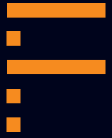


Fishburns LLP

CONSTRUCTION UPDATE

SUMMER 2011

Welcome to the Summer edition of the Fishburns Construction Update.

In this edition of the Update Matt Olorenshaw reviews a decision of the Honourable Mr Justice Coulson which provides a helpful reminder of the approach which should be taken to pleading a case of professional negligence. Robert Calnan looks at a recent TCC decision which appears to suggest that parties to an adjudication can refuse to accept any adjudicator, on any grounds, however spurious. Jonathan Brown reviews the current position relating to contractor liability for pure economic loss following *Robinson v Jones* and John Wevill also reviews a recent Scottish case relating to the effect of the Construction Act on developers' rights to discontinue projects leaving contractors and consultants out of pocket. He also provides some analysis of a recent decision relating to good faith obligations in construction contracts and a recap on the law as it relates to obligations of reasonable skill and care, reasonable endeavours and best endeavours.

Matt Olorenshaw reviews a recent decision considering the effect of an *"After the Event"* insurance policy on a security for costs application and we have further articles from John Wevill on the entitlement of professionals to rely on specialist advice, plus two further adjudication related cases concerning enforcement decisions, which reinforce the Courts' approach that notwithstanding perceived flaws in the process, adjudication is about paying now and arguing later.

All articles are available on our website which also provides details of our unique construction support offering through integrated claims handling, loss adjusting and legal services, including a non-contentious department dedicated solely to professional services issues which may impact on consultants and contractors; indeed through our partnering arrangements with insurers and brokers much of this service is available free of charge to businesses that are insured under qualifying policies.

We welcome all feedback on our publications and whether you are a consultant, a contractor, a sub-contractor, an insurer or broker, we trust that you will find something of interest in this edition.

Peter Campion
Chairman

BACK TO BASICS

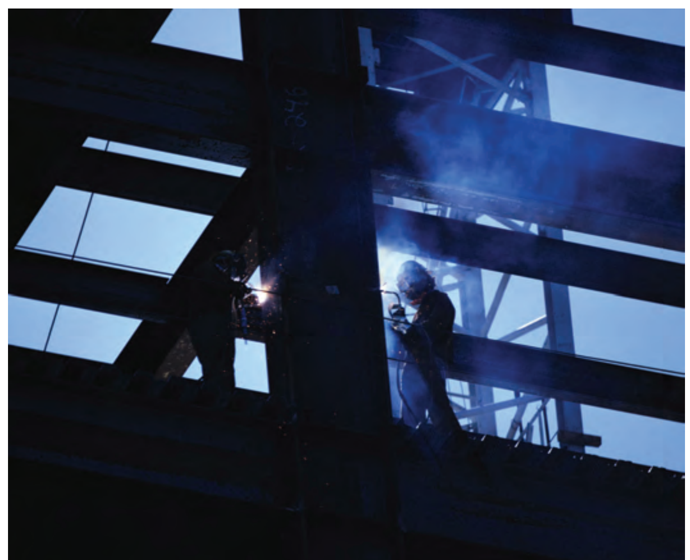
Matthew Olorenshaw

In the case of ***Pantelli Associates Limited v Corporate City Developments Number Two Limited*** the Honourable Mr Justice Coulson provided a helpful reminder of the approach which should be taken to pleading a case of professional negligence. In that case, the Defendant's counterclaim was deficient in some key respects and it was struck out.

Background

The Claimant ("Pantelli") is a firm of quantity surveyors. The Defendant ("CCD") is a firm of developers. Pantelli provided quantity surveying services on two projects which, ultimately, did not proceed beyond the planning stage. CCD failed to pay Pantelli's professional fees. In February 2009, a compromise agreement was signed in respect of Pantelli's fees. However, CCD still failed to pay up.

In April 2010, Pantelli commenced proceedings to recover its fees. When CCD served its defence, it also submitted a counterclaim in the sum of £300,000 raising, for the first time, allegations of poor performance and professional negligence on the part of Pantelli.



Pantelli took issue with the general lack of particulars provided in support of the counterclaim. At a hearing in October 2010, the parties agreed to the terms of an 'Unless Order' to the effect that, if CCD failed to provide proper particulars of its counterclaim by 12 November (in the form of an amended pleading), its counterclaim would be struck out.

When CCD's amended pleading materialised, Pantelli was not impressed. It appeared that CCD had simply *'cut and pasted'* each of the relevant terms of the contract between the parties and inserted before each term the words *"failing to"* or *"failing adequately or at all to"*, thereby turning each obligation into an allegation of professional negligence. CCD's Counsel acknowledged that this is precisely what he had done.

The requirement to provide proper particulars

Mr Justice Coulson gave short shrift to this approach. He referred specifically to CPR 16.4(1)(a) which requires that particulars of claim must include a concise statement of the facts upon which the claimant relies. The Judge went on to state:

> *"…where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated."*

The Judge made clear his view that the particulars provided by CCD in its proposed amended pleading failed to come anywhere near the requisite standard. It would be impossible for Pantelli to work out from CCD's generalised and generic allegations what particular matters were being alleged against it.

The timing of CCD's amended pleading was also particularly unfortunate. The Judge accepted that, had the deficient particulars been provided at the outset, then CCD may have been able to avoid the allegations being struck out by arguing that Pantelli could submit a request for further information under CPR Part 18. However, in the instant case, CCD had already been given ample opportunity to make good its defective pleading – Pantelli had requested further particulars in advance of the hearing in October and CCD had agreed to these being provided in accordance with the terms of an 'Unless Order'. CCD had plainly failed to comply with the terms of the 'Unless Order' and this left the Judge with no option but to strike out the allegations comprising CCD's counterclaim.

