Welcome to the winter edition of Construct.Law. 
Emerging technology is re-shaping what we are able to build and the speed, efficiency, cost and safety of building it. We are currently in the midst of the fourth industrial revolution, characterised by a fusion of new technologies that blur the lines between the physical, digital, and biological worlds – fundamentally altering the way we live, work, and relate to one another. What does all this mean for our sector?

In this edition, we look at how new technology and digital disruption will impact the construction sector, including on the contractual side. These are themes we will continue to explore as the Legal Partner for the Financial Times’ Future of Construction Summit taking place in May 2018. We also provide updates on gender pay reporting, the recently published NEC4 contracts, the extent of consultant liabilities for poor advice and take a detailed look at some recent construction cases.

Construct.Law is focussed on the UK construction sector, whilst its sister publication Infra.Law focuses on the domestic and international infrastructure sector. Please do get in touch to suggest future topics.
Driving construction productivity through disruptive innovation and collaboration

Digital disruption is happening across all sectors. Construction may be the second least “digitised” business sector currently (after agriculture) but that simply points to the scale of impact that may be felt within our sector over the coming years.

In his latest book “The Economic Singularity. Artificial intelligence and the death of capitalism” Calum Chace dramatically illustrates the power of exponential change in the following two examples:

“Imagine that you stand up and take 30 paces forward. You would travel around 30 yards (or metres if you are outside Britain and its former colonies). Now imagine that you take 30 exponential paces, doubling the length each time. Your first place is one metre, your second two metres, your third is four metres, your fourth pace is eight metres, and so on. How far do you think you would travel in 30 paces? The answer is, to the moon. In fact, to be precise, the 29th pace would take you to the moon; the 30th pace would bring you all the way back.

That example illustrates not just the power of exponential increase, but also the fact it is deceptive and back-loaded. Here is another illustration of that. Imagine that you are in a football stadium which has been sealed to make it waterproof. The referee places a single drop of water in the middle of the pitch. One minute later she places two drops there. Another minute later, four drops, and so on. How long do you think it would take to fill the stadium with water?

The answer is 49 minutes. But what is really surprising - and disturbing - is that after 45 minutes, the stadium is just 7% full. The people in the back seats are looking down and pointing out to each other that something significant is happening. Four minutes later they have all drowned.”

Where is the average construction company sitting in that football stadium? The fact that exponential growth is “back-loaded” also explains what is known as “Amara’s Law” (after scientist Roy Amara) which observes that we have a tendency to over-estimate the effect of a technology change in the short run and underestimate its effect in the longer term.

In May this year, the Financial Times held its first ever conference on the “Future of Construction”. Charles Russell Speechlys were pleased to be involved as the FT’s Legal Partner. The conference brought together key stakeholders from across the UK, Europe and the USA to explore the future of the construction industry, and in particular how disruptive innovation and collaboration might improve the relatively low levels of efficiency and productivity growth found in the construction sector when compared to other business sectors over the last 20 years – roughly the period since Latham.

McKinsey & Company were the FT’s Knowledge Partner. They presented the findings of their Feb 2017 report entitled “Reinventing Construction: A Route to Higher Productivity” which found that:

- Construction-related spending accounts for 13% of the world’s GDP, employing 7% of the world’s working population
- The construction sector’s annual labour-productivity has only increased by 1% over the past 20 years, contrasting with 2.8% such growth in the world economy and 3.6% in manufacturing. If construction labour productivity were to catch up with the world economy, and half of global infrastructure needs, or increasing global GDP by 2% a year.
McKinsey considered that sector productivity gains of 50% - 60% could be achieved by focusing on the following seven areas:

- Reshaping regulation
- Rewiring contracts
- Rethinking design
- Improving procurement and supply chain
- Improving onsite execution
- Infusing the industry with technology and innovation
- Reskilling works.

They also considered that for some parts of the construction sector, productivity gains of 5x – 10x current levels could be achieved by moving to manufacturing style production systems.

Attendees heard how developments such as BIM, additive manufacturing (3D printing), robotics, AI, smart materials, off-site manufacturing and augmented reality all have the potential to increase productivity and profitability in the industry. However, the key challenge is not the availability of new and exciting technologies, so much as the ability of the industry to deliver process, structural and organisational change that allows such gains to be realised.

From a legal perspective, it was interesting to note that construction contracts were repeatedly cited at the summit as a potential barrier to innovation. In his key note speech, Jérôme Stubler (Chairman of VINCI Construction) referred to a lack of trust leading to complicated contractual relationships. Contracts should incentivise innovative design and construction rather than prioritising risk transfer to the contractor. Live polling during the summit revealed that 24% of attendees thought “rewiring” contractual relationships would have the greatest impact on closing the productivity gap.

Are construction contracts inhibiting innovation?

This provocative question was posed to the 'futurecast' panel on which one of the writers (David Savage) was a member. This is a classic “chicken and egg” question, and perhaps the better question might be “why is the industry not adopting at scale forms of contract that already exist that structure risks differently and better align interests than the traditional bi-lateral main contracting approach?”

Although it is somewhat trite to observe, construction lawyers act on their client’s instructions, and if their clients were asking them to draft and negotiate alliancing agreements that is what they would be doing.

There are of course a number of existing standard form construction contracts which are specifically intended to facilitate innovation and collaboration. For example:

1. NEC 4 suite of contracts generally as recently published, and the new NEC4 Alliancing Contract in particular (which has been published in consultation form only so far)
2. JCT Constructing Excellence Contract 2016
3. ACA PPC 2000 (amended 2013)

These contracts typically seek to foster innovation and collaboration by, for example:

- early contractor involvement
- target cost mechanisms
- encouraging value engineering
- early engagement around, and resolution of, “claims”
- integrating project teams on a multi-lateral contracting basis, rather than bilateral (PPC 2000 and the new NEC4 Alliancing contract in particular).

“Contracts should incentivise innovative design and construction rather than prioritising risk transfer to the contractor.”

However, it is certainly true that more traditional forms of contract continue to dominate in the private sector.

One recurrent challenge is reconciling collaboration with a genuine client need for cost and time certainty. If the developer or its funder has limited contingency in its budget, then it may have very little capacity to share cost risk with the contractor. In our experience, this is the primary reason why clients will often seek to amend design and build contracts in order to create a single point of contractual responsibility and seek to “guarantee” outturn price as much as possible. At the international level, and in the infrastructure sector, one sees this in the growth of robust EPC forms (such as FIDIC Silver book) and the limited take up of target cost pricing options in both the NEC suite and around the IChemE suite of contracts (where such pricing options have always been available to users of those forms).

