



FORMULATING A CONTRACT THAT ENHANCES
YOUR WORKING ARRANGEMENTS

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INTRODUCTION

The aim of this paper is to consider contract terms, in particular key provisions that one might include within a construction contract. However, flexibility is another key issue for those procuring and managing construction projects.

An agreement that “enhances working relationship” is often taken to mean a partnering agreement. In many circumstances, a contract might not exist. The parties could be simply working together in the absence of contract. What then is the position if a dispute arises between them? In the absence of a contract each may well still owe the other certain obligations. A contract might in those circumstances have made the obligations between the parties far easier to identify.

The focus of this paper is then, the nature of partnering relationships, the types of binding and non-binding agreements that are available, and ways in which the parties might by contract regulate some aspect of their relationship so as to enhance their working relationship.

PARTNERING

Partnering cannot be said to be a clearly defined process. Research carried out by James Barlow et al has identified three approaches to the following.¹ The first comprises a tool for improving performance of the construction process in order to maximise the effectiveness of each of the participants in the construction process. A definition of this

¹ Barlow, J., Cohen M., Jashapara, A., and Simpson, Y. (1997) *Towards Positive Partnering: Revealing the Realities in the Construction Industry*, the Policy Press, Bristol.

approach to partnering has been provided by the US Construction Industry Institutes Partnering Taskforce, which has described partnering as:

“... a long-term commitment between two or more organisations for the purpose of achieving specific business objectives by maximising the effectiveness of each participants resources. This requires changing traditional relationships to a shared culture without regard to organisational boundary. The relationship is based upon trust, dedication to common goals, and an understanding of each other’s individual expectations and values.”²

Second, partnering is considered as a management process involving strategic planning in order to improve the efficiency of large construction projects. From this perspective, it has been described as the formation of the project team with the identification of common goals.

Finally, some have focussed on the contractual relationships in order to implement partnering. From this perspective, partnering is about capturing within a contractual framework the essence of commercial and moral business people seeing through their business commitments. This is based upon the presumption that in “days gone by” commercial business people would ensure that they completed their side of the bargain quite simply on a handshake.

Regardless of which approach one considers encapsulates partnering it is clearly seen as a collaborative process. The emphasis is upon identifying, agreeing and then attempting to achieve common goals such that all members of the partnership benefit and as a result the project is delivered in a more efficient and economic manner.

A distinction is often made between long-term and project based partnering. Long-term partnering relates to strategic co-operation between a range of organisations in order to deliver a series of projects. Project partnering refers to narrower co-operation between organisations in order to deliver a single project. It may relate to the entire project, merely the design or simply the conceptualisation of the project. The question is then, how if at all are these partnering processes captured in a formal contractual manner and are standard forms available that captures the essence of partnering. The documents that are available could be considered under the following categories:

² CII, (1991) page 2.

- Contractual partnering arrangements;
 - PPC2000;
 - BE Collaborative Contract;
 - Strategic Forum Model Form of Agreement for an Integrated Project Team; and
 - JCT 2005 Framework Agreement
- Non-contractual partnering charters:
 - JCT 2005 Framework Agreement (Non-binding).
 - JCT Partnering Charter; and
 - NEC Partnering Option X12

PROJECT PARTNERING CONTRACT: PPC2000

The PPC2000 was published by the Association of Consulting Architects and launched in September 2000 (updated June 2003). It provides a multi-party standard form partnering contract which provides a contractually binding partnering agreement. It seeks to integrate the entire project team, who sign up to this single contractual form. In this respect, it is the client, construction contractor, or consultants and any key specialists or suppliers that comprise the “partnering team members”. The contract form is not limited to the construction phase, but is written to cover the entire duration of the construction process from inception, feasibility, design and physical production on site.

The SPC2000 provides a back-to-back arrangement for sub-contractors who are referred to as “specialist” for use with PPC2000.

PPC2000 boldly attempts to provide a multi-party contractual arrangement encompassing the partnering principles. These are expressed by contractually requiring the parties to “work together and individually in the spirit of trust, fairness and mutual co-operation”. Quite how the courts will interpret these provisions is unclear. Further, the contract expressly includes the Egan principles and refers directly to the Egan Report. The Egan Report sets out examples of partnering based co-operation best practice, for example, the manner in which Tesco has organised its construction work in a particular manner. Does this mean that those who sign up to PPC2000 are, by reference to the Egan Report, obliged to follow a practice that Tesco has adopted and that a failure for them to do so will mean that they are in breach of contract?

Arguable the benefit of the multi-party approach is the avoidance of the need for separate and no doubt inconsistent consultant’s appointment. The new consultants or specialist sub-contractors can be joined into the single multi-party agreement by signing a “Joining Agreement”. The consultant’s services schedule attached to the Joining Agreement sets

out the services to be provided by the particular consultant and identifies their responsibilities, as well as providing the consultant's payment terms. There is, therefore, the possibility for gaps between the particular services of each consultant and inconsistency in their role and responsibilities and payment terms.

A further advantage of the multi-party approach might be the avoidance of a raft of collateral warranties to fund as purchasers and tenants via a simple use of the Contract (Rights of Third Parties) Act 1999. However, it seems that the specialists and the consultants will most likely have to produce collateral warranties in the usual manner.

A further aspect is the net contribution options which are included within the project partnering agreement. This provides the ability to limit each of the partnering team's liability to the proportion of his responsibility for any damage. Net contribution clauses are frequently encountered in collateral warranties but are rarely if ever accepted in the primary contractual arrangements. It is only in recent years that they have started to appear in standard forms and then this has only arisen in the profession's standard forms in an attempt for the professions to limit their own liability. It cannot be said to be a generally acceptable practice.

Further, the ramifications on the insurance cover provided in respect of the project cannot be overlooked. The insurance industry that provides cover for projects does not anticipate that a net contribution clause will be included in the primary contract and so this may affect the cover that is available.

