub-contractors to ensure that the sub-contracted work was not negligently performed so as to cause such defects.

It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. To this general rule there are certain well-established exceptions or apparent exceptions. Without enumerating them it is sufficient to say that it was accepted by [counsel on behalf of the appellants] that the instant case could not be accommodated without any of the recognised and established categories by which the exceptions are classified. But it has been rightly said that the so-called exceptions 'are not true exceptions (at least so far as the theoretical nature of the employer's liability is concerned) for they are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to the plaintiff. The liability is thus not truly a vicarious liability and is to be distinguished from the vicarious liability of a master for his servant'.

Herein lies [counsel's] real difficulty. If Wates are to be held liable for the negligent workmanship of their sub-contractors (assumed for this purpose to result in dangerously defective work) it must first be shown that in the circumstances they had assumed a personal duty to all the world to ensure that [the flats] should be free of dangerous effects. This was the assumption on which the judge proceeded when he said: 'The duty of care itself is of course not delegable.' Whence does this non-delegable duty arise? [Counsel] submits that it is a duty undertaken by any main contractor in the building industry who contracts to erect an entire building. I cannot agree because I cannot recognise any legal principle to which such an assumption of duty can be related.

Just as I may employ a building contractor to build me a house, so may the building contractor, subject to the terms of my contract with him, in turn employ another to undertake part of the work. If the mere fact of employing a contractor to undertake building work automatically involved the assumption by the employer of a duty of care to any person who may be injured by a dangerous defect in the work caused by the negligence of the contractor, this would obviously lead to absurd results. If the fact of employing a contractor does not involve the assumption of any such duty by the employer, then one who has himself contracted to erect a building assumes no such liability when he employs an apparently competent independent sub-contractor to carry out part of the work for him. The main contractor may, in the interests of the proper discharge for his own contractual obligations, exercise a greater or lesser degree of supervision over the work done by the sub-contractor. If in the course of supervision, the main contractor in fact comes to know that the sub-contractor's work is being done in a defective and foreseeably dangerous way and if he condones that negligence on the part of the subcontractor, he will no doubt make himself potentially liable for the consequences as a joint tortfeasor. But the judge made no finding against Wates of actual knowledge and his finding that they 'ought to have known' what the manufacturer's instructions were depended on and was vitiated by his earlier misdirection that Wates owed a duty of care to future lessees of [the] flats in relation to their subcontractor's work.

[He] relied on the decision of Judge Edgar Fay QC in *Queensway Discount Warehouses v Graylaw Properties Ltd* (1982) and on the decision of Judge Sir William Stabb QC in *Cynat Products Ltd v Landbuild (Investment and Property) Ltd* (1984). In so far as the former decision relied on any general principle of law that a main contractor is liable to a third party who suffers damage from the negligently defective work done by his sub-contractor, I can only say, as already indicated, that I can find no basis in law to support

any such principle. The relevant issue in the latter case, as in *Batty v Metropolitan Property Realizations Ltd* (1978) in relation to the liability of the developer defendants, was whether the defendants' admitted contractual liability was matched by a parallel liability in tort. In both cases the issue was of importance only as bearing upon the liability of insurers to indemnify the defendants. I do not find authorities directed to that question of any assistance in determining the scope of the duty of care which one person owes to another entirely independently of any contractual relationship on the basis of the *Donoghue v Stevenson* (1932) principle.

More important is the decision of the New Zealand Court of Appeal in *Mount Albert Borough Council v Johnson* (1979). This was another case of the purchaser of a flat suffering damage due to the subsidence of a building erected on inadequate foundations. One of the issues was whether the plaintiff was entitled to recover damages against the development company which had employed independent contractors to erect the building. Delivering the judgment of Somers J and himself Cooke J said:

'In the instant type of case a development company acquires land, subdivides it and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially - as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in *Anns* may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.'

As a matter of social policy this conclusion may be entirely admirable. Indeed, it corresponds almost precisely to the policy underlying the Law Commission's recommendations in para 26 of the report 'Civil Liability of Vendors and Lessors for Defective Premises' (Law Com No 40) to which I have already referred and which was implemented by section 1(1) and (4) of the 1972 Act. As a matter of legal principle, however, I can discover no basis on which it is open to the court to embody this policy in the law without the assistance of the legislature and it is again, in my opinion, a dangerous course for the common law to embark upon the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations.

The conclusion I reach is that Wates were under no liability to the plaintiffs for damage attributable to the negligence of their plastering sub-contractor in failing to follow the instructions of the manufacturer of the plaster they were using, but that in any event such damage could not have included the cost of renewing the plaster."

The principles discussed in this case were further amplified two years later in the previously discussed House of Lords case, *Murphy v Brentwood District Council*.⁴ In 1970, Murphy bought one of a pair of houses built on a concrete raft foundation on an in-fill site. Unfortunately, the raft proved to be defective, causing differential settlement. Murphy, being unable to repair the defect, sold the house and suffered a £35,000 loss. This led him to commence proceedings against Brentwood District Council for their negligent approval of the plans, claiming that there had been an imminent risk to health and safety from fractured gas and oil pipes. The House of Lords held that the loss suffered was economic loss and the council was not liable in

⁴ [1990] 2 All ER 908. It should also be noted that in addition to departing from *Anns* in *Murphy v Brentwood* the House of Lords also ruled the same way in *Department of Environment v Thomas Bates* [1991] 1 AC 499 which is discussed *infra*, (NB Lord Mackay and Lord Bridge sat in *Murphy* but not in *Bates*), giving judgment in both on the same day.

tort for negligent application of the building regulations where resulting defects had not caused physical injury. Lord Oliver wrote:

“I have found it impossible to reconcile the liability of the builder propounded in *Anns* with any previously accepted principles of the tort of negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship.”

Based upon this, as the builder did not owe such a duty, thus the local authority could not owe such a duty either.⁵

In *Murphy* Lord Oliver went on to explain that economic loss would not be recoverable in negligence where the loss was too remote or where it would be impossible to contain liability within acceptable bounds,⁶ and he wrote:

“The critical question ... is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained ... The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such – or, to use the favoured expression, whether it is of sufficient “proximity” – that it imposes upon the latter a duty to take care to avoid or prevent that loss which has in fact been sustained.”

Lord Keith of Kinkel also reviewed the pre-existing cases of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, *Junior Books Ltd v Veitchi Co Ltd*, *Anns v Merton LBC*, and *D & F Estates Ltd v Church Commissioners for England*, as well as others, and wrote:

“Consideration of the nature of the loss suffered in this category of cases is closely tied up with the question of when the cause of action arises. Lord Wilberforce in *Anns* (1978) regarded it as arising when the state of the building is such that there is present an imminent danger to the health or safety of persons occupying it. That state of affairs may exist when there is no actual physical damage to the building itself, though Lord Wilberforce had earlier referred to the relevant damage being material physical damage. So his meaning may have been that there must be a concurrence of material physical damage and also present or imminent danger to the health or safety of occupants. On that view there would be no cause of action where the building had suffered no damage (or possibly, having regard to the word ‘material’, only very slight damage) but a structural survey had revealed an underlying defect, presenting imminent danger. Such a discovery would inevitably cause a fall in the value of the building, resulting in economic loss to the owner. That such is the nature of the loss is made clear in cases where the owner abandons the building as incapable of being put in a safe condition (as in *Batty*), or where he chooses to sell it at the lower value rather than undertake remedial works. In *Pirelli General Cable Works Ltd v Oscar Faber & Partners* (1983) it was held that the cause of action in tort against consulting engineers who had negligently approved a defective design for a chimney arose when damage to the chimney caused by the defective design first occurred, not when the damage was discovered or with reasonable diligence

⁵ It should be noted here that this ruling, along with the others, did not affect the ability of a future occupier of a building to recover damages against a construction professional where the professional's negligence caused personal injury or damage to other property, see e.g. *Baxall Securities Ltd v Sheard Walsh Partnership* [2002] BLR 100 (CA) but as to economic loss, damages were generally irrecoverable in tort against a professional unless the claim could be brought within the concept of negligent misstatement set out in *Hedley Byrne v Heller & Partners*, *infra*.

⁶ This is known as the “floodgates argument”.

might have been discovered. The defendants there had in relation to the design been in contractual relations with the plaintiffs, but it was common ground that a claim in contract was time-barred. If the plaintiffs had happened to discover the defect before any damage had occurred there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage, without having to wait until some damage had occurred. They would have suffered economic loss through having a defective chimney upon which they required to expend money for the purpose of removing the defect. It would seem that in a case such as *Pirelli* where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given. The plaintiffs built the chimney as they did in reliance on that advice. The case would accordingly fall within the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964). I regard *Junior Books Ltd v Veitchi Co Ltd* (1983) as being an application of that principle.

In my opinion it must now be recognised that, although the damage in *Anns* was characterised as physical damage by Lord Wilberforce, it was purely economic loss.

In *D & F Estates Ltd v Church Commissioners for England* (1989) both Lord Bridge of Harwich and Lord Oliver of Aylmerton expressed themselves as having difficulty in reconciling the decision in *Anns* with pre-existing principle and as being uncertain as to the nature and scope of such new principle as it introduced. Lord Bridge suggested that in the case of a complex structure such as a building, one element of the structure might be regarded for *Donoghue v Stevenson* purposes as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part might qualify to be treated as damage to 'other property'. I think that it would be unrealistic to take this view as regards a building the whole of which had been erected and equipped by the same contractor. In that situation the whole package provided by the contractor would, in my opinion, fall to be regarded as one unit rendered unsound as such by a defect in the particular part. On the other hand where, for example, the electric wiring had been installed by a sub-contractor and due to a defect caused by lack of care a fire occurred which destroyed the building, it might not be stretching ordinary principles too far to hold the electrical sub-contractor liable for the damage. If in the *East River* case the defective turbine had caused the loss of the ship, the manufacturer of it could consistently with normal principles, I would think, properly have been held liable for that loss. But even if Lord Bridge's theory were to be held acceptable, it would not seem to extend to the founding of liability upon a local authority, considering that the purposes of the Act of 1936 are concerned with averting danger to health and safety, not danger or damage to property. Further, it would not cover the situation which might arise through discovery, before any damage had occurred, of a defect likely to give rise to damage in the future.

Liability under the *Anns* decision is postulated upon the existence of a present or imminent danger to health or safety. But considering that the loss involved in incurring expenditure to avert the danger is pure economic loss, there would seem to be no logic in confining the remedy to cases where such danger exists. There is likewise no logic in confining it to cases where some damage (perhaps comparatively slight) has been caused to the building, but refusing it where the existence of the danger has come to light in some other way, for example through a structural survey which happens to have been carried out, or where the danger inherent in some particular component or material has been revealed through failure in some other building. Then there is the question whether the remedy is available where the defect is rectified, not in order to avert danger to an inhabitant occupier himself, but in order to enable an occupier, who may be a corporation, to continue to occupy the building through its employees without putting those employees at risk.

In my opinion it is clear that *Anns* did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.

In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision. In relation to the scope of the duty owed by a local authority it proceeded upon what must, with due respect to its source, be regarded as a somewhat

superficial examination of principle and there has been extreme difficulty, highlighted most recently by the speeches in *D & F Estates*, in ascertaining upon exactly what basis of principle it did proceed. I think it must now be recognised that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. Others have been distinguished in the Court of Appeal. The result has been to keep the effect of the decision within reasonable bounds, but that has been achieved only by applying strictly the words of Lord Wilberforce and by refusing to accept the logical implications of the decision itself. These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss. There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.”

It should be noted that while referring to the decision in *Junior Books Ltd v Veitchi Co Ltd*,⁷ Lord Bridge of Harwich expressed the view that there could be situations where “even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss”.

The House of Lords reviewed the decisions in *Anns* and *Murphy* in *Department of the Environment v Thomas Bates and Sons Ltd and others*.⁸ Here, the Department of the Environment was the underlessee of the upper nine storeys of an 11-storey office block built by Bates in 1970–71. Ten years later, in 1981–82, The Department of the Environment discovered that low-strength concrete had been used in the supporting pillars of the building and, although they could support the building’s existing load, they could not support its design load. As a result the Department of the Environment carried out remedial works and commenced proceedings against Bates for the costs incurred. The issue was whether a builder is liable in tort for the cost of making a building suitable for its intended purpose. It was held that the costs were not recoverable from the builder in tort as there was no damage to the building and no threat to health and safety. Here, the House of Lords was faced with a review of the decision in *Anns* and applied the holding in *Murphy v Brentwood*. Lord Keith pointed out the distinctions and wrote:

“... The foundation of the plaintiffs’ case is *Anns v Merton London Borough Council* (1978). That decision was concerned directly only with the liability in negligence of a local authority in respect of its functions in regard to securing compliance with building byelaws and regulations. The position of the builder as regards liability towards a remote purchaser of a building which suffered from defects due to carelessness in construction was touched on very briefly. However, it has since been generally accepted that similar principles govern the liability both of the local authority and of the builder.

It has been held by this House in *Murphy v Brentwood District Council* that *Anns* was wrongly decided and should be departed from, by reason of the erroneous views there expressed as to the scope of any duty of care owed to purchasers of houses by local authorities when exercising the powers conferred upon them for the purpose of securing compliance with building regulations. The process of reasoning by which the House reached its conclusion necessarily included close examination of the position of the builder who was primarily responsible, through lack of care in the construction process, for the presence of defects in the building. It was the unanimous view that, while the builder would be liable under the principle of *Donoghue v Stevenson* (1932) in the event of the

7 [1983] 1 AC 520.

8 [1991] 1 AC 499, [1990] 3 WLR 457, [1990] 2 All ER 943.

defect, before it had been discovered, causing physical injury to persons or damage to property other than the building itself, there was no sound basis in principle for holding him liable for the pure economic loss suffered by a purchaser who discovered the defect, however such discovery might come about, and required to expend money in order to make the building safe and suitable for its intended purpose.

In the present case it is clear that the loss suffered by the plaintiffs is pure economic loss. At the time the plaintiffs carried out the remedial work on the concrete pillars the building was not unsafe by reason of the defective construction of these pillars. It did, however, suffer from a defect of quality which made the plaintiffs' lease less valuable than it would otherwise have been, in respect that the building could not be loaded up to its design capacity unless any occupier who wished so to load it had incurred the expenditure necessary for the strengthening of the pillars. It was wholly uncertain whether during the currency of their lease the plaintiffs themselves would ever be likely to require to load the building up to its design capacity, but a purchaser from them might well have wanted to do so. Such a purchaser, faced with the need to strengthen the pillars, would obviously have paid less for the lease than if they had been sound. This underlines the purely economic character of the plaintiffs' loss. To hold in favour of the plaintiffs would involve a very significant extension of the doctrine of *Anns* so as to cover the situation where there existed no damage to the building and no imminent danger to personal safety or health. If *Anns* were correctly decided, such an extension could reasonably be regarded as entirely logical. The undesirability of such an extension, for the reasons stated in *Murphy v Brentwood District Council*, formed an important part of the grounds which led to the conclusion that *Anns* was not correctly decided. That conclusion must lead inevitably to the result that the plaintiffs' claim fails. I would dismiss the appeal."

It should be noted that the views taken by the House of Lords are not universally held. A particularly good example of this is the approach taken in Canada. There, the view was that, as to municipal tort liability, *Anns* was correct and the Supreme Court of Canada quickly adopted the principles of the *Anns* case in *The City of Kamloops v Nielsen*,⁹ which was decided in 1984. Generally, the rule became that there was no private negligence duty owed by governments to take care in making their "policy" decisions, but such a duty may be owed in their "operational" activities. Mr Justice Linden of the Federal Court of Appeal, noted:¹⁰

"This development might prompt one to observe, paradoxically, that the rule that 'the King can do no wrong' has been changed to 'the King can do only little wrongs', the big wrongs still being immune from ordinary tort liability. Mr Justice Linden also makes the point that the scope of government liability in the United States is narrower than it is in Canada, as it is based on a formulation which expressly excludes discretionary decisions, something that is not found in Canadian statutes."¹¹

In Canada, while it was noted that the House of Lords had taken a step back from *Anns* in *Murphy v Brentwood District Council*, this trend was not followed by the Supreme Court of Canada, which resolutely went forward to define the rules to be applied in distinguishing between policy and operational decisions, and as a result, government tortious liability.

9 [1984] 2 SCR 2.

10 See Mr Justice Allen M Linden, *Tort Liability of Governments*, CBA, Ontario, 1995.

11 It should be noted that there is no debate over liability for intentional torts and abuse of power. Similarly, immunity is conceded with respect to legislative, judicial and quasi-judicial decision-making. The debate remains with respect to what set of rules should be applied to determine whether the government is liable for the negligence of government employees such as the inspector, the regulator, the fireman, the road maintenance crew or the policeman – see Charles MK Loopstra QC, "Canadian Municipal Liability in a Risk Management Context", *Municipal Attorney Article*, October 1995.

In *Just v The Queen in the Right of British Columbia*,¹² the court started to define the rules. In that case, Just and his daughter were travelling along a highway to a ski resort when their car was struck by a falling rock, killing the daughter and seriously injuring the plaintiff. The government was sued for the negligent maintenance of the highway. The action had been dismissed in the lower courts on the basis that the highway inspection system was one of planning and policy, out of which no negligence duty could arise.

The Supreme Court of Canada attempted to simplify the process of making distinctions between true policy decisions and what is considered to be “implementation” and wrote:

“The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at different levels, although usually at a high level ... As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions.”

Thus, if the court comes to the conclusion that a private law duty exists that is clearly not exempted either by a statutory provision or because it was a true policy decision, then the court must still define that duty in light of the surrounding circumstances.¹³ Where inspections are required the court stated:

“In each case, the frequency and method must be reasonable in light of all the surrounding circumstances. The governmental agency should be entitled to demonstrate that balanced against the nature and quantity of the risk involved, its system of inspection was reasonable in light of all the circumstances, including budgetary limits, personnel and equipment available to it and it had met the standard duty of care imposed upon it.”

Accordingly, the court sent the case back for retrial at which time Just won when the court held that the government owed a tort duty, but it was still necessary to determine whether the proper standard of care had been met by the highway department employees, based on the policy decisions, in effect with respect to the manpower resources available, the inspection programme and the method of carrying out such inspections. The example given was that “if the government decides to hire three employees to manage 100 miles of road that is a policy decision. Doing improper, incomplete or insufficient inspections, or failing to inspect in accordance with an approved schedule falls within the ambit of implementation”.¹⁴

Following this decision the Canadian court reviewed two other cases and while not finding any liability, still did not go back to pre-*Anns* decisions. Then, in 1995, the Supreme Court of Canada dealt with the case of *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd*.¹⁵ In that case, in 1972, a Winnipeg developer entered into a contract with Bird Construction for the construction of a 15-storey, 94-unit apartment, which was ultimately completed in 1974. The plans were prepared by architectural firm Smith-Carter. In 1978, ownership of the building was transferred to Winnipeg Condominium Corporation. In 1982, Winnipeg Condominium became

12 [1989] 2 SCR 1228.

13 See e.g. Charles MK Loopstra QC, “Canadian Municipal Liability in a Risk Management Context”, *Municipal Attorney Article*, October 1995.

14 *Ibid.*

15 (1996) 50 Con LR 124.

concerned about the exterior cladding, which consisted of four-inch-thick slabs of stone. They consulted Smith-Carter and a firm of structural engineers who reported that the cladding was structurally sound and recommended minor works, which were carried out. Then, seven years later, a large section of cladding, approximately 20 feet in length, fell from the ninth storey and Winnipeg Condominium had to spend over \$1.5 million removing and replacing the entire cladding. They commenced proceedings against Bird Construction, the architects, and Kornovski and Keller who were the cladding subcontractors. The matter ultimately ended up in the Canadian Supreme Court which held that contractors who take part in the construction and design of a building owe a duty in tort to subsequent purchasers of the building if it is foreseeable that failure to take reasonable care in constructing the building will create defects that pose a substantial danger to the health and safety of the occupants. The court took the position that allowing recovery against contractors in tort for the cost of repair of dangerous defects serves an important preventative function by encouraging building owners to repair, and that there is a policy difference between work which is dangerously defective and work which is merely shoddy and substandard. The court wrote:

“This case gives this court the opportunity once again to address the question of recoverability in tort for economic loss. In *Canadian National Rly Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1049, 91 DLR (4th) 289 at 299, I made reference to an article by Professor Feldthusen, ‘Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow’ (1990–91) 17 Can Bus LJ 356 at 357–358, in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen, namely: 1. The independent liability of statutory public authorities; 2. Negligent misrepresentation; 3. Negligent performance of a service; 4. Negligent supply of shoddy goods or structures; and 5. Relational economic loss. I stressed in *Canadian National Rly Co v Norsk Pacific Steamship Co* that the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise. This case raises issues different from that in *Canadian National Rly Co v Norsk Pacific Steamship Co*, which fell within the fifth category. The present case, which involves the alleged negligent construction of a building, falls partially within the fourth category, although subject to an important caveat. The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort. As I will attempt to show, a distinction can be drawn on a policy level between ‘dangerous’ defects in buildings and merely ‘shoddy’ construction in buildings and that, at least with respect to dangerous defects, compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these defects ...

My conclusion that the type of economic loss claimed by the Condominium Corp is recoverable in tort is therefore based in large part upon what seem to me to be compelling policy considerations. I shall elaborate in more detail upon these later in my reasons. However, before doing so, I think it important to clarify why the *D & F Estates Ltd* case should not, in my view, be seen as having strong persuasive authority in Canadian tort law as that law is currently developing. My reasons for coming to this conclusion are twofold: first, to the extent that the decision of the House of Lords in *D & F Estates Ltd* rests upon the assumption that liability in tort for the cost of repair of defective houses represents an unjustifiable intrusion of tort into the contractual sphere, it is inconsistent with recent Canadian decisions recognising the possibility of concurrent contractual and tortious

duties; second, to the extent that the *D & F Estates Ltd* decision formed part of a line of English cases leading ultimately to the rejection of the *Anns* case, it is inconsistent with this court's continued application of the principles established in *Anns* ...”

It should be noted that the Canadian line of cases are not the only ones which continue to use the two-stage test in *Anns* and do not follow the reasoning in *Murphy*, so for the time being there is a divergence in views among the Commonwealth countries. Thus, for example, one can find several views outside of the UK. For example, in the Australian case of *Bryan v Maloney*,¹⁶ the High Court found that a contractor owed a duty of care to a subsequent purchaser of the house it built, which extended a duty not to cause economic loss based upon the diminution in value of the property built on inadequate foundations. Then, in the New Zealand case of *Invercargill City Council v Hamlin*,¹⁷ the Court of Appeal did not follow *Murphy* and instead held that a local council was liable for the cost of repairs to the foundations of a house for which it had approved the plans. It should be noted that this ruling was upheld in the Privy Council,¹⁸ where it was found that New Zealand was entitled to “develop the common law in its own way and for its own circumstances”.

Also, the court in Malaysia, while initially appearing to follow *Murphy*,¹⁹ held in *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants*²⁰ and *Steven Phoa Cheng Loon v Highland Properties*,²¹ that architects, engineers and other such design professionals could owe a duty not to cause economic loss. In *Dr Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants*, the court stated:

“To adopt the decisions in *Murphy* and *D & F Estates* which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred.”

Also, in adjacent Singapore, the Court of Appeal in *RSP Architects Planners and Engineers v Ocean Front Pte Ltd*²² declined to follow *Murphy* and held that developers owed a duty of care “not to cause economic loss to the management corporation, which had taken over the management and administration of a condominium”.

Although the *Anns* test remains in use in many jurisdictions it has, of late, been changing from the standard originally set out²³ but, despite that, a New Zealand Court in *Couch v Attorney General*²⁴ ruled that it was the appropriate test to determine whether or not a duty of care should be found in new cases. The Court of Appeal in Singapore in *Spandek Engineering (S) Pty Ltd v Defence Science & Technology Agency*²⁵ even proposed a new single test which encompasses the concept of legal proximity along with policy considerations, including factual foreseeability.

16 (1995) 128 ALR 163.

17 [1994] 3 NZLR 513.

18 [1996] AC 624.

19 See e.g. *Kerajaan Malaysia* [1993] MLJ 439; *Teh Khem On v Yeoh & Wu Development Sdn Bhd* [1995].

20 [1997] 3 MLJ 546.

21 [2000] 4 MLJ 200.

22 [1996] 1 SLR 113.

23 See e.g. *Woolcock Street Investments v CDG Pty Ltd* [2005] BLR 92 (Australia); *Diesel SE Asia Pte v PT Bumi International Tankers* (2005) 21 Con LJ 126.

24 [2008] NZSC 45.

25 (2007) 114 ConLR 167.

Indeed, the varying views taken can be best sorted from the speech of Lord Lloyd of Berwick in the Privy Council case of *Invercargill City Council v Hamlin*.²⁶ This was a New Zealand case, where he wrote:

“... Their Lordships cite these judgments in other common law jurisdictions not to cast any doubt on *Murphy*’s case, but rather to illustrate the point that in this branch of the law more than one view is possible: there is no single correct answer. In *Bryan v Maloney* the majority decision was based on the twin concepts of assumption of responsibility and reliance by the subsequent purchaser. If that be a possible and indeed respectable view, it cannot be said that the decision of the Court of Appeal in the present case, based as it was on the same or very similar twin concepts, was reached by a process of faulty reasoning, or that the decision was based on some misconception: see *Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523, [1969] 1 AC 590.

In truth, the explanation for divergent views in different common law jurisdictions (or within different jurisdictions of the United States of America) is not far to seek. The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations. As Mason CJ said in *Bryan v Maloney* (1995) 128 ALR 163 at 166:

‘Inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the court’s assessment of community standards and demands’.

While scientists, such as Stephen Hawking, were searching for an elusive “singularity in space-time” a far more complex search (it would seem) has been underway in the legal profession as it searches for a standard test to determine what is the “duty of care”. As Lord Hoffmann wrote in *Commissioners of Customs and Excise v Barclays Bank plc*:²⁷

“There is a tendency, which has been remarked upon by many judges, for phrases like ‘proximate’, ‘fair, just and reasonable’ and ‘assumption of responsibility’ to be used as slogans rather than practical guides as to whether a duty should exist or not. These phrases are often illuminating but discrimination is needed to identify the factual situations in which they provide useful guidance.”

There have been several tests and approaches suggested both by the courts and by writers in this field, and they include the “Threefold Test”, the “Assumption of Responsibility Test”, the “Incremental Test”, and the “Holistic Test”:

The “Threefold Test”

This test arises from *Caparo Industries plc v Dickman*,²⁸ where Lord Bridge wrote:

“What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the laws as one of ‘proximity’ or ‘neighbourhood’ and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.”

For this to be used the claimant must establish the actual foreseeability of the damage incurred, that damage must be proximate to the acts of the defendant and finally it must be fair, just and reasonable to impose a duty of care on the defendant.

²⁶ (1996) 50 ConLR 105.

²⁷ [2007] 1 AC 181.

²⁸ [1990] 2 AC 605.

This three-pronged approach has been supported in cases such as *Smith v Bush*,²⁹ where a duty was found to be owing by a surveyor to a prospective mortgagor. In *Spring v Guardian Assurance plc*,³⁰ a duty of care was found to be owed by the employer when giving a reference as to a former employee. While this “test” does work another suggested method is the “Assumption of Responsibility” test.

The *Smith v Bush* case³¹ stated:

“... For this to be used the claimant must establish the actually foreseeability of the damage incurred, that damage must be proximate to the acts of the defendant and finally it must be fair, just and reasonable.”

Smith is cited as an example of where a duty was found to be owing by a surveyor to a mortgagor.

Since that case the court has dealt with *Scullion v Bank of Scotland Plc (t/a Colleys)*.³² There, the proposition established in *Smith*, that the duty of care owed by a property surveyor to a mortgagee to prepare its valuation report with skill and care extended to the purchaser of the valued property, did not apply where the transaction concerned an investment in a buy-to-let property rather than an ordinary domestic householder purchasing his home. There was no inherent likelihood that a purchaser, buying property for the purpose of letting it out, would rely on a valuation provided to the mortgagee rather than obtaining his own valuation.

Generally, the starting point for establishing the existence of a duty of care has been the “Threefold Test” from *Caparo Industries plc v Dickman*³³ above. However, in two recent decisions, the Supreme Court has departed from this approach.

In *Robinson v Chief Constable of West Yorkshire Police*,³⁴ the appellant was knocked over in the street by a group of men – that is, two police officers who were attempting to arrest a suspected drug dealer, and had not noticed that the appellant was in the immediate vicinity – and injured. The principal question to be decided was whether the officers owed a duty of care to the appellant and, if they did, whether they breached that duty. The judge at first instance had held that the officers were negligent, but that the police were immune from negligence claims; the Court of Appeal had found that most actions against the police, when engaged in their core functions, will fail the third stage of the *Caparo* test, in that it will not be fair, just and reasonable to impose a duty of care.

The Supreme Court held that the proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the courts will impose a duty of care only where they consider it fair, just and reasonable to do so, is mistaken. It is normally only in novel cases, where established principles do not provide an answer, that the courts need to exercise judgment that involves consideration of what is “fair, just and reasonable”; this case, though, concerned an application of established principles of the law of negligence, and so the existence of a duty of care did not depend on the application of *Caparo*. Distinguishing the present case (which concerned a positive act, not an omission) from *Hill v Chief Constable*

29 [1990] 1 AC 831.

30 [1995] 2 AC 296.

31 [1990] 1 AC 831.

32 [2011] EWCA Civ 693.

33 [1990] 2 AC 605.

34 [2018] UKSC 4.

of *West Yorkshire*³⁵ (which is authority for the proposition that the police do not owe a duty of care, absent special circumstances, to protect the public from harm through the performance of their function of investigating crime), the Supreme Court concluded that the reasonably foreseeable risk of injury to the appellant, when the arrest was attempted, was enough to impose a duty of care on the officers, and that the appellant's injuries were caused by the officers' breach of that duty of care.

In *Steel & Another v NRAM Ltd*,³⁶ the appellant solicitor had mistakenly told the respondent bank's officers that a transaction between her client and the bank involved a discharge of the bank's securities over her client's properties. This statement was entirely inaccurate. The bank's officers, though, relied on this statement, and without checking the bank's own files discharged the securities. Years later, the client went into liquidation. The bank discovered that its loan was unsecured, and brought proceedings against the appellant solicitor for breach of duty by negligent misstatement. The bank's claim was dismissed by the Lord Ordinary at first instance, but the Inner House allowed the bank's reclaiming motion and substituted an award of damages in its favour of £369,811.18.

The question before the Supreme Court, then, was whether a solicitor for one party to a transaction owes a duty of care to the counterparty for a misstatement causing loss to that counterparty. Reviewing the authorities, the Court stressed that, whilst for years *Caparo* was taken to have indorsed the so-called "Threefold Test", the case did no such thing and was, in fact, far more nuanced; rather, *Caparo* was notable, in the circumstances, for its reassertion of the need for it to be reasonable for the representee to have relied on the representation, and for the representor to have reasonably foreseen that they would so rely. It was now clear, the Supreme Court ruled, that it is this concept of assumption of responsibility that remains the foundation of liability for careless misrepresentation; and that, whilst this concept may require cautious incremental development in order to fit cases to which it does not readily apply, such development was unnecessary here as the concept fitted the case perfectly. Accordingly, the appeal was unanimously allowed; the bank's officers had not acted reasonably in relying on the solicitor's statement without checking their own records, and the solicitor could not reasonably have foreseen that the bank's officers would rely on her assertions without checking their accuracy.

The "Assumption of Responsibility Test"

The court in *Hedley Byrne* stated that the voluntary assumption of responsibility by the defendant was sufficient to impose a duty of care in cases dealing with economic loss. This "test" also has its following, as in *White v Jones*³⁷ where a duty was found owing from a solicitor to the intended beneficiaries of a will, and *Williams v Natural Life Ltd*,³⁸ where a duty was imposed on a director to a potential franchisee.

After *Williams* the court in *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd*³⁹ reviewed the concept of pure economic loss in tort.

35 [1989] AC 53.

36 [2018] UKSC 13.

37 [1995] 2 AC 207.

38 [1998] 1 WLR 830.

39 [2014] BLR 574 (QBD (TCC)).

This case involved a dispute in connection with the design and construction of a car park. The court was asked to determine whether the director of a company, which had entered into the design and construction contract, had personally assumed liability in tort to the claimant in respect of pure economic loss alleged to have been suffered as a consequence of defects in the design of a modular car park at one of the supermarket's London stores. Sainsbury's brought a claim in contract against the first and second defendant companies and a claim in negligence against the third defendant, the inventor of the modular car park system and director of the first and second defendant companies, as well as the fourth defendant, a firm of structural engineers who had been involved in the design of the car park. Sainsbury's alleged that the car park was defective as a consequence of inadequate design and construction and that it needed to be demolished and rebuilt, at a cost of approximately £5 million.

Sainsbury's accepted that its claim was one for pure economic loss. The first defendant, Condek, was the company with which Sainsbury's had contracted for the design, construction and installation of the car park. Mr Pashouros was the owner and director of Condek, as well as the inventor of the car park system which had been used. It was argued by Sainsbury's that Mr Pashouros' duty arose on the basis that, as inventor, he had promoted the car park to Sainsbury's and stood to gain financially if the project was successful.

Stuart-Smith J held that Sainsbury's claim against Mr Pashouros was bound to fail on the basis that all of the contractual documents showed that Sainsbury's had contracted with Condek and that Mr Pashouros had acted for and on behalf of his company in all his dealings, in his capacity as director. The judge emphasised that it was commonplace that a trader who transfers his business to a limited company will do so in order to benefit financially from its commercial exploitation. If it were the case that an inventor who wanted to make money will be taken to have assumed personal responsibility, by that fact alone and without more, despite trading through a limited company the main benefits of incorporation would be lost. Furthermore, although it was evident that Sainsbury's was very experienced in the negotiating of construction contracts, it took none of the steps that could and would routinely be taken by an employer who wished to have the added security of an enforceable duty of care owed by someone other than the person who had contracted to procure the design and construction of the structure, such as by some form of bond or collateral warranty. Instead, it was content to contract with Condek alone. On that basis, the fact that Condek was now in liquidation was a risk that Sainsbury's had chosen to take. In short, there was nothing to suggest that Sainsbury's relied (let alone reasonably relied) on Mr Pashouros in his personal capacity rather than on Condek, with which it chose to contract (see paras 33, 35 of judgment); in this regard the court felt that *Williams v Natural Life Health Foods Ltd*⁴⁰ applied.

Essentially, the court took the view that it will not be sufficient to establish an assumption of responsibility if the director simply acts in a way that is consistent with his position as director.

This "Assumption of Responsibility Test" was again one more avenue for the courts to pursue the ultimate test for duty.⁴¹ Yet another avenue was the "Incremental Test".

⁴⁰ 2 All ER 577.

⁴¹ See also *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd* [2014] EWHC 2016 (TCC), [2014] BLR 574 (QBD (TCC)).

The “Incremental Test”

In *Sutherland Shire Council v Heyman*,⁴² Brennan J set out this test as follows:

“It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed’.”

This test also has received the approval of the House of Lords in cases such as *Caparo v Dickman*⁴³ and *Murphy v Brentwood*.⁴⁴ While all of these “tests” seem to have their own elements, another variant is what is referred to as the “Holistic Test”.

The “Holistic Test”

In *Customs and Excise Commissioners v Barclays Bank*,⁴⁵ Barclays had released the funds of one of their clients in breach of a freezing injunction resulting in the Commissioners being left out of money they claimed was owed them. The House of Lords held that there was no duty of care owed by Barclays to the Commissioners and wrote that the tests (which were just described above, and others) that had evolved failed to show any common principle that could be used to determine the existence of a duty of care and criticised the rigid use of the principles as “tests” rather than as guidelines. The House of Lords went on to emphasise both policy factors as well as a multi-test approach to the factual context of the claim, finding that although the “assumption of responsibility test” may be sufficient as a precondition to the existence of a duty of care, it was not necessarily one in and of itself, noting that this test should be applied objectively, but that “the further away one moves from a quasi-contractual situation, the closer one gets to the threefold test”, concluding that in “novel cases there is no simple test that can be applied”. They went on to note that the “incremental test” needs to be used in combination with other tests and principles which identify the “legally significant features of the specific situation” and without this the “incremental test” is of little use. The sum total of all this “test” review was that their Lordships felt that “in each case attention should be focused on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole”.⁴⁶

Following upon this decision the court in *Rice v Secretary of State for Trade and Industry*⁴⁷ wrote:

“[Whilst] ... there are other ways in which the same essential conceptual approach may be articulated ... it is often, in my view, helpful to ask whether a defendant is to be taken to have assumed responsibility to the claimant to guard against the injury or loss for which the claimant claims damages; or, more simply, whether in the circumstances the law recognizes that there is a duty of care ... proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care.”

42 (1985) 157 CLR 424.

43 *Ibid* at 591.

44 [1991] 1 AC 398.

45 [2007] 1 AC 181.

46 See e.g. Finola O’Farrell QC, *Professional Negligence in the Construction Field*, Keating Chambers Publication 2009.

47 [2007] EWCA Civ 289.

Thus, the search continues for the perfect test to determine a duty of care; it seems, however, that in the interim each case will be judged on its own specific set of circumstances.

Vicarious liability

Following along the line of liability for negligence, “vicarious liability” means that a person can be held responsible for the negligence of another because of their special relationship. Thus, a contractor is vicariously liable for the actions of its employees⁴⁸ and the wronged party can sue the contractor, the employee, or both for losses associated with the negligence. The duty to take reasonable care applies to all employees without exception.

A contractor, as any employer (in the non-construction sense), is generally liable for the actions of its employees carried out in the course of their employment. For example, a contractor will be vicariously liable to a site visitor who slips as a result of a member of staff negligently placing material about. Thus, vicarious liability is strict rather than fault-based, i.e. the employer is responsible for its employees. The justification for this is that employers obtain the benefit of their employees’ services and should, therefore, also take the disadvantages of this employment relationship. Accordingly, employers can be vicariously liable for acts committed by employees in the course of their employment, and this applies even if the act was authorised by the employer, but performed incorrectly by the employee, or even if the act was expressly prohibited, all that is needed is that the act was done within the course and scope of the employment or for the furtherance of the employer’s objectives. In the construction industry this is an important concept as agency staff and subcontractors are frequently used and the contractor has potential liability for the acts of those staff. It should be noted that even though agency staff and subcontractors are employed by third parties, if a construction company exerts sufficient control over the activities of those staff in terms of their activities, there could well be vicarious liability for those staff on the basis that the construction company in question is deemed to be their “employer” for a particular activity or period of time. To complicate matters the courts have held that this vicarious liability cannot be contracted away.

The leading case authority on whether vicarious liability can be imposed on a defendant in respect of the conduct of a person who is not, in conventional terms, employed by him arose in *Mersey Docks Harbour Board v Coggins and Griffith (Liverpool)*,⁴⁹ where a harbour authority let a mobile crane to a firm of stevedores for loading a ship and also provided a crane operator employed by the harbour authority. Also, although the harbour authority had the power to fire the crane operator, the general hiring conditions stipulated that cranemen so provided should be the servants of the hirers. In the course of the operation the crane operator injured a third person by negligently driving the crane. The stevedores had immediate direction and control in respect of how the crane was being used but had no power to direct how the crane should be worked or the controls manipulated. The House of Lords held that the

⁴⁸ It must be remembered, however, that most employee contracts of employment (written or implied) require that the employee has a duty to take reasonable care when carrying out his duties. If the employee is then negligent he can be sued by his employer for the resulting loss.

⁴⁹ [1947] AC 1.

harbour authority as the general permanent employer was liable. The burden of showing that the crane operator had, for vicarious liability purposes, become the employee of the stevedore company was placed on the general employer. Lord Simon in the leading speech wrote:

“It is not disputed that the burden of proof rests on the general or permanent employer – in this case the appellant board – to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances. It is not easy to find a precise formula by which to determine what those circumstances must be ... [His Lordship then embarked on a detailed consideration of certain cases. He concluded] ... I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workmen the manner in which the vehicle is driven. It is this authority which determines who is the workman’s ‘superior’. In the ordinary case, the general employer exercises this authority by delegating to their workmen discretion in method of driving, and so the Court of Appeal correctly points out (1) that in this case the driver Newall, ‘in the doing of the negligent act, was exercising his own discretion as driver – a discretion which had been invested in him by his regular employers when he was sent out with the vehicle – and he made a mistake with which the hirers had nothing to do.’ If however the hirers intervened to give directions as to how to drive which they have no authority to give, and the driver *pro hac vice* complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors”

And in the same case Lord Uthwatt added:

“The principles established by the authorities are clear enough. The workman may remain in the employ of his general employer, but at the same time the result of the arrangements may be that there is vested in the hirer a power of control over the workmen’s activities sufficient to attach to the hirer responsibility for the workmen’s acts and defaults and to exempt the general employer from that responsibility ... To establish the power of control requisite to fasten responsibility on him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work”

But what if the “two employers” were held liable for a tort committed by an individual employee, i.e. “dual vicarious liability”? This was the issue in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,⁵⁰ where the Court of Appeal held that, contrary to a long-standing assumption, English law does recognise the possibility of dual vicarious liability which is most likely to arise in the case where one employer hires labour to another employer and both retain control over the actions of the employee. Here, two employers had dual control over the employee so both were vicariously liable for the latter’s tort. Further, applying the Civil Liability (Contribution) Act 1978, the court held that the two employers were equally responsible for the damage suffered by the claimants. This case dealt with when it is appropriate to impose dual vicarious liability on employers and when it is more appropriate to use the more traditional approach of deciding which of the two employers is vicariously liable for the tort of the employee.⁵¹

Here, Viasystems entered into a contract with the first defendant Thermal Transfer whereby Thermal Transfer agreed to install air conditioning in Viasystems’ factory. Thermal Transfer then subcontracted ducting work to the second defendants, S & P

⁵⁰ [2005] EWCA Civ 1151.

⁵¹ See “Dual Vicarious Liability Is Legally Possible” *Building Law Monthly*, 1 November 2005.

Darwell Ltd. The second defendants, in turn, entered into a contract with the third defendants, Troy Hall and Christopher Day, trading as CAT Metalwork Services, under which the latter agreed to provide fitters and fitters' mates on a labour-only basis. The third defendants duly provided Mr Megson, a fitter, and Mr Darren Strang, his mate. At the time the accident occurred Megson and Strang were working under the supervision of Mr Horsley, a self-employed fitter who was contracted to the second defendants.

While Horsley, Megson and Strang were working in the roof space of the factory, Megson sent Strang to collect some fittings. Instead of returning to the roof space by what was termed a "sensible" route, he, for some unknown reason, decided to crawl back through some of the sections of ducting that were already in place. As he crawled through the ducting, the sections moved and came into contact with a part of the fire protection sprinkler system in the factory. This led to a flood, which caused "extensive and expensive damage" to the factory.

As to these flood damages it was agreed that the claimants were entitled to recover damages in breach of contract from the first defendants. The claimants also claimed damages from the second and third defendants. The first defendants, in turn, claimed that they were entitled to recover an indemnity from the second and third defendants. The claim came before His Honour Judge Walton and the case was argued on the basis that the critical issue was whether it was the second or the third defendants who were vicariously liable for the negligence of Mr Strang. Judge Walton held that it was the third defendants who were liable. On appeal, the third defendants were successful to the extent that it was held that both the second and third defendants were vicariously liable for the negligence of Mr Strang and that they were both liable to contribute equally to the damage suffered by the claimants – this being the first finding that two employers can be vicariously liable for the negligence of a single employee.

In *Mersey Docks*, discussed above, the House of Lords pointed out that the inference that the general employer was the employer was not an inevitable one. It was possible for the borrowing employer to be vicariously liable, but the assumption which underpinned the case seemed to be that one or other employer had to be liable and it was not possible for the court to conclude that both employers were vicariously liable for the negligence of the employee.⁵² Accordingly, the Court of Appeal in *Viasystems* needed to determine whether or not dual vicarious liability was legally possible. This required the Court of Appeal to examine a number of other cases⁵³ to ascertain whether or not prior authority precluded it from recognising the possibility of dual vicarious liability – it was not so precluded and in this regard Lord Justice May stated:

"In summary, therefore, there has been a long-standing assumption, technically unsupported by authority binding this court, that a finding of dual vicarious liability is not legally permissible. An assumption of such antiquity should not lightly be brushed aside, but the contrary has scarcely been argued and never considered in depth."

⁵² *Ibid.*

⁵³ See e.g. *Laugher v Pointer* (1826) 5 B & C 547; *Donovan v Laing* [1893] 1 QB 629; *Jones v Scullard* [1898] 2 QB 565; *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437; *Karappan Bhoomides v Port of Singapore Authority* [1978] 1 WLR 189; and *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] AC 643.

However, to determine whether or not there could be such liability the first hurdle was the objection that “a servant cannot have two masters” to which Lord Justice Rix wrote:

“... even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes – and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly – nevertheless that does not prevent the employee of a general employer being lent to a temporary employer.”

The issue really comes down to who controls the employee rather than who employs the employee. In *Denham v Midland Employers' Mutual Assurance Ltd*,⁵⁴ it was held that a contract of employment cannot be transferred without the consent of the employee and in reality:

“... [the] general employer remains the employer throughout and all that happens is that the employee does some work for the borrowing employer for a period of time. While the borrowing employer may become responsible in law for the acts of the employee committed in the course of his work, it does not follow from this that the borrowing employer is, in law, the employer of the employee.”

Thus, Lord Justice Rix noted that the consequence of this was that “the doctrine of vicarious liability may properly be invoked against an employer who is not really, in law, the employee’s employer; and that the use of the expression ‘transfer’ is potentially misleading”. Accordingly, the Court of Appeal held⁵⁵ “that there was no objection in principle to the recognition of the possibility of dual vicarious liability and that English law should develop in this direction”.

Thus, in *Viasystems* Lord Justice May found that both the second and the third defendants had dual control over Mr Strang and, while not providing a full explanation as to the nature of the control which was exercised over Mr Strang, the court took the view that dual vicarious liability would be very much the exception and not the rule, stating that “... an equal measure of control will not often arise”, so that in most circumstances the controlling authority remains the *Mersey Docks* rule: either the general or the borrowing employer will be vicariously liable for the tort of the employee. Lord Justice Rix, however, took a more expansive view and while stating that he was “a little sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control” wrote:

“... to say that I anticipate that subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.”

He then went on to “indicate that the court may distinguish between the case where the employee and some equipment is transferred and the case where labour only is transferred to the borrowing employer”.⁵⁶ *Mersey Docks* is an example in the former

⁵⁴ [1955] 2 QB 437.

⁵⁵ It should be noted that while there was a potential problem with dual vicarious liability leading to a multiplicity of claims, Lord Justice May discounted this potential threat as not being a barrier to the recognition of vicarious liability.

⁵⁶ See “Dual Vicarious Liability Is Legally Possible” *Building Law Monthly*, 1 November 2005.

category and Lord Justice Rix stated that in such a case it is “tempting to think that liability will not be shared”. While there may be said to be some sharing of the control over the employee in such a case, he concluded, “one would hesitate to say that it is a case for dual vicarious liability”. However, where it was only labour that is transferred to the borrowing employer he noted:

“One could contrast the situation where the employee is contracted out labour: he is selected and possibly trained by his general employer, hired out by that employer as an integral part of his business, but employed at the temporary employer’s site or his customer’s site, using the temporary employer’s equipment, and subject to the temporary employer’s directions. In such a situation, responsibility is likely to be shared.”

He then went on to discuss another possible scenario in which an employee is seconded for a substantial period of time to the temporary employer in order “to perform a role embedded in that employer’s organisation”. In such a case, it is likely that the borrowing (or temporary) employer will be held to be the sole employer.

Some writers have noted that the:

“... willingness of Lord Justice Rix to recognise the possibility of dual vicarious liability in the case where labour only is transferred to the borrowing employer is potentially significant for the construction industry given the widespread use which is made of labour-only contracting (or sub-contracting). This is not to say that dual vicarious liability will arise in all such cases. It is unlikely to arise where there is a significant variation in the degree of control exercised over the employee by the two employers and it will not arise in the case where there is an element of personal fault on the part of one or other employer. But in other cases dual vicarious liability does appear to be a possibility with the consequence that the claimant will not have to choose which of the two employers to sue; he can elect to sue both and recover against both.”⁵⁷

But what about contribution in the event of dual vicarious liability? Here, Lord Justice May pointed out that “for dual vicarious liability, equal contribution may, depending on the facts, be close to a logical necessity” and Lord Justice Rix wrote as follows:

“Where, therefore, there is dual vicarious liability arising out of the negligence of a single employee, it follows that the responsibility of each employer for the purposes of contribution must be equal. In other words, in the absence of any personal fault on the part of either employer in respect of the same damage, and in the absence of any other negligence by another employee contributing to the same damage, as here in the absence of any negligence by either Mr Megson or Mr Horsley, the essential decision as regards contribution as well as liability occurs at the time when the court determines that there is dual vicarious liability. The realisation that dual vicarious liability means equal responsibility and equal financial liability could and probably should therefore enter into the earlier and determinative decision. The question would be whether in all the circumstances, including the important question of control, vicarious liability should be shared, on the basis that the employee in question, although not formally the employee of the temporary employer, is, at least for relevant purposes, so much a part of the work, business or organisation of both employers as to make it just for there to be dual and shared liability.”

Following the concept of vicarious liability further in *Various Claimants v Institute of the Brothers of the Christian Schools*,⁵⁸ the concept of dual vicarious liability was introduced to English law. May LJ and Rix LJ offered two different approaches to

⁵⁷ *Ibid.*

⁵⁸ [2013] UKSC 56, [2013] 2 AC 1.

establishing dual vicarious liability. May LJ focused on analysing the level of “control” assessing who had the responsibility to prevent the negligent act. More than one person could carry this responsibility, thus dual control entails dual vicarious liability. While Rix LJ’s approach adopted a broader test which examined the “integration” of the employee with an analysis of “whether or not the employee in question is so much part of the work, business or organization of both employers that it is just to make both employers answer”. It should be noted that cases following *Viasystems* tend to adopt May LJ’s “control” approach to establishing dual vicarious liability (see for example: *Hawley v Luminar Leisure Ltd*⁵⁹ and *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*.⁶⁰ However, in *Various Claimants v Institute of the Brothers of the Christian Schools* (also known as *Various Claimants v Catholic Child Welfare Society*) the court found the control approach too restrictive in favour of Rix LJ’s formulation. The “control” approach is criticised by Lord Phillip in *Various Claimants*:

“42 Rix LJ reached the same conclusion, but his reasoning was not the same. At para 55 he commented that the basis of vicarious liability was, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities, even when performed negligently. Liability was extended to the employer on the practical assumption that because he could spread the risk through pricing and insurance, he was better organised and able to bear the risk and was, at the same time, encouraged to control the risk.

43 Dealing with the test of control, Rix LJ observed at paras 59 and 64 that the right to control the method of doing work had long been an important and sometimes critical test of the master/servant relationship. The courts had, however, imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant. At para 79 he questioned whether the doctrine of vicarious liability was to be equated with control. Vicarious liability was a doctrine designed for the sake of the claimant, imposing a liability incurred without fault because the employer was treated at law as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit. Accordingly, what one was looking for was:

‘a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence’.

44 The brothers who taught at the school were not contractually employed by the Institute; they were contractually employed by or on behalf of the Middlesbrough Defendants. By this appeal the Middlesbrough Defendants seek to establish dual vicarious liability. The question arises of whether the approach of May LJ or that of Rix LJ should be applied in determining whether the Institute is also vicariously liable for the brothers’ torts.

45 The test that May LJ applied was that applied in *Mersey Docks*. I do not consider that there is any justification for applying this stringent test when considering whether there is dual vicarious liability. Where two defendants are potentially vicariously liable for the act of a tortfeasor it is necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant is vicariously liable. In considering that question in relation to each defendant the approach of Rix LJ is to be preferred to that of May LJ.”

This development of the law in *Various Claimants* indicates that vicarious liability can extend beyond the employee/employer relationship to relationships “akin to

59 [2006] EWCA Civ 18.

60 [2008] EWCA Civ 1257, [2009] QB 725.

employment” and dual vicarious liability may be extended to encompass a wider range of circumstances than previously thought.

In the more recent case of *Mohamud v WM Morrison Supermarkets plc*,⁶¹ the Supreme Court confirmed that the question whether vicarious liability arises involves a two-stage test: (i) is there a relationship between the primary wrongdoer and the principal alleged to be liable, capable of giving rise to vicarious liability; and (ii) is the connection between that relationship and the primary wrongdoer’s wrongful act such as to make it just and reasonable to hold the principal legally responsible for the consequences? This second question of “connection”, according to the Supreme Court, in turn demands consideration of two matters, namely (i) what functions or “field of activities” had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job (a question which must be addressed broadly); and (ii) was there a sufficient connection between the position in which the employee was employed and the wrongful conduct, so as to make it just and reasonable for there to be vicarious liability (to be approached by applying the principle of social justice that those who carry on a business should bear the loss caused by risks associated with that business materialising, including the risk of an employee misusing his position).

As to the first question, of the relationship between the primary wrongdoer and principal, vicarious liability has in recent cases been expanded to cover wrongdoers who were not employees of the principal but were in a relationship sufficiently analogous to employment for such liability to arise: see, for example, *Cox v Ministry of Justice*,⁶² in which the Supreme Court found that the Ministry of Justice was vicariously liable for the negligence of a prisoner who, whilst working in a prison’s kitchens, dropped a sack of rice, causing injury to a prison employee (the work done by prisoners was of direct and immediate benefit to the prison service, the Court concluded, and the prisoners were to that extent integrated into the prison’s operations); see, also, *Various Claimants v Barclays Bank plc*,⁶³ in which the Court of Appeal upheld the High Court’s decision that Barclays was vicariously liable for sexual assaults carried out by an independent self-employed doctor it retained to conduct medical examinations of (amongst others) job applicants (on the basis that the alleged torts were committed as a result of an activity undertaken by the doctor on Barclays’ behalf, and that, by retaining him, Barclays had created the risk of those alleged torts occurring, despite the fact that he operated from home and carried out activities other than for Barclays).

Nuisance

There are two types of nuisance: private and public. A private nuisance is considered a civil wrong and is defined as an unreasonable, unwarranted or unlawful use of one’s property in a manner that substantially interferes with the enjoyment or use of another individual’s property, without an actual “trespass” or actual physical invasion of the other property. A public nuisance, however, is a criminal wrong and consists of an act or omission that obstructs, damages or inconveniences the rights of the community as a whole, such as shooting fireworks in the streets, or obstructing a highway or creating a condition to make travel unsafe. A public nuisance interferes with the public as a

⁶¹ [2016] UKSC 11.

⁶² [2016] UKSC 10.

⁶³ [2018] EWCA Civ 1670.

class, not merely one person or a group of citizens. No civil remedy exists for a private citizen harmed by a public nuisance, even if its damages are greater than the damages suffered by others – criminal prosecution is the exclusive remedy. However, if the individual suffers damage that is different from that suffered by the general public, the individual may maintain a tort action for those damages. Thus, if a contractor while dynamiting a part of a project has thrown a large boulder onto a public highway, those who use the highway cannot maintain a nuisance action for the inconvenience. However, a motorist who is injured from colliding with the boulder may bring a tort action for personal injuries.

Some nuisances, however, can be both public and private. For example, in circumstances where the public nuisance substantially interferes with the use of an individual's adjoining land, the pollution of a river might constitute both a public and a private nuisance.

A private nuisance differs in that it is an interference with a person's enjoyment and use of its land. Thus, as the House of Lords found in *Hunter v Canary Wharf Ltd*,⁶⁴ a person who has no interest in the land cannot maintain an action in private nuisance. The law recognises that landowners, or those in rightful possession of the land, have the right to the unimpaired condition of the property and to reasonable comfort and convenience in its occupation. The examples of this are endless, e.g. vibration⁶⁵ or blasting that damages a house; destruction of crops; raising of a water table; rainwater flowing from a building;⁶⁶ the pollution of soil, a stream⁶⁷ or an underground water supply; or flooding caused by a person blocking a drain.⁶⁸ Additionally, private nuisance examples would include noxious gases, smoke,⁶⁹ dust, loud noises,⁷⁰ excessive light or high temperatures.⁷¹ One final type of nuisance is known as an "attractive nuisance" (construction sites generally fall into this category) and gets its name from the fact that this type of nuisance is likely to lure children onto a person's land.

Since *Hunter* the court in *Dobson v Thames Water Utilities Ltd*⁷² dealt with a case which involved a claim for private nuisance as a consequence of odours caused by the allegedly negligent operation of sewage works. In *Dobson* there were 1,350 claimants in total, falling into two categories: occupiers (owners/lessees) and those with no legal interest in the properties in question. The action was brought in nuisance, negligence and under article 1 of the First Protocol to the European Convention on Human Rights (ECHR) 1950 (right to property) and article 8 (right to family life).

The High Court dealt with preliminary issues relating to nuisance and, following *Hunter v Canary Wharf*, held that there can be no compensation for diminution of capital value because the nuisance is "transitory" in nature and did not occasion any permanent damage to the land. Damage is to be assessed on the notional diminution

64 [1997] 2 All ER 426.

65 See *Hoare v McAlpine* [1923] 1 Ch 167.

66 See e.g. *Fay v Prentice* (1845) 1 CB 828.

67 It should be noted that as to percolating there is no liability if the percolation is a natural processes, see e.g. *Palmer v Bowman* [2000] 1 WLR 842.

68 See *Sedleigh Denfield v O'Callaghan* [1940] AC 880.

69 See *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642.

70 See *Halsey v Esso Petroleum* [1961] 1 WLR 683.

71 Moreover, a nuisance may also disturb an occupant's mental tranquillity, such as a neighbour who keeps a vicious dog, even though an injury is only threatened and has not actually occurred.

72 [2011] EWHC 3253 (TCC).

of letting value. The claimants argued that loss of amenity could provide a more appropriate means to measure actual damage.

The court also considered whether a party without an interest in the affected land is precluded from bringing a claim in nuisance (as was found to be the case in *Hunter*). The claimants argued that the preclusion was contrary to the rights afforded by article 8 of the ECHR (right to family life).

The High Court found that the loss of amenity value of the property was not properly accounted for by the principles in *Hunter* as the case did not consider for the number of people living in an affected property and, therefore, damages based on property value. Therefore, if the odour suffered by the plaintiffs was a breach of their human rights, then “just satisfaction” was required by section 8(3) of the Human Rights Act 1998 (HRA) and an award of damages based on property value may fail to provide “just satisfaction” to all affected and compensation under the HRA might be necessary to afford “just satisfaction”.

On appeal the High Court’s decision was partially reversed. The Court of Appeal held that damages awarded to the owner of the property would normally amount to “just satisfaction” of claims brought under the HRA for breaches of article 8 of the ECHR. However, this remedy would not satisfy claims brought by occupiers of properties where the parties had no interest.

A test case was brought to the Technology and Construction Court (TCC) and Ramsey J held, among other things, that there was a breach of article 8 of the ECHR and that the defendant has caused an actionable nuisance. On the question of damages, Ramsey J held that the damages awarded to those with an interest was sufficient and it was not necessary to provide damages to those without a proprietary interest because:

1. the damages awarded to property owners reflected the loss suffered by the entire household;
2. the declaration that human rights had been breached meant that other remedies were available, including those in statutory negligence/ability to make a complaint under section 94 of the Water Industry Act 1991.

In respect of claimants without a proprietary interest it was held that the availability of remedy in statutory nuisance under point 3 of the Environmental Protection Act 1990 accords claimants with “just satisfaction” finding at 1099: “the concept of just satisfaction is...a concept which has to be distinguished from the right to damages awarded for breach of common law obligations”.

It should be noted that the decision in *Dobson* does not derogate from the decision in *Hunter*; however, the case explains the scope and application of the *Hunter* principles and the discussion of the interaction between the common law principles of *Hunter*, the ECHR, HRA and statutory nuisance is of interest.

Limiting factors

What constitutes a nuisance and when one occurs, however, is the limiting factor. So as the court found in *Andreae v Selfridge*,⁷³ one can demolish a building on one’s own property and this is not a nuisance so long as the mess and disruption caused are *reasonably* incidental to the normal demolition operations and anyone claiming

73 [1938] Ch 1.

nuisance can recover only if it can show that the damage it suffered was beyond that which would occur if such operations were properly carried out. Of course, another factor is that what may be a nuisance in North London would not necessarily be one in Yorkshire, so it is important to determine what is normal in the locality. It is also important to determine what the standard of conduct is and whether the conduct complained of was foreseeable in the negligence sense. So, as the court pointed out in *Miller v Jackson*,⁷⁴ the standard is the “unreasonable use by a man of his land to the detriment of his neighbour”. Unreasonableness is the key to nuisance claims. Further, the damage caused to the innocent party must be foreseeable and, as shown in *Overseas Tankership (UK) Ltd v Miller Steamship Company Pty Ltd (The Wagon Mound No 1)*,⁷⁵ if not then no liability will arise.⁷⁶

Strict liability in nuisance – the rule in *Rylands v Fletcher*

In *Rylands v Fletcher*,⁷⁷ the defendant mill owners employed independent contractors to construct a reservoir on their land. The contractors failed to do their work properly and, as a result, water burst through into mines below the defendants’ land flooding the plaintiff’s mine. The plaintiff was held to be entitled to recover damages from the defendants. Here, Blackburn J in his judgment (which judgment was approved when the case was later appealed to the House of Lords) wrote:

“We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

This was further amplified by a statement of principle by Lord Cairns LC in the House of Lords when he referred to a “non-natural use” of land by the defendants. Lord Moulton in *Rickards v Lothian*⁷⁸ attempted to define “non-natural use” when he stated:

“It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it i without a propriety interest ncreased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.”

Put another way, if a person brings a dangerous thing onto his land, which is likely to cause damage if it escapes, he must keep it at his peril and is strictly liable for any damages which are caused if it escapes so long as the damage was foreseeable to him at the time he introduced the dangerous thing onto his land and so long as the defendant’s conduct in keeping the thing on his land was not an ordinary use of land.

⁷⁴ [1977] QB 966, CA.

⁷⁵ [1967] 1 AC 617, PC.

⁷⁶ However, if the damage was foreseeable, and the person caused the nuisance unreasonably, then the fact that the defendant took reasonable care to limit the damage is not a defence, see e.g. *Cambridge Water v Eastern Counties Leather* [1994] 2 AC 264, HL, further failing to abate a nuisance which was in existence when property was acquired is also actionable so long as the defendant failed to abate once it became or should have become aware, see e.g. *Sedleigh Denfield v O’Callaghan* [1940] AC 880, HL.

⁷⁷ (1868) LR 3 HL 330.

⁷⁸ [1913] AC 263, 280.

In *Cambridge Water vs. Eastern Counties Leather*,⁷⁹ the House of Lords found that foreseeability of harm is a prerequisite to the recovery of damages both in nuisance and under the rule in *Rylands vs. Fletcher*. In *Cambridge*, the defendant, Eastern, used and stored a chlorinated solvent at its tannery, situated just over a mile from Cambridge's borehole where water was removed for domestic use. Unfortunately, the solvent had seeped into the ground below Eastern's premises and had been conveyed in percolating water towards the borehole. As a result, Cambridge claimed damages on three alternate grounds, negligence, nuisance and the rule in *Rylands v Fletcher*. The trial judge dismissed the actions in negligence and nuisance on the ground that Eastern could not reasonably have foreseen the damage that occurred and the claim based on the rule in *Rylands v Fletcher* was dismissed on the ground that the storage and use of the solvent was, in the circumstances, a natural use of Eastern's land. On Cambridge's appeal against the dismissal of the third cause of action, the Court of Appeal allowed the appeal, but declined to determine it on the basis of the rule in *Rylands v Fletcher*, holding instead that there was a parallel rule of strict liability in nuisance. As a result Eastern appealed.

The House of Lords, allowing the appeal, held that foreseeability of harm was a prerequisite of the recovery of damages both in nuisance and under the rule in *Rylands vs. Fletcher* and, accordingly, notwithstanding that the storage of the solvent constituted a non-natural use of Eastern's land, since Cambridge could not establish that the pollution which occurred was in the circumstances foreseeable, the action failed and that the case of *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound No 1)*⁸⁰ applied. In that case the defendants had collected chemicals on their land as a result of the manufacturing process they carried on. Ultimately, the chemicals percolated out and eventually entered the water supply, causing damage to the claimants. The defendants escaped liability because the escape and damage were not foreseeable to them at the time they used the chemicals.

Finally, in *Transco plc v Stockport Metropolitan Borough Council*,⁸¹ an embankment collapsed as a result of having become saturated with water. The water emanated from a crack in a service pipe, which supplied water to an 11-storey block of flats owned and managed by the defendants, Stockport MBC. The collapse of the embankment exposed and left unsupported a high-pressure gas main owned by Transco plc (formerly British Gas) and, as a result, it was necessary for Transco to restore that support and cover the pipe at a cost of some £94,000. Transco sued the defendants in order to recover the cost of the repairs. The principal ground on which they brought their claim was not based on negligence but on the rule in *Rylands v Fletcher*. The trial judge held that the defendants were indeed liable under this rule but the Court of Appeal reversed this finding and held that the defendants were not liable to Transco. Transco appealed to the House of Lords but their appeal was dismissed and the House of Lords held that the defendant local authority was not liable to the claimants under the rule in *Rylands v Fletcher* as it imposes strict liability on the defendant rather than the usual fault-based liability.

However, the House of Lords did affirm *Rylands* and sought to restate the rule in clearer terms. In giving its decision it found that the main parts of liability under

⁷⁹ [1994] 2 AC 264, HL.

⁸⁰ [1967] 1 AC 617 PC.

⁸¹ [2003] UKHL 61, [2003] 3 WLR 1467.

Rylands are a sub-species of nuisance and not negligence. As such there must be an escape from the defendant's land: The defendant must have done something which he recognised, or ought to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape; it is a tort directed to the protection of interests in land and so damages for personal injuries are not recoverable; liability is, in principle, strict and there are a number of defences to the claim such as Act of God, act of a stranger, statutory authority, etc. As a result, these defences limit the claim that *Rylands* is a tort of strict liability. It was further pointed out that while these defences are significant, they did not reduce the rule to one based on fault because the claimant had the burden of proving fault. Thus, to the contrary, it is the defendant's burden to prove the existence of a defence to the strict liability which will otherwise arise.

More recently, *Northumbrian Water Ltd v Sir Robert McAlpine Ltd*,⁸² a contractor drilled shafts and filled them with concrete to provide support piles in connection with the construction of a building. Concrete escaped into an underground drain and into a sewer where it set, causing an obstruction. The water undertaker claimed damages to cover the cost of the repairs.

The court held that where a builder takes all appropriate precautions he may not be liable for unforeseeable damage caused by materials escaping from his site and causing damage to neighbouring property. There is no general rule that in nuisance claims where an escape of material from the defendant's land causes physical harm to the claimant's land, the defendant is liable regardless of the foreseeability of the escape or nature of the harm caused. Subsequent research had uncovered the existence of the drain in 1908. The court found that this degree of research was beyond the responsibilities of the contractor. The strict liability rule in *Rylands v Fletcher* is restricted to non-natural uses of land. Where there is reasonable use of land, liability for actual damage is avoidable if the following are satisfied:

- i. All reasonable care has been taken; and
- ii. The damage is not foreseeable.

This case would then appear to stand for the proposition that liability can be avoided in circumstances where damage is not foreseeable and the contractor takes reasonable care.

Along this line are the two cases *Coventry v Lawrence*⁸³ and *Coventry (t/a RDC Promotions) v Lawrence*,⁸⁴ which both appear to confirm the principle that landlords are not normally liable for the nuisance of their tenants unless they actively participate in the nuisance. The claimants commenced proceedings against the operators of a car racing stadium, alleging nuisance and seeking an injunction to restrain the nuisance. The claimants were initially successful but the Court of Appeal overturned the decision.

Following on from the earlier cited case of *Transco Plc v Stockport MBC*⁸⁵ we find *Gore v Stannard (t/a Wyvern Tyres)*,⁸⁶ wherein (as in *Transco*) the Court of Appeal reversed the finding that the defendant was liable under the rule of *Rylands v Fletcher* "as

82 [2013] EWHC 1940 (TCC), [2014] EWCA Civ 658.

83 [2014] UKSC 46.

84 [2014] UKSC 13.

85 [2003] UKHL 61, [2004] 2 AC 1.

86 [2012] EWCA Civ 1248, [2014] QB 1 (CA)(Civ Div).

it imposes strict liability on the defendant rather than the usual fault based liability ... In giving its decision they found that the main parts of liability under *Rylands* are that it is a sub-species of nuisance and not negligence. As such there must be an escape from the defendant's land. The defendant must have done something which he recognized, or ought to have recognized, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, it is a tort directed to the protection of interests in land and so damages for personal injuries are not recoverable; liability is, in principle, strict and that there are a number of defences to the claim...As a result these defences limit the claim that *Rylands* is a tort of strict liability. It was further pointed out that whilst these defences are significant, they did not reduce the rule to one based on fault because the claimant had the BoP fault this, to the contrary it is the D's burden to prove the existence of a defence to the strict liability which will otherwise arise."

In *Gore*, the appellant ran a tyre supply business, a fire broke out caused by wiring and caused damage to the neighbouring property. The court found that the appellant had a statutory defence under the Fires Prevention (Metropolis) Act 1774 because the fire was accidental. However, it found that the rule in *Rylands v Fletcher* applied because the haphazard way in which the tyres were stored was dangerous and a non-natural use of the land within the meaning of the rule. The issue was whether there was a special operation of the rule in *Rylands v Fletcher* when damage to a claimant's land was caused by the spread of fire. In the instant case, the "thing" brought onto Stannard's premises was a large stock of tyres, which were not exceptionally dangerous or mischievous. There was no evidence that Wyvern recognised or ought to have recognised that there was an exceptionally high risk of danger or mischief if they escaped. What had escaped was the fire, not the tyres. The recorder had been wrong to conclude that the escape of fire brought the case within *Rylands v Fletcher* principles. In any event, keeping tyres on the premises of a tyre-fitting business was not an extraordinary or unusual use of the land. Liability under *Rylands v Fletcher* had not been established.

In *Gore*, the court held that the guidance set in *Transco* for the application of strict liability for nuisance applied to cases involving escape of fire. However, cases involving fire damage would be difficult to bring within the rule because it was the "thing" which had to be brought onto the land which had to escape, not the fire. The court doubted the case of *Musgrove v Pandelis*,⁸⁷ which appears to support a wider application of the rule. In the court's view, *Transco* weighed heavily against an expansive view of the rule.

Trespass versus nuisance

Trespass should not be confused with nuisance in that a trespass claim deals with an invasion of one's right to exclusive possession of land. If a landowner drops a tree across its neighbour's boundary line a trespass has occurred, but if instead the landowner conducts blasting, or causes the water table to rise, this would be a nuisance. Nuisance can be committed either negligently, intentionally or recklessly, but in any case the conduct complained of must have interfered with the claimant's use and enjoyment of its land. Thus, trespass is the entering of another's land without permission.

In a construction setting this frequently arises as to the operation of building cranes, which may intrude into the air space of adjoining property owners. The court

⁸⁷ [1919] 2 KB 43.

was faced with such a situation in *Woollerton and Wilson v Richard Costain Ltd*.⁸⁸ In September 1969, Costain erected a tower crane on a building site that was so confined that the crane could be erected only in one place. When in use, and occasionally when not in use, the crane's jib overhung the Woollerton's adjoining premises, but was in the airspace 50 feet above the premises. Costain admitted the trespass and offered a substantial sum of money in return for permission to continue the trespass during the course of building on the site. Woollerton refused and instead commenced proceedings, but failed to allege any nuisance or risk to its premises. On a motion by Woollerton, seeking an interlocutory injunction, the court held that in the absence of damage, Woollerton's only remedy was an injunction, and that while an injunction ought to be granted in the circumstances, the injunction would be suspended until November 1970, by which time it was expected that the building would be complete.⁸⁹ However, in the later decision of *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd*,⁹⁰ it was suggested that a landowner would be entitled to an injunction (not stayed).⁹¹ In this case, an injunction was granted where the booms of cranes involved in construction work on the defendant's land trespassed over the claimant's property; Mr Justice Scott, despite acknowledging that an injunction would allow the claimant to seek extortionate fees from the defendant for the right to use its space to complete the construction works, concluded that he was bound to grant such an injunction, and that it was not open to him to proceed on the footing that the trespass be allowed to continue for a limited period upon payment of proper damages. However, in *Jaggard v Sawyer*,⁹² the Court of Appeal held, contrary to the dicta of Mr Justice Scott, that an injunction is an equitable remedy, and thus always within the discretion of the Court; whilst claimants must first establish a case for such equitable relief, then, it remains open to the courts to withhold injunctive relief and award damages instead.

Encroachment

Another form of trespass is encroachment. The usual situation is where a part of the defendant's building is situated on the adjoining land, which is treated as a trespass. What to do about it becomes the problem and, while many adjoining landowners who discover the encroachment would prefer the offending building to be demolished, the court's usual response is to substitute money damages in lieu of an injunction. However, if the defendant acted intentionally or with a reckless disregard for the plaintiff's rights, an injunction will be granted even if the trespass is minor⁹³ and this will be the case even if the removal of the trespassing portion causes the entire structure to collapse as the defendant will have "brought this on himself."⁹⁴

⁸⁸ [1970] 1 WLR 411.

⁸⁹ It should be noted, however, the correctness of this decision to suspend the operation of the injunction was doubted in *Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA.

⁹⁰ (1987) 38 BLR 82.

⁹¹ Planes and aircraft of course do not fall within the trespass category, see e.g. *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902.

⁹² [1995] 1 WLR 269.

⁹³ See e.g. *Cudmore-Ray v Pajouheshnia* [1993] 5 CL 405 noted in [1993] BLM (August) 11.

⁹⁴ See e.g. *London and Manchester Assurance Co Ltd v O and H Construction Ltd* [1989] 2 EGLR 185, [1989] 29 EG 65.



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Time at large and time-bar clauses

Time at large

The concept of “time at large” is based upon the “prevention principle” and arises when the contractor is delayed in completion due to some act of the employer, which “prevents” timely completion. In order to avoid the prevention principle from applying, many construction contracts and subcontracts include provisions for extension of time. In *Peak Construction v McKinney Foundations*,¹ it was held that the extension of time provisions did not cover causes of delay that were the employer’s own fault. Lord Justice Salmon wrote:

“I cannot see how, in the ordinary course, the employer can insist upon compliance with a condition if it is partly its own fault that it cannot be fulfilled.”

In most contracts a delay in completion activates the liquidated damages provisions. The prevention principle stops this from happening and, in effect, the contractor is relieved of the obligation to complete by a specified date, and becomes obliged to complete within a “reasonable time”, i.e. “time at large”. This transformation occurs without the imposition of any liquidated damages.

In *Shawton Engineering Ltd v DGP International Ltd and Others*,² British Nuclear Fuels had a contract with Kvaerner Construction to construct facilities at Sellafield for handling nuclear waste. Kvaerner subcontracted this work to a joint venture called KAT Nuclear. KAT was effectively the main contractor and placed a subcontract with Shawton for the design and manufacture of a number of work packages. Shawton, in turn, subcontracted the design work for five of those packages to DGP and the contract had a fixed completion date. Unfortunately, there was no contractual mechanism for extending time on account of any variations. The parties agreed that, in the event of any variations, DGP was obliged to complete its work within a reasonable time. Then, Shawton gave DGP seven days in which to provide it with a reasonable time frame for completing the contracts. DGP failed to respond within the period and so Shawton terminated the contract and claimed the cost of having another contractor complete the design work together with damages for delay and disruption. The judge found that Shawton was not entitled to dismiss DGP and in doing so Shawton was in repudiatory breach of contract. The judge concluded that Shawton had not established what a reasonable time was and that time had, therefore, not been made “of the essence”. Shawton took the position that DGP was in breach of contract for delay when it sent the seven-day letter and that that letter made time of the essence. Shawton appealed

¹ [1971] 1 BLR 111.

² [2005] EWCA Civ 1359.

against the dismissal of its claim for damages against DGP. In dismissing the appeal, the court held that DGP was not in breach for delay at the time of the seven-day letter and, as such, Shawton was unable to give notice making time of the essence. Shawton could legitimately determine the contract for delay if either it gave reasonable notice, making time of the essence, or DGP's failure to complete within a reasonable time was a fundamental breach. What was to be considered a reasonable time had to be judged at the time the question arose in the light of all relevant circumstances. The circumstances, in the instant case, were that the variations were significant in scope and that Shawton was not insisting on, nor particularly concerned about, early completion of DGP's drawing work. A reasonable time for completion was literally at large, in the sense of being undefined, until Shawton sent the seven-day letter to start negotiating for its better definition. In the absence of breach it was not possible for Shawton to make time of the essence by sending the seven-day letter.

This case points out that where the requirement is to complete works within a reasonable time (i.e. time is at large) the reasonable time for completion must be established and notice making time "of the essence" must be given before a contract can be terminated for delay.

"Time at large" is a concept often raised by contractors who have, for one reason or another, found it difficult (or impossible) to obtain an extension of time to complete their work on a project. Unfortunately, as most standard form construction contracts have elaborate provisions for obtaining extensions of time, this has become difficult at best. Another explanation for the difficulties associated with time at large claims is:

"The argument is so significant as to displace the contractual completion date, that courts and Tribunals are naturally slow to accept this conclusion in the absence of a strong factual and legal basis for doing so. This typically requires extreme circumstances rather than the usual basic dispute between employers/contractors about the responsibility for delays, and the length of the appropriate extensions of time."³

In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*,⁴ Honeywell, who was responsible for the security and communication installations at the Wembley Stadium project, contended that the project had been mismanaged by Multiplex, the main contractors, to the extent that they were no longer bound by the terms of their subcontract to complete their works by a fixed date, claiming time was "at large". Multiplex sought declarations to the effect that time had not been set at large under one of the subcontracts and, as the main contractor constructing the new stadium, it had entered into a contract with Honeywell entrusting it to design, supply and install various electronic communication and control systems. The agreement provided that the Works were to be completed within 60 weeks with a commencement date in April 2004. Under Clause 4 of the subcontract Multiplex could issue a request for a variation proposal, upon which Honeywell was to issue a written response stating the effect of the variation on the period for completion, with any proposals for modification to the programme for completion of the subcontract works. Clause 11 of the agreement concerned extending time for the completion of the Works where written notice of any relevant event was given. Honeywell proceeded with the design and installation of the electronic systems at the stadium, although substantial

³ See e.g. Paul Cowan and John Bellhouse, "Common law 'time at large' arguments in a civil law context" *Construction Law Journal*, 2007.

