THROUGH THE AGES-CONSTRUCTION LAW AND ALL THAT

The Honourable Mr Justice Akenhead

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Introduction

1. That well know academic book "1066 and All That" by Sellars and Yeatman (by whom I was inspired to give this paper) was sub-titled with a statement that the book comprised "103 Good Things, 5 Bad Kings and 2 Genuine Dates" whilst the preface points out that "originally four dates were planned, but last-minute research revealed that two of them were not memorable". This is not intended to be a history lesson but a consideration of where we get some parts of our construction law from.

2. Many civilisations regarded justice as a holy virtue and right. Many had gods of justice, often female for example Maat in Ancient Egypt, Themis in Greece and the aptly named Iustitia in Rome. Oliver Wendell Holmes rather sadly raised law to an obsessive level:

> "The law ... is a mistress only to be wooed with sustained and lonely passion; only to be won by straining all the faculties by which man is likest to a god. Those who, having begun the pursuit, turn away uncharmed, do so either because they have not been vouchsafed the sight of her divine figure, or because they have not the heart for so great a struggle." (1934)

There is no reference to a god or goddess of construction law.

3. The poet Shelley wrote of a "traveller from an antique land" who found two "vast and trunkless legs of stone" at the base of which there was this inscription:

4.

> "My name is Ozymandias, king of kings: Look on my works, ye Mighty, and despair!"

He went on to say that: "Nothing besides remains". It is a sad fact that very few buildings or structures last a very long time. Many are removed by man or by natural or other disasters. Of the Seven Wonders of the World, only one remains in any clearly recognisable form (the Great Pyramid); one might be mythical – the Hanging Gardens of Babylon might not have been at Babylon at all but at Nineveh, about 400 miles north. A few remains still exist such as the temple of Artemis at Ephesus. Most of the Seven Wonders succumbed to various acts of force majeure, for instance:

(a) Phidias' statue of Zeus at Olympia was probably destroyed by the effects of a catastrophic fire some six or seven centuries after it was made. An amusing story is that the mad and bad Roman Emperor Caligula ordered it to be destroyed in the first century A.D. just before he was assassinated. The demolition workmen who put their scaffolding around the statue fled because, at the exact time of his death, the statue burst out laughing. It remained in situ for another 300 years

(b) The lighthouse at Alexandria was 118m high, which is about 38 storeys. It was built to last by Alexander the Great's general Ptolemy in about 300 BC and lasted until the 14th century AD when a third major earthquake reduced it to a stub. The Shard is 72 storeys and 306m high but, is it better and will it be allowed to last 17 centuries?

5. Humans have been building in a permanent or semi-permanent form for at least 9,000 years so we can be sure that there have been building disputes for 8,999 years. My researches reveal that the first building contract termination occurred immediately after Noah's Flood at least 7,000 years ago. In the Book of Genesis (Chapter 11), the following appears:

> "3. And they said one to another, Go to, let us make brick, and burn them thoroughly. And they had brick for stone, and slime had they for mortar.
> 4: And they said, Go to, let us build us a city and a tower, whose top may reach unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth."

Thus was the Tower of Babel conceived: it was a brick structure not reinforced concrete, and the mortar being slime was clearly not suitable. However, it was reaching to the sky, when, unfortunately, the employer considered that the whole concept was unfit for purpose, sacked the entire workforce and scattered them around the world, all speaking different languages. This was the first construction disaster. Concrete did however start to be used by the Romans.

6. The first recorded architect was Imhotep in about 2,600 BC and he designed the first stepped pyramid. History does not relate whether he was ever sued but, as his client was the pharaoh, there was always another sanction for professional negligence. Unlike any other architect in history, he was deified. He is to be distinguished from the fictional Mummy, also called Imhotep, in the entire series of The Mummy, The Mummy's Curse, and the Mummy Returns films.

Delay

7. The pharaoh who built the great Pyramid at Giza outside Cairo was best known as Cheops and was regarded by some ancient historians as "bad" (in 1066 terms). The 180 metre high pyramid is said to have taken 20 years to construct. Its mass was 5.9 million tonnes. First, the site had to be levelled and a founding layer in bedrock had to be excavated; then some 2.5 million stone blocks (many 4-6 tonnes) had to be dug, mostly from nearby quarries, cut and transported, which was not too easy given that they did not have wheels, lorries or forklifts. After setting out, which had to be done very carefully, and the lower blocks laid, temporary work ramps had to be made to get the blocks up higher to be laid.