However, the fundamental question relates to the liability of the individual's involved within the project within a contractual collaborative working arrangement. Precisely what liability does each of the parties have, does liability extend between each member rather than just to the employer? The responsibilities between the parties have been blurred by clause 8.2 which provides:

"... each Design Team member shall contribute those aspects of the design of the project that fall within its role, expertise and responsibilities as stated in the partnering documents. The Design Team shall work together and individually in the development of an integrated design, supply and construction process for the Project ..."

In this respect, the problems of delineating responsibility have been exacerbated because there is no longer a clear delineation of responsibility between the individual parties. Further, the Joining Agreement provides that further design professionals and specialists may join, but may also leave and/or be replaced. The integration of individuals from

different organisation working together in one team makes it difficult to identify which party or parties might be responsible for a particular design or construction error.

On the more positive side, clause 3.7 provides an early warning system in similar terms to that encompassed by the NEC Contract. In respect of dispute resolution there is a problem solving hierarchy incorporating ADR principles. The early warning system sets out contractually a sensible management process, and a dispute resolution hierarchy also provides a practical management based approach to the resolution of disputes.

However, the implications of adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996 cannot be ignored. Any of the parties to the multi-party PPC2000, provided that the project is covered by the Act, will be able to call upon an adjudicator "at any time". While the adjudication process has been shown to be extremely effective within the construction industry, the ability for any party to call upon an adjudicator at any time does not assist the partnering based approach.

THE BE COLLABORATIVE CONTRACT

This standard form partnering agreement is for use with design and construct projects. It was initially developed by the Reading Construction Forum and has already been trialled on some projects. It is limited to the design and construction phase like most standard forms, and therefore does not deal with the operation or performance of the building once completion has been achieved. Further, it is merely a two party contract not a multi party contract like the PPC2000.

The Be Collaborative Contract comprises a set of standard conditions and a purchase order. One set of conditions and a purchase order have been produced for a party that supplies and constructs, and the other for a party that merely acts as a supplier.

Once again, the operative and introductory condition set out in Section 1 under the heading "Overriding Principle" deals with the collaborative manner in which the parties are to work together:

"To work together with each other and all other project participants in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect."

The rest of the terms are to be read in the light of that overriding principle, and therefore the terms, and possibly the conduct of the parties is to be read against the obligation on the parties to co-operate and collaborate in good faith. An open book accounting

procedure has been adopted. The parties are supposed to reach a consensus on how variations to the scope of work are to be incorporated. If the parties cannot reach a consensus then the contract provides a dispute escalation mechanism for resolving the matter.

In addition to the contract the parties are expected to develop a "project protocol". This sets out what the parties hope to gain from their collaboration and how those goals might be achieved. The protocol is not intended to be contractually binding, and therefore this aspect can be considered more akin to the non-binding charters such as NEC Option X12 and the JCT Partnering Charter and more recently the JCT 2005 Framework Agreement (Non-binding).

A further interesting aspect of this contract is the preparation of a "Risks Register". The contract therefore anticipates that the parties will analyse and identify risks. There is, therefore, a pro-active approach to risk management requiring identification of risks which might affect not just the delivery but also the performance of the works or the parties to the contract.

Once the risks have been identified the parties need to then produce a "Risk Allocation Schedule" identifying the time and financial consequences of those risks. In other words, the parties are then identifying who bears the time and cost risk of any particular item on the Risks Allocation Schedule. This approach has become more common on larger projects, but should be encouraged on a much wider range of projects. A detailed risk allocation schedule produced for a specific project goes a long way towards avoiding disputes about who might be liable on any particular issue.

Subcontractors must also participate in the production of the Risk Register, and also the Risk Allocation Schedule before they can commence any work on the project. This is an attempt to manage delay and costs in advance of the particular event.

If disputes develop then they are to be initially resolved between the parties. If this does not work then the project team is to make objective recommendations about the resolution of the dispute. The senior executives are then involved. There is an escalation of negotiation processes in an attempt to resolve disputes. Adjudication is also expressly available, and the final mode of dispute resolution is litigation.

NON CONTRACTUAL PARTNERING CHARTERS

As partnering initially developed in the Construction Industry the parties would sign a short, often only one page, "partnering charter" or "mission statement" identifying their partnering objectives. Some of them are expressed to be not contractually binding, but instead to simply capture in a subjective manner the parties' partnering objectives. They are often produced as a result of a partnering workshop, which the key individuals from the client, contractor, design team and other key suppliers will attend. A typical mission statement might state that the team would strive to make the project "the most exciting retail and working environment, whilst mutually benefiting from our success."

The mission statement then may set out a series of objectives, such as being committed in an open, honest and trusting manner, as well as to develop realistic objective timescales and to achieve them. It would not be uncommon to see such a signed mission statement placed on the wall of the site office for all to see.

Many of these early mission statements do not contain a statement that they are not contractually binding. It is therefore open to debate as to whether these mission statements comprise a separate contract, or a variation to the contract or contracts between the parties, or some collateral contractual arrangement. If there is a dispute between any of the participants then such a mission statement will only serve to exacerbate the issues between the parties as the parties debate the status of the mission statement and how its terms might affect the contractual agreement between them.

The mission statement is often then the result of the partnering workshop, which simply sits alongside the contract between the parties. It is an attempt to capture the culture of co-operation, collaboration and transparency between the parties in order for them all to achieve their goals, such as early completion of a high quality project, and a reasonable profit margin. Partnering is essentially a management process that seeks to establish a way in which the parties will carry out their contractual obligation. From this perspective it is easy to see how a simple non-contractual partnering charter or mission statement can be used on any contract regardless of the standard form. As a result the JCT and the NEC have produced partnering options that can quite simply be used alongside their standard form contracts, which continue to regulate the rights and obligations between the parties.

The first of these was the NEC partnering option X12. It formally recognises that the parties have entered into a partnering arrangement, but at the same time recognises expressly that the NEC option X12 does not create any legally enforceable contractual obligations between the partners other than the parties to the contract.

