



Construction 'Question Time' Seminar

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MACROBERTS

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Right of Contribution

Question

You are a Contractor. You are being sued for the cost of rectifying defects in a building you constructed. The defects were caused by a mixture of defective workmanship and defective design. You had no design obligations. You bring the Architects into the action as a 3rd party and ask for a contribution from them for their share of the responsibility. This is based on section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

Section 3(2) provides: "*Where any person has paid any damages or expenses ... he shall be entitled to recover from any other person who, if sued, might also have been held liable ... such contribution, if any, as the court may deem just.*"

The Architect defends the claim on the basis that their contract with the Employer contains a clause excluding their liability. Can you as Contractor get a contribution from the Architect?

Answer

No.

This issue arose in the Supreme Court case of *Farstad Supply AS v Enviroco* (May 2010).

The parties were:

- Farstad – owner of oil rig supply vessel
 - Asco – charterer of vessel
 - Enviroco – engaged by Asco to clean out tanks on board the vessel
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While Enviroco was carrying out their work, Asco instructed the engines to be started up. At the same time, an Enviroco employee opened a valve releasing oil into the engine room near hot machinery. That caused a fire.

Farstad sued Enviroco for damages in negligence.

Enviroco argued that the fire was materially contributed to by the negligence of Farstad and Asco.

Enviroco claimed for a contribution from Asco under section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

The test under that section was whether, if Asco had been sued by Farstad, Asco would have been held liable in respect of the loss or damage caused by the fire. The answer to that question depended on whether Asco would have had a defence to Farstad's claim. That required the Charterparty between Farstad and Asco to be considered.

The Charterparty contained a clause "*... the Owner shall indemnify and hold harmless the Charterer ... from and against any and all claims ... resulting from loss or damage in relation to the Vessel ... irrespective of the cause of loss or damage, including where such loss or damage is caused by, or contributed to, the negligence of the Charterer ...*"

That clause excluded Asco's liability to Farstad.

On that basis, Enviroco was not entitled to a contribution from Asco under the 1940 Act. Enviroco was not able to establish that, if sued, Asco might have been liable to Farstad for the damage caused by the fire.

In answer to the question – an exclusion clause in a contract between a third party (Asco) and a pursuer (Farstad) will defeat a defender's (Enviroco's) claim for a contribution under section 3(2) of the 1940 Act.

Right of Retention

Question

You are an Architect. You enter into 2 separate contracts with the same Employer. In one, the Employer owes you money for work carried out. In the other, the Employer claims that your defective design caused him loss. Can the Employer retain performance of their obligation to pay on one contract pending resolution of their claim on the other?

Answer

No.

The normal rule is that a party only has the right to withhold performance where both claims arise under a mutual contract. A recent case though did introduce some dubiety which arises out of the issue of "what is a mutual contract".

The issue came up in the Supreme Court case of *Inveresk plc v Tullis Russell Papermakers Ltd* (May 2010).

Inveresk had sold to Tullis a brand of paper.

The transaction was recorded in two documents:

- (i) an agreement for the acquisition of the brand, customer information and related assets ("the Asset Purchase Agreement"); and
- (ii) an agreement whereby Inveresk agreed to continue to manufacture, sell and distribute the paper products for a period of time ("the Services Agreement").

In terms of the Agreements, Tullis were to make various payments to Inveresk. Tullis paid some but Inveresk sued for an additional sum they claimed to be due under the Asset Purchase Agreement of £900,000.

However, Tullis also sued for £5.3m on the basis that Inveresk had failed to comply with its obligations

under the Service Agreement.

The issue was whether Tullis could retain performance of their obligation to pay under the Asset Purchase Agreement pending a decision on their claims under the Services Agreement. If so, that would allow them to set off the sums due to and from them and make only a net payment.

Here, although there were two separate contracts, both formed part of a single transaction.

The Supreme Court's approach was to consider whether the obligations in question were counterparts of each other, regardless of whether they were contained in one contract or more than one.

For retention to be allowed, the obligations under each of the contracts would need to form part of one transaction because there cannot be mutuality between two or more transactions.

This approach requires the obligations owed by each party to the other to be considered in the context of the whole transaction as opposed to restricting the question to whether the obligations were within the four walls of a single contract.

In this case the Court held that both contracts were clearly part of the same transaction. They had a common purpose and depended on one another. This created sufficient reciprocity or mutuality so that Tullis was entitled to retain any sum due to Inveresk under the Asset Purchase Agreement until Tullis's claim under the Service Agreement was determined.

This case leaves some uncertainty as to how closely related contracts have to be in order to create mutual obligations and allow this right of retention to apply.

In construction terms this leaves open questions such as whether a Framework Agreement and the call-offs of individual contracts under that Framework umbrella would be treated as the same transaction for the purposes of arguments related to retention. Could a right of retention exist over separate contracts entered into for different stages of a staged development?

The Supreme Court was keen to stress that the right of retention needs to be kept under control. The rule that the relevant obligations must be counterparts of each other is the key because the right of retention rests on that principle. The answer to that will involve looking at the overall purpose of the

transaction.

If you have multiple contracts in place, it may be worth considering whether they are sufficiently closely connected, and the obligations sufficiently dependent on one another, to allow a right of retention to be invoked. This could be particularly useful if there are concerns about the financial strength of one of the parties. Each situation will require to be considered on its own set of facts and circumstances.

Formation of Contract by Email

Question

You are a Subcontractor. You receive an email from a Contractor asking you to tender for work. You submit an offer. That is followed by an exchange of several further emails. These concluded and a contract was drawn up to reflect the email agreement but not signed. Have you formed a contract by the email exchange?

Answer

Yes.

A recent English case – *Golden Ocean Group Limited v Salgaocar Mining Industries PVT and Mr Anil v Solgaocar* (January 2011) looked at this issue. The case concerned negotiations conducted by email for a Charterparty for the hire of a ship and an associated Guarantee. Negotiations were concluded and an agreement was drawn up but not signed. The Charterer, about 20 days before delivery of the vessel was due, pulled out. The Charterer and the Guarantor argued that no agreement or guarantee had been concluded. The owner raised an action seeking c\$54m in damages.

During the negotiation phase, numerous emails were exchanged which, eventually, resulted in agreement on all terms of the contract and guarantee being reached.

