Quigg Golden

INSIGHT

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BUILDING THE FUTURE

ADJUDICATION | LIQUIDATED DAMAGES
PRACTICAL COMPLETION | BIM
PROCUREMENT ADVICE

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WELCOME TO THE QUIGG GOLDEN INSIGHT

AT A GLANCE

Welcome to our Spring / Summer 2020 edition of Insight!

It's a new decade, and we're excited to be back sharing our inside knowledge of the industry in this fresh new series of articles and position papers.

Our Senior Associate Claire Mc Carry looks back over some influential cases of 2019 relating to adjudication, their impact and what approach to take in 2020 in '*Decisions that Shaped 2019*'.

Claire Graydon, Associate, discusses the obligation on contracting authorities to disclose information to unsuccessful tenderers with respect to the EU Regulations.

Highlighting the recent discussion around how to determine whether practical completion has been achieved, James Sargeant, Associate, gives us his commentary.

We also have William Brown's expertise on Liquidated Damages, originally presented as part of his article series on LinkedIn, '*In About 300 Words*'.

Lastly, for those embarking on contracts requiring BIM integration, John Doherty, Associate, sets out where to begin, complete with a handy guide to the essential documents in '*BIM & Contracts - Where to Start*'.

We hope that this edition is useful for you! For news on all of our latest articles and events you can sign up to our mailing list at **QuiggGolden.com**

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Decisions that Shaped 2019
A look at Adjudication

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As we enter 2020, Adjudication continues to play a vital role in dispute resolution within the construction industry, and we continue to represent our clients throughout the process, because without familiarity of popular procedural issues, crucial oversights can transpire.

Throughout 2019 the Courts, and most specifically the Technology and Construction Court, provided us with several decisions that are of significant relevance to the adjudication process. This retrospective review serves to highlight judgments that may be worth remembering.

When considering jurisdictional challenges

Jurisdictional challenges can arise from the onset. The case of *Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy plc* [2019] EWHC 413 (TCC) questioned the ability of a party to raise a later jurisdictional challenge if it knowingly failed to do so whilst actively participating in the adjudication.

In this case, Coleman Bennett International ("*CBI*") contracted Ove Arup to provide engineering services in relation to a high-speed transportation project. Ove Arup issued a notice of adjudication after CBI failed to pay sums due in relation to Ove Arup's fee for its services. CBI failed to pay the amount the adjudicator decided was due to Ove Arup.

As a result, Ove Arup commenced proceedings seeking enforcement of the adjudicator's decision.

CBI argued the decision was not enforceable on the grounds of three jurisdictional challenges:

i) the contract on which the adjudication was brought was not a construction contract for the purposes of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 ("*the Construction Act*");

ii) the referral was concerned with more than one contract or dispute; and

iii) the adjudicator's jurisdiction turned on questions of fact that could not be properly determined in the adjudication and cannot now be justly decided on an application for summary judgment (the enforcement proceedings).

Mrs Justice O'Farrell disagreed with CBI's arguments. Relying on guidelines in an earlier 2019 Court of Appeal judgement, the decision reiterated that general reservations are not sufficient defence in failing to make a jurisdictional challenge clear enough for the adjudicator to address it. She also decided that by participating in the adjudication CBI "*positively admitted*" there was in fact jurisdiction under the Construction Act.

So, vague and general reservations cannot be relied upon in challenging a decision that doesn't provide the preferred outcome, particularly if the specific objection should have been known during the adjudication!

True Value Adjudication

In 2019 the common 'true value' adjudication was again in the spotlight. The question of entitlement to commence a true value adjudication was debated in the case of *M Davenport Builders Ltd v Greer and another* [2019] EWHC 318 (TCC) (20 February 2019).

This judgement followed the Court of Appeal's judgement in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, reconfirming entitlement to refer to adjudication a dispute about the true value, but only after the first adjudicator's decision is paid. Furthermore, the decision assisted the argument that that decision goes against the right to adjudicate at any time, stating:

> *"In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication."*

In short, Mr. Justice Stuart-Smith found that, whilst a second 'true value' adjudication can be commenced, the decision cannot be relied upon until the initial payment has been made (where that obligation exists). That is, any second decision would not be enforceable until any amount decided by the first adjudication had been paid!

Some suggest this case may lead to an increase in number of prompt 'true value' adjudications. I would argue it could, on the other hand, deter default payment notice adjudications where a party has submitted an overly inflated application, as they will now realise that it could be a very short term gain.

The Slip Rule & Adjudicator's Mistakes

Finally, what happens when an adjudicator makes a mistake in their decision? After all, they too are only human.