Inevitably this will inhibit innovation, but is understandable from a client’s commercial point of view.

Some clients will only build periodically or perhaps only once in a generation, and may therefore have little appetite for innovation unless the industry can present a compelling case for improved outcomes. Contractors are incentivised by lump sum contracts to innovate for their own benefit, in order to maximise profit, but there is no – or too limited – incentive to collaborate or innovate for the true benefit of the client, let alone the long term occupier, facilities manager, or future owner of the built asset.
Nevertheless, and at the same time, it does appear that an increasing number of clients are beginning to favour a more collaborative approach to contracting. The 2015 NBS National Construction Contracts and Law Survey found that 44% of client respondents did employ collaborative techniques on some projects worked on in the last year, although only 28% were collaborating on all projects.

It was notable that collaboration was found to be much more likely on high value projects, and the most common form of collaboration was the relatively limited step of providing for an ethos of “mutual trust and cooperation” in the contract. It is questionable whether this is sufficient to facilitate a genuine change in behaviour. Formal partnering or alliancing contractual models were much less popular.

The adversarial nature of typical construction contractual relationships is further aggravated by the complexity and fragmentation of the industry. As has been commented, UK construction has circa two million workers, engaged by 200,000 employers. Different parties (with different shareholders and insurers) will inevitably seek to protect their own positions, as contractors seek to pass risk on via subcontract terms. McKinsey & Company specifically noted how fragmented specialised trades in construction dragged down the productivity of the sector as a whole: whilst responsible for 52% of construction value added, they performed at 79% of the baseline productivity measure for the sector generally (building performed at 104%, civils at 119%, and industrial at 124%).

As noted during the FT summit, clients need to be persuaded of the benefits of new technologies and to become comfortable with any associated risks. The industry needs to be able to validate innovation and demonstrate the business case for its adoption.

Consequently technology also has an important role to play in performance assessment and data collection.

The role of the public sector as the major client of the sector should not be overlooked in this debate. The Government’s 2011 Construction Strategy recognised that the UK does not get full value from public sector construction. The Government has sought to use its scale in the procurement of construction to lead the process of change by a series of measures including:

- providing visibility of the forward pipeline to enable the industry to invest in skills, products and services
- obtaining benchmark data to target and achieve cost reduction
- requiring fully collaborative 3D BIM (with all project and asset information, documentation and data being electronic) as a minimum by 2016
- requiring good practice in dealings between Government and its directly contracted suppliers to be cascaded down through the supply chain.

The future

In 1994 the Latham report identified a lack of collaborative behaviour in construction as one of the main obstacles to meeting client expectations. Nearly 25 years later, many of the same fundamental problems remain and risk impeding the construction industry from maximising the potential of digital disruption, AI and other new technologies to increase productivity.

Nevertheless, we are optimistic about the opportunities digital change will help bring to the construction process and thus the sector. Advocating for new forms of contract and procurement strategies needs to be part of the leadership response in our sector to enable that change. New forms are already available to facilitate collaboration and innovation—witness the inclusion of an interesting new alliancing form of contract within the new NEC4 suite of contract published in June 2017.

As more data becomes available to validate the benefits, the business case for delivering projects differently—enabled in part by exciting new technologies deployed into all aspects of design and construction activity—should become compelling. If that happens, then more collaborative and alliancing based models of construction contract should start to gain market share.

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**BIM: Legal Issues**

The Government has been a keen exponent of Building Information Modelling (BIM), requiring all Government projects to achieve BIM Level 2 since April 2016.

The Government’s strategy was informed by the BIM Industry Working Group, which concluded in March 2011 that “little change is required in the fundamental building blocks of copyright law, contracts or insurance to facilitate working at Level 2 of BIM maturity.”

This article will consider whether this relaxed view of BIM’s legal implications still rings true, six years later.

**New technology, new risks?**

Concerns have been expressed that BIM may contribute to increased risks for construction professionals, which will translate into higher professional indemnity premiums. For example, a small design error by a consultant may have far reaching consequences if all parties are relying on a shared data set rather than producing independent drawings and calculations.

However, as the adoption of BIM technologies has increased, it is reassuring to note that there are still very few court cases which mention BIM. In the US, a lawsuit is reported to have arisen in relation to the construction of a life-sciences building. Apparently the architect and MEP engineer used BIM to fit the building’s MEP systems into the ceiling plenum. However, the design team failed to inform the contractor that the BIM design required a very specific installation sequence, leading to predictably disastrous results during construction. The dispute was subsequently settled by the parties’ insurers.

However it is debatable whether BIM can fairly be blamed for this litigation. It seems that the real cause was a simple failure to communicate, which could equally occur on a CAD designed project.

Indeed, the use of a level 2 BIM environment may actually reduce the risk of claims arising by:

- Early clash detection and fewer errors caused by inaccurate and uncoordinated information
- Embedded quality control
- Improved ability to visualise the project and assess the impact of changes
- Accurate and rapid generation of cost and quantity data

Followings a series of consultations with the majority of the professional indemnity insurance market on behalf of the Construction Industry Council (CIC), Griffiths & Armour reported an ‘overarching’ response that:

“There are no issues with level 2 BIM which are sufficiently serious as to require coverage restrictions for consultants which use it, nor will its use, all things being equal, materially alter the risk profile presented by a consultant, and therefore the premium implications will be minimal.

You should, therefore, have little difficulty in obtaining assurance from your broker that this activity will fall within the range of activities contemplated by our PI insurers.”

“As the number of BIM technologies has increased, it is reassuring to note that there are still very few court cases which mention BIM.”
However, the CIC best practice guide for professional indemnity insurance noted a number of factors which may affect the risk profile of a particular BIM project and cause concern to insurers:

- Bespoke BIM protocols should be addressed on a case by case basis with brokers and insurers, as the consultation assumed that the CIC BIM protocol would be used.
- Non-designers should be cautious about acting as Information Manager, as this may create (potentially uninsured) liabilities for checking/co-ordinating design.
- Design progressed beyond the level of detail required for a specific project stage may need to be redesigned and may not be reliable.
- The required level of specification should be passed down the contractual chain to subcontractors (who may be working in a traditional CAD environment).
- As BIM requires a greater level of incidence of data sharing, there is a greater need to demonstrate provenance of documents and to show which changes have been made by the consultant (rather than by a third party following issue).
- If a model software or data licence is used on a project (i.e. a document determining who owns the intellectual property rights and who can use the model etc.) then care will need to be taken that the licence allows the model to be passed on.
- Undue reliance should not be placed on automated model checking software. For example, suppliers will usually exclude liability for claims that the building regulations have not been met.

