KC LEGAL UPDATE

Summer 2016

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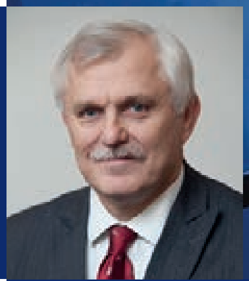
TO THE SUMMER 2016 EDITION OF KC LEGAL UPDATE



This Summer 2016 Issue of KC Legal Update records some very different landmark events, both domestic and international.

Closest to home, of course, was the publication on 30 June of the 10th edition of Keating on Construction Contracts. It is over 60 years since Keating on Building Contracts, as it was formerly known, first appeared and successive editions have carried the names of some of the greatest construction lawyers of their day; Donald Keating himself, Sir Anthony May, Sir Vivian Ramsey and Stephen Furst QC, who comments opposite on how the work is produced and what it seeks to do.

That 'Keating' is truly a Chambers product can be seen from the names of no fewer than 28 members of Chambers who have contributed to it, and managing and integrating their inputs is another significant part of the joint achievement of Stephen and Vivian.

The extension of statutory adjudication and payment provisions continues around the world, principally within the Commonwealth. To the UK, Australia, New Zealand, Singapore, Malaysia and Ireland will be added South Africa, through impending amendment of the Construction Industry Development Board Act 2000. Together with the 2016 publication of a draft international arbitration act, these constitute a major departure in the way South African construction disputes will be resolved, Chambers is fortunate in having two genuine Africa specialists in Dr. Robert Gaitskell QC and Abdul Jinadu to assess the implications of these forthcoming developments.

The international dispute resolution theme is continued with a piece on investment treaty arbitration. The nature of qualifying investments and the status of the contractor as 'investor' are two of the key issues in a highly technical area of dispute work. Simon Hughes QC and Professor Chin Leng Lim, one of our Door Tenants based in Singapore, examine this increasingly important means of recourse for parties in state-led construction projects worldwide.

In the inaugural issue of the Chartered Institution of Civil Engineering Surveyors' Annual Construction Law Review in 1996, Alexander Nissen provided an assessment of the civil justice reforms in his article 'Civil litigation following Woolf', focussing particularly on the then Official Referees' Court. To mark the passing of two decades of vey considerable change, including the advent of the TCC, the same journal invited Alexander Nissen QC to contribute a review of the current landscape in 'Civil litigation – 20 years on', considering inter alia costs management, the Shorter and Flexible Trials Schemes and the Briggs Review of the court system. This article is reproduced with the Institution's permission.

It still remains to be seen whether *Wellesley v Withers* [2015] EWCA Civ 1146 will come to be regarded as a landmark decision of the Court of Appeal but the indications are that it signals a running out of judicial patience with parties who seek to avoid difficulties with bringing their professional negligence claims in contract by relying on the law of tort. Sarah Hannaford QC and William Webb query whether this might be "the beginning of the end for concurrent duties" and they hold out the intriguing prospect that, if the Court of Appeal gets its way, the day when the Supreme Court reconsiders *Henderson v Merrett* may be "closer than we think".

The Summer Issue's line-up is completed by Adrian Williamson QC's consideration of the effect of recent case law on notified sums from the TCC and Court of Appeal on the HGCR Act's aim of improving cashflow to contractors and sub-contractors. The alarming possibility is canvassed that the result could be replacement of 'pay now, argue later' with 'argue now and pay only if you lose the argument'.

Professor Anthony Lavers
Director of Research & Professional Development

Professor Anthony Lavers has been made Visiting Professor of Law in the Centre of Construction Law at King's College, London and will be leaving Keating Chambers at the end of September. Members would like to thank Anthony for his support over the past 15 years and wish him well in his new venture.

Lord Dyson, in giving last year's Keating Lecture, took as his theme the role played by construction cases in the development of the law. Cases such as *Young & Marten v McManus Child*, *Ruxley Electronics v Forsyth* and *Anns v Merton LBC* are obvious examples where construction cases have thrown up difficult points of law from which principles, applicable to all areas of law, have been derived.

Lord Dyson's point was not merely that construction cases have been important in the development of the law but that there are only a limited number of cases in which those principles can be found and that everything else is merely illustrative of those principles.

I would not seek to argue with so eminent a lawyer but lesser mortals feel a need to find authorities which most closely resemble the facts of the matter in hand. *Keating on Construction Contracts*, I hope, satisfies that need for those lesser mortals (and hopefully for eminent lawyers). To satisfy this demand a new edition of *Keating*, the 10th edition, has just been published.

But it goes further than this. The law does not stand still and *Keating* has to reflect changing needs. Thus the new edition includes passages on mediation, dispute resolution boards and a commentary on NEC3, as well as updates on all topics, in particular, adjudication, public procurement and litigation.

Lord Dyson ended his lecture by praising Donald Keating's book, noting that it had originally been written entirely by him, and contrasting that with the number of contributors to the more recent editions of *Keating*. Whilst Donald's book was a masterly account of the law, I'm afraid to say that, given the substantially increased coverage in *Keating* over the years and the demands on the time of present day practitioners, it would be impossible not only to write such a textbook but also to provide updates every two or three years without the input of a large number of members of Chambers. Sir Vivian Ramsey and I would like to express again our gratitude for their input.

There is however one virtue that Donald bequeathed which I hope we have always tried to follow, that is concise exposition. *Keating* attempts to state the law as clearly and shortly as possible, leaving it to the footnotes to provide references and additional reading. I believe the new edition sticks to this principle, however many contributors we have, and provides a relevant, helpful and up to date exposition of construction law.

Stephen Furst QC

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Bilateral Investment Treaty Arbitration – An Overview

by Simon Hughes QC and Chin Leng Lim

International *commercial* arbitration is a well-known means of dispute resolution for those who specialise in construction and engineering, energy and infrastructure projects.

The extent to which parties – and, for example, contractors operating internationally – might be able to avail themselves of remedies under bilateral investment treaty arrangements – or indeed, if a State, become vulnerable to claims brought on such an entirely different basis – is an interesting subject, and certainly a growth area.

Whilst a 'treaty claim' and a 'commercial claim' are fundamentally different in nature, and notions of an easy transition from the one to the other must be disregarded, there are situations where contractors who qualify, by their project involvement, as 'investors', may have some remedies against the State or its emanation where the project is undertaken, if there is an investment treaty between the State and the country where the contractor is incorporated. This is a complex and emerging area and what follows is only an overview and, as such, seeks to identify some of the basic considerations that will apply.

A bilateral investment treaty ("BIT") is a treaty between two States by which each State grants rights and protections to investors from one State investing into the other and their investments.

A key feature of BITs is that they commonly give investors, including contractors and developers, and also project sponsors, the right to bring a claim directly against the State into which their investment is made ("the host State") before an international arbitral tribunal for contraventions of treaty obligations. International arbitration under a BIT can provide an alternative neutral forum to the domestic courts of the host State. The relationship between what might be termed local remedies, and remedies which might exist by reference to the host State's treaty obligations, is a difficult area. There is often, for example, a requirement to pursue local remedies up to a fixed point in time.[1]

Basic Requirements – 'investor', 'investment', remedies and a right to arbitrate ...

It is often pointed out that there are three basic 'threshold' requirements which will govern the contractor's ability to bring an arbitration against a host State in almost all instances (accepting that the exact terms of the BIT will be important in defining with precision the requirements in each case):

There will, first of all, be a question about whether the contractor is properly to be regarded as an "investor" of the home State and therefore benefits from the host State's obligation to protect investors of the home State. Questions of whether the contractor qualifies as an "investor" will in turn lead to questions as to whether the involvement in the transaction which it seeks to protect constitutes as "investment" for the purposes of the BIT in question.

Where the contractor qualifies in respect of "investor" status, there will, next, be a question as to whether the BIT in question confers upon that contractor, as an investor of the home State, protections such that contravention by the host State gives rise to a right of action which, typically, would be resolved by way of arbitration.

The third important element is the basis upon which investment disputes are to be resolved. The agreement to refer future disputes is not so much consensual – as it would be in a commercial agreement to refer future disputes to a third party – but grounded in the standing offer of the host State, contained within the text of the BIT, to any party which has made a qualifying "investment" and which, of course, has an appropriate connection to the other State named in the BIT.

What interests does the BIT typically protect?

