

C/M/S/ Cameron McKenna

The background of the cover features a dark blue gradient with a lighter blue silhouette of two people in professional attire. One person is on the left, facing right, and the other is on the right, facing left. They appear to be in a conversation, with the person on the right gesturing with their hands. The overall aesthetic is clean and professional.

Construction and development

Legal update

Spring 2006

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In this issue



Caroline Cummins

This edition of the Bulletin is accompanied by a handy pocket sized guide to the new JCT contracts that we hope you find useful.

The Bulletin itself is also packed with articles to update and remind you of key legal issues in the development and construction sectors.

We report on government proposals for imposing a tax on the increase in the value of land generated by the grant of planning permission, the latest review issued by the DTI arising from the consultation on reforms to the Construction Act, a new indication of the government's determination to charge for Judges' time and the Company Law Reform Bill.

We also revisit some familiar topics, including the meaning of "consequential loss" and whether that includes loss of profits, and the difference between a guarantee and an indemnity. We review the use and effectiveness of international arbitration which, unlike domestic arbitration, remains the forum of choice for the international construction community. We also have a look at new rules for the execution of contracts.

Last year's reforms in the Technology and Construction Court (TCC) were well received. The TCC has now gone out to

consultation on a proposed court settlement process and a review of the operation of the Construction and Engineering Pre Action Protocol. We review a recent case in which the court considered the application of the Protocol in Part 20 claims.

As usual we also have our adjudication and general cases roundup, including a special section on Health and Safety.

Caroline Cummins
Spring 2006



Mark Heighton

HM Treasury, HM Revenue and Customs together with the Office of the Deputy Prime Minister have finally shown their hand. On 5th December they published the long-awaited consultation paper relating to planning gain supplement (PGS).

Planning gain supplement – the Government's proposals

This document is in response to the Barker Review in relation to housing supply. One of the Barker Report's recommendations was that the Government should seek to capture a portion of the uplift in value of land arising from the planning process.



The Government suggests this will...ensure that local communities receive a better share of the benefits...



The basic rationale of the new tax is to capture part of the increase in the value of land which is generated by the grant of planning permission. The tax revenue would be shared by the Government with local and other authorities to provide infrastructure and community facilities. The Government suggests this will stimulate further growth and ensure that local communities receive a better share of the benefits that come with the development of land.

In the consultation paper the Government acknowledges that the 4 previous attempts at "development gains tax" that have operated in the UK in the past 60 years have not been successful (largely, Government believes, because the complicated nature of the various regimes and the high rates of tax led to wholesale avoidance). However, it also believes that sufficient lessons have been learnt from those previous attempts and that PGS will be successful. The consultation document stresses that the Government is only looking for a scheme which is designed both to minimise tax avoidance opportunities and to capture a "modest portion" of the uplift in value so as not to disincentivise developers from continuing to develop sites.

The main features of PGS are:

- ✔ PGS will not be implemented before 2008.
- ✔ The tax will relate to all residential, commercial and mixed use development.

- PGS is based on the increase in value arising from a “full” planning permission – the consultation paper makes no mention of reserved matters’ approvals but it is assumed that these will also be a trigger for calculation of PGS
 - There will be transitional arrangements to allow the real estate market to adjust. It is accepted that planning permissions granted before an “appointed date” will not be subject to PGS but the precise date has yet to be specified.
 - The person liable to pay PGS will be the person who implements the relevant planning permission. There will be a procedure requiring service of a statutory notice (“Development Start Notice”) before work is started.
 - PGS will be payable in one lump sum upon commencement of the development (which will, probably, have the normal Planning Acts meaning). This will be some years (typically up to three years) after the grant of the full planning permission but based on the increase in value as at the time of the grant of the planning permission.
 - The percentage of the tax has yet to be fixed and there may well be a lower tariff for brown field sites.
 - Payment will be by way of a self assessment regime with the person who is liable to pay the tax actually determining the increase in value. When looking at the value it is assumed that the property is valued as a freehold with vacant possession.
 - There will be penalties and interest regime for defaulters. As a final sanction parties who have implemented a planning permission without paying the tax could be forced to stop work.
 - Section 106 obligations will be scaled back and in future these obligations would only relate to the “environment of the development site” itself and affordable housing. Contributions towards all off site facilities (such as schools, hospitals, highways, etc) would all be dealt with by way of the PGS. In theory this means that the tax payable by way of PGS should be off set by the reduction in potential liabilities under section 106 obligations.
 - It is suggested that there should be some exclusions from PGS but only in relation to small scale house improvements (eg small extensions) The Government is reluctant to accept a threshold for small development projects.
 - PGS will largely be recycled back to local communities. There are two different alternatives suggested in the paper for this. The preferred solution of the Government is that the PGS revenue will be distributed as grants in direct proportion to the revenues raised for that area.
 - Not all of the revenue would be distributed back at a local level. A significant proportion will be used to deliver strategic regional infrastructure via an expanded and revised Community Infrastructure Fund
- A few of the more obvious issues for the industry to comment on/consider include:
- Because the tax is payable by one lump sum there will be adverse cash flow consequences for developers where similar payments under the section 106 agreement would normally have been payable in phases (for example on physical completion or occupation of a specific number of units). The Barker Report did recommend that consideration should be given to allowing phased payments so as not to adversely affect developers’ cash flow but this has not been incorporated into the consultation paper
 - There is no proposed arrangements for reimbursement of PGS in the event of the monies not actually being used to provide the community facilities – section 106 agreements would normally provide for repayment.
 - Of critical importance will be the transitional arrangements. Issues include:
 - Where an outline planning permission has been granted before the “appointed date” but a reserved matters approval granted subsequently, PGS could be payable when the reserved matters approval is implemented although the developer may well not have factored that in to its development appraisal.
 - Developers will need to consider carefully what strategies they want to adopt in the run up to PGS being

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...there will be adverse cash flow consequences for developers...

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Ultimately if and when FGS is implemented and the market becomes used to the procedures the likely effect will simply be to reduce the prices which developers are prepared to pay for land so as to offset any additional tax burden. In terms of the practicalities of FGS the crucial issues will be the rate of tax and the terms of the transitional regime because these will determine the appetite of developers to take action to avoid the tax.

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*Developers will need
 to start considering
 the potential impact
 of FGS...*
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- implemented – particularly in relation to implementing full planning permissions or reserved matters approvals before the appointed date so as to avoid paying FGS.
- Similarly, developers may want to accelerate programmes and apply for and try and obtain reserved matters approvals before the “appointed date” for FGS coming into effect.
 - ✔ Developers will need to start considering the potential impact of FGS in relation to schemes they are negotiating to acquire now (particularly large phased developments where reserved matters approvals may be granted after 2008). Issues include:
 - Making sure that FGS is reflected in any overage arrangements/thresholds agreed on options/conditional contracts being negotiated.
 - Because section 106 Agreements may be entered into now with outline planning consents but the reserved matters approval may trigger FGS section 106 Agreements need to contain provisions that there should be deducted from any monies payable under a section 106 agreement any tax paid by way of FGS. Developers are not going to want to pay twice!
 - ✔ Is the proposed freehold valuation approach correct? For example, what about a typical shopping centre or redevelopment where the freehold is retained by the local authority and a head lease granted to the developer/investor.
 - ✔ On large phased developments which may be undertaken by a consortium will FGS be assessed in relation to each phase separately or could the implementation of, say, the reserved matters approval for the infrastructure alone trigger payment for the whole site?

Clearly there is a lot for the property industry to consider. The period for consultation expires on 27th February 2006 so there is plenty of time for the industry to put in a measured and considered response to these proposals:

A contractor providing a collateral warranty to an owner may be able to exercise rights of set-off to reduce or extinguish its liability under that warranty. The effect may be to require the owner to shoulder some or all of the burden of an intermediate developer's failure to pay the contractor.