Building Contracts
The starting point is a well drafted BIM protocol. The 2016 suite of JCT contracts now require the contractor to carry out and complete the works in compliance with the relevant BIM protocol.

In turn, NEC has published guidance on using BIM with NEC3 contracts, including suggested wording for a Z clause that can be used with the CIC BIM protocol.

The CIC BIM protocol is the benchmark for BIM Level 2 projects in the UK. It identifies the BIM models that will be produced by the project team and puts into place specific obligations, liabilities and associated limitations on the use of the models. However, the CIC BIM protocol is not without controversy.

"The starting point is a well drafted BIM protocol. The 2016 suite of JCT contracts now require the contractor to carry out and complete the works in compliance with the relevant BIM protocol."

For example:

- It limits project team members’ liability for data corruption in the BIM model. This may leave clients exposed, particularly as the BIM software providers will also seek to limit their liability.
- It only requires project team members to use “reasonable endeavours” to deliver BIM models in accordance with the required level of detail and information requirements. This is a lower duty of care than usually expected and is also subject to events outside the team members’ “reasonable control”.
- The client’s licence to use the BIM model is subject to revocation in the event of a fee dispute.

Intellectual Property
Standard building contracts and appointments usually contain provisions dealing with the use of copyright materials. However, in some cases the wording may require some redrafting to reflect the wider ranges of uses for copyright material held in a BIM environment and to cover other intellectual property rights such as database rights. Designers will need to consider the increased likelihood of joint authorship and whether they require any restrictions on the use of commercially sensitive data. Team members should also consider how the system will be protected from threats such as cyber-attacks, viruses, system failures and user errors (e.g. accidental deletions).

Conclusion
This article has outlined some examples of the contractual points to be considered when embarking upon a BIM project. At Level 2 BIM, the legal issues are unlikely to be significantly more challenging to resolve than the usual contractual negotiations. In contrast, achieving Level 3 BIM may require a more fundamental shift away from the traditional adversarial approach to contracting, which may in turn require the adoption of integrated project insurance.

Ultimately, while there are always significant operational risks associated with the rapid deployment of emerging technologies, it may be those businesses which are unwilling or unable to keep up with the pace of innovation who find themselves most threatened by BIM.

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The New NEC4: what are the changes?

The New NEC4 suite of contracts was released on 22 June 2017 at the NEC Users’ Group Annual Seminar. We set out below a summary of the key changes in the NEC4 and a brief summary of the two new contract forms.

The new DBO form
This is a new contract form under which the Contractor can take responsibility for design, construction, operation and/or maintenance of the works.

It is intended to be a flexible contract in which the operational services can be provided before, during and after the works are completed. These operational services can range from basic FM services to obligations to operate the works to achieve specified performance levels.

Its key features include:
- It generally follows the NEC approach and structure.
- It is based on the Term Service Contract as the core contract with ECC elements added.
- The payments can be split between the construction works and operational services.
- There can be a mix between a cost and price based strategy in the Price List.
- There are targets for performance against the Operational Requirements and the payments to the Contractor can be adjusted depending on their performance in meeting these operational requirements.

The new Alliance Contract
This is to be published initially as a consultative form. It is a multi-party contract that is intended to provide a fully integrated delivery team for complex projects.

It generally follows NEC principles but has a number of changes to address its multi-party nature.

“The new NEC4 is definitely a case of evolution, not revolution. The NEC4 would be clearly recognisable to any users of the NEC3; the structure and drafting style has remained the same. The improvements are welcome and should improve the contract”.

Its key features include:
- Partners (i.e. members of the delivery team) can be added or removed.
- All liabilities are shared between the Client and the Partners, save for those caused by the wilful default of the Partners and (if the Client chooses) third party claims. This is intended to align the incentives and risks for all parties.
- An Alliance Board manages the Alliance on behalf of its members. The decisions of the Alliance Board have to be unanimous but then they bind all members of the Alliance.
- An Alliance Manager is to be appointed who is responsible for the majority of roles reserved to the Project Manager and the Contractor under the NEC4 ECC. There are relatively limited matters reserved to the Client. For example, the Alliance Manager assesses the payment due and this is then checked and certified by the Client.
- It is a cost reimbursable contract with limited grounds for disallowing costs but with risk and reward depending on whether the Alliance Objectives are met.
- Payment is made via a Project Bank Account.

It includes a single Contract Data (rather than a split between the Client’s Contract Data and Contractor’s Contract Data).

There are no provisions for dispute resolution proceedings – although the right to adjudicate would be implied by statute in any contract covered by the Construction Act 1996. The intention of the drafters is that any dispute is resolved by negotiation, potentially with third party support but that the Alliance would be brought to an end if a dispute could not be amicably resolved.

New features
Contractor’s design
Secondary option X15 has been expanded with more extensive provisions specifically related to design and build contracting:
- The Contractor’s design duty has been amended so that it refers to the skill and care normally used by professionals designing similar works, rather than the Contractor using reasonable skill and care to ensure the design complies with the Works Information. The burden of proof is also no longer reversed in this regard, i.e. it is for the Client to prove that the Contractor was in breach, not for the Contractor to prove that it was not in breach.
- A requirement for PI insurance to be held by the Contractor has been included. The relevant level of PI insurance and the period it has to be held for are to be specified in the Contract Data.
- There is a requirement to retain documents in relation to design information in the form set out in the Scope for the period for retention specified in the Contract Data.

A new secondary option X9 provides that ownership of the material prepared for the design of the works transferred to the Client, except as stated in the Scope. This is a reverse of the more common position under say the JCT forms, where the Contractor would retain ownership of the intellectual property rights in its design but provide an irrevocable, non-exclusive, royalty-free licence to the client.

Contractor’s proposals
Clause 16 includes a new right for the Contractor to propose a change to the Scope which reduces cost. The Project Manager has four weeks to respond and has the option to accept and instruct, reject or request a quotation prior to making a decision.
Under Options A and B “the Prices are reduced by an amount calculated by multiplying the assessed effect of the compensation event by the value engineering percentage”. Therefore, the Client is entitled to the ‘value engineering percentage’ of the saving. Under Options C & D, the benefit is shared as in NEC3 due to Clause 63.11.

Clause 36 allows the Contractor, as well as the Project Manager, to propose an acceleration to achieve Completion before the Completion Date.