The range of interests which are typically protected by *commercial* contracts are not the same as the range of "investor" interests which will typically be protected under a BIT.[2]

1 See *Içkale v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016.

2 This is a topic discussed in detail in *Impregilo SpA v Pakistan* ICSID Case No ARB/03/3, decision on jurisdiction, 22 April 2005; and in *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Pakistan* ICSID Case No ARB/03/29, 14 November 2005.

The range of provisions contained in most BITs will typically cover the following in one way or another:

(1) **Measures to prevent expropriation by the host State.** Typically, a BIT will provide that the investment will not be nationalized, expropriated or subjected to measures having the equivalent to nationalization or expropriation except for a proper purpose related to the internal needs of the [host State] and on a non-discriminatory basis and with prompt and adequate compensation paid.[3]

(2) **Fair and equitable treatment provisions.** Typically, a BIT will provide that investments are to be accorded fair and equitable treatment and are to enjoy full protection and security in the territory of the host State. The BIT will often go on to provide that there shall be no impairment, by unreasonable or discriminatory measures, in the management, use, enjoyment or disposal of the investment.

(3) **Treatment of investors.** A BIT will routinely provide that the host State will not treat investors or their investments less favourably than the host State's own investors (sometimes referred to as the "National Treatment Provisions" within a BIT) and their investments, or those of any third country (often referred to as "Most Favoured Nation Provisions" within a BIT).[4]

> *"Indeed, in the context of modern, trans-national investment, it is vital that essential protections are in place for investors."*

The nature and extent of the protections available will depend upon the exact terms of the BIT under consideration. Commentators often illustrate this point by reference to very old treaties[5] which, upon close analysis, do not apparently have protections against expropriation which, in the modern context, would be regarded as the paradigm of protection under a BIT. Again, this problem can arise under older Chinese treaties, many of which continue to operate today; however, with notable exceptions aside, most modern BITs contain all these protections. Indeed, in the context of modern, trans-national investment, it is vital that essential protections are in place for investors.

In terms of international contracting, or investments in major international projects, the sorts of actions that are likely to trigger considerations as to whether the terms of a BIT have been contravened might include: the seizure of assets, such as an airport or infrastructure project; assuming control of the investor's business operations within the host State; requiring the contractor or other investor to deliver up to the host State, or an emanation of the host State, a share of profits without a contractual or other right to do so; or the imposition of new forms of taxation of the investment activities, or perhaps one-off or 'windfall' taxes on profits or possibly upon reduction or withdrawal of investment by the investor.

Foreign investments in the construction sector have given rise to a significant proportion of the known investment treaty disputes. Claims have been brought under BITs in relation to the construction of major infrastructure works including highways, canals, hydro-electric projects and pipelines, as well as smaller or individual projects and developments. BIT protection could extend to the pure financing phase of such projects, including a claim by a project sponsor for an alleged unfair revocation of a license.

Is the contractor as 'investor' within the meaning of the BIT?

The threshold jurisdictional issues for any claim brought under a BIT will be whether the contractor qualifies as an "investor" from its home State, and whether that

3 This language is taken from Art. 5 of the UK/Pakistan BIT, 30 November 1994.

4 See for example Art. 3 in the Pakistan/UK BIT, 30 November 1994.

5 *Berschader v. Russian Federation*, SCC Case No. 080/2004, SCC, Decision of 21 April 2006.

> *"Foreign investments in the construction sector have given rise to a significant proportion of the known investment treaty disputes. Claims have been brought under BITs in relation to the construction of major infrastructure works including highways, canals, hydro-electric projects and pipelines as well as smaller or individual projects and developments."*

contractor's project in the host State qualifies as an "investment" under the BIT in question. If the conditions for "investors" and "investments" under the BIT are not met, the contractor or their project will not be protected by the host State.

In general, investment treaties define "investors" as persons of a State party to the treaty, other than the State where the investment takes place. Typically, this includes a juridical person (i.e. a company) incorporated in the investor's home State. While simple incorporation may be sufficient for certain home States, other States may require their BITs to define "investor" more strictly, for example also requiring a company to have its seat in the relevant home State and/or to carry out certain activities there in order to qualify as an investor of the home State.

Whether a contractor is an investor will, first and foremost, depend on the definition of "investment" which is found within the BIT itself.[6] The question will then often, in terms of the position of a contractor, be whether the contractor made a contribution in terms of such things as know-how, equipment and personnel; and then whether there was a financial contribution. However, there will then be questions of the *object* of the contract said to be the basis for the investment of the contractor, and there will also be consideration of whether the elements of an investment identified in the decision in *Salini v Morocco*[7] have been met, in terms of a) a contribution, b) a certain duration over which the project in question has been implemented, c) sharing of the operational risks and d) a contribution to the host State's development.

With regards to the language and terms of the BITs themselves, different contracting States adopt very different approaches to the way in which they decide to treat investments.

A State which has often not placed strict limits on the criteria for its qualifying "investors" is the Netherlands. Many Dutch BITs require only that an entity is incorporated within the jurisdiction to benefit from BIT protection. For example, the Netherlands - Czech BIT defines Dutch "investors" to be simply "*legal persons constituted under the laws of* [The Netherlands]". Other States prefer that only entities with genuine commercial activity within their territory may benefit from protective rights offered by other State parties to their investors. Ultimately, this comes down to a question of policy in terms of the real degree of economic activity which the host State wishes to see on its territory.

A number of disputes have arisen where the contractor is originally a national of a State which has a BIT with the host State, so no investment structuring is necessary. For example, in the case of *Toto Construzioni v Lebanon* involving the construction of a highway in Lebanon, the Italian contractor Toto brought an investment treaty arbitration against Lebanon directly under the Italy-Lebanon BIT.[8] A foreign shareholder or a foreign party to a joint venture project may obtain BIT protections as a foreign "investor", even if its local partners may not.

The BIT may also stipulate that a foreign parent can claim on behalf of a local subsidiary. The case of *Tulip Real Estate v Turkey* involved the construction of a residential and commercial complex in Turkey.[9] The foreign contractor Tulip Real Estate, a subsidiary of a major European contractor, held 65% of the shares of a local Turkish JV company which it had established for the project. Tulip brought an arbitration against Turkey by qualifying as an "investor" under the relevant BIT (its claim was limited to the proportional shareholding amount of the alleged damage suffered by the local JV company), but Tulip's local partners did not qualify for similar rights of recourse against Turkey.

The difficulty which very often arises is where an international contractor (incorporated within a contracting State) is required to have a local partner, for example where the project is the construction of a major infrastructure project and 'local law' requires a local partner to have a certain percentage interest or holding. In such a case, and as illustrated above, it will be an important question as to whether the international contractor, who is the "investor" for the purposes of a BIT claim,

6 This was the approach taken by the tribunal in the *Bayindir* decision (*supra*) at paragraph [105] et seq. where Art I(2) of the BIT was in terms of "… every kind of asset, in particular, but not exclusively…" [and then a list].

7 ICSID Case No ARB/00/4 decision on jurisdiction 23 July 2001.

8 *Toto Construzioni Generali S.P.A, v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 Sept. 2009.

9 *Tulip Real Estate Investment and Development Netherlands* B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014.

can only claim in respect of its share, or whether it can claim remedies in relation to the whole operations of what might be a joint venture. The conventional analysis, based upon the nature of BIT rights and remedies, and as confirmed by the *Tulip* decision, is that the 'local' party has no recourse or remedy under the BIT, unless this is expressly and clearly permitted.

> *"Tribunals generally assess whether a project is an "investment" on the basis of its features or characteristics, and by taking into account the circumstances of the case."*

Qualifying "investments" under a BIT

Each BIT usually also contains its own definition of the "investment" to be made by the "investor" which would then qualify for BIT protection by the host State. Typically, the definition is broad and covers "every kind of asset", including tangible and intangible property, shares, bonds, licenses, IP and concessions (e.g. to construct and operate an infrastructure project). However, a BIT may also impose conditions, such as that an investment must be approved by the host State, or must have certain characteristics such as the commitment of capital or other resources.

Tribunals generally assess whether a project is an "investment" on the basis of its features or characteristics, and by taking into account the circumstances of the case. Features that may be used to point to the existence of an "investment" include the allocation or contribution by a foreign investor of capital, an element of risk, a long-term duration, the expenditure of funds by a foreign entity for the expectation of profit in the host State, or a claim to money or the purchase of an asset. It has been said that qualifying as an investment may be more hazardous in the case of ICSID arbitrations, although it is fair to say that the existence or extent of this problem invites conflicting opinions.[10]

The wide scope of these provisions would generally encompass international construction projects, but this is a question of fact and varies from case to case.

