TECBAR Review

Spring 2018

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Chairman's Message

This is my first message since taking over as Chairman in July 2017 and, as such, the appropriate occasion to publicly thank Martin Bowdery QC for his excellent work over the last two years as our Chairman. Generous thanks should also go to Lynne McCafferty for her tireless work as Secretary of Tecbar.

Change is in the judicial air. We warmly congratulate Mr Justice Coulson on his elevation to the Court of Appeal. Sir Peter has made an invaluable contribution to the field of construction law and, particularly, to the law on adjudication and payment related issues. It is important for members of Tecbar and construction lawyers more generally that there remains within the appellate court someone with direct experience of TCC work and related arbitration matters and we are delighted that it is Sir Peter who has been chosen for that purpose.

It is also time to pay tribute to Lord Justice Jackson who, sadly, has just retired. Both as Judge in charge of the TCC and in the Court of Appeal, Jackson LJ produced a series of important and clear decisions which have contributed towards the development of construction law. He also worked tirelessly to promote the status of the TCC and for that our membership remains grateful.

But it is not just the Bench which moves on. I would also wish to congratulate those of our members who have been appointed as QCs, namely Lucy Garrett, Jonathan Selby, Lynne McCafferty, Parishil Patel, Adam Robb and Andrew Singer. We wish them every success in the next stage of their careers.

In September I spoke at the Bar Conference as part of a team promoting the work of the Business and Property Courts. We will keep a close watch on the way in which this new venture develops and make our contributions when we can. We recently attended a meeting with the Department for Business, Energy & Industrial Strategy to discuss the role that adjudication plays in the construction world and, particularly, as it affects our members. I am also pleased to say that Junior Tecbar has also been successfully launched.

I look forward to seeing as many of you as possible coming to our annual conference which has now been rescheduled for 21 April 2018. Although you do not need to tot up a specific number of hours to fulfil your CPD obligations, the practical reality is that you will need to have undergone something equivalent under the new regime. We believe the conference will therefore continue to be a benefit to the membership. It is also a good occasion on which to catch up with colleagues. I am delighted to say that O'Farrell J has agreed to be the keynote speaker.

Alexander Nissen QC

From the Editor

This Spring 2018 issue of the *TECBAR Review* contains three contributions.

In the first, Nicholas Maciolek of Atkin Chambers considers the recent case of *Ziggurat (Claremont Place) LLP v HCC International Insurance Company plc* [2017] EWHC 3286 (TCC), [2018] BLR 98, in which the Courts have again considered the interaction between

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the JCT 2011 forms of contract and the ABI Model Form of bond.

Second, Andrew Singer QC of 4-5 Gray's Inn Square and King's Chambers has provided a case note on the costs judgment of HHJ Stephen Davies following the long-running litigation in *Amey LG Limited v Cumbria Council* [2016] EWHC 2946.

Finally, Darryl Royce of Atkin Chambers has provided a further instalment to his regular column on the case of *Systems Pipework Ltd v Rotary Building Services Ltd* [2017] EWHC 3235 (TCC), [2018] BLR 123, in which Coulson J (as he then was) revisited the effect of the Housing Grants, Construction, and Regeneration Act 1996 on final account claims.

Ziggurat (Claremont Place) LLP v HCC International Insurance Company PLC

When invited to extoll the virtues of our system of contract law, commercial practitioners never fail to point to the importance given to the certainty of obligations and outcomes; we like to think that we avoid the worst consequences of imprecise rules when a dispute comes up. It is for that reason that construction contracts and performance bond contracts provide particularly precise and rigorous mechanisms when dealing with termination and calls on a bond, because the stakes are normally quite high when those provisions are at issue. Of course, it is very often the case that, despite the best intentions of the draftsmen, when contractual termination or a call on a bond comes up, something goes wrong with the notice and all the parties are thrown into confusion and acrimony. The decision of Coulson J in *Ziggurat (Claremont Place) LLP v HCC International Insurance Company PLC* [2017] EWHC 3286 (TCC), [2018] BLR 98 provides a clear account of the interaction of the JCT 2011 standard form and an amended version of the standard ABI Model Form performance bond in the context of a contractor's insolvency, which may be of assistance in similar cases when a project goes badly wrong.