There is a new secondary option (X21) that allows the Contractor to propose a change to the Scope which would reduce the cost of operating and maintaining an asset over its whole life.

**Early warnings**
The early warnings procedure has been amended so that:

- The Project Manager (as well as the Contractor) can give an early warning of any issue that could increase the Contractor’s cost.
- The Project Manager prepares a first Early Warning Register within one week of the starting date.
- The first ‘early warning meeting’ is held within two weeks of the starting date.
- Later early warning meetings are held when required and, in any case, no longer than the interval stated in the Contract Data.
- There is an express mention of a Subcontractor potentially needing to attend an early warning meeting.

**Proposed instructions**
The Project Manager can ask the Contractor to submit a quote for a proposed instruction (Clause 65). If the Project Manager decides not to proceed, the preparation of the quotation for the proposed instruction is a compensation event, which allows the Contractor to recover the cost of preparing this quotation.

**Interim payments**
The Contractor is now required to make an interim assessment (Clause 50.2). If it does not, the Contractor is not entitled to any further payment but the Project Manager can certify a payment back to the Client (Clause 50.4). In NEC3, the Project Manager had to make an assessment and had to consider any application made by the Contractor.

**Finality of assessments**
In the cost based contracts (i.e. Options C to F), the Contractor can instigate a review and acceptance of its Defined Cost by the Project Manager.

The Project Manager is obliged to issue a final assessment of the payment due within four weeks of the issue of the Defects Certificate (Clause 53.1). If the Project Manager fails to do this, the Contractor may issue its own assessment. The final assessment becomes conclusive if not challenged by either party referring it to dispute resolution within four weeks of it being issued.

**Schedule of Cost Components**
The Schedule of Cost Components has been simplified. For example:

- The rules for people costs have been amended to allow for working in different locations, i.e. not exclusively in the Working Areas. This is to take account of the increase in flexible working practices. People whose normal place of work is in the Working Areas are to be included in Defined Cost, according to their time worked on this contract.
- Subcontractor costs have been moved to the Schedule of Cost Components and payment of them has been made consistent across all Options. The Defined Cost is the cost paid to the Subcontractor.
- The Working Areas overhead has been removed from the Schedule of Cost Components. The relevant items are paid as actual Defined Cost instead.
- The design overhead and manufacturing and fabrication overhead have been removed as an addition to the relevant rates for design and manufacturing and fabrication.

**Short Schedule of Costs Components**
This is now no longer used for Options C, D and E. It is only used for the priced Options (A and B). It has been simplified by the adoption of a rates approach for people cost and manufacturing and fabrication cost to replace the cost based calculation in NEC3. These rates also include the relevant overhead cost. In addition, payments to Subcontractors are included in this Short Schedule.
**Fee**
There is now only one Fee percentage, with no separate Fee percentage for subcontracted works. This is linked to subcontractor costs now being paid under the Schedule of Cost Components, rather than as a separate element of Defined Cost.

**Compensation Events**
Additional compensation events can now be included in the Contract Data Part One (Clause 60.1(21)).

The compensation event process in the Short Contracts has been shortened and simplified. The Contractor submits a quotation with the compensation event notice, rather than waiting for an instruction. The Client either accepts the quotation or makes its own assessment.

**Programme**
There is now “treated acceptance” of the Contractor’s programme in situations where the Project Manager does not respond to a programme issued by the Contractor for acceptance within the required time limit (Clause 31.3). The Project Manager has two weeks to respond to a programme submitted by the Contractor for acceptance.

If the Project Manager does not respond in that two week period, the Contractor can notify of that failure and there will be deemed acceptance after one week from the Contractor’s notification. This is a helpful change that can assist in preventing confusion as to what is the currently accepted programme, which is important for assessing compensation events, etc.

The drafting has also been clarified to make clear that both implemented and non-implemented compensation events have to be shown on the Contractor’s programme. This was always the position but the drafting had suggested that it was not necessary to show non-implemented compensation events.

**Liabilities and insurance**
There have been changes of terminology in section 8. It now refers to “liabilities” not “risks”. The indemnity wording has also been removed and replaced with references to the recovery of cost. This change is because references to “indemnity” has a specific legal meaning which potentially extends the limitation period (because the limitation period would run from when the cost was incurred rather than the date of the breach), potentially removes the duty to mitigate and potentially extends the scope of losses recoverable beyond those that naturally arise out of the breach or are in the reasonable contemplation of the parties at the time the contract was made.

“it is likely that a number of clients will still insert numerous Z clauses to strengthen their position and add clarity to the parties’ potential liabilities under the contract.”

The Contractor’s liabilities are set out specifically (not by exception to the Employer’s liabilities). This gives greater clarity to the Contractor’s liabilities. They cover:

- Claims from Others arising out of the works
- Damage to the works
- Damage to the Client’s other property caused by the works
- Death or bodily injury to the Contractor’s employees.

The Employer’s liability insurance no longer has to be held in joint names. This reflects the insurance position that Employer’s liability is a third party liability policy and therefore is not held in joint names and would not have an indemnity to principal clause (like public liability cover).

An important clarification has been made to Clause 84.2 to make clear that waiver of subrogation rights extends to the Parties, not just their directors and employees.

**Termination**
There is no longer an automatic right for the Client to terminate at will. Instead, a right to terminate at will is a Secondary Option (Clause X1.1).

**Third party rights**
There is a new Secondary Option (Clause X8) that allows the Client to call for “undertakings to Others”. This is the NEC’s terminology for collateral warranties.

Clients can require the Contractor to provide “undertakings to Others” from the Contractor to third parties and from Subcontractors to the Client and third parties. These are to be provided within three weeks of the provision of the engrossments being sent to the Contractor.

The form of collateral warranty is to be included in the Scope but no form has been produced by the NEC. The relevant details of the “undertakings to Others” to be provided are to be set out in the Contract Data.

Option Y(UK)3 has also been amended to follow more closely the wording of the Contracts (Rights of Third Parties) Act 1999. This allows the beneficiary to be specifically identified from a relevant class once it becomes clear who the beneficiary will be (e.g. who will be a purchaser of the project).

