Fenwick Elliott

QUESTION TIME

Victoria Russell and David Bebb

October 2006

UNIVERSITY COLLEGE LONDON

QUESTION TIME

1. What is the difference between "best endeavours" and "reasonable endeavours"?

The terms "best endeavours" and "reasonable endeavours" are used to dilute or qualify actual contractual obligations; these terms have no definitive legal meaning, and each case where they are in dispute will be decided on its own facts.

Best endeavours

The use of "best endeavours" is closely linked to the concept of reasonableness.

In the case of *Terrell v Mabie Todd & Co Ltd*, in 1952, it was held that a company which had agreed to use its best endeavours to promote sales must "do what they reasonably could in the circumstances". In deciding what it must do to meet its obligations, the Board of Directors must have acted reasonably. The standard of reasonableness in that case was found to be that of a "reasonable and prudent board of directors, acting properly in the interests of their company and applying their minds to their contractual obligations".

In the case of *Pips (Leisure Productions) Ltd v Walton*, Sir Robert Megarry said, in 1981, that "'best endeavours' are something less than efforts which go beyond the bounds of reason, but are considerably more than casual and intermittent activities", thus supporting the view in the *Terrell* case that the actions which should be taken were limited to what constituted a reasonable approach.

The Court of Appeal gave guidance in the case of *IBM UK Ltd v Rockware Glass Ltd* in 1980. In that case, one party to a contract had agreed to use their best endeavours to obtain planning permission. Planning permission was refused. The party under the best endeavours obligation decided not to appeal the decision. The court held that the party who had agreed to use their best endeavours was under an obligation "to take all those steps in their power which are capable of producing the desired result ... being steps which a prudent, determined and reasonable ... person ... acting in his own interests and desiring to achieve that result would take". If the proposed appeal had a reasonable chance of

success, then the party which had agreed to use their best endeavours was obliged to bring it.

Construction contracts of course often require a contractor to use their best endeavours in carrying out and completing the works. An obligation to use best endeavours to keep up to date in technical developments in this respect was held in the case of *Midland Land Reclamation Ltd and Leicestershire County Council v Warren Energy Ltd*, in 1995, to be an obligation to do what was reasonable in the circumstances known to the relevant party at the time of performance. In his judgment, HHJ Bowsher QC quoted a statement found in an earlier case, *Sheffield District Railway v Great Central Railway* (1911), that "best endeavours means what it says - it does not mean second best endeavours". He did not agree that best endeavours must be construed in the light of what was known at the time of entering into the contract, and stated that they must at least be construed in the light of the science or knowledge as it developed from time to time during the life of the project. This did not mean that the actions of either party should be viewed with the benefit of hindsight, but rather that the parties should use their best endeavours to develop their systems and methods of operation as they went along.

Most construction professionals would instinctively expect that, in overcoming problems on a construction site, a contractor should apply such organisational and management skills, and deploy such available resources, as are required to minimise the effects of whatever problems have arisen. This does not normally, however, go so far as to include significant and substantial expenditure on such further additional resources.

As stated in the *Sheffield District Railway* case, "'best endeavours' does not mean the limits of reason must be overstepped with regard to the costs involved, but short of this qualification (and any other relevant to the particular facts in question) 'no stone should be left unturned'".

Reasonable endeavours

The case of *UBH (Mechanical Services) Ltd v Standard Life Assurance Company* (1986) confirmed that an obligation to use reasonable endeavours is less onerous than one to use best endeavours. This case held that the party which was obliged to use its reasonable endeavours could weigh up the obligations in the contract against commercial considerations, including the uncertainties and practicalities relating to fulfilling its obligations, when deciding what action was required. The party obliged to use its reasonable endeavours was also entitled to consider the likelihood of success as a matter of prime importance when deciding what action should be taken.

In the case of *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* in 1997, an obligation to use reasonable endeavours to agree failed for uncertainty as no criteria had been provided in the contract as to what would be reasonable to do to meet the obligation. However, in the case of *RAE Lambert v HTV Cymru (Wales) Ltd* in the following year, 1998, the Court of Appeal held that where a contract was clear in stating what the parties must do in order to meet a reasonable endeavours obligation, the clause would be enforceable.

Conclusion

Whenever the terms "best endeavours" and "reasonable endeavours" are used, there is plenty of scope both for doubt and for argument as to what the relevant party may have to do to fulfil its obligations. For both these terms, the relevant party is entitled not to go beyond the realms of what would be reasonable. Best endeavours should therefore not be regarded as "the next best thing to an absolute obligation" (*Midland Land Reclamation Ltd*).

A reasonable endeavours obligation is likely to oblige the relevant party to make only minimal efforts to fulfil the obligation; commercial considerations can certainly be taken into account when deciding what action should be taken.

Finally, the expression "all reasonable endeavours" is generally regarded to be a halfway point somewhere between the other two terms.

2. What is "economic duress"?

The test for economic duress is whether the circumstances in question are simply the "rough and tumble of the pressures of normal commercial bargaining" (per Dyson J in *DSND Subsea Limited v Petroleum Geo-Services ASA* [2000]) ("DSND") or whether the pressure is legitimate. As this test stands, only very rare factual circumstances will surmount its hurdles, partly because the courts are always reluctant to interfere with agreements reached between commercial entities, especially if the result is to render a contract voidable. Courts are keen to uphold the principle of freedom of contract. As a consequence, it may be better to plead "unjust enrichment".

The doctrine of unjust enrichment has four main requirements, as follows:

1. The defendant has been enriched by the receipt of a benefit;

2. This enrichment is at the expense of the "victim";

3. The retention of the enrichment would be unjust, and

4. the defendant has no defence against such a claim.

In *Woolwich Equitable Building Society v IRC* Lord Goff said, in 1993, that "money paid under compulsion may be recoverable" and "I would not think it right, especially bearing in mind the development of the concept of economic duress, to regard the categories of compulsion for present purposes closed".

As a "victim" can use the evolving theories of "opportunism" and "bad faith" to reverse unjust enrichment, running an unjust enrichment argument will be easier than arguing economic duress, particularly bearing in mind the ideology of freedom of contract which may well preclude an argument of economic duress being successful.

Economic duress

The concept of economic duress is relatively new; it was recognised for the first time in 1976 in a shipping case, *Occidental Worldwide Investment Corp. v Skibs A/S Avanti*, where the charterers of two ships insisted that the shipowners reduce the rate of hire by threatening the shipowners that they, the charterers, would go bankrupt unless the rates

were reduced. It was found that the threats made by the charterers were false and fraudulent, and the owners were entitled to avoid the renegotiated terms of the charter. It was held that, in principle, relief on the ground of economic duress was available, although it was emphasised that in each case the court must be satisfied that the other party's consent was "overborne by compulsion".