⁴ [2007] EWHC 447 (TCC).

delays to the project had already occurred, and continued to occur, after Honeywell commenced work. Honeywell was strongly critical of Multiplex's organisation and planning and was of the view that Multiplex had caused the delay. During 2005, Multiplex issued three revised programmes to Honeywell under Clause 4 of the agreement, each showing certain completion dates. A dispute arose between the parties as to whether Multiplex, by its conduct, had put time at large under the subcontract. An adjudicator determined that time had been put at large because the three programmes had been issued under Clause 4, and Clause 11 of the conditions did not contain any mechanism for extending time in respect of delay caused by a direction under Clause 4. Multiplex then applied for declarations confirming their position that, on the true construction of the contract, Clause 11 provided a mechanism for extending the period for completion of the subcontract works in respect of any delay to completion caused by an instruction issued under Clause 4 of the contract and that a direction issued by Multiplex to Honeywell under Clause 4 of the subcontract would not render time at large so as to relieve Honeywell of its obligation to complete the subcontract works within the agreed period for completion. They further requested a declaration that the subcontract mechanism for extending the period for completion of the Works remained in full force so that a specific period for completion of the Works remained ascertainable. Honeywell did not agree, contending that the adjudicator had been right in its conclusion that any direction under Clause 4, affecting the completion date, put time at large and that its contractual obligation to complete within 60 weeks, subject to any grant of extension of time, had fallen away.

After review by the court a declaration was granted in favour of Multiplex. The court took the position that the construction of the agreement turned upon the operation of the "prevention principle" and that the promisee could not insist upon the performance of an obligation which he had prevented the promisor from performing. The court set out its view that, in the field of construction law, one consequence of the prevention principle was that the employer could not hold the contractor to a specified completion date if the employer had by act or omission prevented the contractor from completing by that date. Instead, time became at large and the obligation to complete by the specified date was replaced by an implied obligation to complete within a reasonable time. The same principle applied between main contractor and subcontractor. In an attempt to avoid the operation of the prevention principle many construction contracts contain provisions for extensions of time for the protection of both parties. Three propositions were derived from a review of authority and these included: that actions by an employer which were perfectly legitimate under a construction contract might still be characterised as prevention if those actions caused delay beyond the contractual completion date; that acts of prevention by an employer did not set time at large if the contract provided for extension of time in respect of those events; and that finally, insofar as an extension of time clause was ambiguous, it should be construed in favour of the contractor. Here, the fact that three programmes were issued by Multiplex under Clause 4 did not prevent Multiplex from awarding such extension of time as might be appropriate. Insofar as Honeywell could demonstrate that any extension of time would be appropriate in consequence of those programmes, such an extension could be awarded under Clause 11. Accordingly, the issue of the programmes did not set time at large, as the adjudicator had held. Multiplex was, therefore, entitled to the declarations sought.

Here, it is interesting to note Honeywell took the position that Multiplex had made the extension of time machinery inoperable by its failure to provide adequate programming data to the subcontractor and, as it had been obliged to work to short-term programmes, it argued that it had never been able to plan its works or to identify the impact of delay events upon the critical path for completion. Thus, it claimed it could never effectively comply with the subcontract requirement for notices and particulars of delay that the subcontract made a condition of Honeywell's rights to extensions of time. The court disagreed and took the position that the condition precedent clauses were not persuasive as the subcontractor was only expected to give notices when it was practicable and if it had the requisite knowledge. Accordingly, by doing the best it could in terrible circumstances, it had, in effect, kept the extension of time provisions and prevented time at large.

In *Multiplex* the court also noted:

“Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.”

This view was also endorsed in *Steria Ltd v Sigma Wireless Communications Ltd*,⁵ where the court wrote:

“... an extension of time provision confers benefits on both parties; in particular it enables a contractor to recover reasonable extensions of time whilst still maintaining the contractually agreed structure of a specified time for completion (together, in the majority of cases, with the contractual certainty of agreed liquidated damages, as opposed to uncertain unliquidated damages). So far as the application of the contra proferentum rule is concerned, it seems to me that the correct question to ask is not whether the clause was put forward originally by Steria or by Sigma; the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party”

Thus, under these past two cases, the condition precedent did not render time at large and further, a condition precedent that bars a right to an extension of time is valid.

The concept of time at large, and the many ways courts have found to thwart it from happening, falls into several categories. Commonly, the extension of time provisions were included in the contract but could or would not be followed, or time was found not to be of the essence. Additionally, the development of alternative methods of extension of time determination, such as the use of dispute boards or 28-day adjudication under the UK rules, may prevent time being set “at large”. The reason for this line of thought is that, by using a quick and effective method for evaluating extension of time claims, the contractor can be afforded an efficient determination allowing it to readjust its schedule or make alternate plans so as to prevent any delay at all. There are several other avenues used by the courts to avoid time being set at large. So, for example, in *Peak Construction*,⁶ where there was no extension of time provision, it becomes difficult to prevent claims of time at large. But even with an adequate provision a continuing problem is whether the contract provisions themselves are capable of properly being

⁵ [2008] BLR 79, 118 ConLR 177.

⁶ [1971] 1 BLR 111.

enforced. If they are not, it will be very difficult for the employer to deny time at large claims. As the court in *Peak* wrote:

“In any event, it is clear that, even if clause 23 had provided for an extension of time on account of the delay caused by the contractor [*sic*], the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages.”

So a time at large claim can fail due to the inept administration of the contract. While it was the architect in *Peak*, in the Canadian case of *Hawl-Mac Construction Limited v Campbell River*⁷ it was the engineer who, despite having received a timely extension of time claim, did not grant the extension until after the completion date had long passed and the employer took the liquidated damages set forth in the contract. The court took the position that this was wrong and the contractor was entitled to know whether the extension of time had been granted by the engineer in advance of completion. Since the required information had not been communicated to the contractor, the employer was not entitled to liquidated damages and, rather, time was at large. The court wrote:

“The requirement that the engineer consider the claim upon receiving it and at that time fix the appropriate extension period for completion would, if implemented, enable the contractor to know the new date within which it must complete the contract. The contractor would then be in a position to add the additional resources in men and equipment, if it saw fit to do so, in order to complete within the extended period and avoid exposure to claims for liquidated damages for delay.

The extension clause in the present contract (clause 9) provides that the time for completion shall be extended for the time lost due to the owner-caused delays and that the engineer, upon receipt of an application for an extension of time, shall fully and fairly consider it and fix the time of the extension. Having failed to perform this obligation before the original time for the completion of the contract period, it is my opinion there was no longer a specified date within which the contract was to be completed or from which penalties could be imposed.

The original completion date was no longer applicable since the contractor was entitled to have the time for completion extended by reason of owner-caused delays and a new completion date had not been substituted for the original in accordance with the procedure contemplated by the extension clause.”

The concept of fairness in awarding liquidated damages can be seen in this case. To that end the court was not prepared to allow the employer to obtain liquidated damages if the engineer, who was acting on behalf of the employer, failed to notify a completion date until after the original date, as this failure put the contractor in an untenable position, consequently rendering time at large. The court felt that a contractor was “entitled to have some positive certainty”⁸ as to its time obligations and quoted from the New Zealand case of *Anderson v Tuapeka County Council*:⁹

“If no date is specified within which the works are to be completed, how is it possible for the contractor to complete the works by a specified date? Or how can he have broken a contract to complete on a specified date if he did not know beforehand what the date was on which he was under an obligation to complete? A proviso which was intended to preserve to the contractee the right to recover penalties in any event which, had it not been for the proviso, would have deprived him of that right, should be expressed in clear and unambiguous

⁷ 60 BCLR 57 (1984–85).

⁸ See Paul Cowan and John Bellhouse, “Common law ‘time at large’ arguments in a civil law context”, *Construction Law Journal*, 2007.

⁹ (1900) 19 NZLR 1.

terms. If it had been intended to allow the Engineer to decide *ex post facto* whether there was a breach of contract to complete, it should have been very plainly stated.”

A distinction should be drawn between situations where the contractor does not have a clear understanding of the completion date(s) needed as opposed to instances where an extension of time is granted after completion. For example, in *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC*,¹⁰ the court took the view that it was well settled that an extension of time could be granted even after the Works have been completed. In that case Clause 18 of a building contract provided:

“If in the opinion of the architect the works be delayed (by reason of labour and materials not being available as required) then in any such case the architect shall make a fair and reasonable extension of time for completion of the works.”

The contract further provided that if the contractor failed to complete the Works by 7 February 1948, or within any extended time fixed by the contract, the contractor should pay liquidated damages to the employer at a specified rate. An extension to 7 February 1949 had already been granted under Clause 18. Yet, despite the contract having been completed on 20 December 1950, the architect (on that date) wrote a letter under the clause giving a further extension setting the expiry date of the contract as 23 May 1949. The contractor took the view that this extension was invalid because the contract had been completed before 20 December 1950, and because the letter granting the extension was after the date to which the extension related, the court did not agree and held that the retrospective extension of time under the contract was valid.

There are other examples of how the courts will tend to avoid liquidated damages provisions and put time at large, particularly if the terms of the liquidated damage provision are not strictly adhered to or if the wording is ambiguous or unclear. So in *Bramall & Ogden Limited v Sheffield City Council*,¹¹ Sheffield contracted with Bramall using the JCT RIBA Standard Form 1963 edition to erect 123 dwellings and associated works. The Appendix provided liquidated and ascertained damages at the rate of £20 per week for each uncompleted dwelling. When the architect issued a Clause 22 certificate, and Sheffield deducted liquidated damages, Bramall took the position that, since the contract contained no express provisions for sectional completion of the Works, the liquidated damages provisions were rendered unenforceable by operation of Clauses 12(1) and 16(e) of the conditions. The court agreed because, as the contract did not provide for sectional completion, Sheffield would have been entitled to deduct liquidated damages in respect of all the dwellings and associated works up to the date of practical completion of all the Works, irrespective of whether they had taken possession of dwellings during the course of the Works (Clause 16(e) could not be operated with the Appendix). As a result, the liquidated damages provisions became a penalty because they could substantially exceed the actual loss sustained and were, therefore, invalid. Time was put at large in spite of how reasonable Sheffield had been in operating those provisions.

Following this case was *Arnhold & Co Ltd v Attorney-General of Hong Kong*.¹² In this case Arnhold was to build sewerage works but, owing to substantial delay in completion, the Government of Hong Kong tried to deduct liquidated damages. Unfortunately, the liquidated damages provision provided for a minimum and a maximum amount

¹⁰ [1952] 2 All ER 452.

¹¹ 29 BLR 73.

¹² 47 BLR 129, (1989) 5 Const LJ 263.

of liquidated damages to be deductible per day with a provision that the minimum sum should vary in accordance with the extent to which any part of the Works was capable of occupation or use by the government. Here, the liquidated damages could range from a minimum of HK\$400 to a maximum of HK\$2,700. Arnhold took the view that this provision was void, either due to uncertainty or because it was a penalty and, consequently, time should be at large. The court agreed with both arguments and found the liquidated damages provision was void for uncertainty because the contract documents did not indicate the principles governing how liquidated damages were to be fixed at a figure between the maximum and minimum amounts. Additionally, the court found that the provision was a penalty as the maximum sum was the starting point for liquidated damages, and even though it could be later scaled down, there were no graduated figures for delay in respect of a portion of the Works, which constituted such scaling down provided for by the contract. Again, lack of clarity caused time to be at large and the court wrote:

“... as a matter of common sense, the object of a liquidated damages clause is to enable an easily ascertained figure to be known as the damages which the contractor pays if he does delay. The clause specifically envisages a sum payable for each day. This contract appears to me to defeat the object of such a liquidated damages clause and is in reality the antithesis of such a clause.”

All of these cases tend to demonstrate the courts’ fundamental need for the contractor to have a clear “path” so that problems relating to dates of completion, and the imposition of liquidated damages, can be avoided. It should be noted, however, that in *Hawl-Mac* and *Anderson* it was the employer who directly caused the delay thus triggering the “prevention principle”, whereas in *Amalgamated* the delays were not employer-generated but rather caused by labour and material problems unrelated to the employer – thus the prevention principle did not arise.

An interesting issue arises when the contract additionally has provisions allowing the arbitrator, dispute board or other “dispute decider” to reopen an application for extension of time to review afresh what has happened. Several writers¹³ have suggested that, if the contract does contain a provision allowing corrections, the employer is in a much stronger position to claim that the liquidated damages provisions are in effect “fair” and can be enforced. In other words, that “the contract is capable of providing the appropriate extension of time, even if it is not granted by the contract administrator”. This approach, i.e. fairness and determinability, has been favoured by the courts.

But what if the contractor just fails to notify in time or if there are concurrent causes for the delay? For example, a contractor might claim an extension of time for a relevant event, such as late instructions, in circumstances where there is also a shortage of labour, which would not be a relevant event. If late instructions stopped work before the shortage of labour occurred, and continued to stop the work until after the shortage had been resolved, the contractor would be entitled to an extension of time for the entire time the instructions had been outstanding, even though it had insufficient labour for some of that period. This is because the contractor could not have proceeded even if it had sufficient labour so the shortage could not have caused the delay. But if the shortage of labour halted the work before the instructions were

¹³ See e.g. Keith Pickavance, “Calculation of a reasonable time to complete when time is at large” [2006] ICLR 167 and *Delay and Disruption in Construction Contracts* 3rd edn, Informa Business Publishing, 2005.

required to progress the work, the contractor would be entitled only to an extension of time for delay caused by the late instructions once the contractor had sufficient labour to proceed. Late instructions could only have delayed completion once the contractor had sufficient labour. Then, if the shortage of labour and the late instructions started to delay work at the same time, and for exactly the same period of time, the contractor would be entitled to an extension of time for the full period of the delay.

However, in the Scottish case of *City Inn Ltd v Shepherd Construction Ltd*,¹⁴ the court disagreed with this concept. Instead, the court said that the contract administrator must consider the “relative significance of the events” and grant such an extension of time as it considers “fair and reasonable”. Here, the employer, City Inn, claimed that the contractor, Shepherd, failed to complete the Works by an agreed completion date. The contract was the JCT standard form with specific amendments. Shepherd took the position that it was entitled to both an extension of time and prolongation costs. The facts showed that the contractual completion date was 25 January 1999, but practical completion did not occur until 29 March 1999. Then, some three months later, in June 1999, the architects issued a certificate retrospectively, in accordance with Clause 25 of the contract, revising the completion date to 22 February 1999 and, as a result, Shepherd received a four-week extension of time. However, Clause 24 of the contract entitled City Inn to damages from 23 February to 29 March at a weekly rate of £30,000 and on that basis they deducted £150,000 from the monies due to Shepherd, taking the position that Shepherd was not entitled to any extension of time beyond the contractual completion date of 25 January 1999. This was because none of the instructions issued by the architect caused any delay in completion and that, if any delays were caused by those instructions, they were concurrent with delays arising from matters that were Shepherd’s fault. Here also, Clause 13.8 of the contract provided that Shepherd was obliged to follow certain procedures when executing an architect’s instruction that could delay the completion date and they had not done so.

Citing *Peak*, the court felt that City Inn was entitled to damages in the event that Shepherd failed to complete the Works on time unless such delay was caused by City Inn. Under Clause 25 the architect was permitted to extend the time for completion of the work on the occurrence of events that were beyond Shepherd’s control. Such extensions had to take account of concurrent events, where some were contractors’ risk events and others were not. However, delay caused by matters for which the contractor was responsible did not deprive it of its claim to an extension of time for delay caused by a “relevant event”, namely one that was outside his control. In that event, a fair and reasonable apportionment of responsibility was necessary. In the instant case, the delay in completion arose from concurrent causes, the majority of which were relevant events for the purposes of Clause 25. However, some delays were attributable to Shepherd and the 11-week extension they claimed was reduced to one of nine weeks. The court noted that Clause 13.8 applied to delays caused by the content of an instruction and not by its lateness. On that basis, all of the architect’s instructions relied on by Shepherd for the purposes of the counterclaim, with one exception, were outside the scope of Clause 13.8. It followed that Shepherd was not precluded from claiming an extension of time under Clause 25 in relation to those matters. Further, the court found that where a claim was made for an extension of

¹⁴ [2007] CSOH 190.

time, there was a clear need to invoke Clause 13.8. In the instant case City Inn had waived its requirements by its failure to do so and Shepherd had acted in reliance on that waiver by pursuing claims under Clause 25 without any reference to Clause 13.8 in relation to some sources of delay. Thus, it was found that an extension of time of nine weeks was proper making the amended completion date 29 March 1999 and entitling Shepherd their prolongation costs for nine weeks. The court stated:

“... The fact that the Contractor is laid under an obligation to comply with clause 13.8.1, rather than merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. Non-compliance with a condition precedent may in many situations result in a party to a contract losing a benefit, which he would otherwise have gained, or incurring a liability, which he would otherwise have avoided. The benefit lost or the liability incurred may not be in any way commensurate with any loss inflicted on the other party by the failure to comply with the condition. The law does not, on that account, regard the loss or liability as a penalty for the failure to comply with the condition. In my opinion, it would be wrong to regard the ‘liquidated damages’ to which the Defendants remained liable because they failed to comply with cl 13.8.1, and thus lost their entitlement to an extension of time, as being a penalty for that failure.”

The court further indicated that the contract administrator should take into account the degree of culpability involved in each event, as well as the significance of each event in causing the delay, thus giving contract administrators discretion to award extensions of time that appear to be fair and reasonable instead of extensions of time merely based on which event occurred first.

It thus appears that the court has taken the extension of time clause away from the general law of causation and to set it up as a contractually specific operation. Taking the court’s example in *Henry Boot v Malmaison*,¹⁵ if a contractor was delayed both by exceptionally inclement weather (a relevant event) and by a labour shortage (a contractor’s risk item), then the extension of time would be granted. The court in *City Inn* stated:

“On the approach to causation found in the general law of contract and delict [tort], it could not be said that the bad weather caused the delay because the delay would have occurred in any event. Under clause 25, however, the architect may take the bad weather into account to the extent that he considers it fair and reasonable to do so.”

Then, after deciding that the “dominant cause” theory of causation could apply to the operation of extension of time clauses the court moved on to its conclusion that:

“Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable.”¹⁶

It seems clear that the basis for these cases is that there are times when the enforcement of a liquidated damages provision would be either unfair and/or unconscionable, particularly if the contract is not clear on exactly how the liquidated damages provisions will be applied and/or the cause of the liquidated damages is directly related to the actions of the employer (or its agent, i.e. the engineer and/or contract administrator).

15 *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32.

16 It should be noted that some writers do not agree that the court’s conclusion in the *City Inn* case are incorrect and should not be imported into English law: see e.g. Brodie McAdam, “Apportionment and the common law: has *City Inn* got it wrong?” *Construction Law Journal*, 2009.

When this occurs the contractor is relieved of the liquidated damages provision and time is then “at large”.

A recent development is found in the case *Bluewater Energy Services BV v Mercon Steel Structures BV*,¹⁷ where the court rejected the subcontractor’s claim that time for completion was at large, finding that there had been no acts of prevention by the contractor and the subcontract provided for extensions of time. While no actual changes were made, extra-judicial commentary suggests a potential shift in approach and these can be seen in Ramsey J’s comments at 518:

“The principle is of some antiquity and has a surprising effect on the contractual obligations as to the time for completion. As I have found that there is an extension of time mechanism for acts of prevention and I am able, so far as is necessary, to determine the appropriate adjustments to the Schedule of Key Dates, this is not the opportunity to consider the underlying basis for the principle.”

Following along this path the contractor needs to ensure that its claims for extensions of time are both correct in terms of what is claimed and also timely. This leads to the issues of “time-barred claims”.

Time-barred claims

The concept of a claim “cutoff” period basically arose in the 1999 changes to the FIDIC Red Book specifically in Sub-Clause 20.1. Before this point, claim “cutoff” periods of time, which are also known as “time-bar”, did not truly exist. Under FIDIC, Sub-Clause 20.1 states:

“20.1 Contractor’s Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

... The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.”

Following this, the NEC forms finally added a time-bar provision in the third edition, NEC3, published in 2005. NEC3 included provisions regarding variations and claims entitled “Compensation Events”. Their time-bar provision Clause 61.3 reads:

“The contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if:

- the Contractor believes that the event is a Compensation Event and
- the Project Manager has not notified the event to the Contractor

¹⁷ [2014] EWHC 2132 (TCC).

If the Contractor does not notify a Compensation Event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.”

These two major, worldwide forms make the point simply: Either put forth your claim within the defined period of time or lose your rights. Many writers¹⁸ have pointed out that the two forms treat the situation differently. While the requirement under FIDIC is to give notice of a claimed right or entitlement to either time and/or money, under the NEC3 the requirement is to just notify the employer that some “compensation event” has occurred. In practice this means that under FIDIC the duty to give notice only comes into play when it is felt that the contractor is entitled to additional time/money as compared with the NEC3, which requires notification within eight weeks of becoming aware of the event. A simple way to state the difference is that under FIDIC the duty is to notify of “an entitlement” to additional time/money while under the NEC3 the duty is to notify of “an event”. Thus, if the engineer makes a modification at the start of the project, for example, it would perhaps be a compensation event under the NEC3 and the contractor would have to so notify the employer within the eight weeks. In the NEC4 the first portion of clause 61.3 is basically the same as it is in the NEC3 and it sets out the contractor’s responsibilities to give notice to the project manager. Unless the project manager has already notified the contractor, a notice has to be given of an event which has happened, or which is expected to happen, if it believes the event is a compensation event.

The second part of the clause deals with the consequence of a failure to provide notice (a time-bar provision). This is where the wording within NEC4 has slightly altered: “If the contractor does not notify the compensation event within eight weeks of becoming aware that the event has happened, the prices, the completion date or a key date are not changed.” The consequences of the contractor missing the eight-week deadline and failing to provide this notice are serious.¹⁹

The time bar in clause 61.3 now arises only if there is a failure on the part of the contractor to notify a compensation event within eight weeks of becoming aware, not of the event, but “that the event has happened”. It can be difficult to prove the date of the contractor’s awareness, which is of course a subjective test. It is also entirely possible for the contractor to be aware of an event at a different, and potentially earlier, date than when he “expects” or ‘believes’ it to be a compensation event.²⁰

Under FIDIC, notification would only be necessary within 28 days of the contractor realising that a modification entitles it to additional time/money, which under the circumstances could be many months later.

It should be noted that the new FIDIC Gold Book is slightly different from the other FIDIC forms. Under Clause 20.1 of the Gold Book notice must still be given as to any event or circumstance giving rise to a claim “not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance” which gives rise

¹⁸ See e.g. Ronan Champion, “Variations, time limits and unanticipated consequences”, *Construction Law Journal*, 2008.

¹⁹ See e.g. Huw Morgan, “Events, Dear Boy Events – The Next Generation of NEC Contracts” 31 July 2017, <https://www.vww.co.uk/news-and-events/blog/construction/events-dear-boy-events-the-next-generation-of-nec-contracts>.

²⁰ *Ibid*.

to a right to claim.²¹ This requirement is modified by Clause 8.4 which requires that both employer and contractor should “endeavour to” advise the other of any circumstances of which they are aware that may adversely affect the project, such as potential delay or increases in costs. Further, in Sub-Clause 20.1(a), the contractor may submit to the dispute board, the details of any circumstances that may justify the late submission of a claim. The clause provides that if the dispute board considers the circumstances are such that late submission was “acceptable”, the dispute board may override the condition precedent, thus giving the contractor a bit of leeway in its claims notification.

As to being “aware” of the “events” when should that be? Under FIDIC, the notification of claims period starts when the contractor is aware, or should have been aware, of a potential claim. Is this subjective or objective? There is a view that, under the NEC3, the time period within which notice should be given is from the time that an “experienced contractor” should have become aware of the event that will start the eight-week period.²² The basis for this view is that adopting such a standard (which is in line with the objective reasonable man test in negligence), will remove the subjective view of the contractor to that of an established contractor experienced in that type of construction as the standard to be applied by adjudicators as well as project managers. Under the NEC there is also a requirement that the project manager is to give notice to the contractor of a compensation event at the time of giving an instruction to the contractor or changing an earlier decision and Clause 61.1 states:

“For compensation events which arise from the Project Manager or the Supervisor giving an instruction or changing an earlier decision, the project manager notifies the contractor of the compensation event at the time of giving the instruction or changing the earlier decision”

Based on this clause two things are clear, the first being that the provision is specifically limited to compensation events arising from a project manager’s instruction and not other types of event. Secondly, if the project manager does not give this notification when required, then the contractor has a defence and if its claim is not timely made it will not fail for not having been given as required.

The importance of a time-bar clause is that if it is held to be ineffective then, in the absence of any extension of time award, the time for completion will be “at large” such that the employer will lose the “automatic” right to liquidated damages. In *Bilton v Greater London Council*,²³ the court wrote:

“... 1. The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.

2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date – see for example *Holme v Guppy* (1838) 2 M&LJ 387, and *Wells v Army and Navy Co-Operative Society* (1902) 86 LT 764. See also *McAlpine Humberoak v McDermott International* (1992) 58 BLR 1 where Lloyd LJ at pp 21–22 stated:

‘The principle enunciated in *Wells v Army & Navy Cooperative Society* was not new. It is as old as *Holme v Guppy* (1831) 3 M & LJ 387, where Baron Parke first used the phrase, often since repeated, of the contractor being “left at large”. In recent times

²¹ It should be noted, however, that where the employer has a claim, it must give notice “as soon as practicable” after it becomes aware of the event or circumstance giving rise to that claim.

²² See *NEC Users’ Group newsletter* issue No 37, Dec 2006, pp 4–5.

²³ (1982) 20 BLR 1.

the principle has been applied in such cases as *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114, *The Cape Hatteras* [1982] 1 Lloyd's Rep 518 and *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391. In all these cases the employer was claiming liquidated damages. In all of them it was held that the claim for liquidated damages must fail since the employer could not rely on the original date of completion, or on a power to extend the date of completion. In the absence of such a power, there could be no fixed date from which the liquidated damages could run...’.”

In terms of time-bar provisions, the recent case of *Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd*²⁴ is relevant. Here Mitchell was the main contractor, engaged to design and construct a warehouse in Kent. However, it appointed a ground works subcontractor, Regorco, to undertake certain ground treatment works. A decade after practical completion, the warehouse tenant complained of settlement of the slab beneath the site's production area. One of the preliminary issues which the Technology and Construction Court was asked to determine was whether Regorco's time-barring clause, as contained within its standard terms and conditions, complied with the Unfair Contract Terms Act 1977. The clause required the notification of any claim for defective works to be made in writing within 28 days of the appearance of the defect, and in any event to be notified within one year of completion of the works.

Mr Justice Edwards-Stuart first concluded that the clause would have been subject to the 1977 Act; although it was only ever intended to be partially incorporated into the subcontract, it was part of Regorco's standard terms of business. He then compared the clause to the time bar imposed by the FIDIC Red Book, which requires a contractor who wishes to claim an extension of time or additional payment to give notice as soon as practicable and not later than 28 days after he becomes aware (or should have become aware) of the event or circumstance giving rise to that entitlement. Mr Justice Edwards-Stuart considered that the FIDIC drafting was reasonable. However, Regorco's time-bar clause, by contrast, (i) applied to events after the parties were off site and to concealed works; and (ii) started time running from the date the defect appeared, and not from when the other party knew, or ought to have known, about it. Accordingly, the clause would have been struck out under the 1977 Act, as it was not reasonable to expect that the contractor should comply with the 28-day time limit, or one year long stop, imposed for bringing a claim for such defects.

In the view of some writers²⁵ the NEC3 Clause 61.3 and FIDIC Clause 20.1 “time-bar” clauses in effect “displace the prevention principle” which is also contended to be a rule of construction rather than a rule of law and as such should be enforced so that the contractor's failure to comply can be a complete defence for the employer. Such an approach not only supports the contract administration ideas that the respective drafting panels intended, but could also resolve such “time-bar” issues as preliminary issues – swiftly and at less cost to the parties,²⁶ thus avoiding time at large issues from developing.

While time-bar clauses and their explicit notice requirements may be effective in most of the world, the courts in the United States have taken a different view, which can be seen in *Ace Constructors Inc v United States*.²⁷ Here, the court held that the

24 [2016] EWHC 76 (TCC).

25 See e.g. Hamish Lal, “The Rise And Rise Of ‘Time-Bar’ Clauses: The ‘Real Issue’ For Construction Arbitrators”, *Proceedings of the Institution of Civil Engineers, Management, Procurement and Law*, February 2007, Issue MP1, 160.

26 *Ibid.*

27 [2006] 70 Fed Cl 253.

contractor was entitled to an equitable adjustment for additional costs incurred due to a differing site condition that had resulted from an inaccurate topographical survey included in the government's original solicitation.²⁸ The court also ruled in favour of the contractor on the adequacy of notice with respect to its differing site conditions claim. The dispute arose from a contract with the US Army Corps of Engineers awarded to Ace for the construction of an ammunition facility to store and transfer ammunition to cargo aircraft. The project required the construction of a concrete loading apron of approximately 9.5 acres and a 1,500-foot taxiway. The government's solicitation included plans that superimposed the elevations required for the finished project over an aerial topographical survey of the site. In preparing its tender Ace estimated, from the government's plans, that the amount of fill needed for the project was approximately equivalent to the amount of fill to be excavated on the project site, which meant that no offsite importation of soil was needed. After entering into the contract, Ace retained a subcontractor to perform a topological survey of the project site. The topological survey indicated that the government's plans were inaccurate in that the elevations depicted on the plans were lower than the actual elevations on the site. Accordingly, rather than there being a balanced site as shown on the government's plans, the project would require the importation of fill from off-site. After examining the topological survey, Ace orally notified the contracting officer of the necessity of obtaining additional fill and submitted a Request for Information, which estimated that 125,000 cubic yards of additional fill would be required to construct the project. As directed by the government, Ace obtained the additional fill by increasing the size of retention ponds on the project and by importing fill from off-site. Overall, Ace was required to obtain approximately 129,000 cubic yards of additional fill as a result of the government's erroneous plans.

Upon completion of the project Ace filed several claims with the government, under the Contract Disputes Act, seeking recovery of additional costs incurred on the project. Ace included a claim for differing site conditions resulting from the inaccurate site elevations included in the government's solicitation. Specifically, Ace asserted that because the plans included in the government's solicitation provided erroneous elevations, the lower site elevations actually encountered constituted a "Type 1" differing site condition.

As the court noted on appeal from the contracting officer's denial of Ace's claims, in order to demonstrate entitlement on a Type 1 differing site condition claim, a contractor must establish by the preponderance of the evidence that:

"(1) the conditions indicated in the contract differ materially from those actually encountered during performance;

(2) the conditions actually encountered were reasonably unforeseeable based on all information available at the time of bidding;

(3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and

(4) the contractor was damaged as a result of the material variation between expected and encountered conditions."

The court determined that Ace had satisfied its burden of establishing a Type 1 differing site condition and held that Ace incurred substantial damages because the site conditions actually encountered by Ace were unexpected and differed materially

²⁸ See Alexander N Lamme, "The Court of Federal Claims 'Aces' The Government" WTHF Article, Summer 2006.

from the conditions indicated in the government's plans. Additionally, the court found that the actual conditions encountered were reasonably unforeseeable to Ace at the time of bidding.

On the issue of adequate notice, the court rejected the government's argument that Ace had failed to provide adequate and timely notice of the differing site condition. The government argued that Ace had failed to give prompt, written notice of the differing site condition as required by the contract's differing site condition clause. In rejecting the government's notice argument, the court held that notice was adequately conveyed by Ace through its verbal conversations with government representatives and by its submission of the Request for Information, which indicated that an additional 125,000 cubic yards of fill were required. Despite the contract's stated requirement that written notice be provided, the court indicated that "notice need not follow any specific format, but must merely make the Contracting Officer aware of the differing site condition". Additionally, the court noted that even where a contractor fails to provide adequate notice, a claim will not be barred unless the government can affirmatively demonstrate that it was prejudiced as a result of the lack of notice and found that the government, in the instant case, had failed to demonstrate any prejudice.

Based on its determination that Ace had established a Type I differing site condition, the court awarded Ace its additional labour and equipment costs (including a percentage mark-up for home office, field office and profit) resulting from the differing site condition. The court also held that Ace had established a claim of constructive acceleration by demonstrating that the government's refusal to grant Ace a time extension, combined with the government's threat to assess liquidated damages, forced Ace to work expanded overtime. The court awarded Ace its lost productivity costs associated with the constructive acceleration.

While this may strike one as minimalist notice, it is important to note that under most time-barred notice requirements all that is necessary is to give what can be termed as bare notice,²⁹ "... a one or two sentence letter from the contractor may do. There is no need for the Contractor to provide particulars within 28 days".

In reviewing any time-bar clause it is necessary to review the underlying intentions and, specifically, that means whether or not the time-bar clause was drafted as a condition precedent. In the House of Lords case of *Handelgesellschaft Schaft GmbH v Vanden Avenne Izegem PVBA*,³⁰ it was held that if a notice requirement clause (such as a time-bar provision) is to be a condition precedent, the clause must state the precise time for service and make it plain by express language that unless the notice is served within that time, the party required to give notice will lose its rights under that clause.³¹

Thus, under that ruling both the FIDIC and NEC3 clauses would qualify because if the time limit is not met then all rights to the underlying claim are lost.³²

29 See e.g. Seppala C, "Contractors claims under FIDIC contracts" (2005) Const LJ 21.

30 [1978] 2 Lloyd's Rep 109.

31 See also Hamish Lal, "The Rise And Rise Of 'Time-Bar' Clauses: The 'Real Issue' For Construction Arbitrators", *supra*.

32 However, one should compare the Court's ruling in *Koch Hightex GmbH v New Millennium Experience Company Ltd (Formerly Millennium Central Limited)* (1999) WL 1019561 where it was held that the following express clause was not a condition precedent: "The provision of a guarantee and performance bond is a condition precedent to any liability or obligation of the New Millennium Company under the contract." Here the Court was not convinced that the employer and the contractor intended that the effect of their agreement should be that the contractor should be entitled to carry on works without being paid for some indefinite period until it chose to provide the guarantee and performance bond.

As has been discussed earlier, there are cases from both Australia and Scotland which delve into the perpetual “prevention principle” versus “time-bar clause” issues. The cases which support “time-bar” clauses include the Australian cases of *Turner Corporation Ltd v Co-ordinated Industries Pty*³³ and *Décor Ceiling Pty Ltd v Cox Constructions Pty Ltd (No 2)*,³⁴ as well as the previously cited Scottish case of *City Inn Ltd v Shepherd Construction Ltd*.³⁵ It should be noted that in *Turner* the court reviewed the direct conflict between the prevention principle and the condition precedent clause, and wrote:

“If the Builder having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension ... resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which it would have negated the effect of that preventing conduct.”

In *Décor* the Supreme Court of South Australia reviewed the situation dealing with whether the subcontractor’s claims failed because a notice of claim required by a clause in the contract was not served by Décor. This clause stated:

“The Main Contractor shall not be liable upon any claim by the Subcontractor in respect of or arising out of a breach of the Subcontract unless within 28 days after the first day upon which the Subcontractor could reasonably have been aware of the breach, the Subcontractor has given to the Main Contractor’s Representative the prescribed notice.

The Main Contractor shall not be liable upon any other claim by the Subcontractor for any extra cost or expense in respect of or arising out of any direction or approval by the Main Contractor’s Representative unless within 42 days of the entitlement to make the claim, the Subcontractor has given to the Main Contractor’s Representative the prescribed notice.”

Décor had argued that this clause was a condition precedent and, therefore, did not need to be pleaded. The court agreed and took the view that compliance with this clause “is properly described as a condition precedent”.

Then, in *City Inn* the court dealt with a contractor’s obligation to comply with an express “time-bar” clause. Here, as mentioned earlier, the contractor had been awarded (by the architect and an adjudicator) a total nine-week extension of time. However, the employer argued that liquidated damages should be payable since the contractor had failed to comply with the express “time-bar” clause. The important part of the clause in question stated:

“If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3.”

The court, after reviewing this clause, found for the employer and wrote:

“... if he [the Contractor] wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances ... But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction.”

33 (1997) 13 BCL 378.

34 [2005] SASC 483, [2006] CILL March 2006.

35 [2003] ScotCS 146, Inner House.

Taking the other position, in favour of the prevention principle, are the two cases of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*³⁶ and *Peninsula Balmain Pty Ltd v Abigroup Contractors Corp Pty Ltd*.³⁷ In *Gaymark* the contract dealt with extensions of time using the following provision:

“The Contractor shall only be entitled to an extension of time ... where the Contractor ... (b)(i) has complied strictly with the provisions of sub-clause SC19.1 and in particular, has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause”

While it was agreed that the contractor had not complied with this provision and had not given notice as required, the court took the view that it was not a condition precedent to recovery.³⁸

Then, in *Peninsula* the New South Wales Court of Appeal was faced with a “time-bar” clause, which stated:

“The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.”

Here again, the contractor did not give proper notice and the court held that the failure to give proper notice did not deprive the contractor of his right to an extension of time but “merely delayed it”, taking the position that the “prevention principle” was of greater importance than the “time-bar” clause. As a result the superintendent should have exercised its unilateral power to grant an extension of time to cover the employer delay.

Unfortunately, the decision in *Gaymark* leaves much to be desired and, when added to the decision in *Peninsula Balmain*, it was felt that³⁹ “in the light of [these decisions] ..., the condition precedent to an extension of time in sub-clause 20.1 of the new suite of FIDIC forms ..., if governed by Australian law, could result in the employer being prohibited from recovering liquidated damages in circumstances where the employer delays the contractor and the contractor fails to comply with sub-clause 20.1”. Further, it is also interesting to note that the *Gaymark* case was dealt a rather unpleasant review by the court in the UK case of *Multiplex Construction v Honeywell Control Systems*⁴⁰ that was discussed earlier, in which the court stated that:

“Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England ... If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.”

36 [1999] 18 BCL 449.

37 [2002] NSWCA 211.

38 It should be noted that the court may have been concerned that the contractual term allowing the contract administrator an overriding discretion to grant extensions of time had been deleted by the parties. In the judge’s view the deletion of this term created an ambiguity since it failed to provide for actual delays caused by the employer.

39 See G Smith, “The ‘Prevention Principle’ and conditions precedent: relevant Australian developments” [2002] ICLR 397. See also IN Duncan Wallace, “Liquidated Damages Down Under: Prevention by Whom?” [2002] 7 *Construction and Engineering Law*, Issue 2, 23, where he states that *Gaymark* represents “a misunderstanding of the basis of the prevention theory” and “a mistaken understanding of the inherently consensual and interpretative basis of the prevention principle”.

40 [2007] EWHC 447 (TCC).

The way forward is best resolved if the “prevention principle” is considered a “rule of construction” and not one of law, thus allowing drafters to allow express terms such as FIDIC 20.1 and the NEC3 61.3 to remove its operation from the contract or, as put forth by some writers,⁴¹ that the “prevention principle” should not apply because the “proximate cause” for “the contractor’s loss is not one by the employer but the contractor’s failure to operate the contractual machinery such that there is no act of prevention by the employer”.

After *Bremer*⁴² the courts have dealt with similar issues and in *WW Gear Construction Ltd v McGee Group Ltd*,⁴³ the court held that the requirement that a contractor should make a loss and expense claim within the general and specific timescales set out in Clause 4.21 of the JCT Trade Contract terms (TC/C) 2002 edition with Amendment No 1:2003 (as further amended by the parties) was a condition precedent to the recovery of loss and expense under that clause. It is noted that this does not depart from the decision in *Bremer*.

Also, while mentioned earlier in *Jerram Falkus Construction Ltd v Fenice Investments Inc*,⁴⁴ the court considered whether delays amounted to acts of prevention setting time at large where the contract did not contain terms pertaining to extensions of time. Also considered was whether a contractor’s claim for loss and expense was time-barred as it was not made within 28 days of the adjudicator’s decision. This case seems to indicate a preference for “causation in fact approach” to concurrent delay.

Time-bar provisions have also been altered in the new 2017 FIDIC editions of the Red, Yellow and Silver Books and the new Clause 20.1 claims procedure applies to both contractor and employer, who are referred to as the “Claiming Party”. Both are subject to a 28-day time-bar. The engineer has 14 days from receipt of the Notice of Claim to notify the parties of any failure to comply with the 28-day time limit.⁴⁵ The Claiming Party must provide a fully detailed claim within 84 days of the date at which it became aware/should have become aware of the event or circumstance giving rise to the claim. If that 84-day time limit is not met in respect of the contractual or legal basis of the claim, the engineer has 14 days to confirm that the Notice of Claim is invalid. But despite all of this the engineer proceeds to agree or determine the claim. The time limit for agreement of the claim is 42 days from the date of receipt of the fully detailed claim, unless both parties advise that no agreement can be reached within this time limit or none is in fact reached, whichever is the earlier, in which case the engineer has an additional 42 days in which to determine the claim. Overall this can lead to a 168-day time period between the occurrence of the “event of circumstance” and the engineer’s determination.

41 See also Hamish Lal, “The Rise And Rise Of ‘Time-Bar’ Clauses”, *supra*.

42 *Bremer Handelsgesellschaft Schaft v Vanden Avenne Izegem* [1978] 2 Lloyd’s Rep 109.

43 [2010] EWHC 1460 (TCC).

44 [2011] EWHC 1935 (TCC).

45 Red, Yellow and Silver Books, Sub-Clause 20.2.2.

CHAPTER 14

Dispute resolution

Traditionally, dispute resolution meant resort to the courts with the attendant delay, costs and frequently unsatisfactory results. Especially in a construction setting, the complexity of disputes has inevitably increased the expense and delay of both litigation and arbitration. There is increasing interest in various other ways in which these conflicts can be resolved. Such possible avenues are known collectively as Alternative Dispute Resolution (ADR).¹ The current trend towards an alternative form of dispute resolution originated in the United States, where a number of court-related factors contributed to the development of ADR, including:

- (a) The constitutionally guaranteed right to jury trial for “suits at common law”;
- (b) The absence of any general system of “fee-shifting” in civil litigation, so that each party must bear its own costs regardless of the outcome;
- (c) The absence of any national system of judicature;
- (d) The poor quality of some judges, due to low pay and/or erratic selection procedure (including election); and
- (e) Congestion of the court system.

Conventional model

The “conventional” dispute resolution model is the one most frequently accomplished through the court system and, as described by Martin Shapiro,² involves an adjudicatory type court process where you have “(1) an independent judge applying (2) pre-existing legal norms after (3) adversarial proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong”.³

Shapiro, however, points out that, when reviewed against various countries and their courts, this model “fits almost none of them”.⁴ Needless to say, this is the usual manner of dispute resolution and the most intense and rigorous. On the scale of dispute resolution methods this one ranks at the top, not in terms of effectiveness but rather in terms of exhaustiveness. The obverse of this is where the potential litigants just sit down and sort out their differences and reach an amicable solution to the dispute. In between are all manner of variants.

¹ See Cyril Chern, *Chern on Dispute Boards: Practice and Procedure*, 4th edn, Informa Publishing, London, 2019, Chapter 1.

² See M Shapiro, *Courts: A Comparative and Political Analysis*, The University of Chicago Press, Chicago and London, 1981.

³ *Ibid.*

⁴ *Ibid.*

A review of the various forms of dispute resolution shows that following close behind court-based litigation are arbitration, adjudication, mediation and other related methods. A short compendium of other ADR forms is as follows:⁵

Judicial Appraisal:	The parties make written submissions to a judge who then gives an appraisal of the likely outcome should the matter go to trial. It is for the parties to agree whether or not the appraisal is to be binding.
High-Low Arbitration:	Prior to the arbitration the parties agree the parameters of the settlement. If the award is within the parameters, it is binding. If it is outside the parameters, the higher or lower limit set by the parties applies, whichever is the nearer.
Adjudication:	This is akin to Judicial Appraisal but the submissions are made to a neutral third party, rather than to a judge. The third party is usually chosen on the basis of expertise in the matter in dispute. Adjudication can encompass oral submissions or site visits. The decision is usually binding but not necessarily final. Adjudication has also become increasingly common in the construction industry. This is as a result of the statutory right to adjudicate under the Housing Grants, Construction and Regeneration Act 1996. Part II of the Act, which came into force on 1 May 1998, provides that construction contracts (as defined) must contain an adjudication procedure that complies with section 108 of the Act. If the contract contains no adjudication provisions or those provisions fall short of those required by the Act, the statutory Scheme for Construction Contracts applies.
Expert Determination:	This can be used to resolve a discrete matter. Usually the expert will investigate and report upon the matter. Reliance upon submissions made by the parties is, therefore, not essential. The decision is usually binding. Where the parties have agreed that the expert's determination will be final and binding, then, in the absence of an agreement as to specific grounds upon which the determination may be challenged, the courts will interfere with the determination only in limited circumstances, such as fraud or a failure on the part of the expert to follow his instructions. ⁶ And now the additional area of "error" can be added.

In this regard there has been some development in this area, and in *Shafi v Rutherford*⁷ an expert determination was set aside because the expert appointed to resolve the amount to be paid for a share of a business did not correct errors in the accounts on which the valuation was based.

In relation to challenging an expert's determination on the basis of "error" is *Walton Homes Ltd v Staffordshire CC*,⁸ where the court refused to grant an order that an expert determination by a surveyor was "manifestly erroneous" where the surveyor had not manifestly

⁵ See Cyril Chern, *Chern on Dispute Boards: Practice and Procedure*, 4th edn, Informa Publishing, London, 2019, Chapter 1 *supra*.

⁶ See e.g. *Dixons Group plc v Jan Andrew Murray-Oboynski* (1997) 86 BLR 16, HHJ Bowsher QC; *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA.

⁷ [2014] EWCA Civ 1186 (CA(Civ Div)).

⁸ [2013] EWHC 2554 (Ch).

erred in rejecting an interpretation of a clause that was commercially absurd. This case seems to indicate the court's reluctance to allow challenges to expert determinations on the basis of error.

Then, in *Ackerman v Ackerman*,⁹ the court held that an expert's departures from express or implied procedural instructions had not been material because his decision had been inevitable and his determination was not otherwise invalidated by the nature of the departures, which had not had a significant effect on him in reaching his decision.

Thus, the extent to which an error of law made by the expert is open to review by the courts is perhaps qualified.

Mediation:	Mediation involves the introduction of a neutral third party, the mediator, whose purpose is to assist the parties in reaching a negotiated settlement. There are two main forms of mediation – facilitative and evaluative. In facilitative mediation, the mediator remains neutral throughout. In evaluative mediation, the mediator may express a view or make a recommendation where this will assist the parties with their negotiations.
Mediation-Arbitration:	The parties use mediation to attempt to reach a negotiated settlement but, should that not prove possible, a decision is imposed upon them in respect of any unresolved issues. The parties decide whether one person is to act as both mediator and arbitrator or whether the roles are to be split. Many find this method compromises both the mediator and the arbitrator, but despite that it is occasionally used in terms of having the mediator, upon settlement, be “commissioned” as an arbitrator solely for the purpose of converting the settlement into an “Agreed Award” or a “Consent Award”.
Conciliation:	The terms “mediation” and “conciliation” are often used interchangeably. However, in the UK conciliation is usually regarded more as an evaluative than as a facilitative approach. For example, under the ICE Conditions parties may refer their dispute to conciliation and, in the event of a conciliated settlement not being reached, the conciliator has the power to make a “recommendation” for the settlement of the dispute.
Executive Tribunal:	This process involves a mediator sitting as a panel with an executive from each party who has not been personally involved in the dispute. The panel hears submissions from each party. Thereafter, the executives retire with the mediator to negotiate a settlement.
Neutral Fact-Finder:	This is similar to Expert Determination. It is usually restricted to specific issues within an overall dispute and is not binding in that the fact-finder does not usually make an award.

Litigation versus arbitration versus mediation

Unfortunately, arbitration comes a close second to litigation in terms of complexity and cost. Where arbitration was once the “golden child” of dispute resolution, it has

⁹ [2011] EWHC 3428 (Ch).

today, in construction settings, become almost as bad, if not worse, than a full court trial in terms of not just cost but also time expended with the added burden of having to pay the arbitrator(s). Unfortunately, litigation is involuntary, in the sense that when a party is sued it has to participate in the process whether it likes it or not or else suffer the consequences, e.g. judgment in default. Mediation, however, is a completely voluntary process. Moreover, mediation is a process of assisted negotiation, as compared to the rigid nature of litigation with its strict rules of procedure and evidence governing the steps leading to, and the conduct of, the trial. Mediation is entirely flexible and can be adapted to meet the particular needs of the parties and the circumstances of the case. It has the added benefit that the parties must do more than passively submit to the process, they must actively participate in the negotiation process, thus leading to a successful outcome that does not need to be enforced but rather will be complied with voluntarily.

Further, while court decisions are imposed and are binding upon the parties, mediation provides for a settlement that is arrived at by the parties themselves with the assistance of the mediator. Mediation normally takes place on the basis that the process is not binding upon the parties and is entirely without prejudice unless and until the parties enter into a written settlement agreement at the conclusion of the mediation.

Another factor against litigation (as is also the case in arbitration) is that it is adversarial, and thus has a tendency to drive the parties further apart. Moreover, at the conclusion of litigation there is usually a “winner” and a “loser”. With mediation, a mutual desire to settle the dispute by negotiation is a prerequisite. The process, therefore, tends to bring the parties closer together. Furthermore, there is no “loser” in a negotiated settlement voluntarily agreed by both parties.

Litigation is a backward-looking process. It is a retrospective enquiry aimed at ascertaining the truth about facts relevant to the dispute to which legal principles are then applied. The judgment of the court is a pronouncement on who was “right” and who was “wrong” in relation to past events. Although that same dispute will be the initial focus of mediation, the parties to mediation are able to introduce into the negotiations any issues they wish. These might be other events in the past which did not materialise into a full-blown dispute but which have left one or both of the parties feeling aggrieved, or there might be problems in the future which one or both of the parties anticipate may arise. Mediation, therefore, enables the parties to reach a settlement, which addresses much wider issues than just their strict legal rights in relation to some past event. This can be very valuable, particularly where the parties are, or wish to be, in a continuing relationship, as is common in the construction industry.¹⁰ Most importantly, while litigation usually mandates that the remedies available to a successful party are limited to damages, with mediation there are no limits to the bases upon which the parties can agree to settle.

For the proponents of mediation, its great advantage over litigation lies not just in its relative speed and low cost but in its flexibility and creativity and in the opportunity it offers for achieving a positive outcome for all parties. The vast majority of legal proceedings settle before trial, often at a very late stage and only after significant costs have been incurred. If a claim is going to settle anyway, a mediated settlement is a means of obtaining a swifter and more satisfactory settlement than would otherwise occur.

¹⁰ *Ibid.*

Arbitration

Arbitration, which was supposed to be a better substitute for court litigation, is a process whereby disputes are determined by a private tribunal chosen by the parties. So long as the arbitrator acts properly there is usually no appeal from the arbitrator's award, which will be enforced by the courts.

The Arbitration Act 1996

In the UK, rather than use of the UNCITRAL Model Law on international and commercial arbitration ("The Model Law") or other forms of rules, the Arbitration Act 1996 applies.¹¹

Section 1 of the Act states:

"The provisions of this part are founded on the following principles, and shall be construed accordingly–

- (a) The objective of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) The Parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- (c) In matters governed by this part of the Act the court should not intervene except as provided by this part."

Despite the Arbitration Act there is a sharp decline in the number of cases being referred to arbitration, partly due to previous dissatisfaction with pre-1996 arbitration, which has led to arbitration clauses in contracts still being struck through as a matter of course, but principally due to the impact of adjudication.¹²

An interesting development is the introduction of the "100-day scheme", devised by the Society of Construction Arbitrators in 2004. This was meant to bridge the gap between adjudication and arbitration and under this scheme the arbitrator is required to make its award within 100 days of the date on which the statement of case is delivered to the arbitrator, or to the other party, whichever is the later.

The arbitration process

"Parties can agree to arbitrate once a dispute has arisen, or more commonly they may agree to refer future disputes to arbitration should the need arise. Section 6(1) of the Arbitration Act recognises this distinction and defines an 'arbitration agreement' as 'an agreement to submit to arbitration present or future disputes'. The definition does not restrict arbitration to merely contractual disputes, and could include a range of matters

¹¹ It may be of interest that, in late 2016, the Law Commission of England and Wales consulted on whether changes to the 1996 Act should form part of its Thirteenth Programme of Law Reform, in order to make arbitration less lengthy and costly (See <https://www.lawcom.gov.uk/arbitration/>). Possible areas of reform included making explicit provision for summary judgment, and to allow for the arbitration of trust disputes. In December 2017, however, the Law Commission decided not to include the 1996 Act in its Thirteenth Programme; it recognised, though, that some changes could be desirable, such that they might prompt a potential reform project – resources permitting – in the future. See Law Commission's Thirteenth Programme of Law Reform, at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf>.

¹² See e.g. Nicholas Gould and Victoria Russell, *Construction Law and Management*, Chapter 11 "Claims And Dispute Resolution".

such as tortious claims. There are limits to the kinds of dispute which may be ‘arbitrable’ for example criminal matters cannot be settled privately by arbitration.”¹³

Interestingly, when grappling with whether there is an agreement to arbitrate, section 6(2) of the Act states that a reference to an agreement that does contain an arbitration clause constitutes a valid agreement to arbitrate. In *Aughton Limited v MF Kent Services Limited*,¹⁴ the court held that merely referring to a standard form contract, which contained an arbitration clause, did not amount to an agreement to arbitrate and that the parties needed to include a written agreement to arbitrate in their primary agreement. The advent of section 6(2) solves this problem.

An arbitration agreement must be in writing, but this is interpreted widely and includes any method of recording the agreement such as electronically or on tape. The agreement to arbitrate need not be complicated. In *Arab African Energy Corporation Limited v Olieprodukten Nederland BV*,¹⁵ the words “English Law – arbitration, if any, London according ICC rules” were held to constitute a valid arbitration agreement which provided for arbitration in London under the ICC rules in accordance with English law.

However, as to what constitutes an “arbitration agreement” within the meaning of the Arbitration Act 1996, the court in *Aughton Ltd (formerly Aughton Group Ltd) v MF Kent Services Ltd*¹⁶ stated:

“... the Court held that merely referring to a standard form contract which contained an arbitration clause did not amount to an agreement to arbitrate and the parties need to include a written agreement to arbitrate in their primary agreement.”

(Note that this has now been resolved by section 6(2)).

And in *Kruppa v Benedetti*,¹⁷ the court took the position that a dispute resolution clause which provided that, in the event of any dispute, the parties would endeavour first to resolve the matter through Swiss arbitration, failing which the English courts would have non-exclusive jurisdiction, was not an arbitration agreement within the meaning of the Act in that the clause did not set out the number, identity and appointment method of arbitrators, the requirement to submit finally to a binding arbitration was absent and the clause’s envisaged two-stage process was inconsistent with its being an arbitration clause.

But in *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd*,¹⁸ the parties agreed in a subcontract that disputes would be referred to arbitration with the Dispute Review Board acting as arbitrator. The court held that the agreement amounted to an agreement to refer disputes to arbitration.

The arbitrator

The arbitrator(s) may either be chosen directly by the parties, or appointed by an appointing body. Most agreements provide a basis where, if the parties cannot agree an arbitrator by a specific time, an appointing body may do so, and failing that there is

¹³ *Ibid.*

¹⁴ (1991) 57 BLR 1.

¹⁵ [1983] 2 Lloyd’s Rep 419.

¹⁶ (1991) 57 BLR 1.

¹⁷ [2014] EWHC 1887 (Comm).

¹⁸ [2013] EWHC 2001 (TCC).

always resolution to the courts to appoint. Once selected, however, the arbitrator(s) or tribunal are subject to section 33 of the Arbitration Act, which states that they are to:

- “(a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”

Normally in the UK, an arbitrator obtains its powers from the agreement between the parties and the applicable rules and the Arbitration Act 1996. The Act provides the arbitrator with a wide range of powers and section 38 sets out the general powers of the arbitrator. Section 38(1) states that:

“The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.”

The balance of the section goes on to give examples of the powers that might be exercised, unless otherwise agreed by the parties, including:

- (1) “The power to order a claimant to provide security for costs.
- (2) The power to inspect, photograph, preserve or take samples of any property being the subject of the proceedings.
- (3) The power to direct that witnesses be examined on oath.
- (4) The power to order the preservation of any evidence.”

Other sections of the Arbitration Act contain specific powers, as follows:

“Section 37: Unless otherwise agreed, the tribunal has the power to appoint experts, legal advisers or technical assessors.

Section 39: The parties are free to agree that the tribunal shall have power to make a provisional award.

Section 41: The parties are free to agree that the tribunal shall, in the event of one party’s failure to do something or delay, have the power to make preemptory orders and dismiss claims if that default continues.”

Further provisions of the Act provide, for example in section 34(1), that the arbitral tribunal shall decide on procedural and evidential matters, subject to the parties’ agreement, and then in section 34(2) a list of procedural and evidential matters is set out which includes the exchange of “pleadings, disclosure of documents, the application of the strict rules of evidence and whether or not the tribunal should take the initiative in ascertaining the facts and the law”.

The award

Like a court judgment, an arbitrator’s award is final and binding on the parties unless they agreed to the contrary. Indeed, section 66 of the Act provides that the award may, with leave of the court, be enforced as if it were a judgment of the court, but the ability of a party to challenge the award is extremely limited. Further, upon issuing the award the arbitrator becomes *functus officio* and its duties and powers come to an end.

Another type of award arises when the parties come to a settlement, either through mediation or otherwise, and when this occurs the arbitrator may issue a consent award, which records the parties’ agreement. Awards of this type are then enforceable by the courts just like any other arbitral award. Further, section 49 of the Arbitration Act allows the arbitrator to award simple or compound interest unless otherwise agreed by

the parties. What makes this different is that normally a court can only award simple interest and very rarely does the court have the power to award compound interest.

Arbitration variations

While arbitration generally follows what appear to be court-like processes, there are many variants, such as “document only arbitrations” in which there are no face-to-face evidentiary proceedings and the arbitrator makes an award based upon the written submissions of the parties. Another variant is “Amiable Compositeur” or “*Ex aequo et bono*”, in which the arbitrator acts in a way to resolve the dispute and may, within certain limits, disregard the strict legal or contractual requirements in order to arrive at a fair and equitable solution. Another variant is what is called “Final offer or last offer”, or sometimes is referred to as “High-Low” arbitration. Each party submits its final offer in monetary terms to the arbitral tribunal. The tribunal must then select one or the other and make an award on that basis. The tribunal may not modify either party’s offer and each party is put in a position where it hopes the offers will be close together. Needless to say, any of these methods, if successful, will satisfy the parties to the dispute, but again litigation and arbitration are quite costly and time consuming. This leads to mediation.

Mediation during the litigation/arbitration process

Although parties in dispute and their advisers have often regarded mediation and litigation as being mutually exclusive, in fact mediation can, and often does, take place after proceedings have commenced. Indeed, this is now expressly contemplated under the Civil Procedure Rules (CPR). Mediation can prove a positive benefit to the litigation process for a number of reasons. First, it can set a timetable for the litigation. There is often an impetus to settle a claim before reaching a particular stage in the litigation. Often that stage will be a point where significant further expense will be incurred, for example, disclosure of documents or exchange of expert evidence. Second, the mediation will define the initial issues for the litigation, although, as pointed out above, there are often others that emerge. Third, the fact that litigation has been commenced enables the parties to put a value on the success of the mediation. If the parties know, at least in general terms, how long it will take for the proceedings to come to trial, how much is at stake and how much it will cost in lawyers’ fees, expert fees and in their own time and effort, then it enables the parties to make an assessment of how much a negotiated settlement is worth to them.¹⁹

In *Mona Al-Khatib v Abdullah Masry and others*,²⁰ the court directed that the parties should be invited to engage in mediation under the Court of Appeal scheme. Although the first mediation failed, due in part to the fact that the mediator was one proposed by the scheme administrator, Lord Justice Thorpe supervised the appointment of an alternative mediator. Following the cases resolution Lord Justice Thorpe stated:

“From the point of view of the Court of Appeal it supports our conviction that there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the process. It also demonstrates how vital it is for there to be judicial supervision of the process of mediation.”²¹

¹⁹ *Ibid.*

²⁰ [2004] EWCA Civ 1353.

²¹ *Supra.*

Refusing to mediate

In *Hurst v Leeming*,²² Hurst was attempting to sue his counsel (Leeming) for negligent advice. Hurst had proposed mediation to Mr Leeming who declined the offer but cited five reasons for doing so. Mr Justice Lightman considered whether the reasons given were sufficient for refusing mediation and divided them into “unacceptable reasons” and “acceptable reasons”:

Unacceptable reasons for declining mediation:

- The level of costs already incurred in the action.
- The fact that a claim is for serious allegations of professional negligence.
- The strength of the case – here it was even agreed that Mr Hurst had no case or claim against Mr Leeming yet Mr Justice Lightman stated that even if you have a “watertight case this is no justification for refusing mediation”.

Acceptable reasons (in this particular case):

- The character of the party proposing mediation. Here, Mr Hurst was considered to have been so personally affected by the actions that his judgment had been seriously disturbed and was incapable of a balanced evaluation of the facts.

Mr Justice Lightman wrote that the critical factor is:

“whether, objectively viewed, a mediation had any real prospect of success ... if the court finds that there was a real prospect, the party refusing may be severely penalised. Further the hurdle in the way of a party refusing to proceed to mediation is high”.

Then, in *Dunnett v Railtrack*,²³ Railtrack won their case at first instance. On giving leave for appeal Schiemann LJ suggested that Miss Dunnett “explore the possibility of Alternative Dispute Resolution”. Miss Dunnett referred this to Railtrack who instructed their solicitors to refuse. The matter proceeded to appeal and Railtrack won again.

On the issue of costs the court referred to CPR1.3 (the parties’ duty to further the overriding objective of using ADR) and CPR1.4 (the duty of the court to further the overriding objective by active case management). They also raised the fact that turning down ADR flat was not a reasonable ground for refusal. Lord Justice Brooke commented, “A mediator may be able to provide solutions which are beyond the powers of the court to provide”. He added that, if lawyers “turn down out of hand the chance of alternative dispute resolution when suggested by the court, they may have to face uncomfortable cost consequences”.

Here, the fact that Railtrack turned down the offers of mediation without anything more made it more difficult to establish that they had acted reasonably.

In *Halsey v Milton Keynes NHS Trust*,²⁴ the claimant proposed mediation on a number of occasions, both before and after the issuance of any claim and the defendant refused these offers primarily because they believed they did not have a claim to answer. After the defendant won at trial, the court considered whether the defendant should be denied all, or part, of its costs because of the refusal to participate in mediation.

²² [2002] EWHC 1051 (Ch).

²³ [2002] 2 All ER 850.

²⁴ [2004] EWCA Civ 576.

The Court of Appeal refused to penalise the successful parties in each case, who had declined to mediate, but made it clear that it had the power to do so, giving some guidance as to how courts should approach such issues.

The court noted that “the value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR”. While it was felt that courts could not positively order mediation against the wishes of an intransigently opposite party, it can make ADR “Orders” of the kind long since used in the Commercial Court (the form used in *Kinstreet v Balmargo*²⁵ and *Shirayama v Danovo*²⁶ which both involved reluctant parties). Thus, where any party refuses to mediate after judicial recommendation, this itself may be enough to justify sanctions.

The court affirmed the views expressed in *Dunnett v Railtrack*,²⁷ modified the observations of Lightman J in *Hurst v Leeming*²⁸ and provided additional comments about mediation. The important headline comments were:

- All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.
- The court could not compel mediation although it could make orders encouraging parties to mediate. Where an order of this kind has been made then the test for declining mediation will be higher.

The court provided six factors, which may be relevant to the question of whether a party has unreasonably refused ADR. Those factors include (but are not limited to):

- (a) The nature of the dispute;
- (b) The merits of the case;
- (c) The extent to which other settlement methods have been attempted;
- (d) Whether the costs of the ADR would be disproportionately high;
- (e) Whether any delay in setting up and attending the ADR would have been prejudicial; and
- (f) Whether the ADR had a reasonable prospect of success.

The first significant case after *Halsey* was *Yorkshire Bank, Clydesdale Bank Asset Finance Ltd v RDM Asset Finance Ltd, John Broadhurst*,²⁹ where the defendant was held to have unreasonably refused to engage in mediation. The court also believed that mediation would have had a reasonable prospect of success. It was, therefore, appropriate to reflect that in the costs order.

Then, in *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence*,³⁰ despite being subject to the Lord Chancellor’s Departments pledge to settle cases by ADR techniques whenever the other side agreed to it, the defendant refused several requests to mediate. Mr Justice Lewison believed that the dispute was suitable for ADR and as such made no order as to costs of the proceedings.

²⁵ CH 1994 G 2999.

²⁶ [2003] EWHC 3006.

²⁷ [2002] EWCA Civ 2002.

²⁸ [2001] EWHC 1051.

²⁹ Queen’s Bench Division (Mercantile Court) 30 June 2004.

³⁰ [2003] EWHC 1841 (Ch).

This case, therefore, places more emphasis on the government “pledge”, which *Halsey* states should not be distinguished. However, as Mr Justice Lewison believed that this dispute was suitable for ADR, this would probably have been significant enough for the same decision to be reached, even after *Halsey*.

Then, in *Burchell v Bullard*,³¹ a dispute arose over the construction of two large extensions to a private home and, as a result, payment was not forthcoming. Prior to issue the claimant suggested that, “to avoid litigation the matter be referred for ADR through a qualified construction mediator”. The defendant’s surveyor, however, responded that the “matters complained of are technically complex and as such mediation is not appropriate”. Burchell issued for £18,000 and the Bullards’ counterclaim exceeded £100,000. Burchell was successful but the Bullards won just over £14,000 on the counterclaim. Following adjustments Burchell received £5,025. A discussion and appeal on costs then ensued. Ward LJ stated:

“First, a small building dispute is the kind of dispute which lends itself to ADR. Secondly, the merits of the case favoured mediation the stated reason for refusing mediation that the matter was too complex is plain nonsense. Thirdly, the costs of ADR would have been a drop in the ocean compared with the fortune spent on this litigation.”

He then went on to admonish the legal profession:

“... The [legal] profession can no longer with impunity shrug aside reasonable requests to mediate ... I draw attention, moreover to para 5.4 of the pre-action protocol for Construction and Engineering Disputes which expressly requires the parties to consider at a pre-action meeting whether some form of AD procedure would be more suitable than litigation.”

More recent developments include *Laporte v Commissioner of Police of the Metropolis*,³² where, despite successfully defending proceedings, the court found that the police commissioner failed, without adequate reason, to engage in ADR. The case also considered the decision in *PGF II SA v OMFS Co 1 Ltd*,³³ where the court extended the guidelines set out in *Halsey* regarding whether a refusal to engage in ADR should result in a cost penalty. The court found that silence in the face of an invitation to participate in ADR was in itself unreasonable regardless of whether there was a good reason not to engage in ADR – endorsing the advice of S Blake, J Browne and S Sime in the ADR Handbook and finding that there were sound practical and policy reasons for a modest extension to *Halsey* [paragraphs 34–40]. The court considered the following:

1. The practical issues imposed on a court faced with the prospect of investigating the reasons for a refusal to participate in ADR for the first time at a costs hearing (i.e. after the fact it is difficult for the court to establish whether the reasons for refusal were genuine);
2. A failure to provide reasons for a refusal to participate in ADR defeats the objective of encouraging parties to participate in ADR. Parties should discuss the reasons for objecting to ADR so as to narrow their differences; and
3. The policy of proportionality.

31 [2005] EWCA Civ 358.

32 [2015] EWHC 371 (QB).

33 [2013] EWCA Civ 1288, [2014] 1 WLR 1386.

The court also found that it would be perverse to regard silence in the face of an offer as anything other than a refusal. Also decided that a Part 36 offer does not necessarily reflect a party's "bottom line" and, therefore, the difference between the parties' positions could not reasonably be regarded as insurmountable by recourse to ADR. It further found that a finding of unreasonable conduct by refusal to participate in ADR did not automatically result in a cost penalty. It should be noted that *Halsey* did not recognise that the court might go further and order an otherwise successful party to pay all or part of the unsuccessful party's costs. While the court has the power to do so, a cost sanction should be reserved for serious and flagrant failures to engage in ADR such as in circumstances where the court has encouraged the parties to do so and this is ignored.

Here, the court rejected the defendant's assertion that mediation had no reasonable prospect of success at the time proposed by the claimant due to the unavailability of expert reports considered essential to the success of the mediation as they had not raised this point at the time of rejecting the proposal (thus preventing the other party from potentially expediting access to the required reports).

An analysis of PGF II provides the following suggestions should a party wish to decline a request to engage in ADR on the basis that they have reasonable grounds to refuse:

1. Do not ignore the request;
2. Respond promptly giving clear and full reasons for the refusal;
3. If lack of evidence is an obstacle to mediation, canvass this with the other party and give consideration as to whether the information can be obtained;
4. Do not close off the exploration of ADR processes at a later date.

Then, in *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd*,³⁴ Ramsey J considered the *Halsey* criteria and the view that, generally, disputes requiring the determination of a point of law have been considered unsuitable for ADR. However, in *BAE*, the court found that even a dispute involving a matter of contractual construction can be suitable for ADR. In this instance, the point of contractual construction would not affect the continuing relationship between the parties and was only relevant to the determination of the dispute itself. The fact that *BAE* believed it had a strong case was found to be a factor that carried some, but limited, justification for not mediating, as the belief, although reasonable, was outweighed by other circumstances. In considering whether a mediation had a reasonable prospect of success the court cannot merely consider the position taken by the parties as this approach ignores the ability of a skilled mediator to find a middle ground. The reasonable prospect of the success of a mediation can be assessed by the court objectively. (It should be noted that as of this writing an appeal is outstanding.)

What should be noted is the "slight extension" of *Halsey* in PGF II while the other cases point towards the court's increasingly outward support of ADR.

Whilst the above cases represent various examples of the English courts outwardly supporting ADR and making clear that any failure to explore all ADR options, before resorting to litigation, may lead to penalties, it should be noted that one recent case appears to represent something of an exception to this trend. In *Gore v Naheed*,³⁵

³⁴ [2014] EWHC 3148 (TCC).

³⁵ [2017] EWCA Civ 369.

a dispute between neighbouring landowners involving complex issues of land law and rights of way, the Court of Appeal unanimously allowed a claimant its costs despite its refusal of, or failure to engage with, the defendant's offer to mediate. Patten LJ sated that he had "some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated". The court went on to explain that a failure to engage in ADR – even if unreasonable – does not automatically lead to costs penalties; rather, it is a factor to be taken into account by judges in exercising their costs discretion.

Enforceability of ADR agreements and mediation settlement agreements

In *Cable & Wireless v IBM*,³⁶ Cable & Wireless had an "escalating" ADR clause in their agreement with IBM and, after a dispute arose, IBM tried to proceed to mediation under the terms of that clause. Cable & Wireless refused on the view that the ADR clause "imposed no more than an agreement to negotiate ... and an agreement to negotiate is not enforceable in English law". The court wrote:

"... parties who enter into an ADR agreement must be taken to appreciate that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are commercially acceptable at the time of the mediation."

"... For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack* [2002] EWCA Civ 2002."

Then, in *Thakrar v. Ciro Citterio Menswear plc*,³⁷ the court was faced with the enforceability of mediation settlement agreements. Here, the parties had signed an agreement, which successfully resolved a mediation between them. Because the agreement might have preferred one shareholder over unsecured creditors, the Court of Appeal refused to approve the order, on the issue of enforceability, and, thus, after further review of the agreement, it was declared enforceable and unconditional and the Vice-Chancellor wrote:

"I have no hesitation in concluding that the compromise arising from the mediation is one which the court can and should uphold. There can be no question but that the mediation was genuine and the resulting agreement arrived at on a proper commercial basis."

Recent cases move the issue forward and in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,³⁸ the court determined that a dispute resolution clause requiring the parties to resolve a dispute by "friendly discussions in good faith" was enforceable. Indeed, the court took the view that "where commercial parties have entered into obligations they reasonably expect the court to uphold those obligations".

Finally, in *Wah v Grant Thornton International Ltd*,³⁹ the court considered and set out the test for determining whether a contractual provision setting out the requirements for the conciliation of disputes prior to arbitration was sufficiently clear and certain

36 [2002] EWHC 2059 (Comm Ct).

37 [2002] EWHC 1975 (Ch).

38 [2014] EWHC 2104 (Comm).

39 [2012] EWHC 3198 (Ch).

to be given binding effect and held that cases would be considered on their own terms rather than the court ticking off the minimum ingredients for validity.

Withdrawing from mediation

In *Leicester Circuits Ltd v Coates Brothers Plc*,⁴⁰ both parties had agreed to mediate and had also agreed on the date of mediation and the appointment of the mediator. Two days prior to the mediation Coates withdrew. In its defence Coates raised the argument that mediation was a form of negotiation, which came to nothing and that there was no real prospect of a successful resolution of the issues. However, Lord Justice Judge commented that:

“the whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult of problems can sometimes, indeed often are, resolved ... having agreed to mediation it hardly lies in the mouths of those who agree to it to assert that there is no realistic prospect of success.”

Refusing to mediate – no cost consequences

There are several Commercial Court cases which have dealt with this issue. In *Midland Linen Services Ltd v Yap and Others*, the court held that “[i]n exercising its discretion under CPR 36 a court should endeavour to come to a determination that was fair and just in all the circumstances and could consider the circumstances of the offer and willingness of the parties to enter into mediation”. In this instance, however, it was believed that the atmosphere between the parties would not have enabled a successful outcome and that the respondent had been inconsistent and uncertain in their approach to mediation.

Corenso (UK) Ltd v The Burnden Group Plc: while this was a dissenting judgment, specific reasons were given. In this matter the successful claimant was entitled to its costs despite not having taken up the defendant’s offers of mediation. The judge considered that the requirement for the parties was to engage in ADR, and other forms of ADR, such as negotiations, could discharge this obligation. In addition, he took the view that the defendant had not proposed mediation with any real conviction. Here, the parties showed some willingness to sort out the issues but couldn’t agree which form of ADR to use and, thus, there was no absolute refusal to mediate.

The court in the case of *Vallentine v Allen & Others* took a similar view as that in *Corenso*, and it was felt that the respondents had made real efforts to settle the case on a reasonable basis, which were not only generous but were also refused by the appellant. In addition, a negotiation meeting had failed and the respondent had expressly stated that they were prepared to have a roundtable meeting. Owing to their attempts to negotiate and put forward settlement proposals, the actions of the respondent were not held to be unreasonable in declining to mediate.

Then, in *SITA v Wyatt Ltd and others (Maxwell Batley Part 20 defendant)*, a “Part 20” claim failed completely. However, Wyatt Ltd submitted that Maxwell Batley should be deprived of their costs as, on three occasions before trial, they declined to participate in mediation. Mr Justice Park made an order entitling Maxwell Batley to their assessed costs. In refusing to deprive Batley their costs Mr Justice Park noted five specific and distinguishing points, the most important being that Wyatt did not want Batley to participate in the mediation to help resolve issues between them but to put

40 [2003] EWCA Civ 333.

pressure on a third party. The other points related to shortness of time in arranging the mediations and the aggressive manner in which Batley were asked to participate.

In conclusion, Mr Justice Park commented that “the circumstance of this case are totally unlike those in the two cases referred to (*Dunnett* and *Hurst*)”.

Then, in *Swain Mason v Mills & Reeve*,⁴¹ the claimants had at various stages proposed mediation or any other appropriate form of alternative dispute resolution. At two of the hearings before him, furthermore, Peter Smith J had encouraged the parties to consider mediation. At all stages, however, the defendant declined to participate, taking the stance that the claim was entirely without merit. The trial judge held that the defendant had acted unreasonably in its refusal to mediate. On appeal, the court took objection to this finding on the following grounds:

- “1) First, the judge had in terms found that the defendant had been ‘vindicated’ in its assessment of the strength of the claimants’ case so far as breach of duty was concerned. Thus its position, maintained throughout, had been shown to be justified on a matter which would have been (and was) determinative of the case in its favour.
- 2) Second, quite what ‘weaknesses’ in the respective cases would have been revealed in a mediation is not explained by the judge. I note that it is also not said that, if identified, their revelation could have led to a mediated settlement.
- 3) Third, I do not understand why avoidance of ‘collateral reputational damage’ to the defendant should have been considered a relevant factor in this case, counting against the defendant. A settled professional negligence claim is capable, in some instances, of leaving behind reputational damage. Some professional defendants may, entirely reasonably, wish publicly to vindicate themselves at trial in respect of claims which will have been publicly aired by the commencement of proceedings. It is a matter for them. It would be unfortunate – speaking generally – if claimants in cases of this kind could be encouraged to think that such a consideration as identified by the judge could enhance their bargaining position.”