8. A critical path analysis on the Pyramid construction has actually been done by some American engineers ("Program Management" – Craig B Smith BE –June 1999). They worked out that an average workforce of 13,200 with a maximum of 40,000 was needed, 2-3 years were needed for site preparation, 5 years for actual construction and 2 more years for removing the ramps, decoration and various other things, a total of 10 years. Stone quarrying, cutting and transporting was not on the critical path. They calculate that the labour cost was 111 million jugs of beer and 126 million loaves of bread over the 10-year span of the project.

9. However, because it took 20 years to build, it was finished 10 years late. There was apparently no liquidated damages clause but liquidation may well have been exacted, which was enforceable in those days despite it being a penalty.

10. This brings me on to the use of critical path analysis in modern litigation and arbitration. Programming experts, like other experts, have to play the factual cards with which they are dealt; their client's case may be strong or week. There is a problem with computer programmes because they only process what goes into them. The most commonly used delay programmes involve a windows based approach which measures, against often monthly or quarterly windows, progress against an initially established critical path. Often, but not always, the experts can use the critical path programme put forward by the contractor at the beginning (and approved or not challenged by the Architect of the Engineer) as the baseline from which to start their exercise. They can otherwise create and agree an appropriate baseline programme. It is extraordinary however in contested cases where delay is in issue how often delay experts depart from the agreed or normal and conventional approach in this regard. In several cases, the Court has been faced with experts who have agreed on a baseline programme on which to work but then in their

reports have departed from what they agreed. Suspicions are raised in a few cases that the computer programme exercise has been run but found not to produce an acceptable answer.

11. An example of what can go wrong in delay analysis is **Cleveland Bridge UK Ltd v Severfield-Rowen Structures Ltd** [2012] EWHC 3652 (TCC) which involved delay on the steelwork to the Shard, where there were two early programmes which could sensibly have been used. The Court's assessment of the programming experts was:

> "So far as the experts are concerned, Mr B, the planning and programming expert for SRS was very impressive: he is extremely experienced in this field. He was sensible, reasoned, clear, logical and made concessions as appropriate. However, I found that Mr H, his opposite number for CBUK, was inexperienced at least as an expert, his first report was confusing and he was nervous and confused although he tried to be open, even when faced with a slightly aggressive albeit polite cross-examination. I felt that he went back on things which he had agreed in the Joint Statements with Mr B, such as the appropriate basis to carry out programme and delay analysis. He carried out no real analysis of why or how CBUK was delayed in its performance, judged against either the June or December programmes; he simply albeit enthusiastically asserted that late information, variations and late release of free issue materials delayed CBUK but did so without any analysis of the facts at all. I have no difficulty in preferring the thrust of Mr B's evidence, albeit that, as will be seen, I do not accept, in logic, all of it." (Para. 9)

12. A problem arises where there is no appropriate baseline programme for the experts to work from. That was the case in **Walter Lilly & Company v Mackay** [2012] EWHC 1773 (TCC) and the experts had to provide an alternative. The expert who found most favour with the Court adopted an approach of establishing critical delay by reference to the "logical sequence(s) of events which marked the longest path through the project". The other expert, who did not find favour, adopted what the Court considered was a more subjective approach "based on determining the most "significant" matters preventing practical completion". The main judgment stated about the Defendants' expert:

> "Some parts of his report were based on conversations and information which were not in evidence and on occasion he had to accept that he was given information by Mr Mackay and by Navigant which was not contained or referred to in his report. He produced as Appendix D a "Weighted Significance Matrix" which was worthless and self-fulfilling when he on a largely subjective basis awarded weightings to the various possible causes of delay; this was taken through the project in 2007 and 2008 on a monthly basis and, unsurprisingly gave much higher weightings to the subjectively accepted factors (such as plastering defects) selected by him or his client as "significant"." (Para. 99)