Section 108(3A) of the Construction Act permits the correction of an adjudicator's decision by application of the slip rule, and 2019 saw a judgement passed that 'extended' that rule to include for consequential correction of an error.

The decision of Mr. Roger ter Haar QC in the case of *Axis M&E UK Ltd v Multiplex Construction Europe Ltd* [2019] EWHC 169 (TCC) was the first time a court had been asked to deal with the issue of consequential corrections in relation to the slip rule.

As a result, we should be aware that if the adjudicator (as permitted) decides to or is asked to correct 'a slip', the rectification of one figure could also impact other figures including interest and even a reallocation of the adjudicator's fee.

Inevitably, errors that exceed the scope of the slip rule also occur as demonstrated in the 2019 case of *Willow Corp S.À.R.L. v MTD Contractors Ltd* [2019] EWHC 1591 (TCC).

The decision here provided useful insight into the management of an adjudicator's error, with the application of severance. In this case, the adjudicator made an error in law in relation to the practical completion clause and relating application of liquidated damages. However, that error did not affect the balance of the decision. As such, 'the good' was able to be severed from 'the bad' and Mr. Justice Pepperall enforced the balance of the decision.

Adjudication in 2019

So, it remains that adjudication can dramatically reduce the length and cost of disputes but, as the decisions of the Courts continue to demonstrate, it is not a process without complication entirely.

If you need advice on referring a matter to adjudication, or alternatively you are on the responding end of a notice of adjudication, get in touch with Claire Mc Carry at Claire.McCarry@QuiggGolden.com

QUIGG GOLDEN & THE COMMUNITY

Quigg Golden places value in being able to contribute to the community around us, and over the past year has been involved in sponsoring and fundraising for events.

Our charity partners are the Lighthouse Club, Pieta House and Wooden Spoon. We support these charities through taking a £15 / €15 donation in lieu of a booking fee for each of our seminars.

In 2019 this helped raise: **£1,845** for Lighthouse Club, **£750** for Wooden Spoon & **€3,030** for Pieta House. Thank you for your continued support!

In April, we supported Connolly & Fee as they took part in a sponsored skydive for AWARE (NI) - a fantastic charity that provides education and support to people affected by depression across Northern Ireland.

We sponsored the Carrick Sevens tournament, with the *Quigg Golden Open* at Carrickfergus Rugby Club in May.

We sponsored Jonathan Parker, a former employee of Quigg Golden as he took part in *Cyclists Fighting Cancer*, taking on the '*Desert of Death*' World Record.

We joined the British Irish Chamber of Commerce at a charity quiz for Haven Hospice. We rowed with our Belfast neighbours, including Edwards & Co, to fundraise for Bowel Cancer UK. The Dublin team were out in strength for the *Run In the Dark* to support the Mark Pollock Trust. We hosted a coffee morning for MacMillan Cancer Support.

If you have any sponsorship proposals for us - get in touch!

Disclosing Information to Unsuccessful Tenderers

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We regularly receive calls from contracting authorities asking whether they are obliged to disclose information to unsuccessful tenderers. What are the regulations and rules to follow in this instance?

Regulation 6 of S.I. No. 130/2010 – European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "*Remedies Regulations*") sets out the information that must be disclosed to candidates and tenderers in the first instance. However, generally the queries that we receive relate to information that is outside of the scope of requirements set out by the Remedies Regulations.

There are no hard and fast rules for a contracting authority to turn to in this instance. However, the courts made it clear in the *RPS v Kildare County Council* [1] case that requests made by unsuccessful tenderers for additional information must be responded to.

The tenderer has 30 days from the day it knew or ought to have known of an alleged infringement to challenge the process in the High Court. Therefore, the information to which it is entitled to should be disclosed as soon as possible by the contracting authority. In *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust* [2], the court said:

> *"…the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality".*

When deciding whether or not to disclose the information sought, the contracting authority should consider whether the information is confidential or commercially sensitive. Under the Freedom of Information Act 2014 records that are confidential or commercially sensitive are exempt. Tenderers are generally asked to indicate and justify if any information provided is confidential or commercially sensitive, it should be redacted from any documents that are released.

Disclosing the requested information could do one of two things:

1. confirm to a tenderer that it may have grounds to challenge to process; or
2. serve to reassure the tenderer that the process was fair and compliant.

If a contracting authority does not want to disclose the information, it could raise suspicions regarding the former.

