

Issue No : 10
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Author : Roger Trett
Title : Introduction - Conflict

John Major knows about conflict, he obviously has some "b.....s" causing conflict in the Cabinet! We in the construction industry seem to thrive on conflict - I wonder why? Or is it just that the adversarial nature of our business flows from other areas of life?

Our Parliamentary, legal and contracting industries have one thing in common; their adversarial nature. Opposition for the sake of it. What would be the outcome if both sides of the industry, Employer and Contractor, Contractor and Sub-Contractor put all their efforts into resolving problems for the benefit of the project rather than firstly seeking to lay the blame at somebody else's door? Perhaps the legal process has to shoulder some of the blame. As a result of the need to have evidence to support legal actions, people are advised to keep as many records as possible. Hence, when an event occurs, off goes a letter to record the event, in many cases soliciting a response to deny responsibility. This process continues until we find we are having to concentrate on pinpointing responsibility first, in order to resolve the problem and move the project forward. The project also becomes affected due to the deteriorating relationship between the parties.

As a consequence of all this conflict, we end up with disputes that have to be referred to the legal process for resolution, often costing millions of pounds. The result is that no-one really wins except the advisors. Each and every Arbitration/Litigation reaches at some stage, and in some cases quite early on, a point of diminishing return as the costs of achieving an award can equal, or be greater than, the resultant award.

Perhaps I should not be too cynical about 'the system' as it creates a substantial part of our workload in Expert Witness work. Nevertheless, we should all seek to avoid conflict as much as possible. You will see from this Digest that we will be running seminars in our Autumn series dealing with Conflict.

We are pleased to announce that Frank Hart has joined the Board of Trett Limited as a Non-Executive Director. Frank has a lifetime of experience in the construction industry, mainly with the heavy engineering sector where he was a Director of Babcock for many years, following which he became Managing Director of Humphreys and Glasgow. We are sure that Frank's experience of industrial life - construction in particular - will provide an objective view of our Company and help to strengthen us further as we continue to grow.

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Author : HardHat
Title : On the Lighter Side - Jurassic Lark

Our Columnist Hardhat spends time off at the film set.

(Scene: The Velocerautor, a particularly vicious, agile dinosaur is about to leap into a scaffolding rig and attack Sam Neill, who plays the hero. A Tyrannosaurus Rex waits for his que.)

Velocerautor: Rarrgh, Gruurgh, Raarrch!

Sam Neill: Look out its a Velocerautor!

Spielberg: Cut, Cut, Cut. Come on Velocerautor give it some life. You're supposed to attack the hero. Get back onto the scaffolding. Right, Action.

Velocerautor: Hold on. I am not going on with this scene until that scaffolding is checked out. I may be pre glacial but I am not stupid.

Spielberg: What do you mean. Get on with it this is costing us a million dollars a shot.

T. Rex: Hurry up it's cold enough for a new ice age out here!

Velocerautor: No! There's not a single toe board on the whole scaffold, and is that supposed to be a safety rail. The whole lot could come down at any minute and bingo another dead Velocerautor.

Spielberg: You stupid scaly son of a *****.

Velocerautor: I might be scaly but I'm not the one wearing a Red Sox baseball cap when clearly a hard hat is called for.

T. Rex: Velo, Velo calm down, its no big deal. As soon as you get on the scaffold I eat you anyway.

Velocerautor: My point exactly, we have to think of the kids, (and my percentage). This film is going to be a flop if all the dinosaurs die in scaffolding accidents!

Spielberg: Good point, get the riggers to work and make sure the ladders are lashed top and bottom.

T. Rex: This is going to take forever. Look I'm on a tight schedule here. After I finish Jurassic Lark I'm off to Tokyo for a role in Godzilla versus Bambi and then I'm to be Project Manager on a new office block on the Hong Kong waterfront.

Velocerautor: I've always been interested in a career in construction, how did you manage to get the job as project manager?

T. Rex: Easy, at the interview it was decided that I had the most modern ideas and that I was the least aggressive applicant.

Spielberg: OK, the scaffolding is safe, let's roll.

Velocerautor: By the way there's a lot of broken glass down there, I was wondering about site safety boots.

(Scene ends with Spielberg strangling blue faced Velocerautor.)

Issue No : 10
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Article No : 3
Author : S Briggs
Title : A Matter of Time

A MATTER OF TIME

In the course of Trett's activities it has become apparent that most claims arise from disputes over matters of time - either delay, disruption and/or extensions of time. All too often we encounter situations where a contractor is claiming time and yet has put forward no meaningful analysis to justify his claim. Furthermore, the contractor will have often entered into the contract on the strength of a programme which has apparently been drawn up on a single A4 sheet of paper.