13. There was a great debate in that case about whether one should adopt a prospective approach in assessing an extension of time as if one were the perfect Architect awarding

extensions as the events were happening or on retrospective basis. The prospective approach assumes that the Architect is fully briefed and particularised and timely applications for extensions are made before any or most of the delay in question has occurred. The Court thought that this on its own was somewhat sterile "because both delay experts accepted that, if each approach was done correctly, they should produce the same result" (Para. 380). A primary pointer is the longest lead approach:

> "Mr R [the claimant's expert] had regard to the likely longest sequence of the outstanding work on a monthly basis as being the primary pointer to what was delaying the work at any one time. This was a wholly logical approach and, indeed is the approach used by most delay experts when there is a usable baseline programme from which to work. The logic is simply that if there are, say, two outstanding items of work, A and B, and A is always going to take 20 weeks to complete but B is only going to take 10 weeks, it is A which is delaying the work because B is going to finish earlier; overall completion is therefore dictated by the length of time needed for A. Put another way, it does not matter if B takes 19 weeks, it will be the completion of A which has prevented completion. Thus, if one is seeking to ascertain what is delaying a contractor at any one time, one should generally have regard to the item of work with the longest sequence. There was some sterile debate about whether Mr R was adopting a purely "prospective" approach when he made it clear that "as a reality check" he had regard to what actually happened. There is in my view nothing wrong with such a "reality check". An example might be that, say in February 2007 WLC was saying albeit in good faith that an item of work would take 25 weeks from then onwards. If in reality it only took two weeks, one would need to have regard to the efficacy of the earlier statement that it would take longer. Therefore it is necessary to have regard to how long individual items actually took to perform and not just have regard to what one party or the other at the time was saying it would take."

14. How of course this would all have worked 4,500 years ago before the ancient Egyptian TCC but I would not count on any delay expert on either side then surviving if he or she tried to find excuses for delays or tried to explain that there was no excuse. Either way, death or slavery awaited. Life is so much easier now, or is it?

Equity and Good Faith

15. It is thought that the concept of equity was first articulated in writing by Aristotle in the fourth century BC (Nichomachean Ethics V 10) and one of his definitions of justice was what was equitable and fair. He defined equity as a form of correction to legal justice, saying that it was right that the law could be adapted in a particular case on the assumption that the lawmaker would have altered the law if he/she had had that particular case in mind. Aristotle was not a lawyer but a philosopher. Roman law recognised a principle known as "aequum et bonum" or what is just and right or equitable and good. Some people did not like equity, the lawyer, John Selden, describing

it in the early 17th Century as a "roguish thing". But as from the 16th century it was here to stay:

> "Law makers take heed to such things as may often come, and not to every particular case, for they could not though they would; therefore, in some cases it is necessary to leave the words of the law and follow that reason and justice requireth, and to that intent equity is ordained, that is to say, to temper and mitigate the rigor of the law." (Doctor and Student)

16. We do not hear Aristotle discussed during tea-breaks on construction sites (except amongst the design and build contractors), and only once or twice a week in the TCC. Quasi-contract, unjust enrichment and quantum meruit emerged in Roman times from about 100 AD, but in particular in the laws codified by the Roman Emperor Justinian in the 6th Century. But the principles of equity do break into construction law in a number of ways.

17. I would like to look at the duty of good faith, which in a way might be considered an equitable concept or embraced by equitable concepts. Cicero, the Roman politician and also a trial lawyer, wrote in the 1st century BC explaining what it meant:

> "These words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever manoeuvres, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance". (de Off 3. 17)

18. There has been a running debate in England as to whether there is a stand-alone duty of good faith or whether such a duty should customarily be implied into commercial contracts. This has recently been considered and reviewed in some detail by Mr Justice Leggatt in **Yam Seng v International Trade Corporation** EWHC [2013] 111 (QB). He prefaced his review as follows:

> "120. The subject of whether English law does or should recognise a general duty to perform contracts in good faith is one on which a large body of academic literature exists. However, I not am aware of any decision of an English court, and none was cited to me, in which the question has been considered in any depth.
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> 121. The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see Chitty on Contract Law (31st Ed), Vol 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 QB 433 at 439 are often quoted:
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> > "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a

principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing… English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

…123. Three main reasons have been given for what Professor McKendrick has called the "traditional English hostility" towards a doctrine of good faith: see McKendrick, Contract Law (9th Ed) pp.221-2. The first is…that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.