NEC option X12 anticipates that there will be a partnering workshop, and then seeks to develop common information systems as well as processes for design development, value engineering, value management and risk arrangements.

The NEC option X12 was possibly one of the first standard forms available for non-contractual partnering arrangements. More recently the JCT has also issued a practice note for use on a single project (JCT practice note 4). It is once again drafted to work alongside the existing JCT Standard Forms of Contract and promote a collaborative working, much like NEC option X12.

The practice notice is relatively short setting out how the parties are to interact and identify four objectives for the partnering team to achieve:

- 1) Delivery,
- 2) People,
- 3) Teamwork, and
- 4) Commercial.

The JCT charter states that the parties are to act in a co-operative manner, fairly towards each other and to avoid dispute by adopting a no blame culture. These terms are once again not intended to create any legal enforceable obligations between the signatories to the charter. The JCT charter has now been replaced by the JCT 2005 Framework Agreement (Binding and Non-Binding).

Performance indicators are to be established in order for the partnering team to measure whether it is achieving the full objectives set out in the charter. Given that the charter is non contractual, there is little that any party can do if the partnering team fails to establish the key performance indicators, or indeed work in a co-operative manner. That, however, in itself emphasises the need for the parties to embrace partnering as a sensible management process which will help all of them to achieve their commercial goals if it is to work in practice. Whilst contracts are there to establish the rights and obligations of the parties, they are also there to provide recourse to one party for breach by the other. Once the relationship between the parties has deteriorated to that extent that the parties are relying upon the strict terms of the contract the trust and co-operation required for partnering to work will have expired.

On the basis of the dicta of His Honour Judge Humphrey LLOYD Q.C. in *Birse Construction Limited v St David Limited*, there are potential problems with partnering agreements.³ Whilst his comments in regard to partnering agreements were strictly obiter and, whilst the

³ (1999) BLR 194; (1999) CILL 1494.

case was overturned on appeal, the Court of Appeal did not address any of the matters concerning partnering agreements.

In *Birse*, His Honour Judge Humphrey LLOYD Q.C. considered that, if a party had agreed to co-operate in a partnering agreement, it could not then go back on its word by then failing to co-operate. So, while partnering agreements are non-binding, it seems that the court may think otherwise and imply standards of conduct into the contract. Moreover the court has a wide ranging power to open up and review certificates, and it may well be that it could take co-operation into account in so doing. The Judge said:-

“In addition it is necessary to recall that the parties had attended the "team building seminar" a few days earlier at which the partnership Charter was signed. The terms of that document, though clearly not legally binding, are important for they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured. If Mr Heath had thought that Mr Goff had agreed to something that he ought not to have accepted Mr Heath would have said so for that would be consistent with an expression of "mutual co-operation and trust" and a relationship which was intended "to promote an environment of trust, integrity, honesty and openness" and "to promote clear and effective communication...

This is particularly surprising since these days one would not expect, where the parties had made mutual commitments such as those in the Charter, either to be concerned about compliance with contractual procedures if otherwise there had been true compliance with the letter or the spirit of the Charter. Even though the terms of the Charter would not alter or affect the terms of the contract (where they are not incorporated or referred to in the contract or are not binding in law in their own right) an arbitrator (or court) would undoubtedly take such adherence to the Charter into account in exercising the wide discretion to open up, review and revise, etc which is given under the JCT conditions...

I have little doubt that the parties considered that the "partnering" arrangement that they had made, as exemplified by the Charter, made it unnecessary. People who have agreed to proceed on the basis of mutual co-operation and trust, are hardly likely at the same time to adopt a rigid attitude as to the formation of a contract.”

No formal contractual document was signed, but the learned judge found it clear from the relationship between the parties that they had agreed to be contractually bound to each other. It could be argued that in doing so he took a commercial and pragmatic view. In

particular he noted that where, as here, an agreement to proceed via partnering made a close relationship of mutual co-operation inevitable, parties are unlikely to adopt a rigid attitude as to the actual formation of the contract. It is also significant that he found that the Plaintiff was (unfairly) trying to capitalise on the situation by sitting on, the unexecuted and unsigned contract in order to try and improve its position. If the procedure under the contract had not been strictly complied with but the spirit of the contract had been complied with, the Court could reflect on that Charter when making a decision.

There is one other case (albeit not a construction case but one which features one of the prime exponents of partnering) which highlights the danger for contractors of partnering. In the case of *Baird Textiles Holdings Limited v Marks and Spencer Plc*, a claim was made by Baird arising out of the termination of its trading relationship.⁴ Baird had been one of the principle suppliers of clothes to Marks and Spencer for 30 years when without warning Marks and Spencer determined all supply arrangements between them with effect from the current production season. Baird claimed that Marks and Spencer could not do this without a reasonable notice of perhaps as long as 3 years.

In a statement given by a former chairman of Marks and Spencer, Sir Richard Greenbury stated that:-

“The special partner relationship which M&S developed with all its suppliers of goods and services was, from its inception some 70 years ago, a cornerstone principle of the company. Furthermore, it was at the very heart of the way we did business with our suppliers M&S was going to carry on doing business with the manufacturer season after season, year after year ... Once a major supplier to M&S, always a supplier - unless the manufacturer’s performance was considered to be poor ...”

A Marks and Spencer witness said:-

“M&S was developed by principle of partnership. This was not a partnership in the legal sense, but more in the spirit of cooperation. The people involved in managing M&S and the suppliers had known each other for a long time, seeing their companies grow together. As a result, they were able to trust each other, converse freely and work together for mutual benefit ... both fed off each other ... it was in the best interest of M&S for its suppliers to grow with it, thereby passing on greater economic scale to M&S and hence its customers ...”

⁴ Court of Appeal 28 February 2001.

It was Baird's case that given the length and nature of the relationship, it was a long term one which would only be terminable upon the giving of reasonable notice. Marks and Spencer were required to deal with Baird in good faith. However, the Court held that there were no contractual obligations between M&S and Baird because of a lack of certainty. There were no objective criteria by which the Court could assess what would be reasonable in relation to quantity or price. The lack of certainty confirmed the absence of any clear evidence of an intention to create legal relations. It could not be said that the conduct of the parties was consistent with the existence of the contract that Baird sought to imply.