The Relevant Terms

In *Ziggurat*, the Claimant engaged a contractor to build student accommodation in Newcastle. Termination was governed by clause 8 of their contract ('the Building Contract'):

a. at clause 8.1, insolvency was defined to include entering into administration within the meaning of Schedule B1 of the Insolvency Act;

b. at clause 8.4, the Claimant was entitled to terminate the contractor's employment in the event of default by the contractor;

c. at clause 8.5, the Claimant was entitled to terminate the contractor's employment in the event of the contractor's insolvency;

d. at clause 8.7, in the event that the contractor's employment was terminated under (*inter alia*) clauses 8.4 and 8.5, the Claimant was entitled to engage other parties to carry out and complete the works, and to recover its costs of doing so from the contractor. Those costs were to be set out in a contract administrator's notice (clause 8.7.4) which would create a debt owed by the contractor to the Claimant (clause 8.7.5).

The contractor's performance was guaranteed by a bond provided by the defendant ('the Performance Bond') with a maximum liability of £382,519.06, whose terms provided (where relevant) that:

> *"(1) The guarantor guarantees to the Employer that in the event of a breach of Contract by the Contractor the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the losses and damages sustained by the Employer as established and ascertained pursuant to and in accordance with the provision of or by reference to the Contract and taking into account all sums due or to become due to the Contractor.*
>
> *(2) The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor."*

It should be noted that clause 2 was a bespoke provision added to the standard ABI terms by the parties.

The Insolvency

Before the building works were complete, in February 2016 the contractor stopped work on site. The contract administrator served a notice on the contractor identifying two breaches of contract (suspending the works and failing to proceed regularly and diligently with the works) and gave 14 days to remedy the breach. No response to the notice was provided, and the Claimant served a notice of termination under clause 8.4 of the parties' contract. Subsequently, in April 2016 the contractor entered into a Company Voluntary Arrangment, and administrators were appointed in May 2016.

The Claimant appointed other parties to complete the contractor's works, and on 10 March 2017 a notice was served on the contractor notifying it that £621,798.38 was due to the Claimant. A week later, the

Claimant made a demand under the bond. On 12 April 2017, the contractor's solicitors wrote to the Claimant contesting the validity of the termination notice, and stating in general terms that the sums Claimed on 10 March 2017 were contested. The debt due under the notice was not paid, and the demand on the bond was not satisfied. The parties sought Part 8 declarations as to whether the Defendant was liable to pay under the bond.

The Decision

Coulson J's decision began by reaffirming the Court of Appeal's ruling in *Perar BV v General Surety and Guarantee Co Ltd* (1994) 66 BLR 72 that insolvency is not, of itself, a breach of contract and so any performance bond which provides for payment on breach will not be engaged merely by the insolvency of the relevant party. However, where the underlying contract provides a notice mechanism for ascertaining the sums due on termination for insolvency, such a notice is provided, but not complied with, that will be a breach of contract which gives rise to liability under the bond. He also noted the more recent decision of the Court of Appeal in *Wilson and Sharp Investments Ltd v Harbour View Developments Ltd* [2015] EWCA Civ 1030, in which it was held that clauses 8.5 and 8.7 of the JCT 2011 standard form survive termination.

Those authorities led Coulson J to find that sums were payable under the bond. The contractor's failure to pay after the March 2017 notice was a breach of the Building Contract engaging clause 1 of the Performance Bond, and on that basis, the maximum payable sum was *prima facie* due, although the judge did note that the notified sum was not conclusive and could theoretically be challenged.