In 2017, the Technology and Construction Court in the UK issued a guidance note on 'Procedures for Public Procurement Cases'. Although it has no binding effect in the Republic of Ireland the guidance will likely be of interest to tenderers and contracting authorities alike as to what the pre action stage should look like. The guidance suggests that the TCC is advocating a more open approach to the disclosure of information at the early stage of proceedings.

If in doubt about whether to disclose a request for additional information you should seek legal advice.

If you are experiencing any issues related to those discussed in this article, you can get in touch with Claire at: Claire.Graydon@QuiggGolden.com

1 *RPS Consulting Engineers Ltd v Kildare County Council* [2016] IEHC 113.
2 *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC)

UPCOMING SEMINARS & COURSES AT QUIGG GOLDEN

Throughout the year, Quigg Golden hosts a number of seminar events and runs training courses geared towards upskilling client management teams and providing CPD. In lieu of a booking fee for seminars, we ask for a £15 / €15 donation for our charity partners. Below is a list of upcoming events.

ICE LAW AND CONTRACTS MANAGEMENT COURSE

A must for anyone involved in the legal or construction industry working with the NEC, Quigg Golden is running the ICE LCM course for the seventh year in Belfast, and Module 2 in Dublin, covering all aspects of Contract and Tort Law (Autumn Term) and Contract Management (Spring Term).

SEPTEMBER 2020 - JUNE 2021
FOR MORE DETAILS SEE: BIT.LY/ICELCM

JCT CONTRACT MANAGEMENT COURSE

A six week course in effective administration and successful delivery of projects under the JCT suite of contracts.

Introduction to JCT - Design Liability, Subcontracting and using Specialists - Payment - Claims for Extension of Time - Claims for Loss and Expense - Termination, Insolvency and Dispute Resolution

Belfast - from 18 February 2020

Maidstone - from 26 February 2020

ASSESSING COMPENSATION EVENTS UNDER THE NEC

In this half day workshop, delegates will gain hands-on experience in how to correctly assess compensation events under the NEC Engineering and Construction Contract (ECC) and the NEC Engineering and Construction Subcontract (ECS).

Belfast - 19 February 2020

ADJUDICATION: A GUIDE ON RUNNING ONE FROM START TO FINISH

This half day workshop will provide construction professionals with a practical guide to understanding current law and best practice in adjudication.

Belfast - 26 March 2020

Dublin - 8 April 2020

London - 22 April 2020

Maidstone - 30 April 2020

AN INTRODUCTION TO PUBLIC PROCUREMENT

For those working for the public sector and looking to development their knowledge of procurement - this course will cover current policies, procedures, award criteria, evaluation and challenges.

Dublin - 28 April 2020

Belfast - TBA

ASSESSING COMPENSATION EVENTS AND DELAY EVENTS UNDER THE PWC

In this half day workshop, delegates will gain hands-on experience in how to correctly assess compensation events and delay events under the Public Works Contract.

Dublin - TBA

HOW TO DEAL WITH INSOLVENCY - SEMINAR

As a contractor, how do you protect yourself? How can you maximise commercial recovery, reduce your risk, and use contractual mechanisms and statutory frameworks to ensure cashflow?

Belfast & Dublin - TBA

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Practical Completion - What does it mean and why is it important?

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A common question that I am asked is:

"What does "Practical Completion" actually mean?"

Unfortunately, however there is no standard definition of practical completion.

Practical completion is sometimes described as being the point at which a building is complete, except for minor defects that can be rectified with minimal interference or disturbance to the occupier.

Alternatively, practical completion can be used to refer to the point at which an architect or contract administrator confirms that the contractor has achieved practical completion under the contract, usually by giving a certificate to this effect. It is worth noting that most standard form contracts do not actually define practical completion, instead leaving this to the professional judgment of the architect or contract administrator.

Why is practical completion important?

Well, practical completion usually signifies a turning point in a project, in that it should trigger the return of any retention monies. It also usually brings about final account stage. Additionally, and possibly of more significance, practical completion is often the starting point for the calculation of any liquid ascertained damages (LADs) which may be due from the contractor to the employer. It is for these reasons, amongst others, that contractors are generally keen for practical completion to be agreed as having been achieved and for this to happen sooner rather than later.

Conversely, employers are reluctant to take possession of a building which they consider defective, and may resist practical completion in order to put pressure on a contractor by withholding sums that would otherwise be due.

These potential consequences arising as a result of practical completion, coupled with the lack of an agreed definition within standard form contracts, means that the question of whether or not practical completion has been achieved is a common cause of dispute within the industry.

It is also an issue which, somewhat surprisingly, does not come before the higher courts all that often, with the current authoritative cases being spread out between 1969 and the present day. This means that trying to establish the court's current position has been somewhat difficult.