In the construction sector, arbitral tribunals have held that risk-bearing activities at various stages of a project may be "investments" qualifying for host State protection. These include investment activities such as the purchase by the claimant contractor of shares in a local construction consortium; the grant of a long-term concession by a host State which "could have generated significant returns" despite the contractor not yet having made significant contributions; a contractor's provision of know-how, equipment and personnel to a project, as well as the contractor incurring significant bank charges for providing bank guarantees equivalent to the value of the employer's advance payment; a contractor's supply of services and materials and the mobilisation of its resources for the performance of a construction contract; an operator's two-year commitment to provide vessels and services for a dredging contract; and a project company's claim to a share of profits or returns flowing from the right to operate a project following its construction.

This is a complex area and a great deal will depend on careful examination of the potentially applicable BIT or range of BITs,[11] and the nature of the difficulties which have arisen on the project, in order to begin to consider whether an investment treaty claim is something which is even viable. However, with the growth of international work, and the massive growth in bilateral investment particularly in parts of the world where 'the state' is the driver and vehicle for projects and development, this is an area which is likely to become of increasing interest and importance to our clients who are active internationally.

10 This is commonly known as the "Salini" problem, which featured in the *Toto* case discussed above.

11 Under a most favoured nation clause in the BIT between the host and home states, where the host state has granted better investor and investment terms under another treaty with a third-state, that other third-state BIT may also be used. At a simpler level, the host and home states may have more than one treaty between them, as so often happens.

The South African Adjudication and Payment Regulations

by Robert Gaitskell QC and Abdul Jinadu

Introduction

There are recent legislative developments in South Africa which are relevant to construction, engineering and infrastructure projects and which will have a profound impact on the regulatory and commercial landscape in the country.

The first major development is publication in 2015 of proposed amendments to the Construction Industry Board Development Act 2000 which will introduce statutory provisions dealing with prompt payment and introducing statutory adjudication for qualifying contracts. The second significant development is the publication earlier this year of a draft international arbitration act. This article by Robert Gaitskell QC and Abdul Jinadu, will discuss the most significant aspects of the Prompt Payment Regulations ("the Regulations") and the draft international arbitration act will form the subject of a later article.

Prompt Payment Regulations

Although not the first of its type, the regulation of payment terms and the introduction of statutory adjudication introduced by the UK Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA") has been replicated in a number of common law jurisdictions and it appears that South Africa will be the latest to join this trend. The vehicle utilised in South Africa for the proposed introduction of the new statutory regime on prompt payment and adjudication is by way of amendment to the existing Construction Industry Development Regulations made under the Construction Industry Board Development Act 2000 ("the Act").

When the proposed amendments were published in May 2015 comments were invited within a 60 day period. That period elapsed some time ago and it is understood that the amendments will be enacted in substantially the same form as the present draft, although there are minor changes in an as yet unpublished updated draft. There is no confirmed date for the commencement of the Regulations but it is anticipated that they will come into force sometime in the third quarter of 2016.

The amendments are set out in three parts: the Schedule which sets out Definitions; Part IVB which deals with prompt payment; and Part IVC which deals with adjudication provisions.

Paragraph 2 of the Schedule contains amendments to the definitions section of the Act. The proposed amendments include definitions for adjudication, adjudicator and construction related works. However, there appears to be a potential drafting infelicity in this part of the amendments. The draft regulations state that a contract for the purposes of Part IVB and C means a "construction works contract as defined in the Act or a construction works related contract." A definition is provided for a construction works related contract in paragraph 2(b) of the Schedule however the Act contains no definition for the term "construction works contract". This is a potentially significant omission, because the amendments make numerous references to "the contract" and in the absence of a definition of a "construction works contract" there is scope for ambiguity in the application of the new statutory provisions.

All is not lost, however, because the Act contains (at section 1) a definition of "construction works" and the Regulations contain (at Schedule 3) Classes of Construction Works. Therefore it is possible, by applying a purposive construction to the Regulations, to identify what is meant by a "construction works contract".

Prompt Payment

The prompt payment provisions contained in Part IVB start at paragraph 26A. It should be noted that the drafting of this part of the Regulations suggests that a failure to comply with the requirements set out in the Regulations only acts to import those elements of which the Regulations are necessary to cure any non compliance, rather than resulting in a wholesale jettisoning of the existing terms and the importation of the provisions of the regulations.

Paragraph 26A(1) provides that the prompt payment provisions apply to contracts whether or not they are reduced to writing and they apply to private and public sector contracts. It should be noted, however, that home building contracts are exempt from the prompt payment provisions. The attempt to exempt home building contracts is potentially problematic because once again there is a possible drafting infelicity. Paragraph 26(1) provides that the exclusion of home building contracts is in respect of such contracts as "*contemplated in the Housing Consumer Protection Measures Act 1998.*" The difficulty is that the Housing Consumer Protection Measures Act 1998 does not contain a definition for a "home building contract"; furthermore the Housing Consumer Protection Measures Act 1998 applies to *any* home builder.[1] Therefore, unlike the UK legislation which only exempts contracts with residential occupiers, the South Africa legislation appears to contemplate that it will exempt from the Regulations all contracts for the construction of homes; including contracts between commercial developers and commercial builders. It is unclear that the legislative intention was to create such a substantial exemption from the operation of the Regulations.

Paragraph 26B contains a prohibition on "pay when paid" clauses which are prohibited save for instances of business rescue proceedings or insolvency.

Paragraph 26C contains the entitlement of the contractor to progress payments and the provisions for calculating the contractor's entitlement to such payments in the event that the paragraph applies. Paragraph 26C(1) provides that parties cannot contract out of the entitlement to progress payments. The starting point is that the provisions of paragraph 26C are imported into a qualifying contract if the contract fails to provide for progress payments at regular and reasonable intervals. There is a potentially significant gap in the Regulations, as there is no definition of what would constitute regular or reasonable intervals. The Regulations do provide that, in the absence of a right to regular and reasonable progress payments, the contractor, supplier or service provider is entitled to submit monthly invoices or tax invoices.

The regime governing the due date for payments and the giving of notices of an intention to withhold payments, set out in paragraphs 26D and 26E, is arguably an improvement on the provisions of the HGCRA on which it is based. The Regulations are simpler and easier to apply. Similar to the HGCRA, the Regulations provide for a due date for payment; however, there is no distinction drawn, between the due date for payment and the final date for payment. The Regulations provide that payment becomes due and payable on the date determined by the contract, which may not be later than 30 days after the date of submission of the invoice.

Pursuant to paragraph 26E, payment may not be withheld unless a notice to withhold is given within 5 days of the receipt of the invoice and paragraph 26E(4) identifies the requirements for a valid withholding notice. It should be noted that one of the conditions of validity is that the notice must be given in compliance with paragraph 26I which deals with the giving of notices under the regulations.

In the event that the recipient of the notice of withholding disagrees with the reasons provided for the withholding, or if it is believed that the giver of the notices has failed to comply with the regulations, there is a mandatory requirement that the recipient of the notice must declare a dispute and that such dispute must be referred to adjudication.

Paragraph 26E limits the entitlement to withhold only to those elements of the works or the invoice which are in dispute.

Paragraph 26F establishes the contractor's entitlement to suspend performance for non-payment subject to the giving of warning notice no less than 7 days prior to the suspension.

