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Welcome to the latest edition of our infrastructure publication, Infra.Law.

It has only been 9 weeks since our sister publication Construct.Law was published and in that time so much has changed in the world as a result of the global outbreak of Covid-19 and its considerable impact on all aspects of our lives.

Understandably, much has been written about the impact of Covid-19 and Charles Russell Speechlys has a dedicated Knowledge and Insights page on its website discussing the changing landscape for personal and business affairs.

As we approach the UK Government’s second review of lockdown measures in this edition of Infra.Law, we take stock on some of the issues which have impacted the construction industry and collate those into a single source.

Paul Henty reviews the UK Crown Commercial Service’s Procurement Policy Notes together with sectoral guidance for construction contracts.

Roger Elford discusses the UK Government’s proposal for reform to UK insolvency law, including the temporary suspension of certain directors’ liabilities in relation to wrongful trading and a likely moratorium preventing creditors from taking action whilst proposals for business restructuring are considered.

Fiona Edmond and Chris Busaileh discuss the impact of Covid-19 on construction contracts and the various rights of parties to additional time and money, potential suspension of works, termination and amendments that may be required to future construction contracts.

Sarah Evans considers the first decision on Adjudication relating to Covid-19 in which one party sought an injunction to prevent an Adjudication from taking place until the lockdown measures ended.

Simon Heatley discusses how the UK Courts are dealing with the impact on court timetables and hearings.

Despite (and understandably so) much attention being focused on Covid-19 issues, there have been other developments which are also likely to have long term impacts on the construction industry. On 2 April 2020 the UK Government published its proposals for the implementation for a reformed building safety regulatory system. Ben Wilkins discusses some of the key proposals.

Finally James Worthington and Karen Morean review the recent case of A Company v (1) X, (2) Y, (3) Z in which the UK Courts decided that experts may owe a fiduciary duty to their clients preventing their firms acting for other parties in related proceedings.

We hope you enjoy reading this edition of Infra.Law. Please get in touch directly if you would like to discuss any of the issues detailed within, have any topics you would like to read about in future editions or for more information on our sister publications, Construct.Law, focused on the UK construction sector, and ‘Building Up’, which explores the challenges of delivering taller developments in London and how property experts are seeking innovative ways to deliver high quality developments at increased densities.
Procuring in a pandemic: Cash-flow, Contracts, Construction, Cards and (Curtailing) Competition

The Covid-19 crisis has created acute challenges for public sector buyers (contracting authorities) and suppliers alike. On the one hand, contracting authorities have been forced to scramble to stockpile such essential supplies as Personal Protective Equipment (PPE) for healthcare workers and ventilators to enable them to respond effectively to the outbreak of Novel Coronavirus. On the other hand, business has been hurt by restrictions on free movement necessitated by the imperative of reducing Coronavirus cases, forcing business to curtail normal revenue generating activities.

By Paul Henty, Partner, Construction

To address this difficult and pressing situation, the UK Crown Commercial Service has released a series of three Procurement Policy Notes (PPNs), together with sectoral guidance for construction contracts. These aim to assist public purchasers in navigating these difficult waters and also to help ensure that they do not lose their suppliers to insolvency events. We have reviewed below the content of the PPNs.

PPN 1 of 2020: “Responding to Covid-19” (PPN 1)
The public procurement rules set an obstacle in the path of rapid purchasing: they mandate competitive tender processes, requiring the creation of tender documents, specifications and the formulation and application of rules of the competition. Contracting authorities who flout the rules risk being sued by aggrieved suppliers and dealing with lawsuits could mean that precious time is lost. Supply contracts can be ripped up by the Courts where the buyer contracted directly without a tender process, only for the Court to hold that there should have been one. The authority may also be forced to pay damages.

PPN 1 aims to assist public buyers in procuring in a compressed time-frame, providing guidance on the mechanisms available for procuring more quickly. For example, the Public Contracts Regulations 2015 (as amended) include a number of exemptions from competitive procurement. These exemptions are rarely used and available for use only in exceptional circumstances only.

PPN 1 Regulation 32(2)(c) of the PCRs allows for direct contracting where this is necessary because of “extreme urgency” due to circumstances which the contracting authority could not have foreseen. The urgency cannot have arisen from the buyer’s failure to plan or from acting too late. This exemption was successfully invoked by the Scottish Government in 2014 when it was forced to make emergency purchases of de-icing salt during the sudden and unexpected onset of the coldest winter in 100 years. Following a challenge, the Scottish Court accepted that the severe cold weather could not have been foreseen and that it was reasonable for the Scottish Government to negotiate directly with one supplier to procure the stocks it needed to keep roads safe.

The guidance note helpfully supports the view that the Coronavirus pandemic is indeed an event which contracting authorities could not have been expected to foresee and which has generated legitimate urgency. Whilst that might seem like stating the obvious, it will provide comfort to contracting authorities that they are not acting in a maverick fashion by negotiating with selected suppliers directly.

The buyer must however undertake and record its own analysis based on the facts. This should explain how and why the need for the type of goods or services it wishes to procure are linked to Covid-19. The buyer must also satisfy itself that its needs could not be met through procuring under one of the “accelerated procedures” under the rules, under which the time-frames of the tender procedure can be truncated to 10 or 15 days.