The next few cases dealing with economic duress were also shipping cases. In 1992, the House of Lords reviewed the judgments thus far, in the case of *Dimskal Shipping Co SA v International Transport Workers Federation*. Lord Goff said:

> It is now accepted that economic pressure may be sufficient to amount to duress ... provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract.

There are two principal judgments dealing with economic duress in the construction industry. One was the judgment by Mr Justice Dyson in the *DSND* case in 2000 to which I have already referred above, and the second is a judgment also by Mr Justice Dyson in *Carillion Construction Limited v Felix (UK) Limited*, which took place one year later, in 2001. Economic duress was found to exist in the *Carillion* case but not in *DSND*.

DSND - No economic duress

In this case, DSND were engaged to carry out underwater works in the North Sea. The original contract was based on the pre-installation risers prior to the arrival of the floating production storage and off-take vessel (FPSO).

PGS, who engaged DSND to carry out this work, would supply and install the risers but DSND would retain full turnkey responsibility for the complete sub-sea system.

The programme was delayed. As a result of the delay and the consequent change in expected sea conditions, the method of connecting the FPSO to the risers had to be significantly altered to a more complex and costly one.

DSND were concerned about the impact of this change on the insurance arrangements for the project. They also wanted to be paid on a cost-reimbursable basis for their work. They instructed their employees not to take delivery of and assemble the equipment needed to carry out the (varied) works until PGS had given them assurances about the insurance and payment which they had requested, and which would have cost PGS an additional sum of nearly £10 million.

PGS were under financial pressure. They had signed an agreement with Conoco under which they would be liable for damages for delay.

In order to overcome PGS's financial concerns with Conoco, and DSND's concerns over insurance and payment, PGS and DSND signed agreements amending their original contract.

After the works package had been completed, PGS then tried to terminate the contract, as amended, on the ground of DSND's failure to remedy "a serious breach of contract". PGS raised for the first time an argument of economic duress as a ground for setting the contract aside.

Mr Justice Dyson set out the law on economic duress as follows:

> The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract ... In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure had acted in good or bad faith; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors.

He went on to say that:

> Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.

and held that DSND's suspension of their work pending resolution of the insurance and payment issues did not amount to "illegitimate pressure", even if it was a breach of contract and even if it amounted to pressure as such.

He found that PGS had reasonable alternatives instead of agreeing to DSND's demands.

He considered that the various meetings which led up to the signing of the contract amendments were nothing more than typical commercial negotiations and decided that there was insufficient contemporaneous evidence that PGS believed it had entered into the agreement under duress. A further point was that PGS had not raised the economic duress argument until after they first raised their allegations of breach of contract.

Carillion - Economic duress established

In this case, Carillion were the main contractor engaged to construct an office building in the City of London. They subcontracted the design, manufacture and supply of the cladding to Felix.

Under the head contract, Carillion would be liable to the developer for LADs at the rate of £75,000 per week if the project was delivered late.

Although Felix were behind programme, they insisted that Carillion sign an agreement relating to their final account, which was in dispute, before Felix would complete delivery of the cladding according to the programme.

Mr Justice Dyson held that Felix's threat to withhold deliveries was a threat to commit a clear breach of contract and thus constituted illegitimate pressure, and hence economic duress. They made their threat when they knew that there were a number of trades which were dependent upon them completing their work. They also knew that Carillion could not complete the works by the completion date and would thus incur LADs unless they, Felix, completed their cladding works on time. Mr Justice Dyson also accepted that Felix "must also have known that it would be impossible for Carillion to find an alternative supplier in time to meet the main contract completion date".

Mr Justice Dyson also agreed with Carillion that they had no practical alternative. They had argued that they had considered, and rejected, the possibility of injunction proceedings, and had also considered adjudication but had decided that that would take too long to complete. In this respect, Mr Justice Dyson said:

> Carillion was acting reasonably in deciding that it could not afford to wait six weeks [for adjudication].

As you can see, not many cases will be able successfully to demonstrate economic duress.

One particular difficulty for any "victim" who wants to rely on economic duress as an argument is the question of affirmation: in practical terms, following the alleged duress, the "victim" often carries on performing the contract in question. In their commentary on DSND, the editors of the *Building Law Reports* said as follows:

> Because a contract entered into as a result of duress is voidable as opposed to void, the victim must, if it wishes to rescind, do so within a reasonable time after the threat or illegitimate pressure has been lifted from the victim. Otherwise ... the alleged victim will affirm the contract which will necessarily therefore no longer be voidable.

It is generally felt to be more beneficial for a victim to plead its case on a basis that does not seek to make contracts voidable (undermining the ideology of freedom of contract) but instead reverses unjust enrichment or opportunistic exploitation. Commercial certainty is regarded as important. Some judges have not liked the concept of the courts looking into whether contracts were ethically unacceptable. Judgments given prior to the two decisions by Mr Justice Dyson having included the following statements:

> ... where businessmen are negotiating at arm's length it is unnecessary for the achievement of justice, and unhelpful in the development of the law, to invoke such a rule of public policy [beyond the existing doctrine of duress]. It would also create unacceptable anomaly. It is unnecessary because justice requires that men, who have negotiated at arm's length, be held to their bargains, unless it can be shown that their consent was vitiated by fraud, mistake or duress. (Lord Scarman, on behalf of the Privy Council, in *Pao On v Lau Yiu Long* [1980]).
>
> [allowing "lawful act duress"] would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover it will often enable bona fide settled accounts to be reopened when parties to commercial dealings fall out. (Lord Justice Steyn in *CTN Cash & Carry Limited v Gallaher Limited* [1994]).

Unjust enrichment

Unjust enrichment remedies are only available where a defendant has been unjustly enriched at the expense of the victim. "Unjust enrichment" is the basis for the restitution (i.e. claim for repayment) sought by the victim, the test for which was described by Lord Hoffmann in the *Banque Financiere de la Cite* case as:

> First, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy.

There is no general cause of action in English law for unjust enrichment but in *Woolwich Equitable Building Society v IRC* in 1993 Lord Browne-Wilkinson recognised that principles can be reinterpreted so as to give a right of recovery, saying:

> In the present case the concept of unjust enrichment suggests that the plaintiffs should have a remedy ... [or the defendant] will be enriched by the interest on the money to which it had no right during that period.

If one is unable successfully to plead economic duress, one should therefore consider pleading unjust enrichment as a cause of action. If one does so, one has to emphasise the unjustness of the enrichment, in other words, the extent of the bad faith and/or opportunism employed by the other side.