The Defendant sought to escape liability under the Bond by two connected arguments – first it contended that liability under the bond could only arise on breach of contract and not on the basis of simple insolvency (interpreting clause 2 of the Performance Bond as definitional and not the source of an obligation); it then sought to rely upon the argument of contractor's solicitors that the original termination notice (for failure to carry out the works) was formally defective. The Defendant contended that if the termination notice was formally defective, the clause 8.7 ascertainment process could not have arisen, and so no contractor's breach had occurred. Coulson J dismissed the defendant's interpretation of clause 2 of the Performance Bond as unrealistic. Moreover, even if the bond did not give rise to a right to claim purely on the basis of insolvency, the Building Contract entitled the Claimant to begin the clause 8.7 ascertainment process after insolvency, and, as noted above, the contractor's failure to respond to the ascertainment process was in and of itself a breach of contract. These defences were therefore rejected.

Amey LG Limited v Cumbria Council [2016] EWHC 2946 TCC – A Case Note

The interrelationship, if any, between proportionality and the Court's decision as to a costs order under CPR Part 44 has been considered by HHJ Stephen Davies in the Manchester TCC in his costs judgment in Amey LG Ltd v Cumbria [2016] EWHC 2946 TCC.

The substantive proceedings between the parties [2016] EWHC 2856 (TCC) had resulted in Amey achieving judgment in its favour of approximately £5.36 million including contractual interest after taking account of all claims and counterclaims. As to those, Amey was awarded £4.61 million on its 'Part 1' annual account claim out of £7.915 million claimed and £296,000 (net) on its 16 separate final account claims pleaded at £19.7 million. Cumbria was awarded £1.214 million for its counterclaims pleaded at £15.616 million. The trial ran for over 40 hearing days from early February to late May 2016 and there were over 60 factual witnesses and 7 liability and quantum experts.

CPR 44.2 provides:

> *"(2) If the court decides to make an order about costs:*
>
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
>
> *(b) the court may make a different order."*

CPR 44(6)(a) allows the Court to make an order that a party must pay "a proportion of another party's costs."

The Judge set out the well known summary of the relevant principles as regards the award of costs in *Multiplex Constructions v Cleveland Bridge* [2008] EWHC 2280 (TCC) per Jackson J as he then was and referred to Ramsey J's decision in *Biffa Waste Services v Maschinenfabrik Ernst Hese* [2008] EWHC 2657 (TCC) and Gloster LJ's judgment in *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93.

It was accepted at the costs hearing that Amey was the successful party, although Cumbria argued that Amey's lack of success, alleged conduct issues and admissible (but not Part 36) offers should reduce its recoverable costs by 50%.

The parties' respective costs were considerably higher than the sums awarded although lower than the sums in

issue at the start of the trial. Amey's costs were circa £8.48 million and Cumbria's circa £10.037 million. The parties' costs had not been subject to case management. When the case started costs management did not apply to cases whose stated valued were over £2 million and neither party sought any costs management order from the Court.

It was argued by Cumbria that proportionality arose in two ways. First, it was said it arose when the Court was deciding what order to make under CPR 44.2 and in particular under 44(6)(a). The Judge rejected that argument in short order on the basis that:

> *"If proportionality had been intended to be a relevant factor under Part 44.2 there can be no doubt that it would have been specifically mentioned." (Paragraph 23)*

The Judge described as "the more difficult question" (Paragraph 24):

> *"Whether or not when the court is considering what order to make about costs or in particular if one or more relevant circumstances such as conduct, success and admissible offers ought to justify making a proportionate costs order considerations of proportionality come into play... when deciding what discount to make the court should consider, and often may consider, what percentage of the overall time would proportionately have been devoted to the claim if pursued in a reasonable and restrained manner."*

The Judge then averted to the practical issue of the risk of "double jeopardy" if the Court makes a proportionate costs order under CPR 44.2 taking proportionality into account and on detailed assessment the costs Judge is also asked to reduce the costs paid by reference to proportionality tests in CPR 44.3.

Reference was made to the approach to be taken in the context of conduct issues and the decision of the Court of Appeal in *Ultraframe v Fielding* [2006] EWCA Civ 1660.

