EVERSHEDS SUTHERLAND

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ELEVATE

Construction quarterly newsletter

Helping our clients from the ground up

Our Construction and Engineering update

Welcome to the Spring 2022 Edition of our quarterly construction newsletter, Elevate.

As the **Building Safety Bill** continues to dominate the headlines, we consider what the latest revisions by parliament mean in terms of assessing liability. We have also worked with **Gallagher**, an insurance brokerage, to understand the **impact the Bill is having on the professional insurance market.**

We look at a recent Court of Appeal decision, in which an **adjudicator was entitled to their fees** even though no decision was provided. We also review a TCC case where a **performance obligation** decided at adjudication was overturned in a subsequent arbitration and the effect this had on the parties.

We share lessons learnt on **contractual interpretation and witness evidence** from a recent case in which we successfully acted for a defendant. We also explain the process of **e-disclosure** and how we can assist clients with this.

In addition, we consider and provide our views on two relatively new standard form contracts: **NEC4 Facilities Management Contract** and the **FIDIC Green Book 2021.**

Now that Covid restrictions have been lifted we look forward to seeing our clients and contacts in person again soon.

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In this issue we look at:

Building Safety Bill -

Court will have power to extend liabilities beyond SPVs

At the time of writing the Building Safety Bill[1] has had its third (and final) reading in the House of Lords – the last chance for input by that chamber. Following considerable changes in the Lords, not only does the Bill potentially extend time periods for claims beyond what anyone might have previously envisaged, it now also fixes potential liability on entities who might have thought they had been discharged from liability, or indeed never thought they would be liable in the first place.

Developers and landlords will have to take a look at their existing (and previous) projects to work out where liabilities might now spread. Going forward changes to ownership structures and construction contract third party rights may need to be considered.

It would be fair to say that the Bill has attracted significant national press coverage and commentary – not just in the many specialist trade journals. When the Bill becomes law the post-Grenfell world will not be the same, as the Bill is a substantial overhaul of the entire process for building safety. It creates a new regulator, and additional stages and duties for design and construction, together with ongoing management duties. Michael Gove, the sponsor of the Bill, has certainly had much airtime. He started the New Year with a comment that the building safety system was "broken" and stirred up the development sector more recently with a comment that there is a "cartel" of volume housebuilders in operation. Gove's statement at the start of the year made it clear that the property industry is to pay for cladding remediation.

The current draft of the Bill is both large and complex. It creates new, free-standing legislation and amends several other Acts by inserting additional provisions. The Bill's evolution is a bit like legislative whack-a-mole. Perceived gaps have been the subject of additional changes. One of the more controversial changes in the Lords has been the introduction of a power for the courts to pierce the corporate veil (i.e. to go after corporate entities who would otherwise be able to shield behind their separate legal existence).

The corporate veil principle

Companies have a separate legal status. They are independent legal entities, separated from shareholders/owners. They can hold assets (property or equipment etc) and sign contracts in their own name, in the same way that individuals can. Corporate law scholars head back to a House of Lords decision in 1897 regarding the effects of the Companies Act of 1862 (**Salomon v Salomon & Co. Ltd)** [2]. There a business was incorporated with a number of family members as shareholders, as well as the main operatives.

The business went bust. It was argued that the family member shareholders were lackies – a device to ensure that there was simply the requisite number of shareholders to satisfy the 1862 Act. The House of Lords disagreed: the requirements of the 1862 Act had been complied with and the company was duly constituted. The Lords would not allow the liabilities of the corporate entity to be passed onto its shareholders.

Of course, great legal theory cannot hold true in all circumstances. In matters of criminality (particularly fraud and dishonesty), taxation, injunctions, and certain "sham" transactions the courts will pursue others who exist behind the corporate entity. For example, in the civil context this might include a seller who transferred land to a wholly owned company to avoid an order for specific performance from an aggrieved purchaser.

1 In this article, references to the Bill are to the 29 March 2022 version, as released by the House of Lords.

Why is this relevant?

The extent of the Bill is explained below but those involved in property development commonly use special purpose vehicles ("SPVs") to develop. Whilst the use of SPVs is not universal (a developer might use a regional entity instead), having an SPV permits the ringfencing of the liabilities of a particular property development to one corporate entity. The structure employed by the developer may use a "DevCo/PropCo" route, so that development responsibilities and liabilities are held separately from land holdings, albeit within the same corporate group. SPVs are also useful for creating joint ventures between different parties.

SPVs can be helpful when raising finance for a particular project. Again, liabilities can be clearly demarcated and a "clean" entity created to accept finance without any historic baggage. With an SPV liabilities from other projects cannot appear suddenly, threatening unexpected insolvency. Parental guarantees may be required but might be limited. With certain funding structures (e.g. non-recourse project finance) there may only be value and income from the assets the project creates with no parental guarantees.

On completion of the construction and sale of development assets, the SPV will normally be wound up. Corporate accounting is settled and the developer moves on. However, the Bill proposes that the developer may still be liable for the activities of the SPV, with the introduction of Building Liability Orders.

Building Liability Orders

The current Bill allows the High Court to make a building liability order if "just and equitable" to do so. The effect of an order is to enable the Court to make the liability of a corporate body (the original body) the liability of another specified category of corporate body. A health warning when reading the Bill is that it has one of the single most uses (overuses?) of the word "specified". In summary, any associated body can be caught according to the Court's discretion (see below).The fact that the original body has been dissolved is irrelevant.

What liabilities are caught?

The court can only transfer liability from one corporate body to another. The Bill does not create a new category of liability for the specified body. So, the original body must have had a liability that relates to a building in England:

- under the Defective Premises Act 1972 (which is amended by the Bill to extend liability) or
- under section 38 of the Building Act 1984 (which will be brought into force by the Bill) or
- as a result of a building safety risk

Defective Premises Act 1972 (DPA 1972)

In summary the provisions of the DPA 1972 already allow redress for occupiers of newly constructed dwelling houses where they are not fit for habitation (including the use of improper materials). Those involved in taking on work for or in connection with the provision of a dwelling can be liable. This could include developers, professional team members and contractors. However, the Bill proposes to extend the liability of the DPA 1972 to cover work on existing dwellings (e.g. refurbishment or similar). In addition, liability periods will be considerably extended. After the Bill becomes law claims for new or refurbished properties can be made for 15 years. If the claim relates to the construction of a new dwelling (not refurbishment) prior to the Bill becoming law the liability period is now 30 years from completion of the defective work.

Section 38 Building Act 1984 (BA 1984)

Section 38 of the BA 1984 creates civil liability for breaches of any Building Regulation duties that cause damage. It was passed as part of the BA 1984 but was never brought into force. It is proposed that this section will become law and the Bill specifies that the liability period for this claim will be 15 years. The Government's advice note on this points out that the BA 1984 does not cover economic loss but the DPA 1972 does.

Building Safety Risk

A "building safety risk" is a term introduced by the Bill and is a general "catch all provision. It is defined as "a risk to the safety of people in or about the building from the spread of fire or structural failure" in relation to a building. A different part of the Bill (Part 4) has a slightly differing, and potentially wider, definition – it remains to be seen if the draftsperson will tidy that up. It is interesting that it does not affix liability to any particular duty created by the Bill. Part 4 of the Bill does provide for possible criminal liability for an "Accountable Person" relating to building safety risks but the original developer or builder is not at all likely to be the Accountable Person. Nevertheless, there is always the possibility of contractual or tortious (e.g. negligence) liability in the absence of statutory liability.

Which bodies can be Associated Bodies?

