

In Site

Guide me O thou great Reformer

Introduction

The Technology and Construction Court ("TCC") has been criticised in some quarters for the standard of the service it provides. In an effort to re-establish itself as the number one forum for resolving construction, engineering and technology disputes, the TCC has published a new Guide for the conduct of TCC litigation.

The Guide's purpose is to provide "straightforward, practical guidance to the conduct of litigation in the TCC". It states the services the TCC offers and also what is expected of TCC users. The Guide, published on 3 October 2005, details for the first time certain TCC procedures, such as the allocation of cases, and includes more contact details for judges and their clerks than were previously available. It follows each step of a dispute, from the pre-action protocol through to the issue of proceedings, the timetable to trial including disclosure and witness evidence, the trial itself and finally costs and enforcement. There are also separate sections dealing with hearings challenging the decisions of adjudicators and arbitrators.

Constitution of the Court

Historically, judges in the TCC have been Senior Circuit Judges ("SCJ") despite the TCC being part of the High Court. In the early 1990s a High Court Judge ("HCJ") was appointed to be in charge of the TCC. Recently, the judge in charge has spent half of his time hearing TCC cases. In June the Lord Chief Justice announced his proposals for the TCC, which the Guide incorporates. The current judge in charge, Mr Justice Jackson, will now spend all his time on TCC work. Most cases in London will still be heard by one of the five SCJs, but the HCJ in charge will also have a panel of six HCJs from which he can select a judge to hear any complex and high value matters issued in the TCC.

Costs

Whilst the Guide is focussed towards the services the TCC can offer users, it also spells out the circumstances in which parties or their legal advisers can be liable for costs sanctions if they fail to adhere to the requirements of the Guide. For example, if one party fails to comply with the pre-action protocol, or if the judge concludes that

Welcome to the Autumn/Winter 2005 edition of In Site.

In this edition we consider the new Guide to the Technology and Construction Court, which was published on 3 October 2005, outline the new Hazardous Waste Regulations, and provide our usual adjudication and case law update.

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one party is not reasonably co-operating with the other parties, costs sanctions may be applied.

Pre-action Protocol

The pre-action protocol requires parties to exchange information about their disputes at an early stage. All TCC claims, save for limited exceptions including actions relating to enforcing adjudicators' decisions, are governed by the protocol. The Guide clarifies several practical points in relation to the protocol, such as the potential costs penalties described above and that full disclosure of all documents, which is sometimes sought under the protocol, is not required.

“The Guide's purpose is to provide straight-forward, practical guidance to the conduct of litigation in the TCC”

The point argued earlier this year in the case of *McGlenn v. Waltham Contractors* (see below) is clarified in the Guide: costs incurred in defending claims put forward in the protocol letter of claim but which do not form part of the proceedings when issued can only be recovered in exceptional circumstances.

Allocation of cases to Judges

A new development for the TCC is the way in which cases will be allocated to judges. Cases in the TCC in London will now be considered by the HCJ in charge of the TCC and assigned either to a HCJ or to a SCJ. The criteria for allocation are straightforward and sensible: the size, complexity and value of the matter, the importance of any point of law and whether the dispute has an international element will all be taken into account. Parties will be able to make written submissions to the judge in charge in relation to allocation when issuing their claim.

Judgments

One complaint frequently made about the TCC, perhaps unfairly given the length and complexity of the construction and technology disputes TCC judges hear, is the length of time it took for judgments to be delivered after the end of a trial. The Guide states that, save in exceptional circumstances, judgments will now be handed down within three months of the conclusion of the trial.

Conclusion

The TCC offers an effective dispute resolution service and its comprehensive and helpful new Guide assists users by listing the services offered by the TCC and providing an easy-to-follow step by step guide through all the stages of a TCC action. The Guide also warns TCC users that they must adhere to the TCC's rules or suffer the costs consequences of not doing so.

Adjudication and Case Law Update

Final Certificates and Adjudication

In *Bennett v. FMK Construction Limited* (5 July 2005) a final certificate dispute arose between Bennett and FMK. The contract provided that if adjudication commenced within 28 days of the final certificate, the certificate would not be conclusive in relation to the subject matter of those proceedings. The contract also provided that the referral notice must be sent to the adjudicator, once appointed, within seven days of the notice of intention to adjudicate. FMK sent its referral notice to Bennett

within the 28 day period but did not send the referral notice to the adjudicator within the required seven days. The adjudicator stood down. FMK re-served its notice of intention to refer, re-appointed the same adjudicator and re-served the notice on the adjudicator within seven days. Bennett now argued that the notice of intention to refer was too late to impact on the final certificate as more than 28 days had now passed. The adjudication was stayed pending the outcome of proceedings in the TCC. FMK claimed declarations that the adjudicator had been appointed validly

in the first adjudication and that, as a result, the final certificate was not conclusive as the referral had been made within time. FMK argued that the time limit in the contract requiring the dispute to be referred within seven days was directory rather than mandatory. HHJ Havery QC agreed. The adjudicator's inability to adjudicate on the dispute when first referred was effectively “cured” by the further referral of the same matter under a new notice; the proceedings had been brought within the time limits in the contract.