**Dispute resolution procedure**
The is a new four week period for a submission of a statement of case and meetings between Senior Representatives of the parties that applies before formal dispute resolution proceedings can be commenced (Clause W1.1).
The Dispute Avoidance Board is made up of one or three members. The members of the Dispute Avoidance Board become familiar with the project prior to any dispute arising by making regular visits to the project. The Dispute Avoidance Board makes recommendations in respect of any disputes that arise if they are not resolved by discussion. The dispute can only be referred to the tribunal if this recommendation is not accepted by the parties. The dispute has to be referred to the Dispute Avoidance Board within four weeks of their recommendation. However, it is not clear whether this recommendation becomes binding or how the dispute is resolved if the dispute is not referred to the tribunal within that four week period. The wording does not reflect the equivalent wording regarding adjudicator’s decisions becoming binding if not referred to the tribunal within four weeks (Clauses W3.1(11) and W3.4(2)), which suggests that a Dispute Avoidance Board’s recommendation would not be binding in a similar manner.

Early contractor involvement

This is a new Secondary Option (Clause X22) that can be used only for Options C and E. It allows the Contractor to be appointed at an early stage to participate in the development of designs and proposals (similar to a PCSA). It splits the construction contract into two stages with a written notice to proceed being required before the Contractor can proceed to stage 2.

BIM

There is a new Secondary Option (Clause Z10) that addresses BIM, although this is referred to by the NEC as “Information Modelling”. This clause requires the Contractor to provide an Information Execution Plan, which must satisfy the BIM Requirements provided by the Client.

Quality management

Clause 40 includes a new obligation on the Contractor to prepare a quality management system and plan.

Bribery and corruption

A new Clause 18 prohibits corrupt acts. There is also a new termination event (Clause 91.8) that allows a party to terminate in the event that a corrupt act is carried out by the other party.

Confidentiality and publicity

A new Clause 29 restricts the disclosure of project information and prohibits the Contractor publicising its involvement in the works without the Client’s agreement.

Assignment

A new Clause 28 allows either party to transfer the benefit of any rights under the contract to another party, save that the Client can only assign if the assignee intends to act in a spirit of mutual trust and co-operation. The NEC3 contracts were silent on assignment and therefore were freely assignable.

Parent company guarantee

Secondary Option X4 has been amended to recognise the existence of more complex corporate structures. The parent company guarantee can be given by a group company that is not the ultimate holding company, provided the alternative guarantor is also owned by the ultimate holding company and the alternative guarantor is accepted by the Project Manager. This change reflects the complex nature of some group structures and that contractors may not wish to give parent company guarantees from their ultimate holding company.

Changes to terminology

The NEC4 has incorporated a number of changes to terminology, including:

- “Employer” is now “Client”
- “Scope” is used as the name of the document that describes the work being provided. It replaces “Works Information”, “Service Information” and “Goods Information”
- NEC4 is gender neutral. Therefore, “he” is now “it”, etc.
- Clause 10.1 has been split into Clauses 10.1 and 10.2 to reflect the two obligations in this clause, i.e. to act as stated in the contract, and to act in a spirit of mutual trust and co-operation.
- The Risk Register is now the “Early Warning Register”. This is to emphasise its use as a risk management tool.
- Secondary Option X12 “Partnering” has been re-titled “Multi party collaboration” to reflect that it is not a pure partnering arrangement.
- The Professional Services Contract, Term Service Contract and Supply Contracts now use Defined Cost in the same way as the ECC.

Conclusion

The new NEC4 is definitely a case of evolution, not revolution. The NEC4 would be clearly recognisable to any users of the NEC3; the structure and drafting style has remained the same. The improvements are welcome and should improve the contract. However, it is likely that a number of clients will still insert numerous Z clauses to strengthen their position and add clarity to the parties’ potential liabilities under the contract.

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Rights to Light: development risks from blocking out light

Rights of Light are increasingly finding their way to the top of a developer’s risk register due to the potentially catastrophic consequences of a successful claim by a neighbouring owner. Aside from the possibility of an injunction being awarded, rights of light claims are a drain on the developer’s profits, limiting the floor space which can be achieved in the development and having to pay out either in damages or for insurance to mitigate the risk of a successful claim being brought.

From a developer’s point of view, the risk needs to be addressed very early on in a project – ideally at the pre-planning stage. There is little point in obtaining permission to build something that will have a significant right of light problem unless you have a clear strategy in place to mitigate that risk.

One of the major misconceptions in this area is that planning permission which involves daylight and sunlight analyses is all you need in order to build. Rights of light are private rights which are entirely separate to the planning process. An entirely separate analysis needs to be carried out in order to assess whether the development has the potential to cause an actionable interference with a neighbour’s right of light.

The biggest risk which a developer faces is that of an injunction being granted. The case of Heaney, decided in 2010, related to an office development in Leeds called Toronto Square.

The fact that the development had been completed and the top floors pre-let to a commercial tenant did not stop a High Court Judge from granting an injunction requiring the developer to pull down the top two floors which were infringing the rights of light in respect of a nearby building.

Whilst the construction industry was still reeling from the decision of the Court in Heaney, the Supreme Court heard the case of Coventry v Lawrence. Although rights of light were not an issue in this case, the case concerned noise nuisance being caused by a speedway track in Norfolk and centred on the law of nuisance, which governs rights of light. In particular, the Court were considering the question of whether an injunction should be granted to prevent a nuisance where it had already been established or whether damages would be a more appropriate remedy.
The factors which the Court will take into account in deciding whether to award an injunction or damages include severity of the infringement, the use of the affected property, the behaviour of the parties concerned and the public interest. It is widely considered that the Supreme Court’s decision in Coventry and Lawrence signalled a move away from the granting of injunctions towards damages.

If the Court decides not to grant an injunction, it will need to make an assessment of the damages that should be paid in lieu of an injunction.

There is a significant body of case law around the legal principles that are applied and the amount of damages which should be awarded. The starting point is the Wrotham Park case [Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798] which related to a breach of a restrictive covenant. The principle which the Courts use to assess the level of damages payable is based on the concept of ransom.

Where a breach of a neighbour’s right would otherwise result in the development not being able to proceed because an injunction would be granted, so the developer is effectively reliant on his neighbour for the scheme to proceed, the question the Court considers is what level of release fee might the developer have to pay in order to release their neighbour’s right.

The approach of the court when considering the level of damages payable is to assess what the outcome would be of a hypothetical negotiation between the developer and the neighbouring owner. The basis of the negotiation is around the profit which the developer will derive from that part of the scheme which infringes the neighbour’s right. There is no hard and fast rule as to how profit is measured but where there is evidence of actual profit the Court is likely to consider it.

Although not set in stone, a neighbour can expect to be awarded something in the region of one third of the profit relating to that part of the development which infringes their rights. As a result of the increasing risk factor that rights of lights have posed in recent years, the insurance market has developed a number of policies intended to assist in mitigating the risk.