Equally, the Court of Appeal rejected the argument that Marks & Spencer's conduct in establishing and maintaining the long term relationship induced Baird to believe that the relationship was long term and would only be terminated upon the giving of reasonable notice and as such as a consequence of reliance upon this, it would be unjust and inequitable to allow Marks and Spencer to act inconsistently with this belief. Thus Marks and Spencer would not have been estopped from denying the relationship with Baird.

In short, whilst the parties had an extremely good long term commercial relationship (based on partnering principles), it was not one which they ever sought to express or which the Court would ever seek to express in terms of long term contractual obligations.

In the case of Baird, the lack of certainty was identified at paragraph 28 of the Particulars of Claim:

"Marks & Spencer deliberately abstained from concluding any express contract or contracts with BTH either to regulate the parties' on-going relationship or their respective rights and obligations season by season because it considered that it could thereby achieve much greater flexibility in its dealings with BTH than could be achieved under a detailed contract or contracts. The absence of such an express contract or contracts was accepted by BTH because, as Marks & Spencer knew and intended or ought to have known, BTH understood from the above pleaded conduct of Marks & Spencer that there existed a relationship between the two companies which was to continue long term and be terminable only on the giving of reasonable notice and under which the parties had the reciprocal rights and obligations pleaded in paragraph 9 above." [Emphasis added].

Significantly, Marks and Spencer's deliberate abstention from concluding any express terms meant a contract had not formed with Baird, and therefore Baird were unable to claim any loss of profits. As a result, the claim for £56 million in respect of loss of profit failed because the contract could not be objectively identified.

INTEGRATED PROJECTS AND VIRTUAL COMPANIES

The next development from a partnering form such as PPC 2000 is that proposed by the Strategic Forum for Construction (originally M4i). The Strategic Forum for Construction has produced a Model Form of Agreement for an Integrated Project Team, based upon a “virtual company”.

It is a multi party binding partnering contract including not just the entire team, but also the insurers. Like PPC 2000 it comprises general contract conditions and then a series of schedules used to identify project requirements, project constraints, team members and a payment. It can be downloaded without cost from the internet. Alongside the contractual provisions are a series of non contractual guidance notes.

The contract envisages that there will be principal members of the partnering team together with “cluster partners”. The cluster partners comprise particular subcontractors and suppliers that are an important part of the team such as the M&E specialist.

An innovative and interesting aspect is the “virtual company”. The virtual company is not a legal entity, and is not a company in the traditional limited liability sense. It merely provides an umbrella under which each of the partners can work as if they were all employed by the same organisation. The contractual approach therefore recognises that it is the individuals that are important to the co-operation and success of the project rather than their organisation. Each individual brings their particular skills to the project, and all of these individuals from the various organisations work together (employer, contractors, design consultants and specialists alike) in order to develop the project in a collaborative manner.

BAA has adopted a similar project team approach at Terminal 5, Heathrow Airport, London. The integrated team works from one office in order to deliver the T5 project. Individuals from many organisations work together in order to reach the common goal of the successful completion of the new airport. The approach to the Strategic Forums Model Form is much the same.

Like the Terminal 5 Project the cost of the work is based on an open book cost reimbursement basis.

The organisations are allocated a specific share in the virtual company, which in turn identifies their specified risks. A party therefore may be liable in the event of some breach leading to a particular loss to the employer or end user.

PARTNERING AND PROJECT MANAGEMENT

According to the proponents of the NEC3 its great strength is that it adopts a partnering approach whilst also placing great emphasis upon pro-active project management. There are perhaps 3 ways that this is clearly demonstrated in the NEC form. First, the early warning system is drafted to encourage the identification of problems and for the parties to work together in order to establish an early resolution. The early warning system provides that a contractor will only be compensated on the basis that an early warning had been given based upon the date on which an experienced contractor would have or ought to have recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures in order to avoid inadequate cost recovery for those problems which materialise later on.

Second, those risks for which the employer is not expressly responsible under clause 80.1 are risks for which the contractor is liable. Finally, the target cost option most clearly reflects the early warning pro-active management approach by affecting the financial bottom line of the parties, in particular the contractor.

Mr Justice Jackson in the case of *Costain Ltd & Others v Bechtel Ltd & Anr*⁵ in May of 2005, considered the role of the project manager under the NEC contract when it came to assessing and certifying sum due to the contractor.

Costain were part of a consortium of contractors carrying out work in respect of the Channel Tunnel Rail Link. The consortium entered into a contract to carry out the extension and refurbishment of St Pancras Station. The contract provided that:

“The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.”

The contract, though amended, was based upon the NEC Form of Contract. The contract was a target cost contract with a pay and gain mechanism providing for the Costain consortium to be paid actual cost less disallowed cost as defined by the contract. The project manager (RLE) was another consortium. The dominant member was Bechtel Rail Link Engineering. Many of the RLE personnel who worked on the contract were also Bechtel employees. On 6 February 2005, RLE issued payment certificate no. 47. This valued the work carried out as approximately £264 million, but disallowed costs of some £1.4 million. On 8 April 2005, payment certificate no. 48 was issued. The total of disallowed costs had risen to £5.8 million.

⁵ [2005] EWHC 1018 (TCC)

The Costain consortium alleged that at a meeting held on 15 April 2005, one Mr Bassily instructed all Bechtel staff to take a stricter approach to disallowing costs. It also alleged that he instructed the Bechtel staff to disallow legitimate costs when assessing the payment certificates. The Costain consortium were concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to them. Accordingly, the consortium issued a claim alleging that Bechtel and Mr Bassily had unlawfully procured breaches of contract by the employer. The claim sought interim injunctions restraining the RLE consortium from acting in such a way in relation to the assessment of the contractor's claims.