The Bill provides an explanation on who is an "Associated Body". It is a control based test that includes a look towards parent companies. It is interesting to note that the Bill does not borrow the detailed definitions that already exist in the Companies Act 2006 for defining parent and subsidiary undertakings plus control of undertakings. Neither does it make use of the standard definitions of 'control' that would typically be used in a contractual context, as set out in the Corporation Tax Act 2010.

The section says that an Associated Body will be any corporate entity which owns at least half of any of the share capital or voting rights; is entitled to the half of the distribution of income; or is entitled to half of the assets on winding up. Special reference is made to limited liability partnerships.

In addition, there is a general sweeper test on control, direct or indirect, when the affairs of the original body are conducted in accordance with the directions of another body. This may catch "shadow" shareholder positions.

Nominee arrangements are also made transparent, so an associated entity cannot hide behind a nominee or multiple layers of controlled subsidiaries.

When considering this, it is interesting to note that in a multi-party joint venture (with each party having at least a third of the voting rights), the joint venture partners would not be deemed to have control under the definitions proposed. Similarly, the section fixes on bodies corporate (including limited liability partnerships). The Companies Act 2006 definitions by comparison are by reference to parent and subsidiary "undertakings", which includes partnerships or trading unincorporated associations. However, the use of the latter entities in property development is limited and it seems that the focus of the Bill is to capture developers using shell companies.

Given the potentially wide nature of these provisions, it remains to be seen whether they will appear in the final Bill and become law.

Who can apply for a Building Liability Order?

The Bill does not limit those who can apply to the court. In principle, one would expect an occupier or occupiers to lead an application, or perhaps a landlord left with costs. However, the 5 April amendments to the Bill provide perhaps a hint at who might benefit by the introduction of a further "companion" order to enable an applicant to obtain information as to who might be an "associate". However, to use such an order requires you to be within the "prescribed description", and such description is to be determined by the Secretary of State.

What are the limitations?

As mentioned above there must be some originating liability – this is not necessarily a given. Outside of that the court is given just and equitable discretion. The phrase "just and equitable" has been judicially considered in the context of insolvency law. The phrase was considered to be one of general application, not requiring the demonstration of behaviour that was "unjust and inequitable". Given the Parliamentary debates and clear direction of the government, it is likely that the court will give this a broad application.

What is the end game?

The Bill is not yet final. The extension of normal liability periods (6 years) to 15 years and the extraordinary 30 years has caused consternation in property circles. Simple evidential hurdles may create issues in establishing any liability. Who will have accurate records going back that far? However, the Government is on a drive to hold developers, professional team members and contractors liable to rectify building safety risks.

As a developer you may need to look over your shoulder.

If a claim were to arise then redress against other parties will almost certainly be reviewed. Typically, though contractual limitation periods will be 12 years. Moreover, contractual arrangements may have been set up on the assumption that only specific entities will face liability and loss due to design and construction errors. Therefore, for those other entities now facing potential liability the necessary contractual redress down the design and construction chain may not be possible. Perhaps, other parties will need to be joined to a Building Liability Order action, if indeed the legislation will allow? Otherwise, they could be left high and dry. Equally concerning is the difficulty the professional indemnity insurance market poses both for historic claims and (the already heavily prescribed) future claims risk.

For those looking to the future, questions will no doubt arise as to whether project structuring offers any practical solutions, and whether changes to construction documentation will allow the expansion of both limitation periods, and those categories of people who are able to enforce contractual obligations.

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PI Insurance in the wake of the Building Safety Bill

Gallagher

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As the Building Safety Bill progresses through parliament and is likely to become law within the next few months, much attention has been focused on how housebuilders, contractors, and their supply chains will be able to respond to new claims arising from ongoing issues relating to the use of combustible materials in residential premises.

In this article, Eversheds Sutherland have teamed up with professional indemnity insurance broker Gallagher to consider the issues.

The first port of call in the event of any claim, or claims, is insurance. Professional indemnity insurance ("PI insurance") responds to civil liability claims for professional negligence, and although this does not provide cover for workmanship issues, it potentially has wide scope by including negligence in the design and in the use, specification, and authorisation of materials.

The insurance market is still processing the high volume of claims and notifications made in the wake of the Grenfell Tower tragedy in 2017. In June 2020 the government reported that there were still over 2000 high rise buildings that have unsafe cladding[1]. In May 2019 the government initially allocated £200m of funds[2] to remove and replace unsafe cladding from high-rise residential buildings but subsequent government funding announced to date is circa £5bn[3] (although the cost of remediation on all affected blocks is estimated to be £15bn). A significant proportion of these costs are being sustained by insurers and have caused PI insurance premiums to skyrocket. Since then, proposals under the Bill are likely to further increase the number of claims. Such changes are likely to cause further challenges in the PI insurance market as it struggles to balance risk.

1 Cladding: progress on remediation (parliament.uk)
2 Private sector ACM cladding remediation fund: prospectus - GOV.UK (www.gov.uk)
3 Government sets out new plan to protect leaseholders and make industry pay for the cladding crisis - GOV.UK (www.gov.uk)

Change in the level of PI insurance cover in the wake of Grenfell

One of the most prominent changes in coverage following the Grenfell Tower tragedy is the restrictions in cover for cladding and/or fire safety issues. Cladding is usually defined widely to cover a range of combustible materials and includes external wall systems and fixing systems. Fire safety is a catch all term in relation to all fire safety matters and the fire performance of a structure. This can include insulation, cavity barriers and any other fire stopping material or system.

In the present circumstances, insurance cover for these types of claims is predominantly only available to larger main contractors. Many other parties in the supply chain are now no longer able to procure cover for cladding and/or fire safety, with these being explicitly excluded from their policy. This is highlighted by the massive differences in cover between architects at the moment.

Where such cover is afforded it is on a highly restrictive basis and subject to large self-insured excesses, which are applied on a per building basis rather than per claim basis. Cover is limited solely to rectification costs, meaning that there is no cover afforded for consequential loss elements, such as loss of use, loss of profit, LADs, rehousing costs etc, which are frequently the highest value elements of a claim. Furthermore, the cover is on an aggregate basis, and with no reinstatements. This means that there is only a finite pot of money available to the insured to meet these types of claims across all their projects in a policy year. Once this pot is exhausted there is no further cover available for any other fire safety/cladding claims in that year.

Changes to policies will have been introduced at each renewal of the annual PI insurance policy. It is likely that broader cover was available at the time the parties first entered into their contract, but this cover became increasingly restricted over time by the insurance market due to the volume of claims. For PI insurance however, the relevant level of cover that responds to the claim is the amount of cover that the insured holds at the time the claim or circumstance is notified (as PI insurance responds on a "claims made" basis). This means that there could be a disparity between the level of insurance which a building owner/housebuilder believes their project team has in place (based on information that was provided at tender stage) compared with what their project team actually has at the time of a claim. This could mean that a large proportion of claims are likely to be uninsured by one or more parties.

A key question for building owners/developers is to determine the scope of their contractor's and consultants' PI insurance cover. Very often there is a contractual obligation upon the contractor and consultants to procure PI insurance for a certain limit and to maintain it for a number of years (usually 12 years to match the length of their contractual liability under a deed). There is usually a contractual obligation to evidence such insurance by sending to the developer/housebuilder a broker's certificate each year confirming the amount of cover held. However, such broker's certificates do not normally provide any detail on the coverage afforded and rarely specify the nature and extent of any exclusions under the policy.

Sometimes contracts have an additional requirement for the contractor/consultants to maintain PI insurance where it is available at commercially reasonable rates, permitting the contractor/consultants to reduce the level of cover maintained. This is accompanied by an obligation to provide the building owner/developer with an update if the scope of their PI insurance has changed, so that alternative arrangements can be put into place, but this is rarely exercised in practice.