As PPN 1 points out, subsequent purchases will require a fresh analysis rather than a mechanistic reapplication of the exemption. If the Covid-19 crisis drags on, it may no longer be sustainable to argue that the outbreak is an unforeseen event justifying a direct purchase. By then, public buyers would have had time to make provision and could be accused of failing to plan earlier. That is unless there was a sudden further escalation in cases which could not have been forecast.

A further exemption mentioned in PPN 1 Regulation 32(2)(b) of the PCRs relates to the ability to contract directly with a supplier who is the sole point of supply for a particular type of good or service. That may become relevant in the context of Coronavirus if for example a particular entity develops a vaccine and protects it through intellectual property. In those circumstances, there would be no purpose served from tendering competitively if it is known that there are no functional alternatives.

Other options discussed in the guidance include buying through a “Central Purchasing Body” (CPB). These are organisations which buy goods through a central purchase point under the procurement rules for the benefit of classes of different public bodies. Public buyers may opt into these purchasing structures, even during their lifetime and make purchases directly on the terms which have been negotiated with suppliers by the CPB.
Buyers may also consider in certain circumstances modifying existing supply contracts to increase the volume of purchases under the contract. PPN 1 provides some guidance as to when and how changes to a contract can be made without triggering the need for a re-tender of the contract. For example, the PCRs allow for variations to be made where necessitated by unforeseen events provided that the value of the changes (e.g., new purchase volumes) do not exceed 50% of the total contract value (Regulation 72(1) (c) of the PCRs).

PPN 1 notes that certain essential items are currently subject to high demand and therefore prices may be substantially higher than normal. This is not in itself prohibitive but does require procurement officers to maintain a record of the prices which were paid and the reasons for their acceptance. Contracting authorities should consider including mechanisms within the contract to try to control the possibility of price rises. One such mechanism could, in my view, include a benchmarking protocol, coupled perhaps with a clawback provision (although admittedly such clauses are often difficult and time-consuming to negotiate).

PPN 2 of 2020: “Supplier Relief due to Covid-19” (PPN 2)

PPN 2 focuses on the need for public buyers to help their contracted suppliers through difficult circumstances. It makes the observation that the current outbreak of COVID-19 is unprecedented and will have a significant impact on businesses of all sizes.

Many suppliers to public bodies will struggle to meet their contractual obligations and this will put their financial viability, ability to retain staff and their supply chains at risk. PPN 2 encourages public bodies to maintain prompt contractual payments to their suppliers with a view to ensuring continuity. In particular need are the suppliers at greatest risk of insolvency.

Suppliers’ cash flow is a particular concern. Contracting authorities should pay suppliers as quickly as possible to maintain cash flow and protect jobs. Contracting authorities should act now to ensure payment is made as quickly as possible to their suppliers, including:

• Targeting high value invoices where a party is reliant on a supply chain to deliver the contract.
• Resolving disputed invoices as a matter of urgency; consider paying immediately and reconciling at a later date in critical situations.
• Take a risk based approach as to whether 2-way matching is always needed (rather than adopt regular 3-way matching against receipt and Purchase Order).
• Encourage suppliers to invoice on a more regular basis to help cash flow (eg every week rather than monthly).

PPN 2 explains that pursuant to the guidance “Managing Public Money”, payments in advance of need are prohibited in absence of HM Treasury consent. However, in the circumstances HM Treasury has decided to provide consent for payments in advance of need where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term. This consent is capped at 25% of the value of the contract and applies until the end of June 2020. HM Treasury will review in mid-June whether this consent needs to be extended for a further period.

Contracting authorities are directed to work with suppliers and, if appropriate, provide relief against their current contractual terms (for example relief on KPIs and service credits) to maintain business and service continuity rather than accepting claims for other forms of contractual relief, such as force majeure. Contracting authorities are also advised to consider amending payment terms which may, for example, be linked to results or the achievement of milestones which are practically impossible given the current restrictions to protect public health.

The overriding message appears to be that it is better to adapt the contract to the realities of the situation and allow some limited performance than simply to allow an inertia to set in which benefits neither the supplier or the purchaser. If there is one, the contract change control procedure should be employed to keep records of any changes made and the decision making behind each one.

Contract variations could include changes to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc. Changes to the original terms should be limited to the specific circumstances of the situation, and considered on a case by case basis. Modifications should be temporary and should be reversed once the current difficulties subside.

Other reliefs sought by a supplier could relate to any contractual obligation but usually takes the form of one, or both, of the following:

• an extension of time for contract performance (eg revised milestone dates or delivery dates, etc);
• a waiver or delay in the ability of the contracting authority to exercise a right and/or remedy (eg to claim liquidated and ascertained damages, service credits or terminate the contract)

PPN 2 recalls that changing a contract could trigger a risk of non-compliance with the PCRs. That is particularly the case as the sorts of changes contemplated in the note will be made in favour of the contractor or supplier. For that reason, contracting authorities are directed to the guidance in PPN 1 of 2020 on the specific subject of making contract changes. It is also worth recalling that where changes can be made through a change mechanism set out in the original contract, it may be the case that no issues of non-compliance arise from the modifications made.
‘Guidance Notes for Construction Contracts - Procurement Policy Note 02/20’

On 6 April, the Cabinet Office issued a further note to explain how the guidance in PPN 2 could be applied to construction contracts with public bodies. The purpose is to set out guidance for contracting authorities in relation to supporting construction suppliers effectively and appropriately, applying the general principles of the earlier note to the specificities of the construction sector. The contracting authority should identify their suppliers at risk and this should be taken on a case by case basis.

