



Fenwick Elliott

RAILWAY LAW FOR ENGINEERS:
GENERAL INTRODUCTION TO ENGLISH LAW,
PRINCIPLES OF CIVIL AND CRIMINAL LIABILITY, THE LITIGATION PROCESS

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SPEECH GIVEN TO INSTITUTION OF ELECTRICAL ENGINEERS

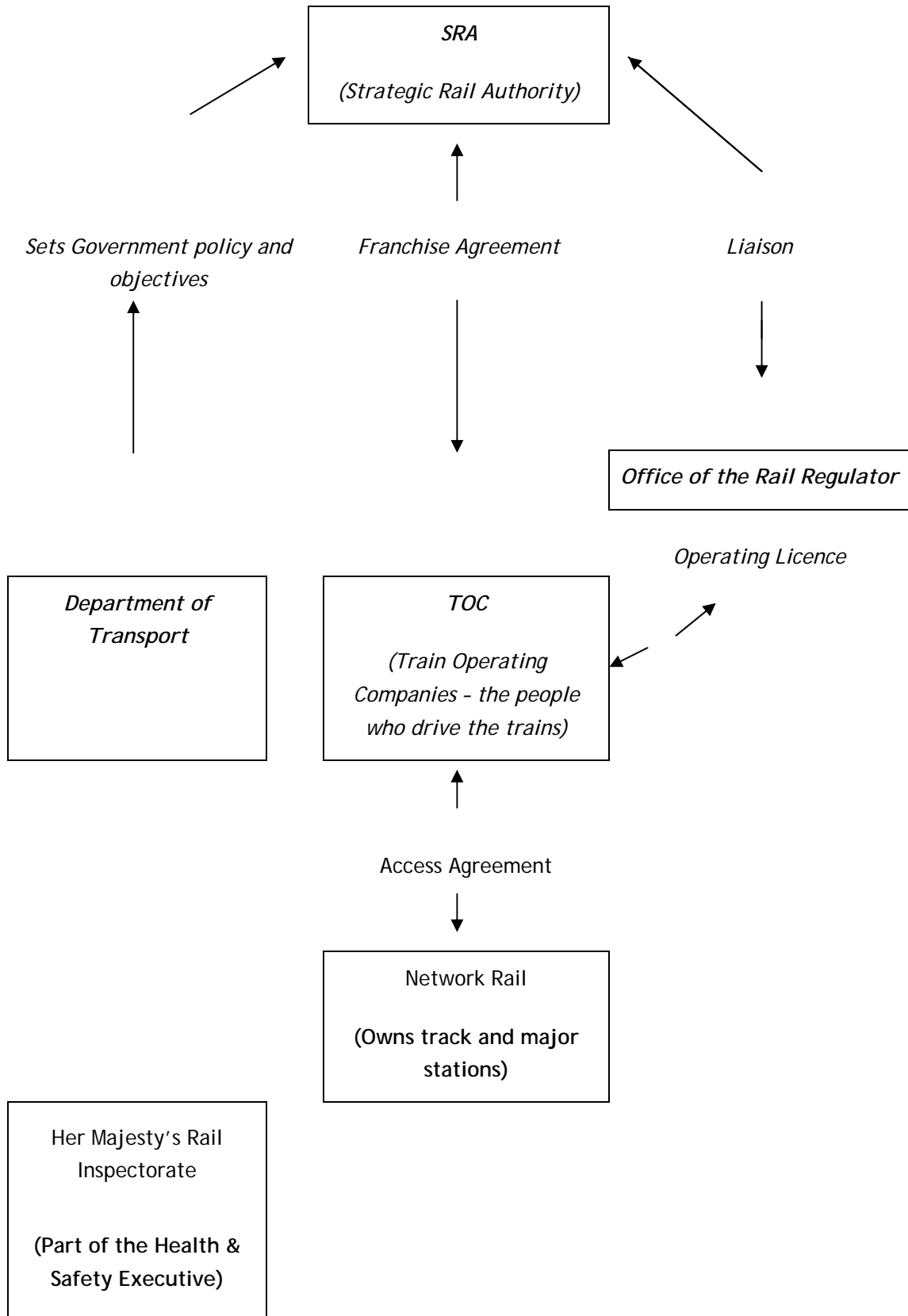
Introduction

Aims

1. The aims of this session are:-
 - 1) to try to follow Tom Windsor;
 - 2) give you an idea of the general principles of English Law which UK rail network operates against;
 - 3) give you an idea of how these general principles of English Law apply to the railways;
 - 4) explain what can happen when something goes wrong.