Expert evidence

The Judge indicated that there was a second reason behind the decision to strike out CCD's counterclaim, namely that no expert evidence had been provided in support of the allegations. Specifically, there was no evidence from an independent quantity surveying expert to confirm that Pantelli's performance had fallen below the standard to be expected from an ordinarily competent quantity surveyor. No explanation was provided as to why such evidence had not been obtained.

Save in cases of solicitors' negligence, it is standard practice for allegations of professional negligence to be supported (in writing) by a professional in the relevant field with the necessary expertise. The Judge regarded this as a matter of common sense. How can it be asserted that an act or omission by a professional person is something that an ordinary professional in that field would or would not have done, if no professional in the relevant field has expressed such a view? In support of this proposition, the Judge referred to CPR Part 35 and pointed out that it would essentially be unworkable if allegations of professional negligence were not supported by appropriate expert evidence.

The Judge mentioned in passing that the Code of Conduct for the Bar prohibits barristers from drafting any document which contains a statement or fact or contention which is not supported by the lay client, or any contention which they do not consider to be properly arguable. The Judge considered this to be consistent with the approach outlined above. In the absence of expert evidence, a lay client cannot support an allegation of professional negligence, and a barrister is unable to know whether or not such an allegation is properly arguable.

Conclusion

If an allegation of professional negligence is to be asserted, it must be pleaded in sufficient detail for the defendant to be able to understand what it is that it is said they should or should not have done and what are the specific consequences said to result from the relevant act or omission. Furthermore, it is imperative that such allegations are supported by written evidence from a professional in the same field as the defendant.

The Judge's comments may appear to be a restatement of the resoundingly obvious and revision for most of us. However, this case is important because it provides an illustration of what can happen in litigation when parties stray from the basic principles.

LANES GROUP PLC v GALLIFORD TRY INFRASTRUCTURE LTD [2011]

Robert Calnan

The recent Judgement of Mr Justice Akenhead in ***Lanes Group Plc v Galliford Try Infrastructure Ltd [2011] EWHC 1035*** provides useful guidance for a party to an adjudication who wishes to exercise control of the appointment of an adjudicator. It also raises, indirectly, a potential public policy challenge to abuse of this prerogative.

Facts

Galliford Try Infrastructure Limited ("GTI") was engaged to carry out refurbishment works at a Train Depot in Inverness. GTI then sub-contracted certain roofing and glazing works to Lanes Group Plc ("Lanes"). The relationship between the parties broke down and both raised objections as to the other's conduct, culminating in Lanes bringing proceedings, which were stayed for arbitration.

In March 2011, GTI served a Notice of Adjudication on Lanes, stating that it had lawfully determined the Sub-Contract, or alternatively that Lanes was in repudiatory breach. The Sub-Contract incorporated terms requiring adjudications to be conducted under the Institution of Civil Engineers' ("ICE") Adjudication Procedure (1997). This procedure included, inter alia, the following terms:

> *3.3 [If a specific adjudicator is not agreed upon]…then either Party may, within a further three days, request the person or body named in the Contract or if none is so named The Institution of Civil Engineers to appoint the Adjudicator*
>
> *4.1 The Referring Party shall within two days of appointment…under paragraph 3.3 send a full statement of his case…*

On 9 March 2011, GTI applied to the ICE for an adjudicator, Mark Dixon, to be appointed. The same day, Lanes challenged Mr Dixon's appointment on the basis of presumed bias. On 10 March, the ICE then appointed a second adjudicator, a Mr Klein. The following day GTI wrote to the ICE raising concerns as to Mr Klein's bias, on the grounds that GTI's solicitor, Mr Fraser, had previously been an opposing party to Mr Klein during an acrimonious adjudication.

Lanes wrote to the ICE on 14 March 2011, stating that Mr Klein was not biased. The following day Lanes wrote to GTI stating that GTI's failure to serve a statement of case within two days amounted to a repudiatory breach of the adjudication agreement, which Lanes accepted. GTI responded on 16 March, stating that Mr Klein had no effective jurisdiction as there had not been a referral.

Shortly after, GTI served a fresh Notice of Adjudication on Lanes and again applied to ICE for an adjudicator. A third adjudicator, Daniel Atkinson, was duly appointed. On 1 April Lanes issued Part 8 Proceedings, seeking an injunction against further attempts by GTI to adjudicate this dispute.

In essence, Lanes argued that the adjudication agreement survived an accepted repudiation. GTI had repudiated the adjudication agreement by deliberately refusing to comply with the terms of the Adjudication Procedure. However, that repudiation was partial, in that it only related to the specific dispute to be dealt with by Mr Klein. The adjudication agreement as a whole survived this partial adjudication and could still be used as the basis for settling other disputes between the parties. Lanes also denied an apparent bias on the part of Mr Klein.

Repudiation

Mr Justice Akenhead first considered whether an adjudication agreement can be repudiated. It was established that arbitration agreements can be repudiated, by one party clearly and unequivocally evincing an intention to no longer be bound by the arbitration agreement (***BEA Hotels NV v Bellway LLC [2007] EWHC 1363 (Comm)***). In principle, it was held that there was no reason why a purely contractual adjudication clause should not be treated in the same manner.

Problems arise however when one has to consider the effect of s.108 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"), which details conditions in *"construction contracts"* which can not be opted out of, including the ability of a party to give notice at any time of an intention to refer a dispute to adjudication. If these conditions are not complied with, the adjudication provisions of the Scheme for Construction Contracts will apply. As such, were the purely contractual adjudication clause to be repudiated, the statutory scheme would apply in its place and the concept of repudiation does not apply to statutory rights.

The Judge also dealt briefly with the issue of whether an adjudication agreement or contract can be repudiated in part, noting that common law repudiation applies to the contract as a whole. Lanes argued that each reference of a dispute gave rise to its own separate agreement, each of which was capable of being repudiated without affecting the others. It was held that there was no legally rational basis for this argument.