The court then went on to state:

“In *Halsey*, the Court of Appeal was concerned to make clear that parties are not to be compelled to mediate. Further, as stated by the Court of Appeal at paragraph 16 of the judgment delivered by Dyson LJ: ‘mediation and other ADR processes do not offer a panacea and can have disadvantages as well as advantages; they are not appropriate for every case.’ The Court of Appeal was also concerned to point out the relevance of the fact where a party reasonably believes that he has a strong case; otherwise there is scope for a claimant to use the threat of costs sanctions to extract a settlement even where the claim is without merit: ‘courts should be particularly astute to this danger’ (at paragraph 18). It was thus emphasised that where a party reasonably believes that he has a watertight case that may well be a sufficient justification for a refusal to mediate. That has obvious resonance here, given the judge’s finding that on the core issue of breach of duty the defendant’s assessment of the strength of its case and weakness of the claimants’ case had been vindicated. That, to my mind, remains very much in point: even if on some (non-core) issues the defence case proved to have weaknesses. After all, it is indeed a relatively rare case where a party succeeds on every issue raised.”

Adjudication

Generally, “Adjudication” in a non-court setting refers to the process by which a neutral third party gives a decision, which is binding on the parties in dispute unless,

41 [2012] EWCA Civ 498, [2012] STC 1760.

or until, revised in arbitration or litigation. This narrow interpretation may refer to the commercial use of an adjudicator to decide issues between parties to a contract. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry, such as the entire FIDIC set of contracts.

Essentially, an adjudicator is neutral, not involved in the project and, more importantly, neither judge nor arbitrator, but derives its powers from the agreement of the parties.

In the UK, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996) introduced adjudication as a swift method of resolving disputes in the construction and engineering industry. It has surpassed arbitration as the principal method of dispute resolution in construction contracts. The introduction of statutory adjudication under section 108 of the HGCRA was one of the key recommendations in the Latham Report (1994), where a system of adjudication was recommended that should be in “all of the standard forms of contract, unless some comparable arrangement already existed for mediation or conciliation”. The Latham report also recommended that the system of adjudication should be “underpinned by legislation”, capable of considering a wide range of issues and that the decision of the adjudicator should be implemented immediately.

It can be seen that the HGCRA makes great allowance as to who can commence adjudication and, of course, covers employers, contractors and subcontractors. Additionally, the Act also covers work which is carried out “in connection with construction operations” and includes such things as agreements for professional consultants’ work such as architectural, design or surveying work, “agreements for the provision of advice on building services, engineering services, interior or exterior decoration and landscaping, and the provision of labour (or the labour of others) for the carrying out of construction operations”.

However, the HGCRA does make certain restrictions applicable (and claims cannot be commenced in adjudication under the Act) to any construction works which are not carried out within England, Scotland or Wales, or any construction contracts with a residential occupier which relate to works to be carried out on a dwelling. It also restricts adjudication regarding any:

“statutory agreements, for example, to adopt a highway or sewer or contracts entered into under the Private Finance Initiative, finance agreements, contracts connected with nuclear processing, power generation, water or effluent treatment, handling of chemicals, pharmaceuticals, oil, gas, steel, food and drink, works being carried out on land that is being sold or let, or works under a development agreement.”

Mandatory provisions

The HGCRA contains a number of mandatory provisions that cannot be removed by the parties from a contract and further, and most importantly, in the event that the Act is not expressly incorporated into the construction contract, the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”) will apply by default. Should this happen, the Scheme contains default procedures which still govern an adjudication, thus, either intentionally or by default, every construction contract provides for adjudication. Thus, if the parties to a construction contract agree its terms as to adjudication, that is fine so long as those terms are consistent with the mandatory provisions of the Act. If they are not consistent, the Scheme will apply instead of the Act.

The process under the Act

Pursuant to Part II of the Housing Grants Construction and Regeneration Act 1996, a party to a construction contract is unilaterally given the right to refer a dispute arising under the contract to adjudication. The Act applies only to “construction contracts” which fall within the detailed definition of section 104. For example, “architectural design, surveying work or to provide advice on building, engineering, interior or exterior decoration or the laying out of landscape in relation to construction operations” are included within the scope of the Act, while contracts of employment are expressly excluded.⁴² In addition, a construction contract is defined to include an agreement to carry out “construction operations”.

The term “construction operations” is further set out in section 105 and includes a wide variety of general construction-related work together with many special exceptions. Section 108 sets out the minimum requirements for an adjudication procedure, which are:

- (1) A party to a construction contract must have the right to give a notice, at any time, of its intention to refer a particular dispute to the adjudicator. This is mandatory.
- (2) There must be a method of securing the appointment of an adjudicator and furnishing the adjudicator with the details of the dispute within seven days of the notice. This also is mandatory.
- (3) The adjudicator is then required to reach a decision within twenty-eight days of a referral. It is not possible to agree in advance of a dispute that additional time may be taken for the adjudication; however, the adjudicator itself may extend the period of twenty-eight days by a further fourteen days if the party referring the dispute consents and, of course, a longer period may be agreed by all the parties; however, such an agreement can only be reached after the dispute has been referred.
- (4) Further, it is mandatory that the adjudicator acts impartially.
- (5) Importantly, (making adjudication different to arbitration) the Act requires the adjudicator “takes the initiative in ascertaining facts and the law”, i.e. to act as an inquisitor thus giving the adjudicator the power to investigate the issues in whatever manner it deems appropriate given the short time scale available.
- (6) Further, the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.
- (7) Importantly, the adjudicator cannot be held liable for anything done or omitted in the discharge of its function unless acting in bad faith. This protection is extended to any employee or agent of the adjudicator.

The Scheme for Construction Contracts

As previously mentioned, if the HGCR is not complied with and/or, for example, the construction contract does not comply with the requirements set out above, then instead of the Act the Scheme will be implied into the contract by default. Another

⁴² See e.g. Nicholas Gould and Victoria Russell, *Construction Law and Management* Chapter 11, “Claims and Dispute Resolution”.

way forward, of course, would be that if the contract is deficient in some manner in regards the Act, the parties are free to provide further and more detailed provisions. Compliance with the Act can be achieved if:

- (i) The parties could adopt the Scheme; and/or
- (ii) The parties adopt a standard form contract which sets out a series of adjudication rules; and/or
- (iii) The parties adopt one of the alternative sets of rules, such as the Construction Industry Council Model Adjudication Procedure or similar such rules; and/or
- (iv) The parties draw up their own set of bespoke rules.⁴³

Section 114(1) of the Scheme provides that the Secretary of State for England and Wales and the Lord Advocate for Scotland “shall by regulation make a Scheme (‘the Scheme for Construction Contracts’) containing provisions about the matters referred to” in the HGCR. The Scheme for England and Wales was introduced by a statutory instrument, which commenced on 1 May 1998 (SI 1998 No 649). In its consultation paper, the Department of the Environment (as it was) stated that: “The Scheme may be used to remedy deficiencies in contractual adjudication agreements ... and also to provide payment terms.”

The Scheme itself has two main parts, one covering adjudication and the other payment. Thus, if a contract’s provisions do not comport with the key requirement of the Act, then the Scheme applies in its entirety. The aim of the Scheme is to provide a series of workable arrangements which detail the mechanics of adjudication in the event that either no provision is made in the contract or inadequate provision is included in the contract.⁴⁴

The Scheme is thus a fallback position to any lapse in the provisions of the Act. Accordingly, the Scheme states that the “written notice must briefly set out the nature and description of the dispute, the parties involved, details of where and when the dispute arose, the remedy sought and the names and addresses of the parties to the contract”. Further, the Scheme contemplates that there may be more than two parties to the contract and requires the notice of referral to be given to “every other party”. In addition, an attempt is made at joinder of related disputes and different contracts and the simultaneous adjudication of more than one dispute with the consent of all parties.⁴⁵

The Act’s main areas – Is there a dispute?

Critical to any adjudication is the key issue of whether, in fact, there actually is any “dispute”. Under the HGCR there can be no adjudication unless a “dispute” has arisen under the contract and any claim can be challenged on this basis. Further, as this issue goes to the jurisdiction of the adjudicator, it is frequently brought up and, as such, any enforcement of the “decision” will be met with this issue, i.e. that without a dispute, the adjudicator has no jurisdiction and cannot give any binding decision.

Thus, the question is: when does a dispute actually occur? The courts have taken two (or more) views on this subject, the first being what is referred to as the “narrow

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

definition”, which is based on the proposition that for a dispute to arise, not only must a claim be made but also the recipient of the claim should have been given reasonable opportunity to consider and respond to it. In *RG Carter Ltd v Edmund Nuttall Ltd*,⁴⁶ the issue was whether the dispute, which formed the subject matter of the adjudication as set out in the subcontractor’s payment application, was the same dispute set out in the previously sent solicitor’s letter, which had been sent on behalf of the subcontractor several months earlier and which was now claimed to be the subcontractor’s notice of referral to adjudication. The court was faced with the question whether the adjudicator had jurisdiction to make his decision.

Here, the court held that the “dispute” referred to in the subcontractor’s solicitors’ letter was the subcontractor’s original payment application and rejected the subcontractor’s contention that its payment application was no longer the subject of any “dispute” as it was clear that the application was not proceeding at that time. The court felt that whoever wrote the subcontractor’s report, which had accompanied the formal notice of referral, may have been formulating it for such a period of time as to have the subcontractor decide to proceed on the basis of the report rather than the earlier payment application. “Finally the payment application did not comprehend any of the fruits of its reconsideration as set out in the report and whilst those fruits could potentially have ripened into a new ‘dispute’ once the contractor had had an opportunity to consider the new facts and arguments in the report, they were not part of the ‘dispute’ which existed at the time of the notice of referral to adjudication”.

The other main category is the “wide definition”, which consists of the cases in which the court has applied the proposition that there is a dispute once a claim is made, unless and until the defendant admits that the claimant is entitled to what has been claimed.

Following upon these two approaches is “the flexible approach”, which arose out of *AMEC Civil Engineering Ltd v The Secretary of State for Transport*.⁴⁷ Here, the court wrote:

- “1. The word ‘dispute’ which occurs in many arbitration clauses and also in s 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
...
 3. The mere fact that one party (whom I shall call ‘the Claimant’) notifies the other party (whom I shall call ‘the Respondent’) of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The Respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The Respondent may simply remain silent for a period of time, thus giving rise to the same inference.
 5. The period of time for which a Respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the Respondent who has a legal duty to consider the

⁴⁶ [2002] EWHC 400 (TCC).

⁴⁷ [2004] EWHC 2339.

- claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.
6. If the Claimant imposes upon the Respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.
 7. If the claim as presented by the Claimant is so nebulous and ill defined that the Respondent cannot sensibly respond to it, neither silence by the Respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.”

In *Fastrack Contractors Ltd v Morrison Construction Ltd*,⁴⁸ a case that pre-dates *AMEC*, Fastrack sought to enforce an adjudicator’s decision against Morrison. The dispute had been referred to arbitration by Fastrack after the sum claimed in the notice of adjudication was substantially higher than that claimed in the last interim application. Morrison contested the adjudicator’s jurisdiction claiming that they had not previously notified or rejected the claim and that at the date the notice was issued there was no “dispute”. They also took the view that if a dispute concerned a precise basis of claim and amount, the notice of adjudication, and the adjudication itself, had to be concerned solely with those matters. “Accordingly only the dispute in existence at the time that the notice of adjudication was served could be within the jurisdiction of the adjudicator and if that was superseded by a new claim which had not had time to develop into a dispute, then the adjudicator appointed to resolve the dispute was appointed without jurisdiction.”

The court agreed with Fastrack and held that an adjudicator derived its jurisdiction from its appointment, which was governed by the Housing, Grants, Construction and Regeneration Act 1996. The Act required that a dispute had already arisen between parties to a construction contract and that what was in “dispute”, within the meaning of the Act, was a question of fact. The “dispute” was all or part of whatever claims, issues or causes of action the referring party chose to refer to adjudication. The court went on to state that a “dispute” could only arise once the subject matter had been brought to the attention of the opposing party and that party had had the opportunity to admit or reject the claim. In this case, the adjudicator had jurisdiction because all the issues in the notice of adjudication had been referred to Morrison, which had rejected them, and they were, therefore, disputes by the time the notice was served.

Two things should be noted: First, that just making a claim does not make a “dispute”; however, if not admitted (objectively within a reasonable time under the circumstances) then a “dispute” can be considered to exist, the goal being that disputes should be readily resolved through adjudication. However, it should be obvious that a dispute does not exist if the matter has already been submitted to, and decided by, an adjudicator. Second, there is no necessity for the parties to engage in any form of ADR such as mediation before referring the “dispute” to adjudication even if the contract contains language requiring mediation as a precursor to adjudication, as such clauses conflict with the absolute right under section 108(1) of the HGCRA allowing the parties to “refer a difference or dispute to adjudication at any time”.

48 [2000] BLR 168.

Does the dispute arise under a construction contract?

After making a determination of whether a dispute exists, the next area of concern is whether the dispute arises under a construction contract within the meaning of section 104 of the Act, which provides:

“104 Construction contracts

- (1) In this Part a “construction contract” means an agreement with a person for any of the following—
 - (a) the carrying out of construction operations;
 - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
 - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement—
 - (a) to do architectural, design, or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- (3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the [1996 c 18.] Employment Rights Act 1996).”

Needless to say, this provision does not cover disputes over whether a contract was entered into, nor whether a settlement agreement should be adjudicated, nor matters dealing with misrepresentation or negligence, unless the claim for negligence is also one that would also arise under the contract based upon the same duty of care. The question whether the dispute arises “under the contract” means just that – a contract is in existence and disagreements as to what the contract contains are subject to adjudication. It should be noted, however, that the parties are always free to add to this definition and to include different wording to expand the scope of what can be adjudicated, e.g. disputes “relating” to the contract, etc.

Does a contract have to be in writing within the meaning of section 107?

Originally, section 107(1) of the HGCRA required that unless the construction contract is in writing it could not be referred to adjudication. Therefore, the Act limited its application and by extension the adjudication procedure it introduced to written contracts. However, on 1 October 2011, when the amendments to the Act came into effect in England and Wales (and subsequently in Scotland and later in Northern Ireland), this position was changed and oral contracts and partly written contracts are now covered under the Act. Prior to this, however, in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*,⁴⁹ the Court of Appeal took a strict view of matters and felt that for the purposes of the requirements under section 107(2)(c) of the HGCRA regarding an agreement needing to be “evidenced in writing”, it was not sufficient that there was evidence in writing capable of supporting the existence of the agreement, or its substance, as evidence in writing of the whole agreement was required. Here, RJT were consulting engineers who brought an appeal against the decision of the deputy judge upholding the determination of an adjudicator that an agreement between RJT and DM was “evidenced in writing” for the purposes of

⁴⁹ [2002] EWCA Civ 270.

section 107(2)(c). The parties had entered into an oral agreement for certain work but the adjudicator found that the agreement had, for the purposes of the Act, been sufficiently evidenced by drawing schedules and by a letter. The deputy judge concluded that it was sufficient, for the purposes of the Act, that there be evidence in writing that was capable of supporting the existence of an agreement or its substance. Unfortunately, the Court of Appeal did not agree and held that the deputy judge had erred in his conclusion. “It was not sufficient, for the purposes of s 107 of the Act, that there was evidence in writing capable of supporting merely the existence of the agreement or its substance; evidence in writing of the terms of the agreement was required.” It was essential that a written record of an agreement exist, since an adjudicator had to be certain of the terms of an agreement under dispute that he was required to determine. In his judgment Auld LJ stated that it was necessary that the terms material to the issue or issues to be determined by the adjudicator be recorded in writing and it was not essential that all terms, however trivial or irrelevant to the issue, be expressly recorded or incorporated by reference. In the instant case, all the evidence indicated the existence of the contract rather than its terms. The court went on to state that invoices, for example, are evidence of the existence of a contract and yet do not define the contract as such. They held that the whole of the agreement had to be evidenced in writing, saying:

“Certainty is all the more important when adjudication is envisaged to have taken place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute.”

What is learned from this is that any record of an agreement must thus be a record of a complete agreement.⁵⁰ Now, with the advent of the 2011 amendments, the issue of what an agreement is or was becomes more interesting – not just for the parties but also for the adjudicator.

Additionally, it should be noted that although oral contracts and part oral contracts are now covered under the HGCRA 1996, clearly, the jurisprudence in this area continues to develop. For example, in the recent case of *In Penten Group Ltd v Spartafield Ltd*,⁵¹ the notice of adjudication sought a declaration that there was a binding contract between the parties. Holding that the parties were bound by the adjudicator’s decision in this regard, Mr Justice Coulson held that the adjudicator could not answer the question about the nature of the parties’ contract without deciding whether the parties had agreed basic terms and, if so, what those terms were; he decided that the parties’ contract was governed by the terms of a letter of intent. Mr Justice Coulson further observed that, because of the repeal of section 107 of the HGCRA, adjudicators were now dealing with “complex questions as to contract formation, appropriate terms and the like, in addition to addressing the underlying claims, all in 28 days”, and that, accordingly, the court had to give them “some latitude as they grapple with these difficulties”.

⁵⁰ It should be noted that one of the judges, Auld LJ, took the view that it was the terms of the agreement which were material to the issues giving rise to the dispute that were important and needed to be recorded in writing, not that every single term, however trivial, should itself be expressly recorded.

⁵¹ [2016] EWHC 317 (TCC).

Such latitude was acknowledged by Mrs Justice Jefford in *Dacy Building Services Ltd v IDM Properties LLP*,⁵² in which she distinguished *Penten*, above, and noted that the key issue here was whether there was a contract at all between the parties (and not simply what the terms of that putative contract were). She observed: “Coulson J’s observations do not amount to saying that an adjudicator has jurisdiction to determine whether a contract exists at all if that dispute is not referred to him or one party objects to his having jurisdiction to do so ... given IDM Properties’ clear reservation of its position on jurisdiction, it is not arguable that they somehow conferred upon the adjudicator jurisdiction to determine whether or not there was a contract.”

When the matter came before Mr Justice Fraser for a full hearing, in *Dacy Building Services Ltd v IDM Properties Ltd*,⁵³ he agreed with the adjudicator’s finding that the parties had entered into an oral contract during a tripartite meeting held at a London bus shelter in December 2015. Mr Justice Fraser also stated that, even if there is a question whether there is a contract, a trial with contested evidence given orally will “very rarely be justified”, adding: “It must be remembered that adjudication decisions simply deal with the positions of the parties on an interim basis. The latitude to which Coulson J referred to in [*Penten*] will not lead to any permanent injustice”.

One commentator has interpreted Mr Justice Fraser’s words, above, as “meaning that the new Judge in Charge of the TCC is clearly wanting to avoid a glut of arguments from parties trying to resist enforcement. For once, the court is trying to close the stable door before the horse has bolted!”⁵⁴

The process

The adjudication process commences when the claimant serves a notice of adjudication to the other party informing it that a dispute has arisen and that the claimant intends to refer it to adjudication. Since the adjudicator’s jurisdiction arises from this notice, and the adjudicator can only decide the issues presented in this notice, it is important that it be as specific as possible.⁵⁵

Following this notice the appointment of an adjudicator follows and, if the adjudicator has been named in the contract, that simplifies matters. If not then the party who sent the notice, i.e. the referring party, can apply to either the adjudicator nominating body named in the contract or, lacking such body, can apply to any adjudicator nominating body such as the ICE, RIBA, ACE and others who provide such services.⁵⁶

Once appointed, the dispute must be formally referred to the adjudicator within seven days⁵⁷ of the notice of adjudication. This is usually accomplished through service of the referral notice on the adjudicator. The referral notice should state the

⁵² [2016] EWHC 3007 (TCC).

⁵³ [2018] EWHC 178 (TCC).

⁵⁴ See <http://constructionblog.practicallaw.com/oral-construction-contracts-and-issues-in-adjudication-enforcement/>.

⁵⁵ Thus, if new issues arise during the course of the adjudication they can well be considered as new adjudications for which the original adjudicator has not jurisdiction.

⁵⁶ It should be noted that in appointing an adjudicator the adjudicator must act impartially, but there is no requirement that the adjudicator be independent of the parties and this is a difference between the Act and the Scheme for where the Scheme applies the adjudicator must not be an employee of a party.

⁵⁷ See e.g. HGCRA 1996, s 108(2)(fc). The adjudicator has no power to proceed until he has received the referral notice. See also *RG Carter Ltd v Edmund Nuttall Ltd* [2002] BLR 359.

referring party's case and should also contain any necessary documents, e.g. drawings, notes, programmes, etc., which the referring party intends to rely upon as evidence to prove the events or support the assertions claimed in the notice. It should be noted that if the referral notice contains documentation other than witness statements, which the responding party has not seen, it will not be part of "the dispute" referred and the adjudicator will have no jurisdiction to consider this information. After the referral the contract must also require that the adjudicator reach a decision within 28 days of referral, "or such longer period as is agreed by the parties after the dispute has been referred".⁵⁸ Additionally, it must allow the adjudicator to extend the period of 28 days by up to 14 days, subject to the consent of the party by whom the dispute was referred.⁵⁹ An interesting situation develops as to how long the adjudicator should have to give its decision. If the contract allows longer than 28 days that is wrong but *if after the referral* the parties and the adjudicator agree, it can take longer than 28 days.⁶⁰

Once the referral has gone out to the adjudicator and to the other side, the other side, i.e. the responding party, is entitled to reply and in its reply it should set out the issues as it sees them, its position, arguments, facts and other details in response to the referral. In complex adjudications it is common for the adjudicator to allow reply and rebuttal submittals ad infinitum.

Following the submittal of this documentation the adjudicator is then free to ask parties questions and to be proactive, adopting an inquisitorial style to seek out both evidence and other materials which are appropriate to assist the adjudicator in deciding the referred dispute. To this end the adjudicator can also conduct site visits, interview potential witnesses and obtain legal or expert advice as needed so long as the rules of natural justice are followed and there is no appearance of bias on the part of the adjudicator. Then, after all of this, the adjudicator must make a decision on the referred matters.⁶¹

As to the form of the decision, the Act does not require any set format. In this regard neither does the Scheme, but it is considered good practice that the decision follow the form of an arbitration award with reasons being given, even if very short, to help the parties understand the reasoning behind the decision and hopefully help resolve the dispute. It is also important that the decision responds to the issues presented to the adjudicator, is clear and concise as to what the remedy is, and how the parties are to comply with the decision and by when.

In *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*,⁶² Bowmer was the main contractor and had a contract with Bloor regarding labour and plant works at a development. A dispute arose which was adjudicated. Then, after receiving the adjudicator's decision, Bowmer identified and notified the adjudicator of an error in its mathematical calculations. On the same day, the adjudicator corrected the decision and notified the parties accordingly. Bloor submitted that once it had communicated the decision, the adjudicator had no power to correct mistakes and that Bowmer was bound by the original decision.

⁵⁸ HGCRA 1996, s 108(2)(c).

⁵⁹ HGCRA 1996, s 108(2)(d).

⁶⁰ HGCRA 1996, s 108(2)(c).

⁶¹ There are times when the adjudicator cannot reach a decision, when that occurs it is best if the adjudicator then resigns and allows the parties to refer the dispute to another adjudicator.

⁶² [2000] BLR 314.

The court, however, took the position that since the Act made no provision for the amendment of a decision, once it had been communicated it was a matter of contract. Here, however, as the contract referring the dispute to adjudication did not deal corrections, it was necessary to consider whether a term could be implied into it. The court felt that the adjudicator's error was "an obvious slip", which did not alter the reasoning or intention of the decision. It followed that a contractual term should be implied that the adjudicator could, either by itself or at the behest of one of the parties, correct an accidental error or omission.

As to costs, unless the parties agree otherwise, the adjudicator has no power to award the payment of costs, other than to determine payment of its own fees and expenses, for which the parties are in any event jointly and severally liable.

And of course, as to enforcement, when the parties do not comply with the decision, it will need to be enforced. This can be accomplished by summary judgment/interim payment application in court, a mandatory injunction, a statutory demand, or "Part 8 proceedings", where the declaration of the court is sought. Of course the "losing" party can challenge the decision and the most common ground is lack of jurisdiction followed closely by claims that the decision is wrong on its merits or did not decide the issues presented. Other challenges include that the adjudicator violated natural justice or was biased and/or unfair. Occasionally, one hears of claims that the adjudicator did not follow any applicable procedural rules or that the losing party is entitled to some set-off and/or abatement against the amount ordered paid or that enforcement proceedings should be stayed until arbitration. Normally, however, where the decision requires the payment of money, summary judgment is sought and while the adjudicator's decision is only temporary unless contested in a subsequent arbitration, this is not an obstacle to the granting of summary judgment. Further, the granting of summary judgment does not affect any later decision that an arbitrator or court may make after reviewing the decision.

In *Macob Civil Engineering Ltd v Morrison Construction Ltd*,⁶³ Macob sought an order to enforce an adjudicator's decision, made under the Scheme for Construction Contracts (England and Wales) Regulations 1998 Schedule, Part I, regarding a dispute about payment. Morrison was challenging the validity of the adjudicator's decision on the ground that it breached the rules of natural justice and argued that the decision was, therefore, not one which was binding on the parties until it had been determined or agreed, in terms of para 23(2) of the Regulations, that it was a valid decision. Morrison argued, in the alternative, that it was not within the court's power to make an order under the Arbitration Act 1996 section 42, since, according to section 42(1) that power was exercisable "unless otherwise agreed by the parties" and a clause in the contract, which referred disputes stemming from an adjudicator's decision to arbitration, was such an agreement. After review the court granted a declaration that the adjudicator's decision was binding on Morrison until the dispute was finally determined by arbitration, litigation or agreement and, that in enacting the Housing Grants, Construction and Regeneration Act 1996, Parliament had sought to introduce a means by which disputes arising from construction contracts could be settled quickly on a provisional interim basis, requiring the enforcement of adjudicators' decisions pending final resolution of the dispute. The word "decision" had not been qualified and there was no reason why it should not be given its ordinary meaning.

63 (1999) 64 ConLR 1.

Therefore, an adjudicator's decision remained a decision within the HGCRA and the Regulations, notwithstanding that one party challenged its validity. The court went on to state that the arbitration clause in the contract between Macob and Morrison was not expressly directed to the section 42 power and that the court would be slow to grant a mandatory injunction to enforce an adjudicator's decision and the usual means of remedying a failure to make payment in accordance with such a decision would be to issue proceedings claiming the amount due, followed by an application for summary judgment.

It should be clear that the intention of the HGCRA is that adjudicators' decisions, if not agreed between the parties, should be enforced without delay.

Procedures under the Scheme

The fallback position for contracts which do not fall under the purview of the HGCRA is the Scheme for Construction Contracts⁶⁴ ("the Scheme") which then, in effect, provides "implied terms" for inclusion into the contract and allows for adjudication of disputes "arising under the contract". The procedural steps are similar to those of the Act and start with one party giving notice of the adjudication to the other and then either directly or through a nominating body obtaining an adjudicator, then comes the referral notice.

Notice of adjudication

The Scheme requires that the "notice of intention to refer a dispute to adjudication" must be in writing and be given to all parties to the contract. Additionally, it has to briefly state the nature and description of the dispute, the parties to the dispute, when and where the dispute arose and what relief is sought, i.e. money, etc., and the names and addresses of the parties to the contract.

Under the Scheme only a single dispute can be referred per adjudication unless agreed to otherwise by the parties⁶⁵ but a single dispute can have many separate elements.⁶⁶

Appointment of an adjudicator

Adjudicator appointment under the Scheme is similar to that in the Act and it can be someone named in the contract,⁶⁷ or otherwise agreed between the parties, or the contract may specify a specific nominating body such as the RIBA. If none of these is set out in the contract then the referring party may direct an adjudicator request to any nominating body which must be accompanied by a copy of the notice of adjudication.

⁶⁴ The Scheme for Construction Contracts (England and Wales) Regulations 1998, and in Scotland it is the Scheme for Construction Contracts (Scotland) Regulations 1998.

⁶⁵ Scheme Pt 1 para 8(1) does, however, allow the adjudicator to adjudicate more than one dispute at the same time under the same contract so long as all the parties have consented.

⁶⁶ See e.g. *David McLean Housing Contractors Ltd v Swansea Housing Association Ltd* (27 July 2001, unreported), TCC, [2002] BLR 125, HHJ Humphrey LLoyd QC. where the dispute contained 5-6 different elements in one dispute; *Chamberlain Carpentry and Joinery Ltd v Alfred McAlpine Construction Ltd* [2002] EWHC 514, unreported, 25 March 2002, TCC, HHJ Seymour QC.

⁶⁷ In *John Mowlem & Co Plc v Hydra Tight & Co Plc* (2001) 17 Const LJ 358, the Court held that a clause which provided for the adjudicator to be the person selected by the contractor from the contractor's list current at the time of notification of the dispute was valid.

While the Scheme does not expressly state a time within which a request must be made, it is safe to assume that it should be made at the same time as the giving of the notice of adjudication. The Scheme provides, however, that an adjudicator must indicate its willingness to act within two days, and a nominating body must communicate its selection within five days. If there is no proper response and/or the adjudicator is either unwilling or unable to act, the Scheme provides details as to how to proceed.⁶⁸ It should be noted that when the contract names an adjudicator, the request to act should be made in writing, accompanied by a copy of the notice of adjudication.

The referral notice

After the adjudicator has been chosen, the referring party must give notice referring the dispute to the adjudicator. Again, this must be done within seven days from the date of the notice of adjudication and must be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon. At the same time copies of the referral notice and enclosures must be sent to every party to the dispute. Further, as in the Act, only existing disputes may be referred to the adjudicator. As was mentioned in *Fastrack* earlier,⁶⁹ the referring party may include further details, clarification or correction of claims already in dispute, or may confine the reference to something less than the totality of the matters then in dispute, but unless the other parties agree it may not raise other matters which have not been disputed.

Adjudicator's powers and duties

The Scheme follows the provisions of the HGCRA in that the adjudicator must act impartially and carry out its task within the terms of the contract and reach a decision pursuant to the applicable laws and the terms of the contract. Here, the adjudicator is also under a duty not to incur unnecessary costs and expenses.

Under the Scheme the adjudicator decides its own procedures for the adjudication, and, in a similar manner as in the Act, the adjudicator is to act in an inquisitorial manner and ferret out whatever information is needed for the decision. It should be noted that while an adjudicator under the Scheme should act impartially and hear all aspects of the dispute, there is no provision allowing any formal defence or other submissions. Most adjudicators, however, permit such documentation.

Further, as is provided in the Act, the Scheme adjudicator has 28 days (from the date of the referral notice) within which to give his decision but the referring party can allow an extra 14 days. Again, in a similar manner as under the Act, the parties may agree a longer period than 28 days for the decision but this can only be made after the referral notice is given and, of course, the Scheme adjudicator must decide only the matters in dispute.

The Scheme gives the adjudicator express powers to decide such things as:

- whether a party to the dispute is liable to make a payment under the contract;
- when the payment is due and the final date for payment;

⁶⁸ Scheme Pt I paras 2(2), 5, 6.

⁶⁹ [2000] BLR 168.

- if an effective withholding notice was given;⁷⁰
- subject to any contract terms concerning interest, the adjudicator may decide that simple or compound interest shall be paid.

Since any dispute arising under the contract may be referred for adjudication, the adjudicator can by implication award damages or give a declaration, such as whether a particular method of work was proper.

As to giving reasons in its decision, a Scheme adjudicator is required to do so but only if requested by one of the parties. Any such request should be made in advance of the decision, because once given the decision terminates the jurisdiction of the adjudicator. Further, under the Scheme, the decision is immediately binding on the parties and they must comply until the dispute is finally determined, either by legal proceedings, by arbitration or by agreement between the parties. But there is no express or implied provision in the Scheme which allows the adjudicator to order either party to pay the costs incurred by the other. Thus, costs may not be awarded unless the parties agree to expand the adjudicator's powers.

Changes to the Housing Grants Act

It should be noted that the Housing Grants, Construction and Regeneration Act 1996 is changing as a result of the Local Democracy, Economic Development and Construction Act 2009.⁷¹ The provisions of Part 8 of the 2009 Act contain various amendments to Part II of the HGCR 1996 and these provisions will apply equally to Scotland as well as England and Wales. The new provisions make several changes as to "construction contracts" that are entered into after their effective date.

The biggest change, as discussed earlier, is the abolition of the requirement that construction contracts be in writing. As mentioned previously, under the current Act (1996) construction contracts are required to be in writing. The new 2009 Act amends the Construction Act so that it will now apply not only to written contracts, but also to oral contracts, as well as partly oral and partly written contracts. This, hopefully, will solve the existing dilemma where a party could get out of the requirements of the Act by claiming that not all of the material terms of the contract were in writing. While the contract will now not have to be in writing to fall within the purview of the Act, any contract provisions dealing with adjudication provisions in a construction contract will, however, need to be in writing and, if not, then the Scheme adjudication provisions will apply. In other words, it is important that the parties make sure that their contracts contain written adjudication provisions which comply with the requirements of section 108 of the 2009 Act, otherwise they will find that the Scheme will apply.

Under the new Act the adjudicator will be able to allocate the costs and legal expenses of the adjudication between the parties – something the adjudicator was not previously able to do. This will be allowed so long as such a provision is contained, in writing, in the construction contract and specifically confers the power on the adjudicator to allocate his fees and expenses between the parties. If this is not the case

⁷⁰ And if the amount withheld should be paid, it must be paid within seven days of the date of the adjudicator's decision, unless the original period for payment is still running and expires later.

⁷¹ See Appendix 2.

then it will still be allowed if it is made in writing after the notice of intention to refer the dispute to adjudication is given.

Another provision change deals with an adjudicator's ability to make corrections to its decision, so long as the error correction is only to remove a clerical or typographical error arising by accident or omission, e.g. an arithmetical error or similar mistake.

There has always been a prohibition against "pay when paid clauses" under the Act (1996). Section 113 of the new Construction Act prohibits "pay when paid clauses" and instead substitutes a new section 110(1A) which has been inserted into the Construction Act to extend the range of prohibited conditional payments. This new section 110(1A) thus extends the class of prohibited conditional payments. This new section provides that a "construction contract does not provide an adequate mechanism for determining what payments become due, or when, where that construction contract makes payment conditional upon (1) the performance of obligations under another contract; or (2) a decision by any person as to whether obligations under another contract have been performed". What this effectively does is prevent the use of "pay when certified" clauses and, thus, any payment provisions cannot be tied to any other provisions under some other contract. This should go a long way to assisting subcontractors, who are frequently faced with the situation where they are unable to obtain payment under their subcontract until sums are "certified" under the main contract to which they have no control nor are a party. It should be noted, however, that this new provision does not apply to contracts to carry out construction operations by another party whether under subcontract or otherwise. Thus, this new section 110(1C) creates a material exception to the general prohibition imposed by section 110(1A) to "ensure that payments in a superior contract can of course continue to depend upon the work carried out in a subcontract",⁷² thus allowing the parties to still provide that if a third party is carrying out work, the payments in their contract can still depend upon the third party properly carrying out its tasks with one of the main parties.

The "payment notices", which are currently contained in section 110(2), will be replaced with what are referred to as "Section 110A Notices". Here, the person paying will have to give a notice no later than five days after the payment due date, which states the sum that the payer considers to be or to have been due at the payment due date, and basis upon which that sum is calculated. Alternatively, the person paying can require that the payee give notice not later than five days after the payment date setting forth what the payee considers due or to have been due at the payment due date and the basis upon which that sum was calculated.

Then, pursuant to section 110B, if the payer has defaulted in issuing the required "Notice" the payee may instead give notice at any time after the date on which the payer notice should have been given. This notice must also comply with section 110A(3). When this occurs the final date for payment shall be postponed for as many days after the date when the notice should have been given.

Section 111 will now deal with "Withholding Notices" by requiring the payer, if it feels that the amount due is incorrect, to give notice and identify the sum that the payer considers is due and how this is calculated; if it fails to do this, then the payer must pay the notified sum on or before the final date for payment. The general view

⁷² See Isobell Reid, "Reform of the Housing Grants, Construction and Regeneration Act 1996 as a result of the local Democracy, Economic Development and Construction Act 2009" 2010, <http://www.mondaq.in/article.asp?articleid=94222>.

is that this amendment(s) is a result of the decision of the House of Lords in *Melville Dundas Limited (in receivership) and others v George Wimpey UK Limited and others* in which it was decided that a payer could legitimately withhold payment even where a withholding notice had not been issued where the contract provided that monies did not require to be paid in the event of the payee's insolvency. It should be noted here that in the amendments to the Construction Act, such contract provisions remain restricted to insolvency situations. It is also assumed that these amendments to section 111 will render previous case law on section 111 withholding notices obsolete, which hopefully time will bear out.

Then section 112 as to "Suspension" is changed and a party is now entitled to choose to suspend part of its obligations and will be entitled to be paid a "reasonable amount in respect of costs and expenses reasonably incurred" as a result of such suspension.

Dispute Boards⁷³

Dispute Boards are an adjudication process and can be either advisory or mandatory. The advisory types are usually referred to as "Dispute Advisory Boards", "Dispute Review Boards" or similar words. The mandatory ones are known as "Dispute Adjudication Boards" or "DABs" for short.

Dispute Boards tend to limit disputes on projects and, as an example, the Ertan Hydroelectric Dam in China valued at US\$2 billion⁷⁴ had 40 disputes referred to its Dispute Review Board for decision and no decision of this Dispute Board went on to arbitration or litigation of any kind. The Hong Kong International Airport valued at US\$15 billion had six disputes referred to its Dispute Board and of those only one went on to arbitration, at which time the decision of the Dispute Review Board was upheld. The Katse Dam in South Africa valued at US\$2.5 billion had 12 disputes referred to its Dispute Board and of these only one went on to arbitration where, again, the decision of the Dispute Review Board was also upheld. In each instance the Dispute Board did resolve those disputes as quickly, economically and sensibly as possible.

Dispute Boards work and sometimes their mere presence and the ability of the Dispute Board members to give informal opinions before any dispute even arises can be of immense assistance. A good example of this in the UK is the Docklands Light Railway, valued at US\$500 million, where no disputes ever fully arose or were submitted to the Dispute Board, or the Saltend Private Gas Turbine Power Plant in the north of England, valued at US\$200 million, where both the number of disputes referred to the Dispute Board and the number that ever went to arbitration were both zero. Needless to say, such statistics were unheard of in the construction industry before the advent of the Dispute Board.

What is a Dispute Board?

A Dispute Board or Dispute Review Board (DRB) or Dispute Adjudication Board (DAB) is a "job-site" dispute adjudication process, typically comprising three

⁷³ See e.g. Cyril Chern, *Chern on Dispute Boards*, 4th edn, Informa Publishing, London, 2019.

⁷⁴ Note that worldwide, dispute board valuations are computed in US dollars.

independent and impartial persons selected by the contracting parties. The significant difference between DRBs and most other Alternative Dispute Review techniques (and possibly the reason why DRBs have had such success in recent years) is that the DRB is appointed at the commencement of a project before any disputes arise and, by undertaking regular visits to the site, is actively involved throughout the project (and possibly any agreed period thereafter).⁷⁵

A Dispute Board becomes a part of the project administration and thereby can influence the performance of the contracting parties during the contract period. It has “real-time” value. The idea behind a standing Dispute Resolution Board is that it may be called upon early in the evolution of any dispute, which cannot be resolved by the parties and be asked to publish decisions or recommendations on how the matters in issue should be settled. It is usual (but not compulsory) that an opportunity remains for the matter to be referred to arbitration or to the courts if the DRB’s decision does not find acceptance by the parties. Thus, a Dispute Resolution Board may be likened to the UK’s adjudication process, either under statutory-compliant contracts or under the regime established by statute itself.⁷⁶ What a DRB does, that UK statutory adjudication does not, is provide a regular and continuing forum for discussion of difficult or contentious matters, to identify ways forward by acting in an informal capacity and to create valuable opportunities for the parties to avoid disputes by keeping proactive communication alive. Another aspect, which is less often discussed, is that if the Dispute Board is established from the inception of the project, the Dispute Board members become part of the project team and are thought of in a different fashion and because of their “hands on” approach can be trusted to be fair and impartial and their advice respected and taken more readily than would a third party or stranger to the project.

The terms “Dispute Board” or “Dispute Review Board” are generic terms and include (a) the Dispute Review Board (DRB), which is a device that originated in the USA and provides non-binding recommendations); (b) the Dispute Adjudication Board (DAB), which is a device emerging from the earlier USA model, but which provides a decision that has interim-binding force); and (c) the Combined Dispute Board (CDB), which is a hybrid of Dispute Review Boards and Dispute Adjudication Boards, and was created by the International Chamber of Commerce in 2004. Various other terms have been used, such as Dispute Settlement Panel, Dispute Mediation Board, Dispute Avoidance Panel and Dispute Conciliation Panel. Fundamentally, these different varieties of Dispute Review devices are the same, each providing early adjudication based on the contractual bargain between the parties.

A DRB is a creature of contract: the parties establish and empower a DRB with jurisdiction to hear and advise on the resolution of disputes. Within the UK it is entirely possible for the contracting parties to establish a DRB to adjudicate construction contract disputes within the statutory requirement for adjudication.⁷⁷ As yet, there are no statutory requirements for DRBs to be established to adjudicate disputes under construction contracts.

While the origins of DRBs are found in the construction industry, their ambit is far wider than construction, and DRBs are now found in the financial services industry,

⁷⁵ Peter HJ Chapman, then President, Dispute Resolution Board Foundation, speaking at the 5th Annual Conference, Dubai, United Arab Emirates, 2005.

⁷⁶ Housing Grants Construction and Regeneration Act 1996.

⁷⁷ See the ICE Dispute Board Procedure published in 2004.

the maritime industry, long-term concession projects, operational and maintenance contracts. The scope for DRBs is substantial. The emergence of the International Chamber of Commerce as an active supporter of Dispute Boards,⁷⁸ as well as the Dispute Board Federation and the Dispute Resolution Board Foundation, makes it highly probable that dispute boards will be established in a range of industries that, until now, have not used adjudication to any great extent.

What makes a Dispute Board unique? What can be achieved by using a Dispute Board?

The construction industry has a reputation for disputes and conflict. Anecdotal evidence from Australia, as just one example, indicates that 50 per cent of all legal costs associated with construction are expended in connection with disputes. In almost 10 per cent of projects, between 8 per cent and 10 per cent of the total project cost was legal cost. Not surprisingly, these projects have a high incidence of disputes. This expenditure, which globally represents an enormous sum each year, does not begin to take into account the hidden costs of disputes, the damage to reputations and commercial relationships, the cost of time spent by executive personnel, and the cost of lost opportunities. The situation is aggravated by the increased use of joint ventures both in consulting and in contracting. Such organisations are less autonomous and perhaps less able to negotiate settlements of their contractual problems.

Every construction project is unique and perhaps this is why there is a general absence of “corporate memory” in the construction industry. Regrettably, similar types of dispute arise on many construction projects and it is naïve to think we can eradicate disputes by clever contract drafting alone. Differences will occur, many of which will involve sizeable sums of money and, thus, provide fertile ground for disputes to arise. What parties want is a dispute review device that is considered fair, economical and which will cause the least damage to the due performance of the contract. This is especially true for large projects, where contract periods are lengthy and good inter-party relationships are important to satisfactory performance.

Contracts do not always provide the necessary mechanisms to determine entitlements with certainty. Many disputes concern “non-absolute” matters and, in such cases, the DRB can devise solutions which avoid “win-lose” situations while keeping within the contractual boundaries. Working relationships are less injured and site-level partnering can continue.

Non-binding recommendations

There is much trans-Atlantic debate over the benefits and shortcomings of non-binding recommendations and interim-binding decisions. Even if the DRB recommendation is contractually “non-binding” (as many still are – particularly in the USA), this does not appear to impair the efficacy of the decision. It is suggested that there are two main reasons for this: first, that if the DRB recommendation is admissible in later proceedings (as it often is) the parties know that an arbitrator or judge will be greatly influenced by a decision (on the facts) given by a panel of experienced, impartial construction experts who were familiar with the project during its construction. Thus,

⁷⁸ The ICC Dispute Board Procedure launched in the UK on 13 October 2004.

the parties are likely to accept the recommendation. Secondly, it is unlikely that over the course of a large project the DRB will always find in favour of the same party. It is probable that each party will be pleased with certain decisions and if they expect the other party to honour the favourable decisions, they are obliged to accept those that are less than favourable. In many of the early DRBs, parties were found to give notices of dissatisfaction with every unfavourable DRB recommendation (thereby keeping the matter live) only to drop the proposed arbitration or litigation when the contract was concluded and when closeout negotiations resulted in the DRB's previous decisions being adopted in their entirety by both parties and without demur.⁷⁹

The arguments in favour of non-binding recommendations from DRBs include that:

- (i) they often help parties in resolving a dispute by virtue of the advice the recommendation gives, so long as the parties have respect for the standing and competence of the members of the Board.
- (ii) they may appeal to certain cultural backgrounds, e.g. in China the tradition of conciliation will often lead to the adoption of recommendation by the parties to avoid further conflict;
- (iii) they provide a non-threatening process;
- (iv) the preparation for any hearing is less than other procedures;
- (v) the hearings are shorter and simpler;
- (vi) the hearing costs are reduced;
- (vii) experienced parties are very often able to resolve matters based on a recommendation alone;
- (viii) in the USA the non-binding recommendation, which normally extends only as far as matters of entitlement and not quantum, generally finds acceptance because neither side is usually eager to pursue the matter through arbitration or the courts.

The arguments against non-binding recommendations from DRBs include:

- (i) They enable the losing party to postpone the day of reckoning merely by giving the required notice of arbitration;
- (ii) The effect of the recommendation may be nil.

Interim-binding decisions

By contrast, the interim-binding decision has effect as the Dispute Adjudication Board's decision is contractually to be implemented immediately – even if one or other party is unhappy. Thus the “losing” party would be in breach of contract if it were not to pay/grant time in accordance with the Dispute Adjudication Board decision.

The arguments in favour of binding decisions from Dispute Adjudication Boards include:

- (i) if necessary, may be enforced by legal processes (these may not be without difficulty depending on jurisdiction);

⁷⁹ For example, the Ertan Hydroelectric Project in China where all 27 of the DRB's decisions were adopted by the parties during the final settlement negotiations resulting in final account agreement of a mega project constructed over a nine-year period to be settled in less than six months of contractual completion.

- (ii) the binding nature of the decision will focus the minds of the parties during the Dispute Review process and can thus lead to early settlement;
- (iii) the binding nature of the decision is unlikely to be ignored even by an unwilling or an impecunious party (breach of contract);
- (iv) in a joint venture, consensus may be difficult insofar as adopting a recommendation – not so with a decision;
- (v) different situations arise around the world where there is corruption and suspicion arises if any public employee authorises payments that are not compulsory.

The arguments against binding decisions from Dispute Adjudication Boards include:

- (i) matters are often harder fought, as there is more at stake;
- (ii) hearing preparation costs, hearing time and costs are likely to be more. Generally, more documentation is put before the Board;
- (iii) more chance of legal representation;
- (iv) the final decision is taken away from the parties;
- (v) some matters are very complex and the time limits can be testing when much can turn on the decision.

In general there is no right or wrong answer as to whether the output from a Dispute Board should be a non-binding recommendation or an interim-binding decision. Much will depend on circumstances, jurisdiction, the skills and identity of the board members and the needs of the parties as well as cultural considerations.

History of Dispute Boards

Dispute Boards evolved to meet the need in the construction industry for prompt, informal, cost-effective and impartial Dispute Review. The Dispute Board concept originated in the USA where it has been used for over 30 years as a means of avoiding and resolving disputes in civil engineering works, particularly dams, water management projects and contracts for underground construction, and the most common form of Dispute Board there is the Dispute Review Board. The earliest reported use was on Boundary Dam in Washington in the 1960s, where the technical “Joint Consulting Board” was asked to continue its operation and make decisions regarding conflicts and other related matters. The idea worked well and the Dispute Board embryo began to grow.

In 1972, the National Committee on Tunnelling Technology undertook a study in the USA into improved contracting practices. This led to a publication, in 1974, entitled “Better Contracting for Underground Construction”, in which the undesirable consequences of claims, disputes and litigation were highlighted. As a result of the study, and the consequent publication, a Dispute Board was established in 1975 for the Eisenhower Tunnel in Colorado. The benefits of the Dispute Board approach were recognised and appreciated by the contracting parties and “The Eisenhower” became an example that was followed with enthusiasm throughout the USA.

The International Federation of Consulting Engineers,⁸⁰ FIDIC, has for some years published several forms of contract that are popular for use in international

⁸⁰ Known as FIDIC or the Fédération Internationale des Ingénieurs Conseils, an international organisation based in Geneva that represents consulting engineers.

procurement. The FIDIC forms emanate from the standard form of contract published by the Institution of Civil Engineers in the UK. Both the Institution of Civil Engineers and FIDIC forms originally empowered the “engineer” to act in a quasi-judicial manner in settling disputes that arose between the contracting parties. As suspicions grew concerning the independence of an owner’s agent acting fairly to determine disputes, and as costs in resolving claims by arbitration or the courts increased, the need grew for a cheap and timely system of Dispute Review in large infrastructure projects where parties of differing nationalities were involved.

In 1980, a Dispute Board was used on a large international project in Honduras (the “El Cajon Dam and Hydroelectric facility”). This project was funded in part by the World Bank that was convinced, mainly by the efforts of an American, Al Mathews, who had been involved in a number of Dispute Boards in the United States, that a Dispute Board would overcome the potential problems that were foreseen on this large project that was to have an Italian contractor, a Swiss “engineer” and an owner – the Honduras Electricity Company – that had never embarked on such a large project before, nor one with non-national contractors. The El Cajon Dispute Board was successful and the use of Dispute Boards on international projects started.

The World Bank

The World Bank, in the very early 1990s, published *Procurement of Works*, which comprised inter alia a modified FIDIC contract with provisions for Dispute Boards to publish non-binding recommendations. FIDIC followed suit in 1995/1996 with a new version of the Design-Build Contract and an optional amendment to its standard form construction contracts. In both these new documents Dispute Adjudication Boards were introduced. It was at this stage that the divide first occurred between the traditional Dispute Review Boards, which give non-binding recommendations, and Dispute Adjudication Boards with their interim-binding decisions. Additionally, FIDIC removed the engineer as the first-tier dispute decider if the Dispute Adjudication Board option was incorporated in the contract.

In 1999, FIDIC revised its various forms of contract and in this edition the Dispute Adjudication Board was presented as the principal means of Dispute Review within the contractual mechanisms. In the FIDIC Red Book (Construction), the Dispute Adjudication Board is to be established *at the start* (and thus is a true dispute board) while in the Yellow Book (Plant and Design/Build) and the Silver Book (EPC/Turnkey) the establishment of the Dispute Adjudication Board may be deferred until an actual dispute arises.

In 2000, the World Bank produced a new edition of the *Procurement of Works*. This was a significant publication as the World Bank moved away from the US model of Dispute Review Boards towards the FIDIC-style Dispute Adjudication Boards. The World Bank has thus adopted a contract whereby the Dispute Review Board (the name remained) gives recommendations that are in the interim binding and where the engineer is not required to act in the traditional quasi-judicial manner in deciding disputes arising between the parties.

Harmonised contract conditions

The World Bank and FIDIC embarked upon a process to harmonise the Dispute Resolution Board/Dispute Adjudication Board provisions to bring them into

alignment. Other development banks (EBRD, Asian Development Bank, African Development Bank) were involved in this harmonisation and, in 2005, a set of contract conditions, published by FIDIC, was adopted by all the leading development banks, utilising Dispute Review Boards.

The Institution of Civil Engineers (ICE) in the UK has an initiative to consider a statute-compliant clause in its standard form contract whereby dispute boards may be established that comply with the UK statutory provisions for adjudication. A number of such boards are already in progress and the ICE initiative would mean that contracting parties are provided with standard wording should they wish to adopt the Dispute Board route. The ICE has launched its own Dispute Board procedure that can be selected by parties choosing to use a Dispute Board in association with an ICE contract.

Growth of Dispute Boards

By the start of 2007, well over 1,700 projects have been completed, or are under construction, utilising Dispute Boards. The total value of these projects is approaching US\$100 billion. Although issues of confidentiality prevent an absolute determination, it is understood that almost 3,000 disputes have been the subject of Dispute Board decisions. There have been few occasions (under 35 cases reported to date) where a Dispute Board's decision or recommendation on a substantive dispute has been referred on to arbitration or the courts. Of such referrals very few decisions of a Dispute Board have been overturned.⁸¹

Dispute Boards are currently known to be in operation in numerous countries (e.g. USA, UK, Ireland, France, Sweden, Denmark, Bulgaria, Romania, Czech Republic, Iceland, Greece, Italy, Switzerland, Turkey, Southern Africa, Uganda, Ethiopia, Egypt, Hong Kong, China, Vietnam, India, Pakistan, Bangladesh, The Maldives, St Lucia, New Zealand, and Australia). They are ideally suited to the larger projects, to projects that are "international" (i.e. contracting parties from differing domiciles) and to multi-contract projects such as mass transit and high-speed railways, large power stations, etc. A recent development is the establishment of Dispute Boards for major concession projects lasting over several decades (e.g. Channel Tunnel Rail Link, Hospitals, schools and private power plants).

Dispute Boards are undoubtedly set to grow in popularity and frequency of use. Quite apart from their effectiveness in promoting early resolution of disputes – in the words of Lord Woolf, "lancing the boil"⁸² – there are several clear reasons why the use of Dispute Boards will develop. First, is the support given by the World Bank, other development banks, FIDIC, the International Chamber of Commerce, the Institution of Civil Engineers, the Dispute Board Federation and the Dispute Resolution Board Foundation. Second, is the success shown by dispute boards in avoiding and resolving disputes quickly, inexpensively and with a high quality of decision-making. Third, is the adjudication explosion in the UK arising from the UK "Adjudication Act" and

⁸¹ The Dispute Resolution Board Foundation in Seattle, Washington has conducted research that indicates over 98 per cent of disputes referred to dispute boards conclude the matter. Of the 2 per cent referred on to arbitration or the courts, half of those that reach a determinate stage sees the DRB's decision upheld and well less than 1 per cent overturn the DRB decision.

⁸² Keynote speech, "Adjudication: a New Deal for Disputes", ICE, 20 October 1997.

finally the ever-growing need in construction contracts for certainty and consistency in decision-making during — rather than after — the period of construction.

An overview — composition of Dispute Boards and their operation

Dispute Board panels of three are usual, but this composition is not mandatory. For small projects, which could not justify the expense of a three-person tribunal, a Dispute Board of one person can be utilised. Both the World Bank and the FIDIC conditions encourage one-person boards for small contracts. Very large multi-discipline and multi-contract projects could necessitate a larger pool from which a panel of one, or three or more members can be selected.

The Channel Tunnel project in the UK/France had a Dispute Board of five persons. All five members heard all of the disputes, but final decisions were made by a three-person panel composed of the chairman and two other members (chosen for their particular expertise). The Hong Kong Airport construction had a group (Disputes Review Group, DRG) of six members plus a convenor to cover all the main contracts (about 20) awarded by the Hong Kong Airport Authority. A panel of one or three members was selected depending on the nature or complexity of the dispute. The members of the Hong Kong Airport Disputes Review Group were chosen to provide the range of expertise that was considered likely to be required to comprehend the technical aspects of disputes that could arise.

Under the Channel Tunnel Rail Link project, a US\$5 billion concession project in the UK on which construction started in October 1998, two panels were established: a technical panel comprising engineers (to give decisions on the construction-related disputes) and a finance panel (to give decisions on disputes concerning the financial provisions of the concession agreement). The Docklands Light Railway Extension to Lewisham, opened to the public in about 2000, established technical and financial panels (each of three persons), but chaired by the same individual. A private finance initiative hospital project in northern England has a Dispute Board comprising a chairman and one other standing member but other members (from a long list including about 30 doctors) are to be co-opted to strengthen the Board when required to deal with financial, facilities and clinical matters.

Several Dispute Boards are being set up in Eastern Europe for long-term concession infrastructure projects. The notion is that the board will have a “moving membership” to suit the various stages of the project (construction, operation and maintenance, tariff indexation, economic trends, etc.).

Appointment and membership

Typically, each party selects one member of the Dispute Board, with the third member, who then acts as chairperson, being appointed by the parties or by the first two members. Another approach, which is sometimes utilised, is where the parties choose the chairperson who then selects the two other members of the panel. This method allows the chairperson to select individuals who are best suited for the particular project involved. For Dispute Boards to function well, a right of (reasonable) objection over the other party's selection is usually included. Yet another method of selection is for the parties to agree the identity of the chairman who, once appointed, works with the parties in selecting the other members.

Despite the first two members being party selections, each member is entirely independent. Appointment is not as party representative. The members are to serve both parties with total impartiality. A member's independence is paramount as a Dispute Board that is perceived as partisan will not engender respect and its recommendations or decisions are less likely to be acceptable. Consequently, whenever possible, active participation by the parties in the selection of members should be encouraged.

Dispute Board members should be chosen with care because the success of a dispute board depends on the parties' confidence in the expertise of the members, particularly that of the chairperson, who must conduct the regular meetings and hearings fairly and firmly. In construction projects the majority of issues brought to the attention of a Dispute Board have technical content. In such cases, a member with little or no understanding of such matters may fail to appreciate the extent of the dispute and may thus be unable to contribute to the proceedings. Additionally, members need to be well versed in contract administration and confident in their ability to understand and interpret contractual provisions. It is usual for the Dispute Board to publish its decisions with reasons. Confidence in the Dispute Board would disappear if the Dispute Board's interpretation of contractual provisions appeared bizarre or unsubstantiated.

However, there are many occasions when a dispute does not lend itself to absolute interpretations under the contract and the Dispute Board needs to give decisions which do not contravene contractual principles but which are robust enough to give clear and sensible guidance which is acceptable to the parties. The Dispute Board should provide the parties with avenues that could lead to the resolution of their disputes at the earliest opportunity. This will enable the real project to proceed, unhindered by any contractual baggage.

The importance of early appointment and of regular site visits

The Dispute Board should be established at the commencement of construction and should exist throughout the contract period. This is the feature that most differentiates Dispute Boards from some other forms of adjudication. Some lending institutions make provision in their loan agreements whereby funds are suspended until the Dispute Board has been appointed and has commenced its programme of regular visits to the project. In some contracts failure to appoint the Dispute Board (within a certain period) constitutes breach and enables the non-defaulting party to apply for institutional appointments.⁸³ The establishment of the Dispute Board should not be left until a dispute has arisen or after the contract has been completed. A Dispute Board's main value is in being part of the project from the outset so that its presence can, from the start, influence the attitudes and behaviour of all those involved.

Early appointment and regular site visits enable the Dispute Board members to become highly conversant with the project and actually observe the problems on site as they develop. Technical difficulties and their contractual ramifications can readily be appreciated and, should the Dispute Board be required to make a decision on a dispute, its close knowledge of the project and of the issues (and personalities)

⁸³ Such as the ICE, ICC, FIDIC, or the Dispute Board Federation (DBF) which are organisations which publish lists of accredited dispute board members and chairmen.

should permit quick, well-informed, even-handed and consistent responses. As every arbitrator and judge knows, it is difficult to visualise factual circumstances that are said to have existed several years earlier merely by listening to others or by reading documents. If the disputes involve allegations of delay or disruption, or if ground conditions are in issue, even contemporaneous correspondence or photographs can be misleading. By having witnessed the technical and physical conditions prevailing at the time, the difficulties of ex post facto determinations are avoided and the expensive task of reconstructing historical events reduced.

Routine operations

Experience indicates that the routine visits to the project of a Dispute Board become a focus for the parties and their professional advisers. Claims and potential claims are subject to regular (albeit general) review and are not permitted to lie and fester, surfacing again as major disputes some time later.

The frequency of site visits depends upon the nature of the work, the construction activities in process and the number of potential or actual disputes. In technically complex construction projects, or those where ground conditions are known to be suspect, or where contract interfaces and rates of progress could become issues, visits should be relatively frequent, perhaps every three months. This frequency can reduce to six months or more as the work progresses. Whenever appropriate, site visits should be combined with hearings of disputes (which would normally be conducted on or near the site).

A typical programme for a visit would be for the Dispute Board to be given a brief progress update followed by a site inspection, particularly of those areas where potential difficulties exist, (e.g. rock quality in a tunnel drive). The parties would be given ample opportunity to provide the Dispute Board with further information on such issues, not by way of contractual argument, but so that the Dispute Board can better appreciate the consequential effects to the project and the steps the parties and their advisers are taking in mitigation. Further site inspections of particular areas could take place in the light of information received. The Dispute Board will also convene sessions with the parties during which the Dispute Review Board asks questions or seeks additional information from the parties as to how they are going about resolving their differences. These sessions often stimulate remarkable interaction between the parties and it is not unusual for issues to be clarified and new understandings develop as a result. In cases when a dispute has arisen, the hearing of the dispute would commence on site once the routine visit is over.

It can be advantageous for the Dispute Board to prepare a report at the conclusion of each regular site visit. This should state what occurred and make suggestions as to how matters of concern could be progressed to settlement. The higher up the chains of command this report reaches, the better. Most contracts now provide for a report after each site visit.

Apart from the regular visits to the site, Dispute Board members should be kept informed of construction progress on a regular basis, usually by being sent copies of, or extracts from, the routine progress reports. It is vital that the member takes the trouble to read and digest the contents of these reports (and to keep them accessible and in good condition for later reference should a dispute arise). Total familiarity with the project is essential when visiting the job site and each board member must

spend a considerable amount of time in preparation. But a member's obligation is not just to read reports: Dispute Board members must be available at short notice to read dispute submissions, convene hearings and prepare decisions. This availability is paramount and warrants the retainers which members are usually paid. The Dispute Board agreements usually specify a period from notification within which the hearing is to be convened. For the members of the Dispute Board to request deferrals of the hearings because of inflexible schedules defeats a principal benefit of the Dispute Board. Consequently, individuals should not accept invitations to serve on Dispute Boards unless they have the availability to fulfil these important obligations.

Informal operations

The formal involvement of the Dispute Board as dispute adjudicator arises when one or other party to the contract serves notice of a dispute. Sometimes, this referral may not be made until a dispute has reached a relatively advanced stage and negotiations between the parties have failed to resolve the matter.

A Dispute Board can, however, operate on an informal level. During the routine site visits matters of concern and potential dispute are brought to the attention of the Dispute Board and grievances can be aired and a dialogue established between the parties, under the watch of the Dispute Board. However, caution must be exercised and the Dispute Board should not give informal pronouncements or attempt to pre-judge issues that may later be the subject of a formal reference. It is not difficult, however, to steer the parties towards new understandings and thereby help clarify matters in contention. This role of the Dispute Board has obvious similarities to non-evaluative mediation.

But it must be stressed that the informal operation of Dispute Boards should be undertaken with caution. Injudicious statements from the Dispute Board should not usurp the role of the professional advisers. Nor should the formal role of the Dispute Board be prejudiced. With this said, the parties usually welcome the informal operation and is a valuable means of dispute avoidance.

The Dispute Board can, with the agreement of the parties, be asked to give an advisory opinion that is similar in nature to an award or judgment on a preliminary point in arbitration or the courts. The advisory opinion can be used when the parties need guidance on a contractual interpretation that is preventing the settlement of a dispute. By referring this interpretative matter to the Dispute Board (who may agree to deal with the matter on inspection of documents only) further hearings on the dispute may be unnecessary.

Dispute Board procedures

To achieve maximum benefit from a Dispute Board, the procedures adopted for the hearing of any dispute should be simple, easily understood, fair and efficient. To impose multiple steps of review and negotiation prior to, or during, the Dispute Board hearing can lessen the likelihood of success by increasing confrontation. In particular, procedures should facilitate the prompt reference of the dispute to the Dispute Board.

The World Bank, FIDIC, International Chamber of Commerce, Dispute Board Federation and Institution of Civil Engineers publish standard procedures for use by

Dispute Boards and, in the main, permit the Dispute Board power to adopt whatever procedure it considers necessary to conduct its business in a fair and efficient manner.

Strict rules of evidence are not followed in Dispute Board hearings. All documents that are to be referred to during the hearings should have been provided to the Dispute Board, and the other party, prior to the hearing. For a party suddenly to produce a stack of correspondence upon which it relies without having given due notice will inevitably delay the procedure. In practice, there are occasions when discussions or questions at the hearing require a party to produce further evidence. In such cases, the Dispute Board should allow the other party an opportunity to consider and reply to the new material. This is normally possible after a few hours' recess, or by the next morning. If more difficult questions arise, the Dispute Board can reserve its decision pending receipt of written responses. The Dispute Board should ensure that neither party is prejudiced by an "ambush" but, at the same time, try to prevent the submission of non-essential material that carries no substantive weight and merely confuses the issues. This judgment is one of the most difficult aspects of the Dispute Board's operation. The balance between fairness and expedition is not always easy.

Dispute Review Board costs

When compared to the likely costs of arbitration, Dispute Boards do seem to offer good value. It has been estimated that three-person Dispute Boards can cost between 0.05 per cent and 0.3 per cent of total project costs. Clearly, the larger the project the easier it is to justify the expense of a Dispute Board, but one-person "local" boards can be considered for the smaller projects at very modest costs. It is usual that the cost of a Dispute Board is shared equally by the contracting parties – some users viewing the expense of a Dispute Board as an insurance premium against more costly procedures.

Furthermore, the costs of a Dispute Board are offset by the lower bid prices that are known to result when contractors prepare tenders on Dispute Board contracts, particularly when working overseas. Obviously, a tenderer will include Dispute Board costs in its tender but it should not need to inflate prices to cover what, without the Dispute Board, may be a risk of injustice or delay. In cases where the Dispute Board actually replaces the owner's engineer as the first-tier adjudicator, the terms of reference under which the engineer is appointed may omit certain Dispute Board functions, thus producing some savings to off-set the cost of the Dispute Board.

Perhaps one of the most significant aspects in considering the expense of a Dispute Board is the significant difference in time (and thus costs) between preparing a dispute for a Dispute Board hearing and in assembling the voluminous trial documentation to put before an arbitrator or a judge – costs that are never recovered in full, even by the winning party. Notwithstanding the cost of resolving a particular dispute being considerably less by Dispute Board than by arbitration or litigation, the parties do expect something for their money and a proactive, enthusiastic and well-informed Dispute Board will achieve far more and give better value than one that is entirely passive or reactive.

Why Dispute Boards work

Dispute Boards generally succeed without the parties requiring recourse to law. The parties must live with the Dispute Board for long periods and it is evidently

counterproductive to chase off to the courts on every small matter while the contract is ongoing and the Dispute Board is still operating.

From the available figures it appears that Dispute Boards are effective in avoiding arbitration and litigation and bringing the parties to settlement: the record for Dispute Boards would indicate that parties accept the “judgments” of Dispute Boards as fair – or at least as fair as they might expect from an arbitrator or a judge.

With a Dispute Board in place, it is evident that the parties will themselves take efforts to resolve potential disputes and reduce matters in contention. The Dispute Board is thus an effective dispute avoidance device. Its very existence (its “long shadow”) minimises the outbreak of disputes and fosters cooperation between the parties, often providing the impetus for amicable settlements. The damaging “duel of egos” is avoided. Claims and defences are more carefully prepared and more credible as there is a natural desire not to appear foolish before the Dispute Board, or to be seen as unhelpful or exaggerating. The parties thus undertake their own reality check before embarking on the referral. Fewer spurious claims are advanced and fewer meritorious claims are rejected. Dealing is more open and the procedural posturing, so common in arbitration or litigation, is rarely evident.

Parties are less inclined to send acrimonious correspondence that can damage relationships. They are aware, possibly subconsciously, of the Dispute Board’s reaction to such exchanges. The parties’ approaches are thus tempered by their perception of the Dispute Board’s view of their behaviour. Attitudes remain positive, not adversarial.

By the owner adopting the Dispute Board approach in the bidding documents, tenderers are given a strong indication that fair play will prevail. This promotes openness and the partnering spirit. Furthermore, engineers, whether owners, engineering consultants or contractors, engage them and have very strong paternalistic feelings towards their projects. With the parties having to report to the Dispute Board during the site visits, cooperation towards the common goal is encouraged and mutually acceptable solutions emerge.

When a dispute does arise it is given early attention and addressed contemporaneously. This avoids the commonly encountered situation of the engineer being too busy to address a voluminous claim. An inclination to reject in any event is not unknown, possibly in the hope that such action would make the claim go away. Delays occur which can result in aggravation, acrimony and the development of entrenched views. Opportunities to negotiate and settle are lost. The Dispute Board prevents this by its regular review of progress on claims. Parties’ unrealistic ideas do not turn into unrealistic expectations and issues are isolated and contained, not being allowed to snowball into unmanageable proportions.

Because of the Dispute Board’s familiarity with the project, and the speed with which disputes come up for hearing, those presenting and adjudicating the dispute better understand facts. Reconstruction of historical circumstances is greatly reduced. In most projects, senior construction personnel rarely remain after construction activities complete – they are eager to move to their next job, often depriving the arbitrator or judge of the benefit of their first-hand knowledge of events. With such individuals on hand, greater certainty prevails and the parties are usually content that the material germane to the issue has been revealed.

For meritorious claims, acceptance of the Dispute Board decision results in earlier payments to the contractor, easing cash flow difficulties. With claims resolved as they arise, finalisation of the contract account is usually quick and retention funds may be

released earlier. Both parties can draw their bottom lines and get on with operating their core businesses.

The confidential and low-key procedures preserve good site relationships, vital for the remainder of the project. Face-saving settlement options are provided and neither party is seen as having to back down. The “pay up or we’ll stop work” scenario – guaranteed to put an end to project partnering – is avoided.

Do Dispute Boards offer such easy and inexpensive resolution options that they encourage disputes? This does not appear to be the case, as many “Dispute Board projects” have no disputes whatsoever. As was mentioned at the start of this chapter, several large projects in England have Dispute Boards that were never required to make a decision on a dispute. The contractors freely admitted that this was because the Dispute Board was seen patrolling the site during the quarterly visits and was on top of problems even before they began. Both parties tried very hard to prevent the Dispute Board being used, neither wanting to be proven wrong.

International aspects

On international projects (i.e., those where the contractor is not of the same domicile as the employer and is working outside its country of origin) it is very likely that the members of the Dispute Board will be of different nationalities. Translation of all written and spoken material into languages other than English is not unusual and it does not take much imagination to foresee the difficulties in communication. It does take patience and consideration on the part of the Dispute Board to ensure that the parties, party representatives and each member of the Dispute Board fully understand each and every step of the proceedings. In many instances, certainly during the development of Dispute Boards, many of the participants in the Dispute Board process will lack experience. Guidance and assistance from the tribunal will be essential.



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Key issues in dispute resolution

Agreements

The two most common forms of dispute resolution, which require an agreement, are arbitration and adjudication. Of course, there is mediation but the agreements there are a bit more casual, as one cannot be forced to mediate, but one can be required to arbitrate, or be subject to adjudication. Under the Housing Grants, Construction and Regeneration Act 1996, however, the statutory requirements overshadow individual contracts regarding adjudication (see Chapter 14). Internationally, most large-scale infrastructure projects provide for adjudication of their disputes with referral to arbitration thereafter, according to international standards developed by such groups as the International Chamber of Commerce or the Chartered Institute of Arbitrators. FIDIC, for example, provides for a specific Dispute Adjudication Agreement as part of its dispute resolution procedures flowing from the dispute adjudication board procedures in its contracts. Looking then to the most prevalent form of dispute resolution, arbitration, we find that in England, for example, arbitration is generally subject to the Arbitration Act 1996 and further, particular arbitration clauses can have additional requirements such as being subject to the Construction Industry Model Arbitration Rules. With the advent of adjudication in the UK, arbitration has become a bit more rare but remains applicable to disputes and, in particular, construction disputes, where it is still possible to obtain highly qualified construction arbitrators who know what “section modulus” is or where a “soffit” belongs.

Unfortunately, arbitration, which was initially meant to provide a quick resolution of a commercial dispute by an knowledgeable arbitrator has, over the years, expanded into what to many seems similar to actual court proceedings, with all that entails, such as delay in getting to the hearing, lawyers causing difficulties and the attendant costs. Judges, in particular, who frequently have to review arbitral awards, have noted this situation; for example, in *Northern Regional Health Authority v Derek Crouch Construction Company Limited*,¹ the court wrote: “[a]rbitration is usually no more and no less than litigation in the private sector”.

While this may be true, the Arbitration Act, along with other international requirements, promotes the use of effective and speedy arbitration to help temper this view and goes a long way towards providing a compelling reason not to litigate.

¹ [1984] 1 QB 644.

As to the Arbitration Act 1996, it states in section 1 that its overriding principles are that:

“... The provisions of this Part are founded on the following principles, and shall be construed accordingly –

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
- (b) the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
- (c) in matters governed by this Part, the court should not intervene except as provided by this Part.”

The Act then defines such an arbitration agreement in sections 5 and 6 as follows:

“5 Agreements to be in writing

- (1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions ‘agreement’, ‘agree’ and ‘agreed’ shall be construed accordingly.
- (2) There is an agreement in writing –
 - (a) if the agreement is made in writing (whether or not it is signed by the parties),
 - (b) if the agreement is made by exchange of communications in writing, or
 - (c) if the agreement is evidenced in writing.
- (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
- (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
- (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
- (6) References in this Part to anything being written or in writing include its being recorded by any means.

6 Definition of arbitration agreement

- (1) In this Part an “arbitration agreement” means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
- (2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.”

Then, following along this path, once section 5 and 6 have been complied with, the parties *must* proceed to arbitration and are precluded from commencing court litigation. If one party decides to start legal proceedings instead of arbitration, the other can ask the court to transfer the matter to arbitration or, as is more likely, to enjoin further court proceedings pending the outcome of the arbitration.² In *Halki Shipping Corp v Sopex Oil Ltd*,³ the court dealt with both the 1996 Act and its repeal of the former Arbitration Act 1975 as well as the mandatory nature of the 1996 Act. In this case *Halki* was a shipowner who had an agreement, under a charterparty, with *Sopex*, which provided for arbitration in respect of any disputes arising from it. *Halki* issued a summons under the Rules of the Supreme Court, Order 14 for

² See e.g. Paul Newman, “Commercial Arbitration: Part 1”, *Construction Newsletter*, 2009.

³ [1998] 2 All ER 23.

summary judgment as to a claim for demurrage against the Sopex. Here, Sopex had successfully applied for a stay of proceedings under the Arbitration Act 1996 section 9 on the grounds that the proceedings brought by Halki were in respect of a matter, which, under the charterparty, was to be referred to arbitration. Halki appealed, contending that the repeal by the 1996 Act of the Arbitration Act 1975 section 1, which provided that a stay of proceedings could be refused if “there was not in fact any dispute between the parties with regard to the matters agreed to be referred”, simply “removed a superfluity” and did not change the law as stated in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*,⁴ so that the fact that a defendant refused to admit an indisputable claim did not create a dispute under the arbitration agreement.

The court did not agree and dismissed the appeal, stating that the contention that neither the 1975 Act section 1, nor its repeal, affected the law could not be supported and the removal of that ground for refusing a stay of proceedings had to be viewed as an important difference between the two Acts, which left almost all disputes within the arbitration clause to be referred to arbitration. The repeal of the 1975 Act section 1 showed that Parliament did not consider that the court’s summary jurisdiction under Order 14 was a necessary safeguard against delay in arbitration proceedings and the 1996 Act emphasised the importance of ensuring that the parties’ decision to go to arbitration was respected. The key question, therefore, was whether there was *any* dispute within the meaning of the arbitration clause where one party claimed a sum that the other party refused to pay, or denied was owed. In the instant case there was a dispute according to the ordinary use of the English language and accordingly, per the 1996 Act, so long as there was a valid arbitration agreement there was a mandatory stay of proceedings. The court wrote:

“... I take s 1 in general and s 1(b) in particular as emphasising the importance of the fact that the parties have chosen an alternative form of dispute resolution, namely arbitration, and should not be limited in that preference unless ‘such safeguards are necessary in the public interest.’

Therefore, it is important to read the contract before commencing court proceedings. For instance, in *Ardentia v British Telecommunications* [2008] EWHC B12 (Ch) the claimant and the defendant were in dispute over software licences and payments and BT’s wish to appoint an alternative supplier. Ardentia sought an interim injunction to stop the appointment of the third party supplier (which the judge dealt with) but the underlying dispute was transferred to arbitration. The contract was clear. Clause 7.1.3 of the Dispute Resolution Procedure stated – ‘If the Contractor intends to commence court proceedings it shall serve written notice on BT of its intention and BT shall have 15 (fifteen) business days following receipt of such notice to serve a notice in reply on the Contractor requiring that the dispute should be referred to arbitration’

When there is a valid contract, which provides for arbitration of any dispute, the defendant is usually the one who has the option of demanding that arbitration proceeds rather than a court action. So, for example, if the claimant commences proceedings it is the defendant/respondent who has the right to compel arbitration pursuant to section 9 of the Arbitration Act 1996. Occasionally, however, the defendant/respondent does not immediately proceed to compel the claimant but rather conducts itself in a way to suggest that it agrees with proceeding in court instead – sometimes this is actual and most often, however, it is accidental – either way the claimant will attempt to use this as a basis for claiming that the arbitration provisions of the agreement have

4 [1977] 1 WLR 713.

been waived as the defendant/respondent has “taken a step in the proceedings”. This “taken a step” situation raises all sorts of additional questions, the least of which is exactly what is “a step”. The Irish case of *O’Dwyer & Anor v Boyd*⁵ reviewed the various authorities and provided the analysis. *O’Dwyer* was an appeal from an order of the High Court granting a stay of specific performance proceedings instituted by O’Dwyer against Boyd so as to enable certain matters to be referred to arbitration in accordance with the terms of a contract of sale.

The contract of sale was dated 21 August 1998 and was in a standard Law Society form. That standard form included “General Conditions of Sale” which, by virtue of paragraph 2 of the special conditions, were to be incorporated into the contract. Condition 51 of the general conditions clearly stated that all differences and disputes between the vendor and the purchaser, in relation to certain listed matters, were to be referred to arbitration.