The first insurance policies were known as “wait and see” policies, which involved placing insurance against the risk of a claim by a neighbouring owner – but required there to be no contact whatsoever with the neighbouring owner. The wait and see nature of the policies had the effect of increasing the likelihood of an injunction being granted, given the Court’s focus on conduct. The Courts disapprove of a developer who makes no effort to make contact with his neighbour whose rights will be breached by the development.

As a consequence, “negotiating policies” were introduced, which addressed the problem. These policies provide cover in the event of a claim but also allow the developer to negotiate with the affected parties with a view to reaching a financial settlement. Financial settlements are by far the preferred outcome for a developer as they will result in a release of any rights the neighbour had and remove the risk of a claim being brought.

There is no substitute for direct negotiation between the developer and the affected parties. It provides certainty, assuming that releases can be agreed and documented. The issue is that negotiations can take time and risk alerting parties who would otherwise have been unaware of their rights of a potential claim. Negotiating with the comfort of an insurance policy in place is advisable to remove the risk of a claim being brought.

It cannot be emphasised how important it is for full legal due diligence to be carried out. Historic ownership and title searches can throw up a lifeline in an apparently difficult situation and is something which is surprisingly often overlooked.

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Five gender pay reporting pitfalls in the Construction Industry

Gender pay reporting is the mandatory obligation for large employers (250+) to publish online specified gender pay data no later than 4 April 2018. Construction News reported in April 2017 the governments’ findings that the gender pay gap within the construction industry is up to 5 percentage points higher than the UK average. With the construction industry comprising 18% of the businesses in the UK in 2016, it accounts for 8% of employment in the UK, it is not an insignificant statistic. The proportion of female to male workers in this sector is recognised as imbalanced, as is the likelihood of gender pay disparities. Getting gender pay reporting right should be high on HR’s agenda in the construction industry.

Calculating the hourly rate
It is easy if the group of relevant employees are all on the same contract, paid at the same time, and only earn salary and possibly a cash bonus. Calculating the hourly rate is quickly complicated, however, if there are different pay frequencies, bonus schemes, non-cash elements and allowances. If the pay data is not held by the employer (e.g. because it relates to an agency worker), the employer must take reasonable steps to find it out. Certain payments and benefits are also excluded from the calculations of “pay”. If part of the compensation package is paid in equity, knowing when to include its value in reportable pay data is important. Finding the hourly rate for a handful of staff might be easy, but working it out for each staff member when there are different contracts in place makes it tricky.

The relevant pay period
If staff are all paid monthly, the pay period is easy to define, but where there are different pay periods, then analysing the pay data is different because different formulae will apply for calculating the hourly rate. There might also be some individuals who dictate to the employer how frequently any element of their pay is delivered, which gives rise to a different method of working out the relevant pay period and the appropriate hourly rate.

Analysing the data
Having captured data for pay paid in the relevant pay period (e.g. the one which includes 5 April 2016), employers now have until 4 April 2018 to analyse the data and contemplate whether to add a narrative. The data has to be published online (and left there for three years) so that it can be used as a comparison against each subsequent year’s pay data. 12 months sounds like a sufficient period to analyse the data, but in reality is probably just enough time to ensure that the statistics are no more than what is required and that a satisfactory explanation can be provided for any pay disparities. Without a narrative, hares could be unnecessarily set running.

Internal communications
The key method of enforcement will be peer pressure and risk to reputation, as the Government’s Equalities Office will seek to “name and shame” inadequate reporting. No doubt interest groups, employees and potential candidates will be watching how employers respond to their reporting obligations. Getting the communications right will be important, particularly where the company has expressed commitment to diversity and inclusion. This should be part of it.

Six reporting obligations
- The difference between the (1) mean and (2) median hourly rates of pay between male and female “full-pay relevant employees”
- The difference between the (3) mean and (4) median (annual) bonus pay paid to male and female “relevant employees”
- (5) The proportions of male and female “relevant employees” who were paid a bonus
- (6) The proportion of male and female “full-pay relevant employees” in the lower, lower-middle, upper-middle and upper quartile pay bands

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If the advice isn’t right

Construction professionals often give advice on the best course of action in a construction project. However, if such advice is wrong, for what losses could the consultant be liable?

A mountaineer goes to his doctor to check out his knee before going on an expedition. The doctor negligently gives the go ahead. He injures himself in an entirely foreseeable manner as a result of mountaineering but that is unrelated to the state of his knee. If the doctor had given the proper advice he would not have gone, so is the doctor legally responsible for the injury? No, this is known as the SAAMCo principle after the landmark 1997 case of South Australia Asset Management Corporation vs York Montague Ltd.

This important principle has been clarified in the recent Supreme Court decision of BPE Solicitors & Anor vs Hughes-Holland (in substitution for Gabriel) (Rev 1) [2017].

The claimant in the original case – Richard Gabriel – had loaned £200,000 to a company controlled by his mate on the understanding that it was to be used to redevelop a heating tower. In fact, the loan was used to discharge the pre-existing loan secured on the tower. No money was left over to fund the development. Two years after the loan, no attempt had been made to develop the property and the claimant exercised his power of sale. However, he could not find a buyer and so the property was sold at auction for only £13,000, which was entirely consumed by the costs of the sale. Who would go into property development?

Gabriel’s solicitor, BPE, was found to have negligently advised him by failing to explain that the funds would not be applied to develop the tower. The Supreme Court had to decide what the extent of the losses recoverable from the solicitors was, in an appeal case brought by Peter Hughes-Holland, Gabriel’s trustee in bankruptcy, by deciding which of the following questions applied:

- Was the claimant entitled to recover the entire loss which he had suffered by entering into the transaction, on the grounds that he would not have done so had he not been misled about the proposed use of the loan?
- Was the claimant not entitled to recover anything, as based on his mate’s over-optimistic assessment of the likely cost of development, coupled with his own commercial misjudgement about the likely value of the property before and after development, the project was never viable? The costs would have been greatly in excess of £200,000 and therefore the claimant would have suffered the same loss even if the transaction had proceeded as he had been led to expect.

The court held that this case was an “information” case and, on the evidence, that if the “information” negligently advised by the solicitors had been right, the claimant would still have lost his money. Even if the “information” had been right, the development scheme was not viable. The sum involved – £200,000 – was not sufficient to have built out the development, the loan would have remained unpaid, and the property more or less worthless.

Consultants should be aware of the significant additional liabilities they could take on when they assume responsibility for advising on the proper course of action, rather than advising on issues that are just one piece of the jigsaw.