So far as the circumstances to be considered under CPR 44.2 and proportionality, however, the Learned Judge considered that in "most if not all cases a clear dividing line can be drawn." While the trial Judge should make a proportionate costs order based on considerations such as conduct, success and admissible offers, the Judge should not go further and consider "what proportion of the overall costs would have been incurred had the action been pursued in a manner which was proportionate" [Paragraph 27]. The Judge regarded the latter as a matter for detailed assessment. Further, the Judge noted both parties' position that if he was satisfied he should exclude any consideration of proportionality at this stage he should say so, as he did.

So proportionality should not feature in the Court's decision under CPR 44.2 even when the Court has decided to make a proportionate costs order in the vast majority if not in all cases.

In this case the Judge did then consider the matters put to him as to the parties' relative success, conduct and admissible offers and made a proportionate costs order. In summary, the Judge held that a substantial amount of time at the trial was taken up with consideration of Cumbria's defects counterclaims as to which they "very substantially failed" [paragraph 61(2)]. A similar amount of time was taken up with consideration of the details of the contract and how it operated over the 7 years of its lifetime and those costs were regarded by the judge as "common" costs. [paragraph 61(1)] Lesser amounts of time were spent on Amey's Better Highways claim which failed but without any criticism from the Judge in it being brought and within that claim Cumbria failed on one of the two significant issues. There was also no criticism of Amey's conduct in bringing other claims which failed. As to offers made the Judge was not persuaded that any offers made were reasonable (the one relied upon being a "walk away" offer in late July 2015) and should have been accepted or that Amey could be criticised for its response or that a different response would have led to the case being settled. Nor did the judge regard Amey's conduct in refusing the walk away offer and continuing to trial as commercially flawed, as the Judge put it:

> *"it does not seem to me that it was obviously unreasonable for Amey… to press onto trial even at a further cost of around £4.5 million in relation to costs…to recover that amount." [paragraph 52]*

The most significant consideration in the Judges's view was that both parties knew "the critical question was who owed who money and how much" [paragraph 61(5)]. Amey succeeded in recovering a significant sum, defeating very substantial counterclaims and there were on analysis no realistic settlement offers from Cumbria and no basis to criticise Amey's approach to settlement. The Judge awarded Amey 85% of its assessed costs and a payment on account of costs in the sum of £4,312,500.00.

The decision is also a useful reminder to practitioners involved in long cases which will take time to reach trial that Courts can and will award interest on costs incurred pre-judgment. Amey recovered interest from September 2015 (for practical reasons that was when it had incurred around 50% of its total costs) at 2% above base.

Andrew Singer QC
4-5 Gray's Inn Square
First junior counsel for Amey

A Tale of Mystery and Imagination

Readers will remember that in Edgar Alan Poe's unsettling short story, *The Pit and the Pendulum*, the French narrator has been captured by the Spanish and sentenced to death by black-robed judges, whereupon he faints. Recovering consciousness, he ponders his fate, puzzled because those condemned to death usually perished at the autos-da-fe, the public penance of heretics followed by execution by burning. Thus it appears that he is a prisoner of the Spanish Inquisition. Discovering that he is on the brink of a circular pit, he congratulates himself on avoiding the doom that had been prepared for him. He drinks from a pitcher of water and falls asleep, awakening to find himself strapped to a bench, above which a huge pendulum begins to swing and descend, hissing as it swings through the air.

All this may seem a far cry from the amendments made to the payment provisions of the Housing Grants, Construction and Regeneration Act 1996 by the Local Democracy, Economic Development and Construction Act 2009 and, in particular, the changes to a payee's entitlement to payment. Under the unamended Act, although full payment of the 'sum due under the contract' had to be made in the absence of a withholding notice where a third party's certificate determined the amount due,[1] there remained the argument that in other types of contract the 'sum claimed' could be reduced despite the lack of notice.[2]

In *Systems Pipework Ltd v Rotary Building Services Ltd*, however,[3] Coulson J relied on the metaphor of the pendulum in relation to the effect of these amendments. He pointed out that one of the beneficial effects of the 1996 Act was that paying parties were required to identify early on what (if anything) they say was due and why, and that standard forms of contract now required notices and cross-notices to be supplied within days, and contained provisions adumbrating the draconian consequences of a failure to issue a timely or detailed challenge, or both. He continued:

> *"But in the usual way, there is a concern that the pendulum has swung too far the other way. These rigorous contractual terms have been extended to cover, not only interim payments (which was the primary aim of the 1996 Act), but the permanent rights and obligations that arise out of dispute resolution procedures and the settlement of the final account."*

This was, in essence, a complaint about what might have been anticipated by those considering the proposed reforms of the legislation, namely the rise of the 'smash and grab' claim based on nothing more than the absence of a pay less notice. As Coulson J had already observed in *Caledonian Modular Ltd v Mar City Developments Ltd* (at [36]),[4] one of the 'more baleful effects' of the amendments to the 1996 Act had been an increase in the number of cases in which the receiving party argued that the paying party had failed to serve its notices on time, so that there was an automatic right to payment in full of the sum claimed. As he said in *Paice v MJ Harding (t/a Mj Harding Contractors)*:[5]

> *"… coming back to what this case is all about, namely the true value of the defendant's final account, the chances must be high that at present, the claimants have overpaid the defendant. After all, he was paid the entirety of his final account claim because of the absence of a valid payless notice. Everyone in the construction industry knows that contractor's claims are usually overstated. Accordingly, it is likely that the defendant has been overpaid."*

The *Systems Pipework* case was concerned with a similar situation, except the usual roles were reversed: on the defendant main contractor's case, the claimant subcontractor had lost its right to make its own final account claim because it had failed to challenge the main contractor's assessment or valuation of that final account within 14 days. Coulson J reviewed four authorities which had considered what he described as "the new breed of provisions in construction contracts relating to time limits, and the permanent loss of rights", namely the *Caledonian* case, *Henia Investments Inc v Beck Interiors Ltd*,[6] *Severfield (UK) Ltd v Duro Felguera UK Ltd*,[7] and *Jawaby Property Investment Ltd v The Interiors Group Ltd*,[8] and concluded that a contractor who seeks to take advantage of such provisions has to meet a high threshold. He concluded this would apply *a fortiori* where, as in this instance, the court was dealing, not with an interim application which might be capable of subsequent adjustment or modification, but a final account entitlement which, on the defendant's case, would be lost to the claimant for all time if there has been a valid notification and no dissent.[9]

1 *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2003] EWCA 1563, [2004] BLR 18, [2004] 1 WLR 1867.

2 *SL Timber Systems Ltd v Carillion Construction Ltd* [2001] BLR 516.

3 [2017] EWHC 3235 (TCC), [2018] BLR 123.

4 [2015] EWHC 1855 (TCC), 160 Con LR 42, [2015] TCLR 6, [2015] BLR 694.

5 [2015] EWHC 661 (TCC), [2015] BLR 345 [70].

6 [2015] EWHC 2433 (TCC), [2015] BLR 704 (Akenhead J).

7 [2015] EWHC 3352 (TCC), 163 Con LR 235 (Coulson J).

8 [2016] EWHC 557 (TCC), [2016] BLR 328 (Carr J).

9 [2017] EWHC 3235 (TCC), [2018] BLR 123 [18].

The wording of the relevant provisions was as follows:

> *"In the absence of a proposed Final Account submission from the Sub-Contractor in accordance with clause 28.5, the Contractor may value the proper amount due for payment in respect of the Sub-Contractor's Final Account on a fair and reasonable basis and notify the Sub-Contractor accordingly.*
>
> *… if such notification is not dissented from in writing by the Sub-Contractor within 14 Days, then the notified figure will be deemed to have been agreed and will be binding on the parties."*

Coulson J held that the assessment/valuation under the relevant contractual clause of 'the proper amount due for payment in respect of the Final Account' was an exercise that consisted of two parts: the assessment/valuation of the total amount payable for all the sub-contract work, less previous payments, and any ongoing retention.[10] He also relied on:

> *"… the basic principle that, if X is supposed to be notifying Y that a sum is due, under a clause that provides for a deemed agreement that binds the parties unequivocally, then it is a prerequisite of the arrangement that the sum due and the clause are clearly set out in the relevant notice."*[11]

The document relied on was plainly a valuation of the whole of the sub-contract works, with no identification of any balance due. Sums previously paid, retention and the like, were nowhere to be found. Neither would the reasonable recipient have regarded the documents as a notification of the sum due: for it to be that, the minimum that was required was the actual identification of the sum due, and an express reference to the relevant clause.[12] Coulson J said that it was not good enough to say that the recipient could have worked it out for themselves and that it manifestly failed to meet the necessary test when the alleged calculation that it was said could have been done by the recipient relied on later documents, some of which were not even in the recipient's possession.[13]

It might be said that this is quite a tough decision from the main contractor's point of view: after all, the reasonably informed recipient being asked to pay would presumably know what had already been paid and able to work out the balance and the retention figure (the deduction for retention having been identified in clause 28.7.1 as "*50% of the percentage rate stated In Appendix 6*". Neither did clause 28.6 expressly require the notification to refer to that clause. The justification for the result is, of course, the draconian effect of the consequences of a valid notice having been served. But it could be said that many contractual provisions, such as exclusion or limitation of liability clauses, have similar effect. In the light of some Court of Appeal decisions, there seems no reason in principle why such a provision should be construed with particular severity. As Jackson LJ pointed out in *Persimmon Homes Ltd v Ove Arup & Partners Ltd*,[14] in relation to commercial contracts, negotiated between parties of equal bargaining power, the *contra proferentem* rule now has a very limited role, quoting the words of Lord Neuberger MR in *K/S Victoria Street v House of Fraser (Stores Management) Ltd*:[15]

> *"…Quite apart from raising abstruse issues as to who is the proferens (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), 'rules' of interpretation such as contra proferentem are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision."*

In *Triumph*, a strict interpretation was given to the 'machinery' whereby the main contractor's valuation of the amount due could become binding on the subcontractor, namely its notification. In *Mannai Investment Co Ltd v. Eagle Star Assurance*,[16] The majority overruled previous authority and held that a more relaxed approach should be adopted to the construction of notices such as one under a break clause in a lease. Lord Steyn said that the correct test for the validity of such a notice was that posed by Goulding J in *Carradine Properties Ltd v Aslam*,[17] namely: 'Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?' Lord Hoffman agreed and pointed out that Goulding J went on to say that the reasonable tenant must be taken to know the terms of the lease.[18] Lord Clyde added:[19]

> *"The standard of reference is that of the reasonable man exercising his common sense in the context and in the circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect precision in matters which are not within the formal requirements of the relevant power would in my view impose an unduly high standard in the framing of notices such as those in issue here. While careless drafting is certainly to be discouraged the evident intention of a notice should not in matters of this kind be rejected in preference for a technical precision."*

10 *Ibid* [25].
11 *Ibid* [35].
12 *Ibid* [33].
13 *Ibid* [35].
14 [2017] EWCA Civ 373, [2017] BLR 417 [52].
15 [2011] EWCA Civ 904; [2012] Ch 497 68].
16 [1997] UKHL 19; [1997] AC 749, 772C.
17 [1976] 1 WLR 442, 444.
18 [1997] UKHL 19; [1997] AC 749, 780G,
19 [1997] UKHL 19; [1997] AC 749, 782C-D.