The Note contains a useful table to assist contracting authorities in selecting from four contractual relief options for contractors, setting out the particular advantages for each and providing guidance on appropriate implementation. The options include accelerated payment of invoices, certification of interim valuations where work has not been undertaken (based on previous valuations), amending existing payment mechanisms (to make more regular payments or reorder existing payment schedule) and making advance payments to suppliers.

Also included with the Note are two different model Deeds of Variation which can be applied by contracting authorities to incorporate these contract relief options into existing contracts. These are adapted to the JCT and NEC3 standard forms of contract.

The Note also sets out useful guidance on how contracting authorities should deal with and assist their construction contractors at the current time. Protecting cash flow is again a central concern. The Note advises that even where works have had to be paused or scaled back, contracting authorities should continue to pay suppliers at risk due to COVID-19 on a continuity and retention basis until at least the end of June 2020 in order to:

- ensure continuity of suppliers’ businesses during and after the crisis; and
- ensure suppliers are able to resume delivery of public services once the outbreak is over.

This could include, for example, situations where:

- works are required to be ceased or scaled back at short notice due to the impact of COVID-19 and non-payment could result in supply chains collapsing and/or significant financial implications for the supplier and consequential job losses at the supplier and supply chain level; and
- it would be value for money and important to business continuity to continue to pay suppliers in the short term (regardless of whether contracting authorities are able to reconcile at a later stage) to ensure that the supplier can complete the works in due course.

Aside from averting the collapse of retained construction contractors, the guidance is also concerned to avoid businesses benefiting simultaneously from contractual relief measures and other Government Covid-19 support measures. This is related to a desire to avoid an overcompensation to affected businesses.

The guidance is clear that suppliers cannot be paid under delivery of the contract and claim for some or all of the same employees working on the contract under the Coronavirus Job Retention Scheme (CJRS). Payments under CJRS are for staff who are furloughed and not working. Relief provided by contracting authorities should therefore be contingent on suppliers ensuring that during the relief period, all of the parts of the workforce identified to deliver the contract are not furloughed under CJRS.

Any supplier found to have acted fraudulently by claiming under the CJRS (or other COVID-19 support schemes) for workers that are being paid under a public sector contract, may be excluded from future public contracts on grave professional misconduct grounds under Regulation 57(8)(c) of the PCRs.

One other notable piece of advice relates to contractual retention payments. The Note anticipates authorities may be asked to release retentions but advises caution before acceding to any such requests. The authority will need to bear in mind that an early release of a retention may leave it exposed to unpalatable levels of risk for the remainder of the construction contract.

PPN 3 of 2020: Use of procurement cards (PPN 3)

In the third and final note, the CCS has directed that contracting authorities should increase the spending limits on procurement cards in order to allow for expedited buying and payment for goods and services. The note directs that the daily and monthly limits should be raised to £20,000 and £100,000 respectively. Procurement cards are identified within the note as the preferred and most efficient means for making payments, a conclusion that builds on earlier work by the National Audit Office (NAO). The Note cautions that while this will facilitate faster payments, it is not intended to relieve Accounting Officers of their duty to secure value for money.
Conclusion

The PPNs are practical and well thought out. They will be extremely valuable tools in assisting contracting authorities to formulate plans of action for procuring quickly and effectively through the Covid-19 crisis. Nonetheless, as the PPNs recognise, the successful implementation of the different options they address will require legal advice. Modifying contracts, for example, must be carried out in a way which meets the requirements of Regulation 72 of the PCRs. Even using the prescribed templates for modifying construction contracts must be carried out with care, in order to ensure that the variation dovetails with the existing contract and is reversible once the crisis has passed. A thought should also be spared for Accounting Officers, who have the unenviable job of seeking to secure value for money in markets characterised by critical shortages in an extreme pressure situation.
COVID-19 – Announcements to changes in UK Insolvency Law to protect businesses and directors

On Saturday 28 March, Secretary of State for the Business, Energy and Industrial Strategy, Alok Sharma, announced a proposal for the urgent reforms to UK insolvency law, designed to protect companies and their directors during the COVID-19 outbreak.

By Roger Elford, Partner, Corporate Restructuring and Insolvency

Wrongful Trading (section 214 Insolvency Act 1986)

It was announced that there would be a temporary suspension of section 214 Insolvency Act 1986 in relation to wrongful trading.

Where a company enters administration or (insolvent) liquidation, then an administrator or liquidator may pursue a director for a court order requiring that director to contribute to the company's assets where at some point prior to the commencement of the administration or liquidation, that director:

"knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or administration".

Essentially then, if the directors allow the company to trade after the point at which they knew or ought to know that the company has no reasonable prospect of returning to solvent trading, then they can be held personally liable. The Court has a wide discretion to order the level of any such compensation to be made to the company by the director but ordinarily, the director would be held liable for the increase in the deficiency to creditors that occurred between the date the directors should have ceased trading and the date the company actually ceased trading.

We need to see the detail of the new measures but what we anticipate is that the date upon which the director knew or ought to have concluded that the company could not avoid insolvent liquidation or administration cannot be a date during the period to which the new law will apply (which will be backdated with effect from 1 March 2020).

Whilst this is a welcome development, we would strongly advise against any substantive change in approach by boards of directors for the following reasons:

1. Wrongful trading cases are often difficult to pursue (for various evidential reasons) and it was confirmed that there will be no relaxation to directors' fiduciary and statutory duties to the company and/or its creditors in the meantime, nor to the rules on fraudulent trading. Consequently, administrators and
liquidators will continue to focus on, and pursue directors for breaches of those duties, irrespective of whether they can pursue a wrongful trading claim or not.

