

TEN YEARS

by David Thomas QC

in the Life of

CONSTRUCTION LAW:

The View from London 2006–2016

David Thomas QC reviews a decade of construction law.

Introduction: the Nature of Change

It is a characteristic feature of common law systems, of course, that change generally requires judicial pronouncements. In construction law, equally obviously, many of these arise from disputes over buildings, during or after their construction. There is thus a degree of linkage between what happens in the industry and developments in the law and this article will refer to some of the landmarks of the built environment as well as landmarks in the legal environment which they have helped to produce, during the decade which is the 'review period'.

Developments in Statute

Not every aspect of English construction law is governed by decisions of the courts, however; statute plays a part. Usually, that part derives from more general legislation impacting upon construction. The Consumer Rights Act 2015 and the Public Contracts Regulations 2015 are both examples of this, albeit in very different ways. The Consumer Rights Act has to a large extent replicated and in some respects extended previous legislation, notably the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, in the context of business to consumer contracts where, for example, some additional remedies are available to purchasers, such as the right to have the defective supply of a service repeated¹ or the price reduced². The Public Contracts Regulations 2015 largely replaced earlier

subsidiary legislation³ and apply to the procurement of public works, services or supplies with a value in excess of financial thresholds⁴ which are subject, as before, to periodic change.⁵ These Regulations accomplish the introduction into English law of the latest EU Public Sector Procurement Directive,⁶ furthering the long-established regime governing the procedures for tendering, tender evaluation and award of contracts in the public sector and which has continued to offer opportunities for challenges by unsuccessful tenderers. Apart from the diverse impacts which they have on construction contracting, the only other common feature of these recent statutes is that they are both derived from European Directives. Whether and to what extent they will survive the proposed repeal of EU-based legislation, following the UK's referendum decision in June 2016 to withdraw from the European Union, remains to be seen. A key to prediction may lie in their respective purposes. The Consumer Rights Act⁷ is aimed at protecting the position of individual citizens doing business with commercial entities, whereas the whole *raison d'être* of the prescriptive rules governing public sector procurement is to secure equal access and competition within the European single market.

Apart from other subsidiary legislation like the Construction (Design and Management) Regulations 2015,⁸ there was one major foray by the UK Parliament

into legislative reform which was wholly construction-specific. This was the Local Democracy Economic Development and Construction Act 2009 (the LDEDC Act), which substantially amended the equally infelicitously named Housing Grants Construction and Regeneration Act 1996 (the HGCR Act). It is now more than 20 years⁹ since the earlier statute created a system for the mandatory adjudication of construction disputes and provisions governing payment under construction contracts, as the UK government sought to respond to official criticisms of the problems created by poorly-managed conflict and sclerotic cash-flow. Generally speaking, the HGCR Act is regarded as having been successful¹⁰ in addressing these chronic ailments and indeed statutory adjudication has been adopted in other, principally common law, jurisdictions (see below).

However, there were a number of perceived deficiencies in the HGCR Act, some of which had encouraged challenge in the courts to adjudicators' decisions, and the LDEDC Act was intended to remedy some of the most apparent.¹¹ It is now no longer necessary for a construction contract to be written for the legislation to apply, although the force of this reform was somewhat diluted by the continuing requirement for the adjudication provisions to be in writing.¹² The insistence of the courts, in line with Parliament's intention to produce decisions which are binding *pro tem*, on granting enforcement even where the adjudicator had made obvious errors and had created serious practical problems;

¹ Consumer Rights Act 2015 s 55.

² Consumer Rights Act 2015 s 56.

³ The Public Contracts Regulations 2006.

⁴ £106,047–£164,176 for services; £4,104, 394 for works contracts.

⁵ Introduced on January 2016 and in force until December 2017, when they will be reviewed.

⁶ Directive 2014/24/EU.

⁷ The Consumer Rights Act 2015 enacted the Directive on Consumer Rights (2011/83/EC).

⁸ Replacing their 2007 predecessors in regulating responsibility for health, safety and welfare in design and management of construction projects; known as the CDM Regulations.

⁹ Though only some 18 years since the HGCR Act came into force in April 1998.

¹⁰ Research on experience of adjudication at least until 2015 has been reported by Glasgow Caledonian University's Adjudication Reporting Centre.

¹¹ On coming into force on 1 October 2011 in England & Wales and 1 November 2011 in Scotland.

¹² Under s 107 of the HGCR Act as amended.