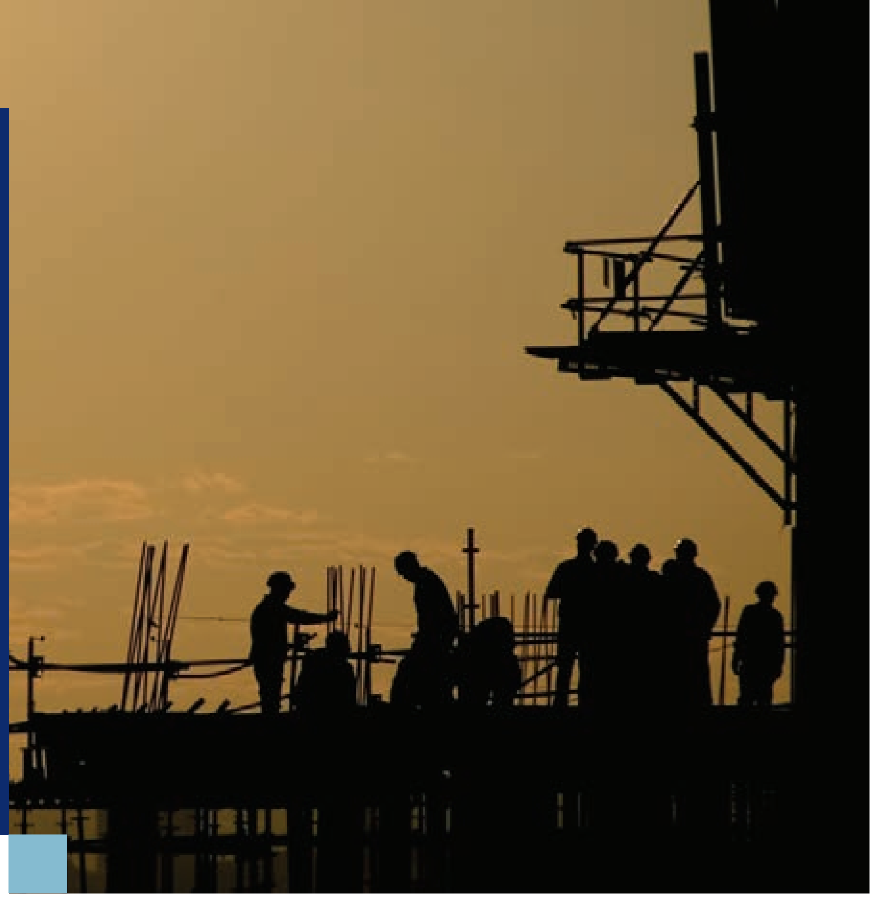
> *"The issue for the South African courts now will be whether rules of procedure will be developed which facilitate the speedy enforcement of decisions of statutory adjudicators as is the case in England and Wales in the Technology and Construction Court."*

Adjudication

The South African market is already familiar with contractual adjudication due to the widespread use of various standard form contracts which include adjudication as a means of dispute resolution and the courts have already handed down a number of decisions in which they have signalled that decisions of adjudicators will be supported by the judiciary.[2] The issue for the South

[1] Which includes an owner builder who has not applied for an exemption pursuant to section 10A of the Housing Consumer Protection Measures Act 1998.

“The issue for the South African courts now will be whether rules of procedure will be developed which facilitate the speedy enforcement of decisions of statutory adjudicators as is the case in England and Wales in the Technology and Construction Court.”



African courts now will be whether rules of procedure will be developed which facilitate the speedy enforcement of decisions of statutory adjudicators as is the case in England and Wales in the Technology and Construction Court.

The adjudication regime, which is introduced by Part IVC of the Regulations, mirrors very closely the amended regime under the HGCRA. Adjudication is a mandatory requirement in a qualifying contract and, pursuant to paragraph 26J(1) of the Regulations, this includes verbal contracts. Paragraph 26J(2) provides that the right to refer a dispute to adjudication is in respect of any dispute arising from a qualifying contract and it is made clear that a dispute includes any difference between the parties in relation to the contract; therefore disputes as to the existence or otherwise of a contract would be subject to adjudication.

Paragraph 26J(4) provides that, notwithstanding the fact that a contract already contains an adjudication procedure which substantially complies with the provisions of the Regulations, the contract must provide for the giving of a notice of adjudication at any time and must provide for the referral of such dispute and the appointment of an adjudicator within 7 days of the notice. In addition, the procedure must also require the adjudicator to give his or her decision within 28 days of the notice of adjudication, subject to an agreement to extend time up to a maximum if 42 days.

It should be noted, however, that in the case of multiple adjudications, pursuant to paragraph 26P(2), it is open to the parties (by agreement) to extend the period for the adjudication beyond the 42 days provided for at paragraph 26J.

Paragraph 26L provides for accreditation by the Construction Industry Development Board of adjudicator nominating bodies. There is provision for the Board to maintain a list of “those adjudicators”; however, it is not entirely clear to which adjudicators reference is being made; is it those adjudicators who have been selected i.e. appointed by the nominating bodies or is it the pool of adjudicators from which appointments can be made? Perhaps the intention is that the Board maintains a list of nominating bodies rather than individual adjudicators. Furthermore, the purpose of the list maintained by the Board is not clear.

Paragraphs 26M contains a list of the powers and duties of the adjudicator which is essentially identical to the similarly titled list in the (English) Scheme for Construction Contracts. Paragraph 26N provides for representation of the parties in the adjudication and paragraph 26N(2) limits representation at any oral hearings to one person unless permission is given by the adjudicator.

Finally, in respect of the Regulations, paragraph 26R sets out the effect of the adjudicator’s decision, including requirements that:

(i) the parties give effect to the decision within 10 days of the delivery of the decision;
(ii) the decision constitutes a liquid document or a liquid amount when it orders payment of money;
(iii) if the dispute[3] does not exceed the jurisdiction of the Magistrates Court and effect has not been given to it within 30 days, the decision will be considered a certificate and the clerk of the court must enter judgment in respect of that sum.

Conclusion

The publication of these draft regulations signals a clear intent on the part of the South African authorities to respond to a growing demand in part of the construction industry for South Africa to adopt some of the practices and methods which have proved so popular in other Commonwealth jurisdictions. Clearly, as highlighted above, there are possible issues with the present draft of the Regulations. However, the direction of travel is clear and, once the minor drafting issues are resolved, the prompt enactment of the Regulations will be a welcome development.

2 See for example *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*, Case No. 06757/2013; *ESOR Africa (Pty)_Ltd/Franki Joint Venture and Bombela Civils Joint Venture (Pty) Ltd* Case No. 12/7442; *Sasol Chemical Industries Ltd v Odell and E-HEL* Case No. 401/2014; *Freeman & Mathebula v Eskom Holdings Ltd*, Case No. 43346/09; *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd*, Case 2008/2013 and *Basil Read (Proprietary) Ltd v Regent Devco (Proprietary) Ltd*, Case No. 411/08/09.

3 Note the drafting of this provision is imprecise because it possibly leaves it open to argument that it is the amount in dispute not the amount ordered to be paid in the decision which must fall within the jurisdiction of the Magistrates’ Court.

KEATING CASES

A SELECTION OF REPORTED CASES INVOLVING MEMBERS OF KEATING CHAMBERS

Reported case summaries

J Murphy & Sons Ltd v Beckton Energy Ltd [2016] EWHC 607 (TCC)

Murphy, the claimant main contractor on a power plant in East London, sought an injunction against a threatened call by the defendant employer (Beckton) of an 'on-demand' performance bond in respect of a claim for liquidated damages under an amended version of the FIDIC Yellow Book. Murphy contended that Beckton was not entitled to call on the bond, because no liquidated damages were due until there had been an agreement or determination by the Engineer. Therefore, if the court upheld that part of Murphy's case, a call on the bond would at that stage be fraudulent so as to justify an injunction.

The court held that by reason of amendments to the standard form, Beckton was entitled to recover liquidated damages, and to call upon the bond for non-payment, without prior determination by the Engineer. The claims were therefore dismissed.

Justin Mort QC represented the defendant

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Mutual Energy Ltd v Starr Underwriting Agents Ltd [2016] EWHC 590 (TCC)

The claimants, Mutual Energy, brought proceedings against the defendant insurers in respect of the failure of the undersea Moyle Interconnector linking the electricity systems of Scotland and Northern Ireland. Three of the insurers of the Interconnector compromised Mutual Energy's claim, but the two defendant insurers refused to do so, alleging deliberate non-disclosure by Mutual Energy, which would entitle them to avoid the insurance contract altogether. The court held that the phrase "deliberate or fraudulent non-disclosure" in the policy wording contemplated some element of dishonesty in the non-disclosure and would not cover a situation where the insured party was unaware that he was obliged to disclose the material in question. Mutual Energy's decision not to disclose a fact which was disclosable as the result of an honest but mistaken belief did not entitle the defendant insurers to avoid the policy.