2. Having a period of suspension may cause administrators and liquidators to look more closely at whether the directors ought to have ceased trading before 1 March 2020 and/or immediately following the lifting of the proposed suspension. In respect of the latter, there may have to be some transitional provisions to allow directors to try and get their companies ‘back on their feet’ without fear of risk of claim, but prudent financial hygiene and monitoring throughout the period of suspension will put the directors in the best possible position to hit the ground running when the suspension is lifted.

In the circumstances and irrespective of whether the law on wrongful trading has been suspended, boards of directors should constantly keep the question as to the company’s future viability under consideration. We appreciate that is extremely difficult given the uncertainty that every business is facing but this highlights the need for regular board meetings and the need to carefully minute decisions throughout the process.

The introduction of a new debtor-in-possession process?

There was also mention of the imposition of a:

“moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seek a rescue or restructure”.

This initiative for changes to the UK’s Insolvency Framework would likely introduce a form of “debtor-in-possession” proceeding, akin to a US Chapter 11 restructuring process (with similar processes currently being rolled out across the EU), that would enable companies to file for insolvency protection, whilst retaining the board’s control of their companies. This follows Government announcements in late 2018/early 2019 that such reforms would be introduced – these may now be accelerated. This would likely:

1. Impose a moratorium preventing creditors from taking action whilst the directors formulated proposals to restructure their business, which would then have to be approved by a requisite majority of the company’s creditors;

2. Prevent the operation of clauses in supplier contracts that terminate the parties’ relationship upon an event of insolvency (a so-called ‘ipso facto’ clause); and

3. Unlike administration and liquidation, the board would retain control of the company throughout the process.

There are currently no further details on the timing of the rollout of this process nor as to how it will operate in practice. At the present time then, companies remain subject to the current (undoubtedly more creditor friendly) landscape of CVA’s, administration, liquidation and schemes of arrangement.

In the meantime though, the use of winding-up petitions by creditors has essentially been halted by virtue of the English High Court adjourning all winding-up petitions, with creditors who wish to continue pursuing their petitions having to file special pleadings to seek the Court’s leave to continue.
COVID-19 – Suspending construction works, time and money

Unsurprisingly COVID-19 and its impact on construction contracts has been a key concern for our clients recently. Unlike some other areas, the position under building contracts is not necessarily straightforward.

By Fiona Edmond, Partner, Construction and Christopher Busaileh, Senior Associate, Construction

Suspension of the works?

The immediate concern for most clients, whether employers or contractors, has been whether works can or should continue on site. While there has been much uncertainty throughout the industry following the government’s lockdown announcement on 23rd March, it is important to keep in mind that it has never been an absolute requirement for all construction operations to cease.

The current position in England is that construction can continue provided it can be carried out in accordance with the Site Operating Procedures published by the Construction Leadership Council. These set out guidance on how to protect construction workers and minimise the risk of infection. They address travel, site access and egress, hand washing, site facilities, cleaning and arrangements for close working. It is the latter of these which has caused most confusion, with version 2 of the Site Operating Procedures advising that activities, where it is not possible for workers to maintain a two metre distance, should not be carried out. Version 2 was retracted less than 24 hours after it was published. Version 3, published on 14th April, sets out a “hierarchy of controls” aimed at reducing the risk where maintaining a two metre distance is not possible.

Although it is permissible for certain construction activities to continue, we are seeing projects where contractors have nonetheless chosen to suspend works. The strict contractual position is often that, unless the contractor can demonstrate that it is not possible to follow the Site Operating Procedures, suspension of the works would amount to a serious breach of contract entitling the employer to terminate. For obvious reasons, many employers do not wish to go down this route and we are generally seeing employers and contractors reach commercial agreement.

A note of caution for parties is the mutual termination provision. The unamended JCT form entitles the parties to terminate where the works, or substantially the whole of them, are suspended for a continuous period of two months due to a force majeure event or the exercise of a statutory power, among others. Whether or not the suspension was instructed by the employer is irrelevant. If contractors suspend the works in circumstances where the works could reasonably continue, the employer should not inadvertently ‘affirm the breach’ as it could entitle the contractor to terminate after two month’s suspension. An agreement in which the contractor waives its right to terminate or agrees to extend the period before the right to terminate is triggered, perhaps in exchange for clarity over an extension of time, is preferable. Failing that, employers should write to the contractor to reserve their position.

Time and money

Even where works are continuing, the impact of Covid-19 is still likely to be felt. The key issues include delays caused by shortages in goods and materials or delays in importing them as well as potentially a lack of labour. Under JCT forms of contract, two ‘Relevant Events’ are, well, relevant: the exercise by the government of a statutory power and force majeure.

Taking the first, the Relevant Event requires both the exercise of a statutory power and a power which directly affects the execution of the works. As we have said, there is no outright prohibition on the continuation of all construction works. Further, the Site Operating Procedures are guidelines and not statutory requirements. Although the Coronavirus Act 2020 was passed on 23 March, this is largely an enabling Act in terms of, among other things, giving the Secretary of State power to make “declarations”. Will parties accept that the Act was the exercise of a statutory power?
As for force majeure, there is no settled definition under English law and the unamended JCT contracts do not define it or give examples. Perhaps the next edition of JCT contracts will do. That said, force majeure is generally understood to cover circumstances which are not within a contracting party’s control and authority suggests it would cover epidemics. On that basis it is difficult to see how the outbreak would not constitute a force majeure event. However, it is common for contracts to exclude a shortage of goods or materials from force majeure and under those contracts the contractor has assumed the risk.