For example, advice could be given to an employer about the pros and cons of different procurement routes. The financial losses that the consultant could be liable for if that advice was negligent may be significantly less compared to if the consultant had taken full responsibility for advising on the correct decision to take.

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Construction Case Law update

Costain v Tarmac Holdings [2017] EWHV 319 (TCC)

Background

Pursuant to a sub-contract Costain engaged Tarmac to supply concrete for a safety barrier on the M1 motorway. The sub-contract incorporated the NEC3 Supply Short Contract Conditions (the “Supply Conditions”) and the NEC3 Framework Contract Conditions (the “Framework Conditions”).

Each set of conditions related to a different aspect of the parties’ contractual relationship. The Supply Conditions related to the supply of concrete and the Framework Conditions related to the quotations received.

Both the Framework Conditions and the Supply Conditions had differing dispute resolution clauses. The Framework Conditions contained a dispute resolution provision that permitted adjudication “at any time”, a reference to the jurisdiction of the courts of England and Wales and was silent on arbitration.

The Supply Conditions contained a restricted right to adjudicate within a specified time frame and, if one or more parties were dissatisfied with the adjudicator’s decision, a right to arbitrate (clause 93.3).

Both the conditions of the Framework Conditions and the Supply Conditions included the requirement at clause 10.1 that the parties shall act “in a spirit of mutual trust and cooperation”.

It was common ground that the concrete was defective but there was a dispute between the parties as to the scope of the appropriate remedial works and the associated costs. Tarmac argued that because Costain failed to comply with the provisions of clause 93.3 it was time to barred from making a claim for the additional monies relating to the remedial works. Costain disputed this.

The dispute was referred to adjudication and the adjudicator found in favour of Tarmac. By this stage, the parties had engaged the Pre-action Protocol. Costain then issued proceedings and sought to recover circa £6m for the remedial works.

Tarmac argued that the proceedings should be stayed on the basis the sub-contract included an arbitration agreement. Costain argued that there was no arbitration agreement, or in the alternative that the arbitration agreement was inoperative.

Decision

Taking each of the parties’ arguments in turn:

Tarmac’s argument

The sub-contract contained an arbitration agreement.

HHJ Coulson reaffirmed the usual rules relating to interpretation and construction of contracts. He considered the conflicting provisions of the Framework Conditions and the Supply Conditions and found that, although there were two sets of conflicting conditions, they worked to govern different aspects of the parties’ relationship. He said that only if there is an irreconcilable discrepancy is it necessary to resort to some sort of order of precedence in order to make sense of the contract. It is not appropriate for a court to construe a contract by picking through its terms; working out what might still be applicable at the date of the contract and what might relate to obligations which had been performed. Further a court will not correct a bad bargain.

The Framework Conditions related to the offer and acceptance of the quotation and the Supply Conditions related to the supply of concrete. The issue in dispute therefore determines which set of conditions apply. Here it related to the supply of defective concrete and therefore the dispute mechanism in the Supply Conditions applied. To that end, there was an arbitration agreement and the time bar was effective.

Costain’s alternative argument

The arbitration agreement was inoperative by either virtue of estoppel or abandonment.

Section 9(4) of the Arbitration Act states that an arbitration agreement would be inoperative if it has been repudiated, abandoned and both parties accept this, or else if the party is precluded by estoppel.

HHJ Coulson found that:

- even though the parties engaged the Pre-action Protocol at no point did Tarmac abandon its rights to arbitrate
- there was no case for estoppel either by representation or convention.

Costain further argued that even if Tarmac had not done anything which “crossed the line” so that estoppel could be relied upon, Tarmac was in breach of clause 10.1 of the sub-contract by failing to point out to Costain that it was going to be time barred from bringing the adjudication claim.

Importantly, Costain knew what the dispute resolution clause said and it knew of the time bar. Costain’s mistake was thinking it could rely on the Construction Act and its right to adjudicate at any time, not realising that the contract did not fall within the definition of a construction contract as it related to the supply of material.
HHJ Coulson considered what duty clause 10.1 imposed on Tarmac in this context. He drew parallels with a duty of good faith, and referred to Keating which says that parties must act in a way that is “honest, fair and reasonable, and not attempt to improperly exploit the other.”

Taking each in turn Coulson was reluctant to define the term “fairly” saying that this was too subjective and would be difficult to police.

Coulson concluded that Tarmac had not breached clause 10.1, and in relation to the obligations imposed by clause 10.1 “at its highest” the obligation meant that:

“the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case. For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied upon. But beyond that, on my view of clause 10.1, there can have been no further obligation, because otherwise the provisions would have required the defendant to put aside its own self-interest.”

Comment
Even though clause 10.1 of NEC3 is quite often overlooked (mostly because there is no definitive case law on what it means in practice), this case shows that the Courts have an expectation relating to the parties’ conduct in complying with this clause and it will be scrutinised accordingly. Although parties are not required to act against their own self-interest they must not do anything to mislead.

Beumer Group UK Limited v Vinci Construction UK Limited [2016] EWCH 2283 (TCC)

Background
Vinci was engaged as main contractor by Gatwick Airport. Vinci appointed Beumer in relation to works on the South Terminal baggage handling system. Beumer in turn appointed Daifuku Logan Ltd (“Logan”) as the sub-sub-contractor.

A dispute arose between Beumer and Vinci and at the same time a dispute arose between Beumer and Logan. Beumer referred both disputes to adjudication and the same adjudicator was appointed. Neither party knew that the same adjudicator was appointed in both adjudications.

Beumer pursued contradictory arguments in the two adjudications. For instance, it sought liquidated damages from Logan on the basis that works did not finish until 12 April 2016. Yet in the adjudication with Vinci, it claimed that works were finished on 19 December 2015.

The adjudicator found against Vinci. Vinci resisted payment and Beumer commenced enforcement proceedings.

Decision
Vinci argued against the adjudicator’s decision on the basis that there had been a breach of natural justice because:

- the adjudicator had acquired background knowledge from the Logan adjudication
- Vinci had been given no opportunity to consider or make submissions on that information
- it was unfair that there had been no disclosure to Vinci of material provided in the Logan dispute which was relevant to the Vinci dispute. This was contrasted with the fact that had the adjudication taken place at a different time, it would have had the opportunity to consider that result. Beumer advanced factually inconsistent cases in both adjudications.

Beumer in response said:

- there was no obligation to disclose that information and Vinci had no right to see it
- that the adjudicator had restricted himself to looking at just the material relevant to each dispute and therefore there was no breach of natural justice
- The Court found in favour of Vinci and determined there was a breach of the rules of natural justice.