The matters that are relevant to the issue of “steps in the proceeding” are that on 11 April 2000, O’Dwyer served notice of a motion for judgment in default of defence, which came on for hearing on the 8 May 2000. The motion was listed and at that stage O’Dwyer’s affidavit and exhibits were before the court but no affidavit was filed on behalf of Boyd. Counsel for Boyd requested a three-week adjournment, which was opposed, but despite this the court granted an adjournment of one week. Apparently, it had been indicated that Boyd might want to bring a motion to have the proceedings stayed so that there be a reference to arbitration under the contract. The court gave liberty to serve short notice of motion to refer the matter to arbitration for the same date as the resumed hearing of the motion for judgment. On 11 May 2000, a notice of motion was served seeking a stay of the specific performance proceedings under the then applicable Arbitration Act, of which the then subsection (1) read:

“... (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any proceedings in any court against any other party to such agreement, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the proceedings may at any time after an appearance has been entered, and before delivering any pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”

The court found that subsection (1) clearly provided that the application for the stay had been made at the right time, the court had very limited discretion to refuse. By “right time” the court meant that the application must be made “before delivering any pleadings or taking any other step in the proceedings”. This became the central issue in the appeal.

After several adjournments dealing with additional affidavits, the ultimate hearing took place on 3 October 2000 and the stay was granted resulting in the appeal. The Court of Appeal reviewed the situation and wrote:

“... The appellants have included every conceivable point that could be made on their behalf in the notice of appeal but it emerged from the hearing that in reality the substantial grounds of appeal can be reduced to two. These are:

- (1) ... The appellants’ argument is that their litigation directed towards obtaining title and vacant possession is a specific performance suit in which they are also

5 [2002] IESC 54.

claiming damages and that the scope of their action goes well beyond so called “error” in description which they deny existed. They say that the arbitration effectively deprives them of their specific performance suit.

- (2) If the appellants are wrong about that, the High Court still had no jurisdiction to grant the stay because the respondent had taken a step in the proceedings within the meaning of section 5 of the Arbitration Act, 1980. This ground of appeal is essentially contained in paragraph 5 of the notice of appeal.

The other grounds of appeal are not really stateable in law though it is very understandable that the appellants would have regarded them as relevant. Ground No. 1 refers to section 26 of the Arbitration Act, 1954. That section reads as follows:

‘26. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the court to order specific performance of any contract other than a contract relating to land or any interest in land.’

The appellants seem to take the view that because of this section issues in their specific performance suit cannot be referred to arbitration. That is a misreading of the section. If the matter substantially in dispute in this case goes to arbitration, the arbitrator will, in the first instance, be concerned with whether Condition 33 applies at all. My impression is that the appellants would obviously like that issue to be decided by a court and not by an arbitrator, but they have signed a contract which says that that issue does have to go to an arbitrator. All the provisions of the Arbitration Acts will apply to any such arbitration including of course, if difficult legal questions arise, the power of the arbitrator to state a case to the High Court. But Condition 51 of the general conditions incorporated in the contract which the appellant signed incontrovertibly provides that the applicability of Condition 33 is itself to be arbitrated on as distinct from the issues under Condition 33. If the arbitrator came to the conclusion that Condition 33 was applicable, then he or she would go on to determine whether there should be an abatement of the purchase price. In the meantime, this specific performance suit does not disappear. It is simply stayed pending the outcome of the arbitration. There is no question of the arbitrator granting a specific performance order and, therefore, there is no question of any contravention of section 26 of the Arbitration Act, 1954. If and in so far as there are issues outstanding after any abatement of purchase price has been determined they will come to be determined by the court if necessary.

...

Moving now to the second substantial ground of appeal that is to say that the court had no jurisdiction to order the stay because the respondent had taken a step in the proceedings, it is only fair to say that although many relevant and useful cases have been cited none of them are quite on all fours with what happened in this case.

Before reviewing the case law, I think it useful to refer first to textbook passages on which the appellants have particularly relied. The passage most favourable to the appellants’ point of view is probably that contained in Halsbury’s Laws of England, 4th edition, reissue, Volume 2 at paragraph 627. The passage in question reads as follows:

‘The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant’s election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that that act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of a defence, and an application to the court for leave to serve interrogatories, or for a stay pending the giving of security for costs, or for an extension of time for serving a defence, or for an order of discovery, or for an order for further and better particulars. The following have been held not to be steps: acts preliminary to the issue of proceedings, a request in correspondence for an extension of time for serving a defence, the filing of affidavits in answer to an application by the plaintiff for the appointment of a receiver,

transferring a summons into counsel's list, applying to strike out a defective statement of claim, resisting an application for an interlocutory injunction by putting in evidence and appearing in court, and applying for a stay on grounds other than that the dispute was subject to an arbitration payment'."

In a footnote to that passage there is a very general statement in the following terms:

"Any act which does not involve the court does not invoke its jurisdiction: ... as a general rule any application to the court, or filing of pleadings or documents, does invoke its jurisdiction and does amount to a step in the proceedings: ... under certain circumstances, however, such actions may not amount to steps.

The appellants also relied on a passage in the Law and Practice of Commercial Arbitration in England, second edition, Mustill and Boyd. The passage appears at p 472 and with reference to what is a 'step in the proceedings' reads as follows:

'The reported cases are difficult to reconcile, and they give no clear guidance on the nature of a step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.'

To arrive at a true understanding of the correct principles to be applied it is necessary to review the actual decided cases. At this stage I should make it clear that although I will be reviewing the cases I will be doing so in the context of one aspect only of this case. In ground 5 in the notice of appeal the appellants rely on three distinct alleged 'steps'. Two of these are in my view unstateable for the reasons which I will be indicating. Serious consideration has only to be given to the third. Associated with the contract of sale there had been a tenancy agreement between the respondent and the appellants. In 1999 the respondent purported to terminate that tenancy agreement and issued ejectment proceedings against the appellants in the District Court. The appellants claim that the issuing of the District Court ejectment proceedings constituted a 'step'. This argument cannot be sustained since clearly the alleged 'step' was not a 'step' in these specific performance proceedings brought in the High Court but rather the institution of different litigation in a different court.

The second alleged 'step' is the imposing on the appellants the necessity to make an application to the High Court for liberty to serve out of the jurisdiction in South Africa because the respondent would not nominate their Dublin solicitors to accept service. While it was very understandable that the appellants should be highly aggrieved by this behaviour on the part of the respondent it cannot be said to constitute a 'step'. The behaviour complained of was not part of the proceedings itself.

The third 'step' alleged by the appellants is undoubtedly arguable and requires serious consideration. This relates to the application to McCracken J for an adjournment of the motion for judgment. After carefully considering the decided cases which I am about to review, I have come to the conclusion nevertheless that that was not a 'step' within the meaning of the Arbitration Act, 1980. By merely applying for an adjournment the respondent was not indicating to the court one way or the other whether he intended to participate further in the proceedings and indeed the question of reference to arbitration was raised. The adjournment was in my view nothing more than a holding operation.

The leading English case on the question of what constituted a 'step' was for many years *Ford's Hotel Co Limited v Bartlett* [1896] AC 1. Quite apart from any persuasive value which the case may have, it is of importance in Ireland in that it was relied on and effectively followed by Finlay P in *O'Flynn v An Bord Gais Éireann* [1982] ILRM 324, a case to which I will be referring in more detail in due course. In the *Ford's Hotel* case a defendant had taken out a summons and had obtained an order for further time for delivering a defence. This was held to be a 'step' in the proceedings within the meaning of the similar provision contained in the Arbitration Act, 1889. In the *O'Flynn*

case as will be seen, Finlay P approved the following passage from the speech of Lord Halsbury:

‘The intention of the legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once, and before any further proceedings were taken, specify the *terminus a quo*, and that if an application to stay proceedings was made under those circumstances, then that the court should enforce the contractual obligation to go to arbitration. My Lords, that seems to be a very wise provision: that costs should not be thrown away in beginning to litigate.’

Three of the five Law Lords delivered opinions and there is some slight discrepancy between them as to whether it was the application for the extension of time or the actual making of the order for the extension of time or a combination of both which constituted the ‘step’ but nothing turns on that for the purposes of this appeal. In this case the respondent never made any application to the court for an extension of time to deliver a defence or indeed any other application other than for an adjournment which must necessarily be noncommittal. But it was not entirely noncommittal in that short service was allowed for the bringing of a motion to stay the proceedings.

For a ‘step’ to be constituted it may not be essential that the parties seeking the stay has himself or herself made some application to the court. In the English case of *Pitchers Limited v Plaza Queensbury Limited* [1940] 1 All ER 151 it was held that opposition to a summons for leave to sign final judgment before the Master was a ‘step’. However, the case is somewhat unusual in that as was pointed out in the judgment of Slesser LJ that was not a case where an application for a stay was made at the same time as leave to sign judgment was opposed. At the stage when the matter was before the Master there was no application to stay on the grounds of arbitration. That only first arose on appeal to the judge. But again the facts are far removed from this case where all that was asked for was a straightforward adjournment.

The next case of importance is the Irish case of *O’Flynn* already cited. I referred to the fact that Finlay P in that case approved of the interpretation of the relevant section by Lord Halsbury in the *Ford’s Hotel* case but he went on to make the following observation:

‘... it seems clear that the step which should be held fatal to a party seeking to refer a matter to arbitration is a step which involves costs, in other words a step which invoked the jurisdiction of the court at his instance or which institutes some matter whether by way of motion or otherwise in the court. In the case of the *Brighton Marine Palace and Pier Limited v Woodhouse* [1893] 2 Ch 486 it was held that an agreement reached by letter between the parties for the extension of time for a defence was not the taking of a step by the defendant which could debar him from obtaining a staying order under the Acts. In the course of the judgment of North J in that case he points out that it was not a proceeding in the action but rather in a sense outside the court.’

In one sense an application for an adjournment is the invoking of the court’s jurisdiction but that is not sufficient for it to constitute a ‘step’, it is a totally neutral act in the context of whether it is an intention to refer to arbitration or proceed with litigation.

Finally I would refer to the modern English case of *Turner & Goudy v McConnell and Anor* [1985] 1 WLR 898. In that case, a Court of Appeal consisting of Dillon LJ and Mustill J (as he then was and who was one of the co-authors of the work cited earlier) held that the defendants had taken a step in the proceedings by filing an affidavit showing cause why summary judgment should not be entered against them and by appearing before the Master thereby causing judgment to be deferred by an adjournment; and that therefore it was too late to apply for a stay under the Arbitration Act 1950. The judgment of the court was delivered by Dillon LJ, and he succinctly explains the reasoning behind the court’s decision in the following passage towards the end of his judgment at p 903:

‘In the present case the defendants were required under Order 14 to show cause why judgment should not be entered against them. They had to do that by affidavit or

otherwise. They did it by filing the affidavit, which I have mentioned, which put forth at length the reasons why they contended that judgment should not be entered against them. Their position that they were opposing the application was maintained by the presence of the solicitor for the defendants before the Master on the 3rd of May and it was because of the contentions put forth in the affidavit, and not withdrawn, that the Master necessarily adjourned the proceedings to a more appropriate date.

They have therefore, in my judgment, taken a step in the action by filing the affidavit to show cause why judgment should not be entered against them and by appearing before the Master on the 3rd of May with the consequence that judgment was deferred by the adjournment and, in my judgment, it is too late for them in June to decide that they want a reply for a stay for arbitration.'

It is clear from that passage that the circumstances of that case were also entirely different from the circumstances of this case where the respondent did nothing except to apply for an adjournment.

The appellants in different connections have referred the court to a number of other authorities which I do not propose to review as I do not think they are relevant. At this stage I would just summarise the legal position in which the appellants find themselves.

They are faced with an application for a stay which was for the reasons which I have indicated made in time and is not defeated by any step taken by the respondent.

...
I would dismiss the appeal."

Once it has been determined that a valid arbitration agreement exists, it can be enforced, and the recalcitrant party compelled to arbitrate, but there are other essential parts of an arbitration agreement that must be taken into consideration.

One of the major problems encountered in agreements to arbitrate is the lack of a clear statement that the parties have agreed to *binding* arbitration. Some writers⁶ have used the example of a "problem" arbitration clause, which recited:

"In case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction."

With this particular clause, unfortunately, the question becomes just exactly how will any dispute be resolved? The real intent of the drafter of this clause would certainly have been to help the parties quickly avoid difficulties when a dispute occurred but, unfortunately, it was drafted in a way that would undoubtedly cause more difficulty than intended. Obviously, this should be avoided and it is always wise to avoid any changes to settled arbitration clauses and should at a minimum require the parties to submit to binding arbitration without any other provisions. In this regard article II.1 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, states:

"... Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which ... may arise between them ... concerning a subject matter capable of settlement by arbitration."

Again, the caveat is that if the arbitration clause is not clear on whether or not the parties have definitely agreed to submit to binding arbitration, it will not be enforced.

Another critical, but seemingly simple, provision is how the arbitration mentioned in the arbitration agreement will commence. A typical clause may state simply: "Any disputes arising out of this Agreement will be finally resolved by binding arbitration".

⁶ L Craig, R Park and J Paulsson, "*International Chamber of Commerce Arbitration sec 9.02*", 2nd edn, Oceana Publications, 1990.

This sort of provision would be enforceable, but unless the parties can agree on all of the other details, such as how the arbitrator will be appointed in the event they cannot choose, and where the arbitration should be held, etc., it will still require resort to the courts, which is something such clauses are intended to prevent. Several writers⁷ feel that there are certain specific provisions that should be contained in any agreement to arbitrate and these include:

- the agreement to arbitrate;
- what disputes will be arbitrated;
- the rules that will govern the arbitration;
- the institution, if any, that will administer the arbitration;
- the place of arbitration;
- the language of the arbitration;
- the applicable law;
- the procedural law that will apply to the arbitration;⁸
- the number of arbitrators and how they will be chosen;
- an agreement that judgment may be entered on the award;
- a provision as to whether or not the award should be a “reasoned award”;
- a provision as to whether or not the substantive law of any particular jurisdiction will govern;
- a provision governing interim relief, i.e. the appointment of an emergency arbitrator or obtaining injunctive relief;
- whether claims by or against company affiliates and/or parent companies are covered by the arbitration;
- whether issues arising from the presence of multiple parties, such as whether or not related arbitration proceedings may be consolidated, or whether provisions (other than those stated in the selected arbitration rules) should apply to selecting the arbitrator;
- a provision as to the scope and/or extent of disclosure/discovery and the procedures to be followed, such as resort to the International Bar Association;
- whether there is a need for a waiver of sovereign immunity;
- whether special confidentiality protection is needed; and
- whether to authorise arbitrators to award legal fees and costs.

Disclosure

Of these provisions the one that comes up is whether pre-arbitration disclosure can occur. In *EDO Corporation v Ultra Electronics Ltd*,⁹ it was found that the procedure for pre-action disclosure provided by section 33(2) of the Senior Courts Act 1981 and CPR Part 31.16 was not available to a party where the underlying dispute arose out of a contract, which required any dispute to be determined by arbitration.

⁷ See e.g. John M Townsend, “Drafting arbitration clauses: Avoiding the 7 deadly Sins”, *Dispute Resolution Journal*, Feb–April 2003.

⁸ It is important to determine or state what the “seat” is, thus for example if the arbitration is one in England and England is not stated as the seat it will be enforced either through the Geneva Convention or the New York Convention but will not be subject to any review by the English courts.

⁹ [2009] EWHC 682 (Ch).

In this case EDO and Ultra were both successful bidders in relation to sonar systems for a Royal Navy Destroyer. In preparing the bid and supplying the sonar, they had entered into two contracts with each other. In each contract Ultra was prohibited from using certain information, which had been provided by EDO, for anything other than the Royal Navy contract. In each contract there was an arbitration agreement. Then later, Ultra was a successful bidder for a sonar system for the Australian Navy. EDO took the position that Ultra misused some of the information that had been provided to it in the context of the Royal Navy work in order to win the Australian contract. However, in order to see whether this was the case, EDO applied for pre-action disclosure of parts of Ultra's bid to the Australian Navy.

The court found that it did not have jurisdiction to make an order for pre-action disclosure in aid of an arbitral process. Section 33(2) of the Senior Courts Act 1981 requires that an applicant should "appear in the High Court" or be "likely to be a party to subsequent proceedings in that court". On the contrary, the parties were bound to arbitration by the terms of their contracts so would not be litigating in the English court. The court noted that, had the legislature intended for those who were likely to be parties to arbitral proceedings to have similar ancillary assistance to that provided by section 33(2), it would have made an express provision to that effect either within the Senior Courts Act or, more probably, within section 44(2) Arbitration Act 1996.

The case of *EDO Corporation* is authority for the proposition that the courts do not have jurisdiction to entertain an application for pre-action disclosure whether the contract incorporates an arbitration agreement. Although this point does not appear to have been considered at a higher level, it was conceded in a more recent case, *Barrier Ltd v Redhall Marine Ltd*,¹⁰ in which Barrier acknowledged that, in order to succeed in its application for pre-action disclosure, it had to show that there was no arbitration clause in the relevant contract.

Thus, one should be careful in the drafting of an arbitration clause for, where the contract that forms the basis of a dispute contains an arbitration clause pre-action disclosure, it is not going to be available either through a court or through any pre-arbitral mechanism, as there will at that point be no arbitrator(s) appointed to hear the application, which is yet another reason to provide for a method to obtain this result in the arbitration agreement itself.

Another aspect of disclosure has to do with whether evidence presented in an arbitration is subject to disclosure elsewhere. In one of a series of cases entitled *Michael Wilson & Partners Ltd v Emmott*,¹¹ Michael Wilson Partners appealed against a decision authorising the disclosure, for the purposes of proceedings in New South Wales and in the British Virgin Islands, of documents generated in an English arbitration. In the underlying matter, Michael Wilson Partners had been established to provide legal services in Kazakhstan. Emmott was a solicitor who had joined them as a director and senior lawyer under an agreement containing an arbitration clause. After five years he had left Michael Wilson Partners and set up a competing business together with two other former employees of the company. It was claimed by Michael Wilson Partners that this was part of a scheme to divert their business in breach of contract and in breach of trust and they commenced arbitration in London and court proceedings against Emmott and others in England, New South Wales, the British Virgin Islands,

¹⁰ [2016] EWHC 381 (QB).

¹¹ [2008] EWCA Civ 184, [2008] Bus LR 1361.

Jersey and Colorado. In the arbitration Emmott sought an order permitting disclosure of documents from the London arbitration in the foreign proceedings on the basis that Michael Wilson Partners' case at arbitration was materially inconsistent with that advanced in other proceedings and it had been presenting those courts with a misleading or inaccurate picture. The judge ordered disclosure on the basis that it was in the interests of justice so that the foreign courts would not be misled, or potentially misled, where the cases that were being advanced in the various proceedings were essentially raising the same or similar allegations. Emmott took the position that the appeal should be dismissed as academic because the documents in issue had been made available to the foreign courts and Michael Wilson Partners submitted that there was no jurisdiction to make such an order for disclosure of documents in favour of a non-party in proceedings before the court unless such documents were a matter of public record and that, further, there was no basis for such a jurisdiction in relation to documents generated in an arbitration. As such, the disclosure order constituted an unwarranted intrusion into the confidentiality of arbitrations, which could only be overridden in the public interest in the context of a dispute between a party to the arbitration and a stranger. The Court of Appeal reviewed the situation and dismissed the appeal.

Its decision was based upon:

“the fact the court should not refuse to hear the appeal because it had become academic. It was possible that either side might wish to disclose more arbitration documents to one or more of the courts hearing aspects of the dispute. The determination of the appeal might give some guidance if further disclosure were requested. Further the judge had jurisdiction to determine the question of confidentiality. There was an implied obligation, arising out of the nature of arbitration itself, on both parties to an English arbitration not to disclose or use for any other purpose any documents prepared for and used in the arbitration, and as such *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 applied. That obligation was not limited to documents that contained material that was confidential, such as trade secrets. If the implied agreement of the parties was the basis of the obligation of confidentiality, it ought to follow that disputes about its limits were within the scope of the arbitration agreement and should be determined by the arbitral tribunal. On the evidence of the reported cases, however, when a dispute had arisen as to the applicability and extent of confidentiality it had been resolved by an application to the court for an injunction to restrain disclosure. The application in the instant case should be regarded as the mirror-image of such an application, namely as a claim for a declaration that the confidentiality obligation did not apply. Michael Wilson Partners did not seek a stay of Emmott's application but rather it took the point that the only way in which the documents could be obtained was by a request under the Evidence (Proceedings in Other Jurisdictions) Act 1975. There was nothing in that point, since the 1975 Act only applied to requests for evidence and there was no case for suggesting that the material sought was evidence in that sense. Further there was an exception to the obligation of confidentiality where the interests of justice required it, *London and Leeds Estates Ltd v Paribas Ltd* [1995] 1 EGLR 102 and *Ali Shipping v Shipyard Trogir* applied. In the circumstances the judge had been right to order disclosure in the interests of justice since otherwise there was a possibility that the foreign court would be misled.”

E-disclosure

Increasingly, arbitrators have to come to grips with electronic disclosure, i.e., e-disclosure of electronically stored information (ESI).¹² Indeed, most companies,

¹² See David Howell, “Developments in Electronic Disclosure in International Arbitration” *Dispute Resolution International* Vol 3 No 2, October 2009.

as well as business individuals, handle their communications electronically and it has become very common for no “original” copies of a document to exist, but rather only as ESI, e.g. Word, Excel, PDF files, email, etc., which can contain not just the document but also who produced the document and other encrypted information such as the creation date, document title, edits, changes and hidden notes known collectively as “metadata”. Many jurisdictions have restrictions on such data and its transfer, such as the EU Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, which dealt with the protection of individuals with regard to the processing of personal data and on the free movement of such data. Unfortunately, the mass of information has reached the door of arbitration so arbitrators, as well as parties, should be acquainted with the problems and concerns related to disclosure/discovery of “e” information and, while the courts have dealt with these disclosure situations for several years, arbitration is not litigation.

The fact of the matter is that currently the issue of electronic disclosure does not come up that often in international arbitrations. However, the situations are changing and arbitrators should be aware of how to best handle this situation if it develops. It should be noted, however, that “there is clearly a broad and strong consensus among arbitration users from both civil and common law jurisdictions that litigation-style ‘discovery’ (in particular US litigation-style discovery), which is based upon a positive obligation to disclose and produce all non-privileged documents relevant to the issues pleaded (whether helpful or harmful to a party’s case), has no place in international arbitration.”¹³

In the UK, under the Civil Procedure Rules (CPR), the obligation of “standard disclosure” in litigation compels a party to disclose materials on which it intends to rely; that adversely affect its own case, that adversely affect another party’s case, or that support another party’s case. The scope of litigation discovery in the US is “wider and extends to any material relevant to the subject matter of the action and also any material that appears reasonably calculated to lead to discovery of admissible evidence”.¹⁴ This is similar to the UK position before the CPR, when parties were required to produce all background materials and any documents leading to a “train of enquiry”, in addition to all documents supportive of or adverse to each party’s case. It should be noted in this context, most civil law jurisdictions impose few, if any, documentary disclosure obligations on parties to litigation.¹⁵

While some arbitral organisations, such as the London Court of International Arbitration (LCIA), require parties to disclose documents on which they choose to rely,¹⁶ there “is no disclosure obligation in arbitration equivalent to the wide obligation of discovery that exists in litigation in many common law jurisdictions”. The usual situation is that, in fact, it is the arbitral law of the seat of the arbitration that will govern disclosure in general and e-disclosure in particular.

It has been considered that while “production” normally refers to the delivery of documents, whereas “disclosure/discovery covers the broad spectrum of requests

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See e.g. article 15.6 of the LCIA Arbitration Rules.

for, and objections to, the physical production of otherwise relevant and material documents, and encompasses production”.¹⁷

Under the IBA Rules on the Taking of Evidence in International Commercial Arbitration, permissible, narrow and specific requests for documents, or categories of documents, that are considered relevant and material to the outcome of the case, may be made.¹⁸ However, the tribunal may, at its discretion, refuse such a request on various grounds, e.g. it would be an unreasonable burden to produce the requested evidence, as well as fairness or equality between the parties.

This requires the tribunal to balance the amount and nature of the dispute and the likely relevance and materiality of the documents requested to the outcome of the case, against the cost and burden of giving disclosure.

“That balancing exercise will also be influenced by the legal and cultural background of the tribunal and counsel.”¹⁹

“However if it is accepted (as reflected in the IBA Rules) that parties should be entitled to seek disclosure of documents that are relevant and material to the outcome of the case, having due regard to balancing the amount and nature of the dispute, the likely relevance and materiality of the documents and the cost and burden of giving disclosure, it is not productive to take the position that electronic disclosure ‘has no place in international arbitration’.^[20] In this regard it is helpful to look to ‘litigation’ activities have sorted out this situation and a good example of this can be seen from the Sedona Conference (2002), which brought together counsel, judges and IT experts who developed concepts for the discovery of electronic data in a litigation context. The result of those efforts was the ‘*Sedona Principles on the Disclosure of Electronic Data*’.”²¹

The techniques suggested by the Sedona Conference can be summarised as follows:

- early consideration of electronic disclosure by the parties, their counsel and by the tribunal, in cases where the time and cost of electronic disclosure may become burdensome and contentious;
- allocate costs as one means to moderate the potentially oppressive effects of extensive requests for electronic disclosure;
- in a litigation context shift all or some of the costs of production to the requesting party where the electronic data sought is not reasonably accessible;
- leaving it open to the requesting party to offer to bear the cost of disclosure, either on a final basis or subject to the final discretionary award on such costs dependent upon the outcome of the arbitration;²²
- a “responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information”.

17 See David Howell, “Developments in Electronic Disclosure in International Arbitration” *Dispute Resolution International* Vol 3 No 2 October 2009.

18 See article 3.9 of the IBA Rules.

19 *Ibid*, at 750.

20 *Ibid*.

21 See “Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production”, January 2004. It is interesting to note that the work of the Sedona Conference was drawn upon in the Cresswell Report of 2004 in the UK, resulting in the Practice Direction to Part 31 of the English Civil Procedure Rules (CPR31) in November 2005, followed by amendments to the US Federal Rules of Civil Procedure in December 2006.

22 *Ibid*, at 750.

The Chartered Institute of Arbitrators Protocol for E-disclosure in Arbitration

The Chartered Institute of Arbitrators (CIArb) Protocol was developed as a checklist for arbitrators, parties and counsel having to deal with electronic disclosure issues and includes:

- whether documents in electronic form are likely to be the subject of a request for disclosure (if any) during the course of the proceedings and if so; what types of electronic documents are within each party's control and what are the computer systems, electronic devices, storage systems and media on which they are held;²³
- what (if any) steps may be appropriate for the retention and preservation of electronic documents, having regard to a party's data retention policy and practice (provided that it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant e-document);²⁴
- what rules and practice apply to the scope and extent of disclosure of electronic documents in the proceedings, whether under the agreed arbitration rules, the applicable arbitral law or under any agreed rules of evidence;²⁵
- whether the parties have made, or wish to make if they have not done so, an agreement to limit the scope and extent of electronic disclosure of documents;²⁶
- what tools and techniques²⁷ may be usefully considered to reduce the burden and cost of e-disclosure (if any), including:
 - a) limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents;
 - b) the use of agreed search terms;
 - c) the use of agreed software tools;
 - d) the use of data sampling; and
 - e) the format and methods of e-disclosure.
- whether any special arrangements with regard to privilege, or waiver of privilege, in respect of electronic documents disclosed may be agreed;²⁸
- whether any party and/or the tribunal may benefit from professional guidance on IT issues relating to e-disclosure having regard to the requirements of the case.

Other points include:

- "Reflecting the appropriate scope of disclosure in international arbitration contained in the IBA Rules, any request for the disclosure of electronic documents should properly contain a description of the document or a narrow and specific requested category of documents; a description of how the documents requested are relevant and material to the outcome of the case; a statement that the documents are not in the possession or control of the party requesting the documents, and a statement of

23 CIArb Protocol for E-disclosure in Arbitration, at § 3(i) and (ii).

24 *Ibid*, at § 3(iii).

25 *Ibid*, at § 3(iv).

26 *Ibid*, at § 3(v).

27 *Ibid*, at § 3(vi).

28 *Ibid*, at § 3(vii).

the reason why the documents are assumed to be in the possession or control of the other party.^[29]

- In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the tribunal should have proper regard to the appropriate scope and extent of disclosure of electronic documents in the proceedings, whether under the agreed arbitration rules, the applicable arbitral law or any agreed rules of evidence (eg, the IBA Rules). The tribunal should also have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.^[30]
- In making any order or direction for e-disclosure, the tribunal should have regard to considerations of reasonableness and proportionality; fairness and equality of treatment of the parties and ensuring that each party has a reasonable opportunity to present its case, by reference to the cost and burden of complying with the order or direction. This will require balancing considerations of the amount and nature of the dispute, and the likely relevance and materiality of the documents requested, against the cost and burden of giving e-disclosure.^[31]
- The primary source of disclosure of electronic documents should be reasonably accessible data, namely active data, near-line data or offline data on disks. In the absence of particular justification, it will normally not be appropriate to order the restoration of back-up tapes; erased, damaged or fragmented data; archived data; or data routinely deleted in the normal course of business operations. A party requesting disclosure of such electronic documents may be required to demonstrate that the relevance and materiality outweigh the costs and burdens of retrieving and producing the same.^[32]
- However, in considering these issues due regard must be paid to improvements in the available techniques for recovery of electronic data (for example, in the recovery of data from back-up tapes). The production of electronic documents ordered to be disclosed should normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form. The requesting party may request that the electronic documents be produced in some other form. In the absence of agreement between the parties, the tribunal should decide whether production of electronic documents ordered to be disclosed should be in native format or otherwise.^[33]
- A party requesting disclosure of metadata in respect of electronic documents should be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.^[34]
- The tribunal should consider the appropriate allocation of costs in making an order or direction for e-disclosure.^[35]
- The tribunal should establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of requests for e-disclosure and compliance with the same.^[36]
- The tribunal should require that a producing party gives advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic documents.^[37]
- The tribunal may, after discussion with the parties, obtain technical guidance on e-disclosure issues as it considers necessary and appropriate. Such discussion

29 *Ibid*, at § 4.

30 *Ibid*, at § 5.

31 *Ibid*, at § 6.

32 *Ibid*, at § 7.

33 *Ibid*, at § 8.

34 *Ibid*, at § 9.

35 *Ibid*, at § 10.

36 *Ibid*, at § 11.

37 *Ibid*, at § 12.

shall include who shall be instructed to provide technical guidance and the costs expected to be incurred. The costs of the same shall be included in the costs of the arbitration.^[38]

- In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with any agreement between the parties or any order of the tribunal as to the giving of electronic disclosure, the tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.³⁹

Confidentiality

The concept of confidentiality is closely linked to that of privacy. The law of the UK has always maintained that absent an agreement by the parties, everything that occurs in an arbitration is private to the extent that even a common tribunal in linked English arbitrations cannot order the two arbitrations to be heard together, however close the links between the issues and the parties. In *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The Eastern Saga) (No 2)*,⁴⁰ there was a dispute between a shipowner and a charterer under a charterparty and a closely related dispute between the charterer and subcharterer, which were both referred to arbitration. The question arose as to whether there was power to order a consolidation of hearings without the consent of all the parties and the court specifically held that an arbitrator has no power to order the consolidation of hearings of disputes arising out of separate, though related, agreements without the consent of all parties. The current state of the law regarding confidentiality/disclosure in the UK is as per *Ali Shipping Corp v Shipyard Trogir*.⁴¹ The disclosure of arbitration documents can be made with the express, or implied, consent of the party to the arbitration who originally produced the material and that disclosure can be made in accordance with an order or leave of the court. However, where a court rules in favour of a third party's right to disclosure of documents from an arbitration to which he is not a party, the party ordered to make disclosure would not be in breach of contract by making such disclosure, though he would, no doubt, have a duty to inform the court of the existence of the confidentiality obligation and give notice of the disclosure application to the other arbitrating party.⁴² Further, as stated in *Ali*, disclosure can be made if it is reasonably necessary for the enforcement of the legal rights or protection of the legitimate interests of an arbitrating party and, as set forth in *Emmott*, disclosure can be made where the interests of justice or public interest require such disclosure.

Generally, disclosure falls into certain defined categories, such as disclosed documents that have a separate and distinct confidentiality, apart from their disclosure in the arbitration. So, for example, documents disclosed in UK court proceedings may only be used for the purposes of those proceedings unless the documents are referred to in a public hearing, the parties agree, or the court gives leave.⁴³ Other categories include pleadings or submissions where their confidentiality flows from the privacy of the arbitration itself and, except for situations such as those in *Emmott*, the use of

38 *Ibid*, at § 13.

39 *Ibid*, at § 14.

40 [1984] 2 Lloyd's Rep 373.

41 [1998] 1 Lloyd's Rep 643.

42 See the earlier cited case(s) *Emmott v Michael Wilson & Partners* [2008] 1 Lloyd's Rep 616.

43 See e.g. CPR rule 31.22.

such pleadings elsewhere would be rare. Another category is witness statement and/or transcripts of oral proceedings elsewhere. Since witnesses in arbitration have a right of confidentiality, per the decision in *London & Leeds Estates Ltd v Paribas (No 2)*,⁴⁴ their use elsewhere would also be rare, except for public policy reasons or to impeach. Finally, the other category is the award itself and here, too, the confidentiality of awards also follows from the privacy of arbitrations but being the intended product of the arbitration process and determinative of the parties rights, any obligations of confidentiality cannot prevent the use of the award for enforcing those rights.⁴⁵

Enforcement of foreign awards in the UK

The common assumption has generally been that once an international arbitration award is obtained, its enforcement was just a matter of course under both the New York Convention and the Arbitration Act 1996. Recent court rulings, however, have reinforced the notion that whether or not to enforce at the courts' discretion should not be taken for granted. Article V.1 of the New York Convention states that "Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked ...". In the UK the use of the word "may" means that it is within the courts' discretion to deny enforcement. One case demonstrative of the courts' exercising their discretion is *Dallah Real Estate & Tourism Holding Co v Pakistan*.⁴⁶ Here, Dallah, a Saudi Arabian company, entered into an agreement in September 2006 with the Ministry of Religious Affairs of the Government of Pakistan in which it signed a memorandum of agreement under which Dallah agreed to acquire land in Mecca, build accommodation suitable for pilgrims and lease it to the Ministry for 99 years and that, additionally, the Ministry, by ordinance, established a trust known as the "Awami Hajj Trust" as a vehicle for the project. The trust was to accept deposits from Hajj pilgrims and invest them in Sharia-compliant schemes to help meet the costs of the pilgrimage. However, while the agreement was entered into in September 2006, the Awami Hajj Trust in December 2006 ceased to exist as a legal entity. Dallah entered into an agreement with the trust that provided for disputes to be settled by arbitration under the rules of the International Chamber of Commerce (ICC), Paris. The agreement contained no express choice of law. Thereafter, a dispute arose under the agreement and the Awami Hajj Trust issued proceedings in Pakistan. About 16 months later, Dallah commenced a claim against the Government through the ICC in Paris; however, the Government refused to participate in the arbitration proceedings or sign the terms of reference, on the basis that it was not a party to a valid arbitration agreement. The Government took the position that it had merely established a trust vehicle and that Dallah had entered into an agreement for the project with that trust vehicle and not with the Government. Further, in that agreement the Government was not expressly a party, nor did it sign it in any capacity. Ultimately, the tribunal found that the Ministry of Religious Affairs, Government of Pakistan, was bound by the arbitration agreement and in its final award the tribunal awarded Dallah over US\$18 million in damages for breach of contract.

44 [1995] 1 EGLR 102.

45 See e.g. Simon Crookenden QC, "Who Should Decide Arbitration Confidentiality Issues?" *Arbitration International*, Vol 25, No 4 (2009).

46 [2009] EWCA Civ 755.

When Dallah sought to enforce the award in the UK, the judge, applying French law as the law of the place where the award was made under the Arbitration Act 1996 section 103(2)(b), held that the Government was not a party to the arbitration agreement and that, consequently, the award could not be enforced. Dallah took the position that the judge had erred in interpreting section 103(2) as requiring or permitting him to reconsider the issue of the arbitrator's jurisdiction by way of a rehearing and that he failed to apply the French law correctly. Dallah further took the position that the Government was estopped from denying that the arbitration agreement was valid because the arbitral tribunal was a court of competent jurisdiction and the failure of the Government to challenge the award before the French courts had rendered the award final and conclusive. In the alternative, Dallah argued that even if the award was not valid, the judge had discretion to enforce it and should have done so.

The Court of Appeal dismissed the appeal by Dallah, holding that the wording of the 1996 Act reflected faithfully that of the New York Convention 1958. The wording of section 103(2) required that the party wishing to challenge the recognition and enforcement of a Convention award had to be entitled to ask the court to reconsider all relevant evidence on the facts, including foreign law. The argument that some more limited review of the arbitrator's decision on their jurisdiction was desirable or necessary was rejected. The Court of Appeal also found that the judge correctly applied the principles of French law to the evidence before him and was entitled to conclude that it was not the subjective intention of all the parties that the Government should be bound by the agreement or the arbitration clause. It further found that the arbitral tribunal did not constitute a court of competent jurisdiction for the purpose of creating an issue estoppel, per the holding in *Carter v Ahsan (No 1)*,⁴⁷ as that depended on whether the parties to the award had agreed to confer jurisdiction upon it, since the arbitrator's jurisdiction was derived from the consent of the parties and that issue – and hence the validity of the award – was the very issue that fell to be decided in the instant proceedings. Here, too, it noted that the time allowed for challenging the award in France would not have begun to run until Dallah took steps to enforce it and it had not done so. As such, the award had not become invulnerable to challenge in the French courts. However, even if it was invulnerable, it would not be sufficient to prevent the Government from challenging its recognition and enforcement in England on the grounds set out in section 103(2)(b). The Court of Appeal took the view that the Arbitration Act 1996 and the New York Convention preserved the right of a party to a foreign arbitration award to challenge enforcement on grounds that impugned its fundamental validity and integrity. There was no obligation on the Government to challenge the award in France. As to the use of the word “may”, the Court of Appeal took the position that while

“it might be that the use of the word ‘may’ in s 103(2)(b) gave the court a discretion to permit enforcement even where one of the grounds justifying refusal had been established, *Dardana Ltd v Yukos Oil Co (No 1)* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819 and *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 2 All ER (Comm) 413 considered. However, if the person opposing recognition or enforcement of an award could prove that he was not a party to the relevant arbitration agreement, it would rarely, if ever, be right to recognise or enforce it solely on the ground that he had failed to take steps to challenge it before the supervisory court, *Svenska Petroleum Exploration AB v Lithuania (No 1)* [2005] EWHC 9 (Comm), [2005] 1 All ER (Comm) 515 considered. It would not be a proper

⁴⁷ [2007] UKHL 51, [2008] 1 AC 696.

exercise of the court's discretion in the instant case to allow enforcement of the award once it had reached the conclusion that there was no valid arbitration agreement between Dallah and the Government."⁴⁸

It is interesting to note that here Dallah took the position that even if the Government were to establish that the arbitration agreement was not valid, the court should still exercise its discretion to allow enforcement of the award. As was just discussed, this position was rejected with the court taking different views as to the discretionary language in the Act. In this regard Moore-Bick LJ "accepted the existence of a very restrictive notion of discretion, expressing his agreement with comments made in previous cases, including the fact that the grounds for refusing enforcement under the Act are concerned with the 'fundamental structural integrity of the arbitration proceedings' and therefore the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound". Then Rix LJ felt that "the discretionary language of the Act is expressing a limitation on the court's power to refuse enforcement rather than granting a discretion to enforce despite the existence of a proven defence".

The Court of Appeal was also faced with coming to grips with the important issue of whether, when a party challenges the recognition and enforcement of a New York Convention award under section 103(2)(b) of the Arbitration Act as to jurisdiction, the court required to have a full hearing of all the relevant evidence, or was it instead to be just a review of the decision of the arbitrators on the issue of jurisdiction?

The trial court had reasoned that the language of section 103(2) of the Act "reflects faithfully that of the [New York] Convention," and it then rejected the argument that international comity and the general "pro-enforcement" approach of both the New York Convention and Part III of the Act favoured "deference to an international arbitral tribunal's decision on its own jurisdiction and that section 103(2)(b) should permit only limited review by a court of a tribunal's findings". The trial court justified a reopening of the tribunal's award on the basis of the statutory construction of section 103(2)(b). This was "despite the Government's French law expert accepting in the High Court that, in general, the arbitrators had generally applied the correct test as would be enunciated by a French court". Here, the trial court then took it upon itself to reopen the tribunal's decision and reached the opposite conclusion to the tribunal – finding that the Government of Pakistan had proved, pursuant to section 103(2)(b) of the Act, that under French law the arbitration agreement was not valid as between it and Dallah and, accordingly, the trial court refused enforcement of the tribunal's award in the UK. It should be clear that here, the Court of Appeal confirmed the trial court's interpretation of section 103(2)(b) and agreed that it required a full rehearing as to the validity of the arbitration agreement, not just a review of an arbitral tribunal's decision. In reaching this conclusion, the Court of Appeal rejected the suggestion that section 103(2)(b) only permitted the court to conduct a rehearing in circumstances where an arbitral tribunal's decision was "clearly wrong".

Thus, this relatively recent case shows that when an award under the New York Convention is opposed in the UK under section 103(2), the court is required to consider all relevant factual evidence relied on by the party opposing enforcement and if this "evidence" has already been considered by the arbitral tribunal then the task of the court in the UK will be to conduct a rehearing, not a review.

48 [2010] UKSC 46,

The troubling aspect of this decision is that both the English High Court and Court of Appeal took it upon themselves to set aside, in effect, an award of an international arbitration tribunal where the arbitrators correctly applied French law and where the UK courts had so agreed, i.e. that the arbitrators had properly applied the correct legal test under French law. Such conduct raises the spectre of review over all such similar enforcement proceedings and creates concern as to whether any foreign award is truly final and enforceable through the UK courts.

Dallah was later applied in *Yukos Capital Sarl v OJSC Oil Co Rosneft*.⁴⁹ In *Yukos* the court had to address whether they could enforce an award that had been set aside in the seat of arbitration (Russia). The four awards made in Yukos' favour were annulled by the Moscow Arbitrazh Court (upheld on appeal). Yukos successfully sought subsequent enforcement in the Netherlands. When OJSC failed to pay, Yukos commenced proceedings in the High Court of England. Referring to the judgment of Rix LJ in *Dallah*, Simon J held [at paragraph 20]:

"In my judgment the answer to the question is not provided by a theory of legal philosophy but by a test: whether the Court in considering whether to give effect to an award can (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award. In applying this test it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy."

The judgment also addressed Moore-Bick LJ's discussion of the "more-favourable-right" provision in article VII(1) of the New York Convention. It should be noted that the Arbitration Act does not contain a corresponding identical provision (the most relevant being section 104). The court in *Yukos* considered the application of the "more-favourable-right" discretion at common law, concluding that it was a narrow discretion with limited application in England.

As to the enforcement of foreign awards, the recent case of *Diag Human Se vs/ Czech Republic*,⁵⁰ is applicable. Here the court found that there was no reason why issue estoppel might not, in an appropriate case, arise from rulings made by a foreign court in the course of enforcement proceedings, including enforcement proceedings under the New York Convention 1958.

Additionally, in the *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*,⁵¹ Coeclerici commenced an arbitration in London. A settlement sum was reached before the hearing which provided that Coeclerici would be entitled to an immediate consent order if the sums were not paid, and when the sum was not paid Coeclerici applied to the arbitral tribunal for a consent award. Gujarat argued that they had not been given a reasonable opportunity to present their case. Despite this the consent award was given and Gujarat applied to the court to have the award set aside. The issue before the court was whether the applicant had a "reasonable opportunity" to present its case and, ultimately, dismissed the application. Coeclerici applied to have the award enforced in Australia and, enforcing the award, the Federal Court held that there was issue estoppel regarding Gujarat's argument of a "reasonable opportunity to respond". It would seem logical that if a party is unsuccessful in an application to

49 [2014] EWHC 2188 (Comm).

50 [2014] EWHC 1639 (Comm).

51 [2013] EWHC 1987 (Comm).

set aside an award at the seat of arbitration this may give rise to an estoppel preventing the unsuccessful party from bringing the same defence.

Serial adjudication decisions

Adjudication conundrum

Pursuant to the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), section 108 states in part:

“(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.”

But what happens if one of the parties then decides to re-refer the same dispute to another adjudicator? The HGCRA is silent on this issue though some writers feel that it is “an implied term in every construction contract that, where one of the parties has referred a dispute to an adjudicator, who has made a valid decision, neither party will refer the same or substantially the same dispute in a subsequent adjudication”.⁵² The Scheme for Construction Contracts does, however, provide some guidance in paragraph 9(2) where it states:

“9(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.”

The problem that arises is what constitutes “the same or substantially the same” in this context, especially in a construction setting. Another problem is what if the facts are the same but the adjudicator is faced with new evidence and/or different legal arguments?

Election

In *PT Building Services Ltd v Rok Build Ltd*,⁵³ Rok opposed the enforcement of an adjudicator’s decision because it felt that the adjudicator had no jurisdiction and had informed the first adjudicator of this jurisdictional challenge reserving its rights on this issue. Then, PT Building issued a second notice of adjudication and this time Rok argued that the second adjudicator also had no jurisdiction, but this time the grounds were that the dispute referred was the subject of the previous adjudicator’s decision and, as a result of this argument, the second adjudicator resigned. Despite the audacity of Rok, PT took the position that as Rok had taken the benefit of the adjudicator’s decision and used it to persuade the second adjudicator to resign, Rok had elected to take the benefit of the decision and could not now assert that it was not valid and binding. Rok did not agree and, instead, took the position that it had made no election preventing it from being able to challenge the decision.

⁵² See e.g. Peter Sheridan, “Same difference: Successive Adjudications”, *Construction Law Journal*, *Construction Act Review*, October 2009.

⁵³ [2008] EWHC 3434 (TCC).

The court sided with PT and ruled that by relying on the first decision and persuading the second adjudicator to resign, Rok had elected to treat the first decision as a valid and binding decision and that Rok had obtained a clear benefit, i.e. the resignation of the adjudicator by relying on that decision, and it could not now challenge it in enforcement proceedings.

In a similar vein is *Linnett v Halliwells LLP*,⁵⁴ where Linnett, the adjudicator, was not paid because Halliwells considered that he had no jurisdiction to decide the dispute referred to him. Then, in connection with a second adjudication, Halliwells relied on the decision in the first adjudication. Again, in doing so, Halliwells obtained the benefit of the first decision in the second adjudication and was precluded from asserting that the adjudicator did not have jurisdiction to make the first decision and was thus bound by the first decision.

Pushing this concept a bit further is *Redworth Construction Ltd v Brookdale Healthcare Ltd*,⁵⁵ where Brookdale opposed Redworth's attempted enforcement of an adjudicator's decision, because there was no contract in writing. During the enforcement proceedings Redworth relied on documents it had not relied upon when challenging the jurisdiction of the adjudicator for want of a written contract. The court took the position that, where a party seeks to put its argument in a certain way in order to obtain a benefit, such as the adjudicator's decision, which it did in fact obtain, then, under the principle of election, it would not be just to allow that party to depart from that election or to depart from its original argument in order to subsequently elect to present a different argument to obtain another benefit. Accordingly, the court held that Redworth could not rely upon documents not previously raised in order to support the adjudicator's decision that he had jurisdiction. As a result, the adjudicator's decision was not enforced as no written contract was found to exist.

It should be noted that in the more recent *Purton (t/a Richwood Interiors) v Kilker Projects Ltd*,⁵⁶ in which Mr Justice Stuart-Smith, after agreeing with the doubt expressed about the correctness of *Redworth Construction Ltd* in *Nickelby FM Ltd v Somerfield Stores Ltd*,⁵⁷ held that – in cases where there can be no doubt that the adjudicator, if properly informed, should and would have concluded that he had jurisdiction; and the proper basis of jurisdiction does not make a difference to the substantive outcome – the courts should not shut out claimants who come before the courts to enforce the adjudicator's decision. The jurisdiction to refer a contract to adjudication is dependent on the existence of a construction contract and a dispute arising under it, Mr Justice Stuart-Smith found, and not on identifying each and every contractual term with complete accuracy so that referral becomes a formalistic obstacle course.

Thus, the principle of “election” dictates that a party who elects to accept the benefit under an instrument (such as an adjudicator's decision) will be bound and prevented from either acting inconsistently with its election or from subsequently electing to present a different argument to obtain another benefit. Further, as to adjudicator's decisions, a party cannot both assert that an adjudicator's decision is valid and at the same time challenge its validity. A party must elect to take one course or the other.⁵⁸

⁵⁴ [2009] EWHC 319 (TCC).

⁵⁵ [2006] EWHC 1994 (TCC).

⁵⁶ [2015] EWHC 2624 (TCC).

⁵⁷ [2010] EWHC 1976 (TCC).

⁵⁸ See Gary Brewer, “Rights and remedies: PT Building Services v ROK Build”, *ContractJournal.com*, 10 March 2009.

In *Sherwood & Casson Ltd v Mackenzie*,⁵⁹ Sherwood, as a subcontractor to Mackenzie, made three interim applications for payment, the third of which included a claim for certain variations. When it was not paid, Sherwood commenced an adjudication pursuant to the HGCRA 1996. In its response, Mackenzie submitted two lists of countercharges and the adjudicator decided that Mackenzie would have to pay Sherwood £6,631. Later, when Sherwood prepared its final account, it included a variation account that listed the same variations as had previously been listed in the adjudication, but several of the sums now claimed, while supported by documentation, differed from the original claim. The account also included a claim for loss and expenses arising from the prolongation of the Works and a detailed response to the countercharges raised by Mackenzie in its response to the first adjudication. This then led to a second adjudication where Mackenzie disputed these new charges and Sherwood sought payment of its final account. The second adjudicator decided that the second dispute, relating to the variations, was not substantially the same dispute as that determined in the first adjudication, but the dispute regarding countercharges was substantially the same and so he was bound by the decision of the first adjudication on that issue. The second adjudicator also decided that Mackenzie owed a further sum. After the second decision, Sherwood brought a claim for summary judgment and Mackenzie took the position that the second adjudicator was not entitled to hear the disputes relating to variations and countercharges. The court allowed the application for summary judgment in the sum of £14,198.26 and found that the second adjudicator had the jurisdiction to decide whether the disputes before him were the same, or substantially the same, as those dealt with at the first adjudication and was bound to resign if finding that they were. Also, the court, applying the holding in *Project Consultancy Group v Trustees of the Gray Trust*,⁶⁰ found that it could review that decision and, after reviewing the second adjudicator's decision, found that there were no grounds for finding that the adjudicator had erred in the instant case. He identified significant differences between the subcontractor's interim and final applications. Here, it should be noted, that the court found many significant differences between Sherwood's interim and final applications, and while it was possible that a final account could, on different facts, be substantially the same as the preceding interim account, that was not the case here.

This situation was looked at in a slightly different way in the Scottish case of *Skanska Construction UK Ltd v ERDC Group Ltd*,⁶¹ where Skanska claimed that the adjudicator had no jurisdiction to hear a second dispute relating to sums due under the construction contract and took the further position that the terms of the contract prevented ERDC from referring to, or providing as evidence, any documentation which had not been available at the time of a prior adjudication. Initially, in the first adjudication, ERDC had a claim for direct loss and expense against Skanska relating to extensions of time and disruption. At that time, the adjudicator had found that no payment was due to ERDC. When ERDC submitted its final account to Shanska, it again referred to adjudication a claim for direct loss and expense relating to extensions of time and disruption. Skanska took the position that the second adjudicator should resign on the ground that the dispute was essentially the same as had been referred to

⁵⁹ [2000] 2 TCLR 418.

⁶⁰ [1999] BLR 377.

⁶¹ [2003] SCLR 296.

adjudication previously, but the second adjudicator refused to resign, finding that the original dispute related to an interim payment and the sums ERDC was entitled to at that time, while the second adjudication related to an adjustment of the subcontract involving different contractual provisions. The court took the position that the second adjudicator was correct and that the fundamental nature of the disputes was different and, citing *Sherwood*, found that the dispute before the second adjudicator related to a different stage of the contract, as compared to the dispute referred to the first adjudicator, with the result that different contractual provisions applied, further information would be available and different considerations and perspectives may have applied.

It is interesting to note that each of these types of case involves the court in a factual review, but generally the trend is towards enforcing the adjudication decision unless, in fact, the second decision is based not just on similar facts but apparently the “exact same” facts and even then it is difficult to dispense with the second adjudication decision. Take, for example, *Holt Insulation Ltd v Colt International Ltd*,⁶² where the facts were exactly the same but the request was slightly different. Here, Colt asked the first adjudicator to order “immediate payment of the balance of the sum due” arising from its most recent application for payment (note here that it was a specific request for a specific sum). The first adjudicator took its task literally, i.e. to decide whether the precise sum claimed by Colt was, or was not, due. As he could not agree that the total of what was claimed was due, and his jurisdiction did not allow him to come up with any alternative valuation, his decision was that no money was due. A bad result for Colt, to say the least, and one that led to Colt’s commencing a second adjudication, the only change being that this time its claim was for immediate payment of the balance due under the interim application or, alternatively, “such other sum or sums as the adjudicator shall decide to be fair and reasonable in the circumstances of the claims”. Other than that the facts were exactly the same. Based upon the facts being exactly the same, Holt called the second adjudicator’s attention to paragraph 9(2) of the Scheme for Construction Contracts Regulations 1998 and pointed out that “An adjudicator must resign where the dispute is the same, or substantially the same, as one which has been previously referred to adjudication and the decision has been taken in that adjudication”. The second adjudicator took the view that there was a further and discrete issue, which did not arise in the earlier referral, and proceeded to go through all the amounts involved in the application and adjudication and, dealing with each claim and counterclaim, made an award for a sum payable to Colt. Holt refused to pay and asked the court to set the decision aside, claiming that a subcontractor who “claims a large sum and fails, for whatever reason, cannot reshape his claim very slightly in the light of the award and claim a smaller sum and seek a second adjudication”.

Colt put up the interesting argument that the decision by the first adjudicator was based upon a specific claim for a specific amount, which the adjudicator held was not recoverable, while the second adjudication dealt with a more flexible claim for valuations on different aspects of the contract. The court reviewed the situation and concluded that while the reference may have related to the same matters arising out of contractual relations between the parties, they did not relate to the same dispute

⁶² Unreported, 23 July 2001 LVO1 5929, HC (TCC).

and, in the court's view, the difference was that the Notices of Referral were "crucially different" and found for Colt.

A good review of all the applicable cases was undertaken by the court in *Benfield Construction Limited v Trudson (Hatton) Limited*.⁶³ Here, Benfield had been hired by Trudson to do design and construction work and the contract incorporated the JCT standard form which stated that the decision of an adjudicator would be binding and that the parties were to comply with such decision. The parties signed a handover form confirming that the Works were accepted as being complete, subject to various outstanding defects being dealt with in a reasonable time. Unfortunately, it was later claimed by Trudson that, due to a particular defect, it could not certify practical completion. Benfield, however, pointed out that this particular defect had not been previously identified in the handover form and, therefore, practical completion was effective from the date of handover. Trudson then served two notices of adjudication. In the first adjudication Trudson sought a declaration that practical completion had not occurred at the date of referral. Here, the court later held that the various passages from the first adjudication documents made plain that the dispute, as to practical completion, was both a matter of fact and also something that, according to Benfield, was deemed to have happened as a result of the contents of the handover form. The adjudicator decided that practical completion had not occurred at the date of the adjudication notice. The second adjudication concerned liquidated damages and the same adjudicator decided that Trudson was entitled to liquidated damages.

Benfield then commenced a third adjudication seeking declarations to the effect that Trudson was not entitled to liquidated damages on the grounds that Trudson had taken partial possession on the handover date and, by reference to the contract, practical completion had occurred. The adjudicator found for Benfield deciding that Trudson was not entitled to liquidated damages. Trudson took the position that this adjudicator had no jurisdiction to reach his decision as the dispute was the same, or substantially the same, as the dispute referred to and decided in the first two adjudications. Benfield argued that there was no jurisdictional issue and that practical completion and partial possession were two completely different concepts and that, therefore, the first two adjudications had dealt with different issues than the third one as the argument concerning partial possession had not actually been raised in the first two adjudications and, therefore, it was entitled to bring the third adjudication. The court took the view that were real grounds for concluding that the adjudicator in the third adjudication had erred in deciding that there was no overlap with the first two adjudications.

"The third adjudication found that practical completion had taken place and that Trudson was not entitled to liquidated damages, whereas the first two adjudications found the direct opposite, which obviously amounted to an overlap. Further, it was clear that the adjudicator in the third adjudication did not have the necessary jurisdiction to deal with the dispute in question. There were no different material facts presented, or detailed issues considered, in the third adjudication that had not already been presented, and although practical completion and partial possession were different legal concepts, the underlying dispute of the earlier and latter adjudications was whether practical completion had occurred and whether liquidated damages were due. Therefore the dispute in the third adjudication was the same or substantially the same as the disputes that had been decided

⁶³ [2008] EWHC 2333 (TCC), see also Daniel Atkinson, "Benfield Construction Limited v Trudson (Hatton) Limited", *Atkinsonlaw.com*, 12 October 2008.

earlier. If Benfield wished to rely on the partial possession argument, then it should have raised such an argument at the first two adjudications. By allowing a party to fight certain issues on one set of legal arguments and, if it lost on those arguments, allowing it to dispute the same issues by a different set of legal arguments, it would amount to an abuse of the process of adjudication.”

Accordingly, the court found that the adjudicator in the third adjudication had no jurisdiction as the dispute there raised the same, or substantially the same, matters.

In reaching the conclusion it did, the court reviewed the earlier cases of *VHE Construction Plc v RBSTB Trust Co*,⁶⁴ *Mivan Limited v Lighting Technology Projects Limited*⁶⁵ and *Skanska Construction UK Ltd v The ERDC Group Ltd*,⁶⁶ where the material relied on in the second adjudication was different from that relied on in the first, giving rise to a separate and distinct factual enquiry the second time round. The court here observed that later examples of the trend were the decisions in *Emcor Drake & Skull Limited v Costain Construction Limited*⁶⁷ and *David McLean Contractors v The Albany Building Limited*.⁶⁸ As mentioned earlier, in *Sherwood*, courts would give considerable weight to the decision of the adjudicator and would embark on a jurisdictional enquiry only where there were real grounds for concluding that the adjudicator had erred in deciding that there was no substantial overlap. Here, in *Benfield*, the court took the position that “any decision by an adjudicator, including one on jurisdiction, was a matter which ought to be the subject of careful consideration by the court in circumstances where that court was being invited not to enforce the adjudicator’s decision”.

Paragraph 9.2 of the Scheme for Construction Contracts provided that an adjudicator must resign where the dispute is the same, or substantially the same, as one that has previously been referred to adjudication and a decision has been taken in that earlier adjudication. “Accordingly, the parties may not refer a dispute to adjudication in such circumstances, per Dyson LJ in *Quietfield Ltd v Vascroft Construction Ltd*,⁶⁹ where there was an imperfect analogy with the rules of issue estoppel developed by the common law to prevent successive litigation over the same matter.” The court in *Benfield* considered that Dyson LJ’s remarks were consistent with points made by His Honour Judge Humphrey LLOYD QC in *KNS Industrial Services v Sindall Ltd*⁷⁰ and Lord MacFadyen in *Construction Group Centre Limited v The Highland Council*.⁷¹ Further, as this was a JCT contract, Clause 39A.7.1 provided a limit to serial adjudications per *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd*.⁷²

Then, the court set out several principles regarding serial adjudications, which are:

“The parties are bound by the decision of an adjudicator on a dispute or difference until it is finally determined by court or arbitration proceedings or by an agreement made subsequently by the parties.

64 [2000] BLR 187.

65 [2001] ADJCS 04/09 (TCC).

66 [2003] SCLR 296.

67 [2004] EWHC 2439 (TCC).

68 [2005] EWHC B5 (TCC).

69 [2007] BLR 67.

70 [2000] EWHC 75 (TCC).

71 [2002] BLR 476.

72 [2007] EWHC 144, [2007] BLR 175.

The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.

The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator. The approach was to ask whether the dispute or difference was the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference, which was the same or fundamentally the same as the relevant dispute or difference.

The approach must involve not only the same but also substantially the same dispute or difference. This was because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to readjudicate what was in substance the same dispute or difference would deprive clause 39A.7.1 of its intended purpose.

Whether one dispute was substantially the same as another dispute is a question of fact and degree.

An issue which one party could have raised a particular issue in an adjudication but did not do so, could not be taken subsequently, to be distinguished from applications for extensions of time where there was a changing factual position and later extensions of time were based on a different set of facts.”

Then, by applying these principles, he

“... held that it could not sensibly be argued that there are no real grounds for concluding that the adjudicator in the third adjudication erred in deciding that there was no such overlap. In the first adjudication, it was decided that practical completion had not taken place on 17 August 2007, whilst in the third adjudication, it was decided that practical completion must indeed be deemed to have taken place on that very date. Similarly, in the second adjudication it was decided that the employer was entitled to some £75,000 worth of liquidated damages, whilst in the third adjudication it was decided that the employer was not entitled to any liquidated damages at all.”

He held that in those circumstances it was difficult to imagine a more obvious case of overlap and a starker case of fundamentally contrary decisions.

The court also held that it was necessary to distinguish between, on the one hand,

“... the underlying dispute between the parties, and the issues/argument on the other. Partial possession and practical completion might be different legal concepts and, depending on the facts, they might give rise to different issues, maybe even different disputes, between the contracting parties. However in the instant case it was held that the underlying dispute in the first and second adjudications was whether practical completion under the terms of the building contract could be said to have occurred on 17 August and, if it had not, whether liquidated damages were due to Trudson. The legal concept of partial possession only mattered because it was a way in which Benfield could argue that practical completion had occurred (or should be deemed to have occurred) on 17 August 2007 and that, therefore, there was no liability to pay liquidated damages.”

Thus, if Benfield had wished

“... to rely on the partial possession argument under clause 17.1, separately and independently of the central argument that it had already made about the handover form in the first and second adjudications, then it was plainly obliged to raise that matter there. If Benfield failed to emphasise sufficiently the effect of that handover form as a matter of contract construction, then that was entirely a matter for Benfield.”

The court took the position that it would be an abuse of the process of adjudication to allow one party to raise one legal issue at a time, in serial adjudications extending over many months or even years, until that party achieved a result that it liked. It

would place an intolerable burden on the other party. It was not the purpose for which adjudication was designed. Accordingly, the court held that the third adjudicator did not have jurisdiction and declined to enforce the award writing:

“... It would mean that a contractor could fight about practical completion and liquidated damages based on one set of legal arguments arising out of agreed facts and then, if it lost on those arguments, could dispute both practical completion and liquidated damages all over again, by reference to another set of legal arguments which arose out of exactly the same facts, and which, for whatever reason, it had not deployed first time round. It seems to me that such a method of proceeding would be an abuse of the process of adjudication. And that is not an idle point: the parties to adjudication do not recover their costs, no matter how successful they might be. Allowing one party to raise one legal issue at a time, in serial adjudications extending over many months or even years, until that party achieved a result that it liked, would place an intolerable burden on the other party. It was not the purpose for which adjudication was designed.”

Following this comes the case of *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd*,⁷³ where a novel approach was taken. Here, a dispute arose as to the responsibility of each party for delays which occurred during the Works and the issue became whether the defendant was entitled to withhold payment on the grounds that the defendant was pursuing a further adjudication in which it reasonably expected to recover an equivalent sum and submitted that: (1) that sum ought to be set off against the award in the earlier adjudication; (2) alternatively, there should be a stay of execution pending the enforcement of the later adjudication decision.

The court held that where the losing party in an adjudication then pursued a new adjudication, in which it expected to recover an equivalent sum, it was not entitled to withhold payment of the earlier adjudication award. Here, Cleveland had been in breach of contract for ten weeks by reason of its failure to pay the sums awarded in the earlier adjudication. That fact was not affected by the adjudicator's decision in the later adjudication. Further, the court felt that imposing a stay of execution would have the same practical effect as allowing a defence of set-off and also Cleveland had not shown there were special circumstances why a stay should be granted. Not surprisingly, the defendant did not succeed with this argument. The relevant CIC Model Procedure terms included the following:

“4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

5. The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration ...

31. The parties shall be entitled to the redress set out in the decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration. No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the Parties.”

The court wrote:

“... Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues.

73 [2006] EWHC 741 (TCC).

The matter may be tested in this way. Interserve now asserts a claim to well over £3 million which will be advanced in adjudication number four. If Mr Hargreaves' contention is right, the existence of that claim could be relied upon as a reason for Interserve to withhold payment of the sum which will be due in respect of adjudication number three on 17 February. If Mr Hargreaves' argument is correct, it would have a bizarre consequence in cases such as the present, where there is a series of consecutive adjudications between the same parties. The result might be that no adjudicator's decision is implemented, each award simply takes its place in the running balance between the parties. Such an outcome is plainly contrary to the policy of the 1996 Act."

The court's decision in *Interserve* was followed in *YCMS Ltd (t/a Young Construction Management Services) v Grabiner*,⁷⁴ where the court wrote:

"... Finally, I turn to the Third Decision. These courts have from 1998 onwards taken the view that adjudicators' decisions are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice ground which renders enforcement inappropriate. There is perhaps unfortunately nothing in the HGCRA which legislates for setting off one adjudicator's decision against another. It is in these circumstances that the dictum of [of the court] in the *Interserve* case is so apposite. It is not accepted by YCMS that the Third Decision is enforceable. Because the decision has only relatively recently been issued, YCMS reserve their position so far as enforceability is concerned. It took a jurisdictional objection during the Third Adjudication and it may seek to rely on that in any enforcement proceedings in relation to the Third Decision.

It follows from my views above that YCMS have established that the First Decision should be enforced. I see no good reason to depart from the approach adumbrated by [by the court] in the *Interserve* case. I do not consider that the fact that a Third Decision has been reached which on its face allows to the Defendants a net recovery is a special circumstance which justifies departing from the general rule that valid adjudicators' decisions should be enforced promptly. Things might be different if there were effectively simultaneous adjudications and decisions. There is no suggestion that YCMS or the Defendants are in financial difficulties and will not be able to pay the sums said to be due on the First Decision or said to be due the other way on the Third Decision. There is no prejudice to the Defendants in having to honour the First Decision, which should have been honoured some 14 months ago, albeit I accept that it was not the Defendants' fault as such that proceedings for enforcement were delayed against them."

Whilst the cases cited deal with the issue of parties deciding to re-refer the same dispute to another adjudicator, or so-called "serial adjudication", *Amey Wye Valley Ltd v Hertfordshire District Council*⁷⁵ is the most recent. Here the parties had entered into a contract in 2003 for repair and maintenance works to highways and roads in Hertfordshire over a 10-year period. During 2005, they fell into a dispute as to how to calculate the price adjustment for inflation under the contract, and so entered into a side agreement, VOP3, to resolve that dispute. However, the parties could not agree what VOP3 required, or what it actually meant. This prompted two adjudications, at Amey's instigation. The first was tasked with deciding, amongst other things, how VOP3 should work; the second was concerned with putting money figures to the first's findings (which were binding, neither party having served a notice of dissatisfaction). Mr Molloy, the second adjudicator, decided that there had been a substantial overpayment to Amey, on account of inflation, and that this sum – around £9.5million – should be repaid to HDC.

⁷⁴ [2009] EWHC 127 (TCC).

⁷⁵ [2016] EWHC 2368 (TCC).

HCD commenced enforcement proceedings. Amey resisted enforcement, on the grounds that Mr Molloy did not follow or apply what Mr Entwistle, the first adjudicator, had decided, and accordingly had acted without jurisdiction. Mr Justice Fraser rejected Amey's challenge. Citing the Court of Appeal's decision on serial adjudication in *Quietfield v Vascroft*,⁷⁶ amongst other authorities, the judge stated that (i) adjudicators' decisions will be enforced, regardless of errors of fact or law; (ii) an adjudicator's decision will not be enforceable to the extent that s/he purports to decide again that which has already been decided by a previous adjudication; and (iii) with regard to scope, the dispute should not be looked at in isolation, and the adjudicator is entitled to examine the terms, scope and extent of the dispute previously referred and the earlier decision; it is what the first adjudicator decided which determines how much or how little remains to be considered by the subsequent adjudicator.

Applying the above, Mr Justice Fraser held that, provided Mr Molloy was resolving the dispute referred to him, and not re-deciding something that was not (because it had already been decided by Mr Entwistle), then he had jurisdiction to determine the dispute, regardless of whether he made mistakes in doing so. Mr Molloy had not only known, but had applied, Mr Entwistle's decision; put another way, Mr Entwistle had decided how VOP3 would work, and Mr Molloy had decided the consequences of that (and, to the extent that there were errors in his decision, those were errors of fact or law and did not affect the enforceability of the decision).

Amey Wye Valley Ltd is notable, then, because it underlines the courts' apparent frustration in dealing with adjudication enforcement proceedings. As Mr Justice Coulson put it, in *Penten*, above:

"The topics raised at adjudication enforcement hearings seem to change with the seasons. A few years ago, those debates centred on alleged breaches of natural justice. More recently, it was the intricacies of the payment notice/payless notice regime which held centre stage. And now the wheel has turned again and the courts are grappling with the consequences of what might be termed serial adjudication ..."⁷⁷

Set-off

Interserve leads to the concept of set-off in adjudications, which, as noted in *YCMS*, is not provided for under HGCRA. This was dealt with in *HS Works Ltd v Enterprise Managed Services Ltd*,⁷⁸ where HS applied to enforce an adjudication decision made against the Enterprise and, at the same time, Enterprise applied to enforce a later adjudication decision made against HS. Here, the subcontract between the parties had lasted several years, after which HS submitted its final account causing the parties to disagree over the value of HS's work and the extent of Enterprise's entitlement to withhold payment in respect of contra-charges. HS gave notice of adjudication in relation to the disputed contra-charges and alleged that Enterprise had not served a valid withholding notice and, thus, was unable to withhold the contra-charges and put forward an alternative case if such notices were held to be valid.

The adjudicator agreed that there had been no valid notice and did not consider the alternative case ordering Enterprise to pay HS the sums equivalent to the disputed contra-charges. The parties did not reach agreement on the value of HS's work and

⁷⁶ [2007] BLR 67.

⁷⁷ [2016] EWHC 317 (TCC) at 1.

⁷⁸ [2009] EWHC 729 (TCC).

Enterprise referred that issue to a second adjudication. HS took the position that this second adjudicator would be unable to calculate the final account within the 28-day period allowed given the complexity of the dispute and that he should, therefore, resign – which was refused – and he ultimately made a declaration that the value of HS's work was lower than it would have been in accordance with the first adjudication. Enterprise took the position that the decision of the first adjudicator was invalid because he had been jurisdictionally bound to address, in his decision, the alternative cases put forward by the parties. HS claimed that the second adjudicator's decision was invalid because no crystallised dispute had been referred to him, meaning he had had no jurisdiction and he had acted unfairly by not resigning.

The court held that the first adjudicator had not been bound jurisdictionally to address the alternative case put forward by HS, as his jurisdiction was defined by the notice of adjudication and the nature of the dispute referred to him. That dispute had involved an

“... assertion that as there were no effective withholding notices, the contra-charges were not properly withheld: logically, if that case was upheld, there was no need for the adjudicator to consider the alternative case. It was generally not incumbent on an adjudicator to make findings on every issue arising in the reference, save to the extent that it was necessary to explain what he did decide. Although the ambit of the reference might unavoidably be widened by the nature of the defence, if an adjudicator decided that a defence was a bad one, there was no need to address the facts that supported that defence.”

The court also decided that as “the parties had been in dispute over the value of the works by the time that HS had submitted its final account, there could be no doubt that the parties remained in dispute throughout the first adjudication in respect of the contracharges: detailed arguments and evidence had been deployed on that issue”. HS had continued to reject Enterprise's figures as to the sums due after the first adjudication. Thus, by the time Enterprise served the second notice of adjudication, there was a dispute both as to the value of the final account and as to the contracharges. The court also looked at the problem of complex adjudications, where the dispute was so extensive that an “adjudicator or the defending party could not easily deal with it in the 28-day period the court had to consider whether, and on what basis, the adjudicator felt able to reach a decision in the time available, and what opportunities were available to the defending party before the start of the adjudication to address its subject-matter” and found that the second adjudicator had acted fairly in not resigning as he was an experienced adjudicator – and there was no suggestion that he thought he could not act fairly – and he had done a thorough and conscientious job in producing the decision. All this aside, the court then dealt with whether one decision could be set off against another, i.e. whether both decisions were valid and enforceable, in which case the court should enforce them both, provided that separate proceedings had been brought to enforce each decision as well as how each decision was to be enforced, as it might be inappropriate to permit a set-off of one financial decision where the first decision had been predicated upon a basis that there could be no set-off. Here, the court found that both the instant decisions were valid and enforceable. The second adjudicator had only made a declaration as to the net value of the final account. He had not ordered HS to pay any balance back to Enterprise. By implication from the Housing Grants, Construction and Regeneration Act 1996, section 108(3) and the Scheme for Construction Contracts (England and Wales) Regulations 1998, Schedule 1 para 23, the subcontract had to be read as requiring the parties to comply with the

valid decision of an adjudicator, including when the decision was declaratory. Both the parties and the court were required to give effect to both decisions and that involved bearing in mind that each decision should have been complied with upon receipt. The orders would be drawn to reflect the net effect of the judgment and as such Enterprise would pay HS the difference between the sums due pursuant to the decisions.

The court gave the following steps that needed to be considered as to whether to permit a set-off of one decision against another:

- “(a) First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it can not be determined whether each is valid, it is unnecessary to consider the next steps.
- (b) If both are valid, it is then necessary to consider if both are capable of being enforced or given effect to; if one or other is not so capable, the question of setoff does not arise.
- (c) If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision.
- (d) How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set-off of a second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set-off.”

Arbitration of Dispute Board decisions

In most instances, once the Dispute Board has given either its Decision or Recommendation, the matter is at an end and the formally disputing parties take the work of the Dispute Board and resolve the dispute accordingly.⁷⁹ As was mentioned earlier, under the FIDIC (and other forms of Dispute Board) agreements, the Dispute Board will give its decision within 84 days of receiving the reference of the dispute. Additionally, the Dispute Board can propose another, different period of time, usually longer than 84 days, and if both parties approve this the Dispute Adjudication Board shall give its decision at the agreed time. This decision is generally then binding on the parties, who are required to promptly give effect to the decision unless and until it is revised in an amicable settlement or an arbitral award. This means that unless the parties resolve the matter amicably, in the form of a settlement agreement or take the matter to arbitration and receive an award from an arbitrator, the contractor must continue with the project in accordance with the contract and cannot stop work unless the contract has already been abandoned, repudiated or terminated.

Notice of dissatisfaction

If either party under FIDIC contracts, for example, is dissatisfied with the Dispute Adjudication Board's decision, then either party may, within 28 days after receiving the decision, give notice to the other party of its dissatisfaction. Additionally, if the Dispute Adjudication Board does not give its decision within the period of 84 days (or as otherwise agreed) after receiving the reference, then either party may, 28 days after this period has expired, give notice to the other party of its dissatisfaction.

⁷⁹ See Cyril Chern, *Chern on Dispute Boards*, 4th edn, Informa Publishing, London, 2019.

In either event, the notice of dissatisfaction must state that it is given and shall set out the matter in dispute and the reason(s) for dissatisfaction. This must be done before any party can proceed to arbitration and if no such notice is given after the decision is given by the Dispute Adjudication Board, then the decision becomes final 28 days after the decision was received by the parties. Further, under FIDIC rules, if one of the parties fails to comply with the Dispute Adjudication Board's decision after the decision has become final and binding and neither party has given any notice of dissatisfaction, then the party who has complied is allowed to refer the failure to comply by the other party to arbitration.

Amicable settlement

Where notice of dissatisfaction has been given under FIDIC, and other forms of rules, both parties are required to attempt settlement of the dispute in an amicable fashion before any arbitration is started. Generally, this means that some sort of mediation should be attempted before proceeding further, but if both parties cannot agree on a different timetable then (under FIDIC rules) arbitration may be commenced on or after the 56th day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made. This is a last attempt to get the parties to resolve matters without further litigation, but when situations arise where neither party wants to amicably settle anything, then after the "cooling off" period of 56 days, the arbitration may go forward.

Arbitration

*New developments*⁸⁰

There have been some developments in the enforcement of DAB decisions during the interim period from when they are given until the point when an arbitral tribunal gives its award. Generally, under all arbitration rules and procedures there is the possibility to apply to the tribunal for an "interim award" pending the final award. These are usually asked for to protect property rights and other measures in anticipation of the final award being given. The concept of a "binding" decision per rules such as those set forth in FIDIC being enforceable on an "interim basis", is a step in this direction. This "interim award" situation arose in ICC Case No 10619, which dealt with a "binding" but not "final" decision of the engineer; under the FIDIC Conditions the tribunal found that such decisions are, in appropriate circumstances, enforceable by an interim arbitral award, and held that logically a "binding" but not "final" decision by a DAB under FIDIC rules should also be enforceable by an arbitral award in such circumstances.⁸¹ In that *ICC Case No 10619* (which occurred in 2001 and only published in 2008⁸²), the tribunal was faced with decisions by the engineer under the

⁸⁰ See also *Chern on Dispute Boards: Practice and Procedure*, 4th edn, Informa Publishing, London, 2019.

⁸¹ This is the view put forward by Christopher R Seppälä, Partner in White & Case, Paris, in his December 2009 article "An Engineer's/Dispute Adjudication Board's Decision Is Enforceable By An Arbitral Award" also published in the Oct 2009 issue of *International Construction Law Review* as "Enforcement by an arbitral award of a binding but not final engineer's or DAB's decision under the FIDIC conditions".