In this particular case the judge had to consider whether the email exchange satisfied the requirements of the English Statute of Frauds of 1677! Clearly email was not in contemplation at this time. However the wording of that was: "... the Agreement on which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party ... or some other person ...

lawfully authorised."

In simple terms this required an agreement in writing, signed by the parties or their agents.

The court considered itself able to look at all documents said to have constituted the agreement, however many there may be, to decide whether agreement was reached. On that basis, the Court considered there was agreement reached by email and this was enough to be an agreement in writing.

In terms of signature, it was said that the emails which constituted the agreement were signed by the electronically printed signature of the people who sent them.

The judge commented *"As to commercial good sense, it seems to me highly desirable that the law should give effect to agreements made by a series of email communications."*

This case was dealing with a specific English statute. It seemed clear though that the court was prepared to take account of commercial considerations, recognising the level of business conducted in this way. In Scotland what is required to form a contract is consensus between the parties and agreement on the essential terms of the contract. It seems likely that a contract formed by email would be recognised in Scotland also, if these could be established.

What was not considered in this case was the impact of automatically generated statements at the end of emails such as "This email does not form part of any contract unless specifically stated". If you are trying to create a contract, look out for those and ensure that your intentions are clear.

Pure Economic Loss

Question

You are a Contractor. You carried out work to a property some time ago. Defects later became apparent requiring remedial work.

Your contract contains a clause limiting liability for defects.

The Employer sues you in delict for breach of a duty of care, claiming for economic loss.

Can you be held liable to the Employer for economic loss on the basis of a negligent breach of a duty of care where you are not liable under the contract?

Answer

This is an area on which the law has for a long time been uncertain with conflicting decisions coming from the courts. The answer according to the most recent Court of Appeal case in England of *James Andrew Robinson v PE Jones (Contractors) Limited (January 2011)* is no - a Contractor does not automatically owe a duty of care to his client in tort (delict) over and above those in his contract.

The case was primarily concerned with English rules on time bar. In short, any claim under the contract was time barred. However, if it was possible to establish that there was a claim in tort (English equivalent of Scottish delict) based on breach of a duty of care then that would still be live.

The contractor had done work to the chimneys of Mr Robinson's house. Over 12 years later it was found the work was defective. The contract contained a term which said that the Contractor was not liable for any defect, error or omission in the execution or completion of the work except to the extent to which it had liability under the NHBC Agreement.

The decision contains a review of the numerous previous cases on liability for economic loss.

In *Murphy v Brentwood* (1991, House of Lords) the local authority was found not to have a duty of care to owners or occupiers of property for economic loss except in relation to defects which caused personal injury or physical damage to property other than the defective property itself. In the same case the Court commented on potential liability of a Contractor. It was considered that the Contractor would also not owe a duty of care in tort to protect the building owner from suffering economic loss due to defects.

In *Henderson v Merrett* (1995, House of Lords) it was found that a party could have assumed responsibility to another party for provision of information or services so as to give rise to a duty of care not to cause economic loss. That requires there to be more than just a contract. The relationship would need to involve reliance by one party on the other's advice. This duty could sit in parallel with contractual liabilities and the pursuer could choose the most advantageous route to its remedy.

In the Robinson case, there was no issue of personal injury and no damage to other property. The claim was for pure economic loss due to defects in the property.

The starting point for the Court was to find that absent any assumption of responsibility, there were no duties of care between the parties which sat alongside their contractual obligations.

The question then was when did a contractor assume responsibility so as to acquire such liabilities. It was said that professional people assumed responsibility for economic loss to their clients. This has been held to include engineers, architects, lawyers and managing Agents at Lloyds. These categories of people expect their clients to act in reliance on their advice, often with financial or economic consequences.

How far does that go and to what other classes of people should it extend?

It was said to be necessary to look at the relationship and the dealings between the parties to ascertain whether a contractor or subcontractor assumed responsibility. This means that these cases will depend on their individual facts and circumstances.

In the Robinson case there was nothing to suggest any assumption of responsibility. There was a building contract and a specification. The Contractor had no design responsibility. The contract provided extensive but not total protection against defects and allocated risk between the parties.

In addition, there were contract clauses limiting liability to that in the NHBC Agreement. It was considered it would be inconsistent with the whole contract scheme if the law imposed on the contractor duties of care in tort far exceeding its contractual responsibilities. The contract in this case expressly excluded any liability in negligence which might otherwise arise. On this basis it was decided the Contractor did not owe a duty of care in tort to the Employer, concurrent to its contractual duties, in relation to economic loss.

Lord Justice Stanley Burton said:

"It must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss."

What the case did not deal with was the issue of design and build contracts. On the basis that Architects & Engineers have been found liable in relation to these on the basis of assumption of responsibility, it seems likely that Contractors would be found to be in the same position for at least the design elements of their work. Management contracts may also be treated differently.

It is also evident from the case that it is possible to include contract terms to exclude such liability and if there is any doubt this should be considered.

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Payment notices under the amended HGCR Act

Scenario

The date is 8 March 2012. The amendments to Part II of the Housing Grants Construction and Regeneration Act 1996 (as contained in the Local Democracy Economic Development and Construction Act 2009) have come into force. You are a contractor carrying out refurbishment works and employ a number of sub-contractors. You have a standard form of sub-contract but you understand that the changes made to the HGCR Act are minimal, and although your standard form was reviewed by your solicitors some years ago, you do not think that there is any need to spend any money on lawyers this time round. (For the purposes of this scenario, it can be assumed that the sub-contracts are all "construction contracts" for the purposes of the HGCR Act).

The sub-contract form provides that the Contractor shall issue a monthly valuation in respect of its assessment of the value of the work carried out under the relevant sub-contract. The sub-contract form specifies that the valuation will be treated as a "payment notice" for the purposes of the Act.

In the past, you have simply submitted valuations specifying the amount of the monthly valuation with no further information or breakdown.

You are aware that the original section 110(2) of the Act provided that the payment notice required to state the basis on which the sum proposed to be paid is calculated, but you have never had any challenge from sub-contractors in respect of the form of the notice.