Alex Cunliffe

A safe way of setting-off

In *Safeway Stores Ltd v Interserve Project Services Ltd* [2005] EWHC 3085 (TCC) Safeway, as owner of the site, appointed a developer to design and construct a new supermarket and car park. The developer in turn appointed a contractor – Interserve – who provided a warranty in favour of the owner. The key facts are that:

- ✔ The contractor's workmanship was allegedly defective. The owner sued the contractor for breach of warranty, seeking to recover the cost of repairing the defects. The amount claimed by the owner was in the order of £400K.
- ✔ The contractor defended the claim on the basis that it was owed a substantial amount of money by the developer, which was in liquidation. It said that under the terms of the warranty it had a right to equitably set this amount off against anything it had to pay the owner for the alleged defects. It was not in dispute that the amount owed to the contractor by the developer was some £1.26m. In effect, if the contractor was right, the owner's claim would be extinguished.
- ✔ The relevant term in the warranty was as follows:

"The Contractor shall owe no duty or have any liability under this deed which are greater or of longer duration than that which it owes to Developer under the [building contract between the developer and the owner]".
- ✔ By contrast the owner argued that the reference to 'liability' in clause 3.3 referred only to the cost of the remedial works. It should not take into account any right of set-off.

Mr. Justice Ramsey agreed with the contractor – the limitation clause extinguished its liability to the owner. In effect, 'liability' could not be ascertained just by looking at the cost of the remedial works in isolation. The judge considered that, if the developer had not gone into liquidation, it would have had to take account of the sums it owed to the contractor in settling any claim for defective works. The contractor's right to payment constituted an equitable set-off which was not merely a procedural rule but a substantive defence to the claim.



The contractor's right to payment... was... a substantive defence to the claim.





...the owner's recourse under the warranty was analogous to an assignment.



The judge found this consistent with the 'step-in' mechanism of the warranty. Had the owner decided to step into the developer's shoes under the contract, the owner would have had to pay the sums owed by the developer. There was no reason to suppose that this apportionment of risk would be different where the owner sued under the warranty instead.

Whilst not clearly drawn out, Mr. Justice Parnsey seems to have viewed the owner's recourse under the warranty was analogous to an assignment. Since an assignment is taken 'subject to equities' (in this case, subject to the contractor's claim for payment), so again the owner's rights under the warranty should be so limited.

This case will certainly not leave warranty beneficiaries feeling safe. The form of clause 3.3 is essentially the same as the JCT collateral warranties, widely used across the industry. Whilst there has been some ambiguity, it was thought by many that 'liability' meant the contractor's liability without having to take into account any defences which might be said to be 'personal' to the employer. Following this case, a warranty recipient would be wise to insist that its warranty clearly states that the defence of equitable set-off (and possibly all forms of set-off and counter-claim) are not to be taken into account in the limitation clause.

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When drafting an exclusion clause in a contract, ask yourself: 'what sort of loss do I want to protect myself from if a claim for damages arose against me in the future?' If your answer includes 'indirect or consequential loss', or 'loss of profits' then read on...



Billie Bingham

“Consequential Loss” revisited

Exclusion of liability for 'indirect or consequential loss' is a common feature of commercial contracts. Therefore it is important to understand the meaning of the term at common law.

What is the definition of 'indirect or consequential loss'?

Firstly it should be noted from the outset that no distinction should be drawn between 'consequential loss' and 'indirect loss'¹. The clause is not to be read disjunctively.

Secondly, and perhaps even more importantly, the term 'consequential loss' does not have the meaning that the commercial man might expect it to. The natural meaning of 'consequential' is: 'following as a result or consequence'. However this is not the meaning given to the phrase by the courts. Typically 'consequential loss' is interpreted by the courts to describe a distinct subset of loss that can be contrasted with other types of loss and damage. To the legal eye it is clear that the distinction is drawn along the first and second limb of *Hadley v Baxendale*². 'Direct loss' has been described by the courts as loss or damage which can be said to flow directly and naturally from a breach of contract i.e. in the usual course of things (the 'first limb' in *Hadley v Baxendale*). 'Consequential loss' is the additional loss or damage which was within the contemplation of the parties at the time of entering the contract (the 'second limb' in *Hadley v Baxendale*).

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...the term 'consequential loss' does not have the meaning that the commercial man might expect it to.

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¹ In *Hotel Services v Hilton International Hotels* (2000) BLR 235 there was an exclusion clause for 'indirect or consequential loss'. The Judge concluded that the exclusion clause plainly used consequential as a synonym of indirect.

² (1854) 9 Ex 341

So what does an exclusion clause for 'indirect or consequential loss' exclude?

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...if losses are deemed to be direct, they will escape an exclusion clause for consequential loss.”

The line of cases from the Court of Appeal³ indicates that an exclusion for 'indirect or consequential loss' will **not** cover loss which directly and naturally results in the ordinary course of events, but only loss which is less direct or more remote. So, if losses are deemed to be direct, they will escape an exclusion clause for consequential loss. Let's take some examples:

- In *Hotel Services v Hilton International* the court found that loss of profit incurred on defective minibars, along with the costs of their removal, were direct losses and not caught by an exclusion clause that stated the supplier was not liable 'for any indirect or consequential loss'.
- In *Deepak v ICI Chemicals* the explosion of a methanol plant resulted in reconstruction costs, loss of profits and wasted overheads. None of the losses were held to be consequential so the exclusion clause (which expressly excluded liability for loss of profits as well as indirect and consequential loss) was ineffective.
- In *British Sugar v NEI Power Projects* faulty power station equipment supplied by the defendant led to increased production costs and loss of profit for the claimant. The limitation clause for 'consequential loss' did not protect the defendant from liability for either loss because they could be said to flow directly from faulty goods.

Does an exclusion clause for 'consequential loss' exclude claims for 'loss of profit'?

Put simply, no. The case law suggests that generally normal loss of profit is direct loss, as opposed to consequential loss, and so it would not be excluded by an exclusion clause for 'consequential loss'.

How should I draft an exclusion clause to exclude claims for 'loss of profit'?

Very clearly! Particular care should be taken when listing an exclusion for 'loss of profit' alongside an exclusion for 'indirect or consequential losses' (e.g. 'no liability for indirect or consequential losses such as loss of profits'). There is a risk that such an exclusion might be interpreted so that claims for 'loss of profit' can still be made, in spite of the exclusion clause, if the loss is said to occur as a direct result of the breach.

This is demonstrated in the Court of Appeal decision in *University of Keele v Price Waterhouse*⁴. Price Waterhouse was engaged to establish a profit related pay scheme for Keele. The engagement letter contained a clause:

“...we accept liability to pay damages in respect of loss or damage suffered by you as a direct result of our providing the Services. All other liability is expressly excluded, in particular consequential loss, failure to realise anticipated savings or benefits and a failure to obtain registration of the scheme”.

³ The line of cases includes *Millar's Machinery Company v David Way & Son* (1935) 40 Com.Cas 204, CA; *Saint Line Limited v Richardson, Westgarth & Co Limited* (1940) 2 KB 99, *Croudace Construction Limited v Cawoods Concrete Products Limited* (1978) 2 Lloyd's Rep 55, CA; *British Sugar plc v NEI Power Projects Limited* (1998) 87 BLR 42, CA; *BHP Petroleum Ltd and Others v British Steel PLC and Dalamine SpA* 1999 2 Lloyd's Rep, 583; *Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers* (1999) 1 Lloyd's Rep 387, CA; *Hotel Services v Hilton International Hotels* (2000) BLR 235

⁴ [2004], All ER 264

The Court found Price Waterhouse liable for loss arising from failure to realise anticipated savings in spite of the exclusion clause. It was said that the loss was directly caused by Price Waterhouse's work so the exclusion clause was ineffective.

Let's take a typical exclusion clause and interpret the clause in the light of this decision:

“neither party shall be liable to the other party hereto for any indirect or consequential loss (which terms shall for the purpose of this clause include but not be limited to loss of profit), suffered (or incurred) by the other party arising out of the performance of this contract...”

By analogy with the *University of Keele* decision there is a risk that this clause would not exclude liability for loss of profit. Liability will still occur, irrespective of the exclusion clause, if the loss can be considered to be 'direct' loss.

Tips for drafting in relation to 'indirect or consequential loss' and 'loss of profit'

In practice it will be difficult to tell whether particular losses are direct or indirect. Therefore it is important to follow some practical advice:

- ✔ An exclusion clause should be drafted in plain English and explicitly state what liability is intended to be excluded or limited.
- ✔ Loss of profits should be excluded in clear terms.
- ✔ It should be noted that the following types of clauses should be avoided:
 - “no liability for indirect or consequential losses such as loss of profits”;
 - “all consequential or indirect losses whatsoever including any loss of business or profit”;
 - “loss of profits or other indirect or consequential losses”.