⁸² See *ICC International Court of Arbitration Bulletin*, Vol 19, No. 2, 2008.

former Clause 67 of the FIDIC fourth edition Red Book and the interim award was made pursuant to the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (ICC). The tribunal there in its award “expressly addresses the question of how to enforce decisions of the Engineer made under Clause 67 of the FIDIC Conditions, fourth edition, and, by analogy, how to enforce decisions made by a DAB under Clause 20 of the 1999 Red Book”.⁸³

In that case the panel of three arbitrators unanimously found that “a partial or interim award could enforce the Engineer’s decision even though the party seeking to enforce the Engineer’s decision had given formal notice of dissatisfaction as set out under the particular Clause”. The reasoning behind this determination was that since the Engineer’s decision should have been “given effect to by such an award because the FIDIC Conditions expressly provided that a decision of the Engineer under Clause 67 was binding on the parties notwithstanding that one or both parties have given a notice of dissatisfaction with it”. Accordingly, the arbitral tribunal determined that they could enforce this provision by an interim or partial award under the ICC Rules, which immediately ordered the other party to pay the amount of the Engineer’s decisions. For purposes of Sub-Clause 20 of the current version of the FIDIC Red Book, the same logic flows as the DAB’s decisions are held to be the “new version of the old Engineer” and as such would also be immediately enforceable.

The facts underlying that award show that on 16 November 1994, the contractor (who was the claimant) entered into two construction contracts with the respondent (who was the employer) for the construction of two roads. The FIDIC fourth edition 1987 was the contract used with the governing law being not the common law but rather the civil law of the employer country. While construction was ongoing the contractor submitted many claims including ones for time extensions and additional payments for work done up to 31 May 1997. Then, on 18 October 1998, the contractor sought a decision from the engineer under Clause 67 as to two claims – one as to an extension of time and the other for the payment mentioned. A month later the engineer gave his decisions on these claims, agreeing with the contractor and deciding that it was owed the sum of money it had requested. Then two months later, on 25 January 1999, the contractor gave formal notice of dissatisfaction as to the decisions pursuant to Clause 67.6 of the contract. While this was going on the contractor then submitted two additional claims re time extensions and additional payments and, in effect, updated “the previous ones for work done up to 30 June 1998”, and then, on 29 January 1999, the contractor sought a decision(s) as to these additional claims. The engineer granted these claims on 5 May 1999, and this was in addition to the earlier decision. Needless to say, the employer did not comply with any of these decisions and, as a result, on 11 August 1999, the contractor commenced arbitration against the employer and filed a Request for Arbitration with the ICC International Court of Arbitration, pursuant to Clause 67 which claimed: ...

- “a) Delay and disruption arising from the design and other associated causes,
- b) Respondent’s failure to grant the Claimant with possession of site,
- c) Exceptionally adverse weather conditions,
- d) Other delaying and disruptive events,
- e) Respondent’s failure to give effect to Engineer’s decision pursuant to Sub-Clause 67.1 of the contracts,

⁸³ *Ibid.*

- f) Respondent's failure to provide funding for the contracts,
- g) Breaches of Contract and law."

Of these, the one of interest was (e), which was specifically for the "Respondent's failure to give effect to Engineer's decision pursuant to Sub-Clause 67.1 of the contracts". Later, after the employer filed its Answer, the contractor stated its:

"... intention to request the Arbitral Tribunal to render an interim Award ... to the effect of (i) declaring that the Respondent must give effect to the Engineer's Decisions pursuant to Sub Clause 67.1 [of the FIDIC conditions] regardless of the pending arbitration, and (ii) ordering the Respondent to immediately pay the amounts determined by the Engineer as an advance payment in respect of any further payment which would result [*sic*] due by the Respondent pursuant to the final award."

Here, the contractor took the position as set out in Sub-Clause 67.1:

"[s]uch decisions [of the Engineer] are binding ... on both parties and shall have effect as soon as they are made notwithstanding any notice of dissatisfaction and/or application or Request for Arbitration, and they must remain effective for as long as that they are not reviewed or cancelled by an out of court settlement or by an arbitral award."

And requested that the tribunal "should give them immediate effect by the means of an interim award, without waiting until the time when after a complete review of the factual and legal evidence the Tribunal could adjudicate in full on the merits of the dispute". In addition to the wording of Clause 67, the claimant relied on article 23 of the ICC Rules relating to the power of an arbitral tribunal to order conservatory and interim measures and, as the place of arbitration was Paris, France, on the provisions of the French Code of Civil Procedure relating to the subject of "référé provision". Accordingly, the claimant requested the Tribunal to order the respondent:

"to provisionally pay the sums recognized due by the Engineer, plus accrued interest at the annual rate of 7% pending the final judgment of the Tribunal on the merit [*sic*] of the respective arguments of the parties on the whole of the dispute".

The issue, as far as the employer was concerned, revolved around the concept of "interim relief", which is usually had only when there is a risk of immediate or irreparable harm to the claimant in the absence of such an interim award. Here, the employer felt, this did not exist; there was no evidence of urgency or of a risk of irreparable harm for the contractor. It put forward the view that when and if the tribunal actually adjudicated in favour of the contractor there was adequate compensation for any loss through the award of interest in addition to the principal amounts "granted to it in a final award and, in the meantime, there was no evidence that the Claimant would suffer from any financial inconvenience as a result of the employer's failure to pay at this stage in the proceedings". The complicating factor here was also the assertion by the employer that the real purpose of Sub-Clause 67.1 was, in effect, to keep the works moving forward and the reason for the binding nature of the engineer's decision is its need to "... [prevent] disruption of the works pending the final resolution of disputes between the parties [and that here that was not the issue] as all of the relevant engineer's decisions were made after the completion of the works". Further, the employer took the view that if any of the parties had "expressed its disagreement with the Engineer's decisions [by giving a formal notice of dissatisfaction], [which the Respondent maintained both parties had done], ... the decisions are deprived of their binding character".

The award

Initially, the tribunal reviewed how exactly Sub-Clause 67.1 operated and wrote in part that:

- (1) if a dispute should arise between the Employer and the Contractor in connection with the Contract, it must be referred in writing to the Engineer who is required to notify the parties of his decision within 84 days;
- (2) if the Engineer should fail to notify his decision within that time period, then within a further period of 70 days either party may notify its intention to commence arbitration as to the matter in dispute; and
- (3) if, as is ordinarily the case, the Engineer notifies his decision within 84 days, then either party may, also within a time limit of 70 days, address a notice of its intention to challenge the decision by way of arbitration to the Engineer and the other party, failing which the decision will become ‘final and binding’ on both parties and ‘cannot be revoked in arbitration’.”

The question also arose as to the effect of a notice of dissatisfaction and the tribunal felt that:

“if either party had given a notice of dissatisfaction with the decision within 70 days, then while such decision is not ‘final’, nevertheless it is ‘binding’ on both parties who are required to comply with it forthwith, as stated in the second paragraph of Sub-Clause 67.1 whereby:

... the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award”.

Of the four engineer decisions only two were held to be effective and as the tribunal found that “... the 5 May decisions are held ineffective ..., those of 17 November 1998 survive”, having been made in time per the relevant sub-clause, i.e. within 84 days. Here, the contractor correctly filed its notice of dissatisfaction within the required 70 days and, as a result, the tribunal found that the decisions made on 17 November 1998:

“... must be considered as capable of producing immediate legal effect on the parties for as long they are not revised or set aside by the parties in an out of court settlement or by an arbitral award. It does not matter whether they were notified after or before completion of the works: in both cases, Article 67.1 states that its provision shall apply.”

Dealing then with whether they could treat this matter as an interim award, the tribunal justified its decision and wrote:

“... If the above Engineer’s decisions have an immediate binding effect on the parties so that the mere fact that any party does not comply with them forthwith is deemed a breach of contract, notwithstanding the possibility that at the end they may be revised or set aside in arbitration or by a further agreement to the contrary, there is no reason why in the face of such a breach the Arbitral Tribunal should refrain from an immediate judgment giving the Engineer’s decisions their full force and effect. This simply is the law of the contract. In this respect, this Tribunal wishes to emphasize that neither the provisions of Article 23 of the ICC Rules, nor the rules of the French NCPC relating to the *référé* provision are relevant. For one thing, the judgement to be hereby made is not one of a conservatory or interim measure, *stricto sensu*, but rather one giving full immediate effect to a right that a party enjoys without discussion on the basis of the Contract and which the parties have agreed shall extend at least until the end of the arbitration. For the second thing, the will

of the parties shall prevail over any consideration of urgency or irreparable harm or *fumus boni juris* which are among the basics of the French *référé* provision.” (Emphasis added)

The Tribunal could have held merely that the employer was in breach of contract and required the employer to pay damages for such breach, represented by interest on the amount of the unpaid decisions. But, instead, the Tribunal ordered the employer to pay the amount of the engineer’s decisions on the ground that “[t]his is simply the law of the Contract”.

This has been an ongoing issue in the construction industry, i.e. once a decision is made whether by the engineer or the DAB what should be done? Should it be paid by the employer (something which does happen) or should the employer wait until after the arbitration confirms the decisions via an award and also after much money and time are spent in a full ICC arbitration? Here, the tribunal took the view that it should be treated as an interim award in the same way any emergency request is handled, thus allowing the contractor the benefit of the bargain it originally intended to make and to make the employer perform as agreed also. Seppälä, in his paper, takes the correct view that

“it is the intention of the FIDIC Conditions that Engineer’s decisions are to be respected even if they have been the subject of a timely notice of dissatisfaction from a party and might later be proved to have been wrong. If they specify that an amount is to be paid to the Contractor, then the amount is to be paid even though the decision could later be reversed and the amount paid be required to be returned. How better to promote respect for Engineer’s decisions, in keeping with the intention of the FIDIC Conditions, than to enforce them directly by an arbitral award?”

In this award it is also of interest to note that the award, in part, stated:

“...The rights of the parties as to the merits of their case, including but not limited to the final and binding effect of the Engineer’s decisions are reserved until the final Award of this Tribunal.”

This clearly puts forth the position that the interim nature of the award does not prejudice the employer to later argue that the amount decided by the engineer was maybe wrong and that in the end the final award may require the contractor to repay the employer. Indeed, it appears that by finding the way they did the tribunal put the order of payment in the correct fashion. A decision for moneys due is made, they should be paid immediately, and argued about later keeping the “cash flow” for a project in balance.

As Seppälä notes, the interim award in *ICC Case No. 10619* appears to be

“the first example of a published award where an arbitral tribunal has ordered payment by an award of the amount of an engineer’s decision which is ‘binding’ but not ‘final’, that is, which had been formally challenged within the required time limit (70 days of the decision under the FIDIC Conditions, fourth edition), by one or both of the parties. The practical effect of enforcing by an interim award an Engineer’s decision ordering a payment to be made to the contractor – and assuming the payment were made – is to reverse the parties’ roles in the arbitration in relation to the dispute which was the subject of the decision in that the contractor will now hold the corresponding money. The Contractor whose claim has been satisfied, albeit temporarily, no longer has necessarily to claim for it in the merits phase of the arbitration, and is therefore no longer exposed to the risk of the Employer’s insolvency in the interim. Instead, the Employer is exposed to the risk of the Contractor’s insolvency in the interim should the Employer later prevail on that claim in the merits phase and seek to recover the money.”

With the advent of full Dispute Adjudication Boards this is very helpful, for based upon the logic set out in the Arbitral Tribunal in *ICC Case No. 10619* any decision ordering payment notwithstanding any notice of dissatisfaction should be fully enforceable, immediately via arbitration. This is because the relevant language of Clause 67 of the fourth edition is almost exactly the same as that of Clause 20 of the 1999 FIDIC Series, in that Sub-Clause 67.1 states:

“... the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.”

And as this is the exact language used by the tribunal to justify their award, it is noted that under the 1999 FIDIC Sub-Clause 20.4, the language is of the same import in stating:

“The decision [of a Dispute Adjudication Board] shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.”

Recent developments

This concept has been expanded in another recent case before the ICC arising from a binding but not final “ex parte” Decision of a Dispute Adjudication Board (DAB) under a FIDIC contract.⁸⁴

In this newer case a contractor (the “respondent” in the arbitration) had entered into a contract with an employer (the “claimant” in the arbitration) for the construction of new infrastructure. The standard version of the Red Book’s Clause 20 was adopted with few amendments; a single member DAB was chosen, as were the ICC Rules of Arbitration. The substantive law to be applied was that of the employer’s national civil law jurisdiction.

Disputes arose between the parties during the course of the Works culminating in the employer’s serving a notice of termination on the contractor for allegedly fundamental breaches of contract. The contractor considered such notice to be in breach of the Red Book Contract and proceeded to refer that dispute, among others, to the DAB. Not in dispute was the fact that the parties had jointly failed to enter into a DAB Agreement within 42 days after the Commencement Date for the Works (the “42-day period”) as contractually required. What was not agreed between them, however, was the legal consequence of that joint failure. In fact, many months had passed since the expiration of the 42-day period. Once disputes had arisen the contractor wrote (repeatedly) to the employer seeking a joint appointment of a single member DAB. The employer refused to comply. At first it simply failed to respond and later argued that, given that the time for entering into the DAB agreement had expired, a DAB could no longer be appointed. Unhappy with this position and determined to comply with what it perceived to be a mandatory precondition of the Red Book Contract, the contractor relied upon Sub-Clause 20.3(a) thereof and applied to the President of FIDIC (the appointing entity under the Red Book Contract) to nominate a single-member DAB in the face of the employer’s continuing refusal to do so. The President duly proceeded

⁸⁴ The author is grateful to Giovanni DiFolco and Mark Tiggeman as well as the DBF for allowing use of this matter which was contained in the DBF Newsletter September 2010.

to appoint and the employer disputed the validity of that appointment. It continued to refuse to sign the DAB agreement despite being invited to do so by the contractor and notwithstanding the appointment of the single-member DAB. The employer maintained that the nomination of the DAB was not in accordance with the Red Book Contract because of the expiry of the 42-day period. It said that the 42-day period was an “extinctive term” under the substantive law of the Red Book Contract and, therefore, legally incapable of being complied with after its expiration. The employer additionally argued that its own refusal to participate in the DAB process was fatal to its validity. The consequence of all of this, it argued, was that the DAB was improperly constituted and illegitimate, resulting in any decisions it rendered being void.

The contractor proceeded to refer various disputes to the DAB notwithstanding the employer’s objections. This effectively resulted in the DAB proceedings being conducted *ex parte*.

In this regard the contractor referred various disputes arising on the construction project to a single-member DAB pursuant to the slightly amended FIDIC 1999 Red Book Contract. Thereafter, the employer refused to participate in any stage of the DAB process arguing that the DAB had been improperly appointed and was invalid. Despite this position taken by the employer the DAB rendered two decisions in favour of the contractor, effectively on an “*ex parte*” basis, dealing with both liability and quantum respectively (the “DAB decisions”). Even with the DAB decisions the employer failed to pay the contractor the substantial sum awarded to the contractor under one of these DAB decisions and the employer itself then referred various disputes to arbitration and sought, *inter alia*, a declaration from the arbitral tribunal that the DAB appointment was “illegitimate and void” and that the DAB decisions were equally flawed.

Following this, the contractor applied to the arbitral tribunal for bifurcated proceedings to enable the legal status of the DAB decisions, particularly the issue of their immediate enforceability, to be heard early in the arbitration, effectively as preliminary issues. The arbitral tribunal agreed and ordered bifurcated proceedings and, most importantly, decided in favour of the contractor by granting a final partial award upholding the validity of the “*ex parte*” DAB and ordering the employer, among other things, to pay the contractor the money awarded by the DAB in its decision.

The DAB further decided that:

- “1. It had jurisdiction to hear the disputes;
2. The Employer’s Notice of Termination was invalid and unlawful;
3. A substantial sum was payable by the Employer to the Contractor as damages for the invalid and unlawful termination of the Red Book Contract; and
4. Such damages should be paid by the Employer within 28 days of the delivery of the second of the DAB’s Decisions.”

Notwithstanding that it disputed both the validity and jurisdiction of the DAB, the employer proceeded to serve notices of dissatisfaction against both DAB decisions, citing alleged procedural irregularities and also dissatisfaction with the merits of both DAB decisions. The employer’s position was that the DAB decisions were neither final nor binding and that the matters in dispute should be decided *ab initio* by an arbitral tribunal which had the full power to open up, review and revise any decision of the DAB, including the parties’ failure jointly to agree on the appointment of the DAB itself.

The employer also served a notice of dissatisfaction against the second of the DAB decisions challenging the sufficiency of the quantum of damages awarded.

The employer also decided to refer its own disputes to arbitration seeking damages from the contractor for alleged breaches of the Red Book Contract. It also impugned the validity and jurisdiction of the DAB and, therefore, its decisions by repeating its previous objections to the appointment of the DAB.

In its answer to the employer's request for arbitration, the contractor restated that Sub-Clause 20.3 of the Red Book Contract (Failure to Agree Dispute Adjudication Board) clearly applied in circumstances where the employer refused jointly to agree to appoint the DAB and, accordingly, permitted the contractor to proceed to do so unilaterally. It also counterclaimed substantial damages against the employer.

The contractor also applied for bifurcation of the arbitral proceedings seeking a partial award that, inter alia, the DAB was duly and properly appointed and that its decisions were valid, binding and enforceable against the employer forthwith.⁸⁵ While the employer opposed that approach, the arbitral tribunal agreed and ordered that a separate procedural timetable be adopted for the early resolution of those arguments, effectively as preliminary issues. Further, a partial award, rather than an interim award, was sought on the basis that the former was considered to be more straightforward to enforce before the courts of the employer's jurisdiction than the latter, should enforcement become necessary.

The contractor requested the arbitral tribunal to find that the employer's refusal to agree to the appointment of a DAB itself represented a breach of the principle of good faith, which applied as part of the applicable substantive law. It was argued that acting in good faith implies an obligation of cooperation between the contracting parties, including a duty to facilitate the performance of the Red Book Contract. The contractor also argued that the effect of Sub-Clause 20.4 of the Red Book Contract (Obtaining the Dispute Adjudication Board's Decision) is that any decision of the DAB is immediately binding upon the parties and, therefore, should be fully complied with even if it is not final. This was said to be derived from the relevant wording of the Sub-Clause itself, namely:

“... The [DAB] decision shall be binding on both Parties, *who shall promptly give effect to it* unless and until it shall be revised in an amicable settlement or an arbitral award...”
(emphasis added)

Of note is the fact that the arbitral tribunal in reaching its partial award considered the priority that should be given to the documents comprising the Red Book Contract. It found that the appendix to tender took precedence over both the particular and general conditions of contract. That was particularly significant on the facts as the appendix to tender contained the 42-day period and also provided that the President of FIDIC, or his nominee, was to be the appointing entity.

The arbitral tribunal also examined the intentions of the parties with regard to the appointment of the DAB. In particular, it noted the numerous requests made by the contractor to the employer to agree that appointment and also the fact that, at the time the disputes in question arose on the project (well after the expiration of the 42-day period), the engineer had himself agreed that a DAB should be appointed and had urged the employer to do so.

⁸⁵ In their article in the DBF Newsletter the authors Giovanni Di Folco and Mark Tiggeman note that a bifurcated process was sought by the contractor to allow the arbitral tribunal to decide on the enforceability of the original DAB decisions on an expedited basis. It was intended that the substantive issues disputed by the parties, including those that had already been decided by the DAB effectively on an interim basis, be heard and determined in due course by the arbitral tribunal under a final award.

Ultimately, the arbitral tribunal decided that the appointment of the DAB was made validly and in compliance with the terms of the Red Book Contract. In reaching this view, the parties' intentions in choosing to include a DAB dispute resolution process were key to giving "effet utile" (proper effect) to their bargain, being an important principle enshrined in the substantive law chosen by the parties to apply to their Red Book Contract.

The arbitral tribunal also agreed with the contractor's primary argument that the DAB decisions were enforceable directly and finally under a partial award. In reaching that view the arbitral tribunal made it very clear that the subject matter of those DAB decisions is, of course, able to be opened up, reviewed and revised by the arbitral tribunal later in the arbitration in accordance with the express power to do so granted by Sub-Clause 20.6 of the Red Book Contract. Accordingly, in that sense, the result is to be treated as interim but, nonetheless, immediately enforceable.

In this case an interesting aspect was the fact that the employer made an application to the arbitral tribunal, purportedly in accordance with article 23(1) of the ICC Rules, to obtain an "interim measure" suspending the effects of the partial award. The employer argued that such an "interim measure" would preserve the "status quo" between the parties as it existed before the partial award was made. The contractor opposed the application on the basis that it was not a genuine interim measure in the sense contemplated by article 23(1) but, rather, an attempt to evade the effect of the final partial award.

The arbitral tribunal refused to grant the "interim measure" primarily on the ground that the employer failed to establish that the relief sought was urgently required in order to avoid serious and irreparable harm being caused to it. In deciding this case the arbitral tribunal answered a number of potentially difficult questions arising from the widespread use of the Red Book form of contract on international construction projects.

The key consequences which appeared to the authors of the article⁸⁶ were (and to which this author agrees):

- “1. Parties who include DAB provisions in a contract but fail to comply with them should (subject to the precise wording of their contract) expect to find arbitral tribunals unsympathetic to non-compliance with the DAB procedure, including any failure by one of the parties to participate in the DAB process;
2. Arbitral tribunals are likely to be sympathetic to applications to bifurcate proceedings to hear arguments about the enforcement of DAB Decisions as soon as possible in the arbitration;
3. Notwithstanding any Notice of Dissatisfaction having been given by either or both parties, DAB Decisions are likely to be enforceable by Partial or Interim Arbitral Awards being made early in an arbitration, albeit usually in circumstances where they are subject to the power of the arbitral tribunal to open up, review and revise any Decision of a DAB later in the arbitration; and
4. An attempt by an unsuccessful party to avoid compliance with a Partial or Interim Award enforcing a DAB Decision by seeking an 'interim measure' to suspend the effect of such Partial or Interim Award (e.g. under Article 23(1) of the current ICC Rules of Arbitration) is likely to fail.

In the authors' opinion, this useful and timely case should provide some much needed clarity, if not certainty, regarding the enforceability of DAB Decisions. It is submitted that all parties involved in international construction projects can have greater confidence that the DAB process will lead to Decisions that will be given 'teeth' by arbitral tribunals. That is so even when DAB proceedings are forced to be conducted on an ex parte basis due to the unwillingness of a party to participate.”

⁸⁶ *Ibid.*

The trend

Thus, the trend continues towards a more effective way of enforcing DAB decisions, especially those flowing from the FIDIC forms of contract. Logic would dictate that, if the parties intended a fast and effective solution to DAB decisions, they would welcome the opportunity to comply; unfortunately, this is not the case and, indeed, the trend in many parts of the world is to delay payment as long as possible. First, by denying the availability of a DAB, as in the case mentioned above, or later, by denying enforceability owing to some perceived error in procedure or just delaying the arbitration proceedings through whatever tactics are available. The use of interim awards to prevent this and to require the parties (usually the employer) to comply with the terms of the contract is refreshing and goes a long way towards balancing out the equities between the parties.

A recent decision in this regard flows from the Singaporean case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*,⁸⁷ commonly known as the “PGN Case” or for our purposes *Persero No 1*. This was then followed by a separate case with the same title, which shall be referred to as *Persero No 2*.⁸⁸

In *Persero No 1*, PT Perusahaan Gas Negara (Persero) TBK (PGN) engaged CRW Joint Operation (CRW) to design, procure, install, test and pre-commission a pipeline and an optical fibre cable in Indonesia (“the contract”). While the contract was being performed, a dispute arose between the parties over certain variation order proposals and requests for payments submitted by CRW. Here, the contract was based upon the FIDIC 1999 edition of the Red Book with modifications, and, thus, pursuant to Sub-Clause 20.4, the parties referred their dispute to a DAB which had been duly appointed and gave several decisions, all of which were accepted except one which required PGN to pay CRW the sum of US\$17,298,834.57. PGN did not agree with this and gave its notice of dissatisfaction. During the cooling off period there was no resolution so CRW then commenced an arbitration against PGN to enforce the DAB’s decision. The arbitration tribunal, comprised of three individuals, conducted a hearing after which a majority final award was rendered which confirmed that the DAB decision before it was binding and that PGN had an obligation to make immediate payment in the sum of US\$17,298,834.57 to CRW. To then further enforce this award CRW applied to the High Court of Singapore to register the award as a judgment in Singapore. In response, PGN applied to the court to set aside the registration order. PGN also applied to the court to set aside the arbitral award pursuant to section 24 of the Singapore International Arbitration Act and article 34(2) of the UNCITRAL Model Law.

The court reviewed the situation and found in favour of PGN, setting aside the arbitration award, and wrote as to its view on the distinction between an arbitration contemplated under Sub-Clause 20.6 and one contemplated under Sub-Clause 20.7 because in its view Sub-Clause 20.7 is confined to a narrow category of cases where a DAB decision had become “final and binding” – i.e. neither party had submitted a notice of dissatisfaction after the receipt of the DAB decision and the unsuccessful party had failed to comply with that decision, this as compared to a “final and binding” decision that is sought to be enforced against the non-complying party by means of arbitration. Such a provision does not involve an enquiry into the merits of

⁸⁷ [2010] SGHC 202.

⁸⁸ [2014] SGHC 146.

the DAB decision. The court also spoke of a “lacuna” in that Sub-Clause 20.7 does not confer any right on a successful party to bring an arbitration against a non-complying party for a DAB decision that is merely “binding” (as opposed to “final and binding”). Additionally, the court was of the view that Sub-Clause 20.6 sets out the procedure for parties to bring a “fresh” arbitration which will be decided on the merits.

The court went on to hold that CRW, by seeking to enforce the DAB decision against PGN by means of arbitration, had “erroneously conflated” the provisions of Sub-Clause 20.6 and Sub-Clause 20.7, especially in its view that since a notice of dissatisfaction had been submitted by PGN, the DAB decision may have been “binding” but was not “final and binding” and as such Sub-Clause 20.7 did not apply.

The court felt that the real issue was whether the DAB’s decision was correct and, as a result, whether CRW was entitled to payment of the amount decided by the DAB. CRW was of the view, however, that the only item in dispute was whether payment of the moneys should have been made immediately, and in so doing CRW was incorrect in relying on Sub-Clause 20.6, and accordingly failed to satisfy certain requirements under Sub-Clause 20.6, i.e. that the matter should have been referred to the DAB for its decision in the first instance, that the arbitral tribunal which was already empowered under Sub-Clause 20.6 to “open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the Dispute” should review the merits of the DAB decision and then either confirm or revise the correctness of that decision. Further, the court felt that since neither of the above requirements had been met, the majority tribunal had exceeded its powers by rendering a final award on a dispute which had not been referred to the DAB for its decision, and accordingly, the court felt that this was outside of the scope of the parties’ arbitration agreement as contained in the contract, with the result that the majority award was set aside under article 34(2)(a)(iii) of the UNCITRAL Model Law.

It should be noted, however, that the court also commented that it would be possible for a successful party such as CRW to rely upon Sub-Clause 20.6 to obtain an interim or provisional award, pending a final determination of the dispute at large, as a means of enforcement. On the facts, however, the court pointed out that CRW had not sought an interim or provisional award and the majority tribunal had also proceeded to render a final award in the matter.

The PGN case provides a distinction between the earlier-mentioned ICC cases and, importantly, provides some distinction between Sub-Clause 20.6 and Sub-Clause 20.7. It in no way, however, deters an aggrieved party from seeking interim relief for the immediate enforcement of a DAB decision and provides a timely reminder of the fundamental yet often overlooked distinction between Sub-Clause 20.6 and Sub-Clause 20.7. Thus, what is learned is that while under Sub-Clause 20.4 a DAB decision is binding, it is not yet final but only becomes “final and binding” when no notice of dissatisfaction is given by either party within 28 days of the DAB decision, which is then amplified in Sub-Clause 20.7. Thus, whether a DAB decision should be enforced by means of arbitration under Sub-Clause 20.6 or Sub-Clause 20.7 will depend entirely on a valid notice of dissatisfaction. Needless to say, one learns from *Persero No 1* that it is vitally important that any DAB decision given must be enforced under the correct sub-clause.

It should be noted that the wording of Sub-Clause 20.7 of the 1999 Red Book (specifically the term “final and binding”) has also been retained in the FIDIC

Multilateral Development Bank Harmonised Edition. The FIDIC (Gold Book) – Conditions of Contract for Design, Build and Operate Projects (First Edition, 2008) goes a long way to sort out this potential problem by providing in Sub-Clause 20.8 that:

”In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights which it may have, refer the failure itself to arbitration under [Sub-clause 20.8] for summary or other expedited relief, as may be appropriate.”

It should also be noted that in *Persero No 1* CRW did not rely on Sub-Clause 20.6 and the ability thereunder to obtain an interim or provisional award, pending a final determination of the dispute at large. Perhaps it should have done so, as this is another approach that can be utilised to overcome any “final and binding” requirements set out in Sub-Clause 20.7.

Persero No 2

The history of this newest version of the *Persero*⁸⁹ saga arises from the fact that PGN maintained throughout the 2009 arbitration, throughout the 2011 arbitration and throughout all the associated litigation, including the two applications which comprise *Persero No 2*, that it cannot be compelled to comply promptly with the DAB decision unless its primary dispute with CRW has been heard and determined on its merits and with finality.

As discussed earlier in the 2009 arbitration, CRW placed before the tribunal only the secondary dispute and sought as relief a final award compelling PGN to pay it the sum awarded by the DAB decision. PGN’s principal argument before the 2009 tribunal was that the parties’ arbitration agreement did not permit an arbitral tribunal to compel PGN to comply with the DAB decision unless the same arbitral tribunal in the same arbitration then went on to hear and determine the primary dispute on the merits and with finality.

The majority of the 2009 tribunal rejected PGN’s argument. The majority issued what it described as a “Final Award”, requiring PGN to comply with the DAB decision and noting expressly that PGN was at liberty to commence a separate arbitration to have the primary dispute heard and determined on the merits. PGN applied to the High Court to set aside that final award. The High Court in 2010 agreed with PGN that that award should be set aside. CRW appealed to the Court of Appeal against the High Court’s decision. The Court of Appeal in 2011 dismissed CRW’s appeal. The result is that CRW’s attempt through the 2009 arbitration to compel PGN to comply with the DAB decision failed.

The 2011 arbitration

Following this and in its continued attempt to obtain payment pursuant to the DAB decision, CRW commenced the second arbitration in 2011. In the 2011 arbitration, CRW adjusted its approach specifically to meet PGN’s earlier argument. It did so by placing before the 2011 tribunal both the primary dispute and the secondary dispute. In response, PGN adjusted its argument to meet CRW’s new approach. This time, PGN argued that the parties’ arbitration agreement and Singapore’s international

⁸⁹ [2014] SGHC 146.

arbitration legislation do not permit an arbitral tribunal to compel PGN to comply promptly with the DAB decision unless the same arbitral tribunal – in the same award and not merely in the same arbitration – also hears and determines the primary dispute on the merits.

Following this arbitration the 2011 tribunal majority rejected PGN’s argument and issued an interim or partial award compelling PGN to comply with the DAB decision. CRW then obtained leave to enforce that award against PGN as though it were a judgment of the High Court. However, PGN did not agree with this and applied to the court to set aside the 2011 tribunal’s interim or partial award and, with it, the order permitting CRW to enforce that award – thus *Persero No 2*.

In court PGN brought the proceedings, even though: (1) the majority’s award simply required PGN to pay promptly a sum to CRW now which PGN had accepted it had been obliged to pay promptly to PGN since 2008; and (2) the 2011 tribunal fully intended to go on to hear and determine the primary dispute on the merits and with finality in the same arbitration.

In *Persero No 2*, PGN took the position that the majority Tribunal in the 2011 arbitration issued an award which they described as an interim or partial award but which was in truth a provisional award. It was provisional because the majority intended their interim award to have finality only up until the time the 2011 tribunal heard and determined the primary dispute on the merits and with finality. In this regard, PGN argued that the International Arbitration Act (Cap 143A, 2002 Rev Ed) (IAA) does not permit a tribunal to issue a provisional award. As a matter of form, section 2 of the IAA refers only to interim, interlocutory or partial awards and makes no mention of provisional awards. As a matter of substance, and more importantly, section 19B(1) of the IAA deems every award which a Singapore-seated arbitral tribunal issues – however it may be described – to be final and binding. Finally, PGN submitted that the legislative history of section 19B showed an intent not to permit provisional awards.

PGN’s position was that, accordingly, the 2011 tribunal therefore has no power to award CRW provisional relief as it attempted to do: as an award that PGN “shall promptly pay the sum of US\$17,298,834.57 as set out in the DAB Decision” to CRW “pending the final resolution of the Parties’ dispute raised in these proceedings”.

Further, their position was that section 19B(1) of the IAA deems the majority’s award to be a final and binding award. That overrides the majority’s intent that its award should have only provisional effect. Further, under section 19B(2) of the IAA, no future award could vary the majority’s award. The majority had, therefore, converted a DAB decision which has only interim finality under the parties’ contract into an award which, under section 19B of the IAA, was final and unalterable. The majority had, therefore, determined with finality the existence and extent of PGN’s obligation to pay CRW. Further, they had done so without determining or even considering the primary dispute between the parties on the merits.

PGN submitted that its primary dispute was founded on the same question that the majority had determined in their award: the existence and extent of PGN’s obligation to pay CRW. The majority’s award has, therefore, inadvertently rendered the primary dispute res judicata. This was contrary to the parties’ arbitration agreement. That agreement required an arbitral tribunal to hear and determine the parties’ primary dispute on the merits before determining that dispute with finality and making it res judicata.

Further, having “inadvertently” rendered the primary dispute res judicata, the 2011 tribunal had also rendered itself functus officio on the issue of how much PGN must

actually pay CRW. The tribunal thus had no power to inquire any further into the primary dispute to ascertain that amount on the merits. This was despite the 2011 tribunal's express intention to go on to hear and determine the primary dispute on the merits and with finality in the 2011 arbitration.

CRW took the position that it was correct to place both the primary and the secondary dispute before the tribunal in the 2011 arbitration and to seek an interim award on the secondary dispute. That approach was consistent with the parties' agreement as interpreted by the Court of Appeal when it upheld the decision to set aside the final award in the 2009 arbitration. Accordingly, the 2011 tribunal's interim award was not a provisional award. It was a final and binding award as mandated by section 19B(1) and it will not be varied by the final award in the 2011 arbitration contrary to section 19B(2) (see [109] below). It was final and binding on the secondary dispute pending the final resolution of the primary dispute. And the final award in the arbitration need not and will not vary the interim award because it will determine with finality a different dispute: the primary dispute.

Further, CRW argued that the 2011 tribunal was not *functus officio* because it had determined with finality only one of the disputes placed before it – the secondary dispute – expressly leaving the primary dispute to be heard and determined in a future decision, on the merits and with finality.

Finally, CRW pointed out that the arguments put forward by PGN were inconsistent with: (i) the approach which PGN itself suggested that CRW should have taken when PGN made its submissions in the litigation arising out of the 2009 arbitration; and (ii) the way forward for CRW which the High Court and the Court of Appeal endorsed in that litigation.

The court then thoughtfully reviewed the history of all the litigation between the parties and in particular the matter in *Persero No 2* and concluded:

“... It is my view that the majority's interim award is final and binding on its subject-matter and therefore complies with s 19B(1). The subject-matter of the interim award is CRW's undisputed substantive provisional right to be paid now and PGN's substantive obligation to argue only later. In other words, the subject-matter of the interim award is the secondary dispute. The majority's interim award has thus determined with finality CRW's substantive but provisional right to be paid promptly, without having to wait for all remaining aspects of the parties' one dispute to be resolved with finality. Section 19B of the IAA prevents the parties and the tribunal from revisiting the secondary dispute.”

The court then went on to state:

“This view is also consistent with the approach of the tribunal in ICC 10619, endorsed by the Court of Appeal in *CRW v PGN* (CA). The contract in that case contained provisions similar to (Sub-Clauses) 20.4 to 20.7 of the Red Book, including the provision that interim adjudications should carry interim finality. The contractor there obtained several interim adjudications in its favour. The employer gave notice of its dissatisfaction with those adjudications and failed to comply with them. The contractor commenced an arbitration, raising both the primary and the secondary dispute.

...

The tribunal in ICC 10619 issued an interim award to the contractor on the secondary dispute. It justified its interim award on the basis that that award merely gave effect to a substantive provisional right under the parties' contract. The tribunal adopted this contractual basis in preference to a procedural basis arising under the applicable rules of arbitration or under a feature of French law. That feature, known as the *référé* provision, allows a claimant to secure an award for interim payment even if there is no contractual right to it, but only if it can show that its ultimate right to the payment is not seriously disputable.

...

Likewise, the majority's interim award gives full immediate effect to CRW's substantive provisional right under the Red Book to be paid now, pursuant to the DAB decision and without further discussion, and which the parties agreed shall extend until the end of the 2011 arbitration. It is that substantive right, and nothing else, which is the subject-matter of the interim award. The interim award does nothing more than to give effect to the parties' agreement that PGN should 'pay now and argue later'. And it does so, as required by s 19B, with preclusive effect."

The court then addressed the specific Singaporean issue:

"Section 19B(2) puts it beyond the tribunal's power in any future award to 'vary, amend, correct, review, add to or revoke' the interim award. That is no cause for concern. The tribunal is perfectly able to dispose of the primary dispute without breaching s 19B(2). The final award will be drawn no differently than it would be if, in 2008, PGN had paid CRW voluntarily under the DAB decision or if PGN had, under a hypothetical contract which did not include a contractual security of payment regime, made full payment to CRW under protest while validly reserving all its rights to challenge CRW's rights to receive the payment.

The majority's interim award, by its terms, ceases to be effective when, and only when, the 2011 tribunal has resolved with finality every aspect of the one dispute before it. The award or awards which the tribunal will go on to issue to achieve that resolution need not deal with the majority's interim award in any way that is inconsistent with s 19B(2). The majority's interim award will simply, in accordance with its terms, cease to have effect at that point in time. Further, the fact that each of these future partial award will be immediately enforceable once issued is also not a concern. The tribunal can easily address that issue by releasing a single final award or collecting all partial awards for release together."

The court then concluded with the crux of the matter and stated:

"The operative part of the majority's interim award contains two limbs which, when taken together, comprise two declarations (one in each limb) and an imperative (in the second limb). Neither limb will cease to be effective or will be altered by any future award, including the award or awards in this arbitration which settle all remaining aspects of the parties' one dispute with finality. This is because the two declarations comprise eternal and immutable truths. No words of temporal limitation can falsify them. As for the imperative, that too is eternal and immutable: it will always be true – no matter what the final outcome of the 2011 arbitration is – that PGN now ought to pay CRW promptly pursuant to the DAB decision and in the future, that it ought to have paid CRW promptly pursuant to the DAB decision. ...

[Here this prompt payment] ... is eternal and immutable because that is what the parties expressly agreed. The content of the declaration in the first limb became true when the parties chose to contract on the Red Book's terms and because of that choice. It has continued to be true ever since. It continued to be true when the DAB issued its decision in 2008. It continued to be true when CRW commenced the 2009 arbitration. It continued to be true when CRW commenced the 2011 arbitration. It continued to be true when the tribunal in the 2011 arbitration interpreted cl 20.4 to 20.7 and issued both the majority and the minority awards. It continues to be true today. Further, the 2011 tribunal has no power to change its truth in a future award (by reason of s 19B(2) of the IAA) and no need to do so (because the 2011 tribunal has determined the secondary dispute with finality). This proposition will therefore still be true no matter what the tribunal decides when it disposes with finality of all remaining aspects of the dispute before it.

The second limb declares without qualification that PGN 'shall promptly pay the sum of US\$17,298,834.57' to CRW. No future award can or will need to change the declaration. Again, it is common ground between the parties and the unanimous view of the tribunal that the DAB decision obliges PGN to pay that sum promptly to CRW. Again, it is more than that: it is what the parties' contract provides. That PGN is subject to this obligation will never change. That PGN is obliged to perform this obligation promptly will never change. How much money PGN is obliged to pay CRW promptly will never change.

It is only the imperative comprised in the second limb which the introductory words of the majority's award could conceivably falsify. On one reading, those introductory words mean that the majority's imperative ceases to have effect once the 2011 tribunal has finally resolved all aspects of the parties' one dispute. Even if for some reason it is beyond the power of the tribunal to do that, I do not read these words as foreshadowing a final award in the 2011 arbitration which will deal with the interim award in a manner prohibited by s 19B(2). If it is necessary, I would prefer to read those words as merely reflecting the fact that their interim award, in accordance with the express provisions of the parties' contract, carries no preclusive effect on the primary dispute, even though it is preclusive on the secondary dispute. Those words would therefore simply confirm, if confirmation is necessary, that the majority's interim award does not preclude PGN from invoking cl 20.6[2] and 20.6[3], and thereby arguing the primary dispute on its merits, when the tribunal turns to resolve the remaining aspects of the party's dispute with finality.

The interim award therefore is and will eternally and immutably be final as to PGN's obligation conceptually to pay the specified sum to CRW promptly in accordance with the DAB decision and also as to its obligation actually to make that payment. The award may, on one view, be phrased provisionally. But if that is not permitted by the IAA, I would read the declarations and imperative it comprises as not being provisional.

No future award will vary the award ... [and] Even assuming that the IAA prohibits awards whose effectiveness is limited by time, it is my view that the 2011 tribunal can determine the one dispute before it without varying the majority's interim award.

If the 2011 tribunal finds that the DAB was correct in its decision, then the tribunal need do no more than merely say so in its final award and stop there. The majority's interim award and the final award will stand together for enforcement. There is no breach of the stricture in s 19B(2).

If, on the other hand, the tribunal holds that the DAB awarded CRW too little (assuming that such a holding is open to the tribunal even though CRW has not served a notice of its dissatisfaction), then the tribunal need do no more than make that finding and order PGN to pay CRW the additional amount. Again, the majority's interim award and the final award will stand together for enforcement. Again, there is no breach of the stricture in s 19B(2).

The only possible concern arises if the tribunal finds that the DAB awarded CRW too much. But in that situation, the tribunal need do no more than make that finding and issue a final award requiring CRW to return the excess. Once again, the majority's interim award and the final award will stand together for enforcement. If PGN fails to comply with the majority's interim award but nevertheless attempts to recover under that final award, CRW can resist that attempt simply by relying on the interim award by way of set-off. That is expressly permitted by s 19B(1)."

Based on this logic the court dismissed both of PGN's applications.

This case is of importance because it deals with the unanswered and continual issue of what happens to the DAB decision once an arbitral tribunal upholds the decision and it becomes final and binding as part of an interim partial award but later, in subsequent hearings, makes its final award which varies from the amount awarded in the interim partial award.

Persero No 2 is clear, and this author agrees, that the interim award is truly "final and binding" as between the parties, and that should the tribunal later award less to the party seeking payment under the DAB Decision, then that can easily be dealt with in the final award by the tribunal making a finding to that effect and issuing a final award requiring a return of any excess. In a similar fashion, if the amount due later is found to be greater than originally awarded in the interim partial award, the tribunal can order the payment of a greater sum. This sorts the never-ending issue of "final and binding" DAB decisions and their interface with arbitral partial and final awards.

APPENDIX 1

GLOSSARY OF CONSTRUCTION TERMS

Abatement: A reduction in an amount paid to a party to reflect inadequate performance by that party (contrast set off).

Acceleration: When this term is used within the context of a building contract it refers to an agreement by the contractor to finish earlier than he would otherwise be required to do under the terms of the building contract. This does not necessarily mean earlier than the contractual completion date but earlier than the date by which he would be obliged to complete, bearing in mind any extension of time (see below) to which he would otherwise be entitled. If the contractor agrees to accelerate then this is almost invariably in return for an increased payment and a separate acceleration agreement should be negotiated (usually with the benefit of legal advice) because there may be a substantial knock-on effect on other elements of the contract.

Accommodation Works: Preliminary works carried out before the development of land.

(ACE) Association of Consulting Engineers: Engineering and technical association. It publishes standard form engineering consultants' appointments.

Activity Float: Unallocated time within a planned duration of a single activity. The float is established simply by dictating an activity duration that is greater than the actual time needed to complete that activity with the planned resources and productivity. Alternatively, it may be created automatically by some project programming software products. An activity with float so created can be referred to as a "discontinuous", an "interruptible", or "stretched" activity. Where the contractor intends to use this unallocated time as a contingency.

Activity Schedule: List of activities the contractor expects to carry out in completing the works.

Adjudication: A form of dispute resolution procedure, which is compulsory within construction projects. It involves the appointment by whichever party requires the dispute to be resolved of an independent adjudicator (usually through one of a number of appointing bodies specified within the contract) to decide the issue. The decision has to be given by the adjudicator within 28 days of the referral. That decision is then binding on the parties until one of the party reopens it either in court or by arbitration. The aim of the process is to enable disputes to be resolved quickly without holding up the construction process.

(ADR) Alternative Dispute Resolution: Informal methods of dispute resolution including adjudication, mediation, conciliation, expert determination, expert appraisal and judicial appraisal.

Advance Payment: A payment by an employer to cover a contractor's start up and procurement costs, usually before work starts on site.

Advance Payment Bond: A bond provided by the contractor to secure an advance payment against default by the contractor.

AIA: The American Institute of Architects, the governing body for US architects.

(AI) Architect's Instruction: A written instruction with which the contractor is required to comply in accordance with the terms of the building contract. It often relates to variations or defective work.

Appointments: Consultants may be appointed by deed, contracts under hand or by letter. The appointment should specify the services to be performed and the legal rights and obligations of both parties.

Arbitration: The resolution of disputes by one or more arbitrators under the Arbitration Act 1996. If a construction contract contains a valid arbitration clause, disputes must be referred to arbitration. The courts will decline to handle a dispute covered by an arbitration clause. An arbitrator's award is final and binding, with only limited possibilities of appeal.

Archaeological Survey: An investigation which developers are often obliged to carry out prior to development. If remains are discovered they are either preserved in situ or excavated. The development appraisal should take into account the resultant delay to the development timetable.

Architect: An architect is the designer of the project and where there is more than one designer (there may for example be engineers or service engineers or environmental consultants all of whom may design specific parts of the project) he/she is generally the lead designer responsible for ensuring that individual components of the design work together. However traditional forms of contract assume that the architect is also the client's key agent on building projects. The standard form of building contract for traditional procurement (see below) refers to the Architect as being the client's representative for the purposes of giving instructions as to changes/variations and the person who will certify what sums are owing to the contractor and when the building is finished. However, although this role is in some forms of the contract attached to the word "Architect", it does not need to be performed by a qualified architect (see definition of Contract Administrator below).

AS2124: Australian Standard Conditions of Contract 1992.

AS4000: Australian Standard Conditions of Contract 1997 (supersedes AS2124).

As-Built but-for Analysis: Sometimes referred to as the "collapsed as-built" method. A method of analysis which uses the as-built programme as a base-line from which the effect of delaying events are removed in order to calculate what would have been the completion date but for those events.

As-Built Drawings: Show the actual construction of the project. Usually included in the health and safety file. Which are sometimes also referred to as "Record Drawings."

Assignment: The transfer of the benefit of a contract, usually by deed. May require the consent of the other parties to the contract (contrast novation).

Bills of Quantities: This document summarises the terms of the construction contract, and the general services to be provided by the contractor, and describes the works in detail. The bill is normally prepared by a quantity surveyor in accordance with a standard method of measurement, and priced by the contractor as part of the tender process. It will usually form part of the contract documents.

(BPF) British Property Federation: A property industry trade association representing owners and investors in commercial and residential property. The BPF publishes standard forms of building contract, appointments and warranties.

Brownfield Site: A site which has previously been developed for industrial or other urban uses. Environmental considerations, for example clean up costs, are often an issue. As compared with a "Greenfield" site which is native.

Buildability: The ease with which a project can be built efficiently in terms of time, cost and quality.

Building Contract: A contract between an employer and a contractor for the execution of building works. This can range from a simple oral agreement to elaborate public works contracts.

Often referred to as the main contract when sub-contractors are to be engaged. There are many standard form construction contracts, for example those published by the JCT. Standard form building contracts almost always require amendment to suit the particular development.

Building Lease: A long lease at a ground rent imposing an obligation on the tenant to erect a building.

Building Licence: A licence allowing a contractor to go on site in order to carry out works.

Building Regulations: The relevant Local Authority has a statutory responsibility to ensure certain minimum standards of construction and employs a team of building control officers who inspect building works in the course of construction and authorise continued construction only if satisfied with certain elements. However, although building regulations approval indicates conformity with certain minimum standards, it is no guarantee that work has been carried out in accordance with the contract.

Category A Works: See Tenant's Fit Out.

CDM Regulations: The Construction (Design and Management) Regulations which cover the health and safety requirements on site. They require the employer to appoint someone as "the CDM co-ordinator" to be responsible for health and safety issues. This is very commonly the contractor but the employer can be liable (including for criminal penalties) if someone is injured on site and the appropriate arrangements have not been made. CDM Regulations in force since 1994 were replaced on 6 April 2007 by the 2007 Regulations.

Certificate: A document issued by the certifying officer under a construction contract. The most common are interim payment certificates, the certificate of practical completion, the certificate of making good defects and the final certificate.

Certificate of Making Good Defects: Issued by the architect or employer's agent when the contractor has made good any defects, shrinkages or faults during the defects liability period.

Certificate or Statement of Practical Completion: Issued by the architect or employer's agent when practical completion is achieved.

Chartered Institute of Building (CIOB): The CIOB is the professional institute charged with establishing, promoting and maintaining standards of excellence in the construction industry; it represents the construction industry in nearly one hundred countries. The right to use the initials MCIOB or FCIOB is recognised internationally as achievement of the premier professional qualification in construction management.

CIOB: See Chartered Institute of Building.

CIS: See Construction Industry Scheme.

Civil Engineering Standard Method of Measurement (CESMM): A set of measurement rules, similar to the SMM (q.v.), produced and intended for use in relation to civil engineering projects.

Civil Procedure Rules (CPR): The Rules of Procedure of the Supreme Court initiated by the Woolf Report to streamline and make more cost effective the process of civil litigation in England and Wales. On 29 July 1998 the Lord Chancellor told the House of Lords that this was "the most fundamental reform of the civil justice system since the Judicature Acts of the 1870s". The Rules became effective to govern all litigation in England and Wales in which a new step was taken after 26 April 1999.

Claimant: The title given in court and arbitration proceedings to the party asserting a right and upon whom the burden of proof rests in respect of any claim. Previously, before the introduction of CPR, termed the "plaintiff".

Clerk of Works: Sometimes known as site inspector. Engaged by the employer, or less frequently the architect, to monitor the quality of the works. Often used on public sector contracts.

CMS: See Change Management Supplement¹

Code of Measuring Practice: A guide for surveyors and valuers on how to measure buildings, published jointly by the Royal Institution of Chartered Surveyors (RICS) and the Incorporated Society of Valuers and Auctioneers (ISVA). It includes full definitions of such terms as gross external area and net internal area.

COFC: See Court of Federal Claims

Collapsed as-built: Sometimes referred to as the as-built-but-for method (q.v.). A method of delay analysis where the effects of events are “subtracted” from the simulated as-built programme to determine what would have been the effect upon completion but for those events.

Compensation: The recovery or payment of money for work done or time taken up whether by way of valuation, loss and/or expense or damages.

Compensable delay: See reimbursable delay

Compensable event: See reimbursable event (q.v.).

Completion date: The date by which the Contractor is contractually obliged to achieve practical completion¹⁰ or substantial completion¹¹ of the contract and hand the works over for beneficial use. The “completion date” may not be the same as the “date for completion”.

Concurrency: A term used to describe two or more causative events occurring over a calendar period (at least one of which is an Employer risk and at least one a Contractor risk) and where the effects of each may also be experienced over another single calendar period. Concurrency is sometimes used to describe the circumstances of the effects being experienced over a single calendar period but where the causative events giving rise to the effects occur over different calendar periods. This is more correctly termed the “concurrent effect” of sequential events.

Concurrent delay: A delay to progress, to completion, or to the date for completion where at least one of the causes of the causative events is at the contractor’s risk and at least one is at the employer’s risk.

Confirmation of verbal instruction (CVI): A document issued by C, to confirm oral instructions issued by the CA or D. In some contracts such confirmation must be issued within a limited time and not dissented from with a limited time before it becomes of contractual effect.

Collateral Warranty: Agreement given by the contractor, sub-contractors and consultants appointed on the job to third parties usually end users of the building and/or funders. The effect is that if the third parties suffer loss, including in particular defective work as a result of a breach of contract by one of the parties to the construction process, then such third parties can enforce claims for their losses against the contractor or the designers direct.

Construction Act: The common name for Part II of the Housing Grants, Construction and Regeneration Act 1996 which came into force in May 1998. It affects all construction contracts (as defined in the Act itself, including virtually all building contracts, engineering contracts, maintenance contracts, consultants’ appointments and sub-contracts) for commercial and residential developments, requiring them to contain specific provisions relating to payment and adjudication. In the absence of the minimum requirements, certain provisions under the Scheme for Construction Contracts published under the Act apply in default.

¹ Julian Critchlow, The Change Management Supplement, 17/18 November 2003, speech given at the Pickavance Consulting Conference on Delay and Disruption in Construction Contracts.

Construction and Engineering Disputes Pre-Action Protocol: A protocol which sets out steps which should be followed before commencing litigation in the Technology and Construction Court.

Construction Industry Scheme (CIS): A new Construction Industry Scheme came into force on 6 April 2007. The scheme is managed electronically. It affects all payments to sub-contractors as defined under the CIS in relation to construction operations. The definition of “a contractor” will include many employers.

Construction Management: A method of construction procurement whereby the employer enters into separate trade contracts with each specialist contractor. At the same time the employer enters into a Construction Management Agreement with a construction manager who manages the trade contractors and the project. The advantages include flexibility and speed, the disadvantages include expense.

Construction Phase Plan: Required by the CDM Regulations. The principal contractor must ensure that a suitable construction phase plan is prepared before construction work begins and that it is developed, implemented and kept up to date as the project progresses.

Constructive acceleration: Acceleration which the contractor is impliedly required to implement as a result of the actions or omissions of the employer or its agent.

Constructive change: A change which the contractor is impliedly constrained to implement as a result of the actions or omissions of the employer or its agent.

Consultants: Professionals appointed by the employer to provide design, management, cost control and other related services. They include the architect or engineer, quantity surveyor, project manager, CDM Coordinator and specialists such as the structural engineer, services engineer, and environmental consultant. Collectively referred to as the professional team.

Contemporaneous documents: The documents which come into being as a result of the performance of the works.

Contingency period: A fixed time duration allocated for an unspecified purpose in relation to a particular activity, sequence of activities or the works as a whole to be taken up or deducted as required.

Contingency sum: A fixed sum of money, which the contractor is required to include in its tendered price for unallocated purposes, usually to be expended, or deducted from the contract sum as required. It is a sum of money allowed for in a construction contract for events which may or may not be encountered. Frequently found in contracts for refurbishment of buildings, where the exact scope of the work may not be known until the existing structure has been opened up.

Contract administrator (CA): The term given to the person responsible under the contract for administering the provisions of the contract including determining and certifying what delay may be excused by the grant of an extension of time, or what losses or expenses are to be reimbursed. In standard form contracts, this person is alternatively referred to as the engineer, architect, project manager or superintendent. Most forms of contract require the appointment of a representative of the employer to give instructions to the contractor and to certify when payments are due, whether the contract completion date should be extended and when completion has been achieved. This role is performed under different forms of contract by someone with the title “Architect” or “Contract Administrator” (“CA”).

The two elements of the role are contradictory. When giving instructions on behalf of the employer the CA acts for the employer. However when certifying payments, extensions of time and completion the CA is required to act independently without reference to the requirements of the employer.

Contract documents: The documents, usually signed by both parties, defining what is to be done in consideration for the contract sum. These are the most important of all and form the starting-point for any analysis of change.

Contract Sum: The price the employer agrees to pay for the performance of the works.

Contract Sum Analysis: An analysis or breakdown of the contract sum. A contract document under JCT 2005 WCD.

Contractor's Designed Portion Supplement: A hybrid between a traditional building contract and a design and build contract. The contractor is responsible for part only of the design. It is a supplement to the JCT 2005 which is amended to take into account the contractor's partial design responsibility.

Contractor's Proposals: In a design and build contract, the contractor's proposals for the design of the development which are submitted as part of the tender and which form part of the contract documents.

Contracts (Rights of Third Parties) Act 1999: Prior to the Contracts (Rights of Third Parties) Act 1999, under the doctrine of privity of contract, only a party to a contract could enforce any rights under that contract. The Act allows enforceable rights to be given to third parties if this is expressly stated or is the clear intention of the contracting parties.

(COSHH) Control of Substance Hazardous to Health Regulations 1988: Regulations which came fully into force on 1 January 1990 to control the handling and labelling of dangerous substances used at work.

CPR: See Civil Procedure Rules

(CVI or COL) Confirmation of Verbal Instruction: Written confirmation, usually by the contractor, of a verbal instruction by the architect/engineer under the construction contract.

DAAB: Dispute Adjudication Avoidance Board.

DAB: Dispute Adjudication Board.

Date for Completion: The date in the construction contract for completing the works.

Date for Possession: The date in the construction contract when the contractor takes possession of the site to the exclusion of the employer.

DBF: The Dispute Board Federation, located in Geneva and Singapore, is an international body implementing the use of Dispute Boards on international infrastructure projects.

Deed: A document executed as a deed by an individual or a company. Traditionally a deed has been sealed but the requirement for a seal has been abolished for some time. A deed is distinguished from a simple written contract by the fact that a deed needs no consideration for it to be effective and the period for suing for breach is twelve years as opposed to six.

Defects Liability Period: The period set out in the construction contract, usually six to twelve months, following practical completion during which the contractor is responsible for remedying defects.

Defects or Defective Work: Work below the standard required by the contract, including any implied terms in relation to quantity.

Deleterious Materials: Materials which may be defective or harmful if not properly used. It is common to include lists of such materials in development documents and frequently these lists include materials which are not deleterious but which are environmentally unfriendly and which cause no problems if used correctly. A simple, general clause is preferable to a list.

Design and Build Contract: A popular method of construction procurement where the main contractor is responsible for design as well as construction. The advantages of design and build include single point responsibility, relatively short lead-in times and the avoidance of claims following late supply of design information. The disadvantages include continuity difficulties if the contractor becomes insolvent and, arguably, lower quality design.

Design, Build and Maintain: An innovative procurement route whereby the contractor not only designs, constructs and rectifies defects but also takes on the responsibility for maintaining the project. Thought to encourage fewer defects at construction stage.

Developer's Fit-Out: Construction of a building (usually offices) to include suspended ceilings and raised floors but no partitioning. This type of construction may be wasteful when a particular tenant occupies and wants something different – hence the popularity of shell and core.

Development Agreement: An agreement under which the developer agrees with another to procure construction of works for that party. Typically, will also provide for the transfer of an interest in the property. Development Agreements are outside the provisions of the Construction Act.

Disability Discrimination Act 1995: This Act gives disabled people rights in the areas of employment, access to goods, facilities and services and buying or renting land or property. Employment rights and first rights of access came into force on 2 December 1999; further rights of access came into force on 1 October 1999 and in October 2004.

Dispute Escalation Procedure: A tool favoured in partnering where, by prior agreement, unresolved disputes are gradually moved up the management structure for resolution until they reach board or director level.

Disruption: Interference with efficient working on site. Usually, but not always, accompanied by delay to the works.

DNP: Defects Notification Period.

DRB: Dispute Review Board

DRBF: The Dispute Review Board Foundation located in Seattle Washington sponsors the use of Dispute Review Boards mainly in the United States and also internationally

Duty to Warn: A term, implied into a building contract, that the contractor should warn the employer of design defects known to him.

(ECC) Engineering and Construction Contract: Formerly known as the New Engineering Contract. This is published by the ICE and is intended to be a non-partisan and non-confrontational form for a construction contract. There are divided opinions as to its merits.

Economic and Consequential Loss: In negligence, the cost of repairing a construction defect is treated as economic loss and is generally irrecoverable. The rules of economic loss resulting from a breach of contract are more generous but certain categories of loss are still irrecoverable as too remote. This is a complex area of the law.

Egan Report: A report entitled “Rethinking Construction” published by Sir John Egan in July 1998. The report advocated co-operation between parties in the construction chain to achieve savings in time and costs, fewer defects and accidents, increased profitability and better construction.

Employer: Also known as the client or developer. The person, often but not necessarily the owner of the site, for whom the works are undertaken under the construction contract by the contractor. With the contractor, a party to the construction contract.

Employer's Agent: Under a JCT design and build contract there is no certifying officer. An employer's agent, or employer's representative, is appointed to act on behalf of the employer.

Employer's Representative: In a design and build contract there is no architect to issue certificates. An employer's representative is appointed to do so.

Employer's Requirements: Under a design and build contract these set out the employer's requirements for the development with which the contractor's design must comply (see contractor's proposals). One of the contract documents.

Enabling Work: Works of demolition or construction necessary to permit the main project to be undertaken, for example infrastructure works.

Engineer: Deals with the design of complex structural elements. There is a standard form of appointment produced by the Association of Civil Engineers (ACE). It lists the kinds of services to be expected and proposes methods of payment. However there are a number of different kinds of engineer which may be required depending on the nature of the project.

- * Civil engineer – infrastructure development

- * Structural engineer – analyses the design in terms of the way in which the structure will function and determines the size of the structural components

- * Services engineer or mechanical and electrical engineer – deals with the sub-systems of a building including the kind that come under electrical institutions.

Engineering Contract: A contract between an employer and a contractor for the execution of engineering works. The standard form contracts published by the ICE are widely used.

Exclusion or Exemption Clause: A term in a contract which seeks to exclude liability in certain specified circumstances. Such clauses are frequently found in collateral warranties and often seek to limit liability to the reasonable cost of repair. They are generally unacceptable to funds and commercial developers.

Extensions of Time (EOT): Most standard form construction contracts contain a date for completion of the works. Where the work is delayed by certain defined events, the contract date for completion will be extended.

(FIDIC) Fédération Internationale des Ingénieurs-Conseils: The International Federation of Consulting Engineers. It publishes a range of standard form contracts for use on international construction projects.

Final Certificate: A certificate issued under a construction contract after all works, defects rectification, and the final account have been completed. Depending on the wording of the contract, it may be conclusive as to such matters as payments under contract and the quality of work executed.

Financing Bond: A guarantee bond to assist cashflow which provides for payment to be made on the assessment, usually by a quantity surveyor, of the anticipated loss prior to actual payment by the employer for the remedial or completion works.

Fitness for Purpose: A contractor or developer who agrees to provide a building which is fit for its purpose will be accepting an onerous liability. Most will agree to carry out work in a workmanlike manner using good quality materials but will not guarantee that the building will be suitable for the purpose for which the occupier requires it. A fitness for purpose warranty in relation to a project may be implied where a contractor carries out works knowing how the employer intends to use the building, where the employer relies on the contractor's skill and judgement. This implied term is displaced in many standard forms of building contract. Fitness for purpose warranties may not be covered by a PI Policy.

Fixed Price/Guaranteed Maximum Price: The contractor agrees to carry out the works at a capped price so that he is taking the risk of some of the events which would usually entitle him to claim further sums over and above the contract price. The term is misleading because there is

almost no contract in which the contractor agrees to take all risks of increased costs including of course those which occur as a result of variations. Obviously price will include a substantial premium to cover the contractor against all of the risks that it is assuming.

Fixed Price Contract: A contract where the rates are fixed and not subject to fluctuation. The contract sum is still subject to adjustment in respect of variations and other circumstances affecting the execution of the works.

Float: Additional time allowed in a contractor's programme beyond that required to complete a particular activity. Ownership of the float is a matter of much legal debate.

Floor Area LADs: LADs which become payable if the development, when constructed, does not attain the stipulated minimum size requirements.

Fluctuations: Many standard form contracts contain provisions by which the contract sum can be adjusted to take into account changes in taxation, labour and material costs. These provisions must be excluded if the employer and contractor wish to agree a fixed price.

Force Majeure: Also known as "acts of God". Generally, acts outside the parties' control which might affect the performance of the contract. In building contracts it has a narrower meaning as many such events are dealt with separately in loss and expense and extension of time clauses.

Forward Funding: A means of securing interim finance for a development from the purchaser of that development. The developer does not, therefore have to provide or borrow that finance. The purchaser, who buys the site and advances funds as works proceed, is able to influence and monitor the development letting process – unless the development is already pre-let.

There is an agreed limit for the advance of funds, including notional interest on those advances at a rate below normal borrowing costs. Once the development is completed and let, a "price" is calculated by reference to the rents achieved. If this price exceeds the sums advanced plus notional interest, the purchaser makes a payment to the developer of the excess – commonly called "developer's profit".

If the development fails to let after a pre-agreed period, the notional interest payments reduce the developer's profit, possibly to zero, but the developer may then have no continuing liability, the so-called "profit erosion deal". Alternatively, the developer may be required to take a lease himself, or give rental guarantee.

Forward Sale Agreement: An agreement for the sale of an interest in a property prior to the completion of its development or refurbishment, either on the basis of a forward funding or on the basis that the purchaser is to purchase the property when the works are completed or when the property becomes let.

Fund: A party providing finance for a development, usually to a developer. A fund will often review the terms of the construction contracts and consultants' appointments before approving the investment, and will require the issue of suitable collateral warranties.

Funding Agreement: A forward funding or an agreement with a funder to advance development finance.

GC Works: A family of construction contracts issued by the Department of the Environment, Transport and the Regions (DETR) for public sector building and engineering works.

Guarantee: A collateral agreement in which a guarantor agrees to discharge an obligation (often a debt) if the "primary obligor" fails to do so.

Guaranteed Maximum Price: Where the contractor agrees a figure as a ceiling for the contract sum. The contract may also provide for savings to be shared between the employer and the contractor as an incentive to control costs.

Health & Safety Executive: The statutory body responsible jointly with the local authority for enforcement of the Health and Safety at Work Act 1974 and subsidiary regulations.

Home Owner/Occupier JCTO5: A building contract and a consultancy agreement drawn up by the JCT for use by a residential occupier.

(ICE) Institution of Civil Engineers: A professional body for civil engineers. It publishes standard forms of building contract in association with other professional bodies. These are mainly intended for use on engineering projects but it also publishes the engineering and construction contract, formerly the new engineering contract.

Infrastructure: Roads, drains, sewers and other services which serve the development.

Invitation to Tender: This usually includes the proposed conditions of contract, specifications, drawings and un-priced bills of quantities. It is not normally an offer nor does it normally bind the employer to accept the lowest of any tender.

IPC: Interim Payment Certificate(s).

JCT Contracts: The most popular standard form of building contracts are produced by the Joint Contracts Tribunal (JCT). The Tribunal has representatives from all sides of the industry. In 2005 the JCT updated all of its contracts using a simpler drafting style.

JCT Intermediate Form of Building Contract for Works of Simple Content (IFC 2005): A traditional and relatively concise contract for use on simple projects of moderate value.

JCT Major Project Form (2003 Edition): A streamlined contract intended for use on major building projects by experienced clients and contractors who are regularly involved in the procurement of large buildings. It reverses the usual trend towards longer contracts.

JCT 2005: The traditional JCT contract. There are two versions, one for private employers and one for local authorities. Both versions are available for use with quantities, with approximate quantities, or without bills of quantities.

JCT 2005 with Contractor's Design (WCD 2005): For design and build projects (see design and build).

LADs: see Liquidated and Ascertained Damages

Latent Defects: Defects inherent in the design or construction of a property which are not apparent on inspection.

Latent Defects Insurance: Insurance which normally lasts for 10 years and is taken out on the payment of a single premium. Sometimes known as decennial insurance. The policy covers damage to a property caused by latent defects which become apparent during the life of the policy.

Latham: Sir Michael Latham's report "Constructing the Team" foreshadowed many of the Construction Act's provisions. The aim was to identify means of reducing construction cost and the number of construction disputes.

Letter of Intent: A contractual document setting out the terms upon which a contractor starts work on a project before complete formal contract documents have been finalised.

Liquidated and Ascertained Damages ("LADS"): In principle, if the contractor is in breach of the building contract he has to pay the client compensation (known as damages) for any loss the client suffers as a result of such a breach.

The practice has grown up in the construction industry for the parties to try to estimate before the contract is entered into what damages the client may suffer if the contractor is responsible for delay in completion.

The parties usually agree a weekly sum which is to be paid by the contractor for every week of delay. The amount has to be a genuine pre-estimate of what loss might be suffered and so, in order to fix on the relevant sum, it is necessary to prepare a complete assessment of what losses may occur even in terms of loss of revenue because a facility is not opened or the cost of renting alternative accommodation elsewhere, for example. It is important that the liquidated damages are not set too high or the contractor's price will go up substantially in order to take that risk into account. If the liquidated damages are too high they may be set aside by the courts as a penalty.

Loss and Expense: The loss recoverable by a contractor under a particular provision of a construction contract often following an extension of time. Some standard form contracts provide for money claims to be made and assessed under the contract, instead of as a claim for breach of contract, if the contractor's work is delayed or disrupted in certain circumstances.

Management Contracting: A method of construction procurement where the developer contracts with a management contractor, who in turn contracts with numerous trade contractors. The management contractor does little or no construction work itself but manages the process, and is contractually liable for the trade contractors. However, liability is usually limited compared with more traditional procurement methods. Advantages include speed and flexibility, the disadvantages include expense.

Mediation: An informal process to settle a dispute with the help of an independent third party or mediator. The process may be evaluative – that is when the mediator expresses his view on the merits – or facilitative – where the mediator simply encourages discussion.

Minor Works Agreement (MW2005): A JCT short form contract for simple works of low value.

Monitoring Surveyor: A professional normally engaged by a fund or landlord to monitor the progress of construction works in order to protect its investment.

Named Sub-Contractor: A sub-contractor who is named by the employer in the specification or employer's requirements. The contractor bears the risk of the named sub-contractor's procurement and design (contrast nominated sub-contractor).

Net Contribution Clause: A clause, generally in a collateral warranty, which limits the liability of a party to that part of the loss for which that party is specifically responsible. In the absence of these clauses, a party can be liable for 100% of any loss even if his specific responsibility is only 1%. These are increasingly common and are generally acceptable in collateral warranties, although not in construction contracts or consultants' appointments. Employers, purchasers, funds and tenants prefer there to be at least one party who is responsible for the entirety of any loss. In a design and build contract this will usually be the contractor.

Nett Internal Area: The area within a building (taking each floor into account) which can effectively be used and for which rent is normally paid, measured from the inside face of the perimeter walls. Areas such as lifts, WCs, service ducts, lobbies and plant rooms are excluded. The net internal area of an office will typically be between 75% and 80% of its gross external area. See Code of Measuring Practice.

NHBC: National House Building Council. Responsible for the Buildmark Scheme which provides insurance in respect of defects in the construction or refurbishment of residential property.

NOD: Notice of Delay.

Nominated Sub-Contractor: Under the JCT 2005, a sub-contractor selected by the employer with whom the contractor is obliged to place an order. The contractor is not responsible for delays or design defects caused by such sub-contractors. Rarely used and best approached with caution.

Novation: The substitution, with the consent of all parties, of a new contract for an existing contract. The new contract may be between the same parties or, more usually, it may introduce a new party or replace a party.

On Demand Bond: An unconditional performance bond obliging the bondsman to pay the beneficiary a specified sum on demand, usually issued by a bank. Payment is made without the need to prove breach of contract or resulting damage.

Parent Company Guarantee: Commonly required under building contracts, this is provided by the contractor's parent company to guarantee the subsidiary's performance of the building contract. Particularly important where the contractor is a small subsidiary with insufficient assets to pay substantial claims which might arise in the event of serious delay or defects.

Part L: Part L of the Building Regulations (Conservation of Fuel and Power) which came into force on 1 April 2002 and which introduced new standards requiring greater conservation of energy and fuel within buildings.

Part M: Part M of the Building Regulations 1991, Access and Facilities for Disabled People. The Building Regulations (Amendment) 1998 which came into force on 25 October 1999 introduced new accessibility standards for disabled people to dwellings.

Partial Possession: The employer takes possession of part of the development before practical completion, usually to carry out fit-out works. Under the JCT forms of contract this requires the contractor's agreement unless a specific amendment has been made.

Partnering: A framework for involving those involved in the construction process from client to sub-contractor. The parties work together towards a "win win" solution with a view to benefits and risks being shared. Partnering can be project specific or strategic.

Partnering Agreement: Records the parties' agreed objectives e.g. to complete the project on time and within budget! Also records general statements of intent as to how this will be achieved.

Partnering Charter: Sets out the parties' goals, and guidance on how to achieve them. Usually includes common mission, philosophy and values. A point of reference during the project.

Party Wall: Strictly, a boundary wall which sits half on one property and half on another and is therefore a jointly owned wall. However, "party wall awards" relate to the treatment of a boundary wall and other structures adjacent to the boundary where works are to take place on one side of it. Party wall awards used to only be issued in London, but the principles of the London Building Acts were extended to the whole country by the Party Wall Act 1996.

Patent Defect: A defect that is apparent on inspection.

Pay when Certified: A clause, usually in a subcontract, whereby the contractor is only obliged to pay if the subcontract works are certified under the main contract. This is irrespective of whether the subcontract works have been satisfactorily completed.

Pay when Paid: A clause, usually in a subcontract, whereby one party is only obliged to pay the other if payment has been received from a third party. Ineffective under the Construction Act except where the reason for non-payment is the insolvency of the third party.

Penalty Clause: A contract provision that seeks to impose liability in excess of the level of damages which would be recoverable at law. These are generally unenforceable.

Performance Bonds: If there is any concern about the solvency of a contractor, he can be asked to procure a bond from a financial institution of a percentage (usually 10%) of the construction cost which will be paid to the employer to enable it to complete the project if the contractor is unable to do so for any reasons. The cost of the bond is usually included in the contractor's price.

PPC 2000 ACA Standard Form of Contract for Project Partnership: A multi-party partnership contract intended to promote the development of a new non-adversarial construction culture.

Practical Completion: In most construction contracts the date at which the certifying officer certifies the works have been completed. Some minor works, called snagging items, may remain and must be completed within a reasonable period.

Pre-action Protocol: A series of procedural steps which should be undertaken before litigation is commenced. Different protocols apply to different types of disputes.

Preliminaries: The section of the bills of quantities that summarises the terms of the construction contract and the general services to be provided by the contractor.

Priced Activity Schedule: An activity schedule with each activity priced. The total of the activities equates to the contract sum.

Prime Cost Sums/Provisional Sums: Items in the contract where the contractor is not yet able to put a price on those parts of the work. This may be because the exact nature and scope of that particular element of work has not been possible to predict or because it is to be carried out by a sub-contractor nominated by the employer. A sum is usually included as a contingency sum. Obviously the more of these items there are in an overall cost budget, the more uncertain the actual cost outcome is likely to be.

Principal Contractor: Usually the main or managing contractor on a project charged with health and safety management responsibilities under the CDM Regulations.

Project Manager: A person who manages the design and construction process for a developer.

Prolongation Costs: If the works are delayed through no fault of the contractor, then he can become entitled to an extension of time (see above) and it will usually follow from that that he is entitled to be paid more than the contract price because the factors on site which took longer than anticipated means that the work will have cost more; he can usually, for example, claim for extra preliminaries for extra days/weeks spent on site. However, this is a complicated subject and professional advice should be taken in relation to any such claims.

Provisional Sum: Construction contracts may include provisional sums where the cost of an item is not known at the time of entering into the contract. The contract sum is usually adjusted upwards or downwards according to the actual expenditure. There is also usually a further commensurate adjustment of the contractor's profit.

Quantity Surveyor: The person or firm appointed by the employer to prepare a cost plan and to estimate the quantities of the proposed works and set them out in bills of quantities. He may also be required to value the works and any variations as the contract proceeds and to prepare the final account.

Quantum Meruit: Literally "how much it deserves". A reasonable sum payable by a party for works carried out at its request and for its benefit in circumstances where there are no contractual payment provisions.

Record Drawings: Drawings which are done to record the status of a project, usually at the completion of the works.

Retention: Construction contracts frequently provide for interim periodical payments. A percentage of the sums payable is deducted by the employer and held until completion. Half the retention is released on practical completion and the other half of the expiry of the defects liability period. The intention is to provide a fund against the contractor's possible default.

(RIBA) The Royal Institute of British Architects: The professional body for architects, and a nominating body for adjudicators and arbitrators.

(RICS) The Royal Institution of Chartered Surveyors: The professional body for chartered surveyors. Also a nominating body for adjudicators and arbitrators.

(RIDDOR) Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995: Came into force on 1 April 1996. Health and Safety Regulations which require reporting of work related accidents, diseases and dangerous incidents.

Scheme for Construction Contracts: Introduced by the Construction Act, the Scheme implies certain provisions relating to adjudication and payment into all construction contracts which do not themselves comply with the requirements of the Act.

Scott Schedule: A document, originally devised by a judge, in which each party sets out its case on an item-by-item basis and the judge notes his decision against each entry.

Sectional Completion: The construction contract may provide for the works to be undertaken in sections, with each section having a different completion date and different LADs. The JCT publishes sectional completion supplements to cover this.

Services Engineer: An engineer specialising in the design and installation of building services. An increasingly important role as buildings become more complex.

Set Off: A right to set one monetary claim against another by way of defence.

Shell and Core: The construction of a building to a stage where the structure is complete and all services are available but all interior works remain to be completed so that maximum flexibility is available for the occupier.

Site: The land on which the works or development are to take place.

Snagging List: A list of minor defective or outstanding works which are to be made good by the contractor but which do not prevent a certificate of practical completion being issued.

Society of Construction Law: A body which promotes interest in construction law. The Society holds regular meetings, lectures and social events.