As we have said, the date is 8 March 2012 and the amended Act is now in force. On this occasion, you issue under a sub-contract a valuation for £50,000 representing your assessment of the value of the sub-contract works for the previous month. As is your practice, you do not provide any other information or basis for the calculation.

You intend to make payment of the sum of £50,000 on the final date for payment as required under the sub-contract.

However, on this occasion and to your surprise, the sub-contractor serves prior to the final date for payment a notice contending that the Contractor has not given a payment notice as required and stating that the payee's notice should be treated as a payment notice in default. The notice specifies a valuation of £75,000 and provides a detailed description of how the sum has been calculated.

You have never heard of the right to issue such a notice and assume that the sub-contractor is chancing his arm and so you simply ignore it and make payment on the final date for payment of £50,000 based on your own valuation.

You are immediately served by the sub-contractor with an adjudication notice claiming that the amount payable by the final date for payment was in fact £75,000 less the payment to account of £50,000 and that this is due to be paid as a "notified sum".

You mention this to your pal in the pub and you almost choke on your pint when he says that he thinks that you will have no option but to pay up this further sum of £25,000.

Question

Is your friend correct and are you liable to pay the amount specified in the notice issued by the sub-contractor despite the fact that you have issued your own payment notice on time?

Answer

Yes, you will be liable to pay the additional amount.

Section 110(2) of the Act has been effectively replaced by new sections 110A and 110B. New section 110A requires a construction contract to require the payer to give a notice specifying the sum which the payer considers to be due and the basis upon which that sum is calculated, or alternatively requiring the payee or a specified person (e.g. the architect) to give such a notice. The notice must be given not later than 5 days after the "payment due date" i.e. the new term for the due date for payment.

As far as the new notice requirements on the payer are concerned, these are not materially different from the original requirements. However, important changes have been added by new section 110B. Section 110B(1) provides that where the Contract requires the payer to give a payment notice and such

notice is not given as so required, then the payee may give a "notice in default" at any time after the date on which the notice from the payer was required. This notice should specify the amount that the payee considers to be due and the basis on which that sum is calculated.

New section 111 provides that the payer must pay the "notified sum" on or before the final date for payment. Where the payee has issued a notice in default under section 110B, the notified sum shall be the amount specified in the payee's notice.

If you had taken advice earlier, you may still have had a second bite of the cherry by virtue of section 111(3) which allows the payer to give notice of its intention to pay less than the notified sum. This "pay less" notice replaces the provisions for withholding notice under the original Act. However, this "pay less" notice must specify the sum the payer considers to be due, and the basis on which it is calculated, and must be given not later than the prescribed period before the final date for payment. In the absence of any reference to the prescribed period in the Contract, this will be as stated in the Scheme for Construction Contracts. However, as you have not given any "pay less" notice prior to the final date of payment, the amount due as the notified sum will be the amount stated in the payee's notice in default.

The above emphasises the importance on the part of the party making the payment to comply with the provisions of section 110A(2), not only to state the sum which it considers to have been due, but also the basis on which that sum is calculated. Unlike the original terms of the Act, failure to comply can now have serious consequences as the payee now has the right to make a counter-notice in default of the payer's notice. It is not simply a matter of the payer issuing the payment notice timeously i.e. not later than 5 days after the payment due date; the terms of the notice must state the basis on which the sum is calculated. If the terms of the payer's notice do not so comply, then "notice is not given as so required", thereby triggering the payee's right to issue a notice in default under section 110B.

Indirect and consequential loss

Scenario

You are a contractor specialising in refurbishment works. You have entered into a construction contract with a major retailer of high volume discount clothing for the refurbishment of its city centre store. The refurbishment includes fairly significant roof repairs. It is intended that the store close for business during the period of repairs. The owners wish to keep the shop closed for as short a period as possible to minimise loss of business. This is a major contract for you and you look forward to developing your relationship with this client. You are therefore prepared to work to this tight timetable, but you are also

alive to the potential risks.

In addition to the tight timetable, you are concerned at the possibility of any defects in your works causing disruption to the store and, in particular, loss of sales.

So you do a deal with the client:

- The liquidated damages for delay are at a level which you are comfortable with.
- You include in the Contract the following clause: "*The Contractor's liability under the Contract for any indirect or consequential loss shall in no circumstances exceed the total sum of £5,000*".

You achieve practical completion on time and without any undue concerns. Everything appears to be in order. However, six months after practical completion there is a major ingress of water from the roof. You carry out an inspection and have no option but to accept that the cause of the ingress of water and the need for further repairs is the faulty workmanship of your company. The store is closed for a further two weeks to allow rectification works to be carried out and the owners subsequently claim against you a sum of £50,000 for lost business during the period of closure. You contend that your liability is capped by the limitation clause on indirect and consequential loss at £5,000.

Question

Can you rely on the liability limitation on indirect and consequential loss of £5,000 in respect of the claim against you for loss of business?

Answer

No, it is unlikely that you will be able to rely on the limitation clause.

To find out why you cannot rely on the limitation clause, we need to look at what is meant by "indirect and consequential loss". This in turn drives us back to first principles and the governing rule as regards the scope of damages recoverable for breach of contract. This "rule" was established in the case of *Hadley -v- Baxendale* (1854), and provided that recoverable damages could be split into two limbs, viz:

1. damages arising naturally, ie according to the usual course of things, from such breach of contract, or
2. damages 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 a breach of contract.

Damages under the first limb of the rule would normally be recoverable in all cases as "direct" loss (subject always to standard principles such as proof of loss and causation), while damages falling under the second limb would be treated as "indirect" loss and would be recoverable only if it could be demonstrated that the parties were aware, at the time the contract was entered into, that such loss was a likely consequence of a breach of contract.

It has been held consistently by the courts that loss categorised as indirect and consequential loss is loss which falls within the second limb of this rule.

So what does this mean in practice? If the loss arising from a breach of contract can be said to have arisen "according to the usual course of things" and does not require any special knowledge on the part of the party in breach at the time the contract was entered into, such loss will not be construed as consequential and indirect loss. Therefore, any such loss would be direct loss and so would not be covered by any limitation or exclusion of indirect and consequential loss.

This principle has recently been reinforced by the Court of Appeal in England in the case of *GB Gas Holdings v Accenture (UK) Ltd* [2010] EWCA Civ 912.