Marcus Taverner QC and Calum Lamont represented the claimant

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John Sisk & Son Ltd v Carmel Building Services [2016] EW 806 (TCC)

Sisk, the claimant contractor, sought to vary or remit a partial arbitration award arising from the termination of a mechanical and electrical sub-contract with Carmel on a mixed use project in London, after Carmel entered into administration. The challenge was based on s.69 of the Arbitration Act 1996 and comprised three allegations of error of law:

(i) That the arbitrator had been wrong to conclude that Sisk bore the burden of proof to show why a recent interim valuation should not be used as the basis for valuation of the work completed by Carmel.

(ii) That Sisks's primary claim to set-off was made as a global claim which was therefore irrecoverable.

(iii) The statutory rate of interest under the Debts Act due to Carmel on sums unpaid.

The court held that the arbitrator had not erred in law in his conclusions on burden of proof and global claim. Carmel was entitled to interest at the statutory rate.

Adrian Williamson QC represented the claimant.

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Bouygues (UK) Ltd v Febrey Structures Ltd [2016] EWHC 1333 (TCC)

The main contractor, Bouygues, sought declarations in respect of claims brought by sub-contractor Febrey arising from a project at the University of Bath. Febrey had commenced adjudication proceedings following the non-payment by Bouygues of a payment application. Bouygues argued that it had issued a valid Pay Less Notice. The court held that there had been a 'clear and obvious error' in the sub-contract payment schedule and that when it was construed appropriately no timeous Pay Less Notice or Payment Notice had been served.

William Webb represented the claimant

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Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group and NHS Dartford, Gravesham and Swanley [2016] EWHC 1393 (TCC)

This case relates to a tender for adult community services in North Kent. The claimant, an NHS Foundation Trust and incumbent provider ("the Trust"), was unsuccessful in the tender and issued proceedings alleging breach of the procurement rules. These proceedings imposed an automatic suspension on the defendants' ("CCGs") right to enter into a contract with the successful bidder, Virgin Care.

On the CCGs' application, Mr Justice Stuart-Smith ruled that the suspension should be lifted.

The court found that damages were calculable based on the intended annual contribution from the contract to the Trust's fixed overheads and were an adequate remedy for the Trust. The court accepted that the Trust existed to care for the people of Kent, but found that this "*does not give the Trust a monopoly or the right to primacy or priority in the context of NHS procurement. Nor does it determine whether or not damages would be an adequate remedy.*" Faced with opposing evidence from two NHS bodies, the court felt unable to rule on the contention that the public would be better served by maintaining the contract with the Trust and found that a delay of even 6-8 weeks pending an expedited trial would put mobilisation of the new contract prior to the winter at risk. Finally, the court found that the status quo was the CCGs' right to enter into a contract with its chosen provider and thus also favoured lifting the suspension.

The case is significant in particular for the court's rejection of the argument that the public service objects of NHS claimants are such that damages could never be an 'adequate remedy' for the purposes of an application to lift.

Sarah Hannaford QC and Simon Taylor appeared for the defendants

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Stellite Construction v Vascroft Contractors Ltd [2016] EWHC 792 (TCC)

The developer, Stellite, engaged Vascroft as contractors under the JCT Without Quantities Standard form for core and shell works on a substantial residence in Hampstead. A dispute arose over delay to the works, which was referred to adjudication. The adjudicator found that time had been set at large and that liquidated damages were not payable. He then decided what a reasonable time for completion would be. Stellite sought a declaration that the adjudicator's decision was unenforceable on the ground of a breach of the rules of natural justice and that the adjudicator had no jurisdiction to decide what a reasonable time for completion should be. The court rejected Stellite's argument that the adjudicator had breached the principles of Natural Justice by failing to canvass the arguments of the parties on time being set at large. However, in then proceeding to decide the question of what was a reasonable time for completion, the adjudicator had exceeded his jurisdiction.

Piers Stansfield QC represented the claimant
Paul Darling QC represented the defendant

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Volkerlaser Ltd v Nottingham City Council [2016] EWHC 1501 (TCC)

The case concerned an application by the claimant contractor, Volkerlaser, for summary judgment on an interim payment application for insulation work done to housing stock owned by the defendant Council under an amended TPC 2005 Term Partnering Agreement. Volkerlaser's claim was based on no payment notice and no pay less notice having been issued, while the Council's professional advisers were seeking to verify and assess the final account position. The judge held that under the standard payment provisions and bespoke additions, a monthly application could only be made in a month during which work commenced or was completed, whereas the interim payment application here was several months after all works had been completed. It was therefore too late for any right to interim payment to be established and any entitlement would remain to be decided in the final accounting process The council also argued that no final date for a pay less notice and for payment had arrived in the absence of Volkerlaser's failure to submit a VAT invoice. Therefore, even if a valid payment application had been submitted, payment was not overdue. This was crucial because the court rejected the argument that the interim application was invalid as not made at the appropriate time. In the result, the application for summary judgment was refused and the Council held to be entitled to defend the claim. Jonathan Lee QC appeared for the claimant

Adrian Williamson QC represented the defendant

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Civil Litigation Update

by Alexander Nissen QC

> *"While the impact of the reforms was undeniably dramatic, whether they have all benefited the process of litigation is a matter of perennial debate amongst practitioners and court users."*

Writing in the very first volume of the ICES Construction Law Review, published in autumn 1996, Alexander Nissen QC addressed the Final Report on the civil justice system produced by Lord Woolf and its likely impact on litigation generally and Official Referees business specifically. The intervening 20 years have seen significant changes to the landscape of construction litigation, much of which related to the introduction of the Civil Procedural Rules 1998 as a result of Lord Woolf's report.

Delivering a paper to the Society of Construction Law in March 2007, Mr Justice Jackson (now Lord Justice Jackson) commented on the impact of the 1998 Woolf reforms:

> *"Although it is fashionable to carp about detailed glitches and infelicities in the Civil Procedure Rules 1998, it is worth pausing for a moment to note the huge benefits which they have brought to court users. The scandal of civil litigation dragging on inefficiently for many years and then being struck out for want of prosecution has come to an end. An increasing number of disputes are not resolved without any formal legal process at all. Pre-action protocols (one of Lord Woolf's innovations) lead to many cases settling before they start. Mediation is now encouraged by the courts and often leads to earlier settlements."* [1]

While the impact of the reforms was undeniably dramatic, whether they have all benefited the process of litigation is a matter of perennial debate amongst practitioners and court users. This article will review some of the key changes to construction litigation that have occurred in the last 20 years and look to its future prospects.

TCC Guide and Pre-Action Protocol

Since the introduction of the Civil Procedural Rules in 1998, litigation in England and Wales has been radically transformed. While many of the measures implemented by the CPR had been pioneered in the TCC, construction litigation has not been immune to change. The court now has a much greater role in the management of litigation with the aim of *"enabling the court to deal with cases justly and at proportionate cost."*[2] The CPR is supplemented by the TCC Guide, which is currently in its second edition, with a new edition expected shortly.

One of the most significant new measures introduced by the Woolf Reforms was the use of Pre-Action Protocols. These require the parties to a dispute to engage in reasonably extensive correspondence, setting out the basis for the claim and the rejection of it, before they are allowed to issue court proceedings. The aim of this has been to crystallise the matters in dispute at the earliest stage, so that parties can attempt to settle, or at least understand, the case which they have to meet. A unique feature of the TCC Pre-Action Protocol was the provision for at least one pre-action meeting between the parties. One consequence of the protocol has been the front-loading of costs. This has been particularly acute in construction litigation, where a great deal of time and cost can be spent in attempting to set out the nature of the dispute. Parties have often got bogged down in protocol requirements and it has sometimes felt as though the process wastes time and cost rather than saves it. As a result, the two organisations which represent construction lawyers – TECBAR and TeCSA – are working with the TCC to develop a new, streamlined and more cost effective version. This is likely to be published before the end of the year. Whilst it is expected to retain the meeting, the process will be shorter and more focussed. Parties will be able to opt out of it by agreement.

The effect of the Pre-Action Protocol can be seen in the number of claims issued in the TCC. In 1996, 1,778 writs were issued.[3] In 2014-2015 there were a total of 948 claim forms issued in London and the various regional TCCs.[4] In all likelihood, a substantial proportion of the claims issued back in 1996 would have never made it to trial, and it may be that the same amount of cases are making it to trial now. The difference could be accounted for by the fact that, prior to the requirements of the Pre-Action Protocol, parties would often issue a writ simply as part of the negotiation process. Now, because of the increased costs which must be incurred before issue, parties are incentivised to negotiate before resorting to issuing proceedings.