124. In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the Interfoto case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems – including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in Chitty on Contract Law (31st Ed), Vol 1 at para 1-043…"

19. He then refers to cases in the USA, Canada, Australia and Scotland as well as to the law in New Zealand. He underlines the proposition that virtually all contracts will require honesty in their performance (Paragraph 137) and "fidelity to the parties' bargain" (Paragraph 139). He then goes on to say:

"140. The two aspects of good faith which I have identified are consistent with the way in which express contractual duties of good faith have been interpreted in several recent cases: see Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch) at [95]-[97]; CPC Group Ltd v Qatari Diar Real Estate Investment Co [2010] EWHC 1535 (Ch) at [246].

141. What good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information.

142. In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such "relational" contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements."

20. In the TCC, we had a case in May of this year, **TSG Building Services PLC v South Anglia Housing Ltd Association** [2013] EWHC 1151 (TCC) which was concerned with the termination of a 4 year term contract for gas and related services maintenance for some 5,500 dwellings. It had a termination clause which stated:

> "the Client may terminate the appointment…at any time during the Term or as otherwise stated by the period(s) of notice…"

A three month notice period was called for. Another term referred to "partnering":

> "1.1 The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and in all matters governed by the Partnering Contract they shall act reasonably and without delay."

21. The argument was that the Client had an implied overriding duty of good faith and therefore should not terminate unless there was good reason. The Court was assisted in reaching its decision by the Court of Appeal decision in a non-TCC type case, **Mid Essex NHS Trust v Compass Group UK and Ireland Ltd** [2013] EWCA Civ 200 provides some illustrative assistance, albeit that the contract was a different one to that in this case. The contract was for the provision of catering and cleaning services over a seven year term. Clause 3.5 provided:

> "The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract. At all times in the performance of the Services, the Contractor will co-operate fully with any other

contractors appointed by the Trust or any Beneficiary in connection with other services at the Location."

So, this contract actually had an express good faith term but there was also a term which allowed the Trust, where performance criteria or standards had not been met by the Contractor in the performance of the Services, to levy various payment deductions against the monthly amount of the Contract Price payable to the Contractor. The Court of Appeal (Jackson, Lewison and Beatson LJJ) found that there was no implied term of good faith and the express term of good faith did not impinge on the Trust's rights to levy deductions.

22. Having regard to that case in the **TSG** case, the Court said that one could and should read the termination clause as unqualified and in particularly not qualified by the working "together and individually in the spirit of trust, fairness and mutual co-operation" provision. It would have been easy for the parties to qualify the termination clause but they did not. There was no room for an implication of good faith into the contractual termination arrangements where the parties had given the client an unqualified right to terminate. The reality however is that judges will tend to want to construe contracts in a way which does not permit a party to behave in a dishonest or unscrupulous way; therefore 99 times out of 100, our courts will get to the same result in contract cases as if there was a good faith requirement incorporated.

Fitness for Purpose

23. History repeats itself. The Hillsborough football stadium disaster was an absolute tragedy but it does not compare with one which occurred in 27AD in a town called Fidenae just north of Rome. An entrepreneur called Atilius had a very large wooden amphitheatre built just as an imperial ban on gladiatorial games was coming to an end. With an audience of some 50,000 in place to watch men killing each other, it collapsed leaving 20,000 dead. The politicians' response to this was to banish the developer and pass laws by which no-one with a net worth of less than 400,000 sesterces could host gladiator fights and by which proper foundations had to be provided in amphitheatres.

24. Do we ever learn? A hotel in Las Vegas, called the Vdara, had a steel and glass structure which beamed solar rays onto a swimming pool area and apart from heating the water this burned people and melted objects. In 2013, press reports identified a similar problem for the Walkie Talkie building in the City of London. There is nothing new under the sun.