What alternatives are there in cover?

Another problem in attempting to monitor insurance cover is that even if the contractor and/or consultant notified the developer/housebuilder about a change in their cover, there are unlikely to be any alternatives to provide equivalent protection for fire safety and cladding claims.

Latent defects insurance does not offer an alternative means of recovery as claims under that type of insurance are triggered by physical damage to the completed works. Claims for fire safety and cladding are in relation to breach of duty and non-compliance with Building Regulations, usually in the absence of physical damage, and so this will not amount to an appropriate right to make a claim under this type of policy.

In the past, the insurance industry has been able to respond to some insurable risks by supporting reinsurance schemes, such as Pool Re (for terrorism) and Flood Re (for flood risk). In these types of schemes, the risk is shared amongst the insurance industry as a whole up to a certain level, beyond which point the government steps in to provide cover. However, these types of schemes are not presently considered to be a suitable solution for the current cladding crisis and there is no appetite from government to facilitate support for the insurance market.

How insurers are likely to respond to the Building Safety Bill

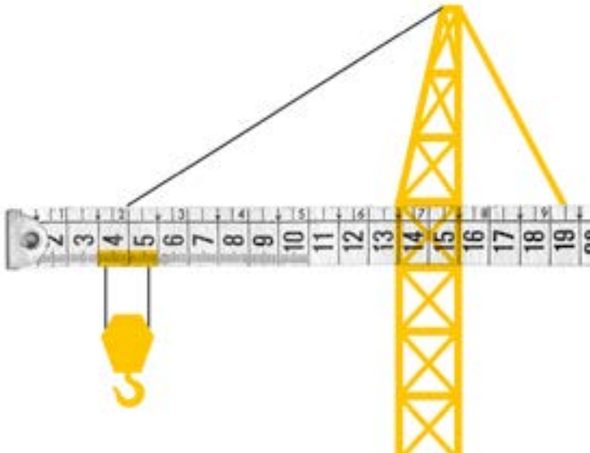
The Bill proposes significant changes to the Defective Premises Act 1972 (**DPA**) such as:

- a 30 year retrospective limitation period and 15 year prospective limitation period for claims under s.1 of the DPA for new build dwellings which are unfit for human habitation
- the inclusion of a new statutory offence under s.2A for making existing dwellings unfit for human habitation, with a 15 year prospective limitation period

These changes will mean that a greater number of buildings will now fall within the scope of the DPA. Whilst there is some debate as to whether the duties under s.1 and s.2A give rise to strict liability, which would create difficulties for claims under a PI policy which only responds to negligence, the courts may decide that these offences are subject to a reasonable skill and care obligation akin to negligence which would be covered by PI insurance (except for workmanship).

Consequently, a DPA claim arising from the retrospective 30 year limitation period would potentially be covered under the PI insurance policy of an insured party, where such cover is afforded, even if the contractual obligation to maintain PI insurance for 12 years from practical completion has expired. This is because any party still in business will be maintaining PI insurance cover, and therefore their policy would potentially respond to the DPA claim (regardless of the fact that the limitation period is 12 years for contracts executed as a deed). However, a number of parties may have no cover in place because it is now excluded under their policy, or because they are no longer in business and consequently their PI insurance will have lapsed.

Most insurers have restricted the availability of cover for these types of claims, so if a new claim is notified (for example due the potential 30 year limitation period) that would be insured under the current PI insurance policy. It is also possible that the scope of such insurance cover is likely to be restricted even further by insurers in the next policy year in response to the number of DPA claims.



The future

Some bespoke insurance products can be developed on an individual basis, but these are likely be expensive and would need to be carefully devised so that they respond to the types of claim that could be faced. At the moment the situation is volatile, due to lack of information on the number of residential properties (and in turn possible claims) that could be impacted by the recent changes to the Bill being proposed by parliament.

Until the situation settles it is unlikely that any new insurance products will be offered to the market. Even then, such new products are likely to be in relation to prospective claims and not claims or circumstances that have already been notified. It remains to be seen whether the Bill, once enacted, will provide increased confidence in matters of fire safety and cladding so that the current exclusions commonplace in PI insurance policies can be removed. At present, and for the foreseeable future, the exclusions and restrictions in PI insurance cover are likely to remain, meaning that many defendants in cladding and fire safety matters will not have cover available to them to respond to such claims. On that basis, it has become increasingly important for housebuilders, contractors, and design professionals to review their past projects and identify any projects that may be subject to a DPA claim and to plan their own financial contingencies to respond to such claims.

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Adjudicator entitled to fees even though no decision provided

The circumstances in which an adjudicator can resign and their subsequent entitlement to fees is not always straightforward. The Scheme for Construction Contracts[1], which applies by default in the absence of any contractual provision, provides that an adjudicator:

(i) may resign at any time upon giving notice (i.e. resigning at will, for any reason)[2]

(ii) must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication[3].

When the adjudicator has to resign because the dispute has already been referred to adjudication, the Scheme makes it clear that the adjudicator is entitled to "the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him"[4]. However, there is no express entitlement within the Scheme for the adjudicator to be paid when they resign at will. The Scheme however does say that the parties will not be liable for the adjudicator's fees and expenses where the "revocation of the appointment of the adjudicator" is due to the default or misconduct of the adjudicator[5]. This potentially raises a conflict whereby a party can claim that the act of resignation is in itself an act of default or misconduct, which therefore forfeits the adjudicator's right of payment for work incurred to date.

Helpfully this issue has been resolved recently by the Court of Appeal in **Steve Ward Services (UK) Ltd v Davies and Davies Associates Ltd**[6]. In this case Steve Ward Services (UK) Ltd (**SWS**) referred a dispute over unpaid works and snagging items at a restaurant to adjudication. The claim was made against Bhavisha Investment Limited (**BIL**), which owned and operated the restaurant, whereas the work had been carried out by SWS pursuant to an unsigned contract with Ms Patel (who was a director and majority shareholder of BIL).

The adjudicator, Davies and Davies Associates Ltd, made enquiries with SWS why the adjudication was not against Ms Patel. When there was no satisfactory reply, the adjudicator resigned on the basis that they lacked jurisdiction to decide a dispute against BIL, when in their view the contract was with Ms Patel. This invoked the adjudicator's right to resign at any time upon giving notice, as set out in the Scheme. The adjudicator's terms and conditions of appointment entitled the adjudicator to be paid upon resignation, save for any act of bad faith. The adjudicator therefore considered that they were entitled to payment of their fees, even though they had resigned without providing a decision. The adjudicator raised court proceedings when SWS failed to pay.

SWS defended the claim on the following grounds:

(1) the adjudicator did not have a right to resign before providing a decision. Resigning in this way was a repudiatory breach of contract and/or an act of bad faith. This meant that the adjudicator was not entitled to their fees according to their terms and conditions, as this constituted an act of bad faith and/or an act of default under the Scheme.

(2) the term within the adjudicator's appointment, entitling them to fees save for any act of bad faith, was unenforceable pursuant to s.3 UCTA[7]. This is because it formed part of the adjudicator's standard terms of business, the operation of this clause rendered the performance of the contract substantially different to what was expected, and it was not reasonable; and

(3) although there may have been a jurisdictional issue, BIL had nevertheless accepted the adjudicator's authority and waived their right to raise this challenge.

On the first issue, the Technology and Construction Court had decided that the adjudicator had resigned in error, because the parties had not raised a jurisdictional challenge. This decision was reversed by the Court of Appeal, who noted that the adjudicator correctly saw that there was "a clear and obvious jurisdictional problem", which the adjudicator was right to investigate without being prompted by the parties.