This case related to a contract for the installation of a new automated billing system. There were defects in the system which resulted in faulty transmission of meter readings and disruption to customer billings. The plaintiffs raised an action for breach of contract. There was an exclusion clause in the contract which excluded liability not only for indirect or consequential loss, but also for specific categories of loss, such as loss of profit and loss of business or revenues.

The Court of Appeal upheld the decision at first instance and found that:

- Gas distribution charges paid to suppliers were charges not loss of revenue or business and so were not excluded
 - Compensation paid to customers was a direct loss and so was not excluded as indirect or consequential loss
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- Additional borrowing charges due to reduction in revenue arising from late billing was a direct loss and so not excluded

Where does this leave our own scenario which I have described? I would suggest that it can be argued with some force that the loss of business was loss which has arisen according to the usual course of things from the breach of contract on the part of the Contractor. It did not require any special knowledge on the part of the Contractor at the time the Contract was entered into to be aware that a defect in the works resulting from a breach could lead to closure of the business and, in turn, loss of revenue. This is therefore direct loss and so not restricted by the limitation clause.

The lesson is that to effectively exclude or limit your liability for any particular head or category of loss, it is not sufficient to rely simply on a reference to "indirect or consequential loss". For any head or category of loss to be effectively restricted or limited, it should be expressly specified in the exclusion/limitation clause e.g. loss of business; loss of profits; loss of rent etc. Indeed, as the *GB Gas Holdings* case illustrates, even where specific heads of loss are expressly excluded or restricted, this may still not give the party in breach the protection it expected. Thus, for example, under our scenario would it have been enough to specify loss of business or revenue in the limitation clause? If the shop owners required to increase their borrowings to counter the lost revenue or if they had to pay compensation to customers for delayed orders, then such heads of loss would probably still escape the liability limitation. In other words, if you want to effectively exclude or limit your liability then make sure you understand what types of losses your breach may cause.

And of course there is also the Unfair Contract Terms Act to be aware of when imposing such exclusions or limitations.... but that is for another day.

Bonds and guarantees

Scenario

A company enters into a main contract for the design and construction of a major office building. In turn, it enters into a sub-contract for the design and installation of the external façade of the building.

The sub-contract requires the sub-contractors to procure a performance bond in a prescribed form for an amount equivalent to 5% of the sub-contract sum. This performance bond is in due course provided by a bank in the required terms.

The bond provides that in any demand made under the bond to the Bank, the contractor is required to state:

- (a) that the sub-contractor has failed to fulfil its obligations under the sub-contract; and
- (b) that the contractor is accordingly entitled to payment.

Following commencement of the sub-contract works, the main contractor contends that the sub-contractor is in breach of contract, which has led in turn to termination of the main contract by the client. The main contractor then serves a demand for payment on the Bank under the bond in terms of the prescribed wording in the bond.

The amount demanded is the maximum amount of the bond i.e. 5% of the sub-contract sum.

The demand does not state that the amount demanded is an estimate of the contractor's loss arising from the breach, it provides no explanation as to how the amount demanded is calculated or estimated, nor does it provide any explanation as to how the amount demanded is linked to the breach of contract.

The Bank fails to make payment and the contractor applies for summary judgement in the commercial court in England.

The Bank contends that the contractor was obliged to state in the demand or at least have reason to believe that the contractor had suffered damage in the amount claimed. The sub-contractor's breaches were only technical or administrative in nature and so the main contractor could not honestly have believed that the sub-contractor was liable for the amount demanded. The demand is therefore fraudulent and the Bank has no liability for the demand.

Question

The main contractor has issued a demand in the stipulated form. However it cannot show that it honestly believed that it has suffered loss in the amount demanded. In those circumstances is the demand fraudulent so as to allow the Bank to refuse liability for the demand?

Answer

No. The demand is not fraudulent and the Bank must pay up.

The facts described were those considered by the commercial court in England on a summary application for judgement in the case of *Enka Insaat VE Sanayi AS -v- Banca Popolare Dell'Alto Adige SpA* [2009] EWHC 2410. The judgment in this case followed the principle that a party claiming under an on-demand bond is not required to explain or justify its right to be paid under a demand by reference to any actual loss as long as the demand notice meets the requirements on the bond.

By virtue of its terms the bond was on-demand bond. Having regard to these terms and the on-demand nature of the bond, the court held that the contractor was not required to state or even have a reason to believe that it had suffered damage for the amount demanded. The demand made was in the form stipulated by the bond, and it is a general principle of an on-demand bond that the guarantor can only resist the demand if it is made fraudulently.

The court founded upon an earlier decision in the case of *Edward Owen Engineering Limited -v- Barclays Bank International* [1978] 1 QB 159, in which Lord Denning stated that a bank which gives a such a bond is not concerned with the relations between the supplier and the customer, nor with whether the supplier has performed his contractual obligation or not. He said that "the bank must pay according to its guarantee, on demand, if so stipulated without proof or conditions."

Lord Denning founded in turn on an earlier decision in the case of *Cargill International v Bangladesh Sugar and Food Industries Corp* [1996] 2 Lloyd's Rep 524 in which it was stated that an on-demand bond is equivalent to a promissory note and the beneficiary can call the bond pending the resolution of the contractual disputes and "does not have to await final determination before he receives some moneys".

These dicta were followed in the *Enka* case described above. In that case, the judge explained the distinction between an on-demand bond and a conventional guarantee. In the case of the on-demand bond, the primary purpose is to secure payment to the beneficiary; in the case of a guarantee the purpose is to provide a guarantee of the sub-contractor's obligations. So while a guarantee requires proof of the breach of the relevant obligation, the on-demand bond does not.

A further recent example of this principle is the decision in the case of *Meritz Fire and Marine Insurance Co v Jan de Nul and another* [2010] EWCH 3362 (Comm). In that case the bond in question was an

advance payment guarantee. The court held that the terms were such that this was an on-demand bond. In the absence of fraud, an on-demand bond must be honoured regardless of the relations between the parties to the underlying contract.

It should be noted that fraud will be a defence to a claim under an on-demand bond, but recent cases indicate that in determining whether fraud has been established the courts have set the bar at a high level. The *Enka* case would suggest that if the party making the demand simply does not apply his mind to whether the amount demanded is accurate, this does not amount to fraud; there would need to be an element of deliberate deceit.

