

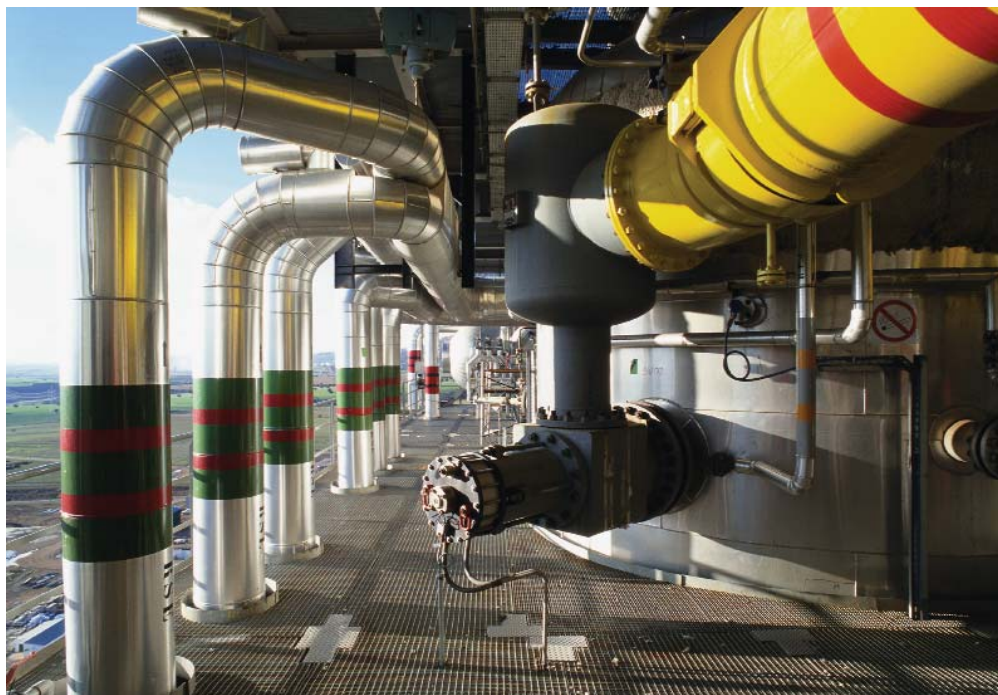
contents

Construction Act Review	1
Global claims	2
Adjudication update	3
OFT hits the roof over price fixing	4
Who to contact	4

Welcome to the Autumn edition.

Welcome to the Autumn edition of In Site. In this issue we consider the main points being addressed in the current review of the Construction Act and issues to consider in assessing global claims.

We also provide you with our usual adjudication update, and a brief note on a recent collusive tendering decision of the Office of Fair Trading.



Construction Act Review

One of the major talking points at the moment is the review of the adjudication and payment provisions of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") announced by the Chancellor in his Budget speech in March. Sir Michael Latham has been appointed to head the DTI review committee and submissions are currently being made by various industry groups. A consultation paper should be published by October with further submissions to be made by the end of the year.

Whilst most would agree that the introduction of the Act in the first place was a very positive step for the industry, opinions on whether the Act needs changing - and if so how and to what extent - differ widely. Any reform

will need to be the result of a delicate balancing act between the competing interests of the various industry groups, and a consideration of whether the changes are consistent with the underlying principles of the Act. Issues being considered include:

- whether to extend the current prohibition on 'pay when paid' clauses to encompass pay-if-paid and/or pay-when-certified provisions, and to remove the insolvency exception to pay when paid;
- the possibility of merging the notice procedures of sections 110 and 111 of the Act which, whilst simplifying the payment notice procedure, could increase the risk of abuse

where applications for payment are made opportunistically; and

- reconsidering the sectors and types of activity (such as residential occupiers, process plant and power generation) that are currently exempted, with a view to broadening the application of the Act.

Changes to the adjudication provisions of the Act may include:

- considering whether to make all disputes subject to the rules of the Scheme for Construction Contracts, rather than the various different adjudication rules currently in use;
- expressing limits to the types of disputes that can be referred to adjudication (either in terms of value, complexity or subject matter) and/or allowing for a greater time for such disputes to be dealt with; and
- addressing a number of the jurisdictional issues which have been the subject of case law, such as granting adjudicators power to decide whether they have jurisdiction to decide a case, including a definition of what constitutes a 'dispute' for the purposes of adjudication and softening the requirements of the "agreement in writing" test laid down in recent decisions.