The adjudicator's investigative powers under the Scheme meant they are able "to take the initiative in ascertaining the facts and the law necessary to determine the dispute"[8]. In doing so the adjudicator was entitled to conclude that BIL was not a party to the contract and, in circumstances where the parties had not satisfactorily answered the adjudicator's concerns, decide that it was appropriate to resign. The Court of Appeal therefore concluded that the adjudicator's resignation was not an act of default. The adjudicator had tried to resolve the potential jurisdictional issue before resigning, showing that the adjudicator had acted in good faith. As the Scheme provided no entitlement to be paid when resigning at will, the adjudicator's entitlement was based entirely on their contractual terms. The adjudicator's appointment made it clear that they were entitled to be paid, even if they had not reached a decision, except for an act of bad faith and no such act of bad faith had arisen.

On the issue of UCTA, the Court of Appeal decided that this was not relevant. The court explained that UCTA relates to the *obligations* under a contract, whereas the disputed clause was in relation to payment in relation to those obligations. The court noted however that even if the adjudicator's right to payment had been caught by the provisions of UCTA the clause would still be upheld, as it was reasonable and made commercial sense.

On the final issue, the Court of Appeal said that they could not infer that BIL had waived their challenge and accepted the adjudicator's jurisdiction. The parties had not satisfactorily addressed the adjudicator's concerns when prompted, and arguments on waiver had not been articulated during the adjudication. As such the adjudicator's decision on jurisdiction was well-founded and the Court upheld the adjudicator's demand for payment of his fees.

This case serves as a reminder for adjudicators to use their powers under the Scheme to take the initiative in ascertaining the facts of the case, particularly in matters of jurisdiction, even when not prompted by the parties. It also highlights the issues that can arise from the adjudicator's terms of appointment. In the very early days of adjudication, the parties are embroiled in either finalising their referral documentation or getting up-to-speed on the nature of the dispute. As such, they have very little time or opportunity to consider the adjudicator's terms in any detail. The timescale of an adjudication and the wish to keep the adjudicator onside means that the adjudicator's terms of appointment will normally be accepted without negotiation. Nevertheless, it is important for the client to have advice on where they stand in relation to the adjudicator's fees if, for example the court finds that the adjudicator's decision is unenforceable or if the adjudicator does not produce any decision at all. There may not be options for a party to dispute and/or negotiate terms that provide for payment in these circumstances, however parties should still go into the adjudication with their eyes open as to what their payment obligations are.

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1 The Scheme for Construction Contracts (England and Wales) Regulations 1998 (the "Scheme").
2 Paragraph 9(1) of the Scheme.
3 Paragraph 9(2) of the Scheme.
4 Paragraph 9(4) of the Scheme.
5 Paragraph 11(2) of the Scheme.
6 [2022] EWCA Civ 153.
7 Unfair Contract Terms Act 1977.
8 Paragraph 13 of the Scheme.

Contractor unable to recover losses arising from an overturned adjudicator's decision

The case of **John Graham Construction v Tecnicas Reunidas**[1] illustrates the interplay between the temporarily binding nature of adjudication and the finality of arbitration or court proceedings. It highlights the problem that a performance obligation carried out in compliance with an adjudicator's decision cannot be overturned retrospectively if an arbitration award later decides differently.

The case involved a dispute between John Graham Construction (the '**Subcontractor**') and Tecnicas Reunidas (the '**Contractor**'). The court had to consider to what extent the Subcontractor was required to comply with an adjudicator's decision regarding its scope of work when that decision was ultimately overturned in a subsequent arbitration, and what effect this had on the valuation of such work in a later adjudication.

Adjudication 1

The dispute between the parties began in respect of works carried out at the Tees Renewable Energy Plant Biomass Power Station, which was referred to adjudication by the Subcontractor to determine the scope of the sub-contract works (**Adjudication 1**). The adjudicator decided, in favour of the Subcontractor, that the scope of the work was limited to the achievement of milestones described in the sub-contract. The Subcontractor continued to carry out its work based on the adjudicator's decision and the Contractor instructed others to undertake what was then considered to be 'out of scope works'.

The Arbitration

The decision in Adjudication 1 was, however, later overturned by arbitration. The tribunal decided that the scope of work was not limited to achieving the milestones, as contended for by the Subcontractor, but rather it included the previously determined 'out of scope works'.

Following the arbitration award, the Subcontractor submitted an interim application for the value of work done to that date. However, the Contractor challenged the application and deducted a contra charge of £356,000 on the basis that:(i) the Subcontractor had failed to carry out the full scope of the works in line with the arbitrator's award; and (ii) the Contractor had incurred the cost of instructing others.

Adjudication 4

The Subcontractor commenced a further adjudication (**Adjudication 4**) in relation to its interim application, challenging the deduction of the Contractor's contra charge on grounds that the limited scope of work was carried out in compliance with the decision in Adjudication 1.

The adjudicator in Adjudication 4 decided in favour of the Subcontractor and rejected the contra charge on grounds that the Contractor's loss was not caused by the Subcontractor's breach. Instead the loss was caused by the Subcontractor's compliance with the (temporarily) binding decision in Adjudication 1. Contrary to the adjudicator's decision in Adjudication 4, the Contractor continued to withhold payment from the Subcontractor to the value of the contra charge.

1 [2022] EWHC 155 (TCC)

Enforcement Proceedings (the decision in Adjudication 4)

The Subcontractor brought enforcement proceedings in relation to Adjudication 4, requiring payment in full by the Contractor. The Contractor challenged the claim on grounds that the adjudicator in Adjudication 4 lacked jurisdiction by:

1. undermining and overriding the arbitration award;
2. failing to act in accordance with the powers granted in the adjudication and subcontract; and
3. answering the wrong question.

The Subcontractor argued in response that the jurisdictional challenges were wrong and in any event the Contractor had waived its right to raise such challenges by not raising them sooner in the process and until after the decision. The Contractor counterargued that the adjudicator's decision was so fundamentally flawed that waiver did not apply and, in any event, the challenge could not have been brought any sooner than after issue of the decision in Adjudication 4.

The Court's decision

In relation to the three jurisdictional challenges in Adjudication 4 the Court decided that the adjudicator:

1. had not undermined or overridden the arbitrator award; whereas the arbitration considered the construction and interpretation of contractual terms, Adjudication 4 decided the financial consequences of those contractual terms.
2. had acted in accordance with the subcontract and the adjudication reference in determining a financial matter rather than a contractual one; and
3. had answered and decided the correct question referred i.e. was the defendant entitled to levy the contra charge? The adjudicator's decision had acknowledged the authority of the arbitration award and developed it by considering its financial consequences.

The court clarified that there is a difference between: (i) an adjudicator's decision; and (ii) the reasons for their decision. Even if the reasons for an adjudicator's decision had strayed into matters that did not concern them (such as the contractual terms) this will not affect their jurisdiction, if they answered the correct question referred.

On the matter of whether the Contractor had waived its right to bring a challenge in the first place (which became a moot point), the court concluded that it had not. The court agreed that the Contractor could not have reasonably raised the various challenges any sooner than after receipt of the decision in Adjudication 4. Incidentally, the court was not persuaded by the Contractor's suggestion that a fundamentally wrong decision could in some way preclude a party's waiver of a jurisdictional challenge.