It followed, then, that GTI was in breach of the adjudication agreement by failing to serve its statement of case, but that the breach could not be repudiatory in practice, given that on any apparent contractual repudiation the statutory scheme would take its place, and thus the agreement survived. The breach would sound in damages but these would likely be minimal as any breach would be nominal, having little effect on the course of the adjudication.

Conclusion

On the basis of this decision, a party to an adjudication would appear to be able to refuse to accept any adjudicator, on any grounds, however spurious. The inability to claim repudiatory breach allows the referring party to refuse service until the adjudication lapses, thus allowing them to refer again and again until it receives an adjudicator it is happy with.

Mr Justice Akenhead refers to this *"lacuna"* in his judgement, noting that a party's ability to frustrate the adjudication until it receives an adjudicator it is *"happy"* with could be perceived as an abuse of statutory and contractual processes. He notes that there is a *"respectable"* argument that a party can only refer a given dispute to arbitration once, but that it would be wrong to conclude on this point until detailed submissions have been heard. It may well be worth noting this point if a contractor wishes to prevent, by injunction, another party from pursuing the same claim on numerous occasions, on the basis that there would appear to be a clear public policy argument against a party abusing the statutory process in this way.

JAMES ANDREW ROBINSON v P E JONES (CONTRACTORS) LIMITED

Jonathan Brown

For some time now it has been accepted that contracts of professional retainer commonly create a duty of care in tort to protect the client against economic loss. One of the leading cases on this issue is ***Henderson v Merrett Syndicates Limited***, a House of Lords case from 1995 in which the Lords decided that, in additional to their various contractual duties, the managing agents of Lloyds syndicates also owed a duty of care in tort to protect their Names from economic loss.

Where the position has traditionally been less clear is in relation to building contractors. Do builders have a duty in tort to protect their clients against economic loss? A number of cases have addressed this issue, but the approach of the Courts has been far from consistent. Indeed, the latest edition of Keating on Construction Contracts highlights the conflicting authorities in this area, saying *"it is difficult to disagree with the view that a contract which stipulates that the contracting party will perform certain services involves an assumption of responsibility which will normally be relied upon by the other contracting party. On the other hand it is true that the authorities prior to Henderson and Merrett… did not envisage a builder… owing duties of care in respect of economic loss. This difference of view requires a reconciliation of these two different streams of authority which will have to await a decision from the Court of Appeal or the House of Lords".*

The Courts have recently grappled with this troublesome issue once again in the case of ***James Andrew Robinson v P E Jones (Contractors) Limited***. This case involved the construction of a house for the Claimant by the builder, which was completed in 1992. In 2004 the Claimant discovered that the chimney flue was defective and had not been constructed in accordance with building regulations. The costs of the remedial works were substantial and, in 2006, the Claimant issued proceedings against the builder.

Given that 14 years had elapsed since completion, the Claimant was out of time for a breach of contract claim. The Claimant therefore claimed in tort, alleging that the builder owed a duty of care to protect against economic loss, and relying on section 14A of the Limitation Act, which affords claimants a 3-year limitation period in negligence from the date of knowledge of the claim, which the Claimant said he first had in 2004.

The two key issues which the Court grappled with were (i) whether a builder can owe his client a concurrent duty of care in tort in relation to economic loss, and (ii) if so, did the builder owe a duty of care to the Claimant on the facts of this case?

The Court took the opportunity to review a number of the authorities on economic loss, endorsing in particular the approach taken in Henderson in which the Lords had said that an *"assumption of responsibility"* for economic loss is a key requirement for a duty in tort to arise. However, Henderson of course related solely to a professional retainer. The question therefore remains, what is the position for builders?

In answer to issue (i), the Court's view was that it is, in principle, possible for builders to assume duties of care in tort not to cause economic loss to their clients. However, the Court made it clear that the existence of a contract between a builder and its client is not in itself sufficient for such a duty to arise. The Court said that, as with professionals, there would need to be an assumption of responsibility. In the case of professional retainers, the Court indicated that such an assumption can be readily inferred:

"…it is perhaps understandable that professional persons are taken to assume responsibility for economic loss of their clients. Typically, they give advice, prepare reports, draw up accounts, produce plans and so forth. They expect their clients and possibly others to act in reliance upon their work product, often with financial or economic consequences".

In the case of builders, however, the Court was far more reticent, saying only that a careful analysis of the relationship and dealings between the parties would be required in order to determine if an assumption of responsibility had arisen.

In answer to issue (ii), the Court said that they could find no assumption of responsibility on the facts of this case. The parties had entered into a standard contract for the construction of a house and both the builder's obligations and the Claimant's remedies in the event of breach were clearly set out in that contract. The Court could not identify any special factors or circumstances that might have given rise to an assumption of responsibility. The Court was also at pains again to differentiate builders from professional design consultants, saying *"the parties were not in a professional relationship whereby, for example, the Claimant was paying the Defendant to give advice or to prepare reports or plans upon which the Claimant would act".*

It seems clear from the above that, although it is possible for builders to owe a tortious duty of care arising from an assumption of responsibility, there remains a question mark over precisely when and how such an assumption will occur. The Court gave little guidance in this regard, save to say that it will depend on the precise facts of the case. However, given that the vast majority of building projects will fall within the summary given by the Court (i.e. there will be a standard building contract that governs the parties' rights and responsibilities), the number of instances of a Court finding an assumption of responsibility for economic loss is likely to be rare.

Most lay persons would doubtless be surprised at builders being placed in a different category from professional persons for the purposes of economic loss duties. Indeed, many people would consider that a builder is just as capable of inflicting economic loss on its client as an architect, engineer, or anyone else providing professional services, and that therefore the law should impose similar duties. Nevertheless, the fact remains that the Courts appear determined to continue the distinction between builders and professional consultants in this regard.

If the distinction is to remain, however, further judicial guidance in this area would be welcome, not least on the type of relationship or circumstances in which a builder might assume responsibilities for economic loss. Let us hope that more definitive guidance from the Courts is forthcoming.