The object of my article is not to attempt to teach contractors how to plan, nor to give away the secret of how to prepare a time based claim. Oh no, far more fundamental than that. The questions which this correspondent wishes to ask are:

- 'Why do contractors place such little importance on the planning function?' and
- 'Why is there no standard method of programming?'

In the first analysis, one answer satisfies both questions. The fact is that none of the standard forms of contract specify anything with regard to programming other than that 'a programme will be submitted' (which is a bit like the specification saying 'a building will be built'). For example, JCT 80 states at 5.3.1.2.:

"the Contractorshall provide.... 2 copies of his Master programme for the execution of the Works ..."

and the ICE 5th Edition is similarly incisive requiring at 4(1). that:

"the Contractor shall submit a programme showing the order of procedure which he proposes to carry out the Works ..."

Gripping stuff but not particularly informative. Now most contractors will be used to work with standard forms of contract, standard methods of measurement, estimating norms etc, yet planning and programming as a result of the above directives and on the evidence we have seen, is subject to as many diverse approaches as wallpaper design.

Why should this be so? After all, very few contractors are involved in truly innovative work ie, in most instances the current project will have similarities to previous work. Which means that a pretty accurate stab at programme durations can be made. Nearly all contractors will have been involved in a dispute at some stage and will, therefore, be aware of the need to demonstrate delay/disruption on a reliable programme. A further indication of the importance which most contractors, and employers, place on programming can be seen from examining the make up of any site team. There will be a veritable army of Quantity Surveyors supported by one planner or possibly two - if the contract value is greater than the site telephone number.

Which brings us back to the original questions - why is so little relevance given to planning and why no standard method? The real answer to these questions lies a lot deeper and is rooted in the ancient traditions of the industry. Quantity Surveying is regarded as a noble profession (yes it is - you have a Royal Institution after all!!!) and earnest men with quill pen, parchment and hard hat have been counting bricks for almost as long as brickies have been laying them. Furthermore, Quantity Surveying is an exact science and the output of the

average Q.S. is accurate, reliable, tangible and has a direct relevance to the bottom line value of the contract.

Planning, on the other hand, is new - Critical Path Analysis was only developed in the 1950's and the computers, which make it easier have only been around and affordable since the advent of the PC. Relying heavily on estimation planning is, at best, semi-accurate and, at worst, fortune telling. There are well documented instances of contractors progress reports for the last ten months of a project predicting "we'll be finished inside a month!". Finally, in monetary terms, planning is not seen to add anything to the value of the contract. In fact, quite the reverse, planning is often regarded as 'just another overhead' or 'something to appease the employer'.

However, proper planning can save time and agreement on programmes between employer and contractor, at an early stage, can make dispute resolution much less contentious. Add the missing ingredient of some form of standardisation (which will help planners to prepare, and non-planners to understand, programmes) we might be getting somewhere.

Perhaps it's just a matter of time ...

Issue No : 10
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Article No : 4
Author : P Newman
Title : Insolvency in The Construction Industry

Insolvency in the Construction Industry

Paul Newman, Barrister, discusses Insolvency in the Construction Industry.

The construction industry is undergoing its worst recession in living memory. In its press release of the 5th October 1992, the Building Employers Confederation estimated that during the period June 1989 -June 1992 over 400,000 jobs had been lost. Other data suggest that 87% of main contractors anticipate less work during 1993 and job losses to 500,000. As the number of construction insolvencies continues to rise the risk is that either the developer, main contractor or one or more of the specialist sub-contractors will become insolvent during the course of the project. All construction professionals need some knowledge of insolvency law and what to do when the insolvency of a key player occurs.

Insolvency law is based on the Insolvency Act 1986, the Insolvency Rules 1986 and case law decisions, many of which are contradictory

Whenever insolvency hits the construction industry it causes perhaps greater problems than in any other industry. This is due to the industry's complexity and the sophistication of the standard form of contract and sub-contracts. Issues that arise include:-

TERMINATION

Under JCT contracts (those drafted by the Joint Contracts Tribunal and used on most major building projects) the contractor's employment traditionally determines automatically on the occurrence of insolvency (eg liquidation, the appointment of an administrative receiver). JCT Amendment 11, published in July 1992, makes fundamental changes to the commonly used contract form, JCT 80. The contractor's employment no longer determines automatically on the appointment of an administrator or administrative receiver, although the employer has a right to determine on notice. JCT 80 is silent on the impact of the appointment of a fixed charge receiver under the Law of Property Act 1925. The contractor's employment neither determines automatically nor are there ground for its determination.