Society of Construction Law Delay and Disruption Protocol: A protocol for determining extensions of time and compensation for delay and disruption published by the Society of Construction Law on 16 October 2002.

Specification: One of the contract documents, which describes in detail the materials and products to be used in the works and the standard of the workmanship to be carried out.

Standard Form Appointments: Professional bodies such as The Royal Institute of British Architects (RIBA), Association of Civil Engineers (ACE) and the Royal Institution of Chartered Surveyors (RICS) produce standard forms of consultants' appointments. These are rarely adequate for commercial developments without substantial amendment and appointments tailored to the particular project are preferable.

Standard Form Construction Contracts: Contracts produced in standard forms. The forms produced by JCT are the most popular building contracts; the ICE produce the most popular civil engineering contracts. There are many different standard form contracts aimed at a wide range of different projects. The form to be used is usually determined by the scale and type of works to be undertaken.

Step in Rights: Rights for a funder to step in and take over a development in order to complete it – normally following the insolvency of the developer.

Structural Engineer: An engineer responsible for structural matters such as the design of foundations and structural steelwork.

Sub-Consultants: Consultants engaged directly by a contractor, usually on design and build projects. They will usually be required to enter into collateral warranties with the employer.

Sub-Contracting: Where part of the works are sub-contracted to a sub-contractor.

Sub-Contractor: The contractor with whom the developer enters into a building contract is known as the main contractor. In most building contracts of any size the main contractor then sub-contracts specialist work to sub-contractors.

Subrogation: A right often reserved by insurers to bring proceedings in the name of the insured.

Substantial Completion: The term used for practical completion in ICE standard form contracts.

Suspension of Obligations: A right given by the Construction Act to consultants and contractors in cases of non-payment where no valid notice of set off has been given. The contract completion date or period is extended by the period of any valid suspension.

TCC: Technology and Construction Court, a specialist part of the High Court which deals with disputes involving technical matters such as construction and computer contract disputes. It has its own procedures which are set out in a practice direction and the Technology and Construction Court Guide.

TECBA: The Technology and Construction Court Bar Association, which represents barristers involved in litigation in the Technology and Construction Court.

TeCSA: The Technology and Construction Solicitors Association, which represents solicitors involved in litigation in the Technology and Construction Court.

Tenant's Fit Out: The work which a tenant carries out to equip the premises to its own requirements. Where it takes a building developed to shell and core the fit out may be notionally split between "category A" works which are works which will ultimately belong to the landlord (such as floors, ceilings, electrical wiring and lights) and those such as internal partitioning which will belong to the tenant.

Tender: The contractor's offer to carry out the works for a specified price. The contractor will generally attach the priced bills of quantities.

Time at Large: Where there is a delay caused by the employer, and no mechanism for extension of time under the building contract, the contractual completion date ceases to apply and is replaced by an obligation to complete the works within a reasonable time.

Tomlin Order: An order disposing of an action on agreed terms which are set out in a schedule to the order. The schedule is usually confidential. The order gives either party the right to go back to court if the other party does not comply.

Traditional Contracting or Procurement: Where the employer takes the responsibility for design and the contractor carries out the works.

Turnkey Contract: A form of design and build contract under which the contractor is responsible for handing over a fully fitted out and completed building or fully operational facility.

Unforeseen Ground Conditions: The risk of ground conditions which may affect the works, particularly under engineering contracts. Responsibility for unknown costs or delays arising from unforeseen ground conditions is allocated between the parties in engineering contracts.

Valuation: The process of preparing a valuation of the works carried out prior to the issue of a payment certificate.

Value Management/Engineering: The process of critically examining all the components and processes in a building project at various stages to ensure that there is no waste contained within the cost plan.

Variation: Most construction contracts give the architect or engineer the power to order the addition, omission or substitution of work to be carried out. Depending on the nature of the variation, additional time may be allowed and/or an increase in the contract sum may be due.

Without Prejudice: A phrase used to enable parties to negotiate settlement of a claim without implying any admission of liability. Letters and other documents which are genuinely aimed at achieving settlement are not admissible in court.

Workmanship: The manner and standard to which the works are carried out by the contractor.

Works Contractor or Works Package Contractor: A contractor appointed to carry out specified works by a management contractor or directly by the employer in the case of construction management.

APPENDIX 2

HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

1996 CHAPTER 53

PART II CONSTRUCTION CONTRACTS

Introductory provisions

104 Construction contracts

- (1) In this Part a “construction contract” means an agreement with a person for any of the following—
 - (a) the carrying out of construction operations;
 - (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
 - (c) providing his own labour, or the labour of others, for the carrying out of construction operations.
- (2) References in this Part to a construction contract include an agreement—
 - (a) to do architectural, design, or surveying work, or
 - (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.
- (3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the [1996 c. 18.] Employment Rights Act 1996).
- (4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.

- (5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

- (6) This Part applies only to construction contracts which—
 - (a) are entered into after the commencement of this Part, and
 - (b) relate to the carrying out of construction operations in England, Wales or Scotland.
- (7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

105 Meaning of “construction operations”

- (1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions—
 - (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
 - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
 - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
 - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
 - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
 - (f) painting or decorating the internal or external surfaces of any building or structure.
- (2) The following operations are not construction operations within the meaning of this Part—
 - (a) drilling for, or extraction of, oil or natural gas;
 - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
 - (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, or water or effluent treatment, or
 - (ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
 - (d) manufacture or delivery to site of—
 - (i) building or engineering components or equipment,
 - (ii) materials, plant or machinery, or
 - (iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems, except under a contract which also provides for their installation;

- (e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.
- (3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.
- (4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106 Provisions not applicable to contract with residential occupier

- (1) This Part does not apply—
 - (a) to a construction contract with a residential occupier (see below), or
 - (b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.
- (2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose—

“dwelling-house” does not include a building containing a flat; and

“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

- (3) The Secretary of State may by Order amend subsection (2).
- (4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

107 Provisions applicable only to agreements in writing

- (1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.

- (2) There is an agreement in writing—
 - (a) if the agreement is made in writing (whether or not it is signed by the parties),
 - (b) if the agreement is made by exchange of communications in writing, or
 - (c) if the agreement is evidenced in writing.
- (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
- (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

- (5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
- (6) References in this Part to anything being written or in writing include its being recorded by any means.

ADJUDICATION

108 Right to refer disputes to adjudication

- (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose “dispute” includes any difference.

- (2) The contract shall—
 - (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
 - (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
 - (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
 - (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
 - (e) impose a duty on the adjudicator to act impartially; and
 - (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.
- (3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

- (4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
- (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.
- (6) For England and Wales, the Scheme may apply the provisions of the [1996 c. 23.] Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator’s decision.

PAYMENT

109 Entitlement to stage payments

- (1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—
 - (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
- (4) References in the following sections to a payment under the contract include a payment by virtue of this section.

110 Dates for payment

- (1) 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.
- (2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if—
 - (a) the other party had carried out his obligations under the contract, and
 - (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.
- (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

111 Notice of intention to withhold payment

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

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

- (2) To be effective such a notice must specify—
 - (a) the amount proposed to be withheld and the ground for withholding payment, or
 - (b) if there is more than one ground, each ground and the amount attributable to it, and must be given not later than the prescribed period before the final date for payment.
- (3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.
- (4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than—
 - (a) seven days from the date of the decision, or
 - (b) the date which apart from the notice would have been the final date for payment, whichever is the later.

112 Right to suspend performance for non-payment

- (1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).
- (2) The right may not be exercised without first giving to the party in default at least seven days’ notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.
- (4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113 Prohibition of conditional payment provisions

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- (2) For the purposes of this section a company becomes insolvent—
 - (a) on the making of an administration order against it under Part II of the [1986 c. 45.] Insolvency Act 1986,

- (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,
 - (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
 - (d) on the making of a winding-up order under Part IV or V of that Act.
- (3) For the purposes of this section a partnership becomes insolvent—
- (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or
 - (b) when sequestration is awarded on the estate of the partnership under section 12 of the [1985 c. 66.] Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.
- (4) For the purposes of this section an individual becomes insolvent—
- (a) on the making of a bankruptcy order against him under Part IX of the [1986 c. 45.] Insolvency Act 1986, or
 - (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.
- (5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.
- (6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.
- In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

SUPPLEMENTARY PROVISIONS

114 The Scheme for Construction Contracts

- (1) The Minister shall by regulations make a scheme (“the Scheme for Construction Contracts”) containing provision about the matters referred to in the preceding provisions of this Part.
- (2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.
- (3) In this section “the Minister” means—
 - (a) for England and Wales, the Secretary of State, and
 - (b) for Scotland, the Lord Advocate.
- (4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.
- (5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

115 Service of notices, &c

- (1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.
- (2) If or to the extent that there is no such agreement the following provisions apply.
- (3) A notice or other document may be served on a person by any effective means.
- (4) If a notice or other document is addressed, pre-paid and delivered by post—
 - (a) to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or
 - (b) where the addressee is a body corporate, to the body's registered or principal office, it shall be treated as effectively served.
- (5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.
- (6) References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly.

116 Reckoning periods of time

- (1) For the purposes of this Part periods of time shall be reckoned as follows.
- (2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
- (3) Where the period would include Christmas Day, Good Friday or a day which under the [1971 c. 80.] Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales or, as the case may be, in Scotland, that day shall be excluded.

117 Crown application

- (1) This Part applies to a construction contract entered into by or on behalf of the Crown otherwise than by or on behalf of Her Majesty in her private capacity.
- (2) This Part applies to a construction contract entered into on behalf of the Duchy of Cornwall notwithstanding any Crown interest.
- (3) Where a construction contract is entered into by or on behalf of Her Majesty in right of the Duchy of Lancaster, Her Majesty shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by the Chancellor of the Duchy or such person as he may appoint.
- (4) Where a construction contract is entered into on behalf of the Duchy of Cornwall, the Duke of Cornwall or the possessor for the time being of the Duchy shall be represented, for the purposes of any adjudication or other proceedings arising out of the contract by virtue of this Part, by such person as he may appoint.

APPENDIX 3

THE SCHEME FOR CONSTRUCTION CONTRACTS (ENGLAND AND WALES) REGULATIONS 1998

The Secretary of State, in exercise of the powers conferred on him by sections 108(6), 114 and 146(1) and (2) of the Housing Grants, Construction and Regeneration Act 1996[1], and of all other powers enabling him in that behalf, having consulted such persons as he thinks fit, and draft Regulations having been approved by both Houses of Parliament, hereby makes the following Regulations:

Citation, commencement, extent and interpretation

1. - (1) These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 and shall come into force at the end of the period of 8 weeks beginning with the day on which they are made (the “commencement date”).
(2) These Regulations shall extend only to England and Wales.
(3) In these Regulations, “the Act” means the Housing Grants, Construction and Regeneration Act 1996.

The Scheme for Construction Contracts

2. Where a construction contract does not comply with the requirements of section 108(1) to (4) of the Act, the adjudication provisions in Part I of the Schedule to these Regulations shall apply.
3. Where -
 - (a) the parties to a construction contract are unable to reach agreement for the purposes mentioned respectively in sections 109, 111 and 113 of the Act, or
 - (b) a construction contract does not make provision as required by section 110 of the Act,the relevant provisions in Part II of the Schedule to these Regulations shall apply.
4. The provisions in the Schedule to these Regulations shall be the Scheme for Construction Contracts for the purposes of section 114 of the Act.

SCHEDULE

Regulations 2, 3 and 4

THE SCHEME FOR CONSTRUCTION CONTRACTS

PART I - ADJUDICATION

Notice of Intention to seek Adjudication

1. - (1) Any party to a construction contract (the “referring party”) may give written notice (the “notice of adjudication”) of his intention to refer any dispute arising under the contract, to adjudication.
 - (2) The notice of adjudication shall be given to every other party to the contract.
 - (3) The notice of adjudication shall set out briefly -
 - (a) the nature and a brief description of the dispute and of the parties involved,
 - (b) details of where and when the dispute has arisen,
 - (c) the nature of the redress which is sought, and
 - (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).
2. - (1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator -
 - (a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or
 - (b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or
 - (c) where neither paragraph (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.
 - (2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.
 - (3) In this paragraph, and in paragraphs 5 and 6 below, an “adjudicator nominating body” shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.
3. The request referred to in paragraphs 2, 5 and 6 shall be accompanied by a copy of the notice of adjudication.
4. Any person requested or selected to act as adjudicator in accordance with paragraphs 2, 5 or 6 shall be a natural person acting in his personal capacity. A person requested or selected to act as an adjudicator shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.
5. - (1) The nominating body referred to in paragraphs 2(1)(b) and 6(1)(b) or the adjudicator nominating body referred to in paragraphs 2(1)(c), 5(2)(b) and 6(1)(c) must communicate the selection of an adjudicator to the referring party within five days of receiving a request to do so.

- (2) Where the nominating body or the adjudicator nominating body fails to comply with paragraph (1), the referring party may -
 - (a) agree with the other party to the dispute to request a specified person to act as adjudicator, or
 - (b) request any other adjudicator nominating body to select a person to act as adjudicator.
- (3) The person requested to act as adjudicator in accordance with the provisions of paragraphs (1) or (2) shall indicate whether or not he is willing to act within two days of receiving the request.
- 6. - (1) Where an adjudicator who is named in the contract indicates to the parties that he is unable or unwilling to act, or where he fails to respond in accordance with paragraph 2(2), the referring party may -
 - (a) request another person (if any) specified in the contract to act as adjudicator, or
 - (b) request the nominating body (if any) referred to in the contract to select a person to act as adjudicator, or
 - (c) request any other adjudicator nominating body to select a person to act as adjudicator.
- (2) The person requested to act in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.
- 7. - (1) Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the “referral notice”) to the adjudicator.
- (2) A referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.
- (3) The referring party shall, at the same time as he sends to the adjudicator the documents referred to in paragraphs (1) and (2), send copies of those documents to every other party to the dispute.
- 8. - (1) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.
- (2) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes.
- (3) All the parties in paragraphs (1) and (2) respectively may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes.
- (4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, that adjudicator’s fees and expenses shall be determined in accordance with paragraph 25.
- 9. - (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.
- (2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

- (3) Where an adjudicator ceases to act under paragraph 9(1) -
 - (a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
 - (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- (4) Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
- 10. Where any party to the dispute objects to the appointment of a particular person as adjudicator, that objection shall not invalidate the adjudicator's appointment nor any decision he may reach in accordance with paragraph 20.
- 11. - (1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
- (2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses.

Powers of the adjudicator

- 12. The adjudicator shall -
 - (a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract; and
 - (b) avoid incurring unnecessary expense.
- 13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may -
 - (a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),
 - (b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
 - (c) meet and question any of the parties to the contract and their representatives,
 - (d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,

- (e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,
 - (f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,
 - (g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and
 - (h) issue other directions relating to the conduct of the adjudication.
- 14.** The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.
- 15.** If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may -
- (a) continue the adjudication in the absence of that party or of the document or written statement requested,
 - (b) draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified, and
 - (c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.
- 16. - (1)** Subject to any agreement between the parties to the contrary, and to the terms of paragraph (2) below, any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not) as he considers appropriate.
- (2)** Where the adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than one person, unless the adjudicator gives directions to the contrary.
- 17.** The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.
- 18.** The adjudicator and any party to the dispute shall not disclose to any other person any information or document provided to him in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.
- 19. - (1)** The adjudicator shall reach his decision not later than -
- (a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or
 - (b) forty two days after the date of the referral notice if the referring party so consents, or
 - (c) such period exceeding twenty eight days after the referral notice as the parties to the dispute may, after the giving of that notice, agree.

- (2) Where the adjudicator fails, for any reason, to reach his decision in accordance with paragraph (1)
 - (a) any of the parties to the dispute may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
 - (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.
- (3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

Adjudicator's decision

- 20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may -
 - (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
 - (b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,
 - (c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.
- 21. In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with this paragraph.
- 22. If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision.

Effects of the decision

- 23. - (1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.
 - (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.
- 24. Section 42 of the Arbitration Act 1996 shall apply to this Scheme subject to the following modifications -
 - (a) in subsection (2) for the word "tribunal" wherever it appears there shall be substituted the word "adjudicator",
 - (b) in subparagraph (b) of subsection (2) for the words "arbitral proceedings" there shall be substituted the word "adjudication",

- (c) subparagraph (c) of subsection (2) shall be deleted, and
 - (d) subsection (3) shall be deleted.
25. The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
26. The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator shall be similarly protected from liability.

PART II - PAYMENT

Entitlement to and amount of stage payments

1. Where the parties to a relevant construction contract fail to agree -
 - (a) the amount of any instalment or stage or periodic payment for any work under the contract, or
 - (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
 - (c) both of the matters mentioned in sub-paragraphs (a) and (b) above,
 the relevant provisions of paragraphs 2 to 4 below shall apply.
2. - (1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).
- (2) The aggregate of the following amounts -
 - (a) *an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with sub-paragraph (b)),*
 - (b) *where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and*
 - (c) *any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.*
- (3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.
- (4) An amount calculated in accordance with this paragraph shall not exceed the difference between -
 - (a) the contract price, and
 - (b) the aggregate of the instalments or stage or periodic payments which have become due.

Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.
4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later -
 - (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or
 - (b) the making of a claim by the payee.
5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between -
 - (a) the contract price, and
 - (b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,

shall become due on the expiry of -

- (a) 30 days following completion of the work, or
- (b) the making of a claim by the payee,

whichever is the later.

6. Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on
 - (a) the expiry of 30 days following the completion of the work, or
 - (b) the making of a claim by the payee,

whichever is the later.

7. Any other payment under a construction contract shall become due
 - (a) on the expiry of 7 days following the completion of the work to which the payment relates, or
 - (b) the making of a claim by the payee,

whichever is the later.

Final date for payment

8. - (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.
- (2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.

Notice specifying amount of payment

9. A party to a construction contract shall, not later than 5 days after the date on which any payment -

- (a) becomes due from him, or
- (b) would have become due, if -
 - (i) the other party had carried out his obligations under the contract, and
 - (ii) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

Notice of intention to withhold payment

10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

Prohibition of conditional payment provisions

11. Where a provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective as mentioned in section 113 of the Act, and the parties have not agreed other terms for payment, the relevant provisions of -
- (a) paragraphs 2, 4, 5, 7, 8, 9 and 10 shall apply in the case of a relevant construction contract, and
 - (b) paragraphs 6, 7, 8, 9 and 10 shall apply in the case of any other construction contract.

Interpretation

12. In this Part of the Scheme for Construction Contracts -

“claim by the payee” means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

“contract price” means the entire sum payable under the construction contract in respect of the work;

“relevant construction contract” means any construction contract other than one -

- (a) which specifies that the duration of the work is to be less than 45 days, or
- (b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

“relevant period” means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

“value of work” means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such

provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

“work” means any of the work or services mentioned in section 104 of the Act.

EXPLANATORY NOTE

(This note is not part of the Order)

Part II of the Housing Grants, Construction and Regeneration Act 1996 makes provision in relation to construction contracts. Section 114 empowers the Secretary of State to make the Scheme for Construction Contracts. Where a construction contract does not comply with the requirements of sections 108 to 111 (adjudication of disputes and payment provisions), and section 113 (prohibition of conditional payment provisions), the relevant provisions of the Scheme for Construction Contracts have effect.

The Scheme which is contained in the Schedule to these Regulations is in two parts. Part I provides for the selection and appointment of an adjudicator, gives powers to the adjudicator to gather and consider information, and makes provisions in respect of his decisions. Part II makes provision with respect to payments under a construction contract where either the contract fails to make provision or the parties fail to agree -

- (a) the method for calculating the amount of any instalment, stage or periodic payment,
- (b) the due date and the final date for payments to be made, and
- (c) prescribes the period within which a notice of intention to withhold payment must be given.

APPENDIX 4

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

1999 CHAPTER 31

1 Right of third party to enforce contractual term

- (1) Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if—
 - (a) the contract expressly provides that he may, or
 - (b) subject to subsection (2), the term purports to confer a benefit on him.
- (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
- (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
- (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.
- (5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).
- (6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.
- (7) In this Act, in relation to a term of a contract which is enforceable by a third party—
 - “the promisor” means the party to the contract against whom the term is enforceable by the third party, and
 - “the promisee” means the party to the contract by whom the term is enforceable against the promisor.

2 Variation and rescission of contract

- (1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement,

rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if—

- (a) the third party has communicated his assent to the term to the promisor,
 - (b) the promisor is aware that the third party has relied on the term, or
 - (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.
- (2) The assent referred to in subsection (1)(a)—
- (a) may be by words or conduct, and
 - (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.
- (3) Subsection (1) is subject to any express term of the contract under which—
- (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or
 - (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).
- (4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied—
- (a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or
 - (b) that he is mentally incapable of giving his consent.
- (5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.
- (6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.
- (7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by both the High Court and a county court.

3 Defences etc. available to promisor

- (1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.
- (2) The promisor shall have available to him by way of defence or set-off any matter that—
 - (a) arises from or in connection with the contract and is relevant to the term, and
 - (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

- (3) The promisor shall also have available to him by way of defence or set-off any matter if—
 - (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and
 - (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
- (4) The promisor shall also have available to him—
 - (a) by way of defence or set-off any matter, and
 - (b) by way of counterclaim any matter not arising from the contract,

that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

- (5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.
- (6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

4 Enforcement of contract by promisee

Section 1 does not affect any right of the promisee to enforce any term of the contract.

5 Protection of promisor from double liability

Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of—

- (a) the third party's loss in respect of the term, or
- (b) the expense to the promisee of making good to the third party the default of the promisor,

then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

6 Exceptions

- (1) Section 1 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.
- (2) Section 1 confers no rights on a third party in the case of any contract binding on a company and its members under section 14 of the [1985 c. 6.] Companies Act 1985.

- (3) Section 1 confers no right on a third party to enforce—
 - (a) any term of a contract of employment against an employee,
 - (b) any term of a worker’s contract against a worker (including a home worker), or
 - (c) any term of a relevant contract against an agency worker.
- (4) In subsection (3)—
 - (a) “contract of employment”, “employee”, “worker’s contract”, and “worker” have the meaning given by section 54 of the [1998 c. 39.] National Minimum Wage Act 1998,
 - (b) “home worker” has the meaning given by section 35(2) of that Act,
 - (c) “agency worker” has the same meaning as in section 34(1) of that Act, and
 - (d) “relevant contract” means a contract entered into, in a case where section 34 of that Act applies, by the agency worker as respects work falling within subsection (1)(a) of that section.
- (5) Section 1 confers no rights on a third party in the case of—
 - (a) a contract for the carriage of goods by sea, or
 - (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention,

except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

- (6) In subsection (5) “contract for the carriage of goods by sea” means a contract of carriage—
 - (a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction, or
 - (b) under or for the purposes of which there is given an undertaking which is contained in a ship’s delivery order or a corresponding electronic transaction.
- (7) For the purposes of subsection (6)—
 - (a) “bill of lading”, “sea waybill” and “ship’s delivery order” have the same meaning as in the [1992 c. 50.] Carriage of Goods by Sea Act 1992, and
 - (b) a corresponding electronic transaction is a transaction within section 1(5) of that Act which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship’s delivery order.
- (8) In subsection (5) “the appropriate international transport convention” means—
 - (a) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under section 1 of the [1983 c. 14.] International Transport Conventions Act 1983,
 - (b) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under section 1 of the [1965 c. 37.] Carriage of Goods by Road Act 1965, and
 - (c) in relation to a contract for the carriage of cargo by air—
 - (i) the Convention which has the force of law in the United Kingdom under section 1 of the [1961 c. 27.] Carriage by Air Act 1961, or

- (ii) the Convention which has the force of law under section 1 of the [1962 c. 43.] Carriage by Air (Supplementary Provisions) Act 1962, or
- (iii) either of the amended Conventions set out in Part B of Schedule 2 or 3 to the [S.I. 1967/480.] Carriage by Air Acts (Application of Provisions) Order 1967.

7 Supplementary provisions relating to third party

- (1) Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.
- (2) Section 2(2) of the [1977 c. 50.] Unfair Contract Terms Act 1977 (restriction on exclusion etc. of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on section 1.
- (3) In sections 5 and 8 of the [1980 c. 58.] Limitation Act 1980 the references to an action founded on a simple contract and an action upon a specialty shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a specialty.
- (4) A third party shall not, by virtue of section 1(5) or 3(4) or (6), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act).

8 Arbitration provisions

- (1) Where—
 - (a) a right under section 1 to enforce a term (“the substantive term”) is subject to a term providing for the submission of disputes to arbitration (“the arbitration agreement”), and
 - (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the [1996 c. 23.] Arbitration Act 1996,

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

- (2) Where—
 - (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration (“the arbitration agreement”),
 - (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and
 - (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

9 Northern Ireland

- (1) In its application to Northern Ireland, this Act has effect with the modifications specified in subsections (2) and (3).
- (2) In section 6(2), for “section 14 of the [1985 c. 6.] Companies Act 1985” there is substituted “Article 25 of the [S.I. 1986/1032 (N.I. 6).] Companies (Northern Ireland) Order 1986”.
- (3) In section 7, for subsection (3) there is substituted—

“(3) In Articles 4(a) and 15 of the [S.I. 1989/1339 (N.I. 11).] Limitation (Northern Ireland) Order 1989, the references to an action founded on a simple contract and an action upon an instrument under seal shall respectively include references to an action brought in reliance on section 1 relating to a simple contract and an action brought in reliance on that section relating to a contract under seal.”.
- (4) In the [1964 c. 23 (N.I.).] Law Reform (Husband and Wife) (Northern Ireland) Act 1964, the following provisions are hereby repealed—
 - (a) section 5, and
 - (b) in section 6, in subsection (1)(a), the words “in the case of section 4” and “and in the case of section 5 the contracting party” and, in subsection (3), the words “or section 5”.

10 Short title, commencement and extent

- (1) This Act may be cited as the Contracts (Rights of Third Parties) Act 1999.
- (2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day.
- (3) The restriction in subsection (2) does not apply in relation to a contract which—
 - (a) is entered into on or after the day on which this Act is passed, and
 - (b) expressly provides for the application of this Act.
- (4) This Act extends as follows—
 - (a) section 9 extends to Northern Ireland only;
 - (b) the remaining provisions extend to England and Wales and Northern Ireland only.

APPENDIX 5

DISPUTE BOARD PROVISIONS UNDER THE FIDIC RED BOOK 1999

FIDIC (RED BOOK)¹

Conditions of Contract For Construction

Sub-Clause 20 Claims, Dispute and Arbitration

20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

¹ Note: The information used in this book referring to FIDIC and its various contracts including Appendix 1, 2 & 3 are provided by FIDIC whose address is World Trade Center II, Geneva Airport, Box 311, 29 route de Prés-Bois, CH-1215 Geneva 15 where full copies are available. Their use herein is by permission of FIDIC

- (c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

20.2 Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [Discharge] shall have become effective.

20.3 Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board],
- (b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive.

Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding

on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication

Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be

commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.7 Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 Expiry of Dispute Adjudication Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

FIDIC (RED BOOK)

Appendix

General Conditions of Dispute Adjudication Agreement

1 Definitions

Each "Dispute Adjudication Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor"; and
- (c) the "Member" who is defined in the Dispute Adjudication Agreement as being:
 - (i) the sole member of the "DAB" (or "adjudicator") and, where this is the case, all references to the "Other Members" do not apply, or
 - (ii) one of the three persons who are jointly called the "DAB" (or "dispute adjudication board") and, where this is the case, the other two persons are called the "Other Members".

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Adjudication Agreement, which incorporates this Appendix. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2 General Provisions

Unless otherwise stated in the Dispute Adjudication Agreement, it shall take effect on the latest of the following dates:

- (a) the Commencement Date defined in the Contract,
- (b) when the Employer, the Contractor and the Member have each signed the Dispute Adjudication Agreement, or
- (c) when the Employer, the Contractor and each of the Other Members (if any) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days' notice of resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any).

3 Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract,
- (b) experienced in the interpretation of contract documentation, and
- (c) fluent in the language for communications defined in the Contract.

4 General Obligations of the Member

The Member shall:

- (a) have no interest financial or otherwise in the Employer, the Contractor or the Engineer, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;

- (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);
- (e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) not while a Member enter into discussions or make any agreement with the Employer, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) ensure his/her availability for all site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any); and
- (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

5 General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, and except to the extent that prior agreement is given by the Employer, the Contractor and the Other Members (if any). The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.

Whenever the Employer or the Contractor refers a dispute to the DAB under Sub-Clause 20.4 of the Conditions of Contract, which will require the Member to make a site visit and attend a

hearing, the Employer or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

6 Payment

The Member shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

- (a) a retainer fee per calendar month, which shall be considered as payment in full for:
 - (i) being available on 28 days' notice for all site visits and hearings;
 - (ii) becoming and remaining conversant with all project developments and maintaining relevant files;
 - (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
 - (iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Adjudication Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by 50%. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Adjudication Agreement is otherwise terminated.

- (b) a daily fee which shall be considered as payment in full for:
 - (i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);
 - (ii) each working day on site visits, hearings or preparing decisions; and
 - (iii) each day spent reading submissions in preparation for a hearing.
- (c) all reasonable expenses incurred in connection with the Member's duties, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause;
- (d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Adjudication Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date on which the Dispute Adjudication Agreement became effective.

The Member shall submit invoices for payment of the monthly retainer and airfares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract)

for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DAB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.8 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

7 Termination

At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Adjudication Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Adjudication Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Adjudication Agreement, the Member may, without prejudice to his/her other rights, terminate it by notice to the Employer and the Contractor. The notice shall take effect when received by them both.

Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Member. However, a notice by the Employer or the Contractor, but not by both, shall be of no effect.

8 Default of the Member

If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB which are rendered void or ineffective.

9 Disputes

Any dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

FIDIC (Red Book) General Conditions Annex Procedural Rules

- 1 Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise

agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.

- 2 The timing of and agenda for each site visit shall be as agreed jointly by the DAB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DAB. The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.
- 3 Site visits shall be attended by the Employer, the Contractor and the Engineer and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the DAB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.
- 4 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the DAB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
- 5 If any dispute is referred to the DAB in accordance with Sub-Clause 20.4 of the Conditions of Contract, the DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:
 - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and
 - (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
- 6 The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.
- 7 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
- 8 The Employer and the Contractor empower the DAB, among other things, to:
 - (a) establish the procedure to be applied in deciding a dispute,
 - (b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it,
 - (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
 - (d) take the initiative in ascertaining the facts and matters required for a decision,

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- (e) make use of its own specialist knowledge, if any,
 - (f) decide upon the payment of financing charges in accordance with the Contract,
 - (g) decide upon any provisional relief such as interim or conservatory measures, and
 - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.
- 9 The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:
- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
 - (b) it shall endeavour to reach a unanimous decision: if this proves impossible, the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
 - (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
 - (i) either the Employer or the Contractor does not agree that they do so, or
 - (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision.

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APPENDIX 5A

DISPUTE BOARD PROVISIONS UNDER THE FIDIC RED BOOK

FIDIC RED BOOK 2017 EDITION

CLAUSE 20

EMPLOYER'S AND CONTRACTOR'S CLAIMS

20.1 Claims

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Engineer) except to the extent that it involves any entitlement referred to in sub-paragraphs (a) and/or (b) above.

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [*Claims For Payment and/or EOT*] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party or the Engineer has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Engineer and Sub-Clause 3.7 [Agreement or Determination] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and include details of the claiming Party's case and the other Party's or the Engineer's disagreement (or deemed disagreement).

20.2 Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

20.2.2 Engineer's initial response

If the Engineer considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [Notice of Claim] the Engineer shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause and disagrees with the Engineer or considers there are circumstances which justify late submission of the Notice of Claim, the claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed claim] details of such disagreement or why such late submission is justified (as the case may be).

20.2.3 Contemporary records

In this Sub-Clause 20.2, “contemporary records” means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.

The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.

Without admitting the Employer’s liability, the Engineer may monitor the Contractor’s contemporary records and/or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Engineer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Engineer. Such monitoring, inspection or instruction (if any) by the Engineer shall not imply acceptance of the accuracy or completeness of the Contractor’s contemporary records.

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, “fully detailed Claim” means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and
- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim,
- or
- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the Engineer the claiming Party shall submit to the Engineer a fully detailed Claim.

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [Claims of continuing effect] shall apply.

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim either under Sub-Clause 20.2.4 [Fully detailed Claim], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [Claims of continuing effect], the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine:

- (a) the additional payment (if any) to which the claiming Party is entitled or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or
- (b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [Extension of Time for Completion] (in the case of the Contractor as the claiming Party), or the extension (if any) of the DNP (before its expiry) under Sub-Clause 11.3 [Extension of Defects Notification Period] (in the case of the Employer as the claiming Party), to which the claiming Party is entitled under the Contract.

If the Engineer has given a Notice under Sub-Clause 20.2.2 [Engineer's initial response] and/or under Sub-Clause 20.2.4 [Fully detailed Claim], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;

- in the case of the time limit under Sub-Clause 20.2.1 [Notice of Claim], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
- in the case of the time limit under Sub-Clause 20.2.4 [Fully detailed Claim], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.

If, having received the fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed Claim], or in the case of a Claim under Sub-Clause 20.2.6 [Claims of continuing effect] an interim or final fully detailed Claim (as the case may be), the Engineer requires necessary additional particulars:

- (i) he/she shall promptly give a Notice to the claiming Party, describing the additional particulars and the reasons for requiring them;
- (ii) he/she shall nevertheless give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];
- (iii) as soon as practicable after receiving the Notice under sub-paragraph (i) above, the claiming Party shall submit the additional particulars; and
- (iv) the Engineer shall then proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine the matters under sub-paragraphs (a) and/or (b) above (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date the Engineer receives the additional particulars from the claiming Party shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3).

20.2.6 Claims of continuing effect

If the event or circumstance giving rise to a Claim under this Sub-Clause 20.2 has a continuing effect:

- (a) the fully detailed Claim submitted under Sub-Clause 20.2.4 [Fully detailed Claim] shall be considered as interim;
- (b) in respect of this first interim fully detailed Claim, the Engineer shall give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];
- (c) after submitting the first interim fully detailed Claim the claiming Party shall submit further interim fully detailed Claims at monthly intervals, giving the accumulated amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party); and
- (d) the claiming Party shall submit a final fully detailed Claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the claiming Party and agreed by the Engineer. This final fully detailed Claim shall give the total amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party).

20.2.7 General requirements

After receiving the Notice of Claim, and until the Claim is agreed or determined under Sub-Clause 20.2.5 [Agreement or determination of the Claim], in each Payment Certificate the Engineer shall

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include such amounts for any Claim as have been reasonably substantiated as due to the claiming Party under the relevant provision of the Contract.

The Employer shall only be entitled to claim any payment from the Contractor and/or to extend the DNP, or set off against or make any deduction from any amount due to the Contractor, by complying with this Sub-Clause 20.2.

The requirements of this Sub-Clause 20.2 are in addition to those of any other Sub-Clause which may apply to the Claim. If the claiming Party fails to comply with this or any other Sub-Clause in relation to the Claim, any additional payment and/or any EOT (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party), shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the Claim by the Engineer.

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CLAUSE 21
DISPUTES AND ARBITRATION

21.1 Constitution of the DAAB

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [Obtaining DMB's Decision]. The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the "sole member") or three suitably qualified members (the "members"). If the number is not so stated, and the Parties do not agree otherwise, the DAAB shall comprise three members.

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB.

If the DAAB is to comprise three members, each Party shall select one member for the agreement of the other Party. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DMB (including the appointment of each member) shall expire either:

- (a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [Discharge]; or
- (b) 28 days after the DMB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [Obtaining DMB's Decision] before such discharge has become effective, whichever is later.

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DMB (including the appointment of each member) shall expire 28 days after:

- (i) the DMB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [Obtaining DMB's Decision]) within 224 days after the date of termination; or

- (ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination whichever is earlier.

21.2 Failure to Appoint DAAB Member(s)

If any of the following conditions apply, namely:

- (a) if the DMB is to comprise a sole member, the Parties fail to agree the appointment of this member by the date stated in the first paragraph of Sub- Clause 21.1 [Constitution of the DMB]; or
- (b) if the DMB is to comprise three persons, and if by the date stated in the first paragraph of Sub-Clause 21.1 [Constitution of the DMB]:
 - (i) either Party fails to select a member (for agreement by the other Party);
 - (ii) either Party fails to agree a member selected by the other Party; and/or
 - (iii) the Parties fail to agree the appointment of the third member (to act as chairperson) of the DMB;
- (c) the Parties fail to agree the appointment of a replacement within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, illness, disability, resignation, or termination of appointment; or
- (d) if, after the Parties have agreed the appointment of the member(s) or replacement, such appointment cannot be effected because one Party refuses or fails to sign a DMB Agreement with any such member or replacement (as the case may be) within 14 days of the other Party's request to do so,

then the appointing entity or official named in the Contract Data shall, at the request of either or both Parties and after due consultation with both Parties, appoint the member(s) of the DMB (who, in the case of sub-paragraph (d) above, shall be the agreed member(s) or replacement). This appointment shall be final and conclusive.

Thereafter, the Parties and the member(s) so appointed shall be deemed to have signed and be bound by a DAAB Agreement under which:

- (i) the monthly services fee and daily fee shall be as stated in the terms of the appointment; and
- (ii) the law governing the DAAB Agreement shall be the governing law of the Contract defined in Sub-Clause 1.4 [*Law and Language*].

Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official. If the Contractor pays the remuneration in full, the Contractor shall include one-half of the amount of such remuneration in a Statement and the Employer shall then pay the Contractor in accordance with the Contract. If the Employer pays the remuneration in full, the Engineer shall include one-half of the amount of such remuneration as a deduction under sub-paragraph (b) of Sub-Clause 14.6.1 [*The IPC*].

21.3 Avoidance of Disputes

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

21.4 Obtaining DAAB's Decision

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [*Avoidance of Disputes*]) and the following provisions shall apply.

21.4.1 Reference of a Dispute to the DAAB

The reference of a Dispute to the DAAB (the “reference” in this Sub-Clause 21.4) shall:

- (a) if Sub-Clause 3.7 [Agreement or Determination] applied to the subject matter of the Dispute, be made within 42 days of giving or receiving (as the case may be) a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid;
- (b) state that it is given under this Sub-Clause;
- (c) set out the referring Party's case relating to the Dispute;
- (d) be in writing, with copies to the other Party and the Engineer; and
- (e) for a DAAB of three persons, be deemed to have been received by the DAAB on the date it is received by the chairperson of the DAAB.

The reference of a Dispute to the DAAB under this Sub-Clause shall, unless prohibited by law, be deemed to interrupt the running of any applicable statute of limitation or prescription period.

21.4.2 The Parties' obligations after the reference

Both Parties shall promptly make available to the DAAB all information, access to the Site, and appropriate facilities, as the DAAB may require for the purposes of making a decision on the Dispute.

Unless the Contract has already been abandoned or terminated, the Parties shall continue to perform their obligations in accordance with the Contract.

21.4.3 The DAAB's decision

The DAAB shall complete and give its decision within:

- (a) 84 days after receiving the reference; or
- (b) such period as may be proposed by the DAAB and agreed by both Parties.

However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains unpaid, the DAAB shall not be obliged to give its decision

until such outstanding invoice(s) have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

The decision shall be given in writing to both Parties with a copy to the Engineer, shall be reasoned, and shall state that it is given under this Sub- Clause.

The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause. The Employer shall be responsible for the Engineer's compliance with the DAAB decision.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

- (i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and
- (ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s).

21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:

- (a) such Party may give a NOD to the other Party, with a copy to the DAAB and to the Engineer;
- (b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and
- (c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause

21.4.3 [The DMB's decision], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub- paragraphs (a) and (b) above.

Except as stated in the last paragraph of Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], in Sub-Clause 21.7 [Failure to Comply with DMB's Decision] and in Sub-Clause 21.8 [No DMB In Place], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

- (i) this part(s) shall be clearly identified in the NOD;
- (ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and
- (iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.

21.5 Amicable Settlement

Where a NOD has been given under Sub-Clause 21.4 [Obtaining DMB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

21.6 Arbitration

Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DMB's decision], Sub-Clause 21.7 [Failure to Comply with DMB's Decision] and Sub-Clause 21.8 [No DMB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and
- (c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DAAB under Sub-Clause 21.1 [Constitution of the DMB] and/or Sub-Clause 21.2 [Failure to Appoint DMB Member(s)].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DMB's Decision]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties, the Engineer and the DAAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any further certification or Notice.

21.7 Failure to Comply with DAAB's Decision

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DMB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

21.8 No DAAB In Place

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

- (a) Sub-Clause 21.4 [Obtaining DMB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply; and
- (b) the Dispute may be referred by either Party directly to arbitration under Sub- Clause 21.6 [Arbitration] without prejudice to any other rights the Party may have.

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APPENDIX 6

DISPUTE BOARD PROVISIONS UNDER THE FIDIC YELLOW BOOK 1999

FIDIC (YELLOW BOOK)

Conditions of Contract for Plant & Design-Build

Sub-Clause 20 Claims, Dispute and Arbitration

20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
- (c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the

Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

20.2 Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties,

the appointment of the DAB (including each member) shall expire when the DAB has given its decision on the dispute referred to it under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which event the relevant date shall be when the DAB has also given decisions on those disputes.

20.3 Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board],
- (b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive.

Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board], either Party may refer the dispute in writing to the DAB for its decision, with a copy to the other Party. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the Dispute Adjudication Board may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference or the advance payment referred to in Clause 6 of Appendix – General Conditions of Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. However, if neither of the Parties has paid in full the invoices submitted by each Member pursuant to Clause 6 of the Appendix – General Conditions of Dispute Adjudication Agreement, the DAB shall not be obliged to give its decision until such invoices have been paid in full. The decision shall be

binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference or such payment, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.7 Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 Expiry of Dispute Adjudication Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

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Appendix – Plant & Design-Build

General Conditions of Dispute Adjudication Agreement

1 Definitions

Each "Dispute Adjudication Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor"; and
- (c) the "Member" who is defined in the Dispute Adjudication Agreement as being:
 - (i) the sole member of the "DAB" (or "adjudicator") and, where this is the case, all references to the "Other Members" do not apply, or
 - (ii) one of the three persons who are jointly called the "DAB" (or "dispute adjudication board") and, where this is the case, the other two persons are called the "Other Members".

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Adjudication Agreement, which incorporates this Appendix. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2 General Provisions

The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication

Agreement, it shall be void and ineffective.

This employment of the Member is a personal appointment. No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any).

3 Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract,
- (b) experienced in the interpretation of contract documentation, and
- (c) fluent in the language for communications defined in the Contract.

4 General Obligations of the Member

The Member shall:

- (a) have no interest financial or otherwise in the Employer, the Contractor or the Engineer, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Engineer, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);
- (e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;

- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) not while a Member enter into discussions or make any agreement with the Employer, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) ensure his/her availability for any site visit and hearings as are necessary; and
- (i) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any).

5 General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, and except to the extent that prior agreement is given by the Employer, the Contractor and the Other Members (if any). The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.

6 Payment

The Member shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

- (a) a daily fee which shall be considered as payment in full for:
 - (i) each working day spent reading submissions of the parties, attending hearings (if any), preparing decisions, or making Site visits (if any); and
 - (ii) each day or part of a day up to a maximum of two days' travel time in each direction for the journey (if any) between the Member's home and the Site, or another location of a meeting (if any) with the Other Members and/or the Employer and the Contractor;

- (b) all reasonable expenses incurred in connection with the Member's duties, including the cost of secretarial services, telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (a) of this Clause; and
- (c) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The daily fee shall be as specified in the Dispute Adjudication Agreement.

Immediately after the Dispute Adjudication Agreement takes effect, the Member shall, before engaging in any activities under the Dispute Adjudication Agreement, submit to the Contractor, with a copy to the Employer, an invoice for (a) an advance of twenty-five (25) percent of the estimated total amount of daily fees to which he/she will be entitled and (b) an advance equal to the estimated total expenses that he/she will incur in connection with his/her duties. Payment of such invoice shall be made by the Contractor upon receipt of the invoice. The Member shall not be obliged to engage in any activities under the Dispute Adjudication Agreement until each of the Members has been paid in full for invoices submitted under this paragraph.

Thereafter the Member shall submit to the Contractor, with a copy to the Employer, invoices for the balance of his/her daily fees and expenses, less the amounts advanced to him/her. The DAB shall not be obliged to render its decision until invoices for all daily fees and expenses of each Member for making a decision shall have been paid in full.

Unless paid earlier in accordance with the above, the Contractor shall pay each of the Member's invoices in full within 28 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DAB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.8 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 28 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice to the Employer and the Contractor. The notice shall take effect when received by them both. Any such notice shall be final and binding on the Employer, the Contractor and the Member.

7 Default of the Member

If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB which are rendered void or ineffective.

8 Disputes

Any dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

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Conditions of Contract for Plant and Design-Build

Annex Procedural Rules

- 1 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the matter in dispute. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the Dispute Adjudication Board comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
- 2 The DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:
 - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and
 - (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
- 3 The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.
- 4 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
- 5 The Employer and the Contractor empower the DAB, among other things, to:
 - (a) establish the procedure to be applied in deciding a dispute,
 - (b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it,
 - (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
 - (d) take the initiative in ascertaining the facts and matters required for a decision,
 - (e) make use of its own specialist knowledge, if any,
 - (f) decide upon the payment of financing charges in accordance with the Contract,
 - (g) decide upon any provisional relief such as interim or conservatory measures, and
 - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.
- 6 The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:
 - (a) it shall convene in private after a hearing, if any, in order to have discussions and prepare its decision;

THE LAW OF CONSTRUCTION DISPUTES

- (b) it shall endeavour to reach a unanimous decision: if this proves impossible, the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
- (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
 - (i) either the Employer or the Contractor does not agree that they do so, or
 - (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision.

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APPENDIX 6A

DISPUTE BOARD PROVISIONS UNDER THE FIDIC YELLOW BOOK

FIDIC YELLOW BOOK 2017 EDITION

CLAUSE 20

EMPLOYER'S AND CONTRACTOR'S CLAIMS

20.1 Claims

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Engineer) except to the extent that it involves any entitlement referred to in sub-paragraphs (a) and/or (b) above.

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [*Claims For Payment and/or EOT*] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party or the Engineer has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Engineer and Sub-Clause 3.7 [Agreement or Determination] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and shall include details of the claiming Party's case and the other Party's or the Engineer's disagreement (or deemed disagreement).

20.2 Claims For Payment and/or EOT

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as

practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the “Notice of Claim” in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

20.2.2 Engineer’s initial response

If the Engineer considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [Notice of Claim] the Engineer shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause and disagrees with the Engineer or considers there are circumstances which justify late submission of the Notice of Claim, the claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed claim] details of such disagreement or why such late submission is justified (as the case may be).

20.2.3 Contemporary records

In this Sub-Clause 20.2, “contemporary records” means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.

The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.

Without admitting the Employer’s liability, the Engineer may monitor the Contractor’s contemporary records and/or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Engineer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Engineer. Such monitoring, inspection or instruction (if any) by the Engineer shall not imply acceptance of the accuracy or completeness of the Contractor’s contemporary records.

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, “fully detailed Claim” means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and

- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim,

or

- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the Engineer the claiming Party shall submit to the Engineer a fully detailed Claim.

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [Claims of continuing effect] shall apply.

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim either under Sub-Clause 20.2.4 [Fully detailed Claim], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [Claims of continuing effect], the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine:

- (a) the additional payment (if any) to which the claiming Party is entitled or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or
- (b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [Extension of Time for Completion] (in the case of the Contractor as the claiming Party), or the extension (if any) of the DNP (before its expiry) under Sub-Clause 11.3 [Extension of Defects Notification Period] (in the case of the Employer as the claiming Party), to which the claiming Party is entitled under the Contract.

If the Engineer has given a Notice under Sub-Clause 20.2.2 [Engineer's initial response] and/or under Sub-Clause 20.2.4 [Fully detailed Claim], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
- in the case of the time limit under Sub-Clause 20.2.1 [Notice of Claim], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
- in the case of the time limit under Sub-Clause 20.2.4 [Fully detailed Claim], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.

If, having received the fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed Claim], or in the case of a Claim under Sub-Clause 20.2.6 [Claims of continuing effect] an interim or final fully detailed Claim (as the case may be), the Engineer requires necessary additional particulars:

- (i) he/she shall promptly give a Notice to the claiming Party, describing the additional particulars and the reasons for requiring them;
- (ii) he/she shall nevertheless give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];
- (iii) as soon as practicable after receiving the Notice under sub-paragraph (i) above, the claiming Party shall submit the additional particulars; and
- (iv) the Engineer shall then proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine the matters under sub-paragraphs (a) and/or (b) above (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date the Engineer receives the additional particulars from the claiming Party shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3).

20.2.6 Claims of continuing effect

If the event or circumstance giving rise to a Claim under this Sub-Clause 20.2 has a continuing effect:

- (a) the fully detailed Claim submitted under Sub-Clause 20.2.4 [Fully detailed Claim] shall be considered as interim;
- (b) in respect of this first interim fully detailed Claim, the Engineer shall give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];
- (c) after submitting the first interim fully detailed Claim the claiming Party shall submit further interim fully detailed Claims at monthly intervals, giving the accumulated amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the

case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party); and

- (d) the claiming Party shall submit a final fully detailed Claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the claiming Party and agreed by the Engineer. This final fully detailed Claim shall give the total amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party).

20.2.7 General requirements

After receiving the Notice of Claim, and until the Claim is agreed or determined under Sub-Clause 20.2.5 [Agreement or determination of the Claim], in each Payment Certificate the Engineer shall include such amounts for any Claim as have been reasonably substantiated as due to the claiming Party under the relevant provision of the Contract.

The Employer shall only be entitled to claim any payment from the Contractor and/or to extend the DNP, or set off against or make any deduction from any amount due to the Contractor, by complying with this Sub-Clause 20.2.

The requirements of this Sub-Clause 20.2 are in addition to those of any other Sub-Clause which may apply to the Claim. If the claiming Party fails to comply with this or any other Sub-Clause in relation to the Claim, any additional payment and/or any EOT (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party), shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the Claim by the Engineer.

FIDIC RED BOOK 2017 EDITION CLAUSE 21 DISPUTES AND ARBITRATION

21.1 Constitution of the DAAB

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [Obtaining DMB's Decision]. The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the “sole member”) or three suitably qualified members (the “members”). If the number is not so stated, and the Parties do not agree otherwise, the DAAB shall comprise three members.

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB.

If the DAAB is to comprise three members, each Party shall select one member for the agreement of the other Party. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DMB (including the appointment of each member) shall expire either:

- (a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [Discharge]; or
- (b) 28 days after the DMB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [Obtaining DMB's Decision] before such discharge has become effective, whichever is later.

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DMB (including the appointment of each member) shall expire 28 days after:

- (i) the DMB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [Obtaining DMB's Decision]) within 224 days after the date of termination; or
- (ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination whichever is earlier.

21.2 Failure to Appoint DAAB Member(s)

If any of the following conditions apply, namely:

- (a) if the DMB is to comprise a sole member, the Parties fail to agree the appointment of this member by the date stated in the first paragraph of Sub-Clause 21.1 [Constitution of the DMB]; or
- (b) if the DMB is to comprise three persons, and if by the date stated in the first paragraph of Sub-Clause 21.1 [Constitution of the DMB]:
 - (i) either Party fails to select a member (for agreement by the other Party);
 - (ii) either Party fails to agree a member selected by the other Party; and/or
 - (iii) the Parties fail to agree the appointment of the third member (to act as chairperson) of the DMB;

- (c) the Parties fail to agree the appointment of a replacement within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, illness, disability, resignation, or termination of appointment; or
- (d) if, after the Parties have agreed the appointment of the member(s) or replacement, such appointment cannot be effected because one Party refuses or fails to sign a DMB Agreement with any such member or replacement (as the case may be) within 14 days of the other Party's request to do so,

then the appointing entity or official named in the Contract Data shall, at the request of either or both Parties and after due consultation with both Parties, appoint the member(s) of the DMB (who, in the case of sub-paragraph (d) above, shall be the agreed member(s) or replacement). This appointment shall be final and conclusive.

Thereafter, the Parties and the member(s) so appointed shall be deemed to have signed and be bound by a DAAB Agreement under which:

- (i) the monthly services fee and daily fee shall be as stated in the terms of the appointment; and
- (ii) the law governing the DAAB Agreement shall be the governing law of the Contract defined in Sub-Clause 1.4 [*Law and Language*].

Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official. If the Contractor pays the remuneration in full, the Contractor shall include one-half of the amount of such remuneration in a Statement and the Employer shall then pay the Contractor in accordance with the Contract. If the Employer pays the remuneration in full, the Engineer shall include one-half of the amount of such remuneration as a deduction under sub-paragraph (b) of Sub-Clause 14.6.1 [*The IPC*].

21.3 Avoidance of Disputes

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

21.4 Obtaining DAAB's Decision

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [*Avoidance of Disputes*]) and the following provisions shall apply.

21.4.1 Reference of a Dispute to the DAAB

The reference of a Dispute to the DAAB (the “reference” in this Sub-Clause 21.4) shall:

- (a) if Sub-Clause 3.7 [*Agreement or Determination*] applied to the subject matter of the Dispute, be made within 42 days of giving or receiving (as the case may be) a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer’s determination*]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid;
- (b) state that it is given under this Sub-Clause;
- (c) set out the referring Party’s case relating to the Dispute;
- (d) be in writing, with copies to the other Party and the Engineer; and
- (e) for a DAAB of three persons, be deemed to have been received by the DAAB on the date it is received by the chairperson of the DAAB.

The reference of a Dispute to the DAAB under this Sub-Clause shall, unless prohibited by law, be deemed to interrupt the running of any applicable statute of limitation or prescription period.

21.4.2 The Parties’ obligations after the reference

Both Parties shall promptly make available to the DAAB all information, access to the Site, and appropriate facilities, as the DAAB may require for the purposes of making a decision on the Dispute.

Unless the Contract has already been abandoned or terminated, the Parties shall continue to perform their obligations in accordance with the Contract.

21.4.3 The DAAB’s decision

The DAAB shall complete and give its decision within:

- (a) 84 days after receiving the reference; or
- (b) such period as may be proposed by the DAAB and agreed by both Parties.

However, if at the end of this period, the due date(s) for payment of any DAAB member’s invoice(s) has passed but such invoice(s) remains unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

The decision shall be given in writing to both Parties with a copy to the Engineer, shall be reasoned, and shall state that it is given under this Sub- Clause.

The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause. The Employer shall be responsible for the Engineer’s compliance with the DAAB decision.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

- (i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and

- (ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s).

21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:

- (a) such Party may give a NOD to the other Party, with a copy to the DAAB and to the Engineer;
- (b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and
- (c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [The DMB's decision], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub- paragraphs (a) and (b) above.

Except as stated in the last paragraph of Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], in Sub-Clause 21.7 [Failure to Comply with DMB's Decision] and in Sub-Clause 21.8 [No DMB In Place], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

- (i) this part(s) shall be clearly identified in the NOD;
- (ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and
- (iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.

21.5 Amicable Settlement

Where a NOD has been given under Sub-Clause 21.4 [Obtaining DMB's Decision], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

21.6 Arbitration

Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DMB's decision], Sub-Clause 21.7 [Failure to Comply with DMB's Decision] and Sub-Clause 21.8 [No DMB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and
- (c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DAAB under Sub-Clause 21.1 [Constitution of the DMB] and/or Sub-Clause 21.2 [Failure to Appoint DMB Member(s)].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DMB's Decision]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties, the Engineer and the DAAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any further certification or Notice.

21.7 Failure to Comply with DAAB's Decision

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DMB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

21.8 No DAAB In Place

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

- (a) Sub-Clause 21.4 [Obtaining DMB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply; and
- (b) the Dispute may be referred by either Party directly to arbitration under Sub- Clause 21.6 [Arbitration] without prejudice to any other rights the Party may have.

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APPENDIX 7

DISPUTE BOARD PROVISIONS UNDER THE FIDIC SILVER BOOK

FIDIC (SILVER BOOK)

Conditions of Contract for EPC Turnkey Projects

Sub-Clause 20 Claims, Dispute and Arbitration

20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Employer. Without admitting liability, the Employer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer to inspect all these records, and shall (if instructed) submit copies to the Employer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Employer, the Contractor shall send to the Employer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Employer may reasonably require; and
- (c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Employer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Employer and approved by the Contractor, the Employer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each interim payment shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

20.2 Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4.

The DAB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions,

with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the DAB has given its decision on the dispute referred to it under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which event the relevant date shall be when the DAB has also given decisions on those disputes.

20.3 Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board],
- (b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Employer, then after a DAB has been appointed pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Agreement] and 20.3 [Failure to, Agree Dispute Adjudication Board], either Party may refer the dispute in writing to the Dispute Adjudication Board for its decision, with a copy to the other Party. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the Dispute Adjudication Board may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference or the advance payment referred to in Clause 6 of the Appendix – General Conditions of Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. However, if neither of the Parties has paid in full the invoices submitted by each member pursuant to Clause 6 of the Appendix – General Conditions of Dispute Adjudication Agreement, the DAB shall not be obliged to give its decision until such invoices have been paid

in full. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference or such payment, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) the Employer, and any decision of the DAB, relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.7 Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

20.8 Expiry of Dispute Adjudication Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

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Appendix – EPC Turnkey Projects

General Conditions of Dispute Adjudication Agreement

1 Definitions

Each "Dispute Adjudication Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor"; and
- (c) the "Member" who is defined in the Dispute Adjudication Agreement as being:
 - (i) the sole member of the "DAB" (or "adjudicator") and, where this is the case, all references to the "Other Members" do not apply,

or

- (ii) one of the three persons who are jointly called the "DAB" (or "dispute adjudication board") and, where this is the case, the other two persons are called the "Other Members".

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the “Contract” and is defined in the Dispute Adjudication Agreement, which incorporates this Appendix. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2 General Provisions

The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective.

This employment of the Member is a personal appointment. No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any).

3 Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Employer’s Representative. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member’s representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract,
- (b) experienced in the interpretation of contract documentation, and
- (c) fluent in the language for communications defined in the Contract.

4 General Obligations of the Member

The Member shall:

- (a) have no interest financial or otherwise in the Employer or the Contractor, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer or the Contractor, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer or the Contractor, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer or the Contractor, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);

- (e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) not while a Member enter into discussions or make any agreement with the Employer or the Contractor regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication

Agreement;

- (h) ensure his/her availability for any site visit and hearings as are necessary; and
- (i) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any)

5 General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, and except to the extent that prior agreement is given by the Employer, the Contractor and the Other Members (if any). The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or
- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.

6 Payment

The Member shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

- (a) a daily fee which shall be considered as payment in full for:
 - (i) each working day spent reading submissions of the parties, attending hearings (if any), preparing decisions, or making site visits (if any); and
 - (ii) each day or part of a day up to a maximum of two days' travel time in each direction for the journey (if any) between the Member's home and the site,

or another location of a meeting (if any) with the Other Members and/or the Employer and the Contractor;

- (b) all reasonable expenses incurred in connection with the Member's duties, including the cost of secretarial services, telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (a) of this Clause; and
- (c) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The daily fee shall be as specified in the Dispute Adjudication Agreement.

Immediately after the Dispute Adjudication Agreement takes effect, the Member shall, before engaging in any activities under the Dispute Adjudication Agreement, submit to the Contractor, with a copy to the Employer, an invoice for (a) an advance of twenty-five (25) percent of the estimated total amount of daily fees to which he/she will be entitled and (b) an advance equal to the estimated total expenses that he/she will incur in connection with his/her duties. Payment of such invoice shall be made by the Contractor upon receipt of the invoice. The Member shall not be obliged to engage in any activities under the Dispute Adjudication Agreement until each of the Members has been paid in full for invoices submitted under this paragraph.

Thereafter the Member shall submit to the Contractor, with a copy to the Employer, invoices for the balance of his/her daily fees and expenses, less the amounts advanced to him/her. The DAB shall not be obliged to render its decision until invoices for all daily fees and expenses of each Member for making a decision shall have been paid in full.

Unless paid earlier in accordance with the above, the Contractor shall pay each of the Member's invoices in full within 28 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DAB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.8 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 28 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice to the Employer and the Contractor. The notice shall take effect when received by them both. Any such notice shall be final and binding on the Employer, the Contractor and the Member.

7 Default of the Member

If the Member fails to comply with any obligation under Clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB which are rendered void or ineffective.

8 Disputes

Any dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

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Conditions of Contract for EPC Turnkey Projects

Annex Procedural Rules

- 1 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the matter in dispute. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the Dispute Adjudication Board comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
- 2 The DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:
 - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and
 - (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
- 3 The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.
- 4 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer and the Contractor, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
- 5 The Employer and the Contractor empower the DAB, among other things, to:
 - (a) establish the procedure to be applied in deciding a dispute,
 - (b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it,
 - (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
 - (d) take the initiative in ascertaining the facts and matters required for a decision,
 - (e) make use of its own specialist knowledge, if any,

- (f) decide upon the payment of financing charges in accordance with the Contract,
 - (g) decide upon any provisional relief such as interim or conservatory measures, and
 - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Employer, relevant to the dispute.
- 6 The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:
- (a) it shall convene in private after a hearing, if any, in order to have discussions and prepare its decision;
 - (b) it shall endeavour to reach a unanimous decision: if this proves impossible, the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
 - (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
 - (i) either the Employer or the Contractor does not agree that they do so, or
 - (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision.

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APPENDIX 7A

DISPUTE BOARD PROVISIONS UNDER THE FIDIC YELLOW BOOK

FIDIC YELLOW BOOK 2017 EDITION

CLAUSE 20

EMPLOYER'S AND CONTRACTOR'S CLAIMS

20 Employer's and Contractor's Claims

20.1 Claim

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/ or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Employer) except to the extent that it involves any entitlement referred to in sub-paragraphs(a) and/or (b) above.

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [*Claims For Payment and/or EOT*] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Employer's Representative and Sub-Clause 3.5 [*Agreement or Determination*] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and shall include details of the claiming Party's case and the other Party's disagreement (or deemed disagreement).

20.2 Claims For Payment

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the other Party, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

20.2.2 Initial response

If the other Party considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [*Notice of Claim*] the other Party shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the other Party does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice.

If the claiming Party receives a Notice from the other Party under this Sub-Clause and disagrees with the other Party or considers there are circumstances which justify late submission of the Notice of Claim, the claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed claim*] details of such disagreement or why such late submission is justified (as the case may be).

20.2.3 Contemporary records

In this Sub-Clause 20.2, “contemporary records” means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.

The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.

Without admitting the Employer’s liability, the Employer may monitor the Contractor’s contemporary records and/ or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Employer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Employer. Such monitoring, inspection or instruction (if any) by the Employer shall not imply acceptance of the accuracy or completeness of the Contractor’s contemporary records.

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, “fully detailed Claim” means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and
- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed On the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim, or
- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the other Party

the claiming Party shall submit to the Employer's Representative a fully detailed Claim.

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Employer's Representative shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Employer's Representative does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Employer's Representative which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*] shall include a review by the Employer's Representative of such disagreement.

If the claiming Party receives a Notice from the other Party under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [*Claims of continuing effect*] shall apply.

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed Claim*], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [*Claims of continuing effect*], the Employer's Representative shall proceed under Sub-Clause 3.5 [*Agreement or Determination*] to agree or determine:

- (a) the additional payment (if any) to which the claiming Party is entitled (or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or
- (b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [*Extension of Time for Completion*] On the case of the Contractor as the claiming Party), or the extension Of any) of the DNP (before its expiry) under Sub-Clause 11.3 [*Extension of Defects Notification Period*] (in the case of the Employer as the claiming Party),

to which the claiming Party is entitled under the Contract.

If a Notice is given under Sub-Clause 20.2.2 [*Initial response*] and/or under Sub-Clause 20.2.4 [*Fully detailed Claim*], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
- in the case of the time limit under Sub-Clause 20.2. 1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or

- in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.

If, having received the fully detailed Claim under Sub-Clause 20.2.4 [*Fully detailed Claim*], or in the case of a Claim under Sub-Clause 20.2.6 [*Claims of continuing effect*] an interim or final fully detailed Claim (as the case may be), the Employer's Representative requires necessary additional particulars:

- he/she shall promptly give a Notice to the Contractor, describing the additional particulars and the reasons for requiring them;
- he/she shall nevertheless give his/her response on the contractual or other basis of the Claim, by giving a Notice to the Contractor, within the time limit for agreement under Sub-Clause 3.5.3 [*Time limits*];
- as soon as practicable after receiving the Notice under sub-paragraph (i) above, the Contractor shall submit the additional particulars; and
- the Employer's Representative shall then proceed under Sub-Clause 3.5 [*Agreement or Determination*] to agree or determine the matters under sub-paragraphs (a) and/or (b) above (and, for the purpose of Sub-Clause 3.5.3 [*Time limits*], the date the Employer's Representative receives the additional particulars from the Contractor shall be the date of commencement of the time limit for agreement under Sub-Clause 3.5.3).

20.2.6 Claims of continuing effect

If the event or circumstance giving rise to a Claim under this Sub-Clause 20.2 has a continuing effect:

- the fully detailed Claim submitted under Sub-Clause 20.2.4 [*Fully detailed Claim*] shall be considered as interim;
- in respect of this first interim fully detailed Claim, the Employer's Representative shall give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.5.3 [*Time limits*];
- after submitting the first interim fully detailed Claim the claiming Party shall submit further interim fully detailed Claims at monthly intervals, giving the accumulated amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party); and
- the claiming Party shall submit a final fully detailed Claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the claiming Party and agreed by the other Party. This final fully detailed Claim shall give the total amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party).

20.2.7 General requirements

After receiving the Notice of Claim, and until the Claim is agreed or determined under Sub-Clause 20.2.5 [*Agreement or determination of the Claim*], in each payment under Sub-Clause 14.7

[*Payment*] the Employer shall include such amounts for any Claim as have been reasonably substantiated as due to the claiming Party under the relevant provision of the Contract.

The Employer shall only be entitled to claim any payment from the Contractor and/or to extend the DNP, or set off against or make any deduction from any amount due to the Contractor, by complying with this Sub-Clause 20.2.

The requirements of this Sub-Clause 20.2 are in addition to those of any other Sub-Clause which may apply to the Claim. If the claiming Party fails to comply with this or any other Sub-Clause in relation to the Claim, any additional payment and/or any EOT (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party), shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the Claim by the Employer's Representative.

21 Disputes and Arbitration

21.1 Constitution of the DAAB

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [*Obtaining DMB's Decision*] The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date that both Parties have signed the Contract Agreement.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the "sole member") or three suitably qualified members (the "members"). If the number is not so stated, and the Parties do not agree otherwise, the DAAB shall comprise three members.

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB.

If the DAAB is to comprise three members, each Party shall select one member for the agreement of the other Party. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DAAB (including the appointment of each member) shall expire either:

- (a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [*Discharge*]; or

(b) 28 days after the DAAB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [*Obtaining DM B's Decision*] before such discharge has become effective, whichever is later.

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DAAB (including the appointment of each member) shall expire 28 days after:

- (i) the DAAB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [*Obtaining DMB's Decision*]) within 224 days after the date of termination; or
- (ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination

whichever is earlier.

21.2 Failure to Appoint DAAB Member(s)

If any of the following conditions apply, namely:

- (a) if the DAAB is to comprise a sole member, the Parties fail to agree the appointment of this member by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the OMB*]; or
- (b) if the DAAB is to comprise three persons, and if by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the OMB*]:
 - (i) either Party fails to select a member (for agreement by the other Party);
 - (ii) either Party fails to agree a member selected by the other Party; and/or
 - (iii) the Parties fail to agree the appointment of the third member (to act as chairperson) of the DAAB;
- (c) the Parties fail to agree the appointment of a replacement within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, illness, disability, resignation, or termination of appointment; or
- (d) if, after the Parties have agreed the appointment of the member(s) or replacement, such appointment cannot be effected because one Party refuses or fails to sign a DAAB Agreement with any such member or replacement (as the case may be) within 14 days of the other Party's request to do so,

then the appointing entity or official named in the Contract Data shall, at the request of either or both Parties and after due consultation with both Parties, appoint the member(s) of the DAAB (who, in the case of sub-paragraph(d) above, shall be the agreed member(s) or replacement). This appointment shall be final and conclusive.

Thereafter, the Parties and the member(s) so appointed shall be deemed to have signed and be bound by a DAAB Agreement under which:

- (i) the monthly services fee and daily fee shall be as stated in the terms of the appointment; and
- (ii) the law governing the DAAB Agreement shall be the governing law of the Contract defined in Sub-Clause 1.4 [*Law and Language*].

Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official. If the Contractor pays the remuneration in full, the Contractor shall include

one-half of the amount of such remuneration in a Statement and the Employer shall then pay the Contractor in accordance with the Contract. If the Employer pays the remuneration in full, the Employer shall include one-half of the amount of such remuneration as a deduction under sub-paragraph (b) of Sub-Clause 14.6.1 [*Notice of Interim Payment*].

21.3 *Avoidance of Disputes*

If the Parties so agree, they may jointly request (in writing) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Employer's Representative is carrying out his/her duties under Sub-Clause

3.5 [*Agreement or Determination*] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

21.4 *Obtaining DAAB's Decision*

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [*Avoidance of Disputes*]) and the following provisions shall apply.

21.4.1 Reference of a Dispute to the DAAB

The reference of a Dispute to the DAAB (the "reference" in this Sub-Clause 21.4) shall:

- (a) if Sub-Clause 3.5 [*Agreement or Determination*] applied to the subject matter of the Dispute, be made within 42 days of the date of the relevant NOD under Sub-Clause 3.5.5 [*Dissatisfaction with Employer's Representative's determination*]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid;
- (b) state that it is given under this Sub-Clause;
- (c) set out the referring Party's case relating to the Dispute;
- (d) be in writing, with a copy to the other Party; and
- (e) for a DAAB of three persons, be deemed to have been received by the DAAB on the date it is received by the chairperson of the DAAB.

The reference of a Dispute to the DAAB under this Sub-Clause shall, unless prohibited by law, be deemed to interrupt the running of any applicable statute of limitation or prescription period.

21.4.2 The Parties' obligations after the reference

Both Parties shall promptly make available to the DAAB all information, access to the Site, and appropriate facilities, as the DAAB may require for the purposes of making a decision on the Dispute.

Unless the Contract has already been abandoned or terminated, the Parties shall continue to perform their obligations in accordance with the Contract.

21.4.3 The DAAB's decision

The DAAB shall complete and give its decision within:

- (a) 84 days after receiving the reference; or
- (b) such period as may be proposed by the DAAB and agreed by both Parties.

However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains/remains unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) has/have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

The decision shall be given in writing to both Parties, shall be reasoned, and shall state that it is given under this Sub-Clause.

The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

- (i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any Statement or Notice; and
- (ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [*Arbitration*], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s).

21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:

- (a) such Party may give a NOD to the other Party, with a copy to the DAAB;
- (b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and
- (c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [*The DMB's decision*], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub-paragraphs (a) and (b) above.

Except as stated in the last paragraph of Sub-Clause 3.5.5 [*Dissatisfaction with Employer's Representative's determination*], in Sub-Clause 21.7 [*Failure to Comply with DMB's Decision*] and in Sub-Clause 21.8 (No *DMB In Place*), neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DMB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DMB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DM B's decision:

- (i) this part(s) shall be clearly identified in the NOD;
- (ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and
- (iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.

21.5 Amicable Settlement

Where a NOD has been given under Sub-Clause 21.4 [*Obtaining DMB's Decision*], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.

21.6 Arbitration

Unless settled amicably, and subject to Sub-Clause 3.5.5 [*Dissatisfaction with Employer's Representative's determination*], Sub-Clause 21.4.4

[*Dissatisfaction with DM B's decision*], Sub-Clause 21.7 [*Failure to Comply with DMB's Decision*] and Sub-Clause 21.8 [*No DMB In Place*], any Dispute in respect of which the DMB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and
- (c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [*Law and Language*].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Employer and/or of the Employer's Representative, and any decision of the DMB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the natural person(s) who has/have acted on behalf of the Employer under the Contract from being called as witness(es) and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DMB under Sub-Clause 21.1 [*Constitution of the DMB*] and/or Sub-Clause 21.2 [*Failure to Appoint DMB Member(s)*].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DMB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [*Obtaining DMB's Decision*]. Any decision of the DMB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties and the DAAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any Statement or Notice.

21.7 Failure to Comply with DAAB's Decision

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [*Arbitration*] in which case Sub-Clause 21.4 [*Obtaining OMB's Decision*] and Sub-Clause 21.5 [*Amicable Settlement*] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [*Arbitration*]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise,) the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

21.8 No DAAB In Place

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

- (a) Sub-Clause 21.4 [*Obtaining OMB's Decision*] and Sub-Clause 21.5 [*Amicable Settlement*] shall not apply; and
- (b) the Dispute may be referred by either Party directly to arbitration under Sub-Clause 21.6 [*Arbitration*] without prejudice to any other rights the Party may have.

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APPENDIX 8

ICC DISPUTE BOARD RULES

DISPUTE BOARD RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE¹

INTRODUCTORY PROVISIONS

Article 1

Scope of the Rules

- 1 Dispute Boards established in accordance with the Dispute Board Rules of the International Chamber of Commerce (the “Rules”) aid the Parties in avoiding or resolving their Disagreements and Disputes. They may assist the Parties (i) in avoiding Disagreements under Article 16, (ii) in resolving Disagreements through informal assistance under Article 17, or (iii) in resolving Disputes by issuing Conclusions under Article 18.
- 2 Dispute Boards are not arbitral tribunals and their Conclusions are not enforceable like arbitral awards. Rather, the Parties contractually agree to be bound by the Conclusions under certain specific conditions set forth herein. In application of the Rules, the International Chamber of Commerce (the “ICC”), through its International Centre for ADR (the “Centre”), which is a separate administrative body within the ICC, can provide administrative services to the Parties. These services include appointing Dispute Board members (“DB Members”), deciding upon challenges against DB Members, determining the fees of DB Members, and reviewing Decisions.

Article 2

Definitions

In the Rules:

- (i) “Contract” means the agreement of the Parties that contains or is subject to provisions for establishing a Dispute Board under the Rules.
- (ii) “Conclusion” means either a Recommendation or a Decision, issued in writing by the Dispute Board, as described in the Rules.
- (iii) “Disagreement” means any difference between the Parties arising out of or in connection with the Contract that has not yet become a Dispute, including Disagreements that are subject to avoidance under Article 16 of the Rules or informal assistance under Article 17 of the Rules.

¹ In force as from 1 October 2015, note that the related Appendixes have been omitted for brevity. As amendments may from time to time be made to the text, readers are referred to the website www.iccdisputeboards.org for the latest version and for more information on this ICC dispute resolution service.

- (iv) “Dispute” means any Disagreement that is formally referred to a Dispute Board for a Conclusion under the terms of the Contract and pursuant to Article 18 of the Rules.
- (v) “Dispute Board” (“DB”) means a Dispute Review Board (“DRB”), a Dispute Adjudication Board (“DAB”) or a Combined Dispute Board (“CDB”), composed of one, three or more DB Members.
- (vi) “Party” means a party to the Contract and includes one or more parties, as appropriate.

Article 3

Agreement to Submit to the Rules

- 1 Unless otherwise agreed, the Parties shall establish the DB at the time of entering into the Contract. The Parties shall specify whether the DB shall be a DRB, a DAB or a CDB.
- 2 The Parties shall cooperate with each other and with the DB in the application of the Rules.

TYPES OF DISPUTE BOARDS

Article 4

Dispute Review Boards (DRBs)

- 1 DRBs may assist the Parties in avoiding Disagreements, in resolving them through informal assistance, and by issuing Conclusions with respect to Disputes upon formal referral. In formal referrals, DRBs render Recommendations with respect to Disputes.
- 2 Upon receipt of a Recommendation, the Parties may comply with it voluntarily but are not required to do so.
- 3 The Parties agree that if no Party has given a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become final and binding on the Parties. The Parties shall comply without delay with a Recommendation that has become final and binding and agree not to contest that Recommendation, unless such agreement is prohibited by applicable law.
- 4 If any Party fails to comply with a Recommendation when required to do so pursuant to this Article 4, the other Party may refer the failure itself, without having to refer it to the DRB first, either to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction. A Party that has failed to comply with a Recommendation, when required to do so, shall not raise any issue as to the merits of the Recommendation as a defence to its failure to comply without delay with the Recommendation.
- 5 Any Party that is dissatisfied with a Recommendation shall, within 30 days of receiving it, give written notice expressing its dissatisfaction to the other Party and the DRB. Such notice may specify the reasons for the Party’s dissatisfaction, in the absence of which the DRB may request the Party to provide the DRB and the other Party with brief reasons for its dissatisfaction.
- 6 If any Party gives such a written notice expressing its dissatisfaction with a Recommendation, or if the DRB does not render its Recommendation within the time limit prescribed in Article 22, or if the DRB is disbanded pursuant to the Rules before a Recommendation regarding a Dispute has been rendered, the Dispute in question shall be finally settled by arbitration, if the parties have so agreed, or, if not, by any court of competent jurisdiction.