Bechtel argued that they were obliged to look after the employer's best interests and that therefore they did not owe a duty to act impartially in respect of consideration of the payment applications.

Mr Justice Jackson disagreed, holding that it was properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer and contractor.

On the evidence before the court, Mr Justice Jackson found that Mr Bassily had, in fact, been telling Bechtel staff to exercise their functions under the contract in the interests of the employer and not impartially. However, when acting as project manager, it was the RLE consortium's duty to act impartially as between employer and contractor and not to act in the interests of the employer.

The Judge considered the authorities, starting with *Sutcliffe v Thackrah*⁶ where the House of Lords discussed the role and duties of an architect in that situation. Lord Reid said:

"It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.

Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether

⁶ (1974) AC 727

work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.

The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor."⁷

Mr Justice Jackson noted that these comments had generally been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract. The issue here concerned the duty of certifiers in general, but the specific duties of the project manager under the present contract. Four reasons were put forward as to why the contract here was different:

"The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.

The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.

The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The project manager is specifically employed to act in the interests of the employer. In *Royal Brompton Hospital NHS Trust v Hammond (No. 8)* [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey Lloyd QC at paragraph 23 described the project manager as 'co-ordinator and guardian of the client's interest'.

The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially."⁸

⁷ Page 737
⁸ [2005] EWHC 1018 (TCC) Paragraph 40

This was an application for an Injunction and the Judge agreed that the Costain consortium had raised serious questions to be tried both in relation to whether RLE had acted in breach of its duty to act impartially as between employer and contractor and whether as a consequence the employer was thereby in breach of contract. In addition to this, the Costain consortium had raised a serious question as to whether the RLE consortium had committed the tort of procuring a breach of contract.

However, Mr Justice Jackson was not prepared to exercise the court's discretion at this interim stage and grant the injunction (and it is important to bear in mind that this judgment does not provide a definitive answer on this issue) to correct any failings in the contractual payment procedures. The reason for this was that these could ultimately be compensated for by way of damages. Whilst the claimants had demonstrated that there were potentially serious questions to be tried thus passing the threshold test in *American Cyanamid Co v Ethicon*⁹, the claimants failed to pass the test of the balance of convenience.

This case is of particular interest because of the debate concerning the obligations owed by the project manager to the contractor in respect of the assessment for payments and the employer's obligations to the contractor in the event of any breach of such obligations by the project manager. The form of contract, whilst amended in many significant respects, is based very much on the NEC target cost contract and therefore the issues considered are of great significance to the industry as a whole, particularly given the popularity of this form of contract for major infrastructure projects.

The defendants argued that they were in fact obliged to look after the employer's best interests and that they did not owe a duty to act impartially in respect of consideration of the contractor's payment application. The Judge held that, at the very least, it is properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer or contractor. At paragraph 44 (Mr Justice Jackson stated:

"When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in *Sutcliffe* do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor."¹⁰

In respect of the second point he stated:

⁹ [1975] AC 396 at 409D
¹⁰ [2005] EWHC 1018 (TCC) Paragraph 44

“Mr Boswood points out that under clause 92.1 the adjudicator is obliged to act impartially. Therefore, he submits, there does not need to be any similar duty upon the project manager. This submission has surprising consequences. If (a) the project manager assesses sums due partially and in a manner which favours the employer, but (b) the adjudicator assesses those sums impartially and without favouring either party, then this is likely to lead to successive, expensive and time-consuming adjudications. I do not see how that arrangement could make commercial sense.”¹¹

On the third point he concluded:

“I do not see how this circumstance detracts from the normal duty which any certifier has on those occasions when the project manager is holding a balance between employer and contractor. In Royal Brompton (upon which defence counsel rely in paragraph 33 of their skeleton argument) the contractual arrangement was very different from that set up in the present case. There were architects and others who would carry out the functions of certification and assessing what was due to the contractor. The role of Project Management International in the Royal Brompton case was far removed from that of RLE in the present case.”¹²

In respect of the fourth point he decided that clause Z10 was not relevant. He then referred to clause Z11 at paragraph 50 of the judgment:

“Clause Z.11.1 provides as follows:

This contract supersedes any previous (negotiations, statements, whether written or oral), representations, agreements, arrangements or understandings (whether written or oral) between the Employer and the Contractor in relation to the matters dealt within this Contract and constitutes the entire understanding and agreement between the Employer and the Contractor in relation to such matters and (without prejudice to the generality of the foregoing) excludes any warranty, undertaking, condition or term implied by custom.

At the moment I do not see how clause Z.11 impacts upon the present issue. The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom.

Nonetheless, the Judge decided that an injunction was not appropriate:

¹¹ Paragraph 47
¹² Paragraph 48

“CORBER have satisfied the threshold test in American Cyanamid. They have shown that there are serious issues to be tried in their claims against both defendants. Nevertheless, when it comes to the question of balance of convenience, CORBER have failed to show that this is a proper case for the grant of an interim injunction. On the contrary, I am quite satisfied that this is not a proper case for the grant of such an injunction.”¹³

A definitive answer on this issue would be extremely welcome. If it is held that the project manager does not owe such a duty of impartiality, it is a little difficult to see how this can sit comfortably with the supposed overriding objective of contracts of this nature to attempt to foster collaborative working and avoid confrontation.

KEY PROVISIONS

Key contract provisions should include:

- Scope and Price
- Design
- Payment (Housing Grants, Construction and Regeneration Act 1996 compliant, if the Act applies)
- Time (commencement, completion, adjusting the completion date, phasing)
- Valuation, variation, final account, defects etc
- Insurance (indemnity, fire code etc)
- Security (assignment, warranties, bond etc)
- Termination
- Dispute resolution

The issues are really the minimum considerations. Some more innovative ones are considered below.

EARLY WARNING

The early warning¹⁴ procedure provides that:

- The Contractor is to give the Project Manager a warning of relevant matters;
- A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;

¹³ Paragraph 60
¹⁴ Core clause 16

- The Contractor and Project Manager are then required to attend an early warning meeting if one or the other party request it. Others might be invited to that meeting;
- The purpose of the early warning meeting is for those in attendance to co-operate and discuss how the problem can be avoided or reduced. Decisions focus on what action is to be taken next, and to identify who is to take that action.