25. It is easy, obvious and right for the law to talk of fitness for purpose, imposed or implied by statute or by way of common law principles. However, the law feels that it has to impose restrictions. For what purposes does the building, the components, the machinery, the technology have to be suitable? The law suggests that they have to be generically fit: A JCB has to do what its says that it can do in the manual but, if it could not work in 3 metres of water, it would not be unfit for purpose unless the client had pre-contract clearly asked for an excavator which could work submerged. Therefore communicated purposes can extend inherent basic generic suitability for purpose. The Courts have resisted the idea that the fitness for purpose obligation (often implied) acts as a guarantee that the object of the particular contract will work or otherwise be satisfactory, irrespective of the circumstances surrounding the contract.

26. One of the most difficult areas for customers in relation to suitability is in the technology field with which the TCC is concerned. Often due to lack of in-house expertise or to political or commercial demands, customers often go into contracts for software provision without an adequate statement of what they really want and need. It is sometimes a wish list with incompatible requirements. Customers often later change their minds as to what they want or need as the project is going on An example was the case of **London Borough of Southwark v IBM** [2011] EWHC 549 (TCC). The Council wanted a Master Data System to handle Council Tax, business rates, housing maintenance, customer complaints and a host of other things. It wanted an efficient system which could for instance pick up errors or differences in peoples names and addresses; for instance a Mr A Smith of 23 Acacia Avenue could be also listed as Mr Adrian Smith of 23 Acacia Avenue and be charged Council Tax twice. It approached IBM, having heard of software marketed by IBM called Websphere which was not a Master Data System but could be used as part of the package for a Master Data System. A system called Arcindex was marketed by a well known software company called Orchard and this was demonstrated by Orchard to the Council who were impressed with it.

27. IBM never recommended to the Council Orchard in general or Arcindex in particular as suitable. The Council chose Arcindex having evaluated it for itself. The Council staff gave the impression to IBM that they were technically qualified to set up, procure and manage the project. Council personnel investigated with Orchard to understand what Arcindex was and could provide and they knew exactly what Arcindex could and would provide and they believed that Arcindex met their requirements as they perceived them. No requirements were formulated in writing by the Council in relation to the IBM procurement. Neither IBM nor Orchard misled the Council about what Arcindex could or could not do.

28. The contract was relatively sophisticated but it expressly called on IBM to provide amongst other things Third Party Software, namely Arcindex, produced by Orchard. The job did not go very well and by the premature end of the project a newly appointed Data Integration Manager had highlighted some fundamental problems, including that Arcindex was said not to be "a mature product…due to its limited user interface, integration capabilities and matching output" and that "real time" integration was expressed to be "a key component". IBM's contract was terminated and proceedings were issued.

29. The claim failed. On analysis, the problem was that in reality Arcindex was not fit for the Council's purposes but it had been selected by the Council as fulfilling and satisfactory for its purposes. Although it had a contract with IBM which involved the provision and installation of the Arcindex software, together with IBM's own software, IBM had not warranted that it was fit for purpose. The Sale of Goods Act 1979, which does statutorily imply fitness for purpose obligations, could have applied to software, although there has been a major debate as to whether software can be "goods". However, the goods (the Arcindex and other software) were not sold as such because they were simply licensed.

30. Fitness for purpose is a basis of claim which is often relied upon in major construction and technology cases but which is not established as often as one might think. Performance specifications are the modern and can be a more reliable way of achieving the same result.

31. A Chinese provincial Governor authorized the building of a 6 storey high wooden pagoda in Hangchow, the architect being a very famous 9th century person called Yu Hao. Whilst it was under construction the governor was worried because it swayed. The Builder explained that as the tiles had not yet been put on, the upper part was still rather light, hence the effect. The swaying continued after the tiles were put on. The governor sent his wife to see the wife of Yu Hao with a present of golden hair pins, and enquire about the cause of the motion. Yu Hao advised the fitting of struts fixed with nails so that it would move no more. The builder followed this advice, and the pagoda stood firm. The nailed struts filled in and bound together all the members up and down the six storeys. The temporarily unstable became fit for purpose in the permanent condition

War, Compromise and Mediation

32. There have been wars from the arrival of *homo sapiens*. The title given to man that he or she is as a species *sapiens* or wise is for many people in history an odd adjective. Judges in history were sometimes called "wise". A remarkably undistinguished Roman 2nd Century BC consul, Gaius Laelius, was known as Sapiens or the wise but history relates his only wise move, unlike most of his peers, was to remain married throughout his adult life to one woman.