Practical effect of the Court's decision

Having upheld enforcement of Adjudication 4 in favour of the Subcontractor and deciding that the contra charge should not have been levied against the interim application, the Contractor was ultimately without a remedy. They were unable to recover the cost of employing another contractor to complete the full scope of works, even though the arbitration award had determined that the Subcontractor had been responsible for this work. The court decided that the arbitration award could not reverse the parties' previous compliance with the adjudicator's decision in Adjudication 1. The Honourable Mr Justice Morris said:

"The First Partial Award [i.e. the arbitration award], although reversing the Decision in Adjudication No 1, cannot, as a matter of fact, have a retrospective effect on the lawfulness of the subsequent actions of the Parties, because the Parties were obliged to give effect- albeit temporarily – to that Decision. Neither party should be penalised for doing so." [1]

1 Paragraph 6.3.3 of the Judgment.

Commentary

This case raises the important point that even though an adjudicator's decision can later be reversed by subsequent proceedings, the parties are required to comply with the adjudicator's decision in the interim. When an adjudicator's decision concerns a performance obligation, any later judgement or award overturning that decision will not have retrospective effect. As such, if a party does comply neither party can later be penalised by such compliance if subsequent proceedings reach a different conclusion.

If, an Adjudicator's decision involves a decision concerning performance of an obligation, the effect of this case is that one party may not have a remedy or redress for its counterparty's performance during the interim period up to final determination. A party wishing to challenge an adjudicator's decision concerning performance on a live contract, should look to bring proceedings as soon as possible to reduce their exposure within the intervening period and (if at all practicable) take as few steps as possible in the interim. However, this creates obvious practical difficulties, given the timeframes associated with proceedings, and brings into sharp focus the cost/benefit analysis of raising any challenge at all.

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Honesty is the best policy:

Witnesses' evidence crucially unravelled the Claimant's case that depended upon an "honest belief"

In Langage Energy Park Limited v EP Langage Limited[1]

Jessica Neuberger and Alice Maloney successfully defended a long standing dispute regarding the validity of a written notice, which purported to trigger significant development obligations at a gas-fired power station at Langage Energy Centre.

Here they share the legal and practical lessons arising from this case, which provides some helpful reminders on:

i. the importance of substance over procedure when dealing with a Part 8 Claim;

ii. the operation of contractual notice provisions and the impact of implied terms; and

iii. the duties of witnesses in disputes.

Factual background to the Claim

The Claimant is the developer of an Energy Park for office, light, industrial and warehousing use. The Defendant is the owner of a Power Station which was built and commissioned in 2010.

Under a s.106 development agreement, the Defendant was obliged in specified circumstances to supply to the Energy Park: (i) high pressure, unodorised gas; (ii) heat by way of 200°C hot water; and (iii) electricity. In particular there was an obligation upon the Defendant to install, up to the Claimant's land, additional (and costly) pipe work (for the gas and heat) and electrical cables, upon receiving written notice by the claimant "*that there is or will be a demand... from the occupier[s] of the Qualifying Buildings*" for the utilities.

On 27 June 2018 written notice was given by the Claimant to the Defendant confirming the existence of the demand for the utilities on the basis that "*we now notify you that we expect to have occupiers in place*".

The Defendant disputed the validity of the notice on the basis that the utilities were specialist and there was no evidence to suggest that there was a "demand" from the occupiers. The Claimant contended that the only pre-requisite to serving the notice was that it had an "honest belief" that there is or will be a demand for the utilities.

Substance over form – Part 8 vs Part 7

The Claimant commenced its claim under the Part 8 procedure based on a suggestion that it concerned a limited legal issue of contract interpretation only, i.e. the validity of the notice.

By contrast, it was the Defendant's position that in order to determine the validity of the Notice, it was necessary to review the contemporaneous documents relevant to the Notice, hear from witnesses involved in the discussions at the time, and obtain expert input into the likely demand for the somewhat unusual utilities. On this basis, the Defendant considered that the claim should have been commenced under Part 7.

However, rather than seeking to have the matter transferred to Part 7, we requested directions at that CMC, within the Part 8 procedure, requiring expert evidence and disclosure.

As the court was being asked to consider what evidence was required, rather than whether the claim should be dealt with by way of Part 7 or Part 8 proceedings, the directions were seemingly dealt with more readily by the court at the CMC. More importantly, this ensured that by the time of the trial the right evidence was before the court, including the rather crucial disclosure and witness evidence, which ultimately undermined the Claimant's case.

This exercise was an important reminder to focus on the substance rather than the form, when approaching a directions hearing, to achieve the desired result.

1 [2022] EWHC 432 (Ch)

Interpretation of the notice provision

The wording within the notice provision gave rise to two competing interpretations from the parties:

(1) The Claimant contended that a mere "honest belief" in the existence of a demand or future demand for the utilities was sufficient to trigger the obligation, regardless of whether such belief was wrongly held.

(2) By contrast, the Defendant argued that the circumstances of the obligation gave rise to an implied term of reasonableness when determining the existence of the demand or future demand (the "**Braganza**" principle).

The Braganza principle

Implied term of reasonableness when party exercises their discretion under a contract

In **Braganza v BP Shipping Ltd**[2] the Supreme Court set out that where there is a contractual term giving a party discretion (based on an evaluative decision) to exercise a contractual right which impacts on another party, an implied term of reasonableness will apply because:

(1) the decision maker has a conflict of interest in that they alone can make a decision that will affect the rights and obligations of both parties;

(2) at the time of the contract it must have been intended by the parties that such decision cannot be made irrationally or capriciously; and

(3) the exercise of the decision in a reasonable way is consistent with the commercial purpose of the contract.

Whilst accepting that this was "not a straightforward "Braganza" issue", the court found in favour of the Defendant's interpretation. The court concluded that the "*parties... cannot have intended that a notice should be capable of being given on the basis of a whimsical belief or an irrational conclusion about future demand. They must have intended there to be some control on the ability of the Claimant to compel the Defendant to install infrastructure*". On this basis, the court was happy to imply this term following the methodology set out by the Supreme Court in **Marks and Spencer plc v BNP Paribas Securities Services Trust (Jersey) Ltd**.

Contractual interpretation of an implied term

In **Marks and Spencer plc v BNP Paribas Securities Services Trust (Jersey) Ltd**[3] the Supreme Court set out the following principles that apply when considering the basis for implying terms within a contract:

(1) an implied term must reflect not what the actual parties would have agreed, but what reasonable people in the position of the parties at the time would have agreed;

(2) a term should not be implied merely because it appears fair or because it is considered that the parties would have agreed to it had it been suggested to them;

(3) the implied term must be reasonable and equitable;

(4) the implied term must reflect either business necessity or be obvious;

(5) any application of what a reasonable person would include in the contract as an implied term must be considered with the utmost care; and

(6) a value based judgment on business efficacy (not absolute necessity) should be made, so that without the implied term the contract would lack commercial or practical coherence.

Following the finding that there must be a rational basis for the Claimant to invoke the notice provision, the court then found it was necessary for there to be an actual existing or future demand for the utilities and it was not enough to infer that this would likely be the case. Considering the evidence, the court found that:

(1) the only party interested in taking occupation at the time of serving the notice expressly confirmed that it did not have a demand for the utilities;

(2) the nature of the utilities available from the Energy Centre would be useful only to a limited category of occupants; and

(3) it was not sufficient for the utilities to be in place merely to market the property to speculative occupiers (who would perhaps prefer the uptake of clean energy from the Grid rather than that produced by the Energy Park).

On that basis, there could be no honest belief by the Claimant, acting reasonably, that there was a demand for the utilities and the notice was therefore invalid. As such the court found in favour of our client, the Defendant.

This decision demonstrates the need for notice provisions to be exercised carefully, especially when they relate to a contractual right which affects both parties but is dependent on the judgement of only one of the parties. In such circumstances, the exercising party's assessment will be examined in the context of the facts and according to what is a reasonable expectation. As demonstrated by this case, where there are no express qualifications of reasonableness included in the notice provision, such qualification may be implied by the court.