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Contracts in Writing

In *Lloyd Projects Ltd v. John Malnick* (22 July 2005), Malnick converted offices in Islington into three residential flats and engaged Lloyd to undertake the work. A dispute arose, which was referred to adjudication. The adjudicator found in favour of Lloyd, deciding that Malnick should pay Lloyd £116,460.13 plus VAT and costs. Malnick resisted as the contract between the parties was not a contract in writing within the meaning of section 107 of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") and therefore the adjudicator was acting outside of his jurisdiction. There is an agreement in writing if the agreement is made in writing (section 107(a)), made by an exchange of communications in writing (section 107(b)) or if it is evidenced in writing (section 107(c)).

The parties had reached an oral agreement in September 2003 regarding the works, which began later that month. In February 2004 there was an exchange of letters in which the parties set out their respective understandings of the contract. Work continued until practical completion in July 2004 when Lloyd submitted an application for payment. Malnick refused to pay, citing the oral contract made in September 2003 in which it was agreed that the work would only take six to seven months. It had taken 10 months to complete the work. Lloyd's case was that the contract was either made or evidenced in writing and contended that the letters exchanged showed with sufficient certainty the whole of the material contract terms as previously agreed orally. Malnick submitted that several principal areas - such as the scope of work and contract period - were not evidenced in writing.

HHJ Kirkham held that by the time of the exchange of letters, the oral agreement was already in existence and the parties had been working to it for some five months and were bound by it. It would be "*straining the language of s.107(2)(b) to describe the letters as an agreement made by the exchange of communications in writing*" within the meaning of s.107(2)(b).

The exchange of correspondence was capable of coming within s.107(2)(c) but there were several material terms of the contract which were not evidenced in writing and that:



"unless these material terms have been evidenced in writing, it cannot be said that the contract is evidenced in writing within the meaning of Section 107".

The two letters did not evidence the agreement within the meaning of section 107 and therefore Lloyd's claim failed.

Pre-action costs

In *McGlenn v. Waltham Contractors and others* (June 2005), McGlenn sent a pre-action protocol letter to the contractor, architect and engineer responsible for defective works to his property. The protocol was not successful in resolving the matter and McGlenn issued proceedings, which did not contain a claim against the architect, which he had spent money defending pre-action. The architect applied for a payment of his costs of defending the abandoned claim.

HHJ Coulson QC found that pre-action costs are recoverable if they are "incidental to the proceedings". However, costs "thrown away" in dealing with issues pre-action that were not advanced in the issued proceedings would not be recoverable unless there were exceptional reasons. Judge Coulson said that allowing such costs would be contrary to the purpose of pre-action protocols.

New Hazardous Waste Regulations

On 16 July 2005, the new Hazardous Waste (England & Wales) Regulations 2005 ("the Regulations") came into force. These Regulations are administered by the Environment Agency and affect all those involved in the management of hazardous waste. By substituting the now-defunct Special Waste Regulations 1996, the new Regulations aim to streamline the existing rules on hazardous waste and more effectively implement the Waste Framework Directive and Hazardous Waste Directive.

So, what are the major changes? Well, firstly, it must be noted that the definition of "hazardous waste" is significantly wider than the previous "special" waste provisions. "Hazardous waste" now includes over 200 new types of waste, including cathode ray TVs and HCFC & CFC fridges and freezers. Note that domestic waste is excluded from the definition unless it contains asbestos or is collected separately, so the Regulations remain a concern for industry rather than the end-user. Another change is the new notification procedure. Where hazardous waste is produced at, or removed from, any

premises, this must be notified to the Environment Agency. This duty lies primarily with the producer of the waste and the notification must be renewed annually. Exemptions apply, but only for a limited set of premises such as offices, shops, farms and schools and only then if they produce less than 200 kg of hazardous waste in a year, and the waste is collected by a registered carrier.

Also, the old section 62 consignment system has been replaced, and pre-notification of movements is no longer required. Now producers and carriers must complete new consignment notes which require a valid site registration or exemption number to be inserted. Each consignment will need to be individually identifiable and will attract a fee, payable by the consignee to the Environment Agency in a quarterly Consignee Return.

Mixing hazardous waste is now banned under Part 4 of the Regulations unless permitted as part of a disposal or recovery operation. The holder of the mixed hazardous waste also has a duty to separate them where technically feasible.

Other regulations, governing landfill of hazardous waste, have also been amended with effect from 15 July 2005. Now all hazardous waste entering landfill sites is subject to the sampling and testing provisions of Waste Acceptance Criteria (WAC) and landfill operators must apply waste acceptance procedures which seek to ensure that hazardous waste complies with WAC and can therefore continue to be landfilled.

Breaking the rules is not a good idea! If convicted, a magistrates' court has the power to imprison you for up to two years or issue a fine of up to £5,000. Also, fines imposed by the Crown Court can be unlimited. The Environment Agency also has ancillary powers to issue fixed penalty notices for £300 for minor offences. You have been warned!

Please contact Sebastian Charles, Partner, Planning & Environment practice group at email: scharles@klng.com or tel: +44 (0)20 7360 8205.

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