In terms of loss and expense, in the unamended JCT contract the contractor takes the entire risk of loss and expense due to the impact of Covid-19 on the progress of its works.

Under NEC forms of contract the position is potentially more favourable for the contractor. Under the NEC 3/NEC 4 contracts a contractor is entitled to both an extension of time and compensation if an event occurs which stops the whole of the works being completed by the date for planned Completion shown on the Accepted Programme, or being completed at all. The contractor will need to demonstrate that an experienced contractor would have judged the Covid-19 outbreak at the Contract Date to have such a small chance of occurring that it would have been unreasonable for the contractor to have allowed for it. This is probably straightforward for earlier contracts, but is more problematic for contracts entered into more recently.

**Future contracts**

In contracts under negotiation, both employers and contractors must address the issue directly and allocate the risk between the parties. Most typically, we are seeing parties agree a risk share where the employer assumes the time risk, but the contractor assumes the cost risk of Covid-19 related delay. That said, parties do not necessarily have a free hand here and interestingly we are seeing funders refuse to lend unless the contractor assumes the risk. Whether most contractors can accept this risk remains to be seen.
“Fast and Furious”- No stopping the action says TCC in first COVID-19 adjudication judgment

The Technology and Construction Court (“TCC”) has provided the first word on the impact of the current COVID-19 crisis (“Crisis”) on the running of adjudications.

By Sarah Evans, Senior Associate, Construction

Its decision in the case of MillChris Developments Ltd v Waters [2020] 4 WLUK 45, handed down on 2 April 2020, sent a very clear message. Suitable workarounds exist to keep swift adjudication timetables and subsequent enforcement proceedings running during the Crisis. Only in very exceptional circumstances will the court step in to grant an injunction to stop them.

The Facts

In September 2017 MillChris Developments Ltd (“MillChris”) started works to a residential property owned by Ms Waters. By November 2019 it had ceased trading.

What happened in the meantime is unclear, but on 23 March 2020, coinciding with the start of the Crisis ‘lockdown’, Ms Waters commenced an adjudication claiming recovery of an alleged £45,000 overpayment and citing defects in the works.

The adjudicator’s timetable followed the usual swift pace, with completion of evidence submissions by 3 April and a site visit scheduled for 14 April.

On 26 March, MillChris contacted the adjudicator arguing it was impossible to meet the imposed deadlines due to the Crisis. It requested postponement of the adjudication until the lockdown was over. The adjudicator dismissed postponement, but offered a two week extension to the timetable. Refusing the extension, MillChris applied to the TCC for an injunction to halt the adjudication.

In support of an injunction, MillChris argued that it would be in breach of the rules of natural justice for the adjudication to continue as:

• it had insufficient time to prepare because of the Crisis and was no longer trading;
• its solicitor had been forced to self-isolate at home which made obtaining the necessary evidence difficult; and
• proceeding with a site visit, in circumstances where its representatives could not attend and there was no time to appoint an independent surveyor, would be unfair.

The decision

Injunctions are draconian measures. Whilst Mrs Justice Jefford acknowledged the TCC’s jurisdiction to grant injunctions in respect of on-going adjudications, the necessarily high threshold in this case had not been met.

The injunction was refused for the following reasons:

• The court would only grant injunctive relief very rarely and in very clear cut cases: Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (In Liquidation) [2018] EWHC 2043;
• In this case, the question was whether proceeding with the adjudication would result in a breach of natural justice so as to render any adjudication decision unenforceable. The test in American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 applied and had not been met.
• Adjudication inevitably brings with it short time scales.

MillChris’ submissions regarding the impact of the Crisis were rejected for the following reasons:

• It had failed to explain why papers could not be transported or scanned over to its solicitor;
• The real reason for not being able to obtain evidence appeared to be the failure of MillChris to contact its former Managing Director and Project Manager rather than due to the Crisis itself;
• The adjudicator’s offer of a two week extension to the adjudication timetable was reasonable and would have improved MillChris’ ability to obtain evidence; and
• Parties to an adjudication have no right to attend a site visit and an adjudicator is at liberty to carry it out alone. In this case, arrangements could have been made for the site visit to have been recorded for MillChris or for it to provide in advance a list of matters to be considered.

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The impact

The TCC’s first word on the impact of the Crisis to adjudication and enforcement is unsurprising and surely won’t be the last.

Adjudication was designed to be and remains a “fast and furious” process. Whilst the Crisis and current ongoing Government restrictions will inevitably create challenges to this, sensible workarounds and pragmatic approaches from parties and adjudicators should help to ensure the process remains on track. Only in exceptional circumstances will the court interfere.

The Construction Act entitles parties to refer a dispute to adjudication “at any time”. Whilst we find ourselves in unprecedented times, the Crisis so far does nothing to change that.
COVID-19: procedural rules on deadlines relaxed but how far do they go?

The third of three new practice directions, released swiftly in response to the disruption caused by the coronavirus outbreak, expands parties’ ability to agree extensions of time between themselves without recourse to the courts. This is a pragmatic response to a fast-evolving and unpredictable situation. However, the practice direction as drafted raises questions over just how far it will apply.