33. There are some records of the use of mediators in Babylon and amongst Phoenician traders. There was a word for commercial mediators in ancient Greece (pronounced "proxnetas") and they were called intercessors or conciliators in the Roman Empire; mediation was recognised in Justinian's laws. St Paul encouraged the faithful to resolve their disputes amongst themselves, mostly because he seems to have regarded at least the Corinthian courts as ungodly (1 Corinthians 6 v 1-4). In the modern world, it saw the light of day in industrial relations dispute resolution, with the forerunners of ACAS (the Advisory, Conciliation and Arbitration Service) in the late 19th Century in this country.

34. As a means of settling construction, engineering and technology disputes, mediation has only come in as a common and effective method of dispute resolution in the late 1980s and 1990s. The TCC is the only court in the country to provide the services of judges as mediators; it is a service not used more than about 10-15 times a year but it is useful particularly when the claim values are relatively low. Mediation is encouraged by the Courts and there are costs sanctions which can be deployed for a party who will not mediate even in hopeless cases.

35. The only real problem with mediation has been found to be disputes about whether a settlement has actually been reached. If one party says that it has settled and another says that it has not, it may be that the Court then has to get involved. The problems may be such as require the mediator to give evidence particularly if he or she has been the carrier of the offer or the alleged acceptance. A recent case in the TCC before Mr Justice Edwards-Stuart, **AB v CD** (16 April 2013), has highlighted this problem. There was no settlement in that case on the day of the mediation but negotiations proceeded with the mediator being kept "in the loop" and passing on one or more offers. The final position was that the parties were apparently agreed about the principal sum and that the Defendant should pay the costs but the agreement was said to be "subject to contract" and there was continuing discussion about a lump sum for the costs and a form of order. The judge decided that there was a binding settlement. Of course the problem can be avoided or at least limited by having a mediation agreement which lays down that there is to be no settlement unless and until it has been written down and signed by both

parties; however, in the **AB** case, that did not help because the mediation as such was no longer proceeding, albeit that the mediator was still helping out.

The need for construction law judges and lawyers now and then

36. The first codified system of construction law was enacted on stone tablets by a Babylonian king, Hammurabi (1792 -1750 BC). It provided for different compensation for defective building and was attractively simple:

> "229 If a builder builds a house for someone, and does not construct it properly, and the house which he built falls in and kills its owner, then that builder shall be put to death.
>
> 230 If it kills the son of the owner, the son of that builder shall be put to death.
>
> 231 If it kills a slave of the owner, then he shall pay, slave for slave, to the owner of the house.
>
> 232 If it ruins goods, he shall make compensation for all that has been ruined, and inasmuch as he did not construct properly this house which he built and it fell, he shall re-erect the house from his own means.
>
> 233 If a builder builds a house for someone, even though he has not yet completed it; if then the walls seem [to be] toppling, the builder must make the walls solid from his own means."

37. Public health and building regulations were first addressed in the Laws of Moses at about the same time. Deuteronomy 22:8 states:

> "When you build a new house, make a parapet around your roof so that you may not bring the guilt of bloodshed on your house if someone falls from the roof."

The Bible also addresses other public safety and health issues involving the environment and proposes a way of sorting out mildew or possibly wet rot. Leviticus 14:39-45 describes the landfill procedure which the Israelites were to follow when mildew was found in the home, the priests being the Environmental Health Officers:

> "On the seventh day the priest shall return to inspect the house. If the mildew has spread on the walls, he is to order that the contaminated stones be torn out and thrown into an unclean place outside the town. He must have all the inside walls of the house scraped and the material that is scraped off dumped into an unclean place outside the town. Then they are to take other stones to replace these and take new clay and plaster the house. If the mildew reappears in the house after the stones have been torn out and the house is scraped and plastered the priest is to go and examine it and, if the mildew has spread in the house, it is a destructive mildew: the house is unclean. It must be torn down—its stones, timbers and all the plaster—and taken out of the town to an unclean place."