Another area where substantial change has been felt is the use of expert evidence – a regular feature of construction litigation. Both the CPR and the TCC Guide give the court far more control over the use and presentation of expert evidence. For instance, the court has the power to order the instruction of a single joint expert on any given issue. Where there are separate experts, the court will usually require them to meet prior to the trial to discuss their respective evidence and produce a joint statement setting out the areas in which they agree, the issues upon which they disagree and the reasons for this disagreement. This is intended to clarify the matters actually in dispute and narrow the issues before the court.

The court also has control over the manner in which expert evidence is presented. It is possible for experts to give concurrent evidence (colloquially known as 'hot-tubbing') so that in disputes involving multiple technical issues, the court can more easily identify what the opposing expert evidence is on a given issue. The use of hot-tubbing varies widely across the various TCC courts, with some judges expressing enthusiasm,[5] and others rarely using it. The judiciary is now undertaking an enquiry into the varied uptake of hot-tubbing to see if it could be more frequently used to further the efficient conduct of litigation.

Costs Management

The other significant procedural reform which has been introduced since 1998 is costs management. After completing a review of costs in civil litigation in 2013, Lord Justice Jackson introduced reforms to the manner in which costs are dealt with in civil litigation. There has been a complete change in emphasis, away from retrospective review of costs and towards prospective costs budgeting.

> *"Failure to file a costs budget on time results in the rather draconian position whereby the party is deemed to have filed a budget which claims court fees only."*

The mainstay of these reforms is the obligation to file costs budgets in almost all cases which are worth less than £10m. The parties are bound to attempt to agree their budgets between themselves and if this is not possible the court will approve the budgets. The court is given a hands-on role in the management of costs budgets and, when assessing costs at the conclusion of the litigation, it will not depart from the budgeted figures unless there is good reason to do so. Failure to file a costs budget on time results in the rather draconian position whereby the party is deemed to have filed a budget which claims court fees only. [6]

This regime does not automatically apply to claims which are valued at more than £10m. However, the court has the power to make costs management orders which can require the filing and exchange of costs budgets. In at least one recent decision, the TCC has emphasised that the courts' power to make such orders is unfettered, that there is no presumption that costs management will not be ordered and that it should be considered in all cases. [7]

The obligation to prepare accurate costs budgets has undoubtedly added to the administrative burden of litigation and has received a mixed response from the legal professions. Lord Justice Jackson's conclusion at the time of the introduction of his reforms was that there was little appetite amongst lawyers for engaging with costs in a detailed way; maybe regarding such matters as the exclusive preserve of specialist costs lawyers and accountants. That said, the pilot schemes for costs management which were run in the Birmingham and London TCCs, were considered a success. Despite initial scepticism about the value of budgets and the provision of unrealistic estimates, many solicitors acknowledged that budgets made them focus on the future conduct of the litigation, the tactics which they adopted and whether settlement should be considered.[8]

The next development in this area may be fixed recoverable costs. In a recent speech dramatically entitled 'Fixed Costs – The Time Has Come,'[9] Lord Justice Jackson called for the introduction of a fixed costs regime which would apply to all civil claims worth less than £250,000. Prescribed total fees – rather than hourly rates – would be set for each stage of litigation, increasing in a series of bands linked to the value of the case.

The supposed benefit of this approach, apart from aiming to ensure that only costs proportionate to the sums at stake are incurred, is that it will alleviate the burden of costs management for 'lower' value claims.

1 Mr Justice Jackson, 'The Tower of Babel: What Happens when a Building Contract Goes Wrong' SCL Paper 136, March 2007.

2 CPR, r1.1(1).

3 Dr R Gaitskell QC, 'Trends in Construction Dispute Resolution,' SCL Paper 129, December 2005, p3.

4 TCC Annual Report 2014-2015, p8.

5 Her Honour Judge Frances Kirkham CBE, 'Reflections on Life as A Judge of the Technology and Construction Court,' SCL Paper D134, April 2012.

6 CPR PD 3E.

7 *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2014] EWHC 2546 (TCC).

8 F Sinclair QC *et al*, 'The Pioneering TCC: Pushing the Boundaries on Litigation Costs' SCL Paper D185, December 2015.

9 Jackson LJ, 'Fixed Costs – The Time Has Come' IPA Annual Lecture, 26th January 2016.

"Despite the passage of time the TCC seems to be in no immediate danger of losing its reputation as a pre-eminent venue for the resolution of construction disputes."

This recognises that for cases worth less than £250,000, attempting to control costs by means of costs management orders and costs budgets can be counterproductive. Under the fixed costs regime, there would be no need to engage in budgeting, as a relatively simple assessment could be conducted at the conclusion of the litigation. It seems that the principle of fixed recoverable costs for low value claims has the backing of the senior judiciary.[10] On the other hand, given the welter of objections from the legal profession, it remains to be seen whether its time has truly come.

Shorter and Flexible Trials Schemes

The TCC, along with other courts in the Rolls Building, is piloting two new schemes: the Shorter Trials Scheme and the Flexible Trials Scheme.

The Shorter Trials Scheme is intended to allow speedy resolution of cases that do not involve allegations of fraud or dishonesty, multiple issues or parties, intellectual property claims or public procurement claims. Its goal is to have the trial within eight months of the Case Management Conference ('CMC').

The trial itself is restricted to four days, all applications are dealt with on the papers and the Pre-Action Protocol does not apply (though parties do have to send the equivalent of a letter of claim). All of this is overseen by a docketed judge who is assigned at the CMC and remains with the case throughout the process. There are shortened timescales for the service of pleadings (which cannot be longer than 20 pages). Parties only have to disclose documents upon which they are relying and/or those ordered after a request for specific disclosure. Evidence is by witness statements which can be no longer than 25 pages and expert evidence is by written report. After trial the judge will endeavour to give judgment within six weeks.

The other significant feature, apart from the lack of a Pre-Action Protocol, is that the costs management provisions of the CPR do not apply. Costs will usually be summarily assessed on the basis of exchanged costs schedules.

It is too early to determine how this Scheme will function, but it has the potential to provide great reductions in both cost and time for those with straightforward cases.

The Flexible Trials Scheme is more focused on the manner in which evidence is gathered and presented. The Scheme itself is largely facilitative: it prescribes few rules, but allows parties to agree on a variety of issues relating to the evidence.

Parties must disclose evidence upon which they rely and which they know to meet the normal disclosure test; though there is no obligation to conduct searches for evidence which may meet the test. Witness and expert evidence is given in written form and oral evidence is limited to issues identified at the CMC. Oral submissions and cross-examination are subject to time limits, which are either agreed or directed. Where oral evidence is necessary, it is limited to the principal parts of a party's case.

The Briggs Review

At the present time, there is an additional review of the Civil Courts Structure being undertaken by Lord Justice Briggs. Matters within his review include the creation of an on-line court, which is unlikely to affect users of the TCC; a possible weakening of the division lines between the Queens Bench and Chancery Divisions; and the question of whether there ought to be a unified structure for the users of the Rolls Building (which the TCC shares with the Commercial Court and Chancery Divisions) so as to create a new Business Court with ticketed judges for particular types of case.

Adjudication

The field of construction litigation has also been affected by the creation of the adjudication regime recommended by Sir Michael Latham's report *Constructing the Team*.

The resulting adjudication system implemented by the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) gives parties to a construction contract the option of referring disputes to adjudication, rather than waiting for arbitration or litigation. This is a speedy process, where the adjudicator is usually required to deliver a decision within 28 days of being appointed. In most cases the dispute is resolved entirely on the papers, without any oral hearings.

The scheme has been an enormous success. While it has generated a field of litigation all of its own, it has reduced the number of construction claims filed in the TCC. Domestic construction arbitrations are virtually extinct. While the decision of an adjudicator is only temporarily binding – with parties retaining the option of re-fighting the dispute in arbitration or litigation – anecdotal evidence suggests that in 80% of adjudications, the parties content themselves with the decision of the adjudicator.[11]

Conclusion

A great deal has changed in the world of construction litigation since 1996. Many of the reforms which have been applied to civil litigation generally have been pioneered in the TCC. This is part of a long tradition of construction litigation being at the forefront of procedural reform. It was in the old Official Referees' courts that the use of written witness statements as evidence, the early exchange of expert reports, and the use of Scott Schedules were pioneered; all of which still form key parts of construction litigation today. Despite the passage of time, the TCC seems to be in no immediate danger of losing its reputation as a pre-eminent venue for the resolution of construction disputes. I look forward to writing about developments in 2036!