We will report more fully on the proposed amendments to the Act, and their likely implications, in a subsequent edition of In Site once the review process is completed later in the year.

Global claims

The Scottish Courts have recently given further consideration to the factors that should be considered in assessing global claims. In June 2004 the Inner House affirmed the earlier decision in *John Doyle Construction Limited -v- Laing Management (Scotland) Limited* and set out a number of significant principles which will make it more difficult to deny liability if a global claim is brought.

If a claimant can demonstrate that all the events on which he relies are the defendant's responsibility (for example, late information and design changes) then it is not necessary to demonstrate causal links between individual events and particular heads of loss i.e a 'global claim' may be brought. However, if a significant cause of the delay and disruption is not the defendant's responsibility (such as bad weather, or the claimant's own errors) then a global claim must fail. Lord Drummond Young in the Inner House said that it does not however follow that a claimant who cannot eliminate all matters that are not the responsibility of the defendant from his claim is thereby debarred from bringing a claim, and the Inner House then set out a number of additional factors that should be considered:

- it may be possible to establish a causal link between particular events for which the defendant is responsible and individual items of loss using the dominant cause approach;

- common sense should be applied to the question of causation. If an event for which the defendant is responsible can be described as the dominant cause of an item of loss, that will be sufficient to establish liability, notwithstanding the existence of other concurrent causes; and

- even if it cannot be said that the dominant cause of the loss is an event for which the defendant is responsible, it may nevertheless be possible to apportion the loss between that and other causes, provided that the events for which the defendant is responsible are material causes.

In relation to this last point, Lord Drummond Young said that "*such a procedure may be appropriate in a case where the causes of the loss are truly concurrent, in the sense that both operate together at the same time to produce a single consequence*" and suggested that during a period when two causes were operating, each should normally be treated as contributing and "*unless there are special reasons to the contrary, responsibility during that period should probably be divided on an equal basis...*". Lord Drummond Young acknowledged that apportionment may produce a 'somewhat rough and ready' result but that this was likely to be fairer than an entire global claim failing if the claimant cannot prove that the whole of the loss was the responsibility of the defendant.

Adjudication update

In *Buxton Building Contractors Ltd -v- Governors of Durand Primary School* (12 March 2004) the Court held that it is incumbent on an adjudicator to identify all the issues in a claim and decide on them.

Buxton had carried out works for Durand and adjudicated to recover retention monies. Durand said Buxton were liable for defective works and argued that their cross-claim should be set-off against the claim, and exhibited all their correspondence with Buxton with their response. The adjudicator's decision in favour of Buxton did not however take into account any of Durand's defective work arguments.

Durand resisted enforcement and the Court considered whether or not the adjudicator's decision not to take Durand's arguments on board was within the adjudicator's jurisdiction.

The Court found that the adjudicator had ignored material referred to him with the consequence that he did not fulfil his statutory duty in deciding the dispute referred to him and failed to decide all matters in dispute.

As such the decision was not capable of enforcement. It was intrinsically unfair in that it failed to take into account relevant material. This suggests a departure from the more robust approach previously taken that 'the dispute' is simply that referred by the referring party.

Similar issues were considered shortly after this in *William Verry Limited -v-*

North West Community Mikvah (11 June 2004). This is another defects claim case, in which Verry had obtained an adjudicator's decision in its favour in relation to work it had carried out but for which the Mikvah refused to pay, on the basis that they had a claim for defects against Verry which the adjudicator had not taken into account.

On the facts of the case, the Court decided that the adjudicator had acted within his jurisdiction, but only just, as he had answered the right question wrongly rather than having answered the wrong question. The decision was enforced, but the Court ordered a stay of execution of 42 days in order that the Mikvah could commence a further adjudication to determine their claim for defects, in order that one decision could then be set off against the other.