Mears Ltd v Costplan Services South East & Ors - 2019

Thankfully, however, earlier this year, the issue of practical completion came before the Court of Appeal for the first time in 50 years and, in its judgment, the court set out guidance as to its current position regarding practical completion.

The case in question was *Mears Ltd v Costplan Services South East & Ors* [2019] EWCA Civ 502, in which Lord Justice Coulson reviewed the existing case law and authorities with regards to practical completion and summarised the current position to be as follows:

1. Practical completion is easier to recognise than define, there are no hard and fast rules.
2. The existence of latent defects cannot prevent practical completion. If the defect is latent, nobody knows about it and it cannot therefore prevent the certifier from concluding that practical completion has been achieved.
3. In relation to patent defects, there is no difference between an item of work which has to be completed (i.e. an outstanding item) and an item of defective work which requires to be remedied. Snagging lists can and will usually identify both types of item without distinction.
4. A practical approach has been adopted by the courts in which practical completion can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as trifling.
5. Whether or not a defect is trifling is a matter of fact and degree, to be measured against the "*purpose of allowing the employers to take possession of the works and to use them as intended*". However, this does not mean that if a house can be inhibited, or a hotel opened for business, that regardless of the nature or extent of any incomplete works, or defects that the works must be regarded as having achieved practical completion.
6. The fact that a defect may be irremediable, does not itself preclude the achievement of practical completion.

When has practical completion been achieved?

As with all grey areas of the law, disputes concerning practical completion are likely to remain commonplace. No doubt the concept of practical completion will continue to evolve and change naturally over time. However, the court's judgment in *Mears* now offers some clear guidance to the industry with regards to the courts approach when it is asked to determine whether or not practical completion has been achieved.

If you have any questions, please get in touch with James.Sargeant@QuiggGolden.com

TRAINING WITH QUIGG GOLDEN

Our experience, gained over 25 years working with contractors and contracting authorities across the private and public sector, has enabled our expert team to develop a range of training programmes for construction and procurement professionals.

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Liquidated Damages ...In about 300 words

Liquidated damages are very common in the construction industry, so it is important to understand what they are and when the courts will enforce them.

What are they?

If you are in breach of contract, the innocent party will generally be entitled to recover "*damages*" that arise naturally from that breach[1]. This can often be very difficult to do as it involves quite complex analysis to identify the loss and to quantify it.

That's where liquidated damages come in. Think of *liquidated* in this context as simply meaning "*pre-agreed*". Instead of having to identify/quantify the loss suffered due to a breach of contract, parties can instead choose to apply a pre-agreed figure to certain types of breach.

In construction, we often use liquidated damages for one very specific breach of contract – failing to meet the contractual completion date. Instead of having to identify/quantify a client's loss due to that breach (again, difficult to do), a simple pre-agreed figure is applied usually as a daily/weekly rate. Easy.

When will the courts enforce them?

The simple answer is… almost always. Do not enter into a contract thinking that the courts will just "*strike them out*". This rarely happens. The courts will only strike out a clause if it amounts to a "*penalty*" i.e. if it is designed to punish rather than restore. That's my little way of remembering what amounts to a penalty.

In 2015, the Supreme Court[2] gave a slightly more precise definition – a clause will be a penalty if:

"... it imposes a detriment out of all proportion to any legitimate interest of the innocent party..."

The test boils down to one of proportionality. For us in construction, that means working out the level of liquidated damages that are necessary to protect the client's legitimate interest of having the project complete on time.

I think a really good way to do this is to use the test from the old case of *Dunlop v New Garage* [1915]. This was the case that, prior to 2015, defined when a clause would be a penalty. In Dunlop a clause would not be a penalty if it was:

"... a genuine pre-estimate of the damage"

A genuine pre-estimate of the client's loss is always going to be proportionate. However, under the new 2015 test, a figure that is higher than a genuine pre-estimate may also be proportionate if it is necessary to protect the client's interest. This effectively raises the bar of what amounts to a penalty – making liquidated damages provisions more difficult than ever to challenge.

The courts have recently applied the new 2015 definition of a "*penalty*" within a construction context in the case of *GPP Big Field v Solar EPC* [2018]. This case confirmed just how difficult it is to argue that liquidated damages are unenforceable. In this case the liquidated damages were (1) expressly called a "*penalty*" (who on earth drafted that?); (2) expressed in very round numbers; and (3) not based on any genuine pre-estimate of the client's loss.