It could be said that this is a partnering based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage of any issue identified by the Contractor or Project Manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

This is a departure from the usual approach of the Contractor serving formal notices. A Contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a Contractor fails to give an early warning of an event which subsequently arises, and that he was aware of, then any financial compensation awarded to the Contractor is assessed as if he had given an early warning. If, therefore, a timely early warning would have provided an opportunity for the Employer to identify a more efficient manner of resolving the issue, then the Contractor will only be paid for that economic method of dealing with the event.

RISK REGISTER

A risk register has appeared for the first time in this most recent edition of NEC¹⁵. The risk register will initially contain risks identified by the employer and contractor, but the risk register will develop as the project proceeds. It works hand in hand with the early warning process and in conjunction with the proactive project management approach of the contract.

There are three main objectives of the risk register:

- 1 To identify the risks associated with the project;
- 2 To set out how those risks might be managed; and
- 3 To identify the time and cost associated with managing those risks.

It may be possible to precisely and specifically identify risks that can be added to the register, or in other instances the risk register may simply contain some generic risks. The process of identification allows the parties to consider how those risks might be managed

¹⁵ Core clause 16.3

before turning their attention to the time and cost implications. If Option A or B¹⁶ applies, then the employer will only bear the costs in terms of time and money if a risk is covered by a compensation event. Otherwise, the contractor bears all other risks. The approach is similar for Options C and D (target cost contracts) in that the employer will bear the risk if the event is one listed in clause 80.1. If not, the employer will in any event initially bear the risk, but the risk will then be shared through the risk share mechanism set out in clause 53.

There is however the further impact of clause 11.2(25) dealing with Disallowed Cost. If an element of cost is a disallowed cost, then the risk will be the contractors in any event. Finally, the employer bears almost all of the risk under Options E and F (cost reimbursable contracts). This is unless the risk is covered by the definition in clause 11.2(25) or 11.2(26) again relating to Disallowed Costs.

Nonetheless, the important aspect of the risk register is not just the early identification, but also the ability to then appraise and re-appraise as well as proactively manage risks before they occur. The overall effect of a well run risk register is a greater assessment of the overall financial outcome of the project and a greater ability to manage the time for completion of the project.

TIME, PROGRAMME AND KEY DATES

The contractor is to start on site on the first access date and is to complete the work on or before the completion date. The project manager is to certify within one week of completion the date of completion. The contractor must also carry out the work such that any condition stated for a key date is met by that key date.

Key dates are distinct from sectional completion dates. If sectional completion is required then secondary option X5 must be included within the contract. Sectional completion provisions are short, and so the detail of the work to be carried out and completed in any

¹⁶ Under NEC3 the six main options are:

- Option A (priced contract with activity schedule);
- Option B (priced contract with bill of quantities) provides that the contractor will be paid at tender prices. Basically, a lump sum contract approach;
- Option C (target contract with activity schedule);
- Option D (target contract with bill of quantities) provides that the financial risks are shared between the contractor and the employer in agreed proportions;
- Option E (cost reimbursable contract); and
- Option F (management contract) a cost reimbursable contract, where the risk is therefore largely taken by the employer. The contractor is paid for his properly incurred costs together with a margin.

particular section must be carefully identified in the Contract data. By comparison the key date is:

“.....the date on which work is to meet the Conditions stated. The key date is the *key date* stated in the Contract Data and the Condition is the *condition* stated in the Contract Data unless later change in accordance with this contract”¹⁷.

The distinction between a sectional completion date and a key date, therefore, is that the contractor must simply meet the condition stated in the contract on or before the key date while a certified completion date means that the employer must take over the works not later than two weeks after completion.¹⁸

The Guidance Notes to NEC3¹⁹ states that key dates are applicable for projects when two or more contractors are working on the same project, albeit under separate contracts, but with a common employer and most usually the same Project Manager. If the contractor's work is dependent upon the actions of the other then the use of key dates within a project programme allows the project manager to monitor the completion of a particular activity by a contractor for part of the works. It is said, that key dates can be used to precisely programme timescales in order to achieve a particular condition, thus allowing other contractors or indeed the employer to proceed to an overall project programme.

In practise there may be some difficulty in defining precisely what it is that must be done in order for a contractor to achieve a key date. There is often some difficulty with adequately and properly defining sections where a particular project is subject to sectional completion. The difficulty can only be compounded by attempting to define the conditions which are something less than the completion of a section, but are readily identifiable.

An example of a key date may be the completion of the contractor's design in respect of a particular section of the works or a design reaching a defined stage. The purpose would be to allow others to then carry on with their design or to commence construction. No doubt with a true commitment to a proactive project management based approach the use of key dates could be invaluable.

A further important aspect of the core clauses dealing with time is the contractor's programme. The programme might be identified in the Contract Data and so attached to the Contract, or alternatively the Contractor may submit a programme to the Project Manager for acceptance. The Contractor's programme must show not only the start date,

¹⁷ Clause 11.2(9)

¹⁸ Clause 35.1

¹⁹ Summary of NEC3 Engineering and Construction Contract Guidance Notes NEC Users Group

access dates, key dates and completion dates but also planned completion the order and timing of operations (both the contractors and the work of others) together with provisions for float, time risk allowances health and safety requirements and other procedures set out in the Contract.

If the Contractor needs access at a particular time and in respect of a particular part of the site then that must also be indicated in the programme together with dates by which acceptances are needed and information from others as well as plant and materials and other "things" that are to be provided by the employer. A statement of how the Contractor is to plan and carry out the work must also be included together with any other specific information required in the works information for that particular project.