¹³ Under s 108 of the HGCR Act as amended.



the LDED Act introduced a 'slip rule' by which clerical and typographical errors in the decision can be corrected.¹⁴

Predictably, parties had sought to evade the application of the adjudication provisions by incorporating into their contracts so-called 'Tolent clauses',¹⁵ burdening the other party with all the costs of referral, irrespective of the outcome. Such pre-allocation of costs is now ineffective unless made in writing after the notice to refer is served.¹⁶ The LDED Act also strengthened the HGCR Act payment provisions by improving the right of suspension of work for non-payment and taking further action against conditional payment in the form of pay-when-paid/pay when-certified-clauses.

Developments in Standard Form Contracts

Because the industry, both in the UK and internationally, is so committed to the use of standard form contracts, changes in the major suites must also be regarded as developments in construction law, subject to the reservation that the legal effect of the provisions may have to await consideration by the courts before being regarded as established.

That it would be impossible or even useful to track all the changes which have taken place to the main standard forms in ten years is self-evident. That impossibility can be demonstrated merely by reference to the dominant domestic forms of contract

in the UK, namely, those produced by the Joint Contracts Tribunal (JCT). In 2006, JCT had recently introduced its 2005 suite, with over 70 documents. In 2007, it introduced the Constructing Excellence form¹⁷ with the intention of encouraging collaborative working. But the introduction of the LDED Act 2009 (see above) alone necessitated the preparation of an entirely new suite and JCT 2011 became the then current edition. And as this article goes to press, at the conclusion of the review period, the year-long roll-out of JCT 2016 will be coming to completion, incorporating references to the principles of Building Information Modelling (BIM), to the provisions of the CDM Regulations 2015¹⁸ and of the Public Contracts Regulations 2015 (see above). If there is a challenger to JCT's historic dominance of the UK standard form marketplace, it is unquestionably the Engineering and Construction Contract published by the Institution of Civil Engineers (ICE) whose third edition is known ubiquitously as NEC3 (New Engineering Contract). In the decade under review, NEC3 has been used on many high-profile projects, starting with the Channel Tunnel Rail Link and then, with more mixed success, on Heathrow Airport's Terminal 5, whose launch in 2008 was dogged by early teething troubles.

NEC3's high-point to date was undoubtedly the triumphant delivery of the London 2012 Olympic facilities, crucially on time and with very modest levels of incidence of disputes. NEC3 is not uncontroversial. Its tone is set by the agreement of the parties to 'act in a spirit

of mutual trust and co-operation'¹⁹ but its unique 'present tense' drafting style was the subject of judicial criticism in *Anglia Water Services Ltd v Laing O'Rourke Utilities Ltd*,²⁰ where Mr Justice Edwards-Stuart said that 'no doubt this approach to drafting has its adherents within the industry but... from the point of view of a lawyer, it seems to me to represent a triumph of style over substance'. ICE somewhat dramatically abandoned its traditional form of engineering contract in favour of NEC3 in 2009, but this was resuscitated in an updated form in August 2011 as the Infrastructure Conditions of Contract (ICC)²¹ under the auspices of the ACE²² and CECA.²³ However, on any view, the period 2006–2016 has seen a significant growth in the use of NEC3 on major projects in particular and this looks set to continue.²⁴

The more specialist suite produced by the Institution of Chemical Engineers (ICChemE) comprises five contracts used extensively in process and water industries. An international version was launched simultaneously in London and Mumbai in 2007 and new domestic versions were produced in the UK in 2013. If added to these are the latest edition of the most used Institution of Mechanical Engineers (IMechE) form,²⁵ amended versions of the Association of Consultant Architects' specialist partnering forms²⁶ and the innovative CIOB contract,²⁷ it can be seen that the standard forms marketplace has changed widely, and in some cases, very significantly.

¹⁴ Within five days of the delivery of the decision.

¹⁵ From the case of *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] CILL1662.

¹⁶ Under s 108 of the HGCR Act as amended.

¹⁷ JCT/CE 2007.

¹⁸ See n8 above.

¹⁹ Core Clause 10.1.

²⁰ [2010] EWHC 1529 (TCC).

²¹ Not to be confused with the ICC (International Chamber of Commerce) Model Turnkey Contract for Major Projects 2007.

²² Association of Consulting Engineers.

²³ Civil Engineering Contractors Association.

²⁴ For a detailed commentary on NEC3, see David Thomas QC, Keating on NEC3 (Sweet & Maxwell 2012).

²⁵ MF/1 2014.

²⁶ PPC 2000 Amended 2013 International edition 2007.

²⁷ Chartered Institute of Building Contract for use with complex projects 2013.