By Simon Heatley, Knowledge Development Lawyer, Litigation and Dispute Resolution

The new practice direction

Practice Direction 51ZA (“PD 51ZA”) makes provision for parties to agree extensions of time to comply with procedural time limits in the Civil Procedure Rules (“CPR”), its practice directions and court orders. It runs until 30 October 2020 and expressly modifies CPR 3.8.

CPR 3.8(4) contains what is known as a “buffer order”. This allows parties to agree extensions of time between them, without recourse to the court, of up to 28 days in circumstances where otherwise a sanction would apply to a failure to comply with a specified time limit. This is subject to the proviso that agreement is reached in writing beforehand and that any extension does not put at risk a hearing date.

The new PD modifies this 28 day period, giving parties the ability to agree extensions of up to 56 days, subject to the same conditions. Any extension beyond this will require the permission of the court.

What this means for parties

The relaxation of the 28-day cap will be welcome for parties working under no doubt challenging circumstances, particularly when facing deadlines which may contain stringent automatic sanctions. It will also spare a court system hurriedly adjusting to remote working numerous applications for extensions of time.

However, the PD is limited to a modification of CPR 3.8. While this will cover many of the key time limits in the procedural rules, it is not the only provision in the CPR that imposes a cap on parties’ ability to agree extensions of time between them without reference to the court.

For example, in the context of Part 8 claims, PD 8A paragraph 7.5 provides a mechanism for parties to agree an extension of time for serving and filing evidence. This is subject to a cap of 14 days for a defendant after they file their acknowledgement of service and, for a claimant serving evidence in reply, 28 days after service of the defendant’s evidence. It is not apparent that the new PD covers this part of the rules and so parties may still find themselves approaching the court for a further time extension beyond the 14 or 28 day period as necessary.
Meanwhile, for the Commercial Court, PD 58 paragraph 7.1 provides that where the parties, in accordance with CPR 2.11, agree in writing to vary a time limit, the claimant must notify the court in writing. As the court memorably reminded parties in *Griffin Underwriting Ltd v Varouakis (Free Goddess) [2018] EWHC 3259 (Comm)*, it takes “three to agree” when it comes to varying time limits in the Commercial Court. PD 58 refers only to CPR 2.11, which sets out parties’ general ability to agree extensions of time. No reference is made to CPR 3.8, but given that CPR 2.11 cross-refers to it, and the obligatory nature of paragraph 7.1, the sensible view would have to notify the court of any agreement concluded between the parties.

Time extensions for defences inhabit arguably a grey area. CPR 15.5 contains its own regime, allowing parties to agree an extension of time for filing a defence of up to 28 days, after which a defendant is required to apply to court if it needs more time. It is not immediately clear that the new PD covers this situation (though one can see the sense in it doing so) so parties erring on the side of caution may find themselves approaching the court to seek the necessary time extension.

Finally, it is important to remember that statutory limitation periods are unaffected by the relaxation in the rules and a party facing the expiry of a relevant limitation period will need to agree a standstill with their opponent or else ensure that they file their claim form in time.

**A “free pass” for more time?**

The obvious risk with any relaxation in approach is that an obstructive party will seek to take advantage of it. The new PD says that it provides guidance to the court when considering applications for extensions of time and adjournments. It states that, in so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for extensions of time, as well as for adjournments or applications for relief.

Clearly this should not be read as a carte blanche for a party to drag its heels and delay unnecessarily, simply citing the existence of the pandemic as a reason. Parties will still need to substantiate requests for more time or an adjournment or relief. On the topic of adjournment, the courts have already demonstrated that the pandemic and the move to remote working will not guarantee parties an adjournment. The recent decision of the High Court in *Blackfriars Ltd, Re [2020] EWHC 845 (Ch)* is a case in point. There, the court refused to adjourn a five-week trial listed for June, requiring the parties to go away and explore technological options.
Government sets out proposals for new building safety measures to implement the Hackitt Report

On 2 April 2020, the UK Government published a raft of proposals for a reformed building safety regulatory system in its response to the Building a Safer Future consultation (Response), which ran from 6 June 2019 to 31 July 2019.

By Ben Wilkins, Associate, Construction

The measures proposed by the Government will be set out in further detail in the yet to be published Building Safety Bill, but the Response gives a clear indication as to what we can expect in the Bill and will be of interest to all involved in the development, design, construction, ownership and management of buildings.

The Government estimates that the total cost of the package of proposed measures in the Response will be between £266m - £530m per annum and the more stringent regulatory regime for multi-occupied residential buildings of 18 metres or more will have the effect of increasing construction costs by £120,000-240,000 per building. The majority of the construction costs incurred in complying with the new regime are expected to be borne by building developers. Nevertheless, the Government also estimates that introducing the measures will result in economic benefits of between £190m - £380m, in part through the savings gained from the overall package of additional checking and information-gathering reducing defects both during and at the end of the construction period.

Implementing the Hackitt Report

The Government’s extensive consultation document, Proposals for Reform of the Building Safety Regulatory System, to which Charles Russell Speechlys was one of around 900 respondents, came in the wake of Dame Judith Hackitt’s high profile Independent Review of Building Regulations and Fire Safety: Final Report (the Hackitt Report). Dame Hackitt had initially set out how the regulatory system covering high-rise buildings was “not fit for purpose” and the Hackitt Report set out numerous recommendations for improvement.