Conclusion

There is a distinct overlap between commercial pressure, compulsion and economic duress, as noted by Lord Diplock in the case of *Universe Tank Ships Inc of Monrovia v International Transport Workers Federation* in 1983, when he said:

> Commercial pressure, in some degree, exists whenever one party to a commercial transaction is in a stronger bargaining position than the other party.

In the *Pao On* case, Lord Scarman said:

> It would become a question of fact and degree to determine in each case whether there had been, short of duress, an unfair use of a strong bargaining position.

Lord Scarman went on to dismiss "unfair use of a strong bargaining position" as a ground for avoiding a contract. Although the law has evolved since this decision, it is still the case that it is much easier merely to reverse the unjust enrichment of a defendant than to avoid a contract by arguing economic duress.

Capital Structures Plc v Time & Tide Construction Ltd (2006)

This is the most recent case on economic duress, decided in March.

T&T resisted an enforcement claim on the basis that the adjudicator had no jurisdiction. The reason given was that the agreement between the parties came about as the result of economic duress and that that agreement had been avoided before the adjudicator assumed jurisdiction.

Capital were a subcontractor to T&T in respect of the supply, delivery and installation of structural steelwork and cladding. After disputes arose, a settlement agreement was signed. The agreement was in full and final settlement of all existing and/or future claims. It included a clause providing that if a dispute arose under it, then that dispute could be referred to adjudication.

T&T said that they had only agreed to the settlement because they had no choice. The adjudicator rejected the claim of economic duress. As stated above, a claim of economic duress is a difficult one to make. To demonstrate and prove actual duress

(i) there must be pressure the practical effect of which is that the "victim" is compelled or had no choice but to agree;

(ii) that pressure must be illegitimate; and

(iii) that pressure must be a significant cause in inducing the "victim" to sign the contract. Relevant factors might include whether the victim has any practical alternative, protested at the time, and whether the victim affirmed or sought to rely on the contract.

HHJ Wilcox noted that the courts, in adjudication enforcement cases, must be wary of encouraging complex satellite litigation. He therefore cautioned against "imaginative and strange interpretation of the facts and events arising in the commercial rough and tumble of the construction industry". This should not be allowed to found weak challenges to jurisdiction.

The Judge first considered the suggestion that even if economic duress was proven, the adjudication provisions of the contract would have survived. He said that where there had never been a contract because it had been avoided on the grounds of duress, it logically followed that any adjudication provision also became void. Here, the Judge felt there was, just, an arguable case. As this was a claim for summary judgment, this was all T&T had to demonstrate.

Accordingly, T&T were given leave to defend and summary judgment was refused. If economic duress was proven and if T&T had taken proper steps to avoid the settlement agreement which was the subject of adjudication, then the adjudicator would not have had jurisdiction.

3. What is an "act of prevention" by an employer, and when will it render time at large?

Case law has established that, if an employer prevents completion of the works in any way, for example by failing to give possession of the site, by failing to provide plans and/or other information at the proper time, or by instructing extras which delay the works, then the general rule is that that employer loses the right to claim liquidated damages for the period of delay triggered by the act of prevention.

Acts of prevention may be breaches of contract on the part of the employer or they may be legitimate acts under the contract that have the effect of preventing the contractor from performing his contractual obligations. In *Dodd v Churton* [1897] 1QB 562, a case concerning delay caused by extra works ordered in accordance with the terms of the contract, L Esher MR stated at p. 566:

> The principle is laid down in Comyns' Digest, Condition L (6), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and accordingly, a well recognized rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the

> effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the Contractor.

In *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452 (CA) Denning LJ stated at page 455:

> I would also observe that on principle there is a distinction between cases where the cause of delay is due to some act or default of the building owner, such as not giving possession of the site in due time, or ordering extras, or something of the kind. When such things happen the contract time may well cease to bind the Contractors, because the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled. That was decided in *Roberts v Bury Improvement Comrs*. and many other cases.

In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1WLR 601 the House of Lords approved the following summary by Lord Denning – see Lord Pearson p.607:

> It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time…

Notwithstanding the heated debates which always take place whenever there is concurrency of delay, it is generally thought that these rules probably even apply if the contractor has by his own delays disabled himself from completing by the due date (*SMK Cabinets v Hili Modern Electrics* [1984]).

If the act of prevention occurs after the contractual completion date, i.e. when the contractor is already in delay, it would appear that the employer can recover liquidated damages up to the date of the act of prevention.

If the contractor can establish that the employer has indeed prevented them from completing the works by the contractual completion date, then they could argue that the stipulated date for completion has ceased to be applicable, and time is therefore at large. In that case, their obligation is to complete within a reasonable time. As for what is a reasonable time, the House of Lords have ruled that where the law implies that a contract will be performed within a reasonable time, it has

> invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligations, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably (per Lord Watson in *Hick v Raymond and Reid* [1893]).

It is not, therefore, merely a question of what is an "ordinary time" or what are "ordinary circumstances". Reasonableness will be determined in the light of the circumstances as they actually exist during the period of performance.

This has been looked at in a number of cases, including *British Steel Corporation v Cleveland Bridge & Engineering Company Ltd* in 1984, when Lord Goff said:

> As I understand it, I have first to consider what would, in ordinary circumstances, be a reasonable time for the performance of the relevant services; and I have then to consider to what extent that time for performance...was in effect extended by extraordinary circumstances outside their control (with the words "outside their control" applying to "the party performing those services").

"Reasonable time" is therefore primarily a question of fact and must depend on all the circumstances which might be expected to affect the progress of the works. There are a number of pointers established by various cases to help decide what a reasonable period might properly be. The original contract completion date will, in the great majority of cases, tend to be accepted by both sides as evidence of what is a "reasonable time in ordinary circumstances", so that the new reasonable time for completion will be arrived at by adding such reasonable periods of delay as can be shown to have been caused by the act of prevention or breach, including any further delays beyond the control of the contractor occurring during that additional period. "Reasonableness" is, as so often the case, the benchmark.

As described in Hudson, one of the leading textbooks, the problem arises, however, if a contractor wishes to assert that the original contract completion date, or extended completion date, was not itself reasonable, either because of delays due to previous events beyond his control, but not covered by any available EOT clause, or that, because of errors or any other reason, the original contract period had been underestimated and was inadequate. It is also the case that, in deciding on a reasonable time for completion, consideration should be given to the circumstances stipulated in any contractual EOT clause as justifying an EOT, either as indicating the circumstances which should be taken into account, or possibly as excluding any circumstances not mentioned in the clause.