Fraser J said there are two limbs to the rules of natural justice: a party should be able to present its case and meet the case against it; and the matter is to be decided by an impartial tribunal.

The threshold to find a breach of natural justice is high, it must be “obviously unfair” and in this case Fraser J thought that this threshold had been passed. As a standard, he pointed out that notwithstanding the time pressures of adjudication; it was still a formal dispute resolution process with basic requirements of fairness; “adjudication is not the wild west of dispute resolution.”
To that end, Fraser J took a dim view of the fact that Beumer had adopted completely contradictory positions in both adjudications on a subject matter that was relevant to both disputes.

He rejected Beumer’s argument that nothing flowed from the inconsistent cases, stating that he did not think it would be possible for "a director of a company could sign a statement of truth in two sets of legal proceedings in such circumstances... This alone should provide obvious direction to the industry to the type of behaviour that this constitutes".

Turning to the adjudicator. Fraser J said he should have disclosed his appointment. His failure to do so raised a whole host of issues that either could have been avoided or else dealt with at the time. He referred to the RICS form for requesting an adjudicator, which states:

"Adjudicators are required to disclose involvement or potential conflicts of interest to RICS prior to nomination".

In general terms, the judge placed an adjudicator akin to an arbitrator when considering rule 3 of the professional code of conduct for arbitrators:

"Both before and throughout the dispute resolution process, a member shall disclose all interest, relationships and matters likely to affect the member’s independence or impartiality or which might reasonably be perceived as likely to do so".

Fraser J referred to a previous case, where Judge Coulson strongly discouraged unilateral phone calls due to potential bias, and said it would be difficult to argue there was not potential bias (at least) in this situation. His conclusion therefore was that "the breach of natural justice was sufficiently material that the decision will not be enforced".

Comment
Where an adjudicator is acting in simultaneous adjudications with related parties his involvement should be disclosed from the outset.
Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd [2017] EWHC 67 (TCC)

Common Scenario
A developer enters into a finance agreement with a funder. As part of that finance agreement, and as a condition precedent to funding, the funder requires construction documents to be assigned by way of security. The developer then enters into a building contract with a contractor and assigns the benefit of that building contract to the funder to comply with his obligations under the funding agreement. The effect of this arrangement is, that whilst the developer still has to fulfil its own obligations to the contractor (e.g. it still has to pay for the works), it is no longer able to enforce any of the contractor’s obligations: this right has been assigned to the funder instead. So what happens when something goes wrong and the developer needs to enforce a provision under the contract? This is what occurred in the following case...

Background
Mailbox entered into a funding arrangement under which it was required to assign to the funder “absolutely by way of security” its rights “from time to time” in assets including:

- the Specific Contracts (as set out in the agreement) and
- “all rights under any agreement to which it is a party and which is not mortgaged or charged under Clause 3.1 (Mortgages and Fixed Charges) together with all Related Rights in respect of such Charged property” provided that Mailbox is entitled until the occurrence of an Event of Default which is continuing to exercise all rights assigned under this Clause 3.3 (Assignments)… and the [Funder] will reassign any such rights to the extent necessary to enable [Mailbox] to do so.” (emphasis added).

Mailbox was entitled to redeem the assignment upon the full payment or discharge of the secured liabilities. Mailbox entered into a building contract with Galliford Try (“GT”) whereby GT agreed to carry out refurbishment works to mixed-use retail and office space. The contract sum was circa £18m. Most of the works were complete when on 1 March 2016 Mailbox purported to terminate the contract. A dispute between the parties followed, relating to delay, liquidated damages, the final account and whether or not termination was lawful.

The dispute was referred to adjudication and Mailbox was successful. The adjudicator decided that:

- Mailbox was entitled to liquidated damages of a gross sum of £4.62m
- GT was to pay Mailbox circa £2.477m
- Mailbox was entitled to interest on the sums awarded.

GT refused to pay and Mailbox issued enforcement proceedings. GT argued that Mailbox had legally assigned the building contract to the funder therefore could not bring the adjudication in its own name; the adjudicator had no jurisdiction, his decision was a nullity and should be ignored.

Mailbox’s case was that there was no legal assignment. It argued that:
- The contract was not even in existence at the time of the assignment; you cannot assign future rights.
- Whilst there may have been a charge in respect of the benefits under the building contract, there was no legal assignment and the parties had operated the building contract on the basis that Mailbox was entitled to the benefit (so raised the issue of conduct).
- If there was an assignment, it had been reassigned before or on the day Mailbox commenced adjudication proceedings against GT.

The Court therefore had to consider the following points:

- Was there a valid legal assignment?
- If so, was it reassigned before the adjudication?

Decision
In relation to the Mailbox’s first point, the building contract was not included within the Specific Documents listed to be assigned. However, it did fall within the definition of “any agreement to which Mailbox is a party”.

...
The relevant clause in the funding agreement referred to Mailbox’s rights and interests “from time to time”, which the judge said included future rights. He found that the parties must have intended this clause should operate as an effective assignment of existing rights and an agreement to assign future rights.

The second point raised by Mailbox was whether there was an absolute assignment or merely a charge in favour of the funder. The judge found that even though the language of the funding agreement was not the clearest, the express wording of the clause (“assigns absolutely its right, title and interest”) demonstrated the intention to operate as an absolute assignment.

The fact that Mailbox was required to give notice of assignment also supported this and indeed notice was validly given. Further, the fact that the document then referred to the rights being capable of reassignment supported the view that legal assignment was intended and indeed occurred.

On the final point of reassignment, the Court agreed with Mailbox. There was a valid reassignment of the building contract on or just before the Notice of Adjudication was served.

This meant that Mailbox was able to bring proceedings in its own name and the adjudicator’s decision was upheld.

**Comment**

What is not clear from the judgment is why the reassignment occurred. Did Mailbox discharge its debt in order to get the reassignment or did the funder re-assign the documents given the situation which arose?

Mailbox got the result it needed but the process was unnecessarily complicated and the concern is that this is something that needs to be addressed more generally. This is not a new issue but this case raises the question: why does the funder need the benefit of collateral warranties?

The response seems to be “because that’s what always happens”, or it’s the “market position”. That’s all well and good, but the fact remains that funders are unlikely to want to be involved in the day-to-day matters of a project or indeed want to have to enforce provisions against the contractor; typically funders simply want security.

Therefore it is important to strike a balance between providing sufficient security for a funder and enabling a developer to get on with the developer without constant recourse to the funder.

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