The Project Manager has two weeks to either accept the programme or set out the reasons for rejecting it. There are four default reasons set out in Clause 31.3. First, the Contractor's plans are not practicable, second the programme does not show the information required by the Contract, third, it is not realistic or finally, it does not comply with the works information. These are the express reasons for not accepting the programme. It seems that a Project Manager could set out his further reasons for not accepting the programme. Nonetheless the Project Manager must set out reasons rather than simply reject the programme.

When the Contractor submits a revised programme that programme must record the actual progress made in respect of each operation and the effect upon the remaining works. The use of programmes therefore is an active and on-going management tool. Further, a programme is to be submitted at the completion of the whole works, thus finally updating the programme to the point where it becomes almost a record of the as-built works.

Clause 35.1 provides that the Employer will take over the works not later than two weeks after completion. If the Contractor completes the work early then the Employer might not be obliged to take over the works before the Completion Date, but only if the Employer has set out in the Contract Date and that he is not willing to do so.

Partial possession is possible if the Employer begins to use a part of the works, unless it is simply to suit the Contractor's method of working or for a reason stated in the Works information. If the Employer does take over part of the works then the Project Manager is to certify the partial taking over within one week.

The Project Manager may request the Contractors to provide a quotation for accelerating the works in order to achieve completion before the completion date.²⁰ NEC is therefore one of the few contracts that provides express power for the Employer, or rather in this instance the Project Manager on behalf of the Employer, to request the Contractor's price for accelerating the works. Nonetheless, any acceleration is of course subject to the Contractor submitting a quotation that is acceptable, or indeed being in a position to accelerate the works.

COMPENSATION EVENTS

Core clause 60 deals with compensation events. If a compensation event occurs, which is one entitling the contractor to more time and/or money, then these will be dealt with on an individual basis. If the compensation event arises from a request of the project manager or supervisor then the contractor is asked to provide a quotation, which should also include any revisions to the programme. The project manager can request the contractor to revise the price or programme, but only after he has explained his reasons for the request.

NEC3 has adopted a more strict regime for contractors in respect of compensation events. Core clause 61.3 is set out in terms:

"The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if

the Contractor believes that the event is a compensation event and

the Project Manager has not notified the event to the Contractor.

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not."

Clause 61.3 is effectively a bar to any claim should the contractor fail to notify the project manager within 8 weeks of becoming aware of the event in question. The old formulation of a 2 week period for notification has been replaced with an 8 week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18) which states that a compensation event includes:

²⁰ Core clause 36.1

“A breach of contract by the *Employer* which is not one of the other compensation events in this contract.”

Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.²¹ The House of Lords case of *Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem PVBA*²² provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract.

This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* in circumstances where the employer has caused some delay. So, *Bremer* is a case where a party seeking to rely upon the condition precedent was not itself at fault in any respect whatsoever. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where the employer has caused a proportion of the delay.

The courts strictly interpret any clause that appears to be a condition precedent. Not only will the Court construe the term against the person seeking to rely upon it, but also the court will require extremely clear words in order for the court to find that any right or remedy has been excluded. However, an alternative way to approaching the drafting of such provisions was highlighted in the case of *City Inn Limited -v- Shepherd Construction Limited*.²³

The case of *City Inn* was a reclaiming motion by Shepherd Construction Limited from an interlocutor (injunction) of Lord MacFadgen. City Inn Limited was the employer, and Shepherd Construction Limited was the contractor for a hotel at Temple Way, Bristol. The conditions incorporated the JCT Standard Form of Contract Private Edition With Quantities (1980 edition). The architect granted an extension of time of 4 weeks. An adjudicator then granted a further extension of 5 weeks.

In this action City Inn Limited argue that both allowances were unjustified and relied upon the mechanics of special condition 13.8. The clause provided:

²¹ See for example *Photo Production Limited -v- Securitor Limited* [1980] AC 827.

²² [1978] 2 Lloyd's Rep 109 HL

²³ 20 May 2003, Appeal of the Opinion delivered by the Lord Justice Clerk, Second Division, Inner House, Court of Session, Clerk LJ, Lord Kirkwood, Lord McCluskey.

“13.8.1 Where, in the opinion of the Contractor, any instruction, or other item, which, in the opinion of the Contractor, constitutes an instruction issued by the Architect will require an adjustment to the Contract Sum and/or delay the Completion Date the Contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as maybe agreed between the Contractor and the Architect) of receipt of the instruction details of;...”

The Contractor was then required to submit details of its initial estimate, requirements in respect of additional resources and the length of any extension of time. Clause 13.8.5 then stated:

“If the Contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the Architect has not dispensed with such compliance under clause 13.8.4, the Contractor shall not be entitled to any extension of time under clause 25.3.”

City Inn Limited argued that as the contractor failed to comply with clause 13.8.1 they were not entitled to any extension of time. Shepherd claimed that clause 13.8.5 was a penalty clause and was therefore unenforceable. They also argued that the clause only applied if on receipt of an instruction the contractor actually formed the opinion that there would be an adjustment to the contract sum and delay to the completion date.

The Appeal Court held that the Lord Ordinary had accepted that the contractor could avoid liability for liquidated damages for culpable delay by simply complying with clause 13.8.1. The £30,000 worth of liquidated damages was payable by the contractor because of the delay to the completion date pursuant to clause 23, not as a result of a breach of clause 13.

Lord Justice Clerk delivering the opinion of the Court, held that the contractor was impliedly obliged to have applied his mind to the question and form a view as to the likely consequences of an Architect’s Instruction. It was not sufficient for the contractor quite simply not to bother to think about the position. The clause was not a penalty because the contractor had the option, if he wished to avoid liability for the delay, of applying his mind to the clause and then providing the employer with the details required by clause 13.8.1. As the contractor had failed to comply with the clause he had deprived the employer of the opportunity to address the matter, if the employer considered that the cost and/or the delay, potentially caused by the instruction were not acceptable.

One important distinction between the drafting of the provision in *City Inn* and the NEC3 is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. The NEC3 is a bar to the bringing of a claim simply for a failure to notify the project manager about a compensation event. A specific instruction might not have been given. The contractor might not be prompted to respond to a specific instruction.