If the date in the contract (as extended) has for some reason ceased to be the proper date for the completion of the works, and time is at large, then the right to liquidated damages will have been lost. Failure of the liquidated damages clause in the contract will not, however, prevent unliquidated, or general, damages being obtained by the employer for failure to complete within a reasonable time. The right to recover such general damages will be subject to proof, and will operate as from the ending of a reasonable time for completion.

The case of *Elsley v Collins Insurance Agencies Limited* in 1978 established that where an employer has invalidated a liquidated damages clause and contract completion date by his own act of prevention or breach, he will not be permitted to recover a larger weekly or other sum as unliquidated damages on establishing failure to complete within a reasonable time. This is analogous to the situation where sums are held to be a penalty.

In the case of *Balfour Beatty Building Limited v Chestermount Properties Limited* in 1993, it was stated that the discharging of express contractual provisions for EOTs and for the deduction of liquidated damages will usually be where these events are not dealt with by provisions of the contract which entitle the contractor to an extension of the contract period for completion. If there are such provisions in the contract, but they are not correctly operated in the contractor's favour, as in your case, then the argument that the clauses are discharged must surely still be valid, and time will be at large.

4. What is the latest legal position in relation to letters of intent?

Principles and pitfalls

Letters of intent will always be a topic of interest to the construction industry. There are times when you cannot avoid them. Indeed, they have been described by some as a necessary evil. In a recent case[(1)], HHJ Coulson QC indicated that a letter of intent could be appropriate when:

- the contract scope and price were either agreed or there was a clear mechanism in place for the scope and price to be agreed;
- the contract terms were, or were very likely to be, agreed;
- the start and finish dates and the contract programme were broadly agreed; and
- there were good reasons to start work in advance of the finalisation of all the contract documents.

The key points everyone should consider before signing a letter of intent.

It can take a long time for the formalities of a professional appointment, building contract or subcontract to be concluded, and time is money for all parties involved in construction. Employers and contractors want to get started on a project as soon as possible, consequently they frequently resort to sending letters expressing their intention to enter into a formal contract for the entirety of the works in due course. There are a variety of reasons why such letters are resorted to, and why both parties to a contract find them acceptable for their respective purposes.

In the case of the employer, they may wish to get the development started early to reduce the borrowing costs or bring forward the date when the development produces an income, rather than delay the design or commencement of construction until the formal contract has been signed.

In the case of the contractor or subcontractor, frequently they want some form of letter before commencing work so they have some comfort, whether it is illusory or real, that they will be paid for the work they are about to embark upon.

It therefore suits both parties to send or receive a letter expressing their intention to enter into a formal contract in due course. Letters of intent come in a variety of forms, but generally they can be categorised into three main types:

(1) *Cunningham & Others v Collett & Farmer* (2006)

1. The most common arrangement is that where the contractor agrees to start work without any agreement to do the whole works. The contractor can thus call a halt at any time to the works. The arrangement is simple and contractual. Usually the letter is sent from the employer, and is either countersigned or accepted by conduct by the contractor. There is usually (but not always) a payment on a cost-reimbursement basis, and sometimes Employers seek to put a limit on their liability to pay the contractor, by expressly stating that the letter only authorises expenditure up to a certain amount. The contractor may not be obliged to complete the work at all, and may not be required to complete it by any particular time, but there will be an implied term as to the quality of whatever work the contractor does. This type of letter of intent is frequently described as "an if contract" following the case of *British Steel Corporation* v *Cleveland Bridge Engineering Company Limited* ([1983] BLR 95).

2. Alternatively, and less frequently, the letter of intent is expressed as the contract for the whole of the works, frequently referring to the terms and conditions, and the various contract documents which are to be incorporated into the formal contract once signed.

3. Finally, there is a "letter of comfort" which is no more than an expression of the parties' intentions, and creates no legal relationship at all. If a Contractor or consultant carries out work pursuant to this letter, then any entitlement to payment for what he does would be on a restitutionary, *quantum meruit* basis.

In the majority of cases where parties have resorted to issuing a letter of intent, they subsequently finalise their negotiations for the entire contract, and the letter of intent arrangements are superseded by execution of the contract, which then governs all the works being carried out. It is only when those negotiations fail to conclude a formal contract, that letters of intent are exposed to judicial scrutiny. The optimism with which the parties agree to carry out the works pursuant to the letter of intent is exposed to the uncompromising law of contract formation as formulated by the courts over a century ago.

In order to determine whether a contract has been concluded in the course of correspondence, one must look at the correspondence as a whole.

Even if the parties have reached agreement on the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. Alternatively, they may intend that the contract shall not become binding until some further term(s) have been agreed. Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.

If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

Parties often enter into letters of intent without fully appreciating what their rights and liabilities are. As a minimum, the following three points should be considered before signing a letter of intent:

Is the letter of intent to form a binding contract? Whether it does or does not depends on the construction of the communications which have passed between the parties and the effect, if any, of their actions pursuant to such communications. If a contract is found to exist, then it will determine the parties' obligations or, alternatively, if no contract is found to exist, the letter of intent will have no contractual effect.

In drafting letters of intent, it is therefore vital for the parties to state clearly whether or not the letter of intent is to form a binding contract. If work is done pursuant to a contract, then the contractor will have obligations as regards the workmanship and time for completion. Conversely, if there is no comprehensive contract, then there can be no such contractual obligations, although there may be obligations for negligence as regards workmanship.

If materials are purchased or bought pursuant to the letter of intent, how are these to be paid for? Whether or not the letter of intent is legally binding on the person carrying out work under it, they will almost certainly be entitled to be paid for their work. The letter of intent should therefore state the basis of such payments. If the letter of intent is to be contractually binding, then payment schedules should be inserted. If no provisions are inserted, then a reasonable rate will be implied.

If a letter of intent is not legally binding, the contractor will almost certainly be entitled to payment on a *quantum meruit* basis, i.e. the contractor is entitled to be paid a reasonable sum for the labour and materials supplied by him.

The letter of intent should state that if a contract is subsequently entered into between the parties, then any payments made under the letter of intent form part of the Contract Sum, thus avoiding potential overpayment problems (see *Boomer* v *Muir* [1933] 24 P.2d 570).

Of course in an ideal world there would be no letters of intent. All parties would agree the terms of their contracts, and execute formal Contract Documentation before commencing work.

There have been two recent cases which demonstrate some of the pitfalls discussed above.

Some recent examples

Notwithstanding HHJ Coulson QC's words of comfort, in an ideal world, there would be no letters of intent. One of the reasons for this was demonstrated by the recent case of *ERDC Group Limited v Brunel University* where a dispute arose as to the basis upon which the contractor should be paid for works carried out under a letter of intent.