2 [2015] UKSC 17
3 [2016] AC 742

Claimant's witnesses fail to give a reliable impression to the court

Whilst the Claimant's contract interpretation argument failed, the court went on to consider whether, as a matter of fact, the Claimant had in fact held an "honest belief" of demand for the utilities. This led to Judge making some rather serious criticisms of the Claimant.

The court reviewed the numerous statements produced by the Claimant, including statements from the signatory of the notice and the Claimant's legal representative (which was provided in support of the Part 8 Claim).

The statements were criticised by the Judge for expressing the generalised beliefs of the Claimant, without identifying the source of information nor the individual taking accountability for the opinions stated. The statements provided a narrative of the documents and did not specify the extent to which the statements supported the witness's own recollections. This is contrary to the requirements of the new Practice Direction 57AC. Under cross examination it was clear that one witness had no personal knowledge of the events in question. The court also analysed the lack of witness evidence from key members of the Claimant's team who had been involved in the decision to issue the notice.

Practice Direction 57AC

Court's requirements for a witness statement

Witness statements signed on or after 6 April 2021 must only set out matters of fact that the witness has personal knowledge of and that are relevant to the case. They are not to simply provide arguments to support the case. The statement must identify any documents that the witness has referred to for the purpose of providing their evidence, but they are not to take the court through the documents. Both the witness and the legal representative responsible for the witness statement are required to sign a confirmation of compliance to show that it has adhered to these principles.

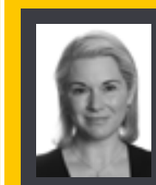
The extent of the non-compliances and misinformation led Mr Justice Fancourt to observe "*It is however a matter of concern that... [the Claimant] was able to approve and sign a witness statement which contains facts and assertions that are untrue and misleading*". As a result, he concluded that he was "*unable to place any reliance on the assertions made*". This crucially undermined the Claimant's case.

Conclusions

This case demonstrates how notice provisions are to be interpreted, when they require the fulfilment of an obligation which impacts both parties but which is dependent on the discretion or judgement of only one party. The court has made it clear that it is keen to see that such notice provisions operate according to reasonableness and business efficacy. The court is prepared to interpret and adopt implied terms to ensure that this is the case.

Although this case is particular to its own facts, it provides some salutary lessons on how witness evidence can undermine a case and the importance of complying with procedural requirements. It is clear that the court will give short shrift to witnesses who fail to comply with the new Practice Direction 57AC, which has been in operation now for a year. It was damaging to the Claimant's case and was a contributing factor to the Judge not being willing to place any reliance on the witnesses' evidence. As well as setting out the witness statement in the correct manner, it is also important to ensure that the correct witnesses are identified and put forward, as those who have personal knowledge of the matter. Otherwise, as shown by this case, it may undermine a party's position, particularly if their argument rests on what they honestly believed at the time.

For further information please contact



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"Thinking Out Loud" about Disclosure

In the High Court case of *Sheeran & Ors v Chokri & Ors*[1], Ed Sheeran's manager had undertaken the disclosure exercise on his client's behalf, which was found to be "*unsatisfactory*". Mr Justice Meade commented that even "*very busy people, with recording and song-writing careers and performing careers to pursue, [must] take responsibility for their own disclosure*". As a result, Mr Justice Meade ordered that Ed Sheeran provide a witness statement stating that he "*personally satisfied himself that his disclosure obligations [had] been met*".

Disclosure is an involved, costly, and time-consuming process, yet also crucial for providing vital documents in a dispute. The information that emerges from disclosure can make or break a case, so effective disclosure is critically important. Yet, how many people outside of private practice can say they truly understand the different disclosure obligations under various regimes and their cost implications? Investing time to get to grips with disclosure obligations, document management policies and data retention policies in dispute-prone sectors can assist in reducing the costs of disclosure and ensuring that parties have the required documents to promptly resolve disputes.

What is E-Disclosure and why is it relevant?

Disclosure is a stage in disputes where parties locate and exchange with each other relevant documents in their possession. This may include documents from the subsidiaries of each party. Electronic disclosure (or "e-disclosure"), in particular, is the process of identifying, preserving, collecting, filtering, reviewing, and disclosing electronically stored information (ESI). This can involve reviewing hundreds of thousands, or in more complex cases even millions of electronic documents.

The success of a case can turn upon documents produced in disclosure. For instance, a claim for an extension of time could involve the production of programmes, correspondence with the contract administrator regarding the extensions of time request, progress reports and relevant photographs (among other documents). However, data retention policies often mean that historical project documents have been deleted. This increases the difficulty of successfully bringing or defending construction disputes.

Disclosure regimes vary depending on the jurisdiction, and also by the dispute resolution mode which has been chosen. Disclosure rules in civil law jurisdictions (for instance, France), which rely on legislation as the primary source of law, are less demanding than the disclosure regimes in common law systems (for example, England and Wales) which rely on legal precedents. We outline some of the key differences:

Civil Law Litigation
In most civil law jurisdictions, parties are generally only required to disclose documents on which they rely to establish their case.

Disclosure rules do not generally permit the adversary to "*fish*" for documents, i.e. asking for wide categories of documents in the hope of finding relevant information.

Common Law Litigation
Disclosure requires production of all known documents which either assist and/or damage a party's case.

Disclosure for certain proceedings in the UK is governed by the Disclosure Pilot Scheme (Practice Directive 51U under the Civil Procedure Rules).

Parties are encouraged by the Tribunal/Court not to "*fish*" for documents.

The issue typically comes down to the extent of the search for unknown documents which the court seeks to ensure is proportionate to the claim/issue.

US Litigation
The US Federal regime has the widest approach to document disclosure (which is known as "*discovery*").

It generally requires discovery of any non-privileged matter that may be used to support a party's claim or defence.

International Arbitration
International arbitration is governed by applicable national laws (where the seat of the arbitration is based) and arbitration agreements.

Parties are generally only required to disclose documents which they intend to rely on and "*fishing*" for documents is discouraged.

The International Bar Association Rules on the Taking of Evidence in International Arbitration are usually complied with.

When considering whether to undertake litigation or international arbitration, parties should have in mind the differing disclosure obligations and how this may affect their case. The choice over which one should apply may form part of the parties' legal agreement, and so will have to be considered at the time the parties enter into contract.

1 *[2021] EWHC 3553 (Ch)*

Call to action

Parties should:
(i) take a forward-looking approach to disclosure by reviewing existing data retention policies and document management systems; and

(ii) keep abreast of legislative changes to time limitation periods for claims.

Existing data retention policies
A data retention policy is a set of guidelines that helps an organisation keep track of how long information must be kept and how to dispose of the information when it is no longer needed. When it comes to data retention policies, every organisation has its own needs and these vary depending on its industry, size, and location. It is essential to be aware of current laws and regulations that need to be incorporated or complied with.

Potential Disputes
In construction projects, disputes can arise over the course of a project and at final account (time and money claims), and/or after practical completion (defect claims). It is good practice to be aware of the data retention policy of your organisation and to have this regularly reviewed so that information that would be relevant in a potential dispute is preserved. In addition, each organisation should also review and update its own document management system to keep it up to date, so that it facilitates the operation of the data retention policy.

Existing Disputes
For existing disputes, it is important to consult with solicitors the moment any dispute is contemplated and stop any document destruction policies in order to preserve relevant documents which could be needed for disclosure purposes. In addition, it might be prudent to send "document preservation notices" to all parties likely to hold documents that are relevant to the dispute requesting them to take steps to preserve those documents (this is a requirement in England and Wales under the Civil Procedure Rules, Practice Direction 51U). Lastly, it is important to recognise that a party may object to disclosure of relevant documents if they attract "privilege". Where privilege is established, a party may withhold production of documents subject to describing those documents or classes of documents and explaining the grounds upon which production is being withheld at the time of providing disclosure.