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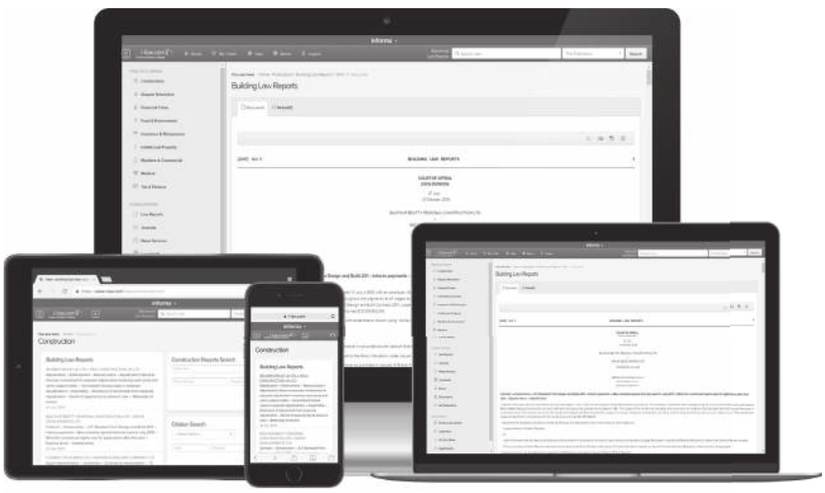

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It could also be said that at first sight, it is difficult to see a significant distinction between the importance of the consequences of the operation of a break clause under a lease and that of a conclusive value one under a construction contract.

In Poe's tale, the narrator escapes the pendulum (for how else would he be able to narrate?) as a result of rats gnawing through the strap restraining him, only to find the walls of his dungeon becoming red hot and moving inwards with the object of forcing him into the pit. He is eventually rescued in the nick of time by General Lasalle[20] and the French army. Members of TECBAR and other practitioners in construction law may not be so lucky, as the pendulum of the Housing Grants, Construction and Regeneration Act will no doubt continue to swing over the pit of adjudication.

Darryl Royce
Atkin Chambers

Darryl Royce's book, *Adjudication in Construction Law*, is published by Informa from Routledge as part of the Construction Law Series.

20 Antoine-Charles-Louis, Comte de Lasalle (1775-1809), a French cavalry general during the Napoleonic Wars.

Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)

Two principal issues arose on the facts of the case. The first was whether the claimant's pay less notice complied with the requirements of the contract. The adjudicator held that it did not because the notice had not incorporated the basis of the claimant's assessment, which had been sent to the defendant five days previously. Coulson J stated that the interpretation of pay less notices must be approached objectively and that the important question to answer was how a reasonable recipient would have understood the notice. He also added that the court would be "unimpressed by nice points of textual analysis" and that one way of "testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer".

Applying this test, it was held that the pay less notice sent by the claimant was valid. The detailed calculation sent with the earlier purported payment notice would have enabled the reasonable recipient to understand precisely how the claimant's valuation was calculated. There were detailed figures for every separate element of the works and there was a detailed agenda for any subsequent adjudication as to valuation. It was also held that there can be "no possible objection in principle to a notice referring to a detailed calculation set out on another, clearly-identified document".

The second issue was whether, if the pay less notice was invalid, the claimant was entitled to commence a claim, whether by way of adjudication or litigation, for a financial adjustment in its favour on the basis of a "fresh valuation" or finding as to the "true" value of the sum due. Coulson J held as a matter of principle and authority that the claimant was entitled to do so. A court can decide the "true" value of any certificate, notice or application and the court has an inherent power to open up, review and revise any existing certificates, notices or applications. Further section 108(1) of the Housing Grants, Construction and Regeneration Act 1996 does not impose any limitation on "the nature, scope and extent of the dispute which either side can refer to an adjudicator". Finally, the dispute which the claimant wished to raise in the subsequent adjudication was a different dispute to that which had been referred in the first adjudication. In the first adjudication the issue before the adjudicator had been whether the pay less notice was deficient or out of time. But in the subsequent adjudication the issue was one that related to the "true" valuation of the application for payment. This being the case, the claimant was held to be entitled to commence a second adjudication in which it sought a decision as to the true value of the interim application for payment.

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Editor: Christopher Reid

Correspondence should be addressed to: creid@atkinchambers.com or Christopher Reid, TECBAR Review Editor, Atkin Chambers, 1 Atkin Building, Gray's Inn, London, WC1R 5AT. DX 1033 Chancery Lane.
Tel 020 7404 0102. Fax 020 7404 7456.
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