ERDC submitted a tender for works to provide sporting facilities which were to be carried out on the basis of the JCT Standard WCD Contract, 1998 Edition. Brunel decided to appoint ERDC, although the formal execution of the contract documents was deferred until after the grant of full planning permission. ERDC agreed to progress the works under a letter of intent. Four further letters of intent were issued and the authority under the final letter of intent expired on 1 September 2002. ERDC continued with the works after that date. The majority of the works were completed by November 2002 but the contract was not executed. ERDC said that the work content of the project had changed significantly and

that accordingly they were not prepared to sign the contract documents. ERDC also said that they were entitled to be paid upon a *quantum meruit* basis. Brunel said that the work executed both prior to and post 1 September 2002 was to be valued according to the JCT contract as provided for by the letters of intent.

The key provisions of the letter of intent were as follows:

> We write to inform you that your adjusted tender for the above works in the sum of £1,238,635.00 has been recommended for acceptance. However, the University are not in a position to award a contract until certain planning conditions are discharged.
>
> In the meantime in order to enable you to deliver the works in line with the Construction Programme of 8 weeks design/mobilisation period and 18 weeks construction, the University is prepared to issue this letter of appointment pending the execution of the Formal Contract subject to the following terms and conditions:
>
> 1. You are hereby authorised to carry out design, planning and procurement works as necessary to make a full and proper start to the works once full planning permission has been received subject to satisfactory insurances and liaison with the University Authorities which shall comprise some or all of the following but not restricted to the following…
>
>   Work shall be paid for in accordance with the normal valuation and certification rules of the JCT Standard Form of Building Contract With Contractors Design to a maximum of £15,000.00 until the issue of a further letter of intent and agreed revised sum or signing of the contracts.
>
>   However such payment will not include any entitlement for loss or profit on any works not carried out.
>
>   No expense shall be incurred in excess of the above sum or agreed revised sum until such time as the formal Contract Documents have been signed…
>
> 3. Until formal execution of the Contract your appointment will be governed by the terms of this letter … However upon the execution of the Contract performance by you of the works authorised by this letter shall be deemed to have been carried out under the Contract and according to its terms and conditions…
>
> 6. Subject to your acceptance of the foregoing terms and conditions, Brunel University hereby confirms that it will pay you up to the sum of fifteen thousand pounds (£15,000.00) in respect of the provision of the works required under the terms of this letter…
>
> 7. … This letter constitutes an instruction to you to commence work only as necessary for you to ensure that the agreed construction programme is met…
>
> Please confirm by return that the above terms are acceptable to you by countersigning and returning one copy of this letter.

HHJ LLoyd QC held that from the wording of the letters of intent, there had been a clear intention to create legal relations. The letters were contracts of the classic "conditional" variety. Although Brunel was not prepared to contract unconditionally for the whole of the

works, it decided to offer ERDC a limited contract on the understanding that when it was able to conclude the full contract that was contemplated, that contract would take effect retroactively. Therefore the letters created a contract, one term of which was that the work carried out before 1 September 2002 was to be valued in accordance with the JCT contract, in other words not on a *quantum meruit* basis but by applying the tender rates and prices.

That left the question of how the work carried out after the letters of intent expired was to be valued. Both parties agreed this should be on a *quantum meruit* basis. However, as the judge noted, the courts have not laid down any hard and fast rules limiting the way in which a reasonable sum is to be assessed. The contractor should be paid at a fair commercial rate for the work done. However, what was that rate? ERDC said the works should be valued on a costs plus profit basis, whereas Brunel said they should be valued in the same way as the works carried out under the letters of intent.

Brunel relied on the judgment of Mr Recorder Reese QC in *Sanjay Lachani* v *Destination Canada (UK) Ltd* (1997) 13 Const LJ*:*

> A building Contractor should not be better off as a result of the failure to conclude a contract than he would have been if his offer had been accepted, i.e., in practical terms, in a case such as this, the price which the building Contractor thought he was to get for the works (because he thought his offer had been accepted) must be the upper limit of the remuneration to which he could reasonably claim to be entitled, even if at that level of pricing the building Contractor would inevitably have ended up showing an overall loss.

In other words, whilst the contractor was entitled to a fair commercial rate or price for the work done, in determining the reasonableness of the valuation here, the court should take into account tender costs and even abortive pre-contract negotiations as to price.

Thus the assessment should be made on ERDC's tender rates and prices since they had been used by the parties throughout the works and they were reasonable commercial rates. Indeed, ERDC had continued to work for a considerable time after 1 September 2002 as if the previous arrangements were still in existence. Yet on the other hand, the circumstances in which ERDC worked were no longer those contemplated by the contract.

Ultimately, the Judge came to the conclusion that, on the facts of this case it would not be right to switch from an assessment based on ERDC's rates to one based entirely on ERDC's costs. ERDC did not make its position clear straightaway, only doing so when all the main elements of work were substantially complete. ERDC applied for payment (and was paid until December 2002) on the basis of the principles set out in the first letter of intent, i.e. in accordance with the JCT Valuation Rules.

One of the quantity surveyor witnesses noted in evidence that:

> a price or rate that was reasonable before 1 September, in my opinion, did not become unreasonable after 1 September simply because the authority in the letter of appointment expires.

It was shown that the conditions under which the remaining work was carried out did not differ materially from those that had been originally contemplated. It was also

demonstrated that ERDC's tender was not abnormally low. Accordingly, as the conditions under which the latter work had been carried out did not differ materially from the conditions under which the rest of the work had been carried out, the appropriate way to value this work was by reference to the original ERDC contract rates and not on a cost plus profits basis.

The second case involved the extension of a letter of intent. In this case of *Skanska Rasleigh Weatherfoil* v *Somerfield Stores Limited* problems emerged as a consequence of work commencing without a clear contract being entered into and the parties subsequently failing to agree and sign up to a contract.

Here Somerfield sought tenders to carry out maintenance works at their stores. Skanska were one of the successful tenderers and on 17 August 2000, Somerfield sent Skanska a letter confirming they had been appointed to provide the maintenance services in three regions. The letter was stated to be subject to contract and enclosed a draft facilities management agreement. The letter further stated:-

> Whilst we are negotiating the terms of the Agreement, you will provide the Services under the terms of the Contract from 28 August 2000 ... until 27 October 2000.

On 21 November 2000, Somerfield extended this period until 26 November 2000. On 22 December 2000, Somerfield wrote another letter to Skanska, again said to be subject to contract, which further extended the working period. This time until 21 January 2001. The letter said that Somerfield were not prepared to give any further extension to this letter. That deadline passed. Skanska continued to perform the maintenance services.