Article 5

Dispute Adjudication Boards (DABs)

- 1 DABs may assist the Parties in avoiding Disagreements, in resolving them through informal assistance, and by issuing Conclusions with respect to Disputes upon formal referral. In formal referrals, DABs render Decisions with respect to Disputes.
- 2 A Decision is binding on the Parties upon its receipt. The Parties shall comply with it without delay, notwithstanding any expression of dissatisfaction pursuant to this Article 5.
- 3 The Parties agree that if no Party has given written notice to the other Party and the DAB expressing its dissatisfaction with the Decision within 30 days of receiving it, the Decision shall remain binding and shall become final. The Parties agree not to contest a Decision that has become final, unless such agreement is prohibited by applicable law.
- 4 If any Party fails to comply with a Decision rendered pursuant to this Article 5, whether it be binding or both final and binding, the other Party may refer the failure itself, without having to refer it to the DAB first, either to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction. A Party that has failed to comply with a Decision shall not raise any issue as to the merits of the Decision as a defence to its failure to comply without delay with the Decision.
- 5 Any Party that is dissatisfied with a Decision shall, within 30 days of receiving it, give written notice expressing its dissatisfaction to the other Party and the DAB. Such notice may specify the reasons for the Party's dissatisfaction, in the absence of which the DAB may request the Party to provide the DAB and the other Party with brief reasons for its dissatisfaction.
- 6 If any Party gives such written notice expressing its dissatisfaction with a Decision, or if the DAB does not render its Decision within the time limit prescribed in Article 22, or if the DAB is disbanded pursuant to the Rules before a Decision regarding a Dispute has been rendered, the Dispute in question shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction. Until the Dispute is finally settled by arbitration or otherwise, or unless the arbitral tribunal or the court decides otherwise, the Parties remain bound to comply with any Decision rendered within the prescribed time limit.

Article 6

Combined Dispute Boards (CDBs)

- 1 CDBs may assist the Parties in avoiding Disagreements, in resolving them through informal assistance, and by issuing Conclusions with respect to Disputes upon formal referral. In formal referrals, CDBs render Recommendations with respect to Disputes pursuant to Article 4, but may render Decisions pursuant to Article 5, as provided in paragraphs 2 and 3 of this Article 6.
- 2 If any Party requests a Decision with respect to a given Dispute and no other Party objects thereto, the CDB shall render a Decision.
- 3 If any Party requests a Decision and another Party objects thereto, the CDB shall make a final decision as to whether it will render a Recommendation or a Decision. In so deciding, the CDB shall consider, without being limited to, the following factors:
 - whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;

- whether a Decision would prevent disruption of the Contract; and
 - whether a Decision is necessary to preserve evidence.
- 4 Any request for a Decision by the Party referring a Dispute to the CDB shall be made in the Statement of Case pursuant to Article 19. Any such request by another Party should be made in writing no later than in its Response pursuant to Article 20.

ESTABLISHMENT OF THE DISPUTE BOARD

Article 7

Appointment of the DB Members

- 1 The DB shall be established in accordance with the provisions of the Contract or, where the Contract is silent, in accordance with the Rules.
- 2 Where the Parties have agreed to establish a DB in accordance with the Rules but have not agreed on the number of DB Members, the DB shall be composed of three members.
- 3 Where the Parties have agreed that the DB shall have a sole DB Member, they shall jointly appoint the sole DB Member. If the Parties fail to appoint the sole DB Member within 30 days after signing the Contract or within 30 days after the commencement of any performance under the Contract, whichever occurs earlier, or within any other time period agreed upon by the Parties, the sole DB Member shall be appointed by the Centre upon the request of any Party.
- 4 When the DB is composed of three DB Members, the Parties shall jointly appoint the first two DB Members. If the Parties fail to appoint one or both DB Members within 30 days after signing the Contract or within 30 days after the commencement of any performance under the Contract, whichever occurs earlier, or within any other time period agreed upon by the Parties, both DB Members shall be appointed by the Centre upon the request of any Party.
- 5 The third DB Member shall be proposed to the Parties by the two DB Members within 30 days following the appointment of the second DB Member. If the Parties do not appoint the proposed third DB Member within 15 days from their receipt of the proposal, or if the two DB Members fail to propose the third DB Member, the third DB Member shall be appointed by the Centre upon the request of any Party. The third DB Member shall act as president of the DB unless all DB Members agree upon another president with the consent of the Parties.
- 6 When a DB Member has to be replaced due to death, resignation, termination or removal, the new DB Member shall be appointed in the same manner, mutatis mutandis, as the DB Member being replaced, unless otherwise agreed by the Parties. All actions taken by the DB prior to the replacement of a DB Member shall remain valid. When the DB is composed of three or more DB Members and when one of the DB Members is to be replaced, the other members shall continue to be DB Members. Prior to the replacement of the DB Member, the remaining DB Members shall not hold hearings or issue Conclusions without the agreement of all of the Parties.
- 7 The appointment of any DB Member shall be made by the Centre upon the request of any Party if the Centre is satisfied that doing so is justified in order to ensure the proper application of the Rules.

- 8 When appointing a DB Member, the Centre shall consider the prospective DB Member's attributes, including but not limited to nationality, residence, language skills, training, qualifications and experience, availability and ability to conduct the work to be carried out, as well as any observations, comments or requests made by the Parties. The Centre shall make all reasonable efforts to appoint a DB Member having the attributes, if any, that have been agreed upon by all of the Parties.

Article 8

Independence

- 1 Every DB Member must be and remain impartial and independent of the Parties.
- 2 Every prospective DB Member shall sign a statement of acceptance, availability, impartiality and independence and disclose in writing to the Parties, the other DB Members, and to the Centre if such DB Member is to be appointed by the Centre, any facts or circumstances which might be of such a nature as to call into question the DB Member's independence in the eyes of the Parties, as well as any circumstances that could give rise to reasonable doubts as to the DB Member's impartiality.
- 3 A DB Member shall immediately disclose in writing to the Parties and the other DB Members any facts or circumstances of a similar nature to those referred to in Article 8(2) concerning the DB Member's impartiality or independence which may arise in the course of such DB Member's tenure.
- 4 Should any Party wish to challenge a DB Member on the basis of an alleged lack of impartiality, independence or otherwise, it may, within 15 days of learning of the facts upon which the challenge is based, submit to the Centre a request for a decision upon the challenge including a written statement of such facts. The Centre will finally decide the challenge after having given the challenged DB Member, any other DB Members and the other Party an opportunity to comment on the challenge.
- 5 If a DB Member is successfully challenged, that DB Member shall be removed forthwith and the DB Member Agreement, if any, between that DB Member and the Parties shall be terminated.

Article 9

Work of the DB and Confidentiality

- 1 By accepting to serve, DB Members undertake to carry out their responsibilities in accordance with the Rules.
- 2 Unless otherwise agreed by the Parties or otherwise required by applicable law, any information obtained by a DB Member during the course of the DB's activities shall be used by the DB Member only for the purposes of the DB's activities and shall be treated by the DB Member as confidential.
- 3 Unless otherwise agreed in writing by all of the Parties, a DB Member shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the Contract, whether as a judge, an arbitrator, an expert or a representative or adviser of a Party.

Article 10

DB Member Agreement

- 1 Before commencing DB activities, every DB Member shall sign with all of the Parties a DB Member Agreement. If there are three or more DB Members, each DB Member Agreement shall have substantive terms that are identical to the other DB Member Agreements, unless otherwise agreed by the Parties and the DB Member concerned.
- 2 The Parties may at any time, without cause and with immediate effect, jointly terminate the DB Member Agreement of any DB Member but shall pay the monthly management fee to such DB Member for a minimum of three months following the termination, unless otherwise agreed by the Parties and the DB Member concerned.
- 3 Every DB Member may terminate the DB Member Agreement at any time by giving a minimum of three months' written notice to the Parties, unless otherwise agreed by the Parties and the DB Member concerned.

OBLIGATION TO COOPERATE

Article 11

Providing of Information

- 1 The Parties shall fully cooperate with the DB and communicate information to it in a timely manner. In particular, the Parties and the DB shall cooperate to ensure that, as soon as possible after the DB has been constituted, the DB becomes fully informed about the Contract and its performance by the Parties.
- 2 The Parties shall ensure that the DB is kept informed of the performance of the Contract and of any Disagreements arising in the course thereof by such means as progress reports, meetings and, if relevant to the Contract, site visits.
- 3 The DB shall, after consultation with the Parties, inform them in writing of the nature, format and frequency of any progress reports that the Parties shall send to the DB.
- 4 If requested by the DB, the Parties shall provide the DB, during meetings and site visits, with adequate working space, accommodation, means of communication, typing facilities and all necessary office and information technology equipment allowing the DB to fulfil its functions.

Article 12

Meetings and Site Visits

- 1 At the beginning of its activities the DB, in consultation with the Parties, shall establish a schedule of meetings and, if relevant to the Contract, site visits. The frequency of scheduled meetings and site visits shall be sufficient to keep the DB informed of the performance of the Contract and of any Disagreements. Unless otherwise agreed by the Parties and the DB, when site visits are relevant to the Contract there shall be a minimum of three such visits per year. The Parties and the DB shall attend all such meetings and site visits, during which the DB Members may engage in informal conversations with one or more representatives of the Parties. In the event that a Party fails to attend, the DB may nevertheless decide to proceed. In the event that a DB Member fails to attend, the DB may proceed if the Parties so agree or the DB so decides.

- 2 Site visits occur at the site or sites where the Contract is being performed. Meetings can be held at any location or by telephone or videoconference, as agreed by the Parties and the DB. If they do not agree on where or how to hold a meeting, such matters shall be decided by the DB after consultation with the Parties.
- 3 During scheduled meetings and site visits the DB shall review the performance of the Contract with the Parties and may assist the Parties in avoiding Disagreements pursuant to Article 16 or may provide informal assistance with respect to any Disagreements pursuant to Article 17.
- 4 Any Party may request an urgent meeting or site visit in addition to the scheduled meetings and site visits. The DB Members shall accommodate such a request at the earliest possible time and shall use their best efforts to make themselves available for urgent physical meetings or site visits within 30 days of the request.
- 5 After every meeting and site visit, the DB shall prepare a written summary of the meeting or site visit, including a list of those present.

Article 13

Written Notifications or Communications; Time Limits

- 1 All written notifications or communications from a Party to the DB or from the DB to the Parties, together with any enclosures and attachments, shall be communicated simultaneously to all Parties and DB Members at the address on file for each of them.
- 2 Written notifications or communications shall be sent in the manner agreed between the Parties and the DB or in any manner that provides the sender with a record of the sending thereof.
- 3 All written notifications or communications from a Party to the Centre shall be communicated simultaneously to all Parties at the address on file for each Party.
- 4 A notification or communication shall be deemed to have been made on the date that it was received by the intended recipient or by its representative or would have been received if made in accordance with this Article 13.
- 5 Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with the preceding paragraph. When the day next following such date is an official holiday or non-business day in the country in which the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

OPERATION OF THE DISPUTE BOARD

Article 14

Beginning and End of the DB's Activities

- 1 The DB shall begin its activities after every DB Member and the Parties have signed the DB Member Agreement(s).

- 2 Unless otherwise agreed by the Parties, the DB shall end its activities upon receiving notice from the Parties of their joint decision to disband the DB.
- 3 A DB Member may resign from the DB at any time by giving three months' written notice to the Parties, unless otherwise agreed in the DB Member Agreement(s).
- 3 Any dispute that may arise after the DB has been disbanded shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction.

Article 15

Powers of the DB

- 1 The proceedings before the DB shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the DB may settle on. In particular, in the absence of an agreement of the Parties with respect thereto, the DB shall have the power, inter alia, to:
 - determine the language or languages of the proceedings before the DB, due regard being given to all relevant circumstances, including the language of the Contract;
 - require the Parties to produce any documents that the DB deems necessary in order to fulfil its function;
 - call meetings, site visits and hearings;
 - decide on all procedural matters arising during any meeting, site visit or hearing;
 - question the Parties, their representatives and any witnesses they may call, in the sequence it chooses;
 - appoint one or more experts, with the agreement of the parties;
 - issue a Conclusion even if a Party fails to comply with a request of the DB;
 - decide upon any provisional relief such as interim or conservatory measures; and
 - take any measures necessary for it to fulfil its function as a DB.
- 2 Decisions of the DB regarding the rules governing the proceedings shall be taken by the sole DB Member or, when there are three or more DB Members, by a majority vote. If there is no majority, the decision shall be made by the president of the DB alone.
- 3 The DB may take measures for protecting trade secrets and confidential information.
- 4 If there are more than two Parties to the Contract, the application of the Rules may be adapted, as appropriate, to the multiparty situation by agreement of all of the Parties or, failing such agreement, by the DB.

THE THREE SERVICES PROVIDED BY THE DISPUTE BOARD

Article 16

Avoidance of Disagreements

If at any time, in particular during meetings or site visits, the DB considers that there may be a potential Disagreement between the parties, the DB may raise this with the Parties with a view

to encouraging them to avoid the Disagreement on their own without any further involvement of the DB. In so doing, the DB may assist the Parties in defining the potential Disagreement. The DB may suggest a specific process that the Parties could follow to avoid the Disagreement, while making it clear to the Parties that it stands ready to provide informal assistance or to issue a Conclusion in the event that the Parties are unable to avoid the Disagreement on their own.

Article 17

Informal Assistance with Disagreements

- 1 On its own initiative or upon the request of any Party and in either case with the agreement of all of the Parties, the DB may informally assist the Parties in resolving any Disagreements that have arisen during the performance of the Contract. Such informal assistance may occur during any meeting or site visit. A Party proposing informal assistance from the DB shall endeavour to inform the DB and the other Party thereof well in advance of the meeting or site visit during which such informal assistance would occur.
- 2 The informal assistance of the DB may take the form of a conversation among the DB and the Parties; one or more separate meetings between the DB and any Party with the prior agreement of all of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance that may help the Parties resolve the Disagreement.
- 4 If called upon to issue a Conclusion in connection with a Disagreement on which it has provided informal assistance, the DB shall not be bound by any views, whether expressed orally or in writing, that it may have given in the course of its informal assistance, nor shall it take into account any information that has not been available to all Parties.

Article 18

Formal Referral for a Conclusion

Any Party may at any time formally refer a Disagreement to the DB for a Conclusion, at which point the Disagreement becomes a Dispute. During the formal referral there shall be no informal conversations and no separate meetings between any DB Member and any Party with respect to any of the issues covered by the formal referral. The procedures set forth below shall apply to formal referrals.

Article 19

Statement of Case

- 1 Any Party shall refer a Dispute to the DB by submitting a concise written statement of its case (the “Statement of Case”) to the other Party and the DB. The Statement of Case shall include:
 - a clear and concise description of the nature and circumstances of the Dispute;
 - a list of the issues submitted to the DB for a Conclusion and a statement of the referring Party’s position thereon, including any relevant facts and law;
 - relevant support for the referring Party’s position such as documents, drawings, schedules and correspondence;

- a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
 - any request for interim or conservatory measures; and
 - in the case of a CDB, if the referring Party wishes the CDB to render a Decision, its request for a Decision and the reasons why it believes that the CDB should render a Decision rather than a Recommendation.
- 2 The date on which the Statement of Case is received by the sole DB Member or the president of the DB, as the case may be, shall, for all purposes, be deemed to be the date of the commencement of the referral (the “Date of Commencement”).
 - 3 The Parties remain free to settle the Dispute at any time, with or without the assistance of the DB.

Article 20

Response and Additional Documentation

- 1 Unless the Parties agree otherwise or the DB orders otherwise, within 30 days of receiving the Statement of Case the responding Party shall respond in writing (the “Response”). The Response shall include:
 - a clear and concise statement of the responding Party’s position with respect to the Dispute;
 - relevant support for its position such as documents, drawings, schedules and correspondence;
 - a statement of the issues on which the responding Party requests the DB’s Conclusion, including any request for interim or conservatory measures;
 - in the case of a CDB, a response to any request for a Decision made by the referring Party or, if the referring Party has not made such a request, any request for a Decision by the responding Party, including the reasons why it believes that the CDB should issue the type of Conclusion it desires.
- 2 The DB may at any time request a Party to submit additional written statements or documentation to assist the DB in preparing its Conclusion. Each such request shall be communicated in writing by the DB to the Parties.

Article 21

Organization and Conduct of Hearings

- 1 A hearing regarding a Dispute shall be held unless the Parties and the DB agree otherwise.
- 2 Unless the DB orders otherwise, hearings shall be held within 15 days of the date on which the sole DB Member or the president of the DB, as the case may be, receives the Response.
- 3 Hearings shall be held in the presence of all DB Members unless the DB decides, in the circumstances and after consultation with the Parties, that it is appropriate to hold the hearing in the absence of a DB Member. Prior to the replacement of a DB Member, a hearing may be held with the remaining DB Members only with the agreement of all of the Parties pursuant to Article 7(6).

- 4 If any of the Parties refuses or fails to take part in the DB procedure or any stage thereof, the DB may proceed notwithstanding such refusal or failure.
- 5 The DB shall be in full charge of the hearings.
- 6 The DB shall act fairly and impartially and ensure that each Party has a reasonable opportunity to present its case.
- 7 The Parties shall appear in person or through duly authorized representatives who are in charge of the performance of the Contract. In addition, they may be assisted by advisers.
- 8 Unless the DB decides otherwise, the hearing shall proceed as follows:
 - presentation of the case, first by the referring Party and then by the responding Party;
 - identification by the DB of any matters that need further clarification;
 - clarification by the Parties concerning the matters identified by the DB;
 - responses by each Party to clarifications made by the other Party, to the extent that new issues have been raised in such clarifications.
- 9 The DB may request the Parties to provide written summaries of their presentations.
- 10 The DB may deliberate at any location it considers appropriate before issuing its Conclusion.

CONCLUSIONS OF THE DISPUTE BOARD

Article 22

Time Limit for Rendering a Conclusion

- 1 The DB shall issue its Conclusion promptly and, in any event, within 90 days of the Date of Commencement as defined in Article 19(2). However, the DB may extend the time limit with the agreement of the Parties. In the absence of such agreement, the DB may, after consulting the Parties, extend the time limit by the shortest time it considers necessary, provided, however, that the total duration of any such extensions shall not exceed 20 days. In deciding whether to extend the time limit, the DB and the Parties shall take into account the nature and complexity of the Dispute and other relevant circumstances.
- 2 Where the Parties have agreed to submit Decisions to the ICC for review, the time limit for rendering a Decision shall be extended by the time required for the Centre to review the Decision. The Centre shall complete its review within 30 days of its receipt of the Decision or of the payment of the filing fee referred to in Article 3 of Appendix II, whichever occurs later. However, if additional time is required for such review, the Centre shall notify the DB and the Parties thereof in writing before the expiration of the 30 days, specifying the new date by which the Centre's review shall be completed.

Article 23

Review of Decisions by the Centre

Where the Parties have provided for review by the Centre of the Decisions of a DAB or a CDB, the DB shall submit the Decision in draft form to the Centre before it is signed. Each Decision shall be accompanied by the filing fee referred to in Article 3 of Appendix II. The Centre may

lay down modifications only as to the form of the Decision. No Decision shall be signed by the DB Members or communicated to the Parties until it has been approved by the Centre.

Article 24

Contents of a Conclusion

Conclusions shall indicate the date on which they are issued and shall state the findings of the DB as well as the reasons upon which they are based. Conclusions may also include, without limitation and not necessarily in the following order:

- a summary of the Dispute, the respective positions of the Parties and the Conclusion requested;
- a summary of the relevant provisions of the Contract; a chronology of relevant events;
- a summary of the procedure followed by the DB; and
- a list of the submissions and documents produced by the Parties in the course of the procedure.

Article 25

Issuing the Conclusion

When the DB is composed of three or more DB Members, the DB shall make every effort to achieve unanimity. If this cannot be achieved, a Conclusion is rendered by a majority of the DB Members. If there is no majority, the Conclusion shall be rendered by the president of the DB alone. Any DB Member who disagrees with the Conclusion shall give the reasons for such disagreement in a separate written document that shall not form part of the Conclusion but shall be communicated to the Parties. The failure of a DB Member to give such reasons shall not prevent the Conclusion from being issued or taking effect.

Article 26

Correction and Interpretation of Conclusions

- 1 On its own initiative, the DB may correct a clerical, computational or typographical error, or any errors of a similar nature contained in a Conclusion, provided such correction is submitted to the Parties within 30 days of the date of such Conclusion.
- 2 Any Party may apply to the DB for the correction of an error of the kind referred to in Article 26(1), or for the interpretation of a Conclusion. Such application shall be made to the DB within 30 days of the receipt of the Conclusion by such Party. After receipt of the application by the sole DB Member or the president of the DB, as the case may be, the DB shall grant the other Party a short time limit from the receipt of the application by that Party, to submit any comments thereon. Any correction or interpretation made by the DB shall be issued within 30 days following the expiration of the time limit for the receipt of any comments from the other Party. However, the Parties may agree to extend the time limit for issuing any correction or interpretation.
- 3 Should the DB issue a correction or interpretation of the Conclusion, all time limits associated with the Conclusion shall start to run afresh upon receipt by the Parties of the correction or interpretation of the Conclusion.

Article 27***Admissibility of Conclusions in Subsequent Proceedings***

Unless otherwise agreed by the Parties, any Conclusion, and any separate written document issued pursuant to Article 25, shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were Parties to the DB proceedings in which the Conclusion was issued.

COMPENSATION OF THE DISPUTE BOARD MEMBERS AND ICC

Article 28***General Considerations***

- 1 All fees and expenses of the DB Members shall be shared equally by the Parties, unless otherwise agreed by the Parties.
- 2 Unless otherwise agreed by the Parties, when there are three or more DB Members, they shall all be treated equally and shall receive the same monthly management fee and the same daily fee for work performed as a DB Member.
- 3 Unless otherwise provided in the DB Member Agreement(s), the fees shall be fixed for the first 24 months following the signature of the DB Member Agreement(s) and thereafter shall be adjusted on each anniversary of the DB Member Agreement(s) in accordance with the terms thereof.
- 4 If the Parties and the DB Members cannot agree upon the fees of the DB Members, the Centre, at the request of any Party or any DB Member, shall fix such fees after consulting the Parties and the DB Members. The Parties shall be bound by the Centre's determination. The DB Members shall either accept the determination or decline the appointment.

Article 29***Monthly Management Fee***

- 1 Unless otherwise provided in the DB Member Agreement(s), each DB Member shall receive a monthly management fee, as set out in the DB Member Agreement(s), to cover the following:
 - becoming and remaining conversant with the Contract and the progress of its performance;
 - activities in managing and coordinating the operation of the DB;
 - studying progress reports in order, inter alia, to evaluate the progress of performance and identify potential Disagreements;
 - reviewing all correspondence between the Parties copied to the DB;
 - being available to attend all DB meetings with the Parties, internal DB meetings, and site visits; and
 - fixed office overhead expenses.
- 2 Unless otherwise agreed in the DB Member Agreement(s), the monthly management fee shall be equal to three times the daily fee set out in the DB Member Agreement(s)

and shall be payable from the date of signature of the DB Member Agreement(s) until termination of the DB Member Agreement(s), except as provided in Article 10(2).

Article 30

Daily Fee

Unless otherwise agreed in the DB Member Agreement(s), each DB Member shall receive a daily fee, as set out in the DB Member Agreement(s), to cover time spent on the following activities:

- meetings and site visits; travel;
- internal meetings of the DB;
- study of documents submitted by the Parties in connection with procedures before the DB;
- work in connection with avoidance of Disagreements;
- work in connection with informal assistance with Disagreements; and
- work in connection with a formal referral for a Conclusion, including hearings.

Article 31

Travel Costs and other Expenses

- 1 Unless otherwise provided in the DB Member Agreement(s), air travel expenses shall be reimbursed at unrestricted business class rates between a DB Member's home and the destination. Expenses incurred for hotels and meals when travelling shall be reimbursed at cost.
- 2 Unless otherwise provided in the DB Member Agreement(s), expenses incurred in DB work for ground transport, long distance telephone calls, courier services, photocopying, postage, visas, etc., shall be reimbursed at cost.

Article 32

Taxes and Charges

- 1 No taxes and charges, except for value added tax (VAT), levied in connection with the services rendered by a DB Member by the country of the residence or nationality of the DB Member shall be reimbursed by the Parties.
- 2 All taxes and charges levied in connection with such services by any country other than the DB Member's country of residence or nationality, as well as VAT wherever levied, shall be reimbursed by the Parties.

Article 33

Payment Arrangements

- 1 Unless otherwise agreed, invoices shall be submitted by each DB Member to each Party for payment as follows:
 - monthly management fees shall be invoiced and paid on a quarterly basis in advance for the next three-month period.
 - daily fees and travel expenses shall be invoiced and paid after each meeting, site visit, hearing or Conclusion.

- 2 Invoices of DB Members shall be paid within 30 days of receipt.
- 3 The failure of any Party to pay its share of fees and expenses within 30 days of receiving a DB Member's invoice shall entitle the DB Member, in addition to any other rights, to suspend work 15 days after providing a notice of suspension to the Parties and any other DB Members, such suspension remaining in effect until receipt of full payment of all outstanding amounts plus simple interest at one-year LIBOR plus two per cent, or the twelve-month prime interest rate in the currency agreed between the Parties and the DB Members.
- 4 In the event that a Party fails to pay its share of the fees and expenses of a DB Member when due, any other Party, without waiving its rights, may pay the outstanding amount. The Party making such payment, in addition to any other rights, shall be entitled to reimbursement from the non-paying Party of all such sums paid, plus, unless prohibited by applicable law, simple interest at one-year LIBOR plus two per cent, or the twelve-month prime interest rate in the currency agreed between the Parties and the DB Members.
- 5 Upon signing the DB Member Agreement, the Parties shall provide the DB Member with the form of the invoice to be sent by DB Members, including the invoicing address, number of copies of invoices required, and VAT number, if applicable.

Article 34

Administrative Expenses of ICC

- 1 The Centre's administrative expenses include an amount for each appointment of a DB Member, an amount for each request for the Centre to fix the fees of the DB Members, an amount for each decision upon a challenge of a DB Member and, when the Parties have agreed to submit Decisions of a DAB or a CDB to the Centre for review, an amount for each such review.
- 2 For each request for appointment of a DB Member, the Centre shall receive the non-refundable amount specified in Article 1 of Appendix II. This amount shall represent the total cost for the appointment of one DB Member by the Centre. The Centre shall not proceed with the appointment unless the requisite payment has been received. The cost of each appointment by the Centre shall be shared equally by the Parties.
- 3 For each decision upon a challenge of a DB Member, the Centre shall fix administrative expenses in an amount not exceeding the maximum sum specified in Article 2 of Appendix II. This amount shall represent the total cost for the Centre's decision upon one challenge of a DB Member. The Centre shall not proceed with the rendering of its decision, and the making of the challenge shall have no effect, unless the said amount has been received by the Centre. The cost of each decision by the Centre shall be borne by the Party making the challenge.
- 4 Where the Parties have provided for the review by the Centre of a DAB's or a CDB's Decisions, the Centre shall fix administrative expenses for the review of each Decision in an amount not exceeding the maximum sum specified in Article 3 of Appendix II. This amount shall represent the total cost for the review of one Decision by the Centre. The Centre shall not approve a Decision unless the said amount has been received by the Centre. The cost of reviewing each Decision shall be shared equally by the Parties.
- 5 For each request for the Centre to fix the fees of the DB Members, the Centre shall receive the non-refundable amount specified in Article 4 of Appendix II. This amount shall represent the total cost for determination of the DB members' fees by the Centre. The Centre shall not proceed with fixing the fees of the DB Members unless the

requisite payment has been received. The cost of the Centre's services in fixing the DB Members' fees shall be shared equally by the Parties.

- 6 If a Party fails to pay its share of the administrative expenses of the Centre, the other Party shall be free to pay the entire amount of such administrative expenses.

Article 35

General Provisions

- 1 Where the parties have agreed upon the application of the Rules after the date of the entry into force of the 2015 ICC Dispute Board Rules, they shall be deemed to have agreed upon the application of that version of the Rules, unless they have agreed otherwise.
- 2 The DB Members, the Centre, the ICC and its employees, the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the DB proceedings, except to the extent such limitation of liability is prohibited by applicable law.
- 3 In all matters not expressly provided for in the Rules, the DB and the Centre shall act in the spirit of the Rules and the DB shall make every effort to make sure that Conclusions are issued in accordance with the Rules.

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APPENDIX 9

THE DISPUTE BOARD FEDERATION DISPUTE ADJUDICATION BOARD AD HOC RULES FOR USE IN INDEPENDENTLY ADMINISTERED DISPUTE BOARD MATTERS¹

Introductory Provisions

1.0 Definitions

In these Rules:

- 1.1 'Dispute Board ('DB') means a Dispute Adjudication Board ('DAB'), composed of one or three Dispute Board Members ('DB Members').
- 1.2 'Appointing Body' means the Dispute Board Federation, Geneva.
- 1.3 'Contract' means the agreement of the Parties that contains or is subject to provisions for establishing a Dispute Board under the Rules.
- 1.4 'Decision' means a Decision, issued in writing by the Dispute Adjudication Board, as described in these Rules.
- 1.5 'Dispute' means any disagreement arising out of or in connection with the Contract, which is referred to a Dispute Board for a Decision under the terms of the Contract and pursuant to the Rules. Any Disputes referred under these rules shall survive the termination of the Contract.
- 1.6 'Party' means a party to the Contract and includes one or more parties, as appropriate.
- 1.7 'Date of commencement' means the date upon which every Dispute Board Member and the Parties have signed the Dispute Board Member Agreement(s).

2.0 Agreement to Submit to the Rules

Unless otherwise agreed, the Parties shall establish the Dispute Board at the time of entering into the Contract.

3.0 Appointment of the Dispute Board Members

- 3.1 At the inception of the Contract between the parties, and in the event that the use of these Rules is referred to, the Appointing Body shall, in accordance with these Rules, appoint, from its Approved List of Dispute Board Members either one or three Dispute Board Members in accordance with the Contract between the parties or in the absence of any such agreement shall upon application by either Party to the Contract within 30 days appoint either one or three the Dispute Board Members based upon its schedule of valuation then in effect.

¹ The information used in this book referring to DBF or the Dispute Board Federation is provided by the DBF, whose address is 14 rue du Rhone, 1204 Geneva, Switzerland, where full copies are available. Their use herein is by permission of the DBF.

- 3.2 The Appointing Body shall determine which of the appointed Dispute Board Members shall act as Chair of the Dispute Board Panel.
- 3.3 If at any time any of the Dispute Board Members is either unwilling or unable to act in the capacity necessary for the proper functioning of the Dispute Board the Appointing Body shall replace said member again from its Approved List of Dispute Board Members. All actions taken by the Dispute Board prior to the replacement of a Dispute Board Member shall remain valid. When the Dispute Board is composed of three Dispute Board Members and one of the Dispute Board Members is to be replaced, the other two shall continue to be Dispute Board Members. Prior to the replacement of the Dispute Board Member, the two remaining Dispute Board Members shall not hold hearings or issue Decisions without the agreement of all of the Parties.
- 3.4 When appointing a Dispute Board Member, the Appointing Body shall consider the prospective Dispute Board Member's qualifications relevant to the circumstances, availability, nationality and relevant language skills.

4.0 Conflicts of Interest

4.1 The Dispute Board Member(s) shall:

- (a) Have no interest financial or otherwise in the Employer, the Contractor or any of the parties before them, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) Not previously have been employed as a consultant or otherwise by the Employer, the Contractor or any of the parties before them, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) Have disclosed in writing to the Employer, the Contractor and the other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or any of the parties before them, and any previous involvement in the overall project of which the Contract forms part;
- (d) Not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or any of the parties before them, except as may be agreed in writing by the Employer, the Contractor and the other Members (if any);
- (e) Comply with the annexed procedural rules;
- (f) Not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) Not while a Member enter into discussions or make any agreement with the Employer, the Contractor or any of the parties before them, regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) Ensure his/her availability for all site visits and hearings as are necessary;
- (i) Become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;

- (j) Treat the details of the Contract and all the Dispute Adjudication Board's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the other Members (if any); and
 - (k) Be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the other Members (if any).
- 4.2** Should any Party wish to challenge a Dispute Board Member on the basis of an alleged lack of independence or otherwise, it may, within 15 days of learning of the facts upon which the challenge is based, submit to the Appointing Body a request for a decision upon the challenge including a written statement of such facts. The Appointing Body will finally decide the challenge after having given the challenged Dispute Board Member as well as any other Dispute Board Members and the other Party an opportunity to comment on the challenge.
- 4.3** If a Dispute Board Member is successfully challenged, that Dispute Board Member's agreement with the Parties shall be terminated forthwith. The resulting vacancy shall be filled following the procedure used to appoint the challenged Dispute Board Member.

5.0 Dispute Board Member Agreement

- 5.1** Before commencing Dispute Board activities, every Dispute Board Member shall sign with all of the Parties a Dispute Board Member Agreement. If there are three Dispute Board Members, each Dispute Board Member Agreement shall have substantive terms that are identical to the other Dispute Board Member Agreements, unless otherwise agreed by the Dispute Board Members concerned.
- 5.2** The Parties may at any time, without cause and with immediate effect, jointly terminate the Dispute Board Member Agreement of any Dispute Board Member but shall pay the Monthly Retainer Fee to such Dispute Board member for a minimum of three months following the termination, unless otherwise agreed by the Parties and the Dispute Board Member concerned.
- 5.3** Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Dispute Board Member. However, a notice by the Employer or the Contractor, but not by both, shall be of no effect.
- 5.4** If the Dispute Board Member fails to comply with any obligation under these Rules, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Dispute Board Member and the other Members (if any), for proceedings or decisions (if any) of the Dispute Adjudication Board which are rendered void or ineffective.
- 5.5** Every Dispute Board Member may terminate the Dispute Board Member Agreement at any time by giving a minimum of three months' written notice to the Parties, unless otherwise agreed by the Parties and the Dispute Board Member concerned.

6.0 Cooperation of the Parties

- 6.1** The Parties shall fully cooperate with the Dispute Board and communicate information to it in a timely manner. In particular, the Parties and the Dispute Board shall co-operate to ensure that, as soon as possible after the Dispute Board is constituted, the Dispute Board becomes fully informed about the Contract and its performance by the Parties.

- 6.2 The Parties shall ensure that the Dispute Board is kept informed of the performance of the Contract and of any disagreements arising in the course thereof by such means as progress reports, meetings and, if relevant to the Contract, site visits.
- 6.3 The Dispute Board shall, after consultation with the Parties, inform the Parties in writing of the nature, format and frequency of any progress reports that the Parties shall send to the Dispute Board.
- 6.4 If requested by the Dispute Board, the Parties, during meetings and site visits, shall provide the Dispute Board with adequate working space, accommodation, means of communication, typing facilities and all necessary office and information technology equipment allowing the Dispute Board to fulfil its functions.

7.0 Meetings and Site Visits

- 7.1 At the beginning of its activities the Dispute Board shall, in consultation with the Parties, establish a schedule of meetings and, if relevant to the Contract, site visits.
- 7.2 The frequency of scheduled meetings and site visits shall be sufficient to keep the Dispute Board informed of the performance of the Contract and of any disagreements. Unless otherwise agreed by the Parties and the Dispute Board, when site visits are relevant to the Contract, there shall be a minimum of four such visits per year. The Parties and the Dispute Board shall attend all such meetings and site visits.
- 7.3 In the event that a Party fails to attend, the Dispute Board may nevertheless decide to proceed. In the event that a Dispute Board Member fails to attend, the Dispute Board may proceed if the Parties so agree or if the Dispute Board so decides.
- 7.4 Site visits occur at the site or sites where the Contract is being performed. Meetings can be held at any location agreed by the Parties and the Dispute Board. If they do not agree on where to hold a meeting, the Dispute Board shall decide the location after consultation with the Parties.
- 7.5 During scheduled meetings and site visits the Dispute Board shall review the performance of the Contract with the Parties and may provide informal assistance, as set forth in the procedural annex, with respect to any disagreements.
- 7.6 Any Party may request an urgent meeting or site visit outside the scheduled meetings and site visits. The Dispute Board Members shall accommodate such a request at the earliest possible time and shall make best efforts to make themselves available for such urgent meetings or site visits within 30 days of the request.
- 7.7 After every meeting and site visit, the Dispute Board shall prepare a written summary of such meeting or site visit including a list of those present.

8.0 Written Notifications or Communications; Time Limits

- 8.1 All written notifications or communications, including any enclosures or attachments, from a Party to the Dispute Board or from the Dispute Board to the Parties shall be communicated simultaneously to all Parties and Dispute Board Members at the address on record for each Dispute Board Member and Party.
- 8.2 Written notifications or communications shall be sent in the manner agreed between the Parties and the Dispute Board or in any manner that provides the sender with proof of the sending thereof.

- 8.3** A notification or communication shall be deemed to have been made on the date that it was received by the intended recipient or by its representative or would have been received if made in accordance with these Rules.
- 8.4** Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with the preceding paragraph. When the day next following such date is an official holiday or non-business day in the country in which the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays or non-business days are included in the calculation of the period of time. If the last day of the relevant period of the time granted is an official holiday or nonbusiness day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

9.0 Beginning and End of the Dispute Board's Activities

- 9.1** The Dispute Board shall begin its activities after every Dispute Board Member and the Parties have signed the Dispute Board Member Agreement(s).
- 9.2** Unless otherwise agreed by the Parties, the Dispute Board shall end its activities upon receiving notice from the Parties of their joint decision to disband the Dispute Board.
- 9.3** Any dispute which may arise after the Dispute Board has been disbanded shall be finally settled by arbitration, if the Parties have so agreed, or, if not, by any court of competent jurisdiction.

10.0 Powers of the Dispute Board

- 10.1** The proceedings before the Dispute Board shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the Dispute Board may settle on. In particular, in the absence of an agreement of the Parties with respect thereto, the Dispute Board shall have the power, inter alia, to:
- (a) Determine the language or languages of the proceedings before the Dispute Board, due regard being given to all relevant circumstances, including the language of the Contract;
 - (b) Require the Parties to produce any documents that the Dispute Board deems necessary in order to issue a Decision;
 - (c) Call meetings, site visits and hearings;
 - (d) Decide on all procedural matters arising during any meeting, site visit or hearing;
 - (e) Question the Parties, their representatives and any witnesses they may call, in the sequence it chooses;
 - (f) Issue a Decision even if a Party fails to comply with a request of the Dispute Board;
 - (g) Take any measures necessary for it to fulfil its function as a Dispute Board.
- 10.2** Decisions of the Dispute Board regarding the rules governing the proceedings shall be taken by the sole Dispute Board Member or, when there are three Dispute Board Members, by majority vote. If there is no majority, the Decision shall be made by the chair of the Dispute Board alone (see Section 13.3 herein).
- 10.3** The Dispute Board may take measures for protecting trade secrets and confidential information.

- 10.4** If the Contract has more than two Parties, the application of the Rules may be adapted, as appropriate, to apply to the multiparty situation, by agreement of all of the Parties or, failing such agreement, by the Dispute Board.

11.0 Payment of Dispute Board Members

- 11.1** The Dispute Board Members shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

- (a) A retainer fee per calendar month, which shall be considered as payment in full for:
 - (i) Being available on 28 days' notice for all site visits and hearings;
 - (ii) Becoming and remaining conversant with all project developments and maintaining relevant files;
 - (iii) All office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
 - (iv) All services performed hereunder except those referred to in sub-paragraph [11.3] of this Clause.

- 11.2** The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Adjudication Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works. With effect from the first day of the calendar month following the month in which [the] Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by 50%. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Adjudication Agreement is otherwise terminated. In the event that a Taking-Over Certificate is not part of the Contract then until 60 days after the completion of the Contract as determined by the Dispute Board.

- 11.3** Daily Fees. A daily fee that shall be considered as payment in full for:

- (a) Each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the other Members (if any);
- (b) Each working day on site visits, hearings or preparing decisions; and
- (c) Each day spent reading submissions in preparation for a hearing.
- (d) All reasonable expenses incurred in connection with the Dispute Board Member's duties, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (a) of this Section;
- (e) Any taxes properly levied in the Country on payments made to the Dispute Board Member (unless a national or permanent resident of the Country) under this Section.

- 11.4** The retainer and daily fees shall be as specified in the Dispute Adjudication Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Dispute Board Member, at each anniversary of the date on which the Dispute Adjudication Agreement became effective.

- 11.5** The Dispute Board Member shall also be entitled to a sum, determined by the Dispute Board Member as Security for the payment of fees and expenses and may request this

sum in advance of any invoices and may further request that said sum be replenished on a regular basis no less frequently than monthly.

- 11.6** The Dispute Board Member shall submit invoices for payment of the monthly retainer and airfares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.
- 11.7** The Contractor shall pay each of the Dispute Board Member's invoices (and requests for Security for fees and expenses) in full within 30 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.
- 11.8** If the Contractor fails to pay to the Dispute Board Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Dispute Board Member and any other amount that may be required to maintain the operation of the Dispute Adjudication Board; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges.
- 11.9** If the Dispute Board Member does not receive payment of the amount due within 60 days after submitting an invoice, the Dispute Board Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under these Rules.

12.0 Procedures before the Dispute Board

- 12.1** On its own initiative or upon the request of any Party and in either case with the agreement of all of the Parties, the Dispute Board may informally assist the Parties in resolving any disagreements that may arise during the performance of the Contract. Such informal assistance may occur during any meeting or site visit. A Party proposing the informal assistance of the Dispute Board shall endeavour to inform the Dispute Board and the other Party thereof well in advance of the meeting or site visit during which such informal assistance would occur.
- 12.2** The informal assistance of the Dispute Board may take the form of a conversation among the Dispute Board and the Parties; separate meetings between the Dispute Board and any Party with the prior agreement of the Parties; informal views given by the Dispute Board to the Parties; a written note from the Dispute Board to the Parties; or any other form of assistance which may help the Parties resolve the disagreement.
- 12.3** The Dispute Board, if called upon to make a Decision concerning a disagreement with respect to which it has provided informal assistance, shall not be bound by any views, either oral or in writing, which it may have given in the course of its informal assistance.
- 12.4** Formal Referral of Disputes for a Decision; Statement of Case
 - 12.4.1** Any Party shall refer a Dispute to the Dispute Board by submitting a written statement of its case (the 'Statement of Case') to the other Party and the Dispute Board. The Statement of Case shall include:
 - (a) a clear and concise description of the nature and circumstances of the Dispute;
 - (b) a list of the issues submitted to the Dispute Board for a Decision and a presentation of the referring Party's position thereon;

- (c) any support for the referring Party's position such as documents, drawings, schedules and correspondence;
 - (d) a statement of what the referring Party requests the Dispute Board to determine.
- 12.4.2** The date on which the Statement of Case is received by the sole Dispute Board Member or the chairman of the Dispute Board, as the case may be, shall, for all purposes, be deemed to be the date of the commencement of the referral (the 'Date of Commencement').
- 12.4.3** The Parties remain free to settle the Dispute, with or without the assistance of the Dispute Board, at any time.
- 12.5** Response and Additional Documentation
- 12.5.1** Unless the Parties agree otherwise or the Dispute Board orders otherwise, the responding Party shall respond to the Statement of Case in writing (the 'Response') within 30 days of receiving the Statement of Case. The Response shall include:
- (a) a clear and concise presentation of the responding Party's position with respect to the Dispute;
 - (b) any support for its position such as documents, drawings, schedules and correspondence;
 - (c) a statement of what the responding Party requests the Dispute Board to determine[.]
- 12.5.2** The Dispute Board may at any time request a Party to submit additional written statements or documentation to assist the Dispute Board in preparing its Decision. The Dispute Board shall communicate to the Parties each such request in writing.
- 12.6** Organization and Conduct of Hearings
- 12.6.1** A hearing regarding a Dispute shall be held unless the Parties and the Dispute Board agree otherwise.
- 12.6.2** Unless the Dispute Board orders otherwise, hearings shall be held within 15 days of the date on which the sole Dispute Board Member or the chairman of the Dispute Board, as the case may be, receives the Response or in the event of no response, as deemed necessary.
- 12.6.3** Hearings shall be held in the presence of all Dispute Board Members unless the Dispute Board decides, in the circumstances and after consultation with the Parties, that it is appropriate to hold the hearing in the absence of a Dispute Board Member; provided, however, that prior to the replacement of a Dispute Board Member a hearing may be held with the two remaining Dispute Board Members only with the agreement of all of the Parties.
- 12.6.4** If any of the Parties refuses or fails to take part in the Dispute Board procedure or any stage thereof, the Dispute Board shall proceed notwithstanding such refusal or failure.
- 12.6.5** The Dispute Board shall be in full charge of the hearings.
- 12.6.6** The Dispute Board shall act fairly and impartially and ensure that each Party has a reasonable opportunity to present its case.
- 12.6.7** The Parties shall appear in person or through duly authorized representatives who are in charge of the performance of the Contract. In addition, advisors may assist them.
- 12.6.8** Unless the Dispute Board decides otherwise, the hearing shall proceed as follows:
- (a) presentation of the case, first by the referring Party and then by the responding Party;
 - (b) identification by the Dispute Board to the Parties of any matters that need further clarification;

- (c) clarification by the Parties concerning the matters identified by the Dispute Board;
- (d) responses by each Party to clarifications made by the other Party, to the extent that new issues have been raised in such clarifications.

12.6.9 The Dispute Board may request the Parties to provide written summaries of their presentations.

12.6.10 The Dispute Board may deliberate at any location it considers appropriate before issuing its Decision.

13.0 Decisions of the Dispute Board

13.1 Time Limit for Rendering a Decision

13.1.1 The Dispute Board shall issue its Decision promptly and, in any event, within 90 days of the Date of Commencement as defined in these Rules. However, the Parties may agree to extend the time limit. In deciding whether to do so, the Parties shall consult with the Dispute Board and shall take into account the nature and complexity of the Dispute and other relevant circumstances.

13.2 Contents of a Decision

13.2.1 Decisions shall indicate the date on which they are issued and shall state the findings of the Dispute Board as well as the reasons upon which they are based. Decisions may also include, without limitation and not necessarily in the following order:

- (a) a summary of the Dispute, the respective positions of the Parties and the Decision requested;
- (b) a summary of the relevant provisions of the Contract;
- (c) a chronology of relevant events;
- (d) a summary of the procedure followed by the Dispute Board; and
- (e) a listing of the submissions and documents provided by the Parties in the course of the procedure.

13.3 Making of the Decision

13.3.1 When the Dispute Board is composed of three Dispute Board Members; the Dispute Board shall make every effort to achieve unanimity. If this cannot be achieved, a Decision is given by a majority decision. If there is no majority, the Decision shall be made by the chairman of the Dispute Board alone.

13.3.2 Any Dispute Board Member who disagrees with the Decision shall give the reasons for such disagreement in a separate written report that shall not form part of the Decision but shall be communicated to the Parties. Any failure of a Dispute Board Member to give such reasons shall not prevent the issuance or the effectiveness of the Decision.

13.4 Correction and Interpretation of Decisions

13.4.1 On its own initiative, the Dispute Board may correct a clerical, computational or typographical error, or any errors of a similar nature, contained in a Decision, provided such correction is submitted to the Parties within 28 days of the date of such Decision.

13.4.2 Any Party may apply to the Dispute Board for the correction of an error of the kind in its Decision, or for the interpretation of a Decision. Such Party must make such application to the Dispute Board within 28 days of the receipt of the Decision. After receipt of the application by the sole Dispute Board Member or the chairman of the

Dispute Board, as the case may be, the Dispute Board shall grant the other Party a 7-day time limit from the receipt of the application by that Party, to submit any comments thereon. Any correction or interpretation of the Dispute Board shall be issued within 28 days following the expiration of the time limit for the receipt of any comments from the other Party. However, the Parties may agree to extend the time limit for the issuance of any correction or interpretation.

13.4.3 Should the Dispute Board issue a correction or interpretation of the Decision, all time limits associated with the Decision shall recommence to run upon receipt by the Parties of the correction or interpretation of the Decision.

13.5 Admissibility of Decisions in Subsequent Proceedings

13.5.1 Unless otherwise agreed by the Parties, any Decision shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were Parties to the Dispute Board proceedings in which the Decision was issued.

14.0 Administrative Expenses of the Appointing Body

14.1 The Appointing Body's administrative expenses include an amount for each appointment of a Dispute Board Member, and an amount for each decision upon a challenge of a Dispute Board Member.

14.2 For each request for appointment of a Dispute Board Member, the Appointing Body shall receive the non-refundable amount as specified in the Appendix to this Agreement. This amount shall represent the total cost for the appointment of one Dispute Board Member by the Appointing Body. The Appointing Body shall not proceed with the appointment unless the requisite payment has been received. The Parties shall share the cost of each appointment by the Appointing Body equally.

14.3 For each decision upon a challenge of a Dispute Board Member, the Appointing Body shall fix administrative expenses in an amount not exceeding the maximum sum of €2,500. This amount shall represent the total cost for the decision upon one challenge of a Dispute Board Member. The Appointing Body shall not proceed with the rendering of its Decision and the making of the challenge shall have no effect unless the said amount has been received. The cost of each Decision by the Appointing Body shall be borne by the Party making the challenge.

14.4 If a Party fails to pay its share of the administrative expenses of the Appointing Body, the other Party shall be free to pay the entire amount of such administrative expenses and thereupon this shall be determined by a Decision as to this payment by the Dispute Board.

15.0 General Rules

15.1 Exclusion of Liability

Neither the Dispute Board Members, nor the Appointing Body and its employees, shall be liable to any person for any act or omission in connection with the Dispute Board proceedings.

15.2 Application of the Rules

In all matters not expressly provided for in the Rules, the Dispute Board shall act in the spirit of the Rules and shall make every effort to make sure that Decisions are issued in accordance with the Rules.

APPENDIX 10

THE DEFECTIVE PREMISES ACT 1972

DEFECTIVE PREMISES ACT 1972

1972 CHAPTER 35

An Act to impose duties in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises.

[29th June 1972]

1 Duty to build dwellings properly

- (1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—
 - (a) if the dwelling is provided to the order of any person, to that person; and
 - (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.

- (2) A person who takes on any such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other shall, to the extent to which he does it properly in accordance with those instructions, be treated for the purposes of this section as discharging the duty imposed on him by subsection (1) above except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty.
- (3) A person shall not be treated for the purposes of subsection (2) above as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design.
- (4) A person who—
 - (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or
 - (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment;

arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

- (5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in

connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished.

2 Cases excluded from the remedy under section 1

(1) Where—

- (a) in connection with the provision of a dwelling or its first sale or letting for habitation any rights in respect of defects in the state of the dwelling are conferred by an approved scheme to which this section applies on a person having or acquiring an interest in the dwelling; and
- (b) it is stated in a document of a type approved for the purposes of this section that the requirements as to design or construction imposed by or under the scheme have, or appear to have, been substantially complied with in relation to the dwelling;

no action shall be brought by any person having or acquiring an interest in the dwelling for breach of the duty imposed by section 1 above in relation to the dwelling.

(2) A scheme to which this section applies—

- (a) may consist of any number of documents and any number of agreements or other transactions between any number of persons; but
- (b) must confer, by virtue of agreements entered into with persons having or acquiring an interest in the dwellings to which the scheme applies, rights on such persons in respect of defects in the state of the dwellings.

(3) In this section “approved” means approved by the Secretary of State, and the power of the Secretary of State to approve a scheme or document for the purposes of this section shall be exercisable by order, except that any requirements as to construction or design imposed under a scheme to which this section applies may be approved by him without making any order or, if he thinks fit, by order.

(4) The Secretary of State—

- (a) may approve a scheme or document for the purposes of this section with or without limiting the duration of his approval; and
- (b) may by order revoke or vary a previous order under this section or, without such an order, revoke or vary a previous approval under this section given otherwise than by order.

(5) The production of a document purporting to be a copy of an approval given by the Secretary of State otherwise than by order and certified by an officer of the Secretary of State to be a true copy of the approval shall be conclusive evidence of the approval, and without proof of the handwriting or official position of the person purporting to sign the certificate.

(6) The power to make an order under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution by either House of Parliament.

(7) Where an interest in a dwelling is compulsorily acquired—

- (a) no action shall be brought by the acquiring authority for breach of the duty imposed by section 1 above in respect of the dwelling; and

- (b) if any work for or in connection with the provision of the dwelling was done otherwise than in the course of a business by the person in occupation of the dwelling at the time of the compulsory acquisition, the acquiring authority and not that person shall be treated as the person who took on the work and accordingly as owing that duty.

3 Duty of care with respect to work done on premises not abated by disposal of premises

- (1) Where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.
- (2) This section does not apply—
 - (a) in the case of premises which are let, where the relevant tenancy of the premises commenced, or the relevant tenancy agreement of the premises was entered into, before the commencement of this Act;
 - (b) in the case of premises disposed of in any other way, when the disposal of the premises was completed, or a contract for their disposal was entered into, before the commencement of this Act; or
 - (c) in either case, where the relevant transaction disposing of the premises is entered into in pursuance of an enforceable option by which the consideration for the disposal was fixed before the commencement of this Act.

4 Landlord's duty of care in virtue of obligation or right to repair premises demised

- (1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.
- (2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.
- (3) In this section “relevant defect” means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision “the material time” means—
 - (a) where the tenancy commenced before this Act, the commencement of this Act; and
 - (b) in all other cases, the earliest of the following times, that is to say—
 - (i) the time when the tenancy commences;

- (ii) the time when the tenancy agreement is entered into;
 - (iii) the time when possession is taken of the premises in contemplation of the letting.
- (4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.
- (5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.
- (6) This section applies to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and “tenancy” and cognate expressions shall be construed accordingly.

5 Application to Crown

This Act shall bind the Crown, but as regards the Crown’s liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

6 Supplemental

- (1) In this Act—
- “disposal”, in relation to premises, includes a letting, and an assignment or surrender of a tenancy, of the premises and the creation by contract of any other right to occupy the premises, and “dispose” shall be construed accordingly;
 - “personal injury” includes any disease and any impairment of a person’s physical or mental condition;
 - “tenancy” means—
 - (a) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but not including a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee; or
 - (b) a tenancy at will or a tenancy on sufferance; or
 - (c) a tenancy, whether or not constituting a tenancy at common law, created by or in pursuance of any enactment;
 and cognate expressions shall be construed accordingly.
- (2) Any duty imposed by or enforceable by virtue of any provision of this Act is in addition to any duty a person may owe apart from that provision.
- (3) Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of the provisions of this Act, or any liability arising by virtue of any such provision, shall be void.

APPENDIX 10

- (4) Section 4 of the Occupiers Liability Act 1957 (repairing landlords' duty to visitors to premises) is hereby repealed.

7 Short title, commencement and extent

- (1) This Act may be cited as the Defective Premises Act 1972.
- (2) This Act shall come into force on 1st January 1974.
- (3) This Act does not extend to Scotland or Northern Ireland.



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APPENDIX 11

UNFAIR CONTRACT TERMS ACT 1977

UNFAIR CONTRACT TERMS ACT 1977 (EDITED)

1977 CHAPTER 50

An Act to impose further limits on the extent to which under the law of England and Wales and Northern Ireland civil liability for breach of contract, of for negligence or other breach of duty, can be avoided by means of contract terms and otherwise, and under the law of Scotland civil liability can be avoided by means of contract terms.

[26th October 1977]

Introductory

- (1) For the purposes of this Part of this Act, “negligence” means the breach—
 - (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
 - (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
 - (c) of the common duty of care imposed by the M1 Occupiers’ Liability Act 1957 or the M2 Occupiers’ Liability Act (Northern Ireland) 1957.
- (2) This Part of this Act is subject to Part 111; and in relation to contracts, the operation of sections 2 to 4 and 7 is subject to the exceptions made by Schedule 1.
- (3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—
 - (a) from things done or to be done by a person in the course of a business (whether his own business or another’s); or
 - (b) from the occupation of premises used for business purposes of the occupier;

and references to liability are to be read accordingly but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier].

- (4) In relation to any breach of duty or obligation, it is, immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

Avoidance of liability for negligence, breach of contract, etc

- (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

- (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Liability arising in contract

- (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
- (2) As against that party, the other cannot by reference to any contract term—
 - (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
 - (b) claim to be entitled—
 - (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
 - (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Unreasonable indemnity clauses

- (1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.
- (2) This section applies whether the liability in question—
 - (a) is directly that of the person to be indemnified or is incurred by him vicariously;
 - (b) is to the person dealing as consumer or to someone else.

Liability arising from sale or supply of goods

- (1) In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage—
 - (a) arises from the goods proving defective while in consumer use; and
 - (b) results from the negligence of a person concerned in the manufacture or distribution of the goods,

liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods.

- (2) For these purposes—
 - (a) goods are to be regarded as “in consumer use” when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and

- (b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.
- (3) This section does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed.

Sale and hire purchase

- (1) Liability for breach of the obligations arising from—
 - (a) [section 12 of the Sale of Goods Act 1979](seller's implied undertakings as to title, etc.);
 - (b) section 8 of the Supply of Goods (Implied Terms) Act 1973 (the corresponding thing in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

- (2) As against a person dealing as consumer, liability for breach of the obligations arising from—
 - (a) [section 13, 14, or 15 of the 1979 Act](sellers's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
 - (b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase),

cannot be excluded or restricted by reference to any contract term.

- (3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.
- (4) The liabilities referred to in this section are not only the business liabilities defined by section 1(3), but include those arising under any contract of sale of goods or hire-purchase agreement.

Miscellaneous contracts under which goods pass

- (1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, subsections (2) to (4) below apply as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.
- (2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.
- (3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

[(3A)Liability for breach of the obligations arising under section 2 of the Supply of Goods and Services Act 1982 (implied terms about title etc. in certain contracts for the transfer of the property in goods) cannot be excluded or restricted by reference to any such term.]

(4) Liability in respect of—

- (a) the right to transfer ownership of the goods, or give possession; or
- (b) the assurance of quiet possession to a person taking goods in pursuance of the contract,

cannot [(in a case to which subsection (3A) above does not apply)], be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.

Other provisions about contracts

- (1) In the Misrepresentation Act 1967, the following is substituted for section 3—

“3 Avoidance of provision excluding liability for misrepresentation

If a contract contains a term which would exclude or restrict—

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.”.

- (2) The same section is substituted for section 3 of the Misrepresentation Act (Northern Ireland) 1967.

Effect of breach

- (1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.
- (2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

Evasion by means of secondary contract

A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another’s liability which this Part of this Act prevents that other from excluding or restricting.

Explanatory provisions

- (1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.
- (2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the

court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

- (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.
- (4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—
 - (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
 - (b) how far it was open to him to cover himself by insurance.
- (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

“Dealing as a consumer”

- (1) A party to a contract “deals as consumer” in relation to another party if—
 - (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
 - (b) the other party does make the contract in the course of a business; and
 - (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

[(1A)But if the first party mentioned in subsection (1) is an individual paragraph (c) of that subsection must be ignored.]

[(2)But the buyer is not in any circumstances to be regarded as dealing as consumer—

- (a) if he is an individual and the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person;
- (b) if he is not an individual and the goods are sold by auction or by competitive tender.]
- (3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

Varieties of exemption clause

- (1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—
 - (a) making the liability or its enforcement subject to restrictive or onerous conditions;
 - (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
 - (c) excluding or restricting rules of evidence or procedure;

and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

- (2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

Interpretation of Part I

In this Part of this Act—

- “business” includes a profession and the activities of any government department or local or public authority;
- “goods” has the same meaning as in [the Sale of Goods Act 1979];
- “hire-purchase agreement” has the same meaning as in the Consumer Credit Act 1974;
- “negligence” has the meaning given by section 1(1);
- “notice” includes an announcement, whether or not in writing, and any other communication or pretended communication; and
- “personal injury” includes any disease and any impairment of physical or mental condition.

PART II

Amendment of Law for Scotland

15 Scope of Part II

- (1) This Part of this Act is subject to Part III of this Act and does not affect the validity, of any discharge or indemnity given by a person in consideration of the receipt by him of compensation in settlement of any claim which he has.
- (2) Subject to subsection (3) below, sections 16 to 18 of this Act apply to any contract only to the extent that the contract—
 - (a) relates to the transfer of the ownership or possession of goods from one person to another (with or without work having been done on them);
 - (b) constitutes a contract of service or apprenticeship;
 - (c) relates to services of whatever kind, including (without prejudice to the foregoing generality) carriage, deposit and pledge, care and custody, mandate, agency, loan and services relating to the use of land;
 - (d) relates to the liability of an occupier of land to persons entering upon or using that land;
 - (e) relates to a grant of any right or permission to enter upon or use land not amounting to an estate or interest in the land.
- (3) Notwithstanding anything in subsection (2) above, sections 16 to 18—
 - (a) do not apply to any contract to the extent that the contract—
 - (i) is a contract of insurance (including a contract to pay annuity on human life);
 - (ii) relates to the formation, constitution or dissolution of any body corporate or unincorporated association or partnership;

- (b) apply to—
 - a contract of marine salvage or towage;
 - a charter party of a ship or hovercraft;
 - a contract for the carriage of goods by ship or hovercraft; or,
 - a contract to which subsection (4) below relates,
 only to the extent that—
 - (i) both parties deal or hold themselves out as dealing in the course of a business (and then only in so far as the contract purports to exclude or restrict liability for breach of duty in respect of death or personal injury); or
 - (ii) the contract is a consumer contract (and then only in favour of the consumer).
- (4) This subsection relates to a contract in pursuance of which goods are carried by ship or hovercraft and which either—
 - (a) specifies ship or hovercraft as the means of carriage over part of the journey to be covered; or
 - (b) makes no provision as to the means of carriage and does not exclude ship or hovercraft as that means,
 in so far as the contract operates for and in relation to the carriage of the goods by that means.



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APPENDIX 12

TORTS (INTERFERENCE WITH GOODS) ACT 1977

TORTS (INTERFERENCE WITH GOODS) ACT 1977 (EDITED)

1977 CHAPTER 32

An Act to amend the law concerning conversion and other torts affecting goods.

[22nd July 1977]

PRELIMINARY

1 Definition of “wrongful interference with goods”

In this Act “wrongful interference”, or “wrongful interference with goods”, means—

- (a) conversion of goods (also called trover),
- (b) trespass to goods,
- (c) negligence so far as it results in damage to goods or to an interest in goods.
- (d) subject to section 2, any other tort so far as it results in damage to goods or to an interest in goods.

[and references in this Act (however worded) to proceedings for wrongful interference or to a claim or right to a claim for wrongful interference shall include references to proceedings by virtue of Part I of the Consumer Protection Act 1987 [or Part II of the Consumer Protection (Northern Ireland) Order 1987] (product liability) in respect of any damage to goods or to an interest in goods or, as the case may be, to a claim or right to claim by virtue of that Part in respect of any such damage.]

DETENTION OF GOODS

2 Abolition of detainue

- (1) Detinue is abolished.
- (2) An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detainue before detainue was abolished).

3 Form of judgment where goods are detained

- (1) In proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with this section, so far as appropriate.

- (2) The relief is—
 - (a) an order for delivery of the goods, and for payment of any consequential damages, or
 - (b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages, or
 - (c) damages.
- (3) Subject to rules of court—
 - (a) relief shall be given under only one of paragraphs (a), (b) and (c) of subsection (2),
 - (b) relief under paragraph (a) of subsection (2) is at the discretion of the court, and the claimant may choose between the others.
- (4) If it is shown to the satisfaction of the court that an order under subsection (2)(a) has not been complied with, the court may—
 - (a) revoke the order, or the relevant part of it, and
 - (b) make an order for payment of damages by reference to the value of the goods.
- (5) Where an order is made under subsection (2)(b) the defendant may satisfy the order by returning the goods at any time before execution of judgment, but without prejudice to liability to pay any consequential damages.
- (6) An order for delivery of the goods under subsection (2)(a) or (b) may impose such conditions as may be determined by the court, or pursuant to rules of court, and in particular, where damages by reference to the value of the goods would not be the whole of the value of the goods, may require an allowance to be made by the claimant to reflect the difference.

For example, a bailor's action against the bailee may be one in which the measure of damages is not the full value of the goods, and then the court may order delivery of the goods, but require the bailor to pay the bailee a sum reflecting the difference.

- (7) Where under subsection (1) or subsection (2) of section 6 an allowance is to be made in respect of an improvement of the goods, and an order is made under subsection (2)(a) or (b), the court may assess the allowance to be made in respect of the improvement, and by the order require, as a condition for delivery of the goods, that allowance to be made by the claimant.
- (8) This section is without prejudice—
 - (a) to the remedies afforded by section 133 of the M1 Consumer Credit Act 1974, or
 - (b) to the remedies afforded by sections 35, 42 and 44 of the M2 Hire-Purchase Act 1965, or to those sections of the M3 Hire-Purchase Act (Northern Ireland) 1966 (so long as those sections respectively remain in force), or
 - (c) to any jurisdiction to afford ancillary or incidental relief.

4 Interlocutory relief where goods are detained

- (1) In this section “proceedings” means proceedings for wrongful interference.
- (2) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for the delivery up of any goods which are or may become the subject matter of subsequent proceedings in the court, or as to which any question may arise in proceedings.

- (3) Delivery shall be, as the order may provide, to the claimant or to a person appointed by the court for the purpose, and shall be on such terms and conditions as may be specified in the order.
- (4) The power to make rules of court under section [99 of the Supreme Court of Judicature (Consolidation) Act 1925] 84 of the Supreme Court Act 1981]or under section 7 of the Northern Ireland Act 1962 shall include power to make rules of court as to the manner in which an application for such an order can be made, and as to the circumstances in which such an order can be made; and any such rules may include such incidental, supplementary and consequential provisions as the authority making the rules may consider necessary or expedient.
- (5) The preceding provisions of this section shall have effect in relation to county courts as they have effect in relation to the High Court, and as if in those provisions references to rules of court and to section [99] [84] of the said Act of [1925] [1981] or section 7 of the Northern Ireland Act 1962 included references to county court rules and to [section 75 of the County Courts Act 1984] or [Article 47 of the County Courts (Northern Ireland) Order 1980].

DAMAGES

5 Extinction of title on satisfaction of claim for damages

- (1) Where damages for wrongful interference are, or would fall to be, assessed on the footing that the claimant is being compensated—
 - (a) for the whole of his interest in the goods, or
 - (b) for the whole of his interest in the goods subject to a reduction for contributory negligence,

payment of the assessed damages (under all heads), or as the case may be settlement of a claim for damages for the wrong (under all heads), extinguishes the claimant's title to that interest.

- (2) In subsection (1) the reference to the settlement of the claim includes—
 - (a) where the claim is made in court proceedings, and the defendant has paid a sum into court to meet the whole claim, the taking of that sum by the claimant, and
 - (b) where the claim is made in court proceedings, and the proceedings are settled or compromised, the payment of what is due in accordance with the settlement or compromise, and
 - (c) where the claim is made out of court and is settled or compromised, the payment of what is due in accordance with the settlement or compromise.
- (3) It is hereby declared that subsection (1) does not apply where damages are assessed on the footing that the claimant is being compensated for the whole of his interest in the goods, but the damages paid are limited to some lesser amount by virtue of any enactment or rule of law.
- (4) Where under section 7(3) the claimant accounts over to another person (the “third party”) so as to compensate (under all heads) the third party for the whole of his interest in the goods, the third party's title to that interest is extinguished.
- (5) This section has effect subject to any agreement varying the respective rights of the parties to the agreement, and where the claim is made in court proceedings has effect subject to any order of the court.

6 Allowance for improvement of the goods

- (1) If in proceedings for wrongful interference against a person (the “improver”) who has improved the goods, it is shown that the improver acted in the mistaken but honest belief that he had a good title to them, an allowance shall be made for the extent to which, at the time as at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement.
- (2) If, in proceedings for wrongful interference against a person (“the purchaser”) who has purported to purchase the goods—
 - (a) from the improver, or
 - (b) where after such a purported sale the goods passed by a further purported sale on one or more occasions, on any such occasion,

it is shown that the purchaser acted in good faith, an allowance shall be made on the principle set out in subsection (1).

For example, where a person in good faith buys a stolen car from the improver and is sued in conversion by the true owner the damages may be reduced to reflect the improvement, but if the person who bought the stolen car from the improver sues the improver for failure of consideration, and the improver acted in good faith, subsection (3) below will ordinarily make a comparable reduction in the damages he recovers from the improver.

- (3) If in a case within subsection (2) the person purporting to sell the goods acted in good faith, then in proceedings by the purchaser for recovery of the purchase price because of failure of consideration, or in any other proceedings founded on that failure of consideration, an allowance shall, where appropriate, be made on the principle set out in subsection (1).
- (4) This section applies, with the necessary modifications, to a purported bailment or other disposition of goods as it applies to a purported sale of goods.

LIABILITY TO TWO OR MORE CLAIMANTS

7 Double liability

- (1) In this section “double liability” means the double liability of the wrongdoer which can arise—
 - (a) where one of two or more rights of action for wrongful interference is founded on a possessory title, or
 - (b) where the measure of damages in an action for wrongful interference founded on a proprietary title is or includes the entire value of the goods, although the interest is one of two or more interests in the goods.
- (2) In proceedings to which any two or more claimants are parties, the relief shall be such as to avoid double liability of the wrongdoer as between those claimants.
- (3) On satisfaction, in whole or in part, of any claim for an amount exceeding that recoverable if subsection (2) applied, the claimant is liable to account over to the other person having a right to claim to such extent as will avoid double liability.

- (4) Where, as the result of enforcement of a double liability, any claimant is unjustly enriched to any extent, he shall be liable to reimburse the wrongdoer to that extent.

For example, if a converter of goods pays damages first to a finder of the goods, and then to the true owner, the finder is unjustly enriched unless he accounts over to the true owner under subsection (3); and then the true owner is unjustly enriched and becomes liable to reimburse the converter of the goods.

8 Competing rights to the goods

- (1) The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court, that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues, and any rule of law (sometimes called *jus tertii*) to the contrary is abolished.
- (2) Rules of court relating to proceedings for wrongful interference may—
 - (a) require the plaintiff to give particulars of his title,
 - (b) require the plaintiff to identify any person who, to his knowledge, has or claims any interest in the goods,
 - (c) authorise the defendant to apply for directions as to whether any person should be joined with a view to establishing whether he has a better right than the plaintiff, or has a claim as a result of which the defendant might be doubly liable,
 - (d) where a party fails to appear on an application within paragraph (c), or to comply with any direction given by the court on such an application, authorise the court to deprive him of any right of action against the defendant for the wrong either unconditionally, or subject to such terms or conditions as may be specified.
- (3) Subsection (2) is without prejudice to any other power of making rules of court.

9 Concurrent actions

- (1) This section applies where goods are the subject of two or more claims for wrongful interference (whether or not the claims are founded on the same wrongful act, and whether or not any of the claims relates also to other goods).
- (2) Where goods are the subject of two or more claims under section 6 this section shall apply as if any claim under section 6(3) were a claim for wrongful interference.
- (3) If proceedings have been brought in a county court on one of those claims, county court rules may waive, or allow a court to waive, any limit (financial or territorial) on the jurisdiction of county courts in [the County Courts Act 1984] or the County Courts [(Northern Ireland) Order 1980] so as to allow another of those claims to be brought in the same county court.
- (4) If proceedings are brought on one of the claims in the High Court, and proceedings on any other are brought in a county court, whether prior to the High Court proceedings or not, the High Court may, on the application of the defendant, after notice has been given to the claimant in the county court proceedings—
 - (a) order that the county court proceedings be transferred to the High Court, and
 - (b) order security for costs or impose such other terms as the court thinks fit.

CONVERSION AND TRESPASS TO GOODS

10 Co-owners

- (1) Co-ownership is no defence to an action founded on conversion or trespass to goods where the defendant without the authority of the other co-owner—
 - (a) destroys the goods, or disposes of the goods in a way giving a good title to the entire property in the goods, or otherwise does anything equivalent to the destruction of the other's interest in the goods, or
 - (b) purports to dispose of the goods in a way which would give a good title to the entire property in the goods if he was acting with the authority of all co-owners of the goods.
- (2) Subsection (1) shall not affect the law concerning execution or enforcement of judgments, or concerning any form of distress.
- (3) Subsection (1)(a) is by way of restatement of existing law so far as it relates to conversion.

11 Minor amendments

- (1) Contributory negligence is no defence in proceedings founded on conversion, or on intentional trespass to goods.
- (2) Receipt of goods by way of pledge is conversion if the delivery of the goods is conversion.
- (3) Denial of title is not of itself conversion.

UNCOLLECTED GOODS

12 Bailee's power of sale

- (1) This section applies to goods in the possession or under the control of a bailee where—
 - (a) the bailor is in breach of an obligation to take delivery of the goods or, if the terms of the bailment so provide, to give directions as to their delivery, or
 - (b) the bailee could impose such an obligation by giving notice to the bailor, but is unable to trace or communicate with the bailor, or
 - (c) the bailee can reasonably expect to be relieved of any duty to safeguard the goods on giving notice to the bailor, but is unable to trace or communicate with the bailor.
- (2) In the cases of Part I of Schedule 1 to this Act a bailee may, for the purposes of subsection (1), impose an obligation on the bailor to take delivery of the goods, or as the case may be to give directions as to their delivery, and in those cases the said Part I sets out the method of notification.
- (3) If the bailee—
 - (a) has in accordance with Part II of Schedule 1 to this Act given notice to the bailor of his intention to sell the goods under this subsection, or
 - (b) has failed to trace or communicate with the bailor with a view to giving him such a notice, after having taken reasonable steps for the purpose,

and is reasonably satisfied that the bailor owns the goods, he shall be entitled, as against the bailor, to sell the goods.

- (4) Where subsection (3) applies but the bailor did not in fact own the goods, a sale under this section, or under section 13, shall not give a good title as against the owner, or as against a person claiming under the owner.
- (5) A bailee exercising his powers under subsection (3) shall be liable to account to the bailor for the proceeds of sale, less any costs of sale, and—
 - (a) the account shall be taken on the footing that the bailee should have adopted the best method of sale reasonably available in the circumstances, and
 - (b) where subsection (3)(a) applies, any sum payable in respect of the goods by the bailor to the bailee which accrued due before the bailee gave notice of intention to sell the goods shall be deductible from the proceeds of sale.
- (6) A sale duly made under this section gives a good title to the purchaser as against the bailor.
- (7) In this section, section 13, and Schedule 1 to this Act,
 - (a) “bailor” and “bailee” include their respective successors in title, and
 - (b) references to what is payable, paid or due to the bailee in respect of the goods include references to what would be payable by the bailor to the bailee as a condition of delivery of the goods at the relevant time.
- (8) This section, and Schedule 1 to this Act, have effect subject to the terms of the bailment.
- (9) This section shall not apply where the goods were bailed before the commencement of this Act.

13 Sale authorised by the court

- (1) If a bailee of the goods to which section 12 applies satisfies the court that he is entitled to sell the goods under section 12, or that he would be so entitled if he had given any notice required in accordance with Schedule 1 to this Act, the court—
 - (a) may authorise the sale of the goods subject to such terms and conditions, if any, as may be specified in the order, and
 - (b) may authorise the bailee to deduct from the proceeds of sale any costs of sale and any amount due from the bailor to the bailee in respect of the goods, and
 - (c) may direct the payment into court of the net proceeds of sale, less any amount deducted under paragraph (b), to be held to the credit of the bailor.
- (2) A decision of the court authorising a sale under this section shall, subject to any right of appeal, be conclusive, as against the bailor, of the bailee’s entitlement to sell the goods, and gives a good title to the purchaser as against the bailor.
- (3) In this section “the court” means the High Court or a county court [and a county court shall have jurisdiction in the proceedings save that, in Northern Ireland, a county court shall only have jurisdiction in proceedings if the value of the goods does not exceed the county court limit mentioned in Article 10(1) of the County Courts (Northern Ireland) Order 1980.]

13 Sale authorised by the court

- (1) If a bailee of the goods to which section 12 applies satisfies the court that he is entitled to sell the goods under section 12, or that he would be so entitled if he had given any notice required in accordance with Schedule 1 to this Act, the court—
 - (a) may authorise the sale of the goods subject to such terms and conditions, if any, as may be specified in the order, and
 - (b) may authorise the bailee to deduct from the proceeds of sale any costs of sale and any amount due from the bailor to the bailee in respect of the goods, and
 - (c) may direct the payment into court of the net proceeds of sale, less any amount deducted under paragraph (b), to be held to the credit of the bailor.
- (2) A decision of the court authorising a sale under this section shall, subject to any right of appeal, be conclusive, as against the bailor, of the bailee's entitlement to sell the goods, and gives a good title to the purchaser as against the bailor.
- (3) In this section “ the court ” means the High Court or a county court, and a county court shall have jurisdiction in the proceedings if the value of the goods does not exceed the county court limit.

SUPPLEMENTAL

14 Interpretation

- (1) In this Act, unless the context otherwise requires—
 - [“ county court limit ” means the [amount which for the time being is the county court limit for the purposes of section 15 of the County Courts Act 1984], or in Northern Ireland the current amount mentioned in [Article 10(1) of the County Courts (Northern Ireland) Order 1980].]
 - “ enactment ” includes an enactment contained in an Act of the Parliament of Northern Ireland or an Order in Council made under the Northern Ireland (Temporary Provisions) Act 1972, or in a Measure of the Northern Ireland Assembly,
 - “ goods ” includes all chattels personal other than things in action and money,
 - “ High Court ” includes the High Court of Justice in Northern Ireland.
- (2) References in this Act to any enactment include references to that enactment as amended, extended or applied by or under that or any other enactment.

APPENDIX 13

SALE OF GOODS ACT 1979

SALE OF GOODS ACT 1979

1979 CHAPTER 54

An Act to consolidate the law relating to the sale of goods.

[6th December 1979]

PART I CONTRACTS TO WHICH ACT APPLIES

1 Contracts to which Act applies

- (1) This Act applies to contracts of sale of goods made on or after (but not to those made before) 1 January 1894.
- (2) In relation to contracts made on certain dates, this Act applies subject to the modification of certain of its sections as mentioned in Schedule 1 below.
- (3) Any such modification is indicated in the section concerned by a reference to Schedule 1 below.
- (4) Accordingly, where a section does not contain such a reference, this Act applies in relation to the contract concerned without such modification of the section.

PART II FORMATION OF THE CONTRACT

Contract of sale

2 Contract of sale

- (1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
- (2) There may be a contract of sale between one part owner and another.
- (3) A contract of sale may be absolute or conditional.
- (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale.
- (5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.
- (6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

3 Capacity to buy and sell

- (1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.
- (2) Where necessities are sold and delivered [to a minor or] to a person who by reason of [mental incapacity or] drunkenness is incompetent to contract, he must pay a reasonable price for them.
- (3) In subsection (2) above “necessaries” means goods suitable to the condition in life of the [minor or other] person concerned and to his actual requirements at the time of the sale and delivery.