ASSIGNMENT/NOVATION

Whenever an administrative receiver sells an insolvent contractor to a purchasing contractor, the purchasing contractor will wish to complete the insolvent contractor's ongoing construction contracts. Assignment/novation are the legal mechanisms by which he can achieve this. Assignment is the process by which a benefit or burden under a contract is transferred from one party to another. Two recent decisions of the Court of Appeal have made the law of assignment under JCT contracts extremely complicated. However, assignment is unattractive to administrative receivers. It cannot let the insolvent contractor 'off the hook' for his contractual performance. In most situations, the device of novation is adopted. A novation is a three party agreement where party A (the insolvent contractor) is released from his contract with party B (the employer) on terms that party C (the purchasing contractor) will take over the insolvent contractor's obligations.

RETENTION OF TITLE

So-called Romalpa or ROT claims are the bane of administrative receivers' lives. Suppliers often supply goods to a purchaser on terms that include a provision whereby ownership in the goods does not pass from supplier to purchaser until such time as the purchaser has been

paid. This is to protect the supplier from the ravages of being an unsecured creditor. Unless carefully drafted this type of provision can easily be no more than a registrable charge under the Companies Act 1985 and void against any insolvency practitioner if not registered. To complicate matters further, there are complex provisions in JCT contracts under which ownership of goods and materials is transferred to the employer as soon as they are paid for in a certificate. The JCT provisions may be worthless where goods and materials are subject to a retention of title provision and the supplier is unaware of, and contractually not bound by, the JCT provisions.

DIRECT PAYMENTS TO NOMINATED SUB-CONTRACTORS

This is one of the most complex areas. On liquidation of a company all the unsecured creditors have to be treated equally. If there are insufficient funds to go round they only get a percentage of what is due. Direct payment clauses put certain creditors, ie nominated subcontractors, in a privileged position. This may be illegal and contrary to established insolvency law. Although JCT contracts indicate where a direct payment should not be made, the prudent employer may choose never to make direct payments. He is always at risk of paying twice.

RETENTION FUNDS

Everyone knows that retention monies belong to the contractor. The employer holds them as 'fiduciary'. Under most JCT contracts the retention monies can be placed in a separate bank account if the contractor so requires. This means that if the employer becomes insolvent those monies are outside the grasp of any liquidator or administrative receiver. A number of cases have demonstrated that the contractor can get an injunction to have the retention monies placed in a separate bank account. However, this is not an automatic right. The contractor will not get an injunction if the employer has a "copper bottom" set-off (eg LAD's for late completion or the cost of making good of defects by other contractors) that overtops the value of retention monies or the contractor unduly delays in applying for an injunction.

PREPARING FOR CONTRACTOR INSOLVENCY

There are a number of things the prudent employer and architect can do. First, watch the valuation and certification process like a hawk. Although on and off site materials, not yet incorporated in the works, can be included in an interim payment, do not be tempted if there is the slightest chance of the contractor's insolvency. Second, use bonds and guarantees to guarantee the performance of the contractor in a given amount. Unfortunately, most bonds are written in archaic jargon and so specialist legal advice is essential. Banks and insurance companies may not pay out if the employer has failed to comply strictly with any conditions in the bond or guarantee.

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Author : R Wrighton
Title : Alternative Dispute Resolution - A Cultural Revolution

ALTERNATIVE DISPUTE RESOLUTION A CULTURAL REVOLUTION?

1990 saw an explosion of literature and public gatherings to herald the arrival in the UK of Alternative Dispute Resolution ("ADR"). The Chartered Institute of Arbitrators produced guidelines for conciliation and mediation and for supervised settlement procedure and the Centre for Dispute Resolution ("CEDR") was born, with an impressive list of founder members. The British Academy of Experts also provides a mediation service.

The expression "ADR" refers to a commercial and/or quasi-legal technique designed to avoid formal litigation or arbitration proceedings. It is commonly used to refer to:

1. A process of conciliation whereby a neutral is appointed to contrive a common result by the parties themselves rather than provide a determinative answer;
2. A process of mediation which is not dissimilar to conciliation, except that the mediator will provide his/her own formula for resolving the dispute;
3. A process involving the so called "mini trial" in which advocates deliver synopsis versions of each party's case on a "without prejudice" basis to a Tribunal consisting of an executive of each party and, frequently, a neutral. The intention of the mini trial is, again, to achieve a settlement which is negotiated between the executive members of the Tribunal assisted by the neutral member who will give assistance on matters of law and provide factual objectivity. If this fails, then it is possible that the neutral member of the Tribunal will be asked to issue a "without prejudice" option as to the likely outcome of any formalised proceedings; and
4. Techniques involving mutual fact-finding, the appointment of a mutual expert, private judging and summary jury trial. On 15th July 1993 CEDR launched its new Judicial Appraisal Scheme. This scheme involves the parties' joint presentation of a case to a senior lawyer on a without prejudice basis to test judicial reaction. This is the latest in a growing number of ADR services which are provided by CEDR. The calibre of the assessors who have offered their services is such that this is likely to be a very valuable service even in the case of difficult litigation which subsequently proceeds to trial.