It is also often not clear whether, on the terms of the relevant instrument, it is truly an on-demand bond as opposed to a guarantee of performance. It was held in a recent English case that where the instrument was not given by a bank, there was a presumption that the instrument was not an on-demand bond, although this presumption could be displaced where the express terms clearly indicated that the instrument was indeed intended to be on-demand. See *Vossloh Atkiengesellschaft v Alpha Trains (UK) Limited* [2010] EWHC 2443. The court in this case emphasised the importance of relying on the wording of the relevant document rather than how it is described, since this area of the law is "bedevilled by imprecise terminology".

Reasonable Endeavours

Scenario

You are a client procuring the construction of a new building on a green-field site.

During the pre-contract negotiations, the contractor advises that he requires a certain area of land adjacent to the Site for storage of materials. Otherwise he will incur additional transport costs which will mean an increase in the contract price.

The land is owned by a neighbouring farmer but you are on good terms with him and are confident you can persuade him to grant a temporary licence to use his land for a reasonable price. Of course you can't be 100% certain and you never seem to have an opportunity of speaking with the farmer and the contractor is putting pressure on you to agree the contract to allow him to start work.

So you agree with the contractor to a term being added to the contract that you will use reasonable

endeavours to obtain temporary rights to allow the land to be used for storage.

Once the contract has been signed, you pay a visit to the farmer to ask if he will agree to giving a licence for the use of the land. You are prepared to pay the market rate for a licence fee plus 20% for his trouble. However, to your surprise he rounds on you and says that his wife and your wife had a big fall-out last week at the bowling club. It would therefore be more than his life was worth for his wife to find out that he had done you a favour. He refuses to talk any more about giving you the rights to the land in question.

A few days later he calls on you and tells you that after speaking with his wife, he will give you a licence to the land but only if you pay him a fee of £500,000. This is many times the market rate and such a payment is will make the overall project completely uneconomical. He refuses to negotiate on the amount.

You tell the contractor that you are unable to obtain rights to the land in question and some time later you receive notice of a claim for damages for breach of your obligation to use reasonable endeavours to procure these rights. The damages are the additional transport costs of materials. The contractor has heard about the farmer's offer to accept £500,000 and maintains that in complying with your obligation to use reasonable endeavours you should have paid this sum in order to obtain the rights.

Question

Are you in breach of your obligation to use reasonable endeavours to obtain the rights to the land?

Answer

No, you are probably not in breach of your obligation to use reasonable endeavours.

It is a question of fact in each case, but it has been recently held by the Scottish courts that a "reasonable endeavours" obligation does not require the person to disregard his own commercial interests. The party is only required to take one reasonable course of action, rather than all courses of action available. If the only way to procure the land was obtaining the rights from the farmer and the farmer was insisting on a payment which would render your whole project uneconomic, then it is likely that you have fulfilled your obligation to use reasonable endeavours by attempting to agree a deal with the farmer. It may, be different, however, if it could be demonstrated that the farmer would

have accepted a much lower amount but that you did not make any reasonable attempt to negotiate.

Mactaggart & Mickel Homes Limited v Charles Andrew Moore Hunter and Sandra Elizabeth Hunter
[2010 CSOH 130]

The term "reasonable endeavours" can be compared with "all reasonable endeavours". The latter is a more onerous obligation and while it does not necessarily require the person to sacrifice his commercial interests, if there are a number of courses of action available to achieve the required end, the person must exhaust all of these.

In turn, the term "best endeavours" is even more onerous and in practice may fall not far short of an absolute obligation, requiring the relevant party to go on using its endeavours until these have been exhausted, including the taking of legal action.

These distinctions were considered in the recent decision of the High Court in England in *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch).

It may be prudent when negotiating the terms of such an obligation to qualify it by setting out the extent of the obligations which the relevant party has to take.

By Mike Barlow
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1. Exchanging Drafts of a Proposed Contract

Question

You are the commercial manager working for a Contractor, and have been negotiating the terms of an important sub-contract with a prospective Sub-Contractor, with whom your company has not previously dealt. The technical documents were agreed a while ago, but your negotiations with the prospective Sub-Contractor on the conditions of contract and the pricing arrangements have been quite protracted. In fact, you've just had to issue draft number 17 of the Sub-Contract to the prospective Sub-Contractor! As a result of the lengthy delay in signing the Sub-Contract, the senior management of both companies agreed that work could start anyway, just to meet the programme. For this reason, a letter of intent was entered into about six months ago. The letter of intent subsequently expired after being in place for only 2 months, and nothing has been done to extend it, though work is continuing at the site and ongoing payments have been made to the prospective Sub-Contractor. Fortunately, you don't think more than another couple of drafts will be required before the Sub-Contract is ready to be signed, since you have at last resolved the main outstanding commercial points, and the draft now contains only a handful of relatively minor points.

Unfortunately, however, the prospective Sub-Contractor causes substantial physical damage to some existing structures at the site, the repair costs of which are likely to exceed £1.5 million. When you try to pass on the repair costs to the prospective Sub-Contractor, they argue that their liability for repair costs is restricted to only £250k because of a limitation clause in the draft Sub-Contract. You respond by stating that the Sub-Contract has not yet been entered into, so the limitation clause does not apply. You point out that the draft Sub-Contract has from the outset contained a clause which states, "*This Sub-Contract shall not be effective until it has been formally executed by duly authorised representatives of both the Contractor and the Sub-Contractor in a self-proving manner.*" Accordingly, you argue that because the Sub-Contract has not yet been formally executed, there is no contract between the parties - so there is no limitation clause. Are you right?

Answer

Although this sort of case will depend to a significant degree on the facts, it is highly likely that the answer is "no" – i.e. the Sub-Contractor is correct, with the result that the Sub-Contractor's liability will be restricted to £250k as per the draft Sub-Contract.