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Developments in Case Law

As with statutes, some of the cases influencing the development of construction law have not themselves concerned construction; this has been especially so in the law of contract.

One of the last decisions of the House of Lords before its transformation into the Supreme Court was *Chartbrook Ltd v Persimmon Homes Ltd*.²⁸ This was also something of a swan-song for Lord Hoffmann, who provided a seminal re-appraisal of the role of evidence of pre-contractual negotiation in the interpretation of commercial agreements in the light of the ‘four corners’ doctrine. In *Rainy Sky SA v Kookmin Bank*,²⁹ a shipbuilding case, the new Supreme Court held that ambiguity

of contractual clauses would be resolved by reference to the interpretation most consistent with business common sense, while in the leasehold case of *Arnold v Britton*³⁰ the deciding factor was said to be what a reasonable person having all the background knowledge available to the parties would have understood the contractual language to mean. *Marks & Spencer v BNP Paribas*,³¹ also a leasehold case, offered an important contribution to answering the crucial question as to when a term can be implied into an agreement; it had appeared that the courts were moving towards the implication of terms as an integral part of contract interpretation, but the Supreme Court has now indicated that it must be proved that the term is necessary to make the contract workable or internally coherent.

²⁸ [2009] UKHL 38.
²⁹ [2011] UKSC 50.

³⁰ [2015] UKSC 36.
³¹ [2015] UKSC 72.

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Perhaps the most dramatic example of a non-construction decision with significant implications for construction has been the Supreme Court case late last year of *Cavendish Square Holding BV v Makdessi*,³² in which the landmark authority of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*³³ and with it the whole foundation of the law of liquidated damages was reconsidered, fittingly after exactly a century, at the highest appellate level. The case, heard together with an appeal concerning parking fees³⁴ which raised similar issues, arose from the forfeiture of very large sums accruing in addition to the basic sale price of a company, as a result of breaches of restrictive covenants by the vendor. The court had to consider whether this offended against the rule against penalties. In the result, the forfeiture³⁵ was upheld, but the dicta of the members of the Supreme Court went far beyond the disputes before them. Previously, according to *Dunlop*, the test for the validity of a liquidated damages clause or equivalent³⁶ was that it had to be based on a ‘genuine pre-estimate of loss’. A clause which, by contrast, was intended to put the offending party, typically a contractor or supplier, in *terrorem* would be a penalty and thus invalid. Since *Makdessi*, the true test as to what amounts to a penalty will be ‘whether the impugned provision... 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’. While it is still very early to predict the exact effect of this re-setting of the law in favour of using secondary contractual obligations to penalise and therefore inhibit breaches of primary obligations, it is safe to say that, while such provisions

must still be proportionate, it will be harder than previously to mount challenges to them, which will typically benefit employers vis-à-vis contractors.

So far as construction-specific cases are concerned, there have been many hundreds decided since 2006; the specialist Technology and Construction Court (TCC) produces judgments which are loaded onto *Bailii*³⁷ at an average rate of over 80 per year. While some are heavily fact dependent and others atypical, certain familiar themes have been observable during that time.

First among these is, predictably, delay and all its attendant complexities: concurrency, the prevention principle and the global pleading of extension of time claims. Few delays can have been more damaging to national prestige, as well as commercial interests, than that which afflicted the new Wembley Stadium. The FA Cup Final in May 2006 was to have been a show-piece occasion for the new arena; that fixture had to be held instead at another National Stadium – in Cardiff. The Football Association eventually received the keys to Wembley in March 2007. The fractious relationships between (many of) the parties on site were then carried over into bitterly contested litigation (and other forms of dispute resolution) involving contractors *Multiplex*³⁸ and numerous other parties, principally sub-contractors. The popular media focussed on criticisms by the then Mr Justice Jackson of the parties’ conduct during the litigation: the 550 ring-binders of documents, the £1m photocopying bill and some £22m of costs overall. The litigation produced judgments on a whole range of construction law subjects, including valuation of variations, the effect of an entire agreement, crystallisation and scope