These two cases show that where a party intends to resist payment on the basis of defects it is important that those arguments are brought within the remit of the dispute referred to the adjudicator. Where they cannot be included in the existing adjudication, a separate adjudication should be instituted to resolve the issues as soon as possible.

The issues that should be considered by adjudicators in deciding whether to admit further evidence were considered in *McAlpine PPS Pipeline Systems Ltd -v- Transco PLC* (12 May 2004). In his judgment, HHJ Toulmin set out a number of questions that were relevant to an adjudicator or to

the court in considering matters concerning an adjudicator's decision, or an adjudicator deciding whether to admit further evidence. These included:

- What issues were discussed between the parties before referral to adjudication?
- What dispute was referred to adjudication after the defendant had been given a chance to respond?
- Was the adjudicator's decision responsive to the issues raised, and were any new issues raised?
- If so, were the new issues objected to by the defendant, and did such an objection go to the fundamental nature of the dispute referred? and
- If so, did the objection go to the fairness of the procedure, and did it affect the fairness of the decision?

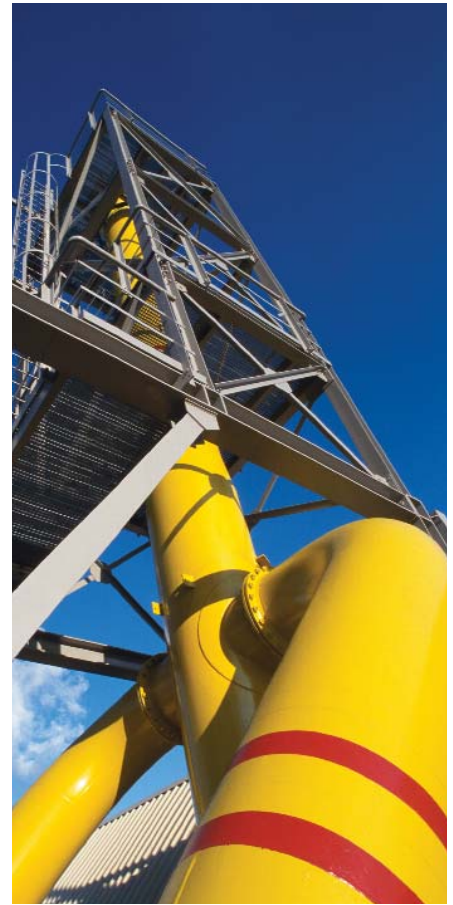
These questions emphasise the importance of making clear which issues are in dispute from the outset of adjudication proceedings and submitting all your evidence as early as possible.

OFT hits the roof over price fixing

The UK and EC competition laws apply to the construction and engineering industries as much as any other industry, and a recent decision of the Office of Fair Trading is a reminder of the dangers of any lingering practices, such as cover-pricing and the placement of "dummy bids", that may blight the competitive tendering of a construction project. It is also an example of whistle-blowing in action.

Nine members of a cartel in the flat roofing market have been fined a total of over £300,000 for price-fixing arrangements that effectively shared out the market between them through a system of collusive tendering. The OFT investigation was a result of one of the cartel members blowing the whistle and (successfully)

applying for leniency. Price fixing is an offence under both the UK Competition Act 1998 and EU law, and can result in fines of up to 10 percent of a business' turnover. If that is not encouragement enough to put a proper competition compliance programme in place and ensure that anti-competitive agreements are not entered into, it is worth keeping in mind that if that cartel had been active after 20 June 2003 - the date when the Enterprise Act 2002 came into force - the individuals involved in that cartel could well be facing criminal prosecution for their actions. We reported on the Enterprise Act in our Summer 2003 edition of In Site. If you have any EU procurement advice needs, please contact Christopher Causer or Neil Baylis for further information.



Who to contact

For further information contact David Race, James Hudson, Kevin Greene, Christopher Causer or Linda Kent.

david.race@ngj.co.uk
james.hudson@ngj.co.uk
kevin.greene@ngj.co.uk
christopher.causer@ngj.co.uk
linda.kent@ngj.co.uk

Nicholson Graham & Jones
110 Cannon Street, London EC4N 6AR
020 7648 9000

Internationally a member of GlobalLex. The contents of these notes have been gathered from various sources. You should take advice before acting on any material covered in this newsletter.