The Response accepts all of the 53 recommendations set out in the Hackitt Report and states that, in certain instances, the measures go even further than those proposed.

Key Proposals

New Regulatory Regime and the Building Safety Regulator

A new stricter regulatory regime will apply to all multi-occupied residential buildings (existing and new build) of 18 metres or more in height or more than six storeys. In terms of existing buildings, details of a transitional period for compliance are due to be published later in the year.

To oversee the new regulations a national Building Safety Regulator will be established as part of the Health and Safety Executive and administer a national register of buildings that fall within the stricter regime. The Building Safety Regulator will be responsible for all major regulatory decisions made at key points during the design, construction, occupation and refurbishment of buildings, in accordance with the new regime.

The Building Safety Regulator will also oversee and enforce (including through criminal sanctions) the safety and performance of all buildings and be responsible for oversight of the competence and performance of building control professionals and the building control bodies in which they work.

System of Duty Holders

Under the Government’s proposals there will be a new system of duty-holders with clear responsibilities at each stage of a building’s lifecycle, designed to provide more accountability to end-users. The five duty-holders during the design and construction phase mirror those under the CDM Regulations 2015 – the Client, Principal Designer, Principal Contractor, any Designer (including anyone who prepares or modifies a design) and any Contractor (including anyone who manages or controls construction work).

The Three Gateways

During the planning, design and construction phases, new builds subject to the stricter regime will need to pass through three Gateways, during which they will be assessed by the Building Safety Regulator. The information submitted during progression through all three Gateways will form part of the ‘golden thread’ of digitally stored data, which will be updated and made accessible throughout the lifecycle of the building.

Gateway one will have to be passed before planning permission has been granted and will focus on fire safety issues, such as emergency fire vehicle access and whether there are adequate water supplies available in the event of a fire.

The intention is for Gateway two to be passed prior to the commencement of construction. However, the Building Safety Regulator will be allowed to permit a staged approach to construction to prevent delay on a project (e.g. by permitting foundation works) if certain information required to
pass Gateway two on a complex build remains outstanding.

At Gateway two, the Client will be required to submit various information to the Building Safety Regulator in order to demonstrate how the building meets applicable regulations and sufficiently manages safety risks. The Building Safety Regulator may seek further information from the Client or reject an application to progress through Gateway two outright. As a result, the Government states that Gateway two will be a ‘hard stop’ before the Building Safety Regulator gives permission for construction to begin although, as noted above, a staged approach may be permitted. It will be interesting to see the detail as to how they envisage the staged approach to work when the legislation is published.

During construction the Building Safety Regulator will still have the power to issue ‘stop’ and ‘improvement’ notices as construction works progress. Failure to respond to an improvement notice may lead to the regulator issuing a stop notice which would require some or all work on site to cease.

Gateway three will have to be passed before occupation of the building is permitted, although the current proposals state that the Building Safety Regulator will be allowed to permit partial occupation before the building is completed. At Gateway three the Client will be required to submit various information on the final, as-built building (including updated, as-built plans). The Client, Principal Designer and Principal Contractor will be required to produce and sign a final declaration confirming that to the best of their knowledge the building complies with the building regulations.

The Accountable Person and Building Safety Manager
Once Gateway three is passed, a new duty-holder for the occupation phase, the ‘Accountable Person’, will be responsible for taking the appropriate steps and actions to mitigate and manage the fire and structural risks in their buildings.

The Accountable Person will be the individual, partnership or corporate body with the legal right to receive funds through service charges or rent from leaseholders and tenants in the building. Any person or company may find itself designated an Accountable Person if they subsequently take ownership of the property. As a result, identifying the Accountable Person could be quite complex given some of the ownership structures of buildings caught by the new regime, though the Response states that the Government will provide comprehensive guidance in due course.

The Accountable Person will be responsible for appointing a Building Safety Manager and ensuring the Manager has the resources necessary to report on and manage various aspects of a building’s safety, including engaging with residents on the safe management of their buildings through the implementation of a Resident Engagement Strategy, which will be reviewed by the Building Safety Regulator.

As with the construction phase, the Building Safety Regulator will have the power to issue a ‘compliance’ notice which will require remedial action to be taken. The Response states that the breach of any of compliance, ‘stop’ or ‘improvement’ notice will be a criminal offence under the proposals, although gives no guidance at this stage as to what the ‘penalties’ may be for a breach.

Going Forward
Prior to release of the Government’s Response, considerable progress had already been made in building and fire safety in the UK and it is notable that on the same day the new measures were announced, the latest non-ACM cladding testing results were released showing that none of the materials tested (including high pressure laminate (HPL), timber, zinc, copper and aluminium honeycomb cladding) behaved in the same manner as ACM.

If enacted, the current proposals will clarify and in all likelihood increase the liability for designers, engineers and contractors responsible for ensuring the fire safety and structural integrity of a building. Nonetheless, the majority of the measures, particularly the new system of duty-holders, are likely to be widely welcomed in the construction industry.

We will keep a close eye on developments following the publication of the Bill and its progression through Parliament.

Existing buildings under the new regime
Existing multi-occupied residential buildings above 18m or six storeys in height will fall under the new more stringent regulatory regime and the Accountable Person will be required to obtain a Building Registration Certificate at Gateway three in a similar way to that required for new builds. The Government will set out further details on how the transition period to the new regime is expected to work for existing buildings later in the year.
Expert witnesses – what is the scope of their duty?