The court had no difficulty in enforcing them. The value of the liquidated damages was not "*extravagant and unconscionable*" and further, the parties were commercially experienced bodies who should have been able to assess the commercial implications of the liquidated damages before agreeing to it. It very much goes to show, the law will not protect you from making a bad deal.

Slightly over my word limit, but lots to say about this area and still plenty more to be said!

[1] This is known as the rule in *Hadley v Baxendale* [1854]. I highly recommend reading this case if the law on damages is more than a fledgling interest!

[2] Derived from the Supreme Court decisions in *ParkingEye Limited v Beavis [2015]* and *Cavendish Square Holdings v Makdessi* [2015]

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8-10 MAY 2020

BIM & Contracts - Where to start?

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This year saw the publication of a number of new international standards for BIM. With more planned for next year and the essentially hands-off approach of the standard forms, it can be a little confusing drafting and understanding contracts which require the use of BIM. This article aims to shed some light on where to start.

Key Documents : ISO 19650

The essential key documents are the standards themselves and the guidance documents which explain them. These are as follows:

Title	Purpose
BS EN ISO 19650-1 Concepts and principles	sets out the recommended concepts and principles for business processes across the built environment sector in support of the management and production
BS EN ISO 19650-2 Delivery phase of the assets	to enable an appointing party to establish their requirements for information during the delivery phase of assets and to provide the right commercial and collaborative environment within which (multiple) appointed parties can produce information in an effective and efficient manner.
Guidance Part 1: Concepts	Guidance to help understand BS EN ISO 19650-1.
Guidance Part 2: Processes for Project Delivery	Guidance to help understand BS EN ISO 19650-2.
CIC (BIM) Protocol Second Edition	Protocol for use in construction contracts to support BIM Working Level 2.

The guidance documents are available free from BSI at this link[1], while the standards themselves can be purchased in the BSI Shop. The CIC protocol is available from CIC here[2].

[1] https://bim-level2.org/en/guidance/

[2] http://cic.org.uk/news/article.php?s=2018-04-10-second-edition-bim-protocol-published

Anyone working on BIM contracts would be advised to begin with the two guidance documents. A particular section to note is *Annex C: Legal and Contractual guidance note* in the Guidance Part 1 documents, which provides some guidance on legal and contractual issues and some other pointers for ensuring effective implementation. Reading BS EN ISO 19650-1 is also advised as this details the approach taken and provides the relevant definitions.

The CIC protocol is intended to be a "*drop-in*" document for use by contracting parties to quickly incorporate BIM into contracts including the various standard forms. This places contractual obligations on the parties, sets out the rights of use of the information produced, identifies the information to be produced and who is to produce it and the required compliance with security standards and processes. However, it reflects the terminology used in PAS 1192-2 (the previous standard) and not the newer ISO 19650, so this will need to be amended for use with ISO 19650. An information protocol is currently being drafted for use with ISO 19650 but is not available as of the date of this article.

Other Documents

There are other documents which are part of the BIM standards. These are currently at the lower level of PAS, which means they are still being developed and comments from industry are invited. Further, some of the older BS 1192 and BS 8536 documents which relate to construction are still relevant as they have not yet been replaced under the new BIM 19650 suite. These include:

a) PAS 1192-3 - Operational Phase of Assets (to be replaced by ISO 19650-3 in 2020);

b) PAS 1192-5 - Security-minded approach to information management (to be replaced by ISO 19650-5 in 2020);

c) PAS 1192-6 - A specification for collaborative sharing and use of structured health and safety information using BIM; and

d) BS 1192-4: 2014 – Best practice for information exchange.

The security-minded approach to BIM (PAS 1192-5) is an important document and security should be considered by clients at early stage, as it is much harder to tack on security procedures during a project than to create a system with these in mind at the start. PAS 1192-5 advocates for information to be limited to a need to know basis and for sufficient checks to be carried out on those performing work for the sensitivity of the information they will have access to.

Finally, there is a move toward standardising data templates, to facilitate information sharing between parties and software. To that end, ISO 23386, containing a methodology to describe, author and maintain properties in interconnected dictionaries, has been published in draft and should soon be available for use in contracts requiring cross software compatibility.

Summary

BIM is a surprisingly diverse topic, however hopefully the above information provides a good starting off point for those embarking on contracts requiring BIM integration. For those requiring more information, we at Quigg Golden can provide training or help and support in reviewing or drafting contracts with BIM requirements.

If you have any questions, get in touch - John.Doherty@QuiggGolden.com

Quigg Golden provides over two decades of specialist experience guiding our clients through complex situations in the construction industry

Find out how we can help your business with a free one hour consultation

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