Time limitation periods for claims

Generally, construction documents are executed as deeds in the United Kingdom. The statutory limitation period for claims under deeds is twelve years. Latent defects which are not apparent at the time of completion can be brought up to fifteen years from the accrual of damage.

In the event that data retention policies are shorter than time limitation periods and relevant documents are no longer available, businesses run the risk of not being able to substantiate any claims they may want to bring, or defend any claims that may be brought against them.

Keeping abreast of legislative changes is also important. For instance, the Building Safety Bill proposes a 30 year retrospective limitation period for certain claims that emerge before the Bill comes into force. As a result, developers and contractors would potentially be liable for certain building defects since the mid-1990s. It is therefore prudent to retain data for at least the prescribed contractual limitation periods.

Technology that can be used

At Eversheds Sutherland, in order to assist clients and make electronic disclosure quick and cost-effective, we have a variety of inhouse resources that can be used. Using technology to manage disclosure also provides certainty, in light of overarching duties to the court, that the procedures and protocols used will comply with all necessary procedural requirements.

As part of the document collection and evidence gathering, there are a few common steps that are necessary for all electronic disclosure exercises, namely:

- retrieving and accessing required and identifiable archived data based on custodians, search terms and date range requirements
- digitising hard copies, where documents have been retained and stored in hard-copy form only. An OCR (optical character recognition) protocol needs to be used for this exercise to allow scanned text within a document to become word-searchable and enable word-searches to be run later)
- accessing data from previous IT systems or back-up tapes, in cases where during the relevant timeline IT systems have been updated or changed
- transferring data from data centres, subsidiaries, third-parties and off-site locations
- transferring the data from various sources onto an electronic documents platform (for example, Relativity, Logiucull, Everlaw or Ringtail) for review by the legal team
- reviewing data that has been received and identifying privileged documents
- exchanging disclosable documents with the other side

Expertise

Our team is well-versed in dealing with disclosure in construction disputes. We have advised on pre-action disclosure, e-disclosure under Practice Direction 51U in High Court proceedings in England and Wales, along with document production in international arbitrations with the seat of law in numerous jurisdictions.

We are also able to advise on forward planning, including reviewing data retention policies to adequately plan for potential disputes.

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The NEC4 Facilities Management Contract

Facilities management, which supports the functionality, safety, and sustainability of existing buildings, is a growth industry. In particular, the pandemic has caused many to reassess the occupancy of existing space and consider factors such as occupant experience, energy consumption, business continuity, lease management, as well as routine maintenance and operations. NEC has worked with the Institute of Workplace and Facilities Management, to provide a dedicated contract for the provision of such services. For those working in this industry, this will require an awareness of the general principles behind NEC. However, even for those experienced in NEC, the **NEC4 Facilities Management Contract** poses many new issues for consideration.

Drafting NEC contracts operate by having core clauses, which set out key contractual principles. There are then a number of optional clauses that can be added to address more specific points if these are relevant to the project. The NEC4 Facilities Management Contract has a significant number of optional clauses, which means that compiling these contractual provisions requires careful consideration. Precise legal drafting is needed, but also a mixture of input from other sources, such as the technical, commercial, risk, and on the ground management teams. Anyone familiar with NEC will note that this form of contract promotes good contract management through collaboration. In the NEC4 Facilities Management Contract it is clear that the drafting of the contract itself requires careful collaboration too.

Meaning of "service" It is first necessary to fully scope out what is meant by the "*service*" to be provided by the Service Provider under a Facilities Management Contract. Specific details of the service are set out in the technical Scope document , which is incorporated into the contract. The contract has been designed to cover a vast range of potential project specific variables, but how these are described could have legal implications. Describing the service accurately is a key part to ascertaining what is deliverable under the contract; when payment is due, and when the service has reached completion. Also, if the service is fully scoped out this helps to determine what constitutes a failure in quality or performance by the Service Provider when considering legal remedies.

Performance Table To assist with this, the NEC4 Facilities Management Contract introduces a concept not generally found in other NEC4 contracts – the incorporation of a Performance Table, which is to be used to assess performance and related performance based payments or payment deductions. The creation of the Performance Table (and performance targets within it) will require input from the *Client's* technical and commercial teams to ensure the performance targets are appropriate for the project and drive the right behaviours from the contract Parties.

Other typical NEC features The NEC4 Facilities Management Contract also includes a number of provisions adapted from other NEC4 suite contracts, such as the ubiquitous early warning procedure (as described later), multiple payment Main Options, the compensation event regime and the Affected Property, Accepted Plan and Service Order / Task Order arrangements found in the NEC4 Term Service Contract. The NEC4 Facilities Management Contract has also moved into new NEC territory to reflect the nature of facilities management work with the welcome inclusion of mobilisation and demobilisation plan provisions.

A "construction contract"? A key consideration when drafting an NEC4 Facilities Management Contract is whether or not the definition of "*service*" will make the contract a "construction contract" for the purposes of the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**"). If the contract is caught by the Act, a number of mandatory payment mechanisms apply in relation to the application and withholding of sums due. The Act also grants the parties a statutory right to suspend the works for non-payment and to adjudicate any dispute under the contract at any time. Under s.105 of the Act, relevant construction operations include alteration, maintenance, repair, landscaping, and cleaning, but only when such cleaning is provided as part of repair but not as part of maintenance. Whether or not the Act applies will be a question of fact, depending on the nature of the *service*, as defined in the contract and the *Client's* legal team should consider the potential application of the Act on a project by project basis.

Duration An NEC4 Facilities Management Contract may operate over a long period of time - the duration of the appointment is the "Service Period" stated in the contract, which is analogous to the similar provision in the NEC4 Term Service Contract. Therefore, as is the case with any long term appointment, the rights of the Service Provider to claim additional time and/or payment by way of the exhaustive list of "compensation events" included in the NEC4 Facilities Management Contract will be critical to identify and manage. The Parties have the ability to agree to add to the standard list of compensation events contained in the NEC4 Facilities Management Contract before signing up to the contract. For example, it may be decided to insert additional compensation events to clearly allocate risk for current issues which may influence the Service Provider's ability to perform and price the service including Covid, Brexit, inflation, labour shortages, or post-contract changes in law.

Changing the Scope One of the most common compensation events is a provision that allows the Client to instruct a new service, in order to change the Scope. However, there are more options to do this within the NEC4 Facilities Management Contract. If a completely new and much bigger type of service is required then the *Client* can instruct a "mini project" via a Project Order, if Secondary Option X27 has been incorporated into the contract. The Project Order can include typical specific project type requirements including a risk and reward regime and the creation and maintenance of a detailed project programme.

Ethos of NEC4 As noted earlier, the NEC4 Facilities Management Contract includes features that are typically found in other NEC4 standard form contracts, but which may be surprising to those in the industry who have not come across these before. The NEC drafting ethos provides a heavy emphasis on contract administration and its administrative requirements could potentially be onerous for facility service providers who are new to NEC contracts. There are risk management features, known as "early warning procedures" (clause 15), whereby the parties are to flag up any potential risks that could increase prices, interfere with the pricing or effectiveness of the *service*, or cause any part of the *service* to extend beyond the end of the Service Period. The intent behind the early warning procedure is admirable in that it obliges the Parties to identify risks early and discuss how to manage such risks to mitigate their effect. However, in practice this creates an obligation on both Parties to notify the other as soon as they become aware of any possible likelihood of such events occurring. Any communications must be written and contemporaneous, which enables the Parties to work together collaboratively. There are serious contractual implications if either the Service Provider or the Service Manager do not promptly notify or assess potential claim events. For example, any event that may have a time and/or cost implication as a potential compensation event must be notified by the Service Provider within 8 weeks of becoming aware of the event and a failure to make such notification could result in the Service Provider losing its right to claim additional time and/or payment. Any failure by the Service Manager to respond to compensation event quotations within the specified NEC4 time periods could lead to deemed acceptance of the claim. There are also a number of different payment models available, which need to be examined and chosen at the time of the contract.