AMW PLUMBING v ZOOM 2010

The Scottish case of ***AMW Plumbing & Heating Ltd v Zoom Developments Ltd [2010]*** considered the place of the retention fund in a development that remained incomplete following the developer's concerns about the financial viability of the project.

John Wevill

Zoom had engaged AMW to carry out and complete plumbing and heating work at a development of three new blocks of flats in Cumbernauld. Work on the first and second blocks was completed in April and October 2008 respectively. There were no defects issues with the work completed. AMW has been unable to complete work on the third block because Zoom has not yet elected to build the third block. AMW has been paid for its work to date, save for a retention of 5% which Zoom has not paid, on the basis of Clause 5.7 of AMW's sub-contract. Clause 5.7 provides that *"5% retention will be held by Zoom… [reducing] to 2.5% on practical completion of the development. One year after practical completion of the development, provided that the works have been completed to Zoom's satisfaction with no outstanding defects, and on written request from the sub-contractor, the balance of the sum due will be released, subject to Zoom's rights under these conditions"*. AMW sought payment of the retention money.

Zoom, in their defence, said that they had exercised fairly their right to suspend the works; the contract did indeed provide a right (under Clause 2.3) for Zoom to suspend the work, or vary or amend the development proposals, at any time and with no liability to AMW for compensation in respect thereof. Practical completion would not occur until all three blocks were completed. On this basis, Zoom maintained that AMW had no entitlement to payment of the retention money. At the time of the trial, nearly two years had elapsed since the successful completion of the first two blocks. Zoom acknowledged that the contract terms, and their position, were unpalatable, but argued that the plain meaning of the contract terms had to be enforced.

AMW argued that Zoom's right to suspend the works was itself restricted by another term of the sub-contract (Clause 3.1), which allowed Zoom *"at its sole discretion"* to suspend the works in the event that one of a list of particular circumstances occurred. There were therefore two suspension clauses, the second of which imposed conditions on exercise of the right to suspend. The Sheriff's Court held that Zoom were not able to bring their suspension within any of the specified events within the second suspension clause, and so there was no entitlement to suspend the works; and, said the Court, AMW was entitled to payment of the retention money.

Zoom appealed, arguing that the two suspension clauses covered two different concepts. Clause 2.3, they said, was intended to deal with a suspension of the work; Clause 3.1 was intended to deal with a suspension of the sub-contractor's employment to do the work. The Sheriff Principal, hearing the appeal, agreed with Zoom that AMW's argument under the sub-contract failed. Zoom was entitled to suspend the works without condition or compensation.

The result of this decision would have been that the satisfaction of the conditions for the payment of the retention rested entirely with Zoom; if they did not instruct the work on the third block of flats, AMW would have no opportunity to successfully complete the work and the retention money would never become payable. Zoom could postpone indefinitely the date for payment.

An alternative argument was raised by AMW under the 1996 Construction Act; they claimed that the sub-contract provisions did not provide an adequate mechanism for determining what payments become due, and when, in accordance with the Scheme for Construction Contracts.

The Sheriff Principal preferred this argument and ultimately found for AMW. He did not see how it could be deemed adequate for the sub-contractor to have to wait for their employer to take a particular step, which they alone control, before the sub-contractor could receive payment for work properly carried out in accordance with the contract. The Sheriff Principal also based his decision on the underlying rationale for retention; it is to provide the developer with security in the event that defects arise after the developer takes possession of the site. There was no question of defects in the current case.

If this decision is generally followed, it will be useful protection for contractors and sub-contractors who may otherwise suffer as a result

of a developer's decision not to complete a project because of the economic downturn. The case also demonstrates the desirability for contractors and sub-contractors of breaking similarly structured projects into sections, with retention linked to completion of individual sections, rather than completion of a whole that may never happen.

TWO COMMON PHRASES

Often we can use words and assume we know what they mean, because we hear them and use them so often. Sometimes, the law reviews the meaning of well-known legal phrases and provides a definitive answer, and the results can be surprising. Two good examples are *"good faith"* and *"reasonable endeavours"*. What do these phrases really mean when they appear in a contract?

John Wevill

Good Faith

Commercial contracts often now include an express obligation on the parties to perform their respective sides of the contract in good faith. The concept of *"partnering"* is built on this principle; but does it mean anything, commercially? Can you really be liable to a claim for damages for not acting with sufficient good faith? The High Court last year provided guidance on the extent to which a party is expected to act to its own detriment to satisfy a good faith obligation. The answer is: not much.

In the case of ***Gold Group Properties v BDW Trading Ltd [2010] EWHC 1632***, Gold had entered into a development agreement with BDW in 2007, under which BDW would construct a residential development of Gold's land. BDW would then sell the properties – a minimum price for each home was set out in the development agreement – and under a profit-sharing mechanism the sale proceeds would be split with Gold. Each party had agreed, under the development agreement, to act in good faith towards the other.

But then, unfortunately, the conditions in the property market turned, and BDW found that the deal they had made was no longer economically viable. They failed to commence construction and sought to renegotiate the profit-sharing arrangement in the development agreement. Gold refused to renegotiate and terminated the agreement altogether in September 2009. Gold claimed that BDW had acted in breach of contract by failing to begin construction of the development; BDW in turn argued that Gold had acted in breach of its good faith obligation by refusing to renegotiate the deal. But did good faith really require Gold to agree an adjustment to the profit-sharing mechanism, or at least agree to negotiate?

The Court found for Gold, and against BDW. The obligation of good faith required the parties to act in a way that would allow both parties to enjoy the anticipated benefits of the contract. Good faith is about the parties observing reasonable commercial standards of fair dealing in accordance with their actions relating to the contract, and requires faithfulness to the agreed common purpose and consistency with the justified expectations of the parties. A good faith obligation does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.

This may seem surprising, but an obligation to act in good faith definitely does not require a party to subordinate its own interests to those of the other party, but merely to have due regard to the reasonable interests of both parties in enjoying the benefit of the contract. BDW could not rely on good faith to escape a bad bargain.