of a dispute and repudiatory breach. But the most significant³⁹ Wembley case was *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd*⁴⁰ between main contractor and communications sub-contractor. Jackson J applied the prevention principle, holding that legitimate actions of the employer (or, as in this case, main contractor) could still constitute acts of prevention. The judgment contained extensive consideration of the so-called *Gaymark*⁴¹ principle from Australia’s Northern Territory, by which failure to claim entitlement to extension of time could lead to time going at large and the loss of the liquidated damages remedy. In the years since 2008, the courts have continued to struggle with both prevention and concurrency and to *Multiplex* has been added (*inter alia*) *Steria v Sigma*,⁴² *Adyard Abu Dhabi v SD Marine Services*⁴³ and *Walter Lilly v Mackay*.⁴⁴ Unsurprisingly, the Society of Construction Law has added to its *Delay and Disruption Protocol* in July 2015 its *Rider No 1*, trying to bring back to delay and analysis ‘a common sense perspective’ and to assimilate the case law developments. *Walter Lilly v Mackay* was also notable for the treatment by Mr Justice Akenhead of the global claims issue, which had been extensively canvassed by the Scottish courts in *John Doyle Construction v Laing Management*⁴⁵ and then in *City Inn v Shepherd*.⁴⁶ *Walter Lilly* confirmed the English courts’ disinclination to follow Scotland down the route of apportionment between concurrent causes, but the practice of pleading claims globally has become part of the UK construction industry’s approach to delay (and other) disputes, both north and south of the border, albeit subject to necessary protection of the right of the defendant/respondent to know the case it has to meet.

32 [2015] UKSC 67.

33 [1915] AC 847.

34 *Parking Eye Ltd v Beavis* [2015] UKSC 67.

35 And the parking fee in *Beavis*.

36 Neither *Makdessi* nor *Beavis* actually concerned liquidated damages.

37 The British and Irish Legal Information Institute provides free access to judgments at: www.bailii.org.

38 In *Multiplex Constructions (UK) Ltd v Cleveland Bridge (No 6)* [2008] EWHC 2220 (TCC).

39 The author makes this point in all modesty, having appeared as counsel in the case; the extent of its subsequent citation confirms it.

40 [2007] BLR 195.

41 *Gaymark Investments v Walter Construction* (1999) NTSC 143.

42 [2008] 118 Con LR 177.

43 [2011] EWHC 848 (Comm).

44 [2012] EWHC 1773 (TCC).

45 [2004] BLR 295.

46 [2010] BLR 473.

47 [2006] EWHC 1771 (TCC).



Not all the themes of the construction case law have been claims-related. Reference has already been made to challenges of the award of public sector contracts by disappointed tenderers under the EU procurement regulatory regime. Another quite different phenomenon which has led to disputes and litigation from the contracting process is the use, and indeed abuse, of letters of intent. In 2006, in *Cunningham v Collett & Farmer*,⁴⁷ His Honour Judge Coulson (as he then was) had warned that 'letters of intent are used unthinkingly in the UK construction industry and that they can create many more problems than they solve'. The ten years since then have seen the point emphasised repeatedly. The problem is that whereas previously letters of intent had no legal effect, they are now used to induce the contractor⁴⁸ to mobilise and commence work. Such usage all too often involves uncertainty about the meaning of the instrument used: whether it is contractual or not, and if it is what its content might be. That uncertainty reached a high-point – or low-point – in the case of *RTS Flexible Systems v Molkerei Alois Müller GmbH*.⁴⁹ The Technology and Construction Court had held that a letter of intent used was contractually binding but that its content must be implied, without reference to the MF/1 form of contract which the parties had failed to sign. The Court of Appeal held that the letter of intent had no contractual effect.

The Supreme Court, reversing this, found that it was contractual, but that the content could be ascertained by incorporating provisions of the unsigned MF/1 Contract. The situation has been exacerbated by the apparently increasing tendency of the industry to use letters of intent as substitute construction contracts. In *Trustees of Ampleforth Abbey v Turner and Townsend*,⁵⁰ the defendant project managers were held to have been professionally negligent in allowing construction to proceed under a series of letters of intent issued to the contractor while the JCT Contract lay unsigned. The effect was that the employer did not have the protection of liquidated damages when the contractor was in delay.

Another long-running practice which has obliged the courts to re-examine principle to provide guidance is the use of net contribution clauses, especially in agreements for the supply of professional services, in an attempt to mitigate the effect of the doctrine of joint and several liability. The Scottish courts' willingness to enforce these devices where possible has been notable during the last decade⁵¹ and this has more recently been taken on by the Court of Appeal with a distinctly sympathetic view of a poorly-drafted clause which was nevertheless found to serve its protective purpose, in the case of *West v Ian Finlay Associates*.⁵²

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In addition to these examples of areas of especially significant activity, a flavour of the kind of issues typically handled by the Technology and Construction Court during this period can be obtained from the author’s study of its reported decisions for 2014.⁵³ Obviously, a proportion of the TCC’s work is routine, such as the enforcement of adjudication decisions, and cannot be said to contribute much to the development of the substantive law where the emphasis is on procedure. However, each year of the review period has seen TCC decisions adding to understanding of construction law principles and their application.