The Structure of the railway industry

2. Although not strictly relevant to a talk on English Law, I thought it would assist if I outlined the bodies that have roles in the UK railway industry.



Strategic Rail Authority

3. Created on 1 February 2001. The SRA provides strategic direction for rail transport in Britain, under Government guidance. The SRA lets and manages franchise agreements, develops and sponsors major infrastructure projects and deals with some aspects of consumer protection.
4. Many of the passenger rail franchises are due to expire in 2004. In November 2002 the SRA issued a Franchising Policy Statement setting out a new long-term partnership for the new franchises. TOCs will be entering into new long-term agreements delivering reliable performance and meeting passenger needs with increased investments in the railways.

Rail Regulator

5. The Rail Regulator (i.e. Tom Windsor) is independent. He provides regulation of the economic and dominant elements of the rail industry. For example, the Rail Regulator looks at Network Rail's charges.
6. The Rail Regulator heads the office of the Rail Regulator, a small non-ministerial department staffed by civil servants. The Rail Regulator also provides directions and guidance to the SRA.

Train Operating Companies ("TOC")

7. These are the companies that run the trains under 7/20 year agreements.

Network Rail

8. The body that owns the major stations, track and assets.

HM Railway Inspectorate (HMRI)

9. Part of the Health & Safety Executive ("HSE"). HMRI staff ensure health and safety law is followed throughout the railway network.

Criminal Law

Health and Safety

10. The State sets out the minimum standards for individuals and companies in the Criminal Law. Criminal Law is not optional. It is not something that it is imposed by an agreement with (say) an employer, TOC, etc. An example of Criminal Law is the Health and Safety at Work Act 1974 which imposes obligations on companies and individuals. The basic principle of health and safety law is that responsibility rests with those who own, manage and work in business. Organisations must assess the risks involved and take actions to manage them effectively. The term "... *so far as is reasonably practicable...*" is widely used in health and safety legislation.
11. It is HMRI who enforce health and safety legislation and have the power to shut down the railway network.

Corporate manslaughter

12. Breaches of criminal law are normally enforced by fines or orders prohibiting actions (for example an order made to prevent someone from being a director of a company). Imprisonment is the ultimate punishment.
13. Killing someone as a result of gross negligence or recklessly endangering life constitutes manslaughter. After the recent rail disasters, attempts have been made to convict companies of "corporate" manslaughter. This has proved difficult for two reasons:-
 - 1) it is impossible to jail a company;
 - 2) the law looks for a "*directing mind*". It is difficult in large scale companies to find one person or even a team who directed the company to act in a grossly negligent manner. Should the operative who failed to install the signal correctly, his supervisor, the manager of the line or the director of the company take responsibility?
14. After the Southall rail crash Great Western Trains were charged with seven counts of corporate manslaughter, together with other charges relating to a breach of the Health and Safety at Work Act¹. As to the charge of corporate manslaughter the Court of Appeal decided

¹ *R v Great Western Trains Company Limited* Central Criminal Court 27 July 1999

that a company could not be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of an identified human individual².

15. Such is the difficulty with convicted companies involved in acts of corporate killing the Government has been considering a change in the law. The original proposals have been changed. Noticeably, in the last Queen's Speech in 2003, no room was left for a Corporate Killing Bill in the Parliamentary timetable.

Tort

Introduction

16. The law of tort governs relationships between individuals and companies which do not arise out of a contract. For example, the law of trespass is a tort - it covers the relationship between property owners and those which come on their property. Another example is a law of nuisance which sets out a code governing the enjoyment of property.

Breach of statutory duty

17. Under the Health & Safety at Work Act 1974, organisations such as the Health & Safety Executive (and through the HSE, the HMRI) are charged with enforcing safety regulations, etc. It is arguable whether HMRI owes a duty to TOCs or even passengers whereby if HMRI fails to carry out its duties adequately, passengers can sue for damages suffered as a result. This is what happened as a result of the Ladbroke Grove disaster. Thames Trains, who were being sued by the victims, sought a contribution from the Health & Safety Executive; Thames Trains argued that the HSE/HMRI had a specific responsibility for infrastructure and safety.
18. The Court held that the wording of the Health & Safety at Work Act 1974 indicated that it was unlikely the Health & Safety Executive could be liable for damages for non-performance of its duty for failing to take reasonable care of the safety of the victims of the rail crash. The Court however suggested that, outside of the scope of the Health & Safety at Work Act, it might be found that the HSE did owe a duty to use reasonable skill and care towards the passengers even though this would mean overcoming considerable hurdles³.