Reasonable Endeavours

Time and again we receive queries concerning reasonable endeavours, all reasonable endeavours and best endeavours. What does it all mean? Is there a parallel with reasonable skill and care, and all reasonable skill and care?

The use of the term *"reasonable endeavours"* in a professional appointment or contract is usually linked to the achievement by a professional of a particular end result. For example, a professional appointment may require the professional to use reasonable endeavours to procure collateral warranties from its sub-consultants. In contrast, an obligation to exercise *"reasonable skill and care"* in an appointment more usually applies to the entirety of the professional's performance under that appointment. For example, a professional appointment will typically provide that the professional shall carry out his services exercising the reasonable skill and care to be expected of an ordinary skilled professional.

Cases directly discussing these terms are surprisingly rare, but there have been two cases in the last few years that sought to clarify the difference between *"reasonable endeavours"*, *"all reasonable endeavours"*, and *"best endeavours"*. As described above, the imposition of a standard of *"reasonable skill and care"* is intended to achieve something rather different and so the *"endeavours"* cases are not strictly relevant by analogy to the question of what constitutes reasonable skill and care.

Reasonable Endeavours, All Reasonable Endeavours, and Best Endeavours

The case of ***Rhodia v Huntsman [2007]***, decided by the High Court, made clear that *"reasonable endeavours"* imposes no obligation on a party to sacrifice its own commercial interests. In another case from 2007, ***Yewbelle v London Green***, the Court of Appeal decided that *"all reasonable endeavours"* does not require a party to lay out significant funds to do, or achieve, the particular thing in question.

The *"best endeavours"* obligation has also been considered by the courts, and is the most demanding obligation, short of an absolute obligation. To satisfy the obligation to use best endeavours, a party must take all reasonable courses of action to achieve the stated purpose. Best endeavours may require the expenditure of significant sums by the professional and may, where necessary, imply an obligation to litigate or appeal against a decision given under a formal dispute resolution process.

Insured professionals, consequently, should be wary of agreeing any obligation beyond *"reasonable endeavours"*. In practice, this will require the professional, using reasonable endeavours to achieve an aim, to take only one reasonable course, not all of them. An insured should also be wary of agreeing to carry out certain specific steps or activities as part

of their obligation to use reasonable endeavours. Where the contract does specify that certain steps have to be taken in order to exercise reasonable endeavours, those steps will in fact have to be taken even if they may involve the sacrificing of that party's commercial interests.

Reasonable Skill and Care and All Reasonable Skill and Care

In the absence of any terms to the contrary, in any contract entered into by a professional for the provision of services, there will be an implied term that the professional should undertake their duties with reasonable skill and care. Most contracts for professional services do in fact contain express wording to this effect, rather than relying on the implication by law of the term.

The standard required by the term *"reasonable skill and care"* will be the standard of the ordinary skilled man exercising and professing to have the skill in question, for example the skill of an architect.

It is difficult to see any practical difference between *"reasonable skill and care"* and *"all reasonable skill and care"*. There is no real parallel with the concepts of reasonable and all reasonable endeavours, because *"endeavours"* means a set of actions that can be taken, whereas *"skill and care"* is a standard in itself. You can use your reasonable endeavours, and if you need to do more you can use "all" reasonable endeavours; but reasonable skill and care is an objective standard and adding *"all"* to the beginning doesn't mean a need for more skilfulness or more care. It doesn't really add anything, it's still reasonable skill and care.

The really important bit is what the skill and care relates to. The standard implied by law is the reasonable skill and care of the ordinary skilled professional. If the clause in the appointment you are looking at says that, this is fine - and in my view saying *"all"* the reasonable skill and care of the ordinary skilled professional makes no difference.

That said, to keep on the right side of its PI insurers, a professional should be wary of agreeing wording in its appointment which provides for any enhanced standard of skill and care. An insured will potentially be prejudicing its PI cover if it agrees to such an enhanced standard. PI policy wording may expressly provide that the insured must not agree to any duty more onerous than the exercise of reasonable skill and care. Alternatively, this may be implied by policy wording which provides that claims arising out of performance warranties will generally be excluded *"unless the liability of the insured would have* existed in the absence of such a warranty under the contract". This wording relies on the fact that the common law standard of care imposed on any professional providing a service is the standard of the ordinary skilled man exercising and professing to have that professional skill – or, put another way, reasonable skill and care.

An enhanced standard of reasonable skill and care can be imposed if, for example, the contract wording provides that the professional must exercise *"the skill and care to be expected of a properly qualified and competent professional experienced in carrying out projects of a similar size, scope and complexity to the Project"*. This duty of care that would, in theory, go beyond the coverage provided by a policy which is based on the common law standard.

A consultant faced with this proposed wording should seek to get back to the standard of the ordinary skilled professional, even if it is unlikely it is that an employer would accept it. Even so, it would in all likelihood be rare for an insurer to take this point in isolation – most would tend to be more pragmatic, because this enhanced standard of care crops up very regularly in bespoke appointments, and it still isn't as onerous as an indemnity – but if there are other factors that count against the insured consultant, such as a failure to operate the PI policy notification procedures properly, an insured may find its agreement to the enhanced standard of care is held against it.

MICHAEL PHILLIPS ARCHITECTS v RIKLIN [2010]

Matthew Olorenshaw

The case of ***Michael Phillips Architects Ltd v Riklin and another [2010] EWHC 834*** will be of interest to anyone thinking about making an application for security for costs, and also to anyone who may end up on the receiving end of such an application. The Court considered whether or not an after the event insurance policy (providing the Claimant with an indemnity in the event it was found liable to pay the Defendant's costs) should be regarded as adequate security for the defendant.