The procedures adopted for any of these techniques are flexible, and examples given by the various promoting bodies as to how matters will proceed vary in emphasis. Different bodies may use the terms "Conciliation" and "Mediation" in different ways. Although the common intention of all of these techniques is to produce an early consensual resolution of dispute, it will be apparent that the variety of techniques and flexibility within each of those techniques is such that a party engaging upon ADR needs to identify with precision at the outset what exactly is going to happen otherwise lack of confidence with the technique adopted will rapidly set in if one party is taken by surprise.

ADR is different from formal litigation or arbitration proceedings in that the parties have to elect to be bound by the results of the process which are not enforceable in any legal sense unless a settlement agreement is drawn up at the conclusion of the ADR process and signed by both parties. The ADR process will come to an end if one or both parties give notice that they no longer wish to participate or the neutral appointee identifies deadlock such as to render continuation pointless. It may also come to an end if one party issues formal proceedings otherwise than for the purpose of preserving legal rights against the application of the Limitation Acts or preserving the subject matter of the dispute. The expectation is that, unlike formal procedures, each side will bear its own costs and share equally in common

expenditure eg, the conciliator's fees and hire of appropriate accommodation. If proceedings break down then it would be unusual for a conciliator/mediator to act as arbitrator unless expressly requested by both parties.

If the ADR process breaks down then the intention is that the parties do not use the content of the informal procedure in any subsequent formal legal proceedings. It is perceived that this is a significant legal difficulty which ADR techniques have overcome before hardened litigants can be persuaded to adopt ADR techniques as a matter of course.

Following the initial enthusiasm in 1990, there was great anticipation of widespread use of ADR techniques. Although there have been some early successes there does not appear to have been the general outbreak of peaceful common sense which was anticipated. However, in 1993 there have been significant indications that we are about to witness an accelerated growth in the use of ADR. In a recent survey conducted within Eversheds nationally, we have identified a number of instances where major PLC's have adopted ADR techniques with complete satisfaction.

The number of actual ADR references has been comparatively small compared with the number of occasions on which it has been discussed with clients as a possibility. However, the expectation is that growing familiarity with ADR techniques and confidence gained from successfully utilising these techniques will result in a greater incidence of successful ADR references and hopefully satisfied clients.

There is now additionally great pressure from within the Judiciary and the legal profession to install ADR as part of the legal system itself. ADR, is therefore, in the process of being institutionalised. This will remove the stigma of "quack medicine" which may have slowed its growth in the UK.

The Heilbron Report "Civil Justice on Trial - The Case for Change" welcomes two particular initiatives which directly affect the day to day operation of the High Court. First, His Honour Judge James Fox Andrews QC who sits as Official Referee (being the Court to which most construction cases are referred) now gives an order for directions which notifies the parties of the possibility of resolving disputes by alternative means and advises that if both parties notify the Court that they wish to engage upon a mediation process then all actions by the parties in the proceedings are suspended for 4 weeks except for fixed dates for Court attendance.

In addition, the Commercial Court is now giving consideration to introducing a form of Court-annexed mediation.

The Heilbron Report advocates the introduction of pilot schemes for the use of ADR with Court facilities being made available. What we are seeing is nothing short of a cultural revolution which will certainly in future determine the approach of both clients and advisors engaged upon dispute resolution. The attitudes towards litigation from clients and advisors alike, which peaked in the 1980's, are well summarised by the Secretary General of the International Court of Arbitration in his address to the Chartered Institute of Arbitrators in November 1990. He commented

"the ICC has observed an increase from every region of the world in what has impolitely and somewhat unfairly been

called the "Anglo Saxon" approach to arbitration; that is a transfer to arbitration of the concept of "litigation as total warfare" which implies that every possible procedural and substantive point should be fully exploited."

There are many clients who would expect nothing less of their lawyers and might even consider that they had gone to the wrong office if there was any suggestion of anything other than the full rigour of the law being applied to their advantage. Those attitudes, however, have to be balanced against the tide of change. All the signs are that litigants can expect

diminishing levels of sympathy from the Courts if they have not at least attempted to resolve a dispute or identify issues by means of some recognised mediation process; if, that is, they are unable to do so themselves or through their legal advisers.

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