By the end of 2002, a dispute had arisen over whether Skanska were entitled to be paid for a number of jobs which were stated to be "timed out" because an invoice had not been submitted within the period required by the draft facilities management agreement.

Before Mr Justice Ramsey, Somerfield argued that all of the terms of the facilities management agreement were incorporated including the "timed out" provisions. Skanska said that the terms of the agreement were incorporated only to the extent that they defined the services which Skanska were required to provide. Skanska also argued that the agreement expired on 21 January 2001. Therefore, there was no agreement as to the contractual relationship and in particular any time limit on the submission of invoices.

The Judge said that that letter of 17 August 2000 was intended to give rise only to an interim arrangement pending the negotiation of an acceptable facilities management agreement. The use of the phrase subject to contract, for example, demonstrated that the parties were not to be bound by the full terms of such an agreement until all necessary matters had been finally negotiated. However, Somerfield's immediate requirement for maintenance works could not await the outcome of the negotiations.

The Judge further held that the obligation to provide the services "under the terms of the contract" could not be read as including all the terms of the facilities management agreement. However, equally it could not be read as including none of those terms. The intention of the parties could not have been to incorporate the terms of the draft

agreement attached to the letter, because these were the terms which the parties were negotiating and which were therefore not necessarily acceptable.

Therefore, the Judge said that the parties intended to incorporate the terms of the facilities management agreement only to the extent that they were necessary to define the services which Skanska was to provide.

In answer to the question as to whether or not any binding agreement continued beyond 21 January 2001, the Judge looked at what happened in the period from 17 August 2000. This was the period during which the interim arrangements were to apply pending the negotiation of the mutually acceptable contract.

Somerfield said that the parties operationally carried on as before after 21 January 2001. Skanska said that they carried out work after that time only in response to Somerfield's faxed requests.

The Judge considered that whilst the wording of correspondence in this period made it clear that Somerfield were reluctant to extend the interim period, it did not contemplate that the terms of the contract (as expressed in the 17 August 2000 letter) would not continue beyond 21 January 2001. Phrases used were by way of exhortation to meet a deadline for the performance of certain obligations (i.e. negotiate the contract), they were not unless or definitive deadlines, which could not be extended.

The question for the court was whether the parties continued to operate on the basis of the original contract after 21 January 2001. Perhaps the most important fact as far as the Judge was concerned was that the parties continued to conduct themselves as they had before with the pre-existing agreement. Nothing really happened contractually after 21 January 2001. Therefore, the original August 2000 contract continued.

This meant that no binding agreement had been reached about the alleged timing out at any period. No supplementary agreements were made. The purpose of the meetings that took place in relation to them was to negotiate the finalisation of the facilities management agreement. These meetings were at all times carried out subject to contract-type basis. That one of the parties had taken legal advice and made incorrect assertions as to what contract position applied did not matter.

The fact that the parties continued to conduct themselves as before in circumstances where they had a pre-existing contractual arrangement was the most important factor which influenced the court. Skanska continued to provide services in the same way as they envisaged under the August 2000 letter.

Thus the contract continued on that basis well into 2003 when Skanska ceased performing the services. It may not have been what the parties intended. However, that was the consequence of the parties' failure to regularise their contractual relationship.

5. Can an employer delay enforcement proceedings of an adjudicator's decision against them to allow the possibility of being able to use the outcome of a further adjudication to reduce their liability?

Allen Wilson Shopfitters Ltd v Buckingham

In this case, the defendant sought to stay or delay enforcement proceedings to allow the possibility of being able to use the outcome of a further adjudication to reduce his liability under the original decision. HHJ Coulson QC noted that:

> Adjudicators' decisions are intended to be enforced summarily and a claimant, being the successful party in adjudication, should not, as a general rule, be kept out of his money.

He continued that pursuant to the court rules, a judgment must be complied with within 14 days. The existence of a further adjudication, due to conclude sometime after that date, which might give rise to a set-off or counter-claim was "wholly irrelevant" to the question of any entitlement to judgment in the enforcement proceedings.

The Judge also considered the decision of HHJ Thornton QC in *Verry* v *North West London Communal Mikvah* where Judge Thornton, having given judgment to enforce an adjudicator's decision, said that that judgment would not be drawn up for six weeks to allow time for the defendant to start fresh adjudication proceedings and seek to have particular disputes resolved before the judgment was formally entered.

Judge Coulson noted that the overriding reason for this conclusion was the fact that the adjudicator's decision, which he was asked to enforce, contained a number of admitted errors. One of those errors arose in a way that was actually unfair to the defendant.

Therefore, in those specific circumstances, the best way to do justice between the parties was to delay enforcement of the judgment so the defendant could attempt to have those points rectified. Such a decision was fair and unsurprising. The same principles did not occur here. Accordingly, if you think you have a potential claim of your own, it is important that you consider whether or not to take prompt action to counter-adjudicate.

Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd

Can a losing party in an adjudication withhold payment on the basis that it expects to recover an equivalent or larger sum in a subsequent adjudication?

The parties were engaged on works to refurbish and strengthen the Tinsley viaduct. Disputes arose and there were a series of adjudications carried out in accordance with the CIC Model Adjudication procedure. Adjudication number two lasted for some 21 weeks. On 24 November 2005, the adjudicator held that Interserve's works had been delayed for 38.8 weeks. Of this, 12.8 weeks were attributable to Interserve and 26 weeks to Cleveland. In addition, the adjudicator ordered that Cleveland pay Interserve the sum of £1.35 million.

Cleveland did not pay. As the extension of time award expired on 27 April 2005, it claimed substantial loss and expense and/or damages for the period 1 May to 31 October 2005. Interserve brought enforcement proceedings commencing on 6 December 2005. The application for summary judgment was held on 3 February 2006. Judgment was given on 6 February 2006.

However, in the interim, on 22 December 2005, Interserve sent a letter of claim to Cleveland claiming further extensions of time and additional loss and/or expense. In

addition, on 6 January 2006, Cleveland served its own adjudication notice. The Interserve claims were not part of this adjudication.

At midday on 3 February 2005, midway through the enforcement application, the adjudicator's decision in adjudication number three was delivered. Interserve was entitled to a further extension of time until 1 June 2005 but was held to be responsible for any delays which occurred after that. Therefore Interserve's liability to Cleveland was held to be some £1.4 million. This was due to be paid by 17 February 2006. Notwithstanding this, Interserve submitted they were entitled to an immediate judgment on the sums awarded in adjudication number two which ought to have been paid by 28 November 2005.

Cleveland said that the sums awarded in adjudication number three ought to be set off against the Interserve award. Alternatively, there should be a stay of execution pending enforcement of the third adjudication.