² Attorney Generals reference no. 2 of 1999: 15 February 2000

³ *Thames Trains Limited v Health & Safety Executive* 23 July 2002

Negligence

19. The most significant tort for the civil engineering industry is negligence. An engineer owes a duty in tort to use reasonable skill and care when carrying out his duties.

Why sue in negligence?

20. Engineers are being sued in negligence because:
- 1) there was no contract with the Engineer - the only option was to sue the Engineer in negligence. For example in *Eckersley v Binnie*⁴ the victims of the Abbeystead disaster sued the Engineer for allegedly defective design of a plant room;
 - 2) limitation periods for suing in negligence can be longer. A claim for breach of contract must be brought 6/12 years from the date of breach i.e. when the contract was broken. A claim for negligence needs to be brought within 6 years of the damage being suffered, which may be later;
 - 3) when a contract is breached damages are measured by what would have been received if the Contract was properly performed. If the Contract was not profitable then damages may not be high. However, for negligence, damages are to put an innocent party in the same position as they would have been in if the negligent act had not happened. This can in some circumstances lead to more money being paid;
 - 4) the recession in the 1980s/1990s saw many contractors going into liquidation. To some extent some litigants were "looking" for other parties involved who had deep pockets. Engineers are obvious targets as they are insured.

The development of negligence

21. The real issue in negligence is to define how many people an engineer owes duty to. He no doubt owes a duty to his employer with whom he is in contract to use reasonable skill and care. Should it be extended to the Contractor? Tenants? Future purchasers? Or even those who use the building?
22. Leading cases illustrating the ebb and flow of negligence in civil engineering over the last 30 years are:-

⁴ 1999 CON LR

- 1) *Anns v Merton London Borough Council*.⁵ A contractor negligently installed foundations. The Owners of the property could not sue the Contractor so they successfully sued the local authority building inspector for negligently passing the foundations under the Building Regulations;
- 2) *Junior Books v Veitchi*.⁶ Here the Employer sued a nominated Sub-Contractor for defective flooring. Significantly there was no contract between the Employer and the nominated Sub-Contractor, hence the Employer had to sue in tort. In a case which has not been followed by the Courts since, but is still to be overruled, it was held that the nominated Sub-Contractor was liable to the Employer;
- 3) *D & F Estates v The Church Commissioners*.⁷ Here a Contractor was sued for defective plastering by a tenant of the building. There was no contract between the tenant and the Contractor. In a retreat from the growth of negligence throughout the 1970s and 1990s, the House of Lords decided that the Contractor was not liable for the cost of remedying defective plasterwork;
- 4) *Murphy v Brentwood District Council*.⁸ The House of Lords overruled the decision in *Anns v Merton London Borough Council* and decided the local authorities were not responsible to property owners for the negligence of their building inspectors;
- 5) *Henderson v Merritt Syndicates Limited*.⁹ Lloyds members alleged they had been defrauded by brokers, syndicates, etc at Lloyds. However, the members were out of time for suing the brokers etc in contract instead they sued in negligence. The House of Lords confirmed that parties to a contract owed a duty in negligence. Claims in negligence were not out of time.
- 6) In *Pacific Associates v Baxter*,¹⁰ the Contractor alleged that there were discrepancies in the tender documents prepared by the Engineer. The Engineer was appointed by the Employer and did not have a contract with the Contractor. The Contractor sued the Engineer in negligence alleging a failure to use reasonable skill and care in preparing the tender documentation. The Privy Council decided in this case that the Engineer did not owe the Contractor a duty to use reasonable skill and care¹¹.

⁵ 1977 2AER 492 HL

⁶ 1983 1AC 520

⁷ 1989 AC177

⁸ 1991 1AC 398

⁹ 1995 2AC 145

¹⁰ 1991 QB 993

¹¹ It has been said by many commentators that the Privy Council was heavily influenced by a disclaimer in respect of the tender documents in the contract between the Employer and the Contractor. Others still feel it would be very difficult for a Contractor to bring a case in negligence against an Engineer in similar circumstances.