All clauses carry the risk that loss of profits will not be excluded. The best advice would be that the exclusion for 'loss of profits' should be distinct from an exclusion for 'indirect or consequential losses'.

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Rupert Choat

On 16 January 2006 the government published the latest round of its review of the Construction Act. The new paper analyses the results of the government's consultation paper of March 2005 and the 356 responses received by the deadline of June 2005. It sets out the government's proposals for change.

The Housing Grants, Construction and Regeneration Act: The review's progress

What's new?

The following summarises the changes proposed and not proposed to the Construction Act in the government's latest paper. It also compares them with the proposals in the consultation paper of March 2005.

Overall the proposals amount to tweaking rather than wholesale change. This seems only right given that the Act has generally worked well.

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	March 2005: Consultation Paper Proposals	January 2006: Proposals to take forward subject to further consultation
	Payment	
1	Amend Section 110(1) of the Act to require that payment mechanisms include terms on: what amounts constitute the payment; when a payment is to be assessed; how amounts are to be determined; the period of time that should elapse from the assessment date before the final date for payment; and what information is to be communicated between the parties.	Amend Section 110(1) to require a statement of what is due in a certificate issued by one of the contracting parties or a third party. Where the contract does not provide for certification of the sum due, it is determined by an application for payment from the payee.

2	Give the payee the right to submit a payment application at any time whilst obliging the payer to pay only that which is due under the contract.	Re-proposed
3	Remove the requirement in Section 110(2) of the Act to serve a notice within five days of a payment becoming due.	Re-proposed
4	Require all Section 111 withholding notices to state the remaining amount that the payer intends to pay after withholding the amount notified.	It is not necessary to redefine the content of withholding notices under Section 111
5	Retain the exception to the ban on pay-when-paid clauses in cases of upstream insolvency.	Re-proposed
6	Pay-when-certified clauses should require each upstream certificate to identify the sub-contract works valued by the certificate and provide for each certificate to be copied to the payee.	Pay-when-certified clauses should be invalid (presumably not in the case of upstream insolvency). This may require primary legislation given the widespread use of pay-when-certified clauses. In the meantime there may be value in guidance on when the courts would be likely to view the use of such clauses as an inadequate payment mechanism under the Act.
7	Pay-what-certified clauses should require each upstream certificate to value each sub-contract works package and provide for each certificate to be copied to the payee.	Pay-what-certified clauses should be banned under proposal 1.
8	Introduce a right to reimbursement for the costs of suspension and remobilisation and provide additional time for remobilisation under Section 112 of the Act.	Re-proposed
9	Make contractual provisions on cross contract set-off ineffective except where there is a close relationship between the contracts concerned.	Change to the Act not proposed. Better suited to guidance.
10	Amend the Scheme to allow stage payments to be made for off-site materials and work on them in advance of their arrival of site.	Change to the Act not proposed. Better suited to guidance.
Adjudication		
11	Parties to adjudication should bear their own costs, unless they agree after referral of the dispute that the adjudicator should decide liability for costs. This will ban clauses in contracts that require the referring party to pay his own and the other party's costs, win or lose. The adjudicator should continue to decide liability for his fees.	Re-proposed
12	Prohibit the use of trustee stakeholder accounts (which suspend the effect of adjudicators' decisions pending litigation or arbitration) other than when the payee is insolvent.	Clauses providing for trustee stakeholder accounts to be invalid even when the payee is insolvent.

13	Provide the adjudicator with the right to overturn “final and conclusive” certificates and decisions where these are of substance to interim payments only.	Re-proposed
14	Empower adjudicators to decide finally aspects of their jurisdiction namely: Is there a construction contract under Sections 104 and 105? Was there a dispute? Was I properly appointed?	Change to the Act not proposed. Better suited to guidance.
15	Entitle the adjudicator to payment when he stands down due to lack of jurisdiction.	Re-proposed
16	Extend adjudicators’ immunity under the Act to claims by third parties.	Change to the Act not proposed. Better suited to guidance.
17	Require adjudicators to be independent (in addition to existing requirement of impartiality).	Change to the Act not proposed. Better suited to guidance.

Matters excluded from formal consultation

A number of important matters have been included from the formal consultation process including the following:

- ✔ Whether to widen the scope of the Act to include:
 - Partly oral and entirely oral contracts. The government is to consider further the possibility of amending the Act by primary legislation. The January 2006 paper says that “This is likely to be a matter for consultation in the future”. The government wants to change the Act by Regulatory Reform Order but this is only available for reducing regulatory burdens (whereas such a change would extend them).
 - PFI/PPP project agreements, contracts in respect of residential buildings for owner-occupiers and contracts for operations related process plant. The government ruled out extending the scope of the Act to cover such contracts in October 2004.
- ✔ Whether to provide a statutory limit on payment period lengths. The government ruled out legislative change on this in the March 2005 consultation paper.
- ✔ Whether to empower payers to redirect payments owed to insolvent contractors to their creditor sub-contractors and suppliers. Again the government ruled out action on this in the March 2005 consultation paper.
- ✔ Whether to introduce a single set of procedural rules for all adjudications. The January 2006 paper says that “The industry may wish to consider whether to bring its own standard adjudication procedures more closely into line with one another”.

What’s next?

In Spring 2006 another consultation paper on amendments is due. From the results of that paper conclusions should be drawn in time for the 2006-7 parliamentary session.

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This article concerns two surety related issues that are the subject of long running debate and recent decisions of the Court of Appeal. Factors determining whether a surety's obligations are characterised as a guarantee or an indemnity, and the effect that amending obligations, which are the subject of a guarantee, has on the surety's obligations.

Guarantees: primary and secondary obligations



Simon Johnston



Jonathan Dames

Key Distinctions between a Guarantee and an Indemnity

Guarantors receive preferential treatment from the courts: guarantees are strictly construed, guarantors are only liable to the extent they have agreed to be liable in writing and any ambiguity in that writing will be interpreted in the guarantor's favour. Indemnifiers receive less sympathetic treatment and, as a result of this and the nature of an indemnity, the recipient of a guarantee should look to include a conversion to indemnity in its guarantees.

The obligations under a guarantee are coterminous with, and dependent upon the continued validity of, the primary obligor's obligations; the guarantor's liability only extends to cover that of the primary obligor. If the principal obligor's liability is reduced or extinguished, the guarantor's liability is correspondingly reduced or extinguished. Equally, if the primary obligation is amended, the guarantee may be extinguished.

Under a contract of indemnity, the indemnifier is assuming a primary obligation. This is not dependent on the validity, extent or nature of any underlying obligation or whether any other party defaults. The indemnifier's liability is independent of, and not an accessory to, the liability of anyone else.



...the indemnifier is assuming a primary obligation.



Guarantee or Indemnity?

In *Marubeni Hong Kong & South China Limited v. Mongolian Government* [2005] All ER (Comm) 289 the Court of Appeal considered a claim from a machinery supplier whose purchaser had secured a letter of undertaking from the Mongolian state (the “**Surety**”). Prior to the claimant making demand on the Surety, the purchaser’s payment obligations had been rescheduled and it had then failed to pay.

The undertaking was expressed to be unconditional, waived the requirement to first claim on any other person and referred to the Surety indemnifying the claimant, who argued that this was a “demand bond” (an indemnity) and not a guarantee (as it had been described by the parties in other documents).

If the undertaking were a guarantee, any material amendment to the underlying obligations being guaranteed (which the rescheduling was found to be) – without the consent of the Surety or an express provision in the undertaking giving prior consent – would discharge the Surety. If, the undertaking were a primary obligation to pay all amounts payable under the contract of sale, it would survive the rescheduling.