10 'Senior judges oppose singling out clinical negligence for fixed costs as consultation nears,' Litigation Futures, 23rd May 2016.

11 Dr R Gaitskell QC, 'Trends in Construction Dispute Resolution,' SCL Paper 129, December 2005.

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Concurrent Duties and Remoteness in Professional Negligence Claims

by Sarah Hannaford QC and William Webb

Sarah Hannaford QC and William Webb look at the case of *Wellesley v Withers LLP* on the appropriate remoteness test in professional negligence claims and consider whether it is the start of a broader move to reduce the ability of parties to circumvent contractual limitations by bringing claims in tort.

Background – The different legal tests

It has been established for some time now that the test for remoteness in tort is different from the test for remoteness in contract. In tort, the test is whether it was reasonably foreseeable that the victim would suffer loss of the type that was in fact suffered, with the central House of Lords authority in support of this proposition being *Overseas Tankship (UK) Ltd v Morts Dock Engineering Co Ltd* [1961] AC 388 at 426, commonly known as *The Wagon Mound (No. 1)*. In contract, it is not uncommon for parties to quote large swathes of *Hadley v Baxendale* at each other and, whilst that is still good law, the more up to date statement of the test comes from *Koufos v C Czarnikov Ltd* [1969] AC 350 at 388, commonly known as *The Heron II*, and is whether the loss suffered is of a type that might reasonably be contemplated as not unlikely to flow from the breach.

The different tort and contract tests are sometimes referred to respectively as the "reasonable foreseeability" and "reasonable contemplation" tests and it is generally accepted that they do not produce the same result, with the contractual test less advantageous to the claimant. This flows not so much from the difference between foresight and contemplation, concepts that are broadly similar, as from the incorporation of the words "not unlikely" in the contractual test, which suggests that mere contemplation will not always be sufficient, whereas, in the tortious test, mere foresight ordinarily will. It is perhaps surprising that a breach of contract and a tortious act, both of which are normally viewed as civil wrongs, should have different remoteness tests. It is far from clear that the average man on the street would expect his legal rights to be more limited in one case than the other. The reason which has been given for the contract rule being tougher is that the claimant can always stipulate contractually for greater protection (see Lord Reid in *The Heron II*). However, it is doubtful that this argument can justify one particular rule instead of another. One could equally reverse the same statement and argue that the contract rule should be more *generous* in terms of recoverable damages because *the defendant* can always stipulate contractually for greater protection. Such a statement is no more or less logical than the converse position. In reality, the ability to contract out of a default rule tells us nothing about what that default rule should be for those parties who do not contract out. In *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Goff described such differences between contract and tort as "adventitious" and it may well be that the only way really to make sense of the distinction is to recognise that it is the sort of inconsistency that arises in case law developed over decades or even centuries.

> *"…one could argue that the contractual rules based upon the parties' agreement ought to take precedence and not be circumvented by reliance upon a tortious claim."*

Wellesley v Withers – which applies in concurrent duty cases?

Whatever the merits of the distinction, it has been clearly established for some time that the contractual rule is tougher on claimants. Which rule, therefore, applies in professional negligence claims where there are commonly concurrent duties of care in contract and tort? On the one hand, it could be said that a party with two causes of action available to it should be able to apply the rules of each cause of action independently and recover money if it succeeds on either one. However, it could also be said that the contractual claim is the dominant cause of action because the contract is the document within which the parties have set out their specific agreement on liability. The tortious claim often only arises because of the contract (or the course of dealing leading up to the contract). In such circumstances, one could argue that the contractual rules based upon the parties' agreement ought to take precedence and not be circumvented by reliance upon a tortious claim.

This issue was recently addressed by the Court of Appeal in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 and the court unanimously held that in concurrent duty cases the contractual rule alone should apply to both contract and tort claims. The rationale given by Floyd LJ at [80] is that the parties are assumed to be contracting on the basis that liability will be confined to damage of the kind which is in their reasonable contemplation (i.e. confined to the contractual test). All three judges appeared concerned by what they viewed as an unsatisfactory situation where two different rules of remoteness could apply, depending upon the cause of action relied upon and preferred the same unifying solution.

One question which immediately arises, given the terms of the judgment, is what the position is in professional negligence cases where there is no contract. This question is not definitively decided but the firm indication is that they will be treated in the same manner as cases where there is a contract. At paragraph 163 of the judgment, Roth J states:

> *"It is unnecessary to explore the position where the liability for negligent advice or professional services arises only in tort… I incline to the view that where there is such a relationship "equivalent to contract" (to adopt the expression used by Lord Devlin in Hedley Byrne) the contractual test should apply, as suggested by Professor Burrows; but this will require separate consideration."*

A similar view is expressed by Longmore LJ at [187] but Floyd LJ, giving the leading judgment, is silent on the point.

Either way, the views of Roth J and Longmore LJ are obiter and, in any event, the true scope of their views is unclear. In particular, is it now said that all tortious actions which involve claims for pure economic loss are subject to the contractual remoteness rules? For example, are claims against auditors or mortgage valuation surveyors the subject of the rule even though they may never have met the recipient of their report and thus never have had the ability to negotiate any particular liability rules (the supposed justification for the contractual rule being tougher)? If so, then it could be that the practical effect of the law is simply that there is now one rule of remoteness for pure economic loss (whether in tort or contract) and another, more generous, rule of remoteness for physical damage or personal injury (which will invariably be in tort). Such a position would probably be more easily justifiable than having different rules depending upon the cause of action.

If, however, some pure economic loss tort claims will still be subject to the tortious rules on remoteness, then we would appear to be back in the position that seemed so anomalous that Lord Goff described it in *Henderson v Merrett* as a "startling possibility" – namely that a party who pays for services pursuant to a contract could thereby put himself into a worse position to sue for a loss than if he was a gratuitous beneficiary of the same services.

> *"Whilst there may be other areas where erosion will occur, the Courts will not be able to erode the most important distinction – the different limitation periods which apply to contractual and tortious claims."*

The Beginning of the End for Concurrent Duties?

One of the broader issues arising from this decision is the Court's willingness to erode benefits of a tortious claim which would not otherwise be available under the contract from which the tortious duty arises. Whilst there may be other areas where erosion will occur, the Courts will not be able to erode the most important distinction – the different limitation periods which apply to contractual and tortious claims.

The reason is that the different limitation periods are the product of two particular legal rules, one of which cannot easily be overturned by the Court and the other of which lies outside the Court's power to overturn. The first is the rule that damage is a constituent part of any cause of action in negligence, whereas it is not in contract. Thus, a breach of contract gives rise to a cause of action for nominal damages upon the breach occurring even if no damage has been suffered, whereas in negligence there is no claim until the claimant suffers harm. Not only is this rule confirmed at the highest level of judicial authority, but it is also an entirely sensible rule that keeps the law of negligence within sensible bounds. It would be extremely difficult for the courts to overturn this rule without substantially altering the nature of the tort of negligence. The second rule derives from the Latent Damage Act 1986 and provides that tortious claimants can benefit from a three year limitation period arising from when the claimant knew or ought to have known about its cause of action. There is nothing that the Courts can do to overturn this rule, since it is statutory in origin. For these two reasons, it seems likely that negligence claims will continue to enjoy more favourable limitation periods than contract claims for the foreseeable future.

Thus, the most likely way in which the inconsistency of the limitation periods in tort and contract could be resolved is by the Courts overturning the decision in *Henderson v Merrett* and scaling back the extent of concurrent duties. At present, there is no indication that the Supreme Court is inclined to entertain such a possibility, but 18 months ago Jackson LJ presented a paper to the Society of Construction Law entitled "Concurrent Liability: Where have things gone wrong" in which he sought "to argue that the common law took a wrong turning in *Henderson v Merrett*". *Wellesley v Withers* suggests that other Court of Appeal judges may well share Jackson LJ's concerns about the possible overreaching of tortious liability and take a similar view that the expansion of tort law in the 1990s went too far. It might just be that the day upon which *Henderson v Merrett* falls to be reconsidered at the highest level is closer than we think.

NOTIFIED SUMS – PAY NOW AND ARGUE LATER?

by Adrian Williamson QC

An avowed intention of the 1996 Act ("the Act") was to improve the cash flow of contractors and sub-contractors. Adrian Williamson QC considers how this aim now stands in light of the recent flurry of cases about notified sums.