The circumstances outlined here are similar to those in the Supreme Court case of RTS Flexible Systems Limited v. Molkerei Alois Müller GmbH & Company KG (UK Production) [2010] UKSC 14. In the RTS Flexible Systems case, RTS were supplying and installing Automated Pot Mixing Lines and a De-Palletising Cell for the Repack line in Müller's Market Drayton factory. RTS and Müller entered into a letter of intent which required RTS to commence the whole of the works, and which stated that the contract would be based on Müller's amended MF/1 conditions of contract and would be agreed and signed within 4 weeks of the letter of intent. The MF/1 document contains various limitations of liability and also a counterparts clause which stated that, "*This Contract may be executed in any number of counterparts provided that it shall not become effective until each party has executed a counterpart and exchanged it with the other.*" (Counterparts clauses of this type are used in England and Wales, but not in Scotland; for current purposes, however, the point is that formal execution of the contract was required.) The letter of intent expired, but RTS continued to construct and deliver the equipment, and was partially paid for doing so. No formal contract was signed. A dispute then arose between RTS and Müller, requiring a preliminary trial as to whether or not a contract existed. At first instance, the trial judge held that after the letter of intent had expired, a new contract had been formed which did *not* incorporate the amended MF/1 conditions, because (amongst other things) the MF/1 conditions required a formal contract to be executed. The Court of Appeal, however, found that the counterparts clause prevented *any* contract (not just a contract on the basis of the MF/1 document) from coming into existence. The Supreme Court then reversed the finding of the Court of Appeal, holding that an MF/1-based contract *had* come into existence, on the grounds that (1) all of the essentials of a binding contract had been agreed, and (2) the parties' conduct indicated that they had waived the strict terms of the counterparts clause.

As Lord Clarke stated when delivering the judgement of the Supreme Court, "*The differing decisions in the courts below and the arguments in this court demonstrate the perils of beginning work without agreeing the precise basis upon which it is to be done. The moral of the story is to agree first and to start work later.*" This is of obvious application wherever there is a need to start work before the contract has been fully agreed - as in the typical letter of intent scenario. A wider issue, however, is the risk of finding that you are bound by a draft contract which has not yet been signed, i.e. because the essential elements of the contract have been agreed. To guard against this risk, it may be appropriate to make clear to the parties with whom you are negotiating that the draft contract will not be binding unless and until all of its terms have been fully agreed and a formal contract has subsequently been engrossed and then executed by duly authorised representatives of the parties. You must then ensure that this arrangement is not waived by conduct.

2. Costs of Adjudication

Question

You work for a developer who – in its capacity as the Employer under a Building Contract - recently lost an adjudication raised against it by the Contractor. You are unhappy with the adjudicator's decision, but decide not to challenge it. The managing director of your company asks you to think how you could discourage Contractors from raising adjudication proceedings against the company in future. You decide that a good way of doing so would be to include a "Tolent clause" in the Building Contract, requiring that whoever refers a dispute to adjudication would have to pay both parties' legal costs in relation to the adjudication. Your colleagues, however, tell you not to bother trying to draft something on this point, because under the changes to the Housing Grants, Construction and Regeneration Act 1996 which will soon be made by the Local Democracy, Economic Development and Construction Act 2009, this type of provision will be unlawful anyway.

Note: the relevant provision in the 2009 Act is as follows:

Adjudication costs

In the Housing Grants, Construction and Regeneration Act 1996, after section 108 insert -

“108A Adjudication costs: effectiveness of provision

- (1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.
- (2) The contractual provision referred to in subsection (1) is ineffective unless -
 - (a) it is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or
 - (b) it is made in writing after the giving of notice of intention to refer the dispute to adjudication.”

Your colleagues tell you that there's no way round the new section 108A of the 1996 Act. Are they right?

Answer

No. There may be a way round section 108A, owing to what appears to be a drafting error in the legislation.

Taking the constituent parts of section 108A in turn, the contractual provision described in subsection (1) is sufficiently wide to cover *any* costs relating to the adjudication – e.g. the legal and professional costs of each of the parties.

Turning to subsection (2), the *second* part – i.e. subsection (2)(a) - is straightforward, in that it covers the situation where an agreement is reached between the parties *after* the notice of intention to refer has been given. In practice, most parties would of course be unlikely to agree to an onerous provision after such notice has been given, but subsection (2)(b) does not prohibit the parties from entering into such an arrangement if they wish.

The oddity lies in the *first* part of subsection (2) - i.e. subsection (2)(a). Rather strangely, it refers to the adjudicator's fees and expenses, in contrast to subsection (1), which (as noted above) is wide enough to cover all costs relating to the adjudication. The net effect of section 108A may be that as long as the requirements of subsection 108A(2)(a) are met, a contractual provision dealing with the costs of the adjudication as a whole will *not* be ineffective. In other words, provided the contractual provision is in writing, is contained in the construction contract and also confers power on the adjudicator to allocate the adjudicator's fees and expenses between the parties, the contractual provision can also allocate the parties' own costs. (Indeed, section 108A could even be viewed as expressly *legitimising* "Tolent clauses", because it states that such contractual provisions are ineffective "unless" subsections 108A(2)(a) or (b) apply. Impliedly, therefore, contractual provisions which do fall within subsections 108A(2)(a) or (b) are legally effective.)

This is entirely contrary to the intention of the 2009 Act, but at first glance that is literally what section 108A seems to be saying. It would have been quite straightforward to outlaw Tolent clauses in the legislation, and it is not clear why the 2009 Act has been worded in this way. A "quick fix" for the legislators might be to change the "or" at the end of subsection 108A(2)(a) to an "and", but it would be preferable for subsection 108A(2) to be rewritten entirely. On the other hand, it is possible that subsection 108A(2) as written could be viewed as saying that the only type of contractual provision dealing with adjudication costs is one which allocates only the adjudicator's fees and expenses. Given the attempts made over the years to circumvent the original 1996 Act, it would not be surprising if this part of the 2009 Act ends up being the subject to litigation.

3. Clause 60.1(19) of NEC3

Question

You work for a Contractor and are in the process of negotiating an NEC3 Engineering and Construction Contract ("ECC") with your opposite number who works for the Employer. The project is politically and economically important, but the scope of work is pretty straightforward and the Contractor will be taking out the insurance policies for the Works on standard terms. With one exception, the Employer has made no changes at all to the NEC3 standard form ECC, and no additional compensation events or

Employer's risks are specified in the Contract Data - though the delay damages are quite high. The only amendment the Employer now wishes to make is to delete the last compensation event in the list contained in clause 60.1, namely clause 60.1(19). The compensation event in clause 60.1(19) is as follows:

"(19) An event which

- stops the *Contractor* completing the *works* or
- stops the *Contractor* completing the *works* by the date shown on the Accepted Programme

and which

- neither party could prevent,
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
- is not one of the other compensation events stated in this contract."