It was found that:

- ✔ each authority on which the claimant relied related to demand bonds issued by banks;
- ✔ such instruments are a bank specific form of document creating irrevocable and unconditional primary obligations;
- ✔ outside that banking context and without clear wording, there is a strong presumption against construing a document as creating a primary obligation where it imposes obligations on a party which relate directly to obligations created in an extrinsic agreement between other parties;
- ✔ prior authority describing a document as a “guarantee” is not conclusive and was explained and distinguished on the basis that there must be other features sufficient to displace the use of this term;
- ✔ the “unconditional” and “demand” wording in the undertaking was qualified;

- ✔ inclusion of a waiver of recourse to third parties does not change the nature of the obligation from secondary to primary, it indicates that the parties intended the obligation to be secondary – necessitating an explicit waiver; and
- ✔ the amendment to the underlying obligation had released the Surety.

Amendments to the underlying obligation

In *Triodos Bank NV v. Ashley Charles Dobbs* [2005] All ER (D) 364 the Court of Appeal considered whether a guarantee, which permitted the beneficiary, a lender, to “agree to any amendment, variation, waiver or release in respect of an obligation of the [borrower] under the [underlying loan agreement]”, covered three additional agreements subsequently entered into between the lender and the borrower which “replaced” the agreement between the lender, the borrower and the guarantor. The loan was made to refinance an existing loan and to finance part of a construction project.

It was found that:

- ✔ execution of a new document incorporating an amendment did not indicate a new and different agreement (which would not be covered and would release the guarantee);
- ✔ a guarantor will only be held to have agreed that its liability can be increased or made more onerous if there are clear words (that is, this is contemplated in the document creating the guarantee);
- ✔ other types of amendments might be covered even if not expressly contemplated and will be considered on a case by case basis;
- ✔ rescheduling was permissible – it was contemplated in the document;
- ✔ making substantial new money available and making money available for a different purpose (a new construction contract) were not permissible – they were not contemplated;
- ✔ increasing sums payable to the bank and including sums payable to the construction contractors constituted



...any material amendment to the underlying obligations being guaranteed... would discharge the Surety.



a new agreement, not a genuine amendment and the terms of the document in which these changes were contained was substantially different to the original document;

- even if the guarantor's liability is not changed, an increase in the risk that the guarantee will be called (because, for example, the loan is increased) may discharge the guarantee in the absence of the guarantor's agreement; and
- the agreement should state whether more than one amendment or variation is permitted.

These cases indicate *first* the continuing care that needs to be taken, when taking an obligation from a third party, to ensure that it will be sufficiently flexible to enable future variations and dealings and *second* the need to be mindful of defences that might become available to a surety to release it from its obligations as a result of such variations or dealings.

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*These cases indicate...
the continuing
care that needs
to be taken...*





Caroline Cummins

On 10 January 2006 the Department for Constitutional Affairs (DCA) issued a statement in respect of its plans for increasing court fees. Its plans resurrect the proposal for Hourly Trial Fees.

What price justice? Proposals for paying Judges by the hour

Government policy is that fees should normally be set to recover the full cost of a service although there are cases where a service recovers less than full cost. Some court users are exempt from paying court fees (generally those on means tested benefits) or court fees are remitted in cases of hardship. Other services (family proceedings) are subject to subsidy. However the latest proposals from the DCA indicate that the government is determined to recover more of the costs of running the court service from those who are using the courts for commercial business, rather than from the taxpayer.



The government's determination to increase revenues from court fees appears unassailable.



The government's determination to increase revenues from court fees appears unassailable. The question (which was the subject of a consultation paper in May 2004) is how the increases should be applied. In addition to general increases in fees for issuing claims in the High Court, the 2004 consultation paper also proposed a new Hourly Trial Fee for trials in the High Court and Appeal Court.

Hourly Trial Fees became one of the most controversial proposals to come out of the 2004 consultation. Significant numbers of respondents to the consultation were strongly opposed to the idea. As a result the introduction of these fees was deferred to allow time to agree best practice and procedure.

The 10 January 2006 statement indicates that Hourly Trial Fees will be introduced in order to "achieve a closer match of income and cost drivers, in particular through the introduction of trial fees".

The 2004 consultation document set out its proposals for Hourly Trial Fees and indicated that each hour or part hour of the trial or appeal would be charged at £200. It then provided a series of options as follows:

- ✔ Option A which sets a limit of £2000 on fees charged for all claims. If the trial requires less than 10 hours of court time the unused balance of the £2000 is returnable.
- ✔ Option B which sets a lower limit of £1000 for personal injury claims and a higher limit of £3000 for other claims. Again, unused balances are returnable.
- ✔ Option C which in effect would charge by reference to the actual number of hours required, by way of a deposit payable up front (calculated by reference to the estimated length of trial) followed as necessary by a top up fee if the case overruns.

- ✔ Option D which abandoned the idea of an hourly rate but added £100 to the cost of issuing all claims above £15,000 in value.
- ✔ Option D was the preferred option of respondents to the consultation. It appears that their views have not been accepted by the DCA.

Hourly Trial Fees are controversial because the length of the trial (and therefore its cost) is not within the control of the litigants. The time taken (as reported in the Response to Consultation document) is affected by the speed of the judge, whether the judge has had time to read into the case before trial, the experience and expertise of the judge, the speed of the advocates, the “gamesmanship” of the advocates, the vagaries of witnesses, the efficiencies or otherwise of the court service and litigants in person. It is also thought that Hourly Trial Fees may well act as a deterrent to the use of the court system, to the detriment of the community. In addition, such fees would be relatively ineffectual at raising revenue because so many claims settle before trial.

Nevertheless if the DCA statement bears fruit, Hourly Trial Fees will be introduced. A further consultation is promised for later on this year with proposals being brought into force not before April 2007.

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Hourly Trial Fees are controversial because the length of the trial (and therefore its cost) is not within the control of the litigants.

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Julian Bailey

The Courts expect would-be litigants to comply substantially with the Pre-Action Protocol for the Construction and Engineering Disputes before proceedings are commenced. But this is not an absolute position, and the difficulties faced by defendants, in existing proceedings, who wish to bring in new parties may be accommodated notwithstanding that the Pre-Action Protocol has not been complied with.

The pre-action protocol in Part 20 claims

Construction disputes which are heading towards the courts are subject to the operation of the “*Pre-Action Protocol for the Construction and Engineering Disputes*”. In broad terms, the purpose of the Pre-Action Protocol is to encourage would-be litigants to exchange information about their respective cases before proceedings are commenced, and to explore opportunities for settling their dispute. The underlying rationale is that if parties *do* follow the Pre-Action Protocol, they may well settle their dispute and avoid spending time and money in litigation. If they *cannot* settle their dispute, then at least they should better understand their opponent’s case, in which case any litigation between them should be less protracted due to the reduced need for further particulars, or amendments to pleadings. The stick which the court may wield if parties fail, in a substantial way, to comply with the Pre-Action Protocol involves the court staying the proceedings until the Pre-Action Protocol has been complied with, or making an adverse costs and interest order against a party for non-compliance with the Pre-Action Protocol, or both.

A situation where compliance with the Pre-Action Protocol may not be entirely straightforward is where a defendant to existing proceedings wishes to bring in a third-party as a defendant. An example may be where an owner has sued a main contractor for damages due to defective works, and the main contractor, in turn, wishes to bring into the proceedings the subcontractor who was ultimately responsible for the alleged defects. Part 20 of the Civil Procedure Rules permits defendants to bring in new parties to existing litigation, and claims made by defendants against third-parties are referred to as “Part 20 claims” (although under impending reforms they will, from April 2006, be called “additional claims”).

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money in litigation.”

The issue of compliance with the Pre-Action Protocol in circumstances where a Part 20 claim is brought arose in *Alfred McAlpine Capital Projects Ltd v SAC Construction (UK) Ltd* [2005] EWHC 3139 (TCC), which concerned existing proceedings between a main contractor and a subcontractor over responsibility for defects in an office building. It emerged through pre-action communications between the main contractor and the subcontractor that a key aspect of the subcontractor's defence was that if there were defects in the building as alleged, then they were the responsibility of the architects and structural engineers engaged by the main contractor, and not the subcontractor's responsibility. Once proceedings were commenced, both the main contractor and the subcontractor looked to join the architects and structural engineers as parties to the proceedings. There were a number of issues before the Court, but one of them was whether the subcontractor, as a Part 20 claimant, was entitled to proceed against the architects and structural engineers as Part 20 defendants, given that the Pre-Action Protocol had not been followed as between the subcontractor and the Part 20 defendants. A trial date for the hearing had been set by the time the Court considered the various submissions concerning compliance with the Pre-Action Protocol.