Under the Civil Procedure Rules ("CPR") Part 25.12, a defendant to any claim may apply to the court for security in respect of its defence costs. Normally, 'security' will comprise a payment into court by the claimant, representing a percentage of the defendant's projected defence costs. The factors a court must consider in deciding whether or not to award security include:

- Whether, in the circumstances, it is just to make such an order; and
- Where the claimant is a company, whether there is reason to believe that it will be unable to pay the defendants' costs, if it is ordered to do so.

In the Riklin case, the Claimant (an architect) assisted the Defendants, Mr and Mrs Riklin, with a project to develop their holiday home in Lymington. The project ran into difficulties when the builder went into administration. Things went from bad to worse when the parties fell out over the terms of the Claimant's professional appointment and he commenced proceedings seeking to recover outstanding professional fees of £147,387. The Riklins counterclaimed alleging numerous breaches of duty on the part of the claimant. The counterclaim was in excess of £162,000 and the Riklins said they were entitled to set-off the entirety of the Claimant's claim.

Concerned by the Claimant's apparently precarious financial position, the Riklins made an application for security in respect of their projected defence costs of £66,000. The Claimant responded by producing a copy of an after the event ("ATE") insurance policy he had taken out. In essence, this provided the claimant with an indemnity in the event that his claim against the Riklins was unsuccessful and he was ordered to pay all or part of their costs. Surely, this policy provided the Riklins with all of the security they needed?

In deciding the application, the Court helpfully ran through the criteria to which it should have regard in exercising its discretion to award security. These included:

- The possibility/probability that the claimant would be deterred from pursuing its claim;
- Balancing the prejudice caused to the claimant in ordering security with the potential injustice caused to the defendant in not doing so;
- The claimant's prospects of success; and
- The timing of the application for security.

To cut a long story short, the Court found on the facts that this was a case where it was appropriate to award security to the Riklins. However, an issue which still needed to be resolved was the extent to which the Claimant's ATE policy already provided security.

The Court examined the legal authorities on this issue and drew from them the following key threads:

- If an ATE policy is being relied upon as security, the defendant is entitled to some assurance as to the scope of cover, that the policy will not be avoided for misrepresentation or non-disclosure and that the proceeds cannot be diverted elsewhere (***Nasser v United Bank of Kuwait***);

- If the outcome of the case depends entirely upon which side is telling the truth, and the ATE policy is voidable or ineffective in the event that the insured is found not to have told the truth, the policy will be of little value (***Al-Koronky v Time-Life***);

- It is unlikely that any standard form of ATE policy can provide a suitable alternative to the standard forms of security, i.e. a payment into court or a bank guarantee (***Belco Trading Co v Kondo***).

Taking into account these points the Court found that, whilst there was no reason in principle why a claimant's ATE policy could not provide some element of security for a defendant's costs, it will be a rare case where an ATE policy can provide as good as security as the traditional options. The main problem stems from the terms of such policies, which are voidable by insurers and subject to cancellation for many reasons.

In the present case, the Claimant produced witness evidence from his insurer to the effect that the insurer would not refuse to pay out on a claim, even if it was found to be fraudulent or false. However, the Court felt that this did not alter the position that the terms of the Claimant's ATE policy meant that it provided no real security for the Riklin's costs, let alone any real comfort for them. The Claimant was ordered to pay £30,000 in to Court.

The process of a court deciding whether or not to award security involves a delicate balancing act. On the one hand, it will be concerned not to stifle valid claims and potentially restrict access to justice. On the other hand, it must consider the interests of defendants faced with dubious claims and little prospect of getting back their costs even if they win, which is an issue of particular relevance in the present economic climate.

It is perhaps not surprising then that, having decided security is appropriate, the courts are keen to ensure that the security ordered provides the defendant with a sufficient degree of certainty and comfort. Standard ATE cover is unlikely to provide this. It remains to be seen whether, in the future, ATE insurance policies will be adapted to meet the specific demands being placed upon them by some claimants.

CO-OP v JOHN ALLEN [2010]

Who can you rely on these days? A specialist vibro contractor, apparently, according to the case of ***Co-operative Group Limited v John Allen Associates Limited [2010] EWHC 2300***. The Court had to consider whether the consultant civil and structural engineer had exercised the reasonable skill and care required by its appointment when relying on the design of a specialist sub-contractor.

John Wevill

Allen had originally been appointed in 1996 as consultant engineer in relation to the construction of a new Co-op store in Kent. The site was overlain by layers of soft clay and silt, meaning the ground had to be stabilised before work on the floor slab could commence. Allen had recommended a vibro replacement method for stabilising the ground. The building contractor, Mowlem, had included a price in their contract for vibro compacting ground improvement and also a specification for soil stabilisation by vibro replacement techniques, prepared by Allen. Mowlem sub-contracted the vibro compaction work to another company, Pennine. It was Pennine which actually designed and carried out the work.

Prior to making its recommendation about the ground stabilisation solution, Allen had taken advice from another specialist ground conditions contractor, Keller.

Unfortunately, once completed, significant problems emerged with the ground floor slab. On investigation it had been found that the ground floor slab had settled by as much as 110mm; in addition there was significant differential settlement because the slab was supported in places on pile caps which had not settled. Use of the supermarket was badly affected and extensive remedial work was required. Co-op sued Allen in relation to the subsidence. Co-op claimed in particular that no competent engineer would have recommended using vibro replacement on the site, because the technique could never have worked in that context, and consequently Allen had been negligent in proposing this solution.

Co-op claimed that Allen could not discharge its duty to use reasonable skill and care simply by relying on the advice of a specialist contractor; they also claimed that Allen had failed to monitor and check the design calculations of the vibro works sub-contractor, Pennine; finally, Co-op argued that Allen had failed in its duty to advise its client to engage a specialist geotechnical engineer.

After hearing detailed expert evidence, the Court concluded that Co-op was wrong in its assertion that vibro replacement would never have worked at the site; in fact, an acceptable level of serviceability could have been achieved from the slab if the vibro work had been properly designed, detailed and carried out. Allen had not been negligent in recommending this solution. But what if the Court had made an adverse finding on the effectiveness of the vibro replacement recommendation? Could Allen have saved itself by claiming it had exercised reasonable skill and care in relying on the advice of a specialist?