Contract

Agreement

23. A contract is no more than an agreement between two or more of the parties to do something. Subject to a few exceptions¹² two or more parties can agree to be bound by anything.
24. Many but not all terms of appointment in the railway industry are based on the standard form. The Association of Consulting Engineers produces a standard form which contains a long list of engineers' duties, several key exclusions and limitations which are always amended. The Institution of Civil Engineers has produced a complete range of contracts known as the "New Engineering Contract" or the "Engineering and Construction Contract". This particular suite of contracts is more easy to read, promotes good management by setting out a contractual mechanism for regular reporting of problems, meetings and follow-up actions and (it is claimed) it allocates risks fairly between the Employer, Contractor and a professional team.
25. The EC/ECC family of contracts has been favoured by the railway industry, particularly in relation to the Channel Tunnel Rail Link and (pre-privatisation) London Underground. It is, however, often amended beyond recognition.

Incorporating documents

26. One of the features of railway contracts is the large number of standard specifications and other documents referred to in the agreement. Anything can be incorporated by a reference within an agreement provided it is clear what is being included. If a contract includes a particular train company's safety standards edition A, provided there is only one document which matches its description, then the parties are bound by the document.
27. Unfortunately, "*I did not read/understand the document*" is not a defence.
28. In broad terms:-
 - 1) The Court will make every effort to ensure that any conflict between incorporated document and the underlying contract are resolved. If there is any way that the two documents can be read together, the Court will strain to do so.

¹² For example, unreasonable exemption clauses under The Unfair Contract Terms Act 1977 may not be valid

- 2) Where a document has been specifically written for the project, say the Contract Conditions, this would take precedence over a generic document that applies to several projects. This particular rule of interpretation is often reversed by standard form contracts whereby the standard form takes precedence over a specific document such as a specification.

Design Responsibility and Reasonable Skill and Care

29. "The law requires of a professional man that he live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skills. He need not possess the highest expert skills; it is enough if he exercises the ordinary skill of an ordinary competent man exercising his particular art." ¹³
30. "...a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession... he must bring to any professional task he undertakes no less expertise, skill and care than any other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average." ¹⁴
31. As an engineer, you are obliged to use reasonable skill and care. The standard required is the ordinary member of the engineering profession carrying out design. What this means in practice is that, if there is a claim for professional negligence against an engineer, engineering experts are called on both sides to decide if a competent engineer would have acted in the same manner. Reference is made to the relevant British Standards Codes of Practice: BRE Standard, etc to establish what can be expected of an Engineer.
32. Standard Form Appointments confirm reasonable skill and care are required:-
 - 1) ACE Conditions:-

...reasonable skill, care and diligence
 - 2) ICE Design and Build form:-

... the skill and care normally used by professionals providing services similar to the Services...

¹³ *Bowlam v Friern Hospital Management Committee* 1957 1WLR 582

¹⁴ *Eckersley v Binni* 1988 18 Con LR1. The case related to consequence of the Abbeystead Disaster

3) RIBA Standard Appointment Form for an Architect:-

... reasonable skill and care in conformity with the normal standards of the Architect's profession..."

Fitness for purpose

33. This is a more onerous obligation. An engineer subject to a fitness for purpose obligation must ensure that the design conform where the purposes that have been made known to him, no matter how unusual they are. You should not the Engineer may have:

- 1) fitness for purpose is an absolute requirement;
- 2) professional indemnity insurance will only cover a reasonable skill and care type obligation. In theory insurers can refuse to cover fitness for purpose type obligations.

Design and Build

34. Where a contractor is designing and building, the law implies a term that works including the design must be fit for purpose.¹⁵

Working out who designed what can be difficult

35. The design of civil engineering works is becoming increasingly complex. There are a large number of Contractors, Sub-Contractors and professional advisers in any major scheme and the demarcation of responsibilities often causes considerable difficulty.

Joint and Several Liability

36. In England according to the *Civil Liability (Contribution) Act 1978*, where two or more parties cause the same damage, they are both responsible for all of the damage so caused. In other words, it is not sufficient for the Engineer who has carried out the design in conjunction with the Contractor to say that he did not design all of that particular element of the work. Frequently it is impossible to work out who designed what, and if both elements of design were defective, then the Engineer will be responsible for all the damage suffered.