The complaint of the architects, as Part 20 defendants, was in substance that as new parties to the existing litigation, they ought not be required to proceed with the litigation, as there had been insufficient information provided by the subcontractor concerning its claim before it commenced proceedings against the architects. The architects sought a stay of the Part 20 proceedings until such time as there had been compliance with the Pre-Action Protocol.

Jackson J held that there would not be a stay of the Part 20 proceedings. Significant to his Lordship's decision was the fact that:

- the architects had received a certain quantity of information concerning the subject matter of the claim *before* proceedings were brought; and

- moreover to stay the proceedings would jeopardise the trial date which had already been set.

The position which the architects found themselves in could be remedied by the subcontractor providing further information concerning its Part 20 claim, or if there was prejudice suffered by the architects then a costs order could be made against the subcontractor at the end of the proceedings to reflect the fact that it had not complied with the Pre-Action Protocol.

What this decision demonstrates is that the Court, in the exercise of its case-management powers, will not, for the purposes of Part 20 claims, insist upon compliance with the Pre-Action Protocol at all costs. The Court will, in endeavouring to comply with the overriding objective of the Civil Procedure Rules, attempt to strike a balance between ensuring that new parties to existing litigation have the benefit of substantial compliance with the Pre-Action Protocol, and on the other hand the undesirability of losing a trial date should proceedings be stayed to permit compliance with the Pre-Action Protocol. It may be noted that in another recent decision, the TCC has indicated that it may view sympathetically the position of Part 20 claimants who have genuine difficulty in complying with the Pre-Action Protocol: *Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* [2005] EWHC 2174 (TCC) at [14], per HHJ Coulson QC.

The Department of Constitutional Affairs has recently been reviewing the various Pre-Actions Protocols with a view to encouraging parties to engage in Alternative Dispute Resolution procedures. The TCC has initiated a consultation of the application of the Construction and Engineering Pre-Action Protocol, which will include a review of the position in respect of Part 20 claims. A copy of the consultation document may be found on the TeCSA website at www.tecsa.org.uk.

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Henry Sherman

In recent years arbitration in England has suffered a significant decline in popularity as the disputes resolution method of choice under domestic construction contracts. Internationally the position is very different.

International Arbitration: does it still lead the field?

The decline of domestic arbitration is the result of two main factors – the first, the perception, only partially accurate, that large construction arbitrations generate a higher level of cost than similar proceedings before the TCC and, secondly, the far more difficult issue of multiparty disputes. In short, the dilemma – familiar to many – is that in the absence of agreement between the parties multi-party proceedings cannot be heard by a single arbitral tribunal. Many if not most large-scale construction disputes will of course come into that category.

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...arbitration remains the pre-eminent method of disputes resolution for international construction contracts of every kind.

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Internationally the position is very different. While generally speaking similar problems are encountered in relation to multiparty proceedings – and these can usually only be overcome by some form of ambitious umbrella agreement – arbitration remains the pre-eminent method of disputes resolution for international construction contracts of every kind.

I was reminded of the sheer scale of international arbitration and its importance to the international construction industry at a recent CMS weekend seminar which we held in Brussels and which was attended by colleagues from over a dozen jurisdictions including many from central and eastern Europe.

At present we are seeing particularly rapid growth across this region as the increasing sophistication of these markets together with EU accession have created an environment in which international arbitration is beginning to gain a significant level of acceptance.

The other factors leading to growth in recourse to arbitration in the new Europe are common to most if not all jurisdictions. They include:

- ✓ Flexibility;
- ✓ Party autonomy subject only to the principles of natural justice;
- ✓ Recourse to a neutral tribunal in a neutral location – a significant consideration where the project is in a politically sensitive country;
- ✓ Confidentiality;
- ✓ Finality – some jurisdictions (unlike England and Wales) exclude all appeals; and
- ✓ Ready enforceability by international convention or otherwise.

As is well known, the world of international arbitration is dominated by the major arbitration institutions and the arbitral rules which they produce. First on the scene was probably the London Court of International Arbitration, founded in 1892, while the most high profile is the arbitration regime administered by the International Chamber Commerce or ICC which is based in Paris and which was founded in 1919.

There is of course an increasing range of dispute resolution mechanisms available and the list has grown longer over recent years. They include expert determination and its closely related cousin, early neutral evolution, as well as dispute review boards and of course mediation. Increasingly – and this can be seen in the continuing revolution at the TCC – the trend is towards combining one or more of these procedures together with litigation or arbitration to provide a sort of a la carte menu of options to the parties where a dispute arises. With their neutral status and access to technical expertise arbitral institutions are ideally placed to provide such a service and many of them are now doing so. By way of example, the LCIA offers a wide-ranging mediation procedure as a prelude to arbitration under the LCIA rules while the ICC provides conciliation services as well as a pre-arbitral referee procedure aimed at providing a fast track provisional solution where an urgent problem arises.

Recourse to arbitral institutions is often expensive. The ICC for example has a sliding scale of administration expenses and arbitrator's fees which obviously need to be added to the other costs of the parties'. On the other hand, the advantages of what is sometimes called the administered arbitration option should not be overlooked. All significant arbitral institutions provide robust recommended arbitration clauses and well-established sets of rules which the parties accept when they incorporate those clauses into their contracts. The major institutions also operate an administrative service to help organise the mechanics of the arbitration and these bodies will also act as secure and independent fund holders of sums deposited by the parties in respect of costs.

The alternative is for the parties to agree to a so-called ad hoc arbitration which is effectively administered by the parties themselves. Parties adopting this course are able to make use of an internationally respected set of rules produced by the UN Commission on International Trade Law or UNCITRAL. While UNCITRAL does not administer arbitrations, its rules address the fundamentals of effective arbitral procedures including provisions for the composition of the tribunal and challenges to arbitrators and the procedure to be adopted by way of submissions, evidence and hearings.

One increasingly high profile area addressed in the UNCITRAL rules among others is the question of so-called interim measures of protection. Such measures typically include by way of example orders by the tribunal aimed at preserving the subject matter of the dispute which could include interim injunctions. The UNCITRAL and ICC rules contain broadly similar provisions. In addition, Article 23 of the ICC rules also allows the parties to apply to any competent court for an order in respect of "interim or conservatory measures" in appropriate circumstances and makes it clear that such an application will not be seen as a breach of the arbitration agreement.

Inevitably, the readiness with which the parties can have recourse to local courts and the rules which apply vary widely between jurisdictions. To help parties find their way through this maze we have put together a CMS guide to arbitration in Europe covering arbitration practice in all the major European jurisdictions. The Guide includes sections dealing with interim measures and the role of the courts in each jurisdiction and is available online on www.law-now.com/guidetoarbitration05.

As for the position in the UK, under the 1996 Arbitration Act the parties are free to agree what powers the tribunal should have in relation to interim orders, including for such matters as security for costs and injunctions. Generally, the parties will not have agreed any specifics in writing and the default position under the Act is set out in section 38. Among other matters this gives the tribunal power to:

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we have put together a CMS guide to arbitration in Europe covering arbitration practice in all the major European jurisdictions.

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- ✔ Order a claimant to provide security for costs; and
- ✔ Make directions for the preservation of property.

The Act also gives the courts a role. At section 44 it provides that unless otherwise agreed by the parties the court will have the power to make a range of orders including orders to preserve evidence and grant an interim injunction.

In the space available this can only be a broad brush look at international arbitration. Rules and local laws can vary and widely and an important further factor to be borne in mind is the civil law nature of European jurisdictions and the different approach which they traditionally have to matters such as disclosure and witness evidence. For the international construction community, however, arbitration remains probably the best option for the binding resolution of international disputes.

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The Company Law Reform Bill was finally introduced to Parliament on 1 November. It proposes extensive changes to simplify and improve company law. The focus is on deregulation and this is expected to save businesses up to £250 million a year, including £100 million for small businesses. The new law will also be easier to understand and will allow a greater degree of flexibility.