Mr Justice Jackson specifically agreed with the conclusions of HHJ Gilliland QC in *Gleeson* v *Devonshire Green* and *McLean* v *The Albany Building* where the Judge held that payment ordered by an adjudicator could not be withheld on the basis of a claim which accrued after the adjudication had commenced and that a party could not set off a claim for damages against an adjudication decision.

Here, a decision had been given in the second adjudication in November 2005. At the end of every adjudication, unless the contract says otherwise or there are some other special circumstances, the losing party must comply with the adjudicator's decision. The losing party cannot withhold payment on the basis of an anticipated recovery in a future adjudication based upon different issues. Cleveland should have paid on 28 November 2005. That situation had not been changed by the decision in the third adjudication. Payment in that adjudication was required on or before 17 February 2005. There was no obligation to pay at the time the enforcement decision was given.

Mr Justice Jackson said that if the existence of a claim could be relied upon as a reason to withhold payment, then you may have a situation where there would be a series of consecutive adjudications with the result that no adjudicator's decision is implemented. Each award would take its place in the running balance between the parties.

Accordingly, the answer to the question as to whether a losing party could withhold payment on the basis that it expected to recover an equivalent or larger sum in a subsequent adjudication was no.

Therefore, if you do think you have a cross-claim, you must start your own adjudication as quickly as possible.

6. On what grounds could you terminate a consultant's appointment without being countersued?

The starting point is always to consider the express terms of the consultant's appointment. This will frequently set out the parties' rights to terminate, the procedure to be followed and what payments then become due.

Many appointments give the client an express right to terminate on notice even where there may not have been any breach on the part of the consultant; essentially a termination by the client for convenience. The reasoning behind such a provision is to ensure that clients are able to terminate appointments should, for example, they fail to secure planning permission or funding in respect of the project.

UCL usually appoints its consultants using either the GC/Works/5 Framework Agreement[2] or, for specific projects, a standard GC/Works/5.[3] These are referred to below as the "Framework Agreement" and the "Standard Agreement" respectively. Accordingly, this "answer" is specifically tailored to these two forms of appointment.

Termination under the Framework Agreement

The Framework Agreement allows for both the termination of individual 'Orders' and the Agreement itself. Condition 1.49(2) provides that:

> By giving a minimum of 14 Days' notice to the Consultant the Employer may cancel the whole or part of the Consultant's Services in respect of any one Order or number of Orders…

It is also possible to terminate the Agreement. Condition 1.50(1) provides that:

> The Employer shall have power to determine the employment of the Consultant under the Appointment:
>
> (a) at any time and for any reason, or
>
> (b) as a consequence of any breach by the Consultant

Termination under the Standard Agreement

The ability to terminate is addressed in Condition 50 which provides that:

> The Employer shall have power to determine the employment of the Consultant under the Appointment at any time and for any reason or as a consequence of any breach by the Consultant. The Employer shall determine by giving notice to the Consultant and upon receipt by the Consultant of the notice of determination, the employment of the Consultant under the Appointment shall be determined but without prejudice to the rights of the parties accrued to the date of determination and to the operation of the provisions referred to in Condition 42 (Payment following termination).

Do the words mean what they say?

On a literal reading of the termination provisions it would seem clear that the client under both agreements has complete freedom to terminate either for *any reason* or for *any breach* by the consultant. Unfortunately, the situation is not quite as straightforward as it first appears.

[2] GC/Works/5(1999) General Conditions for the Appointment of Consultants: Framework Agreement.
[3] GC/Works/5(1998) General Conditions for the Appointment of Consultants.

Turning first to the use of the termination for convenience clauses. There is very little English case law on the subject but decisions in both the United States and some Commonwealth jurisdictions have established some guidelines which could be persuasive should the issue arise in the English courts.

It seems the client's motive is important in deciding whether a termination for convenience clause will be effective. In the American case of *Troncello v U.S.* (1982) such a clause was held to be ineffective where the U.S. Government had invoked the termination for convenience clause simply to secure a more attractive price elsewhere. This is arguably no different to an employer omitting part of a contractor's works only to have those works performed by others. In the absence of very clear words in the contract to the contrary, such conduct by an employer will constitute a breach of contract.

In UCL's situation a termination for convenience clause has to be read in the light of the duty of good faith clause which appears in both the Framework Agreement and the Standard Agreement.[4] This provides that:-

> (1) The Employer and the Consultant shall deal fairly, in good faith and in mutual co-operation with one another, and the Consultant shall deal fairly, in good faith and in mutual co-operation with all members of the Project team
>
> (2) Both parties accept that a co-operative and open relationship is needed for success, and that teamwork will achieve this.

In light of the case law discussed above and the express duty of good faith, any attempt by UCL to terminate for anything other than a legitimate reason could result in a claim from the consultant. Hudson[5] suggests that such a legitimate reason could be a genuine abandonment of the project by a client, either permanently or for the time being. It also suggests that it would be reasonable for the client to do so where the client is bona fide dissatisfied with a contractor's performance but prefers to avoid using a default-based termination provision.

It is then necessary to consider the fault-based termination provisions. As is noted above, both forms of appointment allow the client to terminate on the grounds of *any breach* by the consultant.

The key difference between terminating for convenience and for breach is that in the latter case the client has the ability to recover the additional costs of engaging another consultant. Condition 1.42(2) of the Framework Agreement provides[6] that:

> In the event of the Appointment being determined where the Consultant has committed a breach of this Appointment then the Employer will be entitled to engage another consultant to complete those Services which would otherwise have been performed by the Consultant under the terms of this Appointment and to recover from the Consultant any losses or additional costs and expenses which, in the opinion of the Employer, are attributable to such determination and/or the engagement of another consultant. In the event of determination

[4] See Condition 1.2 in the Framework Agreement and Condition 2 in the Standard Agreement.
[5] *Hudson's Building and Engineering Contracts*, Eleventh Edition, paragraph 12.017
[6] The Standard Agreement's Condition 42(2) is identical.

> of the Appointment for any reason, the Consultant shall co-operate in the transfer of the Consultant's Services in accordance with the Employer's instructions.

On a literal reading a client appears to be able to terminate for *any* breach and then to recover the losses referred to in Condition 1.42(2).

Unsurprisingly, the law has sought to restrain the possible abuse by clients of clauses which provide for termination in the event of any breach. The case of *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council*[7] concerned a gardener engaged by the local authority on a 4-year term agreement to maintain its sports facilities and its parks and gardens. The contract provided that:

> If the Contractor commits a breach of any of its obligations under the contract, the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.