In a case that might cause alarm to firms providing expert witness services, the Technology and Construction Court (TCC) issued a judgment this month finding that experts may owe a fiduciary duty to their clients preventing their firms acting for other parties in related proceedings.

By James Worthington, Partner, Construction and Karen Morean, Associate, Construction

In A Company v (1) X, (2) Y, (3) Z, O’Farrell J granted an injunction to prevent an expert witness from acting for a party in arbitration proceedings in circumstances where a colleague from the same global consultancy firm was already acting for the other party in separate arbitration proceedings.

X and Y were both members of the same global consultancy firm, Z, albeit they were located in different offices in different countries.

The employer sought an injunction preventing Y from representing the EPCM contractor against it in the EPCM Arbitration.

The standard position

An expert’s overriding duty is to the court or tribunal. Therefore, at all times the expert must be and must remain independent.

Experts normally also have a duty of confidentiality to their client. This is commonly set out in the expert’s letter of engagement. In this case, the expert in the Works Package Arbitration was required to treat:

“... all information, facts, matters, documents and all other materials ... as confidential.”

The key issue for the court

The court had to decide whether the expert owed a fiduciary duty of loyalty, as this would mean that, absent informed consent, it could not agree to act, or act for a second client in a manner that was inconsistent with the interests of the first client.

The expert firm opposed the injunction arguing that independent experts do not owe a fiduciary duty of loyalty to their clients, as such a duty is excluded by the expert’s overriding duty to the tribunal.

The law

The definition of a fiduciary was set out in Bristol & West Building Society v Mothew as follows:

“... a fiduciary is someone who has undertaken to act for another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.”

The court identified that there is a distinction between existing client conflicts, where the issue is whether there is a potential breach of the fiduciary obligation of loyalty, and former client conflicts, where the issue is whether there is a risk of misuse of confidential information.

The court then set out the following general principles in respect of expert witnesses:

• In principle, an expert can be compelled to give expert evidence in arbitration or legal proceedings by any party, even in circumstances where that expert has provided an opinion to another party.

• When providing expert witness services, the expert has a paramount duty to the court or tribunal, which may require the expert to act in a way that does not advance the client’s case.

• Where no fiduciary relationship arises, having regard to the nature and circumstances of the expert’s appointment, or where the expert’s appointment has been terminated, the expert is not necessarily precluded from acting or giving evidence for another party.

Decision

The court found that, as a matter of principle, the circumstances in which an expert is retained in relation to litigation or arbitration services could give rise to a relationship of trust and confidence. Even though an expert has a paramount duty to the court that may not align with the interests of their client, that is not inconsistent with an additional duty of...
loyalty to the client. The terms of the expert’s appointment will encompass that paramount duty to the court and therefore there is no conflict between the duties that the expert owes to their client or to the court.

The court decided that in this case a relationship of trust and confidence arose between the expert firm and the employer in relation to the Works Package Arbitration because not only was the expert engaged to provide an independent expert’s report, it was also engaged to provide extensive support and advice throughout the arbitration proceedings. This gave rise to a fiduciary duty of loyalty.

The court also confirmed that a fiduciary duty of loyalty is not limited to the individual alone but extends to the firm or company and potentially to the wider group with which the expert is associated. In this case, the court considered that as the expert firms had common shareholders and were managed and marketed as one global firm with a common approach to identification and management of conflicts, the whole expert group was covered by the duty of loyalty.

The experts had sought to argue that their position was akin to barristers. It is of course common for barristers from the same chambers to act on opposing sides in litigation. However, this analogy was rejected by the court because even though barristers have common funding and marketing, they do not share profits and therefore do not have a financial interest in the performance of their colleagues. It is also common knowledge that they are self-employed individuals and that different barristers from a set of chambers may act on opposing sides. The court noted that if the employer had been aware that the expert firm might take instructions to act both for and against it in respect of disputes arising out of the project, it would not have instructed that firm.

Even though the defendants went to pains to illustrate the physical and technological systems in place to prevent confidential information being inadvertently transmitted between the two experts, the court made it clear that this was insufficient to discharge the fiduciary duty of loyalty. The court noted that:

…”the fiduciary obligation of loyalty is not satisfied simply by putting in place measures to preserve confidentiality and privilege. Such a fiduciary must not place himself in a position where his duty and his interest may conflict.”

The court held that there was plainly a conflict of interest for the expert firm in acting for the employer in the Works Package Arbitration and against it in the EPCM Arbitration and so granted the injunction.

Practical considerations

Expert firms are becoming larger, increasingly multi-national and used to deploying supporting teams to their experts for the biggest disputes.

These firms will no doubt be concerned that this decision may limit the scope of their ability to act on large projects that involve a number of separate disputes between different parties. This decision is likely to prevent firms of experts providing individuals to act for and against the same party on a project, irrespective of how good their information barriers may be.

However, it is likely that clients would have been surprised if this decision had gone the other way. Clients increasingly see the size, reputation and supporting teams available from an expert’s firm as an important part of identifying an appropriate expert. As in this case, clients are unlikely to be best pleased to see other individuals from the same global firm acting against them arbitration agreement.
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Our Construction, Engineering & Projects group provides the full range of dispute and transactional services for large scale construction and engineering projects, in the UK and internationally.

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- real estate developers
- housebuilders
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Our full-service approach ensures that an appropriate strategy can be adopted to achieve our client’s priorities throughout the lifetime of a project. Our aim is to provide a personable and highly responsive specialist service.

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