Barney Hearnden

Company Law Reform Bill

The stated aim of the new law is to ensure that Britain remains one of the best locations in the world to set up and run a business, to keep the regulatory burden on business to a minimum, to promote shareholder engagement and to encourage a long-term investment culture. Certainly, it is true to say that there has been extensive consultation on the proposals with industry and lawyers, which has helped to ensure that the new bill does represent an improvement on the status quo.

The provisions most relevant to directors of a company are as follows:

- ✔ for the first time, there will be a statutory statement of directors' duties. Although this will not provide much guidance on how in practice directors should discharge their duties, it will provide a clear and accessible list of what those duties are;
- ✔ the ability of shareholders to sue directors (on behalf of the company rather than the shareholders themselves) has been codified, with the aim of making such actions easier;
- ✔ all directors (not just those at serious risk of violence or intimidation) will be able to provide a service address for the public record. However existing residential address details will not be removed;
- ✔ private companies will be able to give financial assistance for the acquisition of their own shares or those of their (private company) parent, without having to go through the 'whitewash' procedure;
- ✔ private companies will be able to reduce their share capital by a special resolution supported by a solvency statement from the directors, rather than having to go to court;
- ✔ at least one director of every company will have to be a natural person;
- ✔ private companies will no longer need to have a company secretary; and



...to ensure that Britain remains one of the best locations in the world to set up and run a business...





...provisions relating to auditing... are designed to increase the transparency of the audit procedure



- ▼ the time period for filing accounts will be reduced to nine months (instead of 10 months) for private companies, and six months (instead of 7 months) for PLCs.

There are also a number of provisions relating to auditing. These are designed to increase the transparency of the audit procedure and the relationship between the company and the auditor:

- ▼ subject to annual shareholder approval, all companies will be allowed to limit the liability of their auditors to an amount considered by a court to be 'fair and reasonable' (i.e. an amount proportionate to their fault);
- ▼ shareholders will have greater rights to question auditors and named partners for audit reports (including the right for shareholders of quoted companies to raise questions about the reasons for auditors changing);
- ▼ audit reports will have to name the individual lead auditor as well as the audit firm (although provision is made for confidentiality in exceptional cases);
- ▼ changes to the requirements relating to the statements that auditors have to make when they stop auditing a company: explanatory statements are required more often, and some statements need to be sent to appropriate regulators; and
- ▼ creation of a criminal offence of recklessly or knowingly including misleading, false or deceptive matters in an audit report.

Shareholder engagement will be promoted through enhancing the powers of proxies and making it easier for indirect investors to be informed of and exercise governance rights in the company.

The Bill also includes a power to allow faster updating and amendment of company law in the future, subject to consultation and Parliamentary scrutiny requirements. This should avoid the sort of delays which have been experienced with the introduction of the current bill.

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The draft Bill with the government's latest proposals to reform the law of corporate manslaughter was published in published in March 2005. If enacted it will make it easier to convict companies.



Mark Tyler

Corporate manslaughter reform update

It has long been a Labour Party manifesto commitment to introduce legislation, though its exact scope has been the subject of much argument. Proponents of reform in this area continue to press the government to act, and to make more radical changes to the law than the Bill provided for.

The Bill aims to make convictions easier to secure mainly by removing the requirement in the existing law to prove gross negligence on the part of an individual director or other "controlling mind". The new offence would apply to deaths caused by gross breaches of any civil duty of care owed by corporation (and in certain situations Crown and other governmental/public bodies) where these are attributable to management failures by the senior management of the whole or a substantial part of the organisation.

The Bill also attempts to clarify what is meant by a 'gross' breach, as meaning "*conduct that falls far short of what can reasonably be expected of the organisation in the circumstances*". Where this involves an alleged breach of health & safety legislation (or for that matter official codes of practice or guidance), there are provisions for taking into account the seriousness of the breach, whether management knew or should have known about it and any risk of death or serious harm it may have posed and whether they sought to cause the company to profit from the breach (i.e. by cutting corners)

Pre-legislative scrutiny of the Bill by a Committee of MPs ended in July 2005. Their report recommended the Bill should be modified to have simply 'management failure' as the basis of liability. Also, the MPs argued there should be provisions for prosecuting directors and other individuals for contributing to a management failure and that parent companies should face liability for failures affecting subsidiaries; that there should be narrower exemptions from liability for public bodies; and that there should be no requirement to obtain the Director of Public Prosecution's consent to bring private prosecutions.

The government has not yet indicated when the Bill will be introduced into Parliament. The official line remains (as for several years) that it will be "when Parliamentary time allows". In the meantime, the Scottish Executive's appointment of an Expert Group on Corporate Homicide has produced separate proposals for new offences in that jurisdiction, and has rejected the view that these liabilities should be uniform across the UK.

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The Bill aims to make convictions easier to secure...



For a contract to be enforceable it must be executed correctly. Getting it wrong can prove to be a costly exercise leaving a party without sufficient protection. Tips on getting it right are provided below.

Top tips on executing contracts

Contracts under hand and deeds

A new statutory instrument on the execution of deeds and documents by companies came into force on 15 September 2005 (“ the 2005 Order”), largely to standardise practice on the execution of contracts by companies and to address inconsistencies in the legislation.

Documents can be executed either as simple contracts (often called “ contracts under hand”) or as deeds. There are additional formalities for a document to be executed as a deed, and these vary according to whether the executing party is an individual or a company. Beware that backdating (of contracts or deeds) is an offence!

In some circumstances there is no choice but to execute the document as a deed, for example on the transfer of land or any interest in land (such as a lease), the creation of a legal mortgage or the grant of a power of attorney.

However, parties may elect to use a deed, commonly because:

- ✔ Deeds do not require ‘consideration’ (the price for which a promise is bought). Thus a parent company guarantee, where the parent offers the guarantee in return for what (at least in the past) might have been construed as no benefit, is generally executed as a deed.
- ✔ You can sue under a deed for up to twelve years from the date it was breached; if you execute under hand, the period is only six years.

Every deed must:

- ✔ state that it is intended to take effect as a deed (this is known as the “ face value” requirement);
- ✔ be correctly executed as a deed; and
- ✔ be delivered.

To satisfy the “ face value” requirement you only need to state the document is a deed – no particular form of words is needed.



In some circumstances there is no choice but to execute the document as a deed...



The remainder of this article reviews the requirements for due execution (for contracts under hand and for deeds) and delivery (this applies to deeds only).

Execution by companies

Most companies' articles provide that a contract under hand may be executed on behalf of a company by any person acting under its authority, not only a director. This is normally a matter of authorising an individual, usually by means of board minutes, to sign on behalf of the company. No attestation of the signature is needed.

If the contract is to be executed by a company as a deed it must be:

- ✓ executed by the company and expressed as such; and
- ✓ delivered as a deed.

A company may execute a deed by:

- ✓ using its company seal; or
- ✓ the signature of two directors; or
- ✓ the signature of the company secretary and a director; or
- ✓ appointing an individual, typically a director or another company, as its attorney. The appointing power itself has to be executed as a deed.

If two directors, or a director and the secretary, sign the deed, or attest its sealing, there is a statutory presumption in favour of a purchaser that the deed has been duly executed.

The articles of association of the company will normally specify how the company may use its seal, and may for commercial reasons, permit the directors to authorise sealing attested by someone who is neither a director nor a secretary. This does not, however, confer the same presumption of due execution on a purchaser as if sealing were witnessed by two directors or one director and a company secretary.

Under the 2005 Order, where several companies are executing the deed and the same persons act as their directors or secretaries, the directors and secretaries must sign separately for each company they represent.

Execution by partnerships

Any partner may execute a contract under hand on behalf of the partnership if authorised to do so. The signature block should show the name of the partner and of the partnership and state that he is a partner.

Deeds should be signed, witnessed and delivered by all the partners unless all the partners have entered into a power of attorney (which must itself be executed as a deed by all of them) authorising someone to execute deeds on their behalf. For administrative ease the partnership deed (where used) will often allow deeds to be validly executed where a limited number of them (say, two) sign.

Execution by Limited Liability Partnerships

An LLP can execute a contract under hand by fixing its common seal (if it has one) or by a member of the LLP signing with the document being expressed as executed by the LLP.