⁴⁸ And sub-contractors, suppliers and consultants.
⁴⁹ [2010] UKSC 14.

⁵⁰ [2012] EWHC 2137 (TCC).

⁵¹ In *Langstane Housing Association v Riverside Construction* [2009] CSOH 52 and *Scottish Widows Services Ltd v Harmon* [2010] SLT 1102.

⁵² [2014] EWCA Civ 316.

⁵³ David Thomas QC, ‘A year in a modern specialist court’ (2015) 10(2) CLInt.

“FIDIC is now coming into greater contact with the English legal system than was the case ten years ago.”

The Future

Prediction of legal trends is always somewhat hazardous, especially in a common law system where only the chance occurrence of issues coming before the courts, a fortiori the appellate courts, provides an opportunity for judicial development of principle. In certain areas of construction law, this difficulty must currently be acute. Those areas concerned with public sector procurement which have been subject to extensive coverage by EU Directives and to the jurisdiction of the European Court of Justice stand to be affected, perhaps profoundly affected, by withdrawal from the European Union. It is almost impossible to predict what those effects may be.

Paradoxically, it is in the international sphere that certain observations about the likely course of events can be safely attempted.

It has been explained above that the English domestic forms of contract have undergone a number of changes during the review period. The same is true of the FIDIC forms of contract. To the 1999 ‘Rainbow’ suite have been added during that time the DBO Gold Book⁵⁴ in 2008, the MDB Pink Book⁵⁵ in 2010 and the new Sub-Contract⁵⁶ in 2011. By 2017, the long-awaited new edition of the Yellow Book⁵⁷ should have appeared; in it FIDIC is expected to address criticisms relating to its time bar provisions and perhaps to adjust parts of its dispute resolution machinery. It has been suggested that the Gold Book offers some indicators as to FIDIC’s current thinking. Also making an appearance should be a Test Edition of a specialist tunnelling contract: a new departure for FIDIC.

FIDIC is now coming into greater contact with the English legal system than was the case ten years ago. In 2014, the TCC decided not only the celebrated Obrascon⁵⁸ case on the Yellow Book from Gibraltar but

Peterborough City Council v Enterprise Managed Services⁵⁹ on the Silver Book from a public sector solar energy project in provincial England. The importance of FIDIC generally can be expected to increase, although some of its supporters regard NEC3 as a credible challenger internationally.

The TCC itself looks likely to continue the growth of its international work. Over the past three years, a significant number of cases have come from projects outside England and Wales: including Dubai, Saudi Arabia, Nigeria, Gibraltar, Scotland and most recently a mining case from Sierra Leone,⁶⁰ a dispute from the oilfields of Iraq⁶¹ and a group action relating to a pipe-line in Colombia.⁶² In the last-named, Mr Justice Edwards-Stuart wisely observed that ‘large scale civil engineering and infrastructure projects routinely give rise to public benefit and private detriment, whether they be in the Cotswolds or the Andes’. And therein lies an indicator as to the TCC’s growing attraction to international business as a forum for major construction and engineering disputes: there is no substitute for experience, technical expertise and efficient case management.

International arbitration lies outside the scope of this article but the indications are that London as an arbitral centre and English law as a neutral choice will continue to thrive. The Queen Mary International Arbitration Survey in 2010⁶³ found that ‘certainty’ and ‘respect for freedom of contract’ made English law the leading neutral choice for counsel of international corporations. Those virtues obtain also in construction law and are likely to militate against sudden and violent reversals during the next decade.

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⁵⁴ Conditions of Contract for Design Build and Operate Projects.

⁵⁵ Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition).

⁵⁶ Conditions of Sub-Contract for Construction.

⁵⁷ Conditions of Contract for Plant and Design-Build.

⁵⁸ Obrascon Huarte Lain SA v Attorney-General for Gibraltar [2014] EWHC 1028 (TCC) upheld by the Court of Appeal at [2015] EWCA Civ 712

⁵⁹ [2014] EWHC 3193 (TCC)

⁶⁰ Dawnus Sierra Leone v Timis Mining Corp [2016] EWHC 236 (TCC)

⁶¹ Lukoil Mid East v Barclays Bank plc [2016] EWHC 166 (TCC).

⁶² Re Ocesa Pipeline Group Litigation [2016] EWHC 1699 (TCC).

⁶³ Choices in International Arbitration, Queen Mary University of London 2010