The Employer has expressed concern that the standard wording of clause 60.1(19) is sufficiently wide to cover circumstances such as the insolvency of one of your subcontractors, which the Employer does not consider should be treated as a compensation event. You think this is fair enough because you wouldn't claim for that sort of thing anyway. You can't think of a downside of deleting clause 60.1(19) and neither can the Employer, and you also can't think of any other matters you would like to include as additional compensation events instead. Is it safe to delete clause 60.1(19)?

Answer

No, for at least two reasons.

Firstly, clause 60.1(19) is probably the closest equivalent to what is known in the JCT 2009 contract as "Specified Perils" such as fires, floods and storms. If clause 60.1(19) is deleted, loss or damage caused by a Specified Peril will not entitle the Contractor to an extension of time under NEC3. Where the works are covered by the Contractor's CAR cover, but are damaged as the result of (for example) a fire or flood, this may leave the Contractor with a substantial liability for delay in completion which (unlike the reinstatement costs) will not be covered by insurance. Clause 60.1(19) could protect the Contractor against at least some of this risk. (It should however be noted that clause 60.1(19) does not apply where either Party could prevent the event – which may mean there would be no compensation event where e.g. a fire was caused by the negligent use of sub-contractors' welding equipment. Accordingly, whether or not clause 60.1(19) remains in the contract, it would be advisable, from the Contractor's perspective, to include an additional compensation event or Employer's risk which specifically covers loss or damage caused by Specified Perils - which would need to be properly defined for the purposes of the NEC3 contract.)

Secondly, clause 60.1(19) may also cover events such as terrorism (bearing in mind that the question indicated that the project is politically and economically important). If clause 60.1(19) is deleted, then no extension of time would be granted if the works were to be damaged or interrupted by some kind of terrorism. (Furthermore, unless terrorism is named as an additional compensation event or Employer's risk, it will be a Contractor's risk. This is because under clause 81.1 of NEC3, from the starting date until the Defects Certificate is issued, the risks which are not carried by the Employer are carried by the Contractor.)

The information, materials and opinions in this document and the associated seminar materials:

- *are not exhaustive*
 - *are for general information purposes only*
 - *are not intended to constitute legal or other professional advice*
 - *should not be relied on or treated as a substitute for specific advice relevant to particular circumstances.*
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By Richard Barrie
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Question

I am a quantity surveyor. I am employed on a project. I have no written contract. I am told that the architect is responsible in law for checking the quality of the work and in particular for spotting defects. Am I as Quantity Surveyor only responsible for quantities?

Answer

As obvious as it may sound, as a quantity surveyor, your role is to value the quantity of works, not the quality.

A recent case dealt with this exact situation and clarified any suggestion of 'blurring the lines' between the professional roles on a contract. In *Dhamija & Anr v Sunningdale Joineries Ltd & Ors [2010] EWHC 2396 (TCC)*, the employers sought damages arising out of alleged defects in the design and construction of their new house. An action was brought against the contractor, the architect and the quantity surveyor. Over half of the hundreds of items in the Scott Schedule were apparently defects and the employers maintained that this was as a result of the failure of the QS in his implied duty to "*only value work that had been properly executed by the contractor and ...[that were not] not obviously defective.*" The QS defended the claim stating that it did not owe this duty to the employers.

The question before the TCC, therefore, was this: could a term could be implied into the parties' contract to essentially make a QS liable to the employer for defective works carried out by the contractor?

Now, critically there was no written contract between the employer and the QS. There was, however, a formal contract between the employer and the contractor, the terms of which the Court decided that the QS ought to have been aware. With such awareness, in order to give the contract business efficacy, the Court was prepared to imply a term that the QS would act with the reasonable skill and care of a QS of ordinary competence and experience when valuing the works properly executed for the purposes of interim certificates.

The problem was, however, that the implied duty that the employers in this case sought to rely on went that bit further – it omitted the reference to 'reasonable skill and care', making it an absolute obligation upon the QS. In addition, the implied duty placed an obligation on the QS to inspect the works and draw the Architect's attention to "obvious defects".

What this meant was that the QS would be expected to perform services never contemplated in their original contract.

Decision

The Judge could not see any basis in fact or in law to support the employer's claim that there was any obligation on the part of the QS to make allowance for defective work however manifest and obvious. Rather, in looking at the 40 year old decision in *Sutcliffe v Chippendale & Edmondson (1971) 18 BLR 149*, he made it clear that the responsibility for the detection of defective works was entirely that of the architect and that it was for the architect to continually update the QS about any defective work to then allow the QS to exclude these from his valuations.

Whilst this does all sound quite clear cut, is important to note 2 things in this case that did assist the QS in absolving itself from liability:

Firstly, the QS had actually recorded in writing that it was relying on the architect on the project to bring any defective work or materials to its attention. It did so, for example, by making notes to this effect on its valuations; and

Secondly, as already mentioned briefly, there were no written terms of appointment which may have imposed a more onerous duty of care upon the QS. The only duty was the implied duty to act with reasonable skill and care of QS' of ordinary competence and experience.

What this means for you

So, whilst the rule of thumb is that you value the quantity of works and not the quality, you nonetheless need to make sure that you read the terms of your appointment to find out exactly what duties you owe the employer and ensure that they do not give rise to any suggestion that you have assumed responsibility for quality! If it does, you either need to negotiate these terms or make sure that your insurance cover reflects the extended scope of services and any liabilities arising from that.

In a normal set of circumstances, however, if you do happen to notice a glaringly obvious defect which appears not to have been taken into consideration by the architect, then you are best passing this back to the architect for comment rather than attempting to assess it yourself.

Question

I am a contractor. In 1998 our solicitors updated our Ts and Cs so that they were compliant with s.113 (pay-when-paid clauses) of the 1996 Act. A major client of ours has now gone bust. We owe sub-contractors a lot of money. Should we have any concerns?