37. Accordingly, recent railway accidents have led to litigation involving:-

¹⁵ *IBA -v- EMI* 1980 14 BLR 1

- 1) Railtrack/ Network Rail;
- 2) TOCs;
- 3) Companies maintaining the track;
- 4) HMRI; and
- 5) Designers and engineers involved in the original design etc.

Net contribution clauses

38. Engineers make easy targets as they are insured. This is why many professional appointments, include *net contribution clauses*. Essentially they try to make sure the Engineer only pays damages to the extent he is at fault and the Engineer receives credit for the damages which other parties are liable to pay, whether or not they actually do.

39. Clause 8.2 of the ACE Conditions contains the following:-

....notwithstanding otherwise anything to the contrary contained in this Agreement, such liability of the Consulting Engineer for any claim or claims shall be further limited to such sum as the Consulting Engineer ought reasonably to pay having regard to his responsibility for the loss or damage suffered...on the basis that all Other Consultants and all Contractors and Sub-Contractors shall be deemed to have provided contractual undertakings...and shall be deemed to have paid to the Client such proportion which it would be just and equitable for them to pay having regard to the extent of their responsibility.

40. Bear in mind:-

- 1) Employers frequently try to strike out net contribution clauses from standard terms of appointment;
- 2) insurers often insist they are in!
- 3) when drafting your own terms of appointment, net contribution clauses are often overlooked.

Limitations of liability

ACE Conditions

41. Where a party has "breached" (i.e. failed to comply with) a contract, the innocent party is entitled to damages. Damages are measured as what is reasonably foreseeable and what might have been suffered as a result of the breach when the contract was entered into.
42. Potential liabilities for breach of contract in the railway industry could be huge. The revenue loss with a short interruption in services. As a result some contracts seek to limit or even exclude the engineer's liability for breaches.
43. The ACE Conditions, for example, contain the following:-

Notwithstanding anything to the contrary contained in this Agreement, a liability of the Consulting Engineer under or in connection with this Agreement whether in contract, or in tort, in negligence, for breach of statutory duty or otherwise (other than in respect of personal injury or death) shall not exceed the sum [stated in the Appendix].

UCTA/Difficult to Draft

44. However:
 - 1) the "Unfair Contract Terms Act 1977" applies to the parties standard terms of trading. However, where a clause such as the above seeks to exclude or limit liability, it can only do so where the clause is "*reasonable*";
 - 2) limitation/exclusion clauses are notoriously difficult to draft. Any ambiguities are interpreted against the party trying to rely on the clause.

Disputes

Litigation

45. Unless the Contract contains an arbitration clause (see above) everyone has a right to commence proceedings in Court. The litigate can sue any number of parties in one set of proceedings. For example, Railtrack could sue every contractor, consultant, etc involved in a particular project in one set of proceedings.

Arbitration

46. Some contracts include an arbitration clause whereby disputes are referred to an independent person privately. The arbitration is governed by the Arbitration Act 1996.
47. The whole issue of arbitration clauses in use in the railway industry. An arbitration clause binds only the parties to the contract. Will not bind third parties. For example, recent rail crashes, train operator companies, Network Rail, Health & Safety Executive, rail maintenance companies have all been sued on one set of legal proceedings. With arbitration separate arbitration/litigation would have to be commenced against each organisation.

Adjudication

Housing Grants and Regeneration Act 1996

48. The engineering industry is unique. Virtually all disputes can be referred to an adjudicator who can give a binding decision within 4 weeks. Subject to very few exceptions, the parties must comply with the Adjudicator's Decision.

Construction Operations

49. The Act applies to contracts for the carrying out, or arranging for the carrying out of, "*construction operations*"¹⁶. Accordingly:-
 - 1) almost all professional appointments;¹⁷
 - 2) works of construction, alteration, repair, maintenance, demolition and extension;¹⁸
 - 3) labour only sub-contractors;¹⁹
 - 4) installation of heating, lighting, air-conditioning, power supply, drainage, water supply, security or communication systems;²⁰

are governed by the Act.

¹⁶ Section 104(1).

¹⁷ Section 104(2)(a).