Allen argued that vibro replacement was a specialist area, and that competent consultant engineers would be reasonable in seeking specialist advice when dealing with vibro issues. It was reasonable to seek advice from Keller, and to rely on it, because Keller were acknowledged experts in the field. Even though it did not need to, the Court made a point of deciding this question, and it agreed with Allen. The Court found that a professional consultant could, in fact, discharge its duty to exercise reasonable skill and care by relying on advice or design provided by a specialist, as long as the consultant acted reasonably in doing so.

The taking of the advice, the source of the advice, and reliance on the advice all must be reasonable in the circumstances, on the evidence; so it will not be every case where the consultant's duty of care is properly discharged. A delegation of design liability in a non-specialist area would not typically be reasonable or appropriate, or constitute the exercise of reasonable skill and care. The evidence before the Court showed that it was usual for a competent engineer to seek advice from a specialist if ground treatment issues arose. On the facts of the case, Allen would have been found to have exercised reasonable skill and care (that is to say, not behaved negligently) even if the advice received from Keller, and relied upon, had itself been negligent.

In addition, the Court decided that Allen had carried out appropriate checks on the design and calculations provided by Pennine. Allen's duty was limited to checking only those matters which were within the skill and knowledge of an ordinary competent consulting and civil engineer; in this case, that meant only checking that Pennine's input data and arithmetic were correct, and that the output data satisfied the required specification.

This is a positive decision for consultant architects and engineers. It should be commonsense that many specialist areas are outside the day to day expertise of design consultants, and so it is only reasonable that such consultants may rely, in appropriate circumstances, on expert advice.

YUANDA v WW GEAR [2010]

John Wevill

If the adjudication provisions in a contract state that the referring party must be liable for all costs of the adjudication, is this a breach of the statutory right of the parties to refer a dispute at any time? It seems obvious that being liable for all resulting costs is at least a disincentive to adjudicate, and arguably against the spirit of the 1996 Construction Act, but is an obligation to pay all of the adjudication costs an actual breach of the Act? This was one of the questions the Court had to answer in the case of ***Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720***.

Yuanda was engaged by WW Gear as a trade contractor to provide glazed curtain walling on a luxury hotel development in London. Yuanda was one of a number of trade contractors, and was engaged using the same standard package of contract documents that WW Gear used for the rest – the JCT form of trade contract, with substantial bespoke amendments. One of the amendments altered the adjudication provisions, so that if Yuanda was the referring party it would be obliged in every case to pay the defendant's costs of any adjudication. This was a significant advantage for WW Gear; the history of adjudication is that the vast majority of adjudication referrals are made against the paying party, by an employed party seeking payment. Yuanda claimed, when the matter came to court, that they had not been aware of the amendment and had agreed their trade contract without negotiation of this point, although Yuanda and the project manager had met to settle a number of other points on the trade contract.

The evidence was that at least one, if not several, of the other trade contractors had managed to negotiate this amendment out of their contracts with WW Gear.

The trouble began for WW Gear when a significant number of disputes arose between the parties and Yuanda sought declarations that the amended adjudication provisions in the trade contract were in breach of the 1996 Construction Act, because they acted as an unreasonable fetter on Yuanda's right to refer disputes to adjudication; Yuanda also argued that the 1977 Unfair Contract Terms Act ("UCTA") applied because that trade contract was made on WW Gear's standard terms and had not been specifically negotiated.

The Court took the view that, on the facts of the case, the amended adjudication provisions were directly contrary to the purpose of the 1996 Construction Act. If a party always has to bear its own and the other party's costs of a referral to adjudication, irrespective of the outcome, then it will not be worth making the referral unless the sum it expects to recover will significantly exceed these combined costs; this will act as a significant fetter on the referring party's ability to pursue small adjudication claims and, worse still, the responding party will have no incentive to keep its own costs within reasonable limits. The Court felt that it would be possible for the parties to agree to give the adjudicator jurisdiction to decide that one party's costs should be paid by the other, in the contract itself or in submissions during the adjudication, but that was not the case here.

Not that it helped WW Gear, but the Court also found that UCTA did not apply between the parties on the facts of the case; Yuanda was not effectively dealing as a *"consumer"*, and consequently was not deserving of the protection offered by the 1977 Act, because WW Gear was not using its standard terms of business. The trade contract had not been drafted by WW Gear, but it did contain significant bespoke amendments and, all other things being equal, represented their standard terms because the contract was used in more or less identical form for nearly all of WW Gear's trade contracts. They were not generally varied from transaction to transaction. However, in the pre-contract meeting with Yuanda, significant concessions had been made, to the disadvantage of WW Gear, and as a result it could not be said that the final form of trade contract still represented WW Gear's standard terms.

Subject to any future appeal by WW Gear, the Court has definitively outlawed the practice of forcing the claimant party to bear sole responsibility for the costs of an adjudication. In addition, there is a lesson in this case for parties who regularly contract on their own standard terms. In order to be able to enforce onerous provisions that

have not been specifically negotiated, the effect of such terms must be properly brought to the attention of the other contracting party. Otherwise there is a danger a court will conclude that the party adversely affected by the standard provision was a *"consumer"* and will apply UCTA to render the provision ineffective.

NICKLEBY FM v SOMERFIELD STORES [2010]

The case of ***Nickleby FM Limited v Somerfield Stores Ltd [2010] EWHC 1976*** provided a further statement of intent from the courts that, for as long as they have to uphold the 1996 Construction Act requirement for a contract to be in writing, they will be as generous as possible with their interpretation of *"in writing"* to ensure that otherwise valid adjudicators' decisions are upheld.