Conclusion It is clear that whilst the NEC4 Facilities Management Suite is a welcome addition to the family of NEC contracts, as with all standard forms, it is important to consider whether amendments are necessary to reflect project specific characteristics. Drafting and preparing them requires both parties to invest time in advance and engage in careful planning. The various options available are there to guide the process, but they must each be considered and selected according to their appropriateness. The ongoing management of the contract and heavy administration procedure requires both Parties to be fully engaged, in order to forecast and collaborate when encountering new or potential issues. In particular, the potentially wide-ranging use of this contract could be double edged, meaning that focus is needed when considering the initial definition and scope of the *service*.

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Somewhere over the rainbow -

The road to the FIDIC Green Book 2021

FIDIC (the International Federation of Consulting Engineers) produces a range of standard form contracts for international construction and engineering projects. Each of these is identified by a specific colour, which is why it is sometimes referred to as the rainbow suite of contracts. The contract known as the "Green Book" is a short form of contract, which is designed for use on small value construction projects, where there is a perceived low level of risk. It has been in use since 1999, yet in December 2021 FIDIC decided to issue their first update to this well-used contract. Here we consider the changes made and why they have been introduced.

Why has a new edition been introduced? When it was first issued, the FIDIC Green Book was "*recommended for engineering and building work of relatively small capital value...most likely to be suitable for fairly simple or repetitive work or work of short duration.*" It was expected to be used on small projects, which were notionally those with a value of $500k or less and an expected duration of approximately six months. According to research conducted by FIDIC in 2018 however, it was found that the FIDIC Green Book was being used on a much wider range of projects. It was mostly used on works of around $1million in value which sometimes lasted over two years. Consequently, it became apparent to FIDIC that the market required greater risk allocation between the parties (to reflect the type of works being engaged), but without the more significant administration requirements in other types of FIDIC contract. There was also a practical need to issue a new edition to ensure a consistent approach with other contracts in the suite. In 2017 FIDIC produced revised versions of the Red Book, Yellow Book, and Silver Book, which introduced new terminology and approaches. FIDIC was keen to ensure that these were also mirrored in the Green Book, so that those using the range of contracts become increasingly familiar and comfortable with the updates. This reflects FIDIC's overarching philosophy that clearer contracts help to avoid disputes.

Engineer to administer the contract The 2021 edition is administered by the Engineer (rather than by the Employer's Representative, as previously). This means that a greater standard of professionalism is required for this role, as they are to act as a "*skilled professional*" (clause 3.2.1). This reflects the fact that the Green Book is being used for more complicated works than first anticipated and this requires more sophisticated contract management. FIDIC's guidance notes state that it considers it more likely (but not mandatory) that the Engineer will be an external independent consulting engineering firm, rather than someone within the Employer's own organisation.
Nevertheless, the guidance notes stress that the most important concern is to see that the Engineer acts according to their duties under the Green Book. Clause 3.2.1 states that the Engineer "*shall be deemed to act for the Employer*". However, whenever the Engineer is called upon to agree or determine any matter under the contract it is required under clause 3.5.1 "*to act neutrally between the Parties and shall not be deemed to act for the Employer*". The Engineer is also under an obligation when certifying payment to the Contractor under clause 8.4.1 that the payment certificates reflect the fair value of the works executed by the Contractor. The Engineer also has increased duties to facilitate early resolution of disputes and act neutrally when endeavouring to reach an agreement (clause 3.5.1). This is not unusual as many other standard form contracts have a dual role for the contract administrator, where they are employed by the Employer but expected to act impartially when required.

Pre-determined losses The second edition introduces several pre-determined losses in the contract. Liquidated damages (as a pre-agreed contractual rate of damages) were previously used for delay. The 2021 edition however also applies liquidated damages to termination and prolongation costs. There is a pre-determined loss of profit figure, setting it at 10% of the value of the omitted work. Prolongation costs are calculated using a formula based on the value of the works carried out at the time of the delay event and the average onsite and offsite overheads for delay. This is designed to avoid the parties having to measure damages after the event, and possibly having to engage an expert to determine. This would otherwise be disproportionately expensive and time-consuming for the parties, especially as the Green Book is intended to be used on smaller scale projects.

Time limit, rather than a time bar, for claims The Green Book uses a notice provision in clause 13 for claims where the Contractor believes they are entitled to additional time or money, or where the Employer considers they are entitled to additional payment or relief. The notice describing the event or circumstance, giving rise to the claim, is to be provided within 28 days, with a full detailed claim following within 56 days, of the date that the claiming party became aware or should have been aware of the event or circumstance. However, unlike other FIDIC contracts, if the claiming party fails to comply with this provision there is no time bar, or loss of right. Instead, any entitlement shall be reduced to take into account the lost opportunity to mitigate or investigate the claim arising from the delayed notice. This relaxation in having a time limit, rather than a time bar, reflects the nature of the works under the Green Book. There may not be the same level of resource to administer the contract, when compared with other forms of contract. An example form of notice is included as an Annex to the accompanying guidance notes, but this is only a guide and is not compulsory.

Contractor's entitlement Clause 11 sets out a table setting out what events are considered as the Employer's risk and what the Contractor's potential entitlement is for an extension of time and/or cost. This has been provided for ease of reference, so that the contract can be more easily managed (rather than the parties having to locate these rights throughout the contract).

Adjudication and dispute resolution A new contractual adjudication procedure has been introduced at clause 14, which provides that any dispute that is not resolved amicably between the parties can be referred by either party to adjudication. The adjudicator's decision will be binding on both parties, even if either or both parties are not satisfied with it. This will apply regardless of the fact that the statutory right of adjudication, under the Housing Grants, Construction and Regeneration Act 1996, provides that a decision is temporarily binding unless and until finally determined by court or arbitration proceedings. FIDIC's approach is to quickly resolve disputes and enable the parties to move on with the project There is also an option for the parties to instruct the adjudicator on an informal basis to aid in the resolution of disputes. This involvement will not be binding upon the parties but may help the parties reach an amicable settlement. Such assistance can either be regular or provided as and when required. This is an unusual provision, but in some way appears to be a scaled down alternative to having a Dispute Resolution Board, which is often used in large scale FIDIC contracts. The contract thereby provides for a neutral third party (with some ongoing involvement in the dispute) to act as a sounding board. This is intended to enable the prompt resolution of any disagreements before they become full blown disputes.

Conclusions The revisions to the Green Book are well-intended to facilitate additional features to balance risk, whilst keeping contract administration to a well-defined minimum. The objectives of FIDIC are to keep the project streamlined and efficient by having clearer and more pre-determined outcomes. Given this approach, it is strange that this has been accompanied by a requirement to have an Engineer rather than an Employer's Representative who perhaps could have been equally up to the task. The parties may wish to retain some flexibility over this role to reflect whether there is a need for an Engineer in practice, given the actual scale of the project. We also expect the parties to migrate several common amendments to the 1999 edition over to the 2021. Alongside the new edition are several additional guidance notes, communication forms and user-friendly flowcharts. Given the sensible nature of the changes and the ease that they have been communicated, we expect to see parties gradually moving away from the 1999 edition and towards using the 2021 edition in due course.

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