Formalities of contract

4 How contract of sale is made

- (1) Subject to this and any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.
- (2) Nothing in this section affects the law relating to corporations.

Subject matter of contract

5 Existing or future goods

- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.
- (2) There may be a contract for the sale of goods the acquisition of which by the seller depends on a contingency which may or may not happen.
- (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6 Goods which have perished

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7 Goods perishing before sale but after agreement to sell

Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.

The price

8 Ascertainment of price

- (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

- (2) Where the price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price.
- (3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9 Agreement to sell at valuation

- (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.
- (2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

10 Stipulations about time

- (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale.
- (2) Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract.
- (3) In a contract of sale “month” prima facie means calendar month.

11 When condition to be treated as warranty

- [(1) This section does not apply to Scotland.]
- (2) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
 - (3) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.
 - (4) [Subject to section 35A below] Where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.
 - (6) Nothing in this section affects a condition or warranty whose fulfilment is excused by law by reason of impossibility or otherwise.
 - (7) Paragraph 2 of Schedule 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

12 Implied terms about title, etc

- (1) In a contract of sale, other than one to which subsection (3) below applies, there is an implied [term] on the part of the seller that in the case of a sale he has a right to sell

the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

- (2) In a contract of sale, other than one to which subsection (3) below applies, there is also an implied [term] that—
 - (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and
 - (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.
- (3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.
- (4) In a contract to which subsection (3) above applies there is an implied [term] that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.
- (5) In a contract to which subsection (3) above applies there is also an implied [term] that none of the following will disturb the buyer's quiet possession of the goods, namely—
 - (a) the seller;
 - (b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;
 - (c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

[(5A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition and the terms implied by subsections (2), (4) and (5) above are warranties.]

- (6) Paragraph 3 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

13 Sale by description

- (1) Where there is a contract for the sale of goods by description, there is an implied [term] that the goods will correspond with the description.

[(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.]

- (2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.
- (4) Paragraph 4 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

14 Implied terms about quality or fitness

(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied [term] about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

[(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
- (b) appearance and finish,
- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

- (a) which is specifically drawn to the buyer's attention before the contract is made,
- (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or
- (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.]

[(2D) If the buyer deals as consumer or, in Scotland, if a contract of sale is a consumer contract, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

(2E) A public statement is not by virtue of subsection (2D) above a relevant circumstance for the purposes of subsection (2A) above in the case of a contract of sale, if the seller shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or
- (c) the decision to buy the goods could not have been influenced by the statement.

(2F) Subsections (2D) and (2E) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the buyer deals as consumer or, in Scotland, whether or not the contract of sale is a consumer contract) if the statement would have been such a circumstance apart from those subsections.]

- (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—
 - (a) to the seller, or
 - (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,

any particular purpose for which the goods are being bought, there is an implied [term] that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

- (4) An implied [term] about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.
- (5) The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.
- [(6) As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions.]
- (7) Paragraph 5 of Schedule 1 below applies in relation to a contract made on or after 18 May 1973 and before the appointed day, and paragraph 6 in relation to one made before 18 May 1973.
- (8) In subsection (7) above and paragraph 5 of Schedule 1 below references to the appointed day are to the day appointed for the purposes of those provisions by an order of the Secretary of State made by statutory instrument.

Sale by sample

15 Sale by sample

- (1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.
- (2) In the case of a contract for sale by sample there is an implied term—
 - (a) that the bulk will correspond with the sample in quality;
 - (b)
 - (c) that the goods will be free from any defect, [making their quality unsatisfactory], which would not be apparent on reasonable examination of the sample.
- [(3) As regards England and Wales and Northern Ireland, the term implied by subsection (2) above is a condition.]
- (4) Paragraph 7 of Schedule 1 below applies in relation to a contract made before 18 May 1973.

15A Modification of remedies for breach of condition in non-consumer cases

- (1) Where in the case of a contract of sale—
 - (a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but
 - (b) the breach is so slight that it would be unreasonable for him to reject them,
 then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.
- (2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.
- (3) It is for the seller to show that a breach fell within subsection (1)(b) above.
- (4) This section does not apply to Scotland.]

15B Remedies for breach of contract as respects Scotland

- (1) Where in a contract of sale the seller is in breach of any term of the contract (express or implied), the buyer shall be entitled—
 - (a) to claim damages, and
 - (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.
- (2) Where a contract of sale is a consumer contract, then, for the purposes of subsection (1)(b) above, breach by the seller of any term (express or implied)—
 - (a) as to the quality of the goods or their fitness for a purpose,
 - (b) if the goods are, or are to be, sold by description, that the goods will correspond with the description,
 - (c) if the goods are, or are to be, sold by reference to a sample, that the bulk will correspond with the sample in quality,
 shall be deemed to be a material breach.
- (3) This section applies to Scotland only.]

PART III EFFECTS OF THE CONTRACT

Transfer of property as between seller and buyer

16 Goods must be ascertained

[Subject to section 20A below] Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17 Property passes when intended to pass

- (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

18 Rules for ascertaining intention

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

Rule 4.—When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:—

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract.

[(3) Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk—

- (a) the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and
- (b) the property in those goods then passes to that buyer.

(4) Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.]

19 Reservation of right of disposal

- (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
- (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.
- (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

[20 Passing of risk]

- (1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.
- (2) But where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.
- (3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.
- [(4) In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored and the goods remain at the seller's risk until they are delivered to the consumer.]

20A Undivided shares in goods forming part of a bulk

- (1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met—
 - (a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and
 - (b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk.
- (2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—
 - (a) property in an undivided share in the bulk is transferred to the buyer, and
 - (b) the buyer becomes an owner in common of the bulk.

- (3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time.
- (4) Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk.
- (5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made.
- (6) For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.]

20B Deemed consent by co-owner to dealings in bulk goods

- (1) A person who has become an owner in common of a bulk by virtue of section 20A above shall be deemed to have consented to—
 - (a) any delivery of goods out of the bulk to any other owner in common of the bulk, being goods which are due to him under his contract;
 - (b) any dealing with or removal, delivery or disposal of goods in the bulk by any other person who is an owner in common of the bulk in so far as the goods fall within that co-owner's undivided share in the bulk at the time of the dealing, removal, delivery or disposal.
- (2) No cause of action shall accrue to anyone against a person by reason of that person having acted in accordance with paragraph (a) or (b) of subsection (1) above in reliance on any consent deemed to have been given under that subsection.
- (3) Nothing in this section or section 20A above shall—
 - (a) impose an obligation on a buyer of goods out of a bulk to compensate any other buyer of goods out of that bulk for any shortfall in the goods received by that other buyer;
 - (b) affect any contractual arrangement between buyers of goods out of a bulk for adjustments between themselves; or
 - (c) affect the rights of any buyer under his contract.]

Transfer of title

21 Sale by person not the owner

- (1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
- (2) Nothing in this Act affects—
 - (a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner;

- (b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22 Market overt

- (1)
- (2) This section does not apply to Scotland.
- (3) Paragraph 8 of Schedule 1 below applies in relation to a contract under which goods were sold before 1 January 1968 or (in the application of this Act to Northern Ireland) 29 August 1967.

23 Sale under voidable title

When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24 Seller in possession after sale

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

25 Buyer in possession after sale

- (1) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.
- (2) For the purposes of subsection (1) above—
 - (a) the buyer under a conditional sale agreement is to be taken not to be a person who has bought or agreed to buy goods, and
 - (b) “conditional sale agreement” means an agreement for the sale of goods which is a consumer credit agreement within the meaning of the Consumer Credit Act 1974 under which the purchase price or part of it is payable by instalments, and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled.
- (3) Paragraph 9 of Schedule 1 below applies in relation to a contract under which a person buys or agrees to buy goods and which is made before the appointed day.

- (4) In subsection (3) above and paragraph 9 of Schedule 1 below references to the appointed day are to the day appointed for the purposes of those provisions by an order of the Secretary of State made by statutory instrument.

26 Supplementary to sections 24 and 25

In sections 24 and 25 above “mercantile agent” means a mercantile agent having in the customary course of his business as such agent authority either—

- (a) to sell goods, or
- (b) to consign goods for the purpose of sale, or
- (c) to buy goods, or
- (d) to raise money on the security of goods.

PART IV PERFORMANCE OF THE CONTRACT

27 Duties of seller and buyer

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28 Payment and delivery are concurrent conditions

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29 Rules about delivery

- (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.
- (2) Apart from any such contract, express or implied, the place of delivery is the seller’s place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.
- (3) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.
- (4) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title to goods.
- (5) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact.
- (6) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30 Delivery of wrong quantity

- (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
- (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.
- (2A) A buyer who does not deal as consumer may not—
 - (a) where the seller delivers a quantity of goods less than he contracted to sell, reject the goods under subsection (1) above, or
 - (b) where the seller delivers a quantity of goods larger than he contracted to sell, reject the whole under subsection (2) above,

if the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to do so.

- (2B) It is for the seller to show that a shortfall or excess fell within subsection (2A) above.

(2C) Subsections (2A) and (2B) above do not apply to Scotland.]

[(2D) Where the seller delivers a quantity of goods—

- (a) less than he contracted to sell, the buyer shall not be entitled to reject the goods under subsection (1) above,
- (b) larger than he contracted to sell, the buyer shall not be entitled to reject the whole under subsection (2) above,

unless the shortfall or excess is material.

(2E) Subsection (2D) above applies to Scotland only.]

- (3) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
- (4)
- (5) This section is subject to any usage of trade, special agreement, or course of dealing between the parties.

31 Instalment deliveries

- (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.
- (2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32 Delivery to carrier

- (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.
- (2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.
- (3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and if the seller fails to do so, the goods are at his risk during such sea transit.
- [(4) In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored, but if in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier is not delivery of the goods to the buyer.]

33 Risk where goods are delivered at distant place

Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must nevertheless (unless otherwise agreed) take any risk of deterioration in the goods necessarily incident to the course of transit.

34 Buyer's right of examining the goods

- . . .
- Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract [F2and, in the case of a contract for sale by sample, of comparing the bulk with the sample.].

35 Acceptance

- (1) The buyer is deemed to have accepted the goods [subject to subsection (2) below—
 - (a) when he intimates to the seller that he has accepted them, or
 - (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.
- (2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose—
 - (a) of ascertaining whether they are in conformity with the contract, and
 - (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.

- (3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise.
- (4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.
- (5) The questions that are material in determining for the purposes of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above.
- (6) The buyer is not by virtue of this section deemed to have accepted the goods merely because—
 - (a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or
 - (b) the goods are delivered to another under a sub-sale or other disposition.
- (7) Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit; and in this subsection “commercial unit” means a unit division of which would materially impair the value of the goods or the character of the unit.
- (8) [Paragraph 10 of Schedule 1 below applies in relation to a contract made before 22 April 1967 or (in the application of this Act to Northern Ireland) 28 July 1967.

35A Right of partial rejection

- (1) If the buyer—
 - (a) has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but
 - (b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,

he does not by accepting them lose his right to reject the rest.

- (2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.
- (3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.
- (4) This section applies unless a contrary intention appears in, or is to be implied from, the contract.]

36 Buyer not bound to return rejected goods

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37 Buyer's liability for not taking delivery of goods

- (1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.
- (2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART V RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Preliminary

38 Unpaid seller defined

- (1) The seller of goods is an unpaid seller within the meaning of this Act—
 - (a) when the whole of the price has not been paid or tendered;
 - (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
- (2) In this Part of this Act “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid (or is directly responsible for) the price.

39 Unpaid seller's rights

- (1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
 - (c) a right of re-sale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.

40 Attachment by seller in Scotland

In Scotland a seller of goods may attach them while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.]

Unpaid seller's lien

41 Seller's lien

- (1) Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases:—
 - (a) where the goods have been sold without any stipulation as to credit;
 - (b) where the goods have been sold on credit but the term of credit has expired;
 - (c) where the buyer becomes insolvent.
- (2) The seller may exercise his lien or right of retention notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42 Part delivery

Where an unpaid seller has made part delivery of the goods, he may exercise his lien or right of retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43 Termination of lien

- (1) The unpaid seller of goods loses his lien or right of retention in respect of them—
 - (a) when he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
 - (b) when the buyer or his agent lawfully obtains possession of the goods;
 - (c) by waiver of the lien or right of retention.
- (2) An unpaid seller of goods who has a lien or right of retention in respect of them does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transit

44 Right of stoppage in transit

Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45 Duration of transit

- (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee or custodian for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from the carrier or other bailee or custodian.

- (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
- (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.
- (4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
- (5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as agent to the buyer.
- (6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.
- (7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46 How stoppage in transit is effected

- (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are.
- (2) The notice may be given either to the person in actual possession of the goods or to his principal.
- (3) If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.
- (4) When notice of stoppage in transit is given by the seller to the carrier or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller; and the expenses of the re-delivery must be borne by the seller.

Re-sale etc. by buyer

47 Effect of sub-sale etc. by buyer

- (1) Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it.
- (2) Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then—
 - (a) if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transit is defeated; and

- (b) if the last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.

Rescission: and re-sale by seller

48 Rescission: and re-sale by seller

- (1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit.
- (2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit re-sells the goods, the buyer acquires a good title to them as against the original buyer.
- (3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.
- (4) Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but without prejudice to any claim the seller may have for damages.



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APPENDIX 14

LIMITATIONS ACT 1980

LIMITATION ACT 1980

1980 CHAPTER 58

An Act to consolidate the Limitation Acts 1939 to 1980.

[13th November 1980]

PART I ORDINARY TIME LIMITS FOR DIFFERENT CLASSES OF ACTION

Time limits under Part I subject to extension or exclusion under Part II

1 Time limits under Part I subject to extension or exclusion under Part II

- (1) This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part.
- (2) The ordinary time limits given in this Part of this Act are subject to extension or exclusion in accordance with the provisions of Part II of this Act.

Actions founded on tort

2 Time limit for actions founded on tort

An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

3 Time limit in case of successive conversions and extinction of title of owner of converted goods

- (1) Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion take place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.
- (2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

4 Special time limit in case of theft

- (1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under sections 2 and 3(1) of this Act,

but if his title to the chattel is extinguished under section 3(2) of this Act he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).

- (2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and, except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.

If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.

- (3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.
- (4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related to the theft unless the contrary is shown.
- (5) In this section “theft” includes—
- (a) any conduct outside England and Wales which would be theft if committed in England and Wales; and
 - (b) obtaining any chattel (in England and Wales or elsewhere) by—
 - (i) blackmail (within the meaning of section 21 of the Theft Act 1968), or
 - (ii) fraud (within the meaning of the Fraud Act 2006);]

and references in this section to a chattel being “stolen” shall be construed accordingly.

4A Time limit for actions for defamation or malicious falsehood

The time limit under section 2 of this Act shall not apply to an action for—

- (a) libel or slander, or
- (b) slander of title, slander of goods or other malicious falsehood,

but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued.]

Actions founded on simple contract

5 Time limit for actions founded on simple contract

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

6 Special time limit for actions in respect of certain loans

- (1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.

- (2) This section applies to any contract of loan which—
 - (a) does not provide for repayment of the debt on or before a fixed or determinable date; and
 - (b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;

except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.

- (3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.
- (4) In this section “promissory note” has the same meaning as in the M1Bills of Exchange Act 1882.

7 Time limit for actions to enforce certain awards

An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

General rule for actions on a specialty

8 Time limit for actions on a specialty

- (1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.
- (2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

Actions for sums recoverable by statute

9 Time limit for actions for sums recoverable by statute

- (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
- (2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

10 Special time limit for claiming contribution

- (1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.

- (2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as “the relevant date”) shall be ascertained as provided in subsections (3) and (4) below.
- (3) If the person in question is held liable in respect of that damage—
 - (a) by a judgment given in any civil proceedings; or
 - (b) by an award made on any arbitration;

the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).

For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.

- (4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.
- (5) An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section.

Actions in respect of wrongs causing personal injuries or death

11 Special time limit for actions in respect of personal injuries

- (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

[(1A) This section does not apply to any action brought for damages under section 3 of the Protection from Harassment Act 1997.]

- (2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.
- (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
- (4) Except where subsection (5) below applies, the period applicable is three years from—
 - (a) the date on which the cause of action accrued; or
 - (b) the date of knowledge (if later) of the person injured.
- (5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from—
 - (a) the date of death; or
 - (b) the date of the personal representative’s knowledge;

whichever is the later.

- (6) For the purposes of this section “personal representative” includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.
- (7) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.

11A Actions in respect of defective products

- (1) This section shall apply to an action for damages by virtue of any provision of Part I of the Consumer Protection Act 1987.
- (2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.
- (3) An action to which this section applies shall not be brought after the expiration of the period of ten years from the relevant time, within the meaning of section 4 of the said Act of 1987; and this subsection shall operate to extinguish a right of action and shall do so whether or not that right of action had accrued, or time under the following provisions of this Act had begun to run, at the end of the said period of ten years.
- (4) Subject to subsection (5) below, an action to which this section applies in which the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person or loss of or damage to any property, shall not be brought after the expiration of the period of three years from whichever is the later of—
 - (a) the date on which the cause of action accrued; and
 - (b) the date of knowledge of the injured person or, in the case of loss of or damage to property, the date of knowledge of the plaintiff or (if earlier) of any person in whom his cause of action was previously vested.
- (5) If in a case where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to the plaintiff or any other person the injured person died before the expiration of the period mentioned in subsection (4) above, that subsection shall have effect as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 as if for the reference to that period there were substituted a reference to the period of three years from whichever is the later of—
 - (a) the date of death; and
 - (b) the date of the personal representative’s knowledge.
- (6) For the purposes of this section “personal representative” includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate) but not anyone appointed only as a special personal representative in relation to settled land; and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

- (7) If there is more than one personal representative and their dates of knowledge are different, subsection (5)(b) above shall be read as referring to the earliest of those dates.
- (8) Expressions used in this section or section 14 of this Act and in Part I of the Consumer Protection Act 1987 have the same meanings in this section or that section as in that Part; and section 1(1) of that Act (Part I to be construed as enacted for the purpose of complying with the product liability Directive) shall apply for the purpose of construing this section and the following provisions of this Act so far as they relate to an action by virtue of any provision of that Part as it applies for the purpose of construing that Part.]

12 Special time limit for actions under Fatal Accidents legislation

- (1) An action under the Fatal Accidents Act 1976 shall not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in this Act or in any other Act, or for any other reason).

Where any such action by the injured person would have been barred by the time limit in section 11 [or 11A] of this Act, no account shall be taken of the possibility of that time limit being overridden under section 33 of this Act.

- (2) None of the time limits given in the preceding provisions of this Act shall apply to an action under the Fatal Accidents Act 1976, but no such action shall be brought after the expiration of three years from—
 - (a) the date of death; or
 - (b) the date of knowledge of the person for whose benefit the action is brought;

whichever is the later.

- (3) An action under the Fatal Accidents Act 1976 shall be one to which sections 28, 33 and 35 of this Act apply, and the application to any such action of the time limit under subsection (2) above shall be subject to section 39; but otherwise Parts II and III of this Act shall not apply to any such action.

13 Operation of time limit under section 12 in relation to different dependants

- (1) Where there is more than one person for whose benefit an action under the Fatal Accidents Act 1976 is brought, section 12(2)(b) of this Act shall be applied separately to each of them.
- (2) Subject to subsection (3) below, if by virtue of subsection (1) above the action would be outside the time limit given by section 12(2) as regards one or more, but not all, of the persons for whose benefit it is brought, the court shall direct that any person as regards whom the action would be outside that limit shall be excluded from those for whom the action is brought.
- (3) The court shall not give such a direction if it is shown that if the action were brought exclusively for the benefit of the person in question it would not be defeated by a defence of limitation (whether in consequence of section 28 of this Act or an agreement between the parties not to raise the defence, or otherwise).

14 Definition of date of knowledge for purposes of sections 11 and 12

- (1) [Subject to subsection (1A) below,] in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—
 - (a) that the injury in question was significant; and
 - (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
 - (c) the identity of the defendant; and
 - (d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

[(1A)In section 11A of this Act and in section 12 of this Act so far as that section applies to an action by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product) references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—

- (a) such facts about the damage caused by the defect as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; and
- (b) that the damage was wholly or partly attributable to the facts and circumstances alleged to constitute the defect; and
- (c) the identity of the defendant;

but, in determining the date on which a person first had such knowledge there shall be disregarded both the extent (if any) of that person's knowledge on any date of whether particular facts or circumstances would or would not, as a matter of law, constitute a defect and, in a case relating to loss of or damage to property, any knowledge which that person had on a date on which he had no right of action by virtue of Part I of that Act in respect of the loss or damage.]

- (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
 - (a) from facts observable or ascertainable by him; or
 - (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek;

but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

- (1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
- (2) Section 2 of this Act shall not apply to an action to which this section applies.
- (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
- (4) That period is either—
 - (a) six years from the date on which the cause of action accrued; or
 - (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
- (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
- (6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—
 - (a) of the material facts about the damage in respect of which damages are claimed; and
 - (b) of the other facts relevant to the current action mentioned in subsection (8) below.
- (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (8) The other facts referred to in subsection (6)(b) above are—
 - (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
 - (b) the identity of the defendant; and
 - (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
- (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
- (10) For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire—
 - (a) from facts observable or ascertainable by him; or
 - (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14B Overriding time limit for negligence actions not involving personal injuries

- (1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—
 - (a) which is alleged to constitute negligence; and
 - (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).
- (2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—
 - (a) the cause of action has not yet accrued; or
 - (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.]

Actions to recover land and rent

15 Time limit for actions to recover land

- (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
- (2) Subject to the following provisions of this section, where—
 - (a) the estate or interest claimed was an estate or interest in reversion or remainder or any other future estate or interest and the right of action to recover the land accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest; and
 - (b) the person entitled to the preceding estate or interest (not being a term of years absolute) was not in possession of the land on that date;

no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of twelve years from the date on which the right of action accrued to the person entitled to the preceding estate or interest or six years from the date on which the right of action accrued to the person entitled to the succeeding estate or interest, whichever period last expires.

- (3) Subsection (2) above shall not apply to any estate or interest which falls into possession on the determination of an entailed interest and which might have been barred by the person entitled to the entailed interest.
- (4) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed

or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.

- (5) Where any person is entitled to any estate or interest in land in possession and, while so entitled, is also entitled to any future estate or interest in that land, and his right to recover the estate or interest in possession is barred under this Act, no action shall be brought by that person, or by any person claiming through him, in respect of the future estate or interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate estate or interest.
- (6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.
- (7) Part II of that Schedule contains provisions modifying the provisions of this section in their application to actions brought by, or by a person claiming through, the Crown or any spiritual or eleemosynary corporation sole.

16 Time limit for redemption actions

When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall be brought after the end of that period by the mortgagor or any person claiming through him.

17 Extinction of title to land after expiration of time limit

Subject to—

- (a) section 18 of this Act; . . .
- (b)

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

18 Settled land and land held on trust

- (1) Subject to section 21(1) and (2) of this Act, the provisions of this Act shall apply to equitable interests in land. . . as they apply to legal estates.

Accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be treated as accruing to a person entitled in possession to such an equitable interest in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal estate in the land (and any relevant provision of Part I of Schedule 1 to this Act shall apply in any such case accordingly).

- (2) Where the period prescribed by this Act has expired for the bringing of an action to recover land by a tenant for life or a statutory owner of settled land—
 - (a) his legal estate shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land either has not accrued or has not been barred by this Act; and
 - (b) the legal estate shall accordingly remain vested in the tenant for life or statutory owner and shall devolve in accordance with the Settled Land Act 1925;

but if and when every such right of action has been barred by this Act, his legal estate shall be extinguished.

- (3) Where any land is held upon trust. . . and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land. . . either has not accrued or has not been barred by this Act; but if and when every such right of action has been so barred the estate of the trustees shall be extinguished.
- (4) Where—
 - (a) any settled land is vested in a statutory owner; or
 - (b) any land is held upon trust. . . ;

an action to recover the land may be brought by the statutory owner or trustees on behalf of any person entitled to a beneficial interest in possession in the land. . . whose right of action has not been barred by this Act, notwithstanding that the right of action of the statutory owner or trustees would apart from this provision have been barred by this Act.

19 Time limit for actions to recover rent

No action shall be brought, or distress made, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due.

19A Actions for breach of commonhold duty

An action in respect of a right or duty of a kind referred to in section 37(1) of the Commonhold and Leasehold Reform Act 2002 (enforcement) shall not be brought after the expiration of six years from the date on which the cause of action accrued.]

Actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

20 Time limit for actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land

- (1) No action shall be brought to recover—
 - (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or
 - (b) proceeds of the sale of land;

after the expiration of twelve years from the date on which the right to receive the money accrued.

- (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued.

But if the mortgagee was in possession of the mortgaged property after that date, the right to foreclose on the property which was in his possession shall not be treated as having accrued for the purposes of this subsection until the date on which his possession discontinued.

- (3) The right to receive any principal sum of money secured by a mortgage or other charge and the right to foreclose on the property subject to the mortgage or charge shall not

be treated as accruing so long as that property comprises any future interest or any life insurance policy which has not matured or been determined.

- (4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.
- (5) Subject to subsections (6) and (7) below, no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears shall be brought after the expiration of six years from the date on which the interest became due.
- (6) Where—
 - (a) a prior mortgagee or other incumbrancer has been in possession of the property charged; and
 - (b) an action is brought within one year of the discontinuance of that possession by the subsequent incumbrancer;

the subsequent incumbrancer may recover by that action all the arrears of interest which fell due during the period of possession by the prior incumbrancer or damages in respect of those arrears, notwithstanding that the period exceeded six years.

- (7) Where—
 - (a) the property subject to the mortgage or charge comprises any future interest or life insurance policy; and
 - (b) it is a term of the mortgage or charge that arrears of interest shall be treated as part of the principal sum of money secured by the mortgage or charge;

interest shall not be treated as becoming due before the right to recover the principal sum of money has accrued or is treated as having accrued.

Actions in respect of trust property or the personal estate of deceased persons

21 Time limit for actions in respect of trust property

- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
 - (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
- (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share.

This subsection only applies if the trustee acted honestly and reasonably in making the distribution

- (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

- (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary that he could have obtained if he had brought the action and this Act had been pleaded in defence.

22 Time limit for actions claiming personal estate of a deceased person

Subject to section 21(1) and (2) of this Act—

- (a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued; and
- (b) no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

Actions for an account

23 Time limit in respect of actions for an account

An action for an account shall not be brought after the expiration of any time limit under this Act which is applicable to the claim which is the basis of the duty to account.

Miscellaneous and supplemental

24 Time limit for actions to enforce judgments

- (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
- (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

25 Time limit for actions to enforce advowsons and extinction of title to advowsons

- (1) No person shall bring an action to enforce a right to present to or bestow any ecclesiastical benefice as patron of that benefice after the expiration of whichever of the following periods last expires, that is to say—
 - (a) a period during which three clerks in succession have held the benefice adversely to the right of presentation or gift of the person in question (or of some person through whom he claims); or

(b) a period of sixty years during which the benefice has been held adversely to that right; and in no case after the expiration of a period of one hundred years during which the benefice has been held adversely to that right or to the right of some person entitled to a preceding estate or interest or an undivided share or alternate right of presentation or gift held or derived under the same title.

This subsection shall apply to the Crown or a bishop claiming a right to present to or bestow any ecclesiastical benefice as patron, but shall not affect the right of the Crown or a bishop to present or collate to any ecclesiastical benefice by reason of a lapse.

- (2) Where any benefice becomes void after being held adversely to the right of presentation or gift of the patron of the benefice and a clerk is presented or collated to the benefice by Her Majesty or the ordinary—
 - (a) the possession of that clerk shall be treated as adverse; but
 - (b) where the benefice is avoided in consequence of the incumbent being made a bishop, the incumbency of the new clerk shall, for the purpose of subsection (1) (a) above, be treated as a continuation of the prior incumbency.
- (3) Subject to section 75 of the Land Registration Act 1925, at the expiration of the period prescribed by this Act for any person to bring an action to enforce an advowson the title of that person to the advowson shall be extinguished.

26 Administration to date back to death

For the purposes of the provisions of this Act relating to actions for the recovery of land and advowsons an administrator of the estate of a deceased person shall be treated as claiming as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

27 Cure of defective disentailing assurance

- (1) This section applies where—
 - (a) a person entitled in remainder to an entailed interest in any land makes an assurance of his interest which fails to bar the issue in tail or the estates and interests taking effect on the determination of the entailed interest, or fails to bar those estates and interests only; and
 - (b) any person takes possession of the land by virtue of the assurance.
- (2) If the person taking possession of the land by virtue of the assurance, or any other person whatsoever (other than a person entitled to possession by virtue of the settlement) is in possession of the land for a period of twelve years from the commencement of the time when the assurance could have operated as an effective bar, the assurance shall thereupon operate, and be treated as having always operated, to bar the issue in tail and the estates and interests taking effect on the determination of the entailed interest.
- (3) The reference in subsection (2) above to the time when the assurance could have operated as an effective bar is a reference to the time at which the assurance, as it had then been executed by the person entitled to the entailed interest, would have operated, without the consent of any other person, to bar the issue in tail and the estates and interests taking effect on the determination of the entailed interest.

27A Actions for recovery of property obtained through unlawful conduct etc

- (1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (civil recovery of proceeds of unlawful conduct).
- (2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be brought after the expiration of the period of twelve years from the date on which the [relevant person's] cause of action accrued.
- (3) Proceedings under that Chapter are brought when—
 - (a) a claim form is issued, or
 - [(aa)an application is made for a property freezing order, or]
 - (b) an application is made for an interim receiving order,

whichever is the [earliest].

- (4) The [relevant person's] cause of action accrues in respect of any recoverable property—
 - (a) in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct, when the property is so obtained,
 - (b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained through unlawful conduct which it represents is so obtained.
- (5) If—
 - (a) a person would (but for the preceding provisions of this Act) have a cause of action in respect of the conversion of a chattel, and
 - (b) proceedings are started under that Chapter for a recovery order in respect of the chattel,

section 3(2) of this Act does not prevent his asserting on an application under section 281 of that Act that the property belongs to him, or the court making a declaration in his favour under that section.

- (6) If the court makes such a declaration, his title to the chattel is to be treated as not having been extinguished by section 3(2) of this Act.
- (7) Expressions used in this section and Part 5 of that Act have the same meaning in this section as in that Part.
- [(8) In this section “relevant person” means—
 - (a) the Serious Organised Crime Agency,
 - (b) the Director of Public Prosecutions,
 - (c) the Director of Revenue and Customs Prosecutions, or
 - (d) the Director of the Serious Fraud Office.]

27B Actions for recovery of property for purposes of an external order

- (1) None of the time limits given in the preceding provisions of this Act applies to any proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (civil proceedings for the realisation of property to give effect to an external order).

- (2) Proceedings under that Chapter for a recovery order in respect of any recoverable property shall not be brought after the expiration of the period of twelve years from the date on which the [relevant person's] cause of action accrued.
- (3) Proceedings under that Chapter are brought when—
 - (a) a claim form is issued, or
 - (b) an application is made for a property freezing order, or
 - (c) an application is made for an interim receiving order,

whichever is earliest.

- (4) The [relevant person's cause of action accrues in respect of any recoverable property—
 - (a) in the case of proceedings for a recovery order in respect of property obtained, or believed to have been obtained, as a result of or in connection with criminal conduct, when the property is so obtained,
 - (b) in the case of proceedings for a recovery order in respect of any other recoverable property, when the property obtained, or believed to have been obtained, as a result of or in connection with criminal conduct which it represents is so obtained.
- (5) If—
 - (a) a person would (but for the preceding provisions of this Act) have a cause of action in respect of the conversion of a chattel, and
 - (b) proceedings are started under that Chapter for a recovery order in respect of the chattel,
 - (c) section 3(2) of this Act does not prevent his asserting on an application under article 192 of that Order that the property belongs to him, or the court making a declaration in his favour under that article.
- (6) If the court makes such a declaration, his title to the chattel is to be treated as not having been extinguished by section 3(2) of this Act.
- (7) In this section—
 - (a) “criminal conduct” is to be construed in accordance with section 447(8) of the Proceeds of Crime Act 2002, and
 - (b) expressions used in this section which are also used in Part 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 have the same meaning in this section as in that Part.
- [(8) In this section “relevant person” means—
 - (a) the Serious Organised Crime Agency,
 - (b) the Director of Public Prosecutions,
 - (c) the Director of Revenue and Customs Prosecutions, or
 - (d) the Director of the Serious Fraud Office.]

PART II EXTENSION OR EXCLUSION OF ORDINARY TIME LIMITS

Disability

28 Extension of limitation period in case of disability

- (1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to

whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

- (2) This section shall not affect any case where the right of action first accrued to some person (not under a disability) through whom the person under a disability claims.
- (3) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.
- (4) No action to recover land or money charged on land shall be brought by virtue of this section by any person after the expiration of thirty years from the date on which the right of action accrued to that person or some person through whom he claims.

[(4A) If the action is one to which section 4A of this Act applies, subsection (1) above shall have effect—

- (a) in the case of an action for libel or slander, as if for the words from “at any time” to “occurred)” there were substituted the words “by him at any time before the expiration of one year from the date on which he ceased to be under a disability”; and
- (b) in the case of an action for slander of title, slander of goods or other malicious falsehood, as if for the words “six years” there were substituted the words “one year”.]
- (5) If the action is one to which section 10 of this Act applies, subsection (1) above shall have effect as if for the words “six years” there were substituted the words “two years”.
- (6) If the action is one to which section 11 or 12(2) of this Act applies, subsection (1) above shall have effect as if for the words “six years” there were substituted the words “three years”.
- [(7) If the action is one to which section 11A of this Act applies or one by virtue of section 6(1)(a) of the Consumer Protection Act 1987 (death caused by defective product), subsection (1) above—
 - (a) shall not apply to the time limit prescribed by subsection (3) of the said section 11A or to that time limit as applied by virtue of section 12(1) of this Act; and
 - (b) in relation to any other time limit prescribed by this Act shall have effect as if for the words “six years” there were substituted the words “three years”.]

28A Extension for cases where the limitation period is the period under section 14A(4)(b)

- (1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act—
 - (a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;
 - (b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under subsection (5) of that section was under a disability; and
 - (c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

- (2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act.]

Acknowledgment and part payment

29 Fresh accrual of action on acknowledgment or part payment

- (1) Subsections (2) and (3) below apply where any right of action (including a foreclosure action) to recover land or an advowson or any right of a mortgagee of personal property to bring a foreclosure action in respect of the property has accrued.
- (2) If the person in possession of the land, benefice or personal property in question acknowledges the title of the person to whom the right of action has accrued—
 - (a) the right shall be treated as having accrued on and not before the date of the acknowledgment; and
 - (b) in the case of a right of action to recover land which has accrued to a person entitled to an estate or interest taking effect on the determination of an entailed interest against whom time is running under section 27 of this Act, section 27 shall thereupon cease to apply to the land.
- (3) In the case of a foreclosure or other action by a mortgagee, if the person in possession of the land, benefice or personal property in question or the person liable for the mortgage debt makes any payment in respect of the debt (whether of principal or interest) the right shall be treated as having accrued on and not before the date of the payment.
- (4) Where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either—
 - (a) receives any sum in respect of the principal or interest of the mortgage debt; or
 - (b) acknowledges the title of the mortgagor, or his equity of redemption;

an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgment.

- (5) Subject to subsection (6) below, where any right of action has accrued to recover—
 - (a) any debt or other liquidated pecuniary claim; or
 - (b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

- (6) A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.
- (7) Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

30 Formal provisions as to acknowledgments and part payments

- (1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.
- (2) For the purposes of section 29, any acknowledgment or payment—
 - (a) may be sent by the agent of the person by whom it is required to be made under that section; and
 - (b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

31 Effect of acknowledgment or part payment on persons other than the maker or recipient

- (1) An acknowledgment of the title to any land, benefice, or mortgaged personalty by any person in possession of it shall bind all other persons in possession during the ensuing period of limitation.
- (2) A payment in respect of a mortgage debt by the mortgagor or any other person liable for the debt, or by any person in possession of the mortgaged property, shall, so far as any right of the mortgagee to foreclose or otherwise to recover the property is concerned, bind all other persons in possession of the mortgaged property during the ensuing period of limitation.
- (3) Where two or more mortgagees are by virtue of the mortgage in possession of the mortgaged land, an acknowledgment of the mortgagor's title or of his equity of redemption by one of the mortgagees shall only bind him and his successors and shall not bind any other mortgagee or his successors.
- (4) Where in a case within subsection (3) above the mortgagee by whom the acknowledgment is given is entitled to a part of the mortgaged land and not to any ascertained part of the mortgage debt the mortgagor shall be entitled to redeem that part of the land on payment, with interest, of the part of the mortgage debt which bears the same proportion to the whole of the debt as the value of the part of the land bears to the whole of the mortgaged land.
- (5) Where there are two or more mortgagors, and the title or equity of redemption of one of the mortgagors is acknowledged as mentioned above in this section, the acknowledgment shall be treated as having been made to all the mortgagors.
- (6) An acknowledgment of any debt or other liquidated pecuniary claim shall bind the acknowledgor and his successors but not any other person.
- (7) A payment made in respect of any debt or other liquidated pecuniary claim shall bind all persons liable in respect of the debt or claim.
- (8) An acknowledgment by one of several personal representatives of any claim to the personal estate of a deceased person or to any share or interest in any such estate, or a payment by one of several personal representatives in respect of any such claim, shall bind the estate of the deceased person.
- (9) In this section "successor", in relation to any mortgagee or person liable in respect of any debt or claim, means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve (whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise).

Fraud, concealment and mistake

32 Postponement of limitation period in case of fraud, concealment or mistake

- (1) Subject to [subsection (3)][subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
 - (a) the action is based upon the fraud of the defendant; or
 - (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
 - (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

- (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.
- (3) Nothing in this section shall enable any action—
 - (a) to recover, or recover the value of, any property; or
 - (b) to enforce any charge against, or set aside any transaction affecting, any property;

to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

- (4) A purchaser is an innocent third party for the purposes of this section—
 - (a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and
 - (b) in the case of mistake, if he did not at that time of the purchase know or have reason to believe that the mistake had been made.

[(4A) Subsection (1) above shall not apply in relation to the time limit prescribed by section 11A(3) of this Act or in relation to that time limit as applied by virtue of section 12(1) of this Act.]

- [(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).]

32A Discretionary exclusion of time limit for actions for defamation or malicious falsehood

- (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

- (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
 - (a) the length of, and the reasons for, the delay on the part of the plaintiff;
 - (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A—
 - (i) the date on which any such facts did become known to him, and
 - (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
 - (c) the extent to which, having regard to the delay, relevant evidence is likely—
 - (i) to be unavailable, or
 - (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.
- (3) In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative—
 - (a) the references in subsection (2) above to the plaintiff shall be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and
 - (b) nothing in section 28(3) of this Act shall be construed as affecting the court's discretion under this section.
- (4) In this section “the court” means the court in which the action has been brought.

***Discretionary exclusion of time limit for actions in respect
of personal injuries or death***

**33 Discretionary exclusion of time limit for actions in respect of
personal injuries or death**

- (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—
 - (a) the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
 - (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents;

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

[(1A) The court shall not under this section disapply—

- (a) subsection (3) of section 11A; or
 - (b) where the damages claimed by the plaintiff are confined to damages for loss of or damage to any property, any other provision in its application to an action by virtue of Part I of the Consumer Protection Act 1987.]
- (2) The court shall not under this section disapply section 12(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 11 [or subsection (4) of section 11A].

If, for example, the person injured could at his death no longer maintain an action under the Fatal Accidents Act 1976 because of the time limit in Article 29 in Schedule 1 to the Carriage by Air Act 1961, the court has no power to direct that section 12(1) shall not apply.

- (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
 - (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [by section 11A] or (as the case may be) by section 12;
 - (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
 - (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
 - (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
 - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
- (4) In a case where the person injured died when, because of section 11 [or subsection (4) of section 11A], he could no longer maintain an action and recover damages in respect of the injury, the court shall have regard in particular to the length of, and the reasons for, the delay on the part of the deceased.
- (5) In a case under subsection (4) above, or any other case where the time limit, or one of the time limits, depends on the date of knowledge of a person other than the plaintiff, subsection (3) above shall have effect with appropriate modifications, and shall have effect in particular as if references to the plaintiff included references to any person whose date of knowledge is or was relevant in determining a time limit.
- (6) A direction by the court disapplying the provisions of section 12(1) shall operate to disapply the provisions to the same effect in section 1(1) of the Fatal Accidents Act 1976.
- (7) In this section “the court” means the court in which the action has been brought.
- (8) References in this section to section 11 [or 11A] include references to that section as extended by any of the preceding provisions of this Part of this Act or by any provision of Part III of this Act.

PART III MISCELLANEOUS AND GENERAL

35 New claims in pending actions: rules of court

- (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
 - (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
 - (b) in the case of any other new claim, on the same date as the original action.
- (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
 - (a) the addition or substitution of a new cause of action; or
 - (b) the addition or substitution of a new party;

and “third party proceedings” means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings.

- (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.

For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.

- (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
- (5) The conditions referred to in subsection (4) above are the following—
 - (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
 - (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.
- (6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as necessary for the determination of the original action unless either—
 - (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party’s name; or
 - (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

- (7) Subject to subsection (4) above, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action.

This subsection shall not be taken as prejudicing the power of rules of court to provide for allowing a party to claim relief in a new capacity without adding or substituting a new cause of action.

- (8) Subsections (3) to (7) above shall apply in relation to a new claim made in the course of third party proceedings as if those proceedings were the original action, and subject to such other modifications as may be prescribed by rules of court in any case or class of case.

- (9)

36 Equitable jurisdiction and remedies

- (1) The following time limits under this Act, that is to say—

- (a) the time limit under section 2 for actions founded on tort;

[(aa)the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;]

- (b) the time limit under section 5 for actions founded on simple contract;

- (c) the time limit under section 7 for actions to enforce awards where the submission is not by an instrument under seal;

- (d) the time limit under section 8 for actions on a specialty;

- (e) the time limit under section 9 for actions to recover a sum recoverable by virtue of any enactment; and

- (f) the time limit under section 24 for actions to enforce a judgment;

shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940.

- (2) Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

37 Application to the Crown and the Duke of Cornwall

- (1) Except as otherwise expressly provided in this Act, and without prejudice to section 39, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.

- (2) Notwithstanding subsection (1) above, this Act shall not apply to—

- (a) any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty;

- (b) any forfeiture proceedings under the customs and excise Acts (within the meaning of the Customs and Excise Management Act 1979); or

- (c) any proceedings in respect of the forfeiture of a ship.

In this subsection “duty” includes any debt due to Her Majesty under section 16 of the Tithe Act 1936, and “ship” includes every description of vessel used in navigation not propelled by oars.

- (3) For the purposes of this section, proceedings by or against the Crown include—
 - (a) proceedings by or against Her Majesty in right of the Duchy of Lancaster;
 - (b) proceedings by or against any Government department or any officer of the Crown as such or any person acting on behalf of the Crown; and
 - (c) proceedings by or against the Duke of Cornwall.
- (4) For the purpose of the provisions of this Act relating to actions for the recovery of land and advowsons, references to the Crown shall include references to Her Majesty in right of the Duchy of Lancaster; and those provisions shall apply to lands and advowsons forming part of the possessions of the Duchy of Cornwall as if for the references to the Crown there were substituted references to the Duke of Cornwall as defined in the Duchy of Cornwall Management Act 1863.
- (5) For the purposes of this Act a proceeding by petition of right (in any case where any such proceeding lies, by virtue of any saving in section 40 of the Crown Proceedings Act 1947, notwithstanding the general abolition by that Act of proceedings by way of petition of right) shall be treated as being commenced on the date on which the petition is presented.
- (6) Nothing in this Act shall affect the prerogative right of Her Majesty (whether in right of the Crown or of the Duchy of Lancaster) or of the Duke of Cornwall to any gold or silver mine.

38 Interpretation

- (1) In this Act, unless the context otherwise requires—
 - “action” includes any proceeding in a court of law, including an ecclesiastical court;
 - “land” includes corporeal hereditaments, tithes and rent-charges and any legal or equitable estate or interest therein. . . but except as provided above in this definition does not include any incorporeal hereditament;
 - “personal estate” and “personal property” do not include chattels real;
 - “personal injuries” includes any disease and any impairment of a person’s physical or mental condition, and “injury” and cognate expressions shall be construed accordingly;
 - “rent” includes a rentcharge and a rentservise;
 - “rentcharge” means any annuity or periodical sum of money charged upon or payable out of land, except a rent service or interest on a mortgage on land;
 - “settled land”, “statutory owner” and “tenant for life” have the same meanings respectively as in the Settled Land Act 1925;
 - “trust” and “trustee” have the same meanings respectively as in the Trustee Act 1925; and
 - . . .

- (2) For the purposes of this Act a person shall be treated as under a disability while he is an infant, or [lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings].
- (3)
- (4)
- (5) Subject to subsection (6) below, a person shall be treated as claiming through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be treated as claiming through the person so entitled.
- (6) A person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be treated as claiming through the appointor.
- (7) References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges and tithes, to distrain for arrears of rent or tithe, and references to the bringing of such an action shall include references to the making of such an entry or distress.
- (8) References in this Act to the possession of land shall, in the case of tithes and rentcharges, be construed as references to the receipt of the tithe or rent, and references to the date of dispossession or discontinuance of possession of land shall, in the case of rent charges, be construed as references to the date of the last receipt of rent.
- (9) References in Part II of this Act to a right of action shall include references to—
 - (a) a cause of action;
 - (b) a right to receive money secured by a mortgage or charge on any property;
 - (c) a right to recover proceeds of the sale of land; and
 - (d) a right to receive a share of interest in the personal estate of a deceased person.
- (10) References in Part II to the date of the accrual of a right of action shall be construed—
 - (a) in the case of an action upon a judgment, as references to the date on which the judgment became enforceable; and
 - (b) in the case of an action to recover arrears of rent or interest, or damages in respect of arrears of rent or interest, as references to the date on which the rent or interest became due.

39 Saving for other limitation enactments

This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment (whether passed before or after the passing of this Act) or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by or under any such other enactment.

40 Transitional provisions, amendments and repeals

- (1) Schedule 2 to this Act, which contains transitional provisions, shall have effect.
- (2) The enactments specified in Schedule 3 to this Act shall have effect subject to the amendments specified in that Schedule, being amendments consequential on the

provisions of this Act; but the amendment of any enactment by that Schedule shall not be taken as prejudicing the operation of section 17(2) of the Interpretation Act 1978 (effect of repeals).

- (3) The enactments specified in Schedule 4 to this Act are hereby repealed to the extent specified in column 3 of that Schedule.

41 Short title, commencement and extent

- (1) This Act may be cited as the Limitation Act 1980.
- (2) This Act, except section 35, shall come into force on 1st May 1981.
- (3) Section 35 of this Act shall come into force on 1st May 1981 to the extent (if any) that the section substituted for section 28 of the Limitation Act 1939 by section 8 of the Limitation Amendment Act 1980 is in force immediately before that date; but otherwise section 35 shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint, and different days may be appointed for different purposes of that section (including its application in relation to different courts of proceedings).
- (4) The repeal by this Act of section 14(1) of the Limitation Act 1963 and the corresponding saving in paragraph 2 of Schedule 2 to this Act shall extend to Northern Ireland, but otherwise this Act does not extend to Scotland or to Northern Ireland.



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APPENDIX 15

SUPPLY OF GOODS AND SERVICES ACT 1982

SUPPLY OF GOODS AND SERVICES ACT 1982

1982 CHAPTER 29

An Act to amend the law with respect to the terms to be implied in certain contracts for the transfer of the property in goods, in certain contracts for the hire of goods and in certain contracts for the supply of a service; and for connected purposes.

[13th July 1982]

PART I SUPPLY OF GOODS

Contracts for the transfer of property in goods

1 The contracts concerned

- (1) In this Act [in its application to England and Wales and Northern Ireland] a “contract for the transfer of goods” means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract.
- (2) For the purposes of this section an excepted contract means any of the following:—
 - (a) a contract of sale of goods;
 - (b) a hire-purchase agreement;
 - (c) a contract under which the property in goods is (or is to be) transferred in exchange for trading stamps on their redemption;
 - (d) a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed;
 - (e) a contract intended to operate by way of mortgage, pledge, charge or other security.
- (3) For the purposes of this Act [in its application to England and Wales and Northern Ireland] a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the transfer or agreement to transfer.

2 Implied terms about title, etc

- (1) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is an implied condition on the part of the transferor that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods he will have such a right at the time when the property is to be transferred.

- (2) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is also an implied warranty that—
 - (a) the goods are free, and will remain free until the time when the property is to be transferred, from any charge or encumbrance not disclosed or known to the transferee before the contract is made, and
 - (b) the transferee will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.
- (3) This subsection applies to a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have.
- (4) In a contract to which subsection (3) above applies there is an implied warranty that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made.
- (5) In a contract to which subsection (3) above applies there is also an implied warranty that none of the following will disturb the transferee's quiet possession of the goods, namely—
 - (a) the transferor;
 - (b) in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person;
 - (c) anyone claiming through or under the transferor or that third person otherwise than under a charge or encumbrance disclosed or known to the transferee before the contract is made.

3 Implied terms where transfer is by description

- (1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by description.
- (2) In such a case there is an implied condition that the goods will correspond with the description.
- (3) If the transferor transfers or agrees to transfer the property in the goods by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the transferee.

4 Implied terms about quality or fitness

- (1) Except as provided by this section and section 5 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods.
- (2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this section and section 5 below, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

[(2B) If the transferee deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the transferor, the producer or his representative, particularly in advertising or on labelling.

(2C) A public statement is not by virtue of subsection (2B) above a relevant circumstance for the purposes of subsection (2A) above in the case of a contract for the transfer of goods, if the transferor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(2D) Subsections (2B) and (2C) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the transferee deals as consumer) if the statement would have been such a circumstance apart from those subsections.]

(3) The condition implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

- (a) which is specifically drawn to the transferee's attention before the contract is made,
- (b) where the transferee examines the goods before the contract is made, which that examination ought to reveal, or
- (c) where the property in the goods is transferred by reference to a sample, which would have been apparent on a reasonable examination of the sample.

(4) Subsection (5) below applies where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known—

- (a) to the transferor, or
- (b) where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit-broker to the transferor, to that credit-broker,

any particular purpose for which the goods are being acquired.

(5) In that case there is (subject to subsection (6) below) an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.

(6) Subsection (5) above does not apply where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker.

(7) An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods.

- (8) The preceding provisions of this section apply to a transfer by a person who in the course of a business is acting as agent for another as they apply to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made.
- (9)

5 Implied terms where transfer is by sample

- (1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by reference to a sample.
- (2) In such a case there is an implied condition—
 - (a) that the bulk will correspond with the sample in quality; and
 - (b) that the transferee will have a reasonable opportunity of comparing the bulk with the sample; and
 - (c) that the goods will be free from any defect, [making their quality unsatisfactory], which would not be apparent on reasonable examination of the sample.
- (3)
- (4) For the purposes of this section a transferor transfers or agrees to transfer the property in goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

5A Modification of remedies for breach of statutory condition in non-consumer cases

- (1) Where in the case of a contract for the transfer of goods—
 - (a) the transferee would, apart from this subsection, have the right to treat the contract as repudiated by reason of a breach on the part of the transferor of a term implied by section 3, 4 or 5(2)(a) or (c) above, but
 - (b) the breach is so slight that it would be unreasonable for him to do so,
 then, if the transferee does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.
- (2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.
- (3) It is for the transferor to show that a breach fell within subsection (1)(b) above.

Contracts for the hire of goods

6 The contracts concerned

- (1) In this Act [in its application to England and Wales and Northern Ireland] a “contract for the hire of goods” means a contract under which one person bails or agrees to bail goods to another by way of hire, other than an excepted contract.
- (2) For the purposes of this section an excepted contract means any of the following:—
 - (a) a hire-purchase agreement;

- (b) a contract under which goods are (or are to be) bailed in exchange for trading stamps on their redemption.
- (3) For the purposes of this Act [in its application to England and Wales and Northern Ireland] a contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the bailment or agreement to bail by way of hire.

7 Implied terms about right to transfer possession, etc

- (1) In a contract for the hire of goods there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment.
- (2) In a contract for the hire of goods there is also an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made.
- (3) The preceding provisions of this section do not affect the right of the bailor to repossess the goods under an express or implied term of the contract.

8 Implied terms where hire is by description

- (1) This section applies where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by description.
- (2) In such a case there is an implied condition that the goods will correspond with the description.
- (3) If under the contract the bailor bails or agrees to bail the goods by reference to a sample as well as a description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the bailee.

9 Implied terms about quality or fitness

- (1) Except as provided by this section and section 10 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods.
- (2) Where, under such a contract, the bailor bails goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.
- (2A) For the purposes of this section and section 10 below, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the consideration for the bailment (if relevant) and all the other relevant circumstances.
- (2B) If the bailee deals as consumer, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the bailor, the producer or his representative, particularly in advertising or on labelling.

(2C) A public statement is not by virtue of subsection (2B) above a relevant circumstance for the purposes of subsection (2A) above in the case of a contract for the hire of goods, if the bailor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(2D) Subsections (2B) and (2C) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the bailee deals as consumer) if the statement would have been such a circumstance apart from those subsections.]

(3) The condition implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

- (a) which is specifically drawn to the bailee's attention before the contract is made,
- (b) where the bailee examines the goods before the contract is made, which that examination ought to reveal, or
- (c) where the goods are bailed by reference to a sample, which would have been apparent on a reasonable examination of the sample.

(4) Subsection (5) below applies where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known—

- (a) to the bailor in the course of negotiations conducted by him in relation to the making of the contract, or
- (b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract,

any particular purpose for which the goods are being bailed.

(5) In that case there is (subject to subsection (6) below) an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.

(6) Subsection (5) above does not apply where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit-broker.

(7) An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods.

(8) The preceding provisions of this section apply to a bailment by a person who in the course of a business is acting as agent for another as they apply to a bailment by a principal in the course of a business, except where that other is not bailing in the course of a business and either the bailee knows that fact or reasonable steps are taken to bring it to the bailee's notice before the contract concerned is made.

(9)

10 Implied terms where hire is by sample

- (1) This section applies where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by reference to a sample.
- (2) In such a case there is an implied condition—
 - (a) that the bulk will correspond with the sample in quality; and
 - (b) that the bailee will have a reasonable opportunity of comparing the bulk with the sample; and
 - (c) that the goods will be free from any defect, [making their quality unsatisfactory], which would not be apparent on reasonable examination of the sample.
- (3)
- (4) For the purposes of this section a bailor bails or agrees to bail goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

10A Modification of remedies for breach of statutory condition in non-consumer cases

- (1) Where in the case of a contract for the hire of goods—
 - (a) the bailee would, apart from this subsection, have the right to treat the contract as repudiated by reason of a breach on the part of the bailor of a term implied by section 8, 9 or 10(2)(a) or (c) above, but
 - (b) the breach is so slight that it would be unreasonable for him to do so,
 then, if the bailee does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.
- (2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.
- (3) It is for the bailor to show that a breach fell within subsection (1)(b) above.

Exclusion of implied terms, etc

11 Exclusion of implied terms, etc

- (1) Where a right, duty or liability would arise under a contract for the transfer of goods or a contract for the hire of goods by implication of law, it may (subject to subsection (2) below and the 1977 Act) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
- (2) An express condition or warranty does not negative a condition or warranty implied by the preceding provisions of this Act unless inconsistent with it.
- (3) Nothing in the preceding provisions of this Act prejudices the operation of any other enactment or any rule of law whereby any condition or warranty (other than one relating to quality or fitness) is to be implied in a contract for the transfer of goods or a contract for the hire of goods.

11A The contracts concerned

- (1) In this Act in its application to Scotland a “contract for the transfer of goods” means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract.
- (2) For the purposes of this section an excepted contract means any of the following—
 - (a) a contract of sale of goods;
 - (b) a hire-purchase agreement;
 - (c) a contract under which the property in goods is (or is to be) transferred in exchange for trading stamps on their redemption;
 - (d) a transfer or agreement to transfer for which there is no consideration;
 - (e) a contract intended to operate by way of mortgage, pledge, charge or other security.
- (3) For the purposes of this Act in its application to Scotland a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the transfer or agreement to transfer.

11B Implied terms about title, etc

- (1) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is an implied term on the part of the transferor that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods he will have such a right at the time when the property is to be transferred.
- (2) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is also an implied term that—
 - (a) the goods are free, and will remain free until the time when the property is to be transferred, from any charge or encumbrance not disclosed or known to the transferee before the contract is made, and
 - (b) the transferee will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.
- (3) This subsection applies to a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have.
- (4) In a contract to which subsection (3) above applies there is an implied term that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made.
- (5) In a contract to which subsection (3) above applies there is also an implied term that none of the following will disturb the transferee’s quiet possession of the goods, namely—
 - (a) the transferor;
 - (b) in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person;

- (c) anyone claiming through or under the transferor or that third person otherwise than under a charge or encumbrance disclosed or known to the transferee before the contract is made.

(6) In section 21 of the 1977 Act after subsection (3) there is inserted the following subsection—

“(3A)Notwithstanding anything in the foregoing provisions of this section, any term of a contract which purports to exclude or restrict liability for breach of the obligations arising under section 11B of the Supply of Goods and Services Act 1982 (implied terms about title, freedom from encumbrances and quiet possession in certain contracts for the transfer of property in goods) shall be void.””

11C Implied terms where transfer is by description

- (1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by description.
- (2) In such a case there is an implied term that the goods will correspond with the description.
- (3) If the transferor transfers or agrees to transfer the property in the goods by reference to a sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the transferee.

11D Implied terms about quality or fitness

- (1) Except as provided by this section and section 11E below and subject to the provisions of any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods.
- (2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
- (3) For the purposes of this section and section 11E below, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

[(3A) If the contract for the transfer of goods is a consumer contract, the relevant circumstances mentioned in subsection (3) above include any public statements on the specific characteristics of the goods made about them by the transferor, the producer or his representative, particularly in advertising or on labelling.

(3B) A public statement is not by virtue of subsection (3A) above a relevant circumstance for the purposes of subsection (3) above in the case of a contract for the transfer of goods, if the transferor shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(3C) Subsections (3A) and (3B) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (3) above (whether or not the contract for the transfer of goods is a consumer contract) if the statement would have been such a circumstance apart from those subsections.]

- (4) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—
 - (a) which is specifically drawn to the transferee's attention before the contract is made,
 - (b) where the transferee examines the goods before the contract is made, which that examination ought to reveal, or
 - (c) where the property in the goods is, or is to be, transferred by reference to a sample, which would have been apparent on a reasonable examination of the sample.
- (5) Subsection (6) below applies where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known—
 - (a) to the transferor, or
 - (b) where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit-broker to the transferor, to that credit-broker,

any particular purpose for which the goods are being acquired.

- (6) In that case there is (subject to subsection (7) below) an implied term that the goods supplied under the contract are reasonably fit for the purpose, whether or not that is a purpose for which such goods are commonly supplied.
- (7) Subsection (6) above does not apply where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker.
- (8) An implied term about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods.
- (9) The preceding provisions of this section apply to a transfer by a person who in the course of a business is acting as agent for another as they apply to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made.

[(10) For the purposes of this section, "consumer contract" has the same meaning as in section 11F(3) below.]

11E Implied terms where transfer is by sample

- (1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by reference to a sample.
- (2) In such a case there is an implied term—
 - (a) that the bulk will correspond with the sample in quality;
 - (b) that the transferee will have a reasonable opportunity of comparing the bulk with the sample; and
 - (c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

- (3) For the purposes of this section a transferor transfers or agrees to transfer the property in goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

11F Remedies for breach of contract

- (1) Where in a contract for the transfer of goods a transferor is in breach of any term of the contract (express or implied), the other party to the contract (in this section referred to as “the transferee”) shall be entitled—
 - (a) to claim damages; and
 - (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.
- (2) Where a contract for the transfer of goods is a consumer contract and the transferee is the consumer, then, for the purposes of subsection (1)(b) above, breach by the transferor of any term (express or implied)—
 - (a) as to the quality of the goods or their fitness for a purpose;
 - (b) if the goods are, or are to be, transferred by description, that the goods will correspond with the description;
 - (c) if the goods are, or are to be, transferred by reference to a sample, that the bulk will correspond with the sample in quality,

shall be deemed to be a material breach.

- (3) In subsection (2) above, “consumer contract” has the same meaning as in section 25(1) of the 1977 Act; and for the purposes of that subsection the onus of proving that a contract is not to be regarded as a consumer contract shall lie on the transferor.

11G The contracts concerned

- (1) In this Act in its application to Scotland a “contract for the hire of goods” means a contract under which one person (“the supplier”) hires or agrees to hire goods to another, other than an excepted contract.
- (2) For the purposes of this section, an excepted contract means any of the following—
 - (a) a hire-purchase agreement;
 - (b) a contract under which goods are (or are to be) hired in exchange for trading stamps on their redemption.
- (3) For the purposes of this Act in its application to Scotland a contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the hire or agreement to hire.

11H Implied terms about right to transfer possession etc

- (1) In a contract for the hire of goods there is an implied term on the part of the supplier that—
 - (a) in the case of a hire, he has a right to transfer possession of the goods by way of hire for the period of the hire; and

- (b) in the case of an agreement to hire, he will have such a right at the time of commencement of the period of the hire.
- (2) In a contract for the hire of goods there is also an implied term that the person to whom the goods are hired will enjoy quiet possession of the goods for the period of the hire except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the person to whom the goods are hired before the contract is made.
- (3) The preceding provisions of this section do not affect the right of the supplier to repossess the goods under an express or implied term of the contract.

11I Implied terms where hire is by description

- (1) This section applies where, under a contract for the hire of goods, the supplier hires or agrees to hire the goods by description.
- (2) In such a case there is an implied term that the goods will correspond with the description.
- (3) If under the contract the supplier hires or agrees to hire the goods by reference to a sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- (4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the person to whom the goods are hired.

11J Implied terms about quality or fitness

- (1) Except as provided by this section and section 11K below and subject to the provisions of any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods hired under a contract for the hire of goods.
- (2) Where, under such a contract, the supplier hires goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
- (3) For the purposes of this section and section 11K below, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the consideration for the hire (if relevant) and all the other relevant circumstances.

[(3A) If the contract for the hire of goods is a consumer contract, the relevant circumstances mentioned in subsection (3) above include any public statements on the specific characteristics of the goods made about them by the hirer, the producer or his representative, particularly in advertising or on labelling.

(3B) A public statement is not by virtue of subsection (3A) above a relevant circumstance for the purposes of subsection (3) above in the case of a contract for the hire of goods, if the hirer shows that—

- (a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,
- (b) by the time the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or
- (c) the decision to acquire the goods could not have been influenced by the statement.

(3C) Subsections (3A) and (3B) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (3) above (whether or not the contract for the hire of goods is a consumer contract) if the statement would have been such a circumstance apart from those subsections.]

- (4) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—
 - (a) which is specifically drawn to the attention of the person to whom the goods are hired before the contract is made, or
 - (b) where that person examines the goods before the contract is made, which that examination ought to reveal; or
 - (c) where the goods are hired by reference to a sample, which would have been apparent on reasonable examination of the sample.
- (5) Subsection (6) below applies where, under a contract for the hire of goods, the supplier hires goods in the course of a business and the person to whom the goods are hired, expressly or by implication, makes known—
 - (a) to the supplier in the course of negotiations conducted by him in relation to the making of the contract; or
 - (b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the supplier before forming the subject matter of the contract,

any particular purpose for which the goods are being hired.

- (6) In that case there is (subject to subsection (7) below) an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.
- (7) Subsection (6) above does not apply where the circumstances show that the person to whom the goods are hired does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the hirer or credit-broker.
- (8) An implied term about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods.
- (9) The preceding provisions of this section apply to a hire by a person who in the course of a business is acting as agent for another as they apply to a hire by a principal in the course of a business, except where that other is not hiring in the course of a business and either the person to whom the goods are hired knows that fact or reasonable steps are taken to bring it to that person's notice before the contract concerned is made.

11K Implied terms where hire is by sample

- (1) This section applies where, under a contract for the hire of goods, the supplier hires or agrees to hire the goods by reference to a sample.
- (2) In such a case there is an implied term—
 - (a) that the bulk will correspond with the sample in quality; and
 - (b) that the person to whom the goods are hired will have a reasonable opportunity of comparing the bulk with the sample; and
 - (c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

- (3) For the purposes of this section a supplier hires or agrees to hire goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

11L Exclusion of implied terms etc

- (1) Where a right, duty or liability would arise under a contract for the transfer of goods or a contract for the hire of goods by implication of law, it may (subject to subsection (2) below and the 1977 Act) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
- (2) An express term does not negative a term implied by the preceding provisions of this Part of this Act unless inconsistent with it.
- (3) Nothing in the preceding provisions of this Part of this Act prejudices the operation of any other enactment or any rule of law whereby any term (other than one relating to quality or fitness) is to be implied in a contract for the transfer of goods or a contract for the hire of goods.

...

...

PART II SUPPLY OF SERVICES

12 The contracts concerned

- (1) In this Act a “contract for the supply of a service” means, subject to subsection (2) below, a contract under which a person (“the supplier”) agrees to carry out a service.
- (2) For the purposes of this Act, a contract of service or apprenticeship is not a contract for the supply of a service.
- (3) Subject to subsection (2) above, a contract is a contract for the supply of a service for the purposes of this Act whether or not goods are also—
 - (a) transferred or to be transferred, or
 - (b) bailed or to be bailed by way of hire,

under the contract, and whatever is the nature of the consideration for which the service is to be carried out.

- (4) The Secretary of State may by order provide that one or more of sections 13 to 15 below shall not apply to services of a description specified in the order, and such an order may make different provision for different circumstances.
- (5) The power to make an order under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

13 Implied term about care and skill

In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

14 Implied term about time for performance

- (1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.
- (2) What is a reasonable time is a question of fact.

15 Implied term about consideration

- (1) Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.
- (2) What is a reasonable charge is a question of fact.

16 Exclusion of implied terms, etc

- (1) Where a right, duty or liability would arise under a contract for the supply of a service by virtue of this Part of this Act, it may (subject to subsection (2) below and the 1977 Act) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
- (2) An express term does not negative a term implied by this Part of this Act unless inconsistent with it.
- (3) Nothing in this Part of this Act prejudices—
 - (a) any rule of law which imposes on the supplier a duty stricter than that imposed by section 13 or 14 above; or
 - (b) subject to paragraph (a) above, any rule of law whereby any term not inconsistent with this Part of this Act is to be implied in a contract for the supply of a service.
- (4) This Part of this Act has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description.

PART III SUPPLEMENTARY

17 Minor and consequential amendments

- (1)
- (2) The following subsection shall be inserted after section 7(3) of the 1977 Act :—
 “(3A) Liability for breach of obligations arising under section 2 of the Supply of Goods and Services Act 1982 (implied terms about title etc. in certain contracts for the transfer of the property in goods) cannot be excluded or restricted by reference to any such term.”
- (3) In consequence of subsection (2) above, in section 7(4) of the 1977 Act, after “cannot” there shall be inserted “(in a case to which subsection (3A) does not apply)”.

18 Interpretation: general

(1) In the preceding provisions of this Act and this section—

- “bailee”, in relation to a contract for the hire of goods means (depending on the context) a person to whom the goods are bailed under the contract, or a person to whom they are to be so bailed, or a person to whom the rights under the contract of either of those persons have passed;
- “bailor”, in relation to a contract for the hire of goods, means (depending on the context) a person who bails the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed;
- “business” includes profession and the activities of any government department or local or public authority;
- “credit-broker” means a person acting in the course of a business of credit brokerage carried on by him;
- “credit brokerage” means the effecting of introductions—
 - (a) of individuals desiring to obtain credit to persons carrying on any business so far as it relates to the provision of credit; or
 - (b) of individuals desiring to obtain goods on hire to persons carrying on a business which comprises or relates to the bailment [or as regards Scotland the hire]of goods under a contract for the hire of goods; or
 - (c) of individuals desiring to obtain credit, or to obtain goods on hire, to other credit-brokers;
- “enactment” means any legislation (including subordinate legislation) of the United Kingdom or Northern Ireland;
- “goods” [includes all personal chattels, other than things in action and money, and as regards Scotland all corporeal moveables; and in particular “goods” includes] emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before the transfer [bailment or hire] concerned or under the contract concerned. . . ;
- “hire-purchase agreement” has the same meaning as in the 1974 Act;
- [“producer” means the manufacturer of goods, the importer of goods into the European Economic Area or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;]
- “property”, in relation to goods, means the general property in them and not merely a special property;
- . . .
- “redemption”, in relation to trading stamps, has the same meaning as in the Trading Stamps Act 1964 or, as respects Northern Ireland, the Trading Stamps Act (Northern Ireland) 1965;
- [“repair” means, in cases where there is a lack of conformity in goods for the purposes of this Act, to bring the goods into conformity with the contract.]
- “trading stamps” has the same meaning as in the said Act of 1964 or, as respects Northern Ireland, the said Act of 1965;

- “transferee”, in relation to a contract for the transfer of goods, means (depending on the context) a person to whom the property in the goods is transferred under the contract, or a person to whom the property is to be so transferred, or a person to whom the rights under the contract of either of those persons have passed;
 - “transferor”, in relation to a contract for the transfer of goods, means (depending on the context) a person who transfers the property in the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed.
- (2) In subsection (1) above, in the definitions of bailee, bailor, transferee and transferor, a reference to rights or duties passing is to their passing by assignment [assignation], operation of law or otherwise.
- [(3) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—
- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
 - (b) appearance and finish,
 - (c) freedom from minor defects,
 - (d) safety, and
 - (e) durability.
- (4) References in this Act to dealing as consumer are to be construed in accordance with Part I of the Unfair Contract Terms Act 1977; and, for the purposes of this Act, it is for the transferor or bailor claiming that the transferee or bailee does not deal as consumer to show that he does not.]

19 Citation, transitional provisions, commencement and extent

- (1) This Act may be cited as the Supply of Goods and Services Act 1982.
- (2) The transitional provisions in the Schedule to this Act shall have effect.
- (3) Part I of this Act together with section 17 and so much of sections 18 and 19 above as relates to that Part shall not come into operation until 4th January 1983; and Part II of this Act together with so much of sections 18 and 19 above as relates to that Part shall not come into operation until such day as may be appointed by an order made by the Secretary of State.
- (4) The power to make an order under subsection (3) above shall be exercisable by statutory instrument.
- (5) No provision of this Act applies to a contract made before the provision comes into operation.
- (6) This Act [except Part IA, which extends only to Scotland] extends to Northern Ireland [and Parts I and II do not extend] to Scotland.



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APPENDIX 16

LATENT DAMAGE ACT 1986

LATENT DAMAGE ACT 1986

1986 CHAPTER 37

An Act to amend the law about limitation of actions in relation to actions for damages for negligence not involving personal injuries; and to provide for a person taking an interest in property to have, in certain circumstances, a cause of action in respect of negligent damage to the property occurring before he takes that interest.

[18th July 1986]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Time limits for negligence actions in respect of latent damage not involving personal injuries

1 Time limits for negligence actions in respect of latent damage not involving personal injuries

The following sections shall be inserted in the Limitation Act 1980 (referred to below in this Act as the 1980 Act) immediately after section 14 (date of knowledge for purposes of special time limits for actions in respect of personal injuries or death)—

Actions in respect of latent damage not involving personal injuries

14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

- (1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
- (2) Section 2 of this Act shall not apply to an action to which this section applies.
- (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
- (4) That period is either—
 - (a) six years from the date on which the cause of action accrued; or
 - (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

- (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
- (6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—
 - (a) of the material facts about the damage in respect of which damages are claimed; and
 - (b) of the other facts relevant to the current action mentioned in subsection (8) below.
- (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (8) The other facts referred to in subsection (6)(b) above are—
 - (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
 - (b) the identify of the defendant; and
 - (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
- (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
- (10) For the purposes of this section a person’s knowledge includes knowledge which he might reasonably have been expected to acquire—
 - (a) from facts observable or ascertainable by him; or
 - (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14B Overriding time limit for negligence actions not involving personal injuries

- (1) An action for damages for negligence, other than one to which section 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission—
 - (a) which is alleged to constitute negligence; and
 - (b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

- (2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that—
 - (a) the cause of action has not yet accrued; or
 - (b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.”

2 Provisions consequential on section 1

- (1) The following section shall be inserted in the 1980 Act immediately after section 28 (extension of limitation period in case of disability on date of accrual of cause of action)—

28A Extension for cases where the limitation period is the period under section 14A(4)(b)

- (1) Subject to subsection (2) below, if in the case of any action for which a period of limitation is prescribed by section 14A of this Act—
 - (a) the period applicable in accordance with subsection (4) of that section is the period mentioned in paragraph (b) of that subsection;
 - (b) on the date which is for the purposes of that section the starting date for reckoning that period the person by reference to whose knowledge that date fell to be determined under subsection (5) of that section was under a disability; and
 - (c) section 28 of this Act does not apply to the action;

the action may be brought at any time before the expiration of three years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period mentioned above has expired.

- (2) An action may not be brought by virtue of subsection (1) above after the end of the period of limitation prescribed by section 14B of this Act.”
- (2) In section 32 of the 1980 Act (postponement of limitation period in case of fraud, concealment or mistake), at the end there shall be added the following subsection—

“(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).”

Accrual of cause of action to successive owners in respect of latent damage to property

3 Accrual of cause of action to successive owners in respect of latent damage to property

- (1) Subject to the following provisions of this section, where—
 - (a) a cause of action (“the original cause of action”) has accrued to any person in respect of any negligence to which damage to any property in which he has an interest is attributable (in whole or in part), and

- (b) another person acquires an interest in that property after the date on which the original cause of action accrued but before the material facts about the damage have become known to any person who, at the time when he first has knowledge of those facts, has any interest in the property;

a fresh cause of action in respect of that negligence shall accrue to that other person on the date on which he acquires his interest in the property.

- (2) A cause of action accruing to any person by virtue of subsection (1) above—
 - (a) shall be treated as if based on breach of a duty of care at common law owed to the person to whom it accrues; and
 - (b) shall be treated for the purposes of section 14A of the 1980 Act (special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual) as having accrued on the date on which the original cause of action accrued.
- (3) Section 28 of the 1980 Act (extension of limitation period in case of disability) shall not apply in relation to any such cause of action.
- (4) Subsection (1) above shall not apply in any case where the person acquiring an interest in the damaged property is either—
 - (a) a person in whom the original cause of action vests by operation of law; or
 - (b) a person in whom the interest in that property vests by virtue of any order made by a court under section 538 of the Companies Act 1985 (vesting of company property in liquidator).
- (5) For the purposes of subsection (1)(b) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who has an interest in the damaged property at the time when those facts become known to him to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
- (6) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
 - (a) from facts observable or ascertainable by him; or
 - (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable by him only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

- (7) This section shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

Supplementary

4 Transitional provisions

- (1) Nothing in section 1 or 2 of this Act shall—
 - (a) enable any action to be brought which was barred by the 1980 Act or (as the case may be) by the Limitation Act 1939 before this Act comes into force; or
 - (b) affect any action commenced before this Act comes into force.

- (2) Subject to subsection (1) above, sections 1 and 2 of this Act shall have effect in relation to causes of action accruing before, as well as in relation to causes of action accruing after, this Act comes into force.
- (3) Section 3 of this Act shall only apply in cases where an interest in damaged property is acquired after this Act comes into force but shall so apply, subject to subsection (4) below, irrespective of whether the original cause of action accrued before or after this Act comes into force.
- (4) Where—
 - (a) a person acquires an interest in damaged property in circumstances to which section 3 would apart from this subsection apply; but
 - (b) the original cause of action accrued more than six years before this Act comes into force;

a cause of action shall not accrue to that person by virtue of subsection (1) of that section unless section 32(1)(b) of the 1980 Act (postponement of limitation period in case of deliberate concealment of relevant facts) would apply to any action founded on the original cause of action.

5 Citation interpretation, commencement and extent

- (1) This Act may be cited as the Latent Damage Act 1986.
- (2) In this Act—
 - “the 1980 Act” has the meaning given by section 1; and
 - “action” includes any proceeding in a court of law, an arbitration and any new claim within the meaning of section 35 of the 1980 Act (new claims in pending actions).
- (3) This Act shall come into force at the end of the period of two months beginning with the date on which it is passed.
- (4) This Act extends to England and Wales only.



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i-laws: www.i-law.com

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ISU: www.marine-salvage.com/

Includes copies of contracts such as ISU Award Sharing Sub-contract

International Group of P&I Clubs: <https://www.igpandi.org/>

Group insurance arrangements and links to the websites of all the major Clubs. These in turn publish their Rules annually, as well as many short articles of relevance

IMO: www.imo.org/en/Pages/Default.aspx

IMO main website including publications

www.imo.org/en/About/Pages/DocumentsResources.aspx: Links to separate IMO Docs site (free access by registration) with records of IMO bodies, e.g. the IMO legal Committee and diplomatic conferences. Note that the Legal Committee documents are not complete back to 1969, and many of the earlier documents are available only in print form.

www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx: Status of Conventions, updated regularly. Readers wanting access to full texts of all IMO maritime Conventions (and associated lists of ratifications) should consult the loose- leaf *Ratification of Maritime Conventions* (Informa)

CMI: www.comitemaritime.org

Contains CMI records and documentation going back to 1897 including status of CMI inspired conventions

UNESCO: www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/

Contains copy of Underwater Cultural Heritage Convention 2001 and accessible database of national legislation.

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