John Wevill

Somerfield had engaged Nickleby in 2006 on a three years contract to provide facilities management services across its stores. In early 2009 there had been discussions about extending the contract period; various calls, e-mails and letters were exchanged between the parties concerning the contract extension between March and August 2009.

An extension seems at some stage to have been agreed; but at the end of 2009 Somerfield gave notice of termination, to take effect in May 2010. Almost inevitably, particularly given the financial climate, a dispute over the amount of management fees followed shortly thereafter. During the resulting adjudication, Somerfield raised a jurisdictional objection, but the adjudicator concluded that he had jurisdiction to decide the dispute, and went on to make an award in favour of Nickleby. Somerfield refused to pay up. The Court considered the subsequent enforcement proceedings.

Somefield's case on jurisdiction was that the contract extension had not been finally contractually agreed, or that if there was a binding agreement it was not in or evidenced in writing. Somerfield also claimed that Nickleby's case in support of the adjudicator having jurisdiction was being made on a different basis to that which it had used during the adjudication. Nickleby was now claiming that a binding agreement on the extension of the contract had been made at a meeting in March 2009. Was this correct, and if so was Nickleby allowed to make a case in the enforcement proceedings before the Court that it had not made in the adjudication itself?

The Court decided on the first issue that the contract extension was evidenced in writing. The offer to provide services over the extended period had been accepted by conduct and subsequently evidenced in writing in the form of the various e-mails and letters that were exchanged between the parties during the summer of 2009.

This decision pushes back the boundaries of what constitutes a written agreement once again, and is good news for any party seeking to enforce an adjudicator's award. The Court found that a written offer to provide services can be accepted by conduct rather than in writing, and the adjudication provisions of the 1996 Construction Act will still apply, because the terms of the contract are written in the terms of the offer. Also, evidence in writing does not have to be provided at the time the contract is made – in this case the letters and e-mails were exchanged some time after the acceptance by conduct of the offer to carry out extended services. The Court was frankly dismissive of Somerfield's case – reinforcing the impression that courts will have no problem weeding out what they perceive to be *"spurious"* jurisdictional challenges – describing it as *"much ado about nothing"*.

And what about the second issue – was Nickleby allowed to raise new arguments in support of its case? Categorically yes. The Court made quite clear that only the Court could make a binding decision on the adjudicator's jurisdiction. Unlike a court or an arbitrator, an adjudicator can only give a non-binding decision on his own jurisdiction. On this basis there was no reason why Nickleby should be bound by the arguments it had raised previously on this issue before the adjudicator.

WHAT TO WATCH OUT FOR IN THE NEXT THREE MONTHS

In the next three months, watch out for. . . . Legal action being taken against more than 40 firms who paid to access a 'blacklist' of workers who had been engaged in trade union disputes. Over 100 workers are bringing a High Court case alleging breach of data protection laws... Further disputes over 'Tolent Clauses', as a result of the Government's failure to outlaw them in the recent amendments to the Construction Act 2009...A Government report on self-build housing will recommend bringing "self-building to the masses", by simplifying planning regulations for self-builders and increasing access to land and funding.

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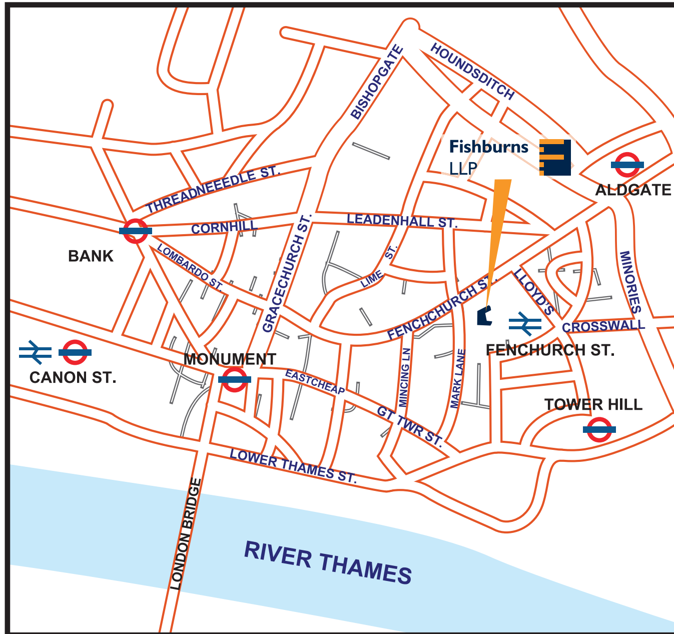

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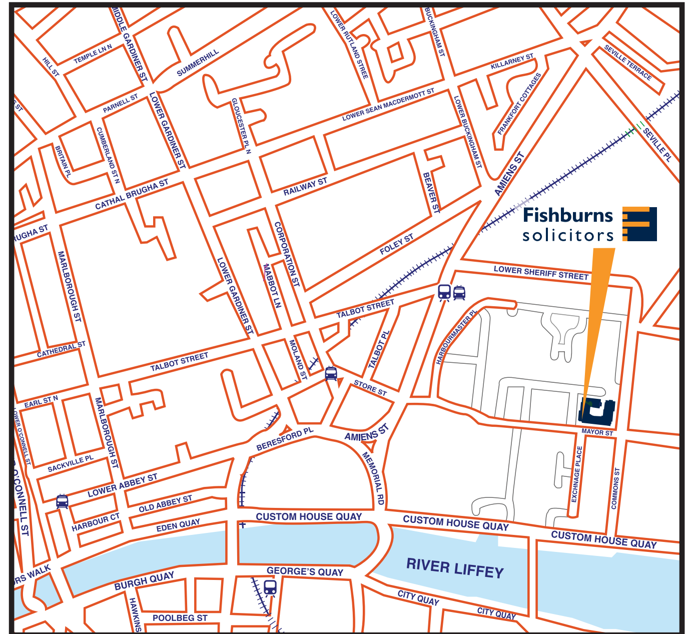

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