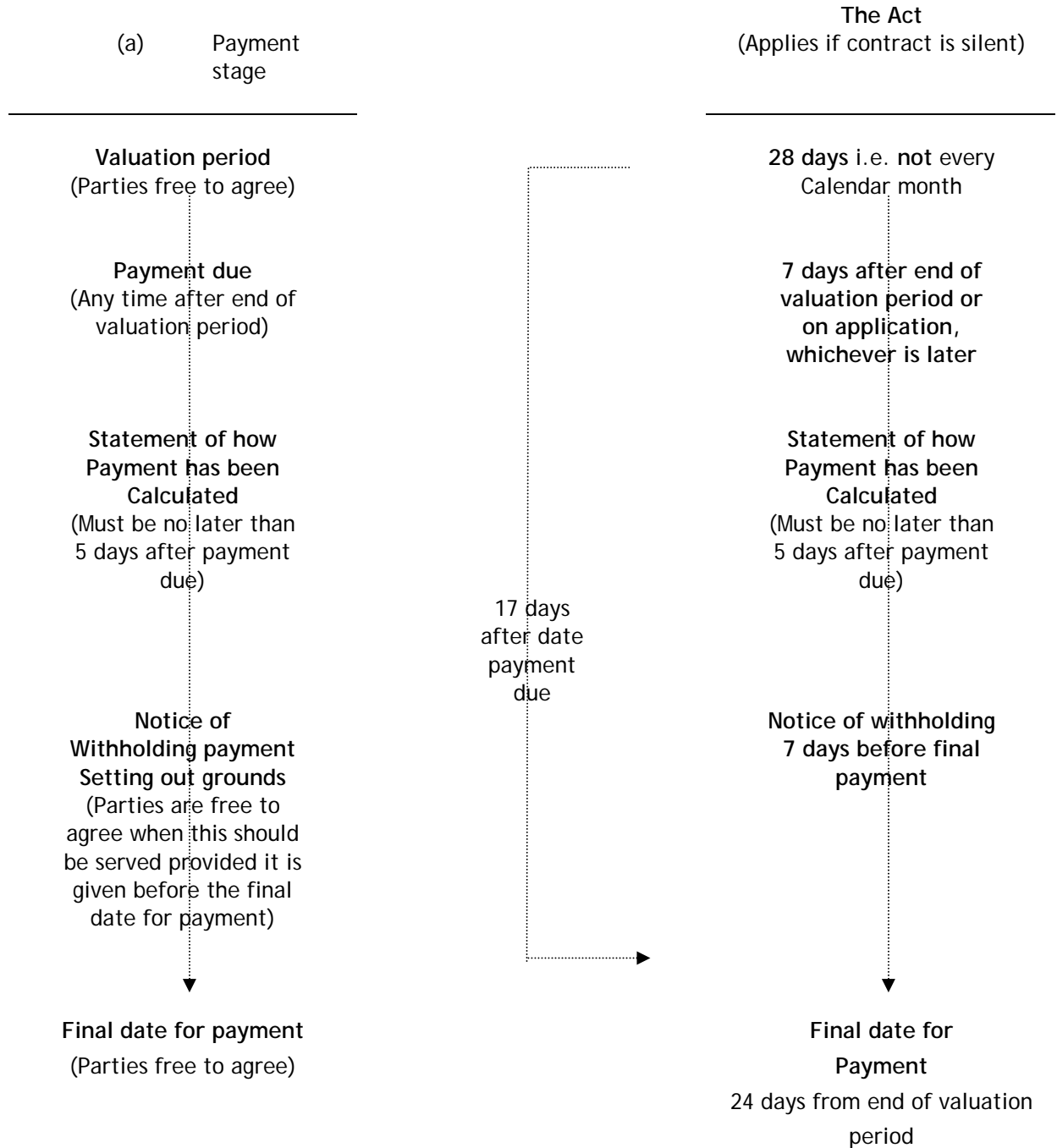
¹⁸ Section 105(1)(a).

¹⁹ Section 104(1)(c).

²⁰ Section 105(c) of the Act.

The Housing Grants, Construction and Regeneration Act 1996

PAYMENT SCHEME



Withholding Notice

50. A party cannot withhold payment after the final date for payment, unless they serve a Withholding Notice.²¹

The Withholding Notice must state:

- 1) the amount which will be withheld and the grounds for withholding; and
- 2) if there is more than one, each ground and the amount which is attributable to each.²²

Save that it must be served before the final date of payment the parties are free to agree the date when the Withholding Notice is served.²³ If there is no agreement the Scheme again cuts in and a Withholding Notice must be served at least 7 days before the date for final payment.²⁴

51. Under the ACE Conditions a Withholding Notice is to be given 7 days before the final date for payment. Under the ICE 7th Edition a Withholding Notice can be given as late as 1 day before the final date for payment.