Sections 110 A and 110 B of the Act, as amended by the 2011 Amendments, deal with payment notices, and Section 111 provides for notice of intention to withhold payment. The effect of these provisions is that, if the contractor makes a compliant application for a notified sum, and the employer does not give the appropriate and/or timely notice, the sum applied for must be paid in full.

Of course, those matters - whether the notice has been given correctly and/or in time - may be in dispute. The Act also provides for this, since the right to refer disputes to adjudication is conferred by section 108. Paragraph 9(2) of Part 1 of the Scheme states that:

> *An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.*

How then do these provisions fit together?

The starting point is the decision of Edwards-Stuart, J, in *ISG v Seevic* [2015] BLR 233, where the contract was in the JCT 2011 form. An adjudicator's decision ("the First Decision") determined that ISG was entitled to £1,097,696.29, the sum it had claimed in its Application 13, since Seevic had not served the required notice. Seevic then sought a declaration as to the contractual value of ISG's works at the date of Application 13. In this decision ("the Second Decision"), the same adjudicator decided that the value of ISG's works at this date was £315,450.47, and that ISG's loss and expense claim was worth £300,000. He directed ISG to repay the difference of £768,525.36.

The judge held that the Second Decision was unenforceable for want of jurisdiction. He followed *Watkin Jones v Lidl* [2002] EWHC 183 (TCC).[1]

> *"If the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong...the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application* (para 28)."

This decision gave the contractor a very valuable weapon. Provided he got his application in on time, he was entitled to every penny applied for unless the employer gave the right notices at the right time – even if nothing, or much less, was in fact due. Anecdotal evidence suggests that, during 2015, many contractors took this route, and many contract administrators got into difficulties with late or defective notices. However, the courts then began to have second thoughts about the wisdom of this approach. Inroads have been made into this apparently harsh principle.

The first qualification was another decision of Edwards-Stuart, J. The facts of *Galliford Try v Estura* [2015] BLR 321 were somewhat unusual. The parties were in dispute in relation to Interim Application 60 ("IA60") and the defendant had failed to serve a payment notice or a "pay less" notice. The adjudicator decided that the claimant had therefore become entitled to the sum stated in IA60. He ordered the defendant to pay the claimant the sum applied for. A week later, the defendant commenced a second adjudication, seeking a decision that the gross valuation in IA60 was too high. The second adjudicator, following *Seevic*, held that he did not have jurisdiction to reopen the questions as to proper value of the IA60 works.

The defendant did not pay the sum ordered, and the claimant applied for summary judgment. The judge held that there was no defence to the application. However, he gave a partial stay to the defendant on the basis that, where there was risk of manifest injustice, there was jurisdiction in adjudication cases to grant a stay under the CPR. In this case, if the adjudicator's decision was enforced in full, an unusual combination of factors gave rise to a risk of irreparable prejudice to the defendant: see paras 54-60.

Obviously, not all contracts are construction contracts; some are hybrid contracts (see section 104 of the Act). One such case was *Severfield v Duro* [2015] EWHC 2975 (TCC). This was a power station contract and, therefore, liable to be excluded at least in part. Severfield submitted Application 15 and Duro did not serve notice on time or pay the sum applied for. Severfield included in a referral to adjudication all the elements of the works in Application 15 which, it said, were not excluded operations. The adjudicator agreed with the demarcation made and awarded Severfield the sums applied for. It then sought summary judgment before Stuart-Smith, J.

The judge refused the application. He said that 'it must be for the claimant who seeks to enforce an award to satisfy the court that all matters that are included in the award were within the jurisdiction of the adjudicator'. Since, on the evidence, it was arguable that some parts of the award were not construction operations, the award could not be enforced.

Nothing daunted, Severfield tried again. They submitted, not through the contract but by way of inter-solicitor correspondence, a refined version of Application 15. They claimed that they had stripped out all elements which were arguably not construction operations and so the refined application must be paid in full. Duro did not agree, and Severfield applied for summary judgment, by way of free-standing proceedings. The matter came before Coulson, J.[2]

He too declined to give summary judgment, saying that 'If the claimant wanted to take advantage of the rights that it had under the 1996 Act, then it had to do so in an open way'.[3] The judge further concluded that it was 'at least arguable that this is a revised claim as a matter of fact. As such, in order to have any entitlement to payment, the claimant was obliged first to present the claim in a fresh payment notice, under the terms of the contract incorporated from the 1996 Act'.

Clearly, the contractor can only rely on the stringent provisions of the Act if he has given a notification which complies with the Act in the first place. Given these consequences, the courts have looked with a sceptical eye at assertions by contractors that they have given such notice. As Coulson J put it in *Severfield v Duro*, 'because of the potentially draconian consequences, the TCC has made it plain that the contractor's original payment notice, from which its entitlement springs, must be clear and unambiguous'.[4] Reference should also be made to *Caledonian Modular v Mar City* [2015] BLR 694 and *Henia Investments v Beck Interiors* [2015] BLR 704.

The Court of Appeal has now considered at least one aspect of this problem in *Harding v Paice* [2016] BLR 85.[5] Here the parties entered into a JCT Intermediate Form contract and the contractor served notice of termination of his employment under the contract. The adjudicator held this was a valid notice and the contractor was therefore also entitled to submit a termination account. The contractor

1 An earlier decision of HHJ LLoyd QC.

2 [2015] EWHC 3352 (TCC).

3 (para 36).

4 see para 24.

5 (Permission to appeal was also given in *Seevic* but the matter settled before the appeal came on).

submitted to the employers his account, showing that the total value of his works was £798,000 and that the balance owing was £397,912. The employers were obliged to pay the amount properly due in respect of the account within 28 days. It was the contractor's case that, if they wanted to pay less than the amount stated in the account, the employers had to issue a pay less notice. The employers failed to do so.

Accordingly, the contractor commenced the third adjudication, seeking payment of the remaining sum due to him. The adjudicator found that the contractor was entitled to further payment for works in the sum of £397,912. He accepted the contractor's argument that, in the absence of notice, the sum had to be paid in full, and did not think it necessary to decide the true value of the account.

The employers launched a fourth adjudication, in which they sought a decision from the adjudicator, Mr. Sliwinski, that the value of the Contract Works was £340,032. They claimed that overall a balance was due to them and asked for payment forthwith. Mr. Sliwinski substantially found for the employer and ordered the contractor to pay to the employer the sum of £325,484. The employer failed to enforce this decision for other reasons but wished to pursue a fifth adjudication.

The Court of Appeal held that it was so entitled. Essentially, the issues in the third adjudication (whether notice had been given) and the fourth adjudication (what the true state of the account should be) were different and each could be adjudicated.

First, Jackson LJ analysed the correct interpretation of para 9(2) of the Scheme:

> *The word "decision" in paragraph 9 (2) means a decision in relation to the dispute now being referred to adjudication… Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, future adjudication about the other matters is prohibited.* (para 58)

Second, he concluded that the issues were different in the two adjudications:

> *63… I think that Harding referred to Mr Linnett a dispute involving two alternative issues.*
>
> *64. The first issue is a contractual one. The second issue is one of valuation. The adjudicator dealt with the contractual issue. He did not need to deal with the valuation issue.*

The question that this leaves open is whether *Seevic* was correctly decided. This point was mentioned but not decided.[6] However, it seems that the *Seevic* approach is hanging by a thread, at best.

When *Seevic* was decided, it appeared that contractors had been handed a powerful weapon, and that those dealing with interim applications would have to be alert to ensure that the contractor did not secure a tactical knockout. However, the subsequent cases suggest that *Seevic* will be very much confined, if it applies at all. It will not avail the contractor:

(1) In situations where the employer may be entitled to a stay;
(2) In respect of hybrid contracts for construction and non-construction operations, unless very cleverly handled;
(3) Where he has not clearly given the right notification;
(4) For final accounts.

It remains to be seen whether, in a case indistinguishable on the facts from *Seevic*, the Court of Appeal would preclude further adjudications. Obviously, there are competing policy considerations in play. If the employer can start a second adjudication on the merits, and set off that decision against the sum otherwise due, then the philosophy of the Act – pay now, argue later – will be undermined. The position will be 'argue now and pay only if you lose the argument'.

6 see para 68 in the judgment of Jackson LJ

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