The contractor must of course be “aware of the event” in order to notify the project manager under clause 61.3. There will no doubt be arguments about when a contractor became aware or should have become aware of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example. Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses the contractor’s experience of dealing with the actual ground conditions may change such that the contractor reaches a point where he should notify the project manager. The question arises as to whether the contractor should have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believed that the ground conditions were unsuitable.

The answer must be that the contractor should give notice when he encounters ground conditions which an experienced contractor would have considered at the Contract Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price having regard to all of the information that the contractor is to have taken into account in accordance with clause 60.2.²⁴

A further question arises in respect of clause 61.3, and that is; who precisely needs to be “aware”. Is it the person on site working for the contractor, the contractor’s agents or employees or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company and not merely servants and agents.²⁵

The starting point is the general argument that all corporations and authorities have a legal identity and act through the individuals that run, are employed by or are agents of that organisation. A corporation or authority is a legal person, and is therefore regarded by law as a legal entity quite distinct from the person or persons who may, from time to time, be the members of that corporation.

²⁴ Clause 60.2 deals with physical conditions.

²⁵ *HL Bolton Engineering Co Limited -v- TG Graham & Sons Limited* [1956] 3 ALL ER 624, in particular the judgment of Denning LJ.

The position is simplified for a person dealing with a company registered under the Companies Act 1985. A party to a transaction with a company is not generally bound to enquire as to whether it is permitted by the company's memorandum or as to a limitation on the powers of the board of directors to bind the company. However, if the contract is to be completed as a deed, then the contract must be signed by either two directors or a director and the company secretary.

Generally directors and the company secretary have, therefore, authority to bind the company. If a person represents that he has authority, which he does not possess, but in any event induces another to enter into a contract that is void for want of authority, then that person will be able to sue for breach of want of authority. However, these propositions relate to the formation of contracts rather than the conduct of the contract and in particular the identification of who within the company needs to have the knowledge required in order to make a decision as to whether a notice should be served. While then an agent of a company can bind a company, that agent must still act within the scope of their authority when taking actions under a contract.

So who then within the company must be "aware" for the purposes of clause 6.3? The concept of identifying the "directing mind" within a company as the key to ascertaining who within a company has the necessary quality to be "aware" is helpful when answering this question. It was established by Denning LJ in *HL Bolton Engineering Co Ltd v TG Graham & Sons Ltd*:

"Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Other are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."²⁶

According to Denning LJ, the intention therefore of the company is to be derived from the directors and the managers, rather than those that might be carrying out the work. The company's intention will, therefore, depend upon; the nature of the matter that is being considered, the position of the director or manager, and other relevant facts of the particular case. This principle has been affirmed in subsequent cases, in particular by Lord Reid in *KR v Royal & Sun Alliance Plc* where he stated:

²⁶ [1956] 3 All ER 624, page 630.

“Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation, he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.”²⁷

Lord Reid confirms the approach of Denning LJ, but notes that it may be possible for the directors or senior managers to delegate, in this instance, fundamental decision making processes required during the course of the running of a construction contract. In the absence of such delegation, it is arguable that those whom must be “aware” are the directors and managers who constitute the “directing mind” of the company.

The prevention principle may also apply in respect of any employer’s claim for liquidated damages. If the contractor does not make a claim, then the project manager cannot extend the Completion Date under NEC3, and so an employer will be entitled to liquidated damages. However, those liquidated damages could be in respect of a period where the employer had caused delay. The employer can only recover losses for delay in completion for which the employer is not liable.

It may be that some will argue that time has been set “at large”. If an employer is unable to give an extension of time (on the basis that the contractor did not give a clause 61.3 notice) that would otherwise be due, then the contractor is relieved of the obligation to complete the works by the specified date. Arguably, where a delaying event has been caused by the employer and there is ordinarily an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.²⁸ It must be remembered that the purpose of the extension of time provisions are quite simply to allow the employer the benefit of the liquidated damages provisions where not only the contractor is in delay, but also where the employer has not caused any of that delay.

The English Legal principle of prevention means that an employer cannot benefit from its breach. If, therefore, there is concurrency of delay and the employer refuses to award an

²⁷ [2006] EWCA Civ 1454.

²⁸ See *Peak Construction (Liverpool) -v- McKinney Foundations* (1971) 69 LGR 1 CA; 1 BLR.

extension of time (thus alleviating the contractual liquidated damages), then the contractor may be released from those liquidated damages in any event.

It might be said that the true cause of this loss was in fact the contractor's failure to issue a notice complying with clause 61.3. However, judgements such as they are are divided. The case of *Gaymark Investments Pty Limited -v- Walter Construction Group*²⁹ is a decision of the court of the Northern Territory of Australia. That decision follows the English case of *Peak -v- McKinney* holding that liquidated damages were irrecoverable as the completion date could not be identified as time had become "at large". The alternative drafting approach of *City Inn* suggests a different conclusion, but further case law on that approach is likely before the *City Inn* approach can be relied upon.

The key distinction is whether it is the employer's acts or omissions under the contract or breaches of contract that are the events that lead to the loss, or whether, regardless of any acts, omission or breaches of the employer, the breach could instead be said to be the *secondary* breach by the contractor in failing to issue the notice.

Finally, the contractor may be able to rely upon the equitable principles of waiver and/or estoppel³⁰. It may be that the contractor does not serve a formal notice because, by words or conduct, the employer or indeed the project manager represents that they will not rely upon the strict eight week notice period. The contractor would also need to show that the contractor relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with the representation made by the employer or project manager. In addition, this approach could be further supported by core clause 10.1 which requires the parties to act "in a spirit of mutual trust and co-operation". It would be somewhat ironic if a contractor did not submit contractual notices in the spirit of "mutual trust and co-operation" but the Employer at some much later date relied on the strict terms of clause 61.3.

30 March 2007
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²⁹ (2000) 16 BCL 449.

³⁰ See *Hughes v Metropolitan Railway* (1877) 2 AC 439.