If a notice to withhold payment is not served, is the Contractor entitled to the sum applied for?

52. It would be fanciful to suggest that, in the absence of a Withholding Notice, the Engineer is entitled to the full amount of the application, whatever that may be. (However, this is the approach taken by JCT 1981 Design and Build Form of Contract.)

53. The position as to what the party is entitled to in the absence of a Withholding Notice is not entirely clear in England. However, the position is probably:

- 1) the absence of a Withholding Notice will prevent the other party from setting of his own claims against payment;
- 2) it will not prevent an abatement for example the employee denying that the amount in the application is actually due.

²¹ Section 111(1) of the Act.

²² Section 111(2) of the Act.

²³ Section 111(3) of the Act.

²⁴ Paragraph 10 of the Act's Scheme.

Adjudication

Notice can be served at any time

- 1) An adjudication is started by serving a Notice of Dispute which can be served at any time.
- 2) There is nothing stopping the parties adjudicating as soon as the Contract has been signed. In *John Mowlem v Hydra Tight* a provision in the ECC form of contract, which required "matter of dissatisfaction" before adjudicating, contravened the Act, as it prevented a party from referring a dispute at any time.

The Adjudicator to be appointed within seven days of notice of dispute²⁵

- 3) The Contract must have the object of getting the Adjudicator appointed within 7 days of a notice of dispute being served. This does not mean that he must be appointed within seven days of a notice of dispute, just procedures should be in place whereby he can be appointed within a week.

If there is no agreement on the Adjudicator (he may be appointed in the contract or agreed when the dispute arises) either party can apply to a nominating body. A nominating body is any organisation that offers adjudication services. Most of the major institutions, namely the Chartered Institute of Arbitrators, the Institute of Civil Engineers, have their own lists.

The Adjudicator to reach decision within 28 days²⁶

- 4) The Adjudicator must make his decision within 28 days of the dispute being referred to him, or longer if the parties agree.

However an adjudicator might not release his decision until his fees are paid.

The Adjudicator may extend the 28 day period by a further 14 days²⁷

- 5) He may do this if the party referring the dispute to him agrees. There is no need for the other party to consent.

²⁵ This is a requirement of paragraph 9 of the CIC Model Adjudication Procedure.

²⁶ Paragraph 16 of the Procedure.

²⁷ Again, paragraph 16.

*The Adjudicator must be impartial*²⁸

*The Adjudicator must have the power to take the initiative in ascertaining the facts and the law*²⁹

*The Adjudicator's decision is binding until the dispute is finally determined by Arbitrator or a Court of Law*³⁰

*The Adjudicator is not liable for any act or omission on his part unless he has acted in bad faith (normally this borders on fraudulent behaviour)*³¹

Key issues

What happens if the Adjudicator makes a mistake?

54. In *Bouygues UK Limited v Dhal Jensen*. Here the Adjudicator mistakenly omitted to take into account the retention that was due to one of the parties to the adjudication. The result of this omission meant that, the party who should have received damages, ended up paying a sizeable sum to the other side.
55. There was no doubt that the Adjudicator had made a mistake. The Court of Appeal refused to overturn the Adjudicator's decision. The test as to whether the Adjudicator's decision should be reviewed was, in the Court of Appeal's view, a simple one. The Court asked whether the Adjudicator had asked himself the right question - here he had. If he had asked himself the right question, but got the wrong answer, the decision was unimpeachable.

If, however, he answered entirely the wrong question then his decision was a nullity.

Conclusions

56. Engineers, like everyone else working in the railway industry, are subject to the Criminal Law. This, for the most part, means Engineers are subject to health and safety legislation. The current position on corporate manslaughter is not clear.

²⁸ Paragraph 2 of the Procedure.

²⁹ Paragraph 3 of the Procedure.

³⁰ Paragraph 4 of the Procedure.

³¹ Paragraph 33 of the Procedure.

57. Engineers owe those who may be affected by their acts a duty to use reasonable skill and care.
58. Read your contracts! To ensure that liability is limited to reasonable skill and care and that you understand and comply with any standards referred to in the contract.

Disclaimer

This talk has been prepared for training purposes and some of the cases used depend upon their own particular facts. Please do not act on this talk in isolation. Take legal advice.

5 November 2003

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