The Council sought to rely on this clause following a number of alleged breaches on the part of Mr Rice relating to the state of the cricket pitches and bowling greens. The court considered the two key issues to arise in the case namely:

1. Was the clause entitling termination for any reason effective; and

2. Was the accumulation of minor breaches by Mr Rice sufficiently serious to warrant termination?

In relation to the first issue, the court said that such a term flew in the face of commercial common sense and as such the Council was not entitled to rely on it.

In relation to the second issue, the court also found in Mr Rice's favour. Whilst there had been a number of breaches on the part of Mr Rice they were insufficient to deprive the Council of "substantially the whole benefit of its contract".

General principles and practical tips

1. Any attempt to terminate a Consultant's Appointment simply on the grounds of obtaining a more favourable price elsewhere may well be considered to be unreasonable. The grounds for termination should be legitimate.

2. It is still possible to use a termination for convenience clause even where the underlying reason may in fact be poor performance on the part of the consultant but such performance does not constitute a material breach. This is a recognition that some clients may simply want to avoid the possible conflict of relying on a termination for breach. This does, however, deprive a client of the express provisions of the contract which may be available on a termination for breach. For example, many building contracts will permit an employer to use a contractor's plant and equipment to complete a project. This is unlikely to be the case where a termination is simply for convenience.

[7] *The Times,* July 26, 2000

3. Clauses allowing clients to terminate for *any* breach will be subject to scrutiny. A court will consider the gravity of the breaches and it is not necessarily the case that a series of breaches will give rise to a right to terminate.

4. Parties would be well advised to specifically define what breaches they consider to be so serious as to warrant termination of the contract. Whilst this is not a watertight approach it is likely to find more favour with a court than simply treating any breach as grounds for termination.

7. What liability does a quantity surveyor have if a certificate is overvalued or incorrectly valued?

Employment of a quantity surveyor arises from his appointment by the employer or by someone authorised on his behalf to make the appointment. The express and implied terms of the appointment govern the rights and obligations of the parties; the express terms are of course the starting point.

GC/Works/5, 1998 and 1999 versions, sets out the duties of the quantity surveyor in Annex 3. This Annex, together with the General Conditions of GC/Works/5, comprise the express terms.

The Supply of Goods and Services Act 1982 provides that a duty to serve the employer with reasonable care and skill is implied in a contract for the supply of a service where the supplier is acting in the course of a business. Thus, even where the construction professional may have been engaged without reference to any standard form conditions, the duty to act with reasonable care and skill is implied by statute.

As described in *Hudson*, generally an owner under a building or engineering contract will have four main interests which he employs his professional adviser(s) to secure, namely:

(i) a design which is skilful and effective to meet his requirements, including those of amenity, durability and ease of maintenance, reasonable cost and any financial limitations he may impose or make known, and comprehensive, in the sense that no necessary and foreseeable work is omitted;

(ii) obtaining a competitive price for the work from a competent contractor, and the placing of the contract accordingly on terms which afford reasonable protection to the owner's interest both in regard to price and the quality of the work;

(iii) efficient supervision to ensure that the works as carried out conform in detail to the design and the specification, and

(iv) efficient administration of the contract so as to achieve speedy and economical completion of the project.

Insofar as any act or omission of the construction professional prejudices any of these interests, and is due to lack of skill or care on his part, he will be failing in his obligations and, if a breach of duty is clear, will be liable to the Employer for any damage which he may suffer (save, possibly, for pure economic loss).

The precise degree of care owed by those holding themselves out as specially qualified in a particular trade or profession has been described in a number of different ways.

It is a question of fact which "appears to us to rest upon this further enquiry, viz: whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant" (per Tindal C J in *Chapman v Walton*).

In England, the House of Lords has adopted as definitive, in the case of professional people generally, the following direction to a jury by McNair J:

> Where you get a situation which involves the use of some special skill or competence … the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess expert skill … it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art." *(Bolam v Friern Hospital Management Committee)*
>
> Architects, doctors, engineers, attorneys and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that his structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather that exercise of that skill and judgment which can be reasonably expected from similarly situated professionals … Until the random element is eliminated in the application of architectural sciences, we think it fairer that the purchaser of the architect's services bear the risk of such unforeseeable difficulties. *(City of Mounds View v Walijarvi)*

Under GC/Works/5, at Condition 10 (1.10 in the 1999 form) "The Consultant shall perform the Services in accordance with all Statutory requirements and with the reasonable skill, care and diligence of a properly qualified and competent consultant experienced in performing such Services on projects of similar size, scope, timescale and complexity as the Project."

Relevant duties of the quantity surveyor in relation to the overvaluation or incorrect valuation of a certificate include those set out in A3.4.3, A3.4.4 and A3.4.6; in Stage 5, relating to the contractor's final account, the quantity surveyor's obligations are set out in A3.5.1, A3.5.2 and A3.5.3.

There is a dearth of authority upon the standard(s) of skill or care owed by a quantity surveyor to the employer. Since, however, his task involves very large numbers of

arithmetical calculations, it seems that an occasional slip or error may be insufficient to sustain an allegation of professional negligence against him.

In the case of *London School Board v Northcroft* in 1889, a school board employed a quantity surveyor for measuring up buildings of a value of £12,000 which had been completed. They brought an action against him for negligence in making two clerical errors in the calculations, whereby the board had overpaid two sums, one of £118 and the other of £15. It was held that as the quantity surveyor had employed a competent skilled clerk who had carried out hundreds of intricate calculations correctly, the quantity surveyor was not liable for these two errors.

Given his professional status and skills, it is argued that a quantity surveyor must employ them for the employer's benefit, should he have an opportunity to do so, even though some other adviser, such as the A/E, must bear the prime responsibility. If he notices defective work while visiting for the purposes of making his valuations, for example, he should bring what he has seen to the A/E's attention, in case the latter has missed it. Considering the high degree of skill professed by quantity surveyors in the detail of construction methods, there would seem to be no reason why they should not also be joined as defendants by an employer where, for example, the defects were so glaring that they should have been seen by them in the course of valuation inspections, as well as by the A/E.

The mere fact that the mistake in question may be a simple mathematical error will not be sufficient to rebut an allegation of negligence. In *Tyrer v District Auditor of Monmouthshire* there were a number of successful claims against the quantity surveyor, including the allegation that the quantity surveyor had approved excessive quantities of prices which led to irrecoverable overpayments to the contractor. There was, in addition, a simple mathematical error in issuing an interim certificate. The judge found that the error could have happened at any time, but "the obligation was on the appellant to ensure that adequate checks were made".

October 2006

Victoria Russell/David Bebb

Fenwick Elliott LLP