Answer

As a contractor, the question you need to ask yourself is: "Do my Ts and Cs incorporate the terms in the 1996 Act **as amended** or do they replicate the wording as it appeared in s.113?" It may sound like the same thing, however, there is a difference.

1. **1996 Act – s.113 and the Insolvency Act 1986:** As you know, s.113 of the 1996 Act prohibits 'pay when paid' clauses, except where a third party employer is insolvent. S.113(2) - (5) makes reference to Part II of the Insolvency Act 1986 & sets out the circumstances in which a company, partnership or individual is defined as being "insolvent". Essentially, a company is put into administration or wound up by an order of a Court only. As such, following the 1996 Act, in order to stay on the right side of the law, contractors tended to base their Ts and Cs entirely on the wording as it appeared in s.113 relating to insolvency.
2. **Enterprise Act:** However, these provisions have now been replaced by a new **Schedule B1**, which was introduced by the Enterprise Act 2002 (Insolvency) Order 2003.
3. **The "new" s.113:** The Enterprise Act has amended s.113 of the 1996 Act to the effect that s.113(2)(a) now reads: "*For the purposes of this section a company becomes insolvent –*
(a) when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986."

Essentially, this now means that a company can be placed into administration by a Court order *or* by an out-of-court procedure. The latter is a "self-certifying option", set out within Schedule B1 and may be started by the company itself, any of its directors or by a qualifying floating charge holder.

4. **What does this mean?** Ts and Cs drafted *after* the 1996 Act, but *before* the EA in 2002 may now not be wide enough and may need to be amended.

Case Study: To illustrate, in a recent case, *William Hare Ltd v Shepherd Construction Limited [2009] EWHC 1603*, the Court had to determine whether or not the insolvency of an employer (Trinity Walk Wakefield Ltd) fell within the terms of the contract's pay-when-paid clause. The pay-when-paid clause (which was taken from the contractor's (Shepherd) standard forms) in question mirrored s.113(1) and (2) of the 1996, but failed to take cognisance of the new Schedule B1 brought in by the Enterprise Act and, in particular, the self-certifying options.

The works commenced & the sub-contractor (William Hare) made 2 applications for payment (valuations 5 & 6). However, by this point, Trinity had been placed into administration by its directors, in terms of the out-of-court procedures introduced in Schedule B1. Separately, Shepherd certified the amounts due to William Hare, but issued a withholding notice, relying on their (erroneous) pay-when-paid clause. William Hare raised an action on the basis that Shepherd could not rely on their withholding notices because their pay-when-paid clause was not sufficient because it did not take account of the insolvency situation that had arisen with Trinity. Shepherd argued that it was absurd that, just because the new self-certified routes weren't specifically referred to in their clause, they couldn't be included in an interpretation of the overall meaning of the insolvency & essentially asked the Court to ignore the use of the word "order" in their clause.

The Court decided that Trinity's insolvency did not fall within the terms of Shepherd's clause as constructed and that the interpretation thereof was to be based on the plain meaning of the words used in the clause. As such, the Court held that William Hare was entitled to be paid c. £997,000 plus VAT plus interest. Shepherd appealed, however, this was refused by the Court of Appeal last year – the Judge stating that the Courts do not "*easily accept that people have made linguistic mistakes, particularly in formal documents.*"

5. **Moral of the story:** The moral of the story is that contractors must keep their Ts and Cs updated to ensure that they are Act-compliant or you may find yourself with a similar expensive lesson as seen in the case study. It may be that, for those standard forms which you use regularly, you include a clause to the effect that any references to legislation also includes a reference to amendments to that legislation as and when they occur. In addition, the case study illustrates that contractual terms must use clear language & be unambiguous in their terms because those clauses which seek to limit liability will be subjected to a very strict interpretation by the courts against the party who is trying to rely on them.
-

De Beers UK Limited v Atos Origin IT Services UK Limited [2010]Question:

You are a contractor in a building contract. Considerable delays are incurred as a result of (a) your own staffing problems and (b) poor instructions from the employer. Are you entitled to an extension of time?

Answer:

Maybe!

If a contractor completes their works after the completion date, the employer is normally entitled to apply liquidated damages, unless the contractor obtains an extension of time because the delay was not his fault.

Delay in construction projects is, however, often a result of several factors caused by both the contractor and the employer – i.e. concurrent delay. Given the frequency with which concurrent delay occurs, it is perhaps surprising that the Courts have failed to develop a uniform approach – despite cases in both the Scottish and English Courts within the last year.

The Scottish Inner House decision in *City Inn Limited v Shepherd Construction Limited* received a considerable amount of attention after it was issued in July 2010. Lord Osborne held that where concurrent delays have arisen, "*it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event.*"

This reasoning was supported by Lord Kingarth, but not by the third Judge, Lord Carloway. He held that, applying the strict wording of the contract, "*What the architect must do is concentrate solely on the effect of the Relevant Event in the absence of any competing default. If he decides that it was likely to, or did, cause a delay beyond the Completion Date, he must fix a "fair and reasonable" new Completion Date having regard to what he estimates to be the delay caused by the Relevant Event, all other things being equal.*"

The difference in the Judges' approaches led to a considerable amount of uncertainty - an uncertainty that everyone was hoping would be clarified by the Supreme Court on appeal but unfortunately the case settled so we're stuck with *City Inns* for the foreseeable future.

That's not to say that there hasn't been any discussion of concurrent delay South of the border. The Technology & Construction Court recently considered the issue in the case of *De Beers UK Limited v Atos Origin IT Services UK Limited*.

De Beers had entered into a sales agreement with the Government of the Republic of Botswana and, as part of that agreement, De Beers had undertaken to move its aggregation process to Botswana. To do so, it needed to develop its software and employed Atos to do so.

The project did not progress well for a number of reasons, including poor staffing by Atos and unclear instructions from De Beers causing substantial delay. Ultimately, De Beers refused to pay an interim invoice (citing the delay and poor quality) and Atos then suspended its works (claiming De Beers had substantially increased the scope of works).

Justice Edwards-Stuart, held that: "*The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary.*"

Accordingly, Atos was entitled to an extension of time (but not prolongation costs) and De Beers was not entitled to liquidated damages for the period of concurrent delay. Given the uncertainty that remains in Scotland, parties wishing to avoid such disputes would be wise to give careful consideration to their drafting.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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