Prior to the Order if the document was to be executed as a deed, it had to be signed by two members or under the common seal. However, the 2005 Order does not expressly deal with LLPs, which is unfortunate since the relevant legislation for LLPs works by adapting the legislation for companies and has been thrown out of kilter by the changes. Although the 2005 Order has helped clarify the law in some areas, for example the presumption of delivery as discussed below, it has muddied the area in relation to LLPs as the presumption of delivery is not similarly applicable. This position is currently under review by the Department for Constitutional Affairs.

The presumption of due execution discussed in the context of companies above will apply. It is for the members to determine in the members agreement what the formalities for the execution of contracts and deeds are between the members, and which of them should



Any partner may execute a contract under hand on behalf of the partnership if authorised to do so.



sign. This does not affect the ability of a purchaser to rely on the presumption of due execution.

Delivery

Finally, as noted earlier, unlike a contract executed under hand a contract executed as a deed must be “delivered”. Delivery does not necessarily mean physically passing the document to the other party, but merely that the person who has executed it must in addition show that he intends to be bound.

There is a rebuttable presumption in favour of purchasers (for example a lessee or mortgagee providing some benefit) that all deeds executed in a certain way are delivered when executed, subject to a contrary intention being proved. One result of the 2005 Order is that the presumption is rebuttable even where the deed is executed by a company without using its seal.



...what was and still is needed is legislation to tie together this disparate area of law.



Crystal clear?

The 2005 Order has brought greater uniformity to the area of execution of documents, however what was and still is needed is legislation to tie together this disparate area of law. A useful summary of consolidated legislation can be found at the annex to the guidance issued by the Department of Constitutional Affairs at <http://www.dca.gov.uk/pubs/deed-doc-guidance.pdf>.

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Julian Bailey

Adjudication cases round-up

Midland Expressway Ltd v Carillion Construction Ltd [2005] EWHC 2963 (TCC)

This is a particularly important case for those involved in PFIs and PPPs. It concerned the construction of the new M6 toll road, near Birmingham.

- ✔ The contractual arrangements for the PFI involved a special-purpose vehicle (SPV) company entering into a concession agreement with the Secretary of State for Transport, under which the SPV agreed to design, build and operate the M6 toll road.
- ✔ The SPV's design and construct operations were subcontracted to a contractor, which was a consortium of large construction companies.
- ✔ The subcontract contained "equivalent project relief" provisions which, in effect, limited the subcontractor's entitlement to payment for such matters as variations, and compensable delay, to the amount which the SPV was able to recover from the Secretary of State under the concession agreement. One of the mechanisms by which the subcontract purported to do this was to restrict the right of the subcontractor to adjudicate an issue until a corresponding adjudication was brought between the SPV and the Secretary of State.

During the project, the subcontractor made certain claims for additional payment due to variations. The SPV, in turn, sought to pass those claims up the line to the Secretary of State. Before there was any final resolution of those claims between the Secretary of State and the SPV, the subcontractor sought to institute an adjudication against the SPV. The SPV then brought legal proceedings, seeking orders that the subcontractor was not entitled to proceed with any adjudication until the SPV had brought an adjudication against the Secretary of State, under the concession agreement. In short, the SPV's contention was that the "equivalent project relief" provisions and adjudication provisions of the subcontract prevented an adjudication from going ahead at that point.

In opposing this application, it was argued for the subcontractor that the "equivalent project relief" and adjudication provisions in the subcontract were unenforceable to the extent that they cut across the subcontractor's statutory entitlement, under the Housing Grants, Construction and Regeneration Act, to commence an adjudication "at any time" (section 108(2)(a)). It was argued that the legislation does not permit contractual schemes which postpone the point at which a party may commence an adjudication. These arguments were accepted by Jackson J in the Technology and Construction Court, who held that the adjudication provisions were either invalid, or at the very least they ought to be read in such a way as to be compliant with the legislation. Either way, the result was the same, i.e. the adjudication provisions of the contract fell away, leaving the Scheme for Construction Contracts to apply. Similarly, the "pay when paid" aspect of the "equivalent project relief" provisions was held to infringe the prohibition on such clauses (section 113 of the Act).

The repercussions of this case for PFI and PPP projects are significant. The purpose of “equivalent project relief” provisions is to ensure that SPV companies act as conduits for contractor claims, without having to bear a residual economic liability for those claims. Limiting a subcontractor’s right to bring an adjudication is a device that has been used to try to meet this objective, but in light of *Midland Expressway v Carillion* that will no longer be an option.

Carillion Construction Ltd v Devonport Royal Dockyard [2005] EWCA Civ 1358

The Court of Appeal has reaffirmed the approach of the courts to adjudicator’s decisions, namely that they are to be treated as enforceable, and will only be interfered with in rare situations. This is so even if the adjudicator has made obvious or highly arguable errors of fact or law.

The facts of this case were quite detailed, but in headline terms they concerned a dispute over a subcontractor’s entitlement to payment for performing works in upgrading a dock.

- The terms of payment under the subcontract, and a related “alliance agreement” between the parties, used a “target cost” mechanism, so that the pain or gain of cost overruns or savings would be shared between them.
- The project works were delayed, and there were disagreements between the main contractor and the subcontractor as to contractual responsibility for this delay.
- This, in turn, spilled over so as to give rise to a dispute as to how the “target cost” mechanism was to be applied, in determining the final account value of the subcontractor’s works. The subcontractor referred this dispute to adjudication. The amount claimed by the subcontractor was more than £10m.

The subcontractor was successful in the adjudication, and was awarded around £10.6m by the adjudicator. The

subcontractor sought summary judgment to enforce the adjudicator’s decision, but this application was opposed by the main contractor, who contended that the adjudicator’s decision should be set aside on the basis that it was made in excess of jurisdiction, in breach of the rules of natural justice, and that it was not otherwise compliant with the *Housing Grants, Construction and Regeneration Act* nor the *Scheme for Construction Contracts*. It was contended that the adjudicator had disregarded evidence that he ought to have taken into account, that he made errors in calculating the amount owing to the subcontractor, and that he had reached his decision on a basis for which neither party had contended, where he had not given the parties an opportunity of making submissions on the relevant point.

It was held by the trial judge (Jackson J) and then the Court of Appeal that the adjudicator’s decision was to be enforced. The criticisms made against the adjudicator’s decision by the main contractor were mainly characterised as being attacks on findings of fact or law made by the adjudicator, which as the Court of Appeal emphasised are not open to challenge on enforcement proceedings. The adjudicator had considered the arguments made by the parties, the evidence presented, and he had decided the dispute which was referred to him. As the Court of Appeal held:

“The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator’s decision unless it is plain that the question which he had decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by [the main contractor] in the present case; which...may, indeed, aptly be described as ‘simply scrabbling around to find some argument, however tenuous, to resist payment’”.

Ardmore Construction Ltd v Taylor Woodrow Construction Ltd [2006] CSOH 3

In this Scottish case the decision of an adjudicator was set aside on the basis that he had not afforded natural justice to the parties to the adjudication.

The adjudication arose out of a subcontract for works at Glasgow Harbour, where the Scottish edition of the Standard Form of Sub-Contract Agreement, 1998 edition, was used.

- ✔ The underlying dispute between the parties concerned the subcontractor's entitlement to overtime payments.
- ✔ The subcontractor contended that it had been instructed by the main contractor to accelerate its works, where the need to accelerate did not arise out of any breach of contract by the subcontractor. It was contended by the subcontractor that, in reliance on the instruction, it *did* accelerate its works, and was entitled to compensation for having worked overtime.
- ✔ The main contractor disputed these contentions. It said that an acceleration instruction was not given in accordance with the requirements of the contract, and accordingly the subcontractor was not entitled to compensation under the contract for acceleration. Furthermore, it said that the subcontractor had not adequately substantiated its claim for acceleration costs.

Meeting no success with the main contractor, the subcontractor commenced an adjudication. The dispute which was referred to the adjudicator was identified by the referring party as whether the main contractor had given to the subcontractor an instruction, under the subcontract, to work overtime. The subcontract provided for the making of *written* instructions to accelerate. But in his decision, the adjudicator found that there was either a *verbal* instruction given by the main contractor to the subcontractor to work overtime, or the main contractor had *acquiesced or agreed* to the subcontractor

working overtime. The significance of this finding was that neither party in the adjudication had made any contentions to the adjudicator concerning the making or effect of any *verbal* instruction, or whether the main contractor had *acquiesced or agreed* to overtime being worked.