38. Marcus Vitruvius Pollio wrote a treatise called "The 10 Books on Architecture" for the Roman Emperor Augustus in about 20 BC calling amongst other things for an architect

for public works to have to pledge his own property by way of guarantee that the costs of construction would not exceed by more than 25% of the given estimate. Roman law recognised that contracts were to be honoured provided that circumstances did not change. Architects now, usually, only have to exercise reasonable care and skill which Romans would have thought was a somewhat diluted standard of care.

39. It is difficult to track down the first ever reported civil construction case in history but it must be there. One gets the impression that at least the cases did not go on for a long time because for instance until the 1870s or so in this country expert evidence was not admissible, as opinions were generally not considered as admissible evidence. One should not blame experts for the fact that litigation and arbitration can be expensive. What does help however is the rise of the specialist judge and in that regard England and Wales achieved a first, probably in history, by having Official Referees appointed in the 1870s to address technically complex cases; this developed by the early 1900s into judges who mostly specialised in construction and engineering work. Nothing can compare in the TCC with Sir William Gascoigne, Henry IV's Chief Justice who committed the future Henry V to prison for contempt after the prince, being upset that a servant of his was being arraigned, went up to the judge and hit him. His son having submitted calmly to his imprisonment, Henry IV thanked "God that he had given him a judge who knew how to administer justice and a son who could obey justice".

40. The TCC does not have to deal with much by way of contempt but a recent case has illustrated the difficulties. In **Berry Piling Systems Ltd v Sheer Projects Ltd** [2013] 347 (TCC), Sheer applied for permission to make an application for committal for contempt against two former directors of Berry, in relation to statements which they had submitted in adjudication enforcement proceedings brought by Berry against Sheer over a year ago. Berry had secured a money judgment in its favour and had fought off an application by Sheer for a stay of execution on that judgment on the basis of those statements which were now said to contain untruths. Contempt can arise where a person "makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth". However, it must in every case be shown that the individual knew that what he or she was saying was false and that the false statement was likely to interfere with the course of justice; the charge has to be proved beyond reasonable doubt. To get permission to pursue contempt proceedings, one has to show among other things a strong prima facie case. It was on this basis that the application failed, the Court also observing that since the overall costs of some £300,000 of the contempt proceedings seeking to prove a case which was not strong and related to an original judgment for £24,000 was disproportionate as well. Statements of Truth are

important and parties who sign them need to know that deliberate untruths can give rise not only to contempt but also to perverting the course of justice charges.

Is History Bunk?

41. Henry Ford's famous quotation that "History is bunk" is a mis-quotation. He actually said:

> "History is more or less bunk. It's tradition. We don't want tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history that we make today." (Chicago Tribune, 1916).

42. What one can draw from history is that there is little new under the sun in terms of the sort of things which go wrong with building, engineering and technology projects. There are very few legal concepts which have not been addressed for 100s and probably 1000s of years. The only really new development was and is the creation of a corps of specialist construction law judges which happened in this country in the 1870s; this legal jurisdiction was the first to do this and the rest of the world has taken a long time to catch up, Malaysia being the 5th to do so in the summer of this year. But mediation is better than war in relation to construction and engineering disputes. Judges and arbitrators by and large do not like internecine scrapping between parties and their legal advisers because it is often leads to avoidable expense and waste of court or tribunal time. That said, Courts these days, and particularly since the amendments to the Overriding Objective in the Civil Procedural Rules in April of this year, will be less tolerant of disproportionate procedural wrangling and also of non-compliances with rules, practice directions and orders. Mediation can have an extraordinarily palliative effect on warring parties in litigation and arbitration and is strongly encouraged by the Courts.

43. There is of course no absolute answer as to whether and to what extent we can usefully draw on history when we have to resolve construction law disputes. Please do not feel it essential to attach in your lists of authorities for any case the works of Cicero, the building statutes of Hammurabi of Babylon, Aristotle's philosophical outpourings, poetry or indeed this paper.

44. **1066 and All That** also contains joke 'Test Papers': "Do not on any account attempt to write on both sides of the paper at once" and "Do not attempt to answer more than one question at a time". It says also that: "the object of this History is to console the reader. No other history does this", and: "History is not what you thought. It is what you can remember." These are equally truisms for and need to be borne in mind at all times by construction lawyers, judges and other practitioners.