In short, the adjudicator's decision was tainted because he had made his decision on a basis for which neither party had contended, and in respect of which the unsuccessful party (the main contractor) had neither notice nor the opportunity to make representations. When the decision came before the Court of Session for enforcement, Lord Clarke held that there had been a "*clear and substantial breach of natural justice*" by the adjudicator, and that his decision should be set aside.

Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 2152 (TCC)

Section 105(1) of the Housing, Grants, Construction and Regeneration Act 1996, so far as material, provides, "*In this Part 'construction operations' means, subject as follows, operations of any of the following descriptions... (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration; (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works...*"

The claimant was engaged to cleanse and disinfect farms after the outbreak of foot and mouth disease to enable them to reopen for business. The actual cleaning used high pressure hoses. On most sites, the claimant's work also consisted of the

construction of temporary roads, buildings and disinfecting facilities, the provision of secure barriers, the construction of lagoons to hold the slurry created by the use of the hoses and the removal of the contaminated material. A question arose as to whether the claimant's contract was a 'construction operation' within the meaning of the 1996 Act.

The court ruled that the contract, being one essentially for the provision of cleansing and disinfecting work on a farm in order to restore the farm to active use, was, as a whole, a 'construction contract' within the meaning of s105(1) of the Act. The purpose of the exercise was to put the farm into a state in which it could be restocked and brought back into working life, which readily fitted the description of 'restoration'.

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Recent cases round-up



Julie Dean

Machenair Ltd v Gill and Wilkinson Ltd [2005] EWHC 445 (TCC)

This case examined the way in which a contractor's standard terms and conditions may be incorporated into a sub-contract by simple reference to those conditions on the face of the sub-contract order.

Gill was the sub-contractor employed on a refurbishment. Gill employer Machenair as sub-subcontractor based upon three separate purchase orders, each of which had a note at the bottom stating, "this order is placed subject to our conditions of purchase, a copy of which is available upon request." Gill contended that their note was sufficient to incorporate their standard conditions into the contract.

It is an accepted principle that express terms can be incorporated into a contract simply by making reference to those terms within the written order, but without setting out in full all the relevant terms. However, for this to be effective, it is essential that the party tendering the document has done all that is reasonably sufficient to give the other party notice of its terms. If a particular condition relied upon by the other party is one that is onerous or unusual, or one that seeks to exclude a right that would otherwise be given by statute, very clear notification of the term must be given.

Mr Justice Jackson concluded that Gill's standard conditions were not incorporated into the sub-contract. On the first two purchase orders the wording making reference to Gill's conditions of purchase had been substantially obliterated by the fax header to such an extent that it was unreasonable to expect Machenair to decipher the words underneath. Even if that were not the case, the words Gill used were not sufficient to incorporate their conditions. The conditions were extensive, not of a standard form within the industry and had never been supplied to Machenair. Taking all these into account, it was not reasonable to impose those conditions upon Machenair.

The Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc [2005] 3 All ER 775

This case concerns Part 36 offers into court and what effect an offer to settle a claim has on costs.

In October 2000, contractors employed by the defendant trespassed onto the claimant's land and felled approximately 400 trees. On 26 February 2002, the defendant wrote to the claimant offering to settle the claim in the sum of £35,000. The offer was not accepted within the defendant's 21 day specified time limit and the claimant commenced proceedings for £780,000. Further, the defendant did not make the payment into court

of the £35,000 in accordance with CPR r36.10(3). However, on 20 August 2002, the defendant paid into court £20,000. Following the trial, the judge awarded the claimant damages in the sum of £25,600. As the claimant had beaten the payment into court and in the absence of an effective payment into court, they were entitled to have their costs paid. However, they were only entitled to half their costs as the claim had been exaggerated and their approach to the litigation had been unreasonable. The claimant appealed on the grounds that the judge had not taken proper consideration of the offer of 26 February 2002.

Dyson LJ noted in his judgement that the CPR provides no guidance as to how the court should exercise its discretion in circumstances such as these. However, he stated four conditions that must be satisfied if a written offer is to be treated as having the same effect as a payment into court:

- ✔ the offer must be expressed in clear terms so there is no doubt as to what is being offered;
- ✔ it must be open for acceptance for at least 21 days;
- ✔ it must be genuine and not be a “sham or non-serious in some way”; and
- ✔ the defendant must be good for the money at the time when the offer was made.

If none of the above is satisfied, then it is likely that the court will hold that the offer affords the defendant no costs protection at all. But, where all the above conditions are met, then Dyson LJ stated that he could see no reason in principle why the effect of an offer should differ from a payment into court. However, as each case will always turn on its own facts, unless there is a very good reason not to do so, if possible it will always be more prudent to pay into court.

Ove Arup & Partners International Ltd v Mirant Asia-Pacific (Hong Kong) Ltd [2005] EWCA Civ 1585

This case concerned the obligations of a structural engineer in designing foundations for a power station. There was an issue in the case arising out of the condition of the underlying ground on which the foundations in question were to be constructed, and the design assumptions and verifications made by the structural engineers. The structural engineers did not have a full set of information about the ground conditions, and prepared their design based on certain assumptions. As it happened, the power station subsided after construction due to the foundations not being suitably designed.

The facts of the case were particularly complicated, and will not be rehearsed here. Nevertheless, Lord Justice May provided a useful summary of the obligations of the structural engineers, in designing the foundations:

“ (1) [the design engineers] were obliged under the design agreement to carry out their design with the skill and care of ordinarily competent engineers for work of this kind. This is not contentious.

(2) A competent foundation design requires a sufficient knowledge of the ground conditions to determine a safe bearing capacity for foundations.

(3) If the designing engineer's knowledge of the ground conditions is insufficient to enable him to determine a safe bearing capacity, he may work initially upon assumptions. But he has an obligation to see to it that the requisite additional information is acquired to verify the assumptions. He does not necessarily have to get the additional information personally, but he must see to it that someone does, and he must see to it that the client knows that the additional information has to be obtained. Absent an explicit warning and disclaimer, it would not

be sufficient for a designer, whose initial design is based on an unverified assumption, to leave it to the client alone to obtain and evaluate the additional information. The designing engineer is responsible for the design, and he should normally see to it that the necessary additional information is conveyed back to him, so that he may judge that it is sufficient for the purpose of his design"

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Alison Newstead

Recent Health and Safety cases round-up

Dual Vicarious Liability: *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd & Others* [2005] EWCA Civ 1151

In a landmark ruling changing two centuries of established principle, the Court of Appeal has decided that two employers can both be vicariously liable for the negligence of an employee.

The claim related to a flooding at Viasystem's factory caused by a fitter's mate (Mr Strang), who had crawled through a duct and damaged a sprinkler system. The first defendant (installer of air conditioning) had sub-contracted ducting work to the second defendant. The second defendant contracted with the third defendant to provide fitters and fitters' mates (who included Mr Strang) on a labour only basis.

It was agreed that the claimant was entitled to recover in contract from the first defendant. The claimant also claimed against the second and third defendants (and the first defendant likewise claimed an indemnity against each).

In the Court of Appeal the issue was whether the second and third defendants could both be vicariously liable for Mr Strang's negligent acts.

It held that there was no binding authority which excluded two parties being vicariously liable for the breach of duty, and that it arose in this case both 'employers' were entitled to exercise control over Strang's work. As the extent of this control was the same for both defendants, and either could have prevented Mr Strang's actions, they each had to bear half the damages awarded.

Donaldson v Hays Distribution Services Ltd [2005] SLT 733

The recent decision in the Scottish courts in the case of *Donaldson v Hays Distribution Services Ltd* has clarified an important question about the liability of premises owners and occupiers.

The Claimant was a customer at a shopping centre where she was crushed against a wall of a loading bay by a lorry. The claimant argued that the Defenders, who were alleged to have been in control of the loading bay, were in breach of Regulations 17(1) and 17(2) of the Workplace (Health, Safety and Welfare) Regulations 1992, which were enacted in the UK in order to implement the EU Workplace Directive. These Regulations require in essence that every workplace should be organised in such a way that pedestrians and persons are protected from vehicle movements.

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