

Issue No : 17
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Author : Roger Trett
Title : Introduction - Latham and Woolf - What Benefit to the Construction Industry

Latham and Woolf - What Benefit to the Construction Industry

In July, Lord Woolf published his final report "Access to Justice". This document followed Sir Michael Latham's report "Building the Team

Whilst each report is independent of one another and addresses separate issues, they are both of considerable interest to us in the Construction Industry. Latham, in building the team and effectively recommending more partnering, is seeking to reduce conflict and thus reduce the level of disputes. Latham also deals with the inherent problem of payment in the industry. On the other hand Woolf recognises the substantial costs and time expended in litigation when a dispute arises and is seeking to reduce both, hence "Access to Justice".

It is admirable that such eminent persons have produced reports which seek to reduce conflict or the resultant time and costs arising from conflict but are we not kidding ourselves that either will make any difference to the day to day workings of the industry apart from some initial lip service.

The history of the construction industry is such that, as I have said before, unless the industry is changed from its very roots and proper prices for construction work are obtainable, and thus different attitudes, then there will always be conflict. Some of the areas which fuel this conflict are dealt with in Tony Farrow's series of articles to follow in this Digest. Latham also considers the payment problems in the industry and, in my opinion, is misguided as he thinks that legislation will resolve late payment problems. We know that it will not because of the many ways in which a dispute can be manufactured to protect cash flows and to effectively negotiate a reduction in the price at the end of a contract. Hence disputes will not reduce. I have first hand knowledge of contractors having an obligation to pay, who simply refuse to do so on the basis of spurious counterclaims. Latham will not help this situation.

If the number of disputes are unlikely to reduce then what benefit will Woolf have? Whilst I agree with most of Lord Woolf's recommendations, and in particular agree with his views on Expert Witness obligations, what greater access to justice will the implementation of his recommendations provide, particularly to the subcontractor who is struggling to make ends meet because of being held out of his money and who cannot afford even to contemplate the costs of Arbitration/Litigation. I cannot see that the recommendations will help bring access to justice any closer for the majority of the industry.

The proposals may well reduce the time and costs but for most participants they will still be beyond their reach therefore denying them justice.

The proposal to direct more disputes to ADR is, I think, perhaps the only glimmer of hope for the industry, although the OR's have been keen to pursue this route for some time. Perhaps the fact that the Courts will take a much keener role in the direction of ADR will help to provide more weight. The drawback of course is that the ADR route is not binding unless the parties actually reach an agreement during the process of ADR.

I am pleased to say that we have recently managed to achieve a fourth settlement by mediation making it a 100% success for clients that we have steered in this direction; however, it seems that there is a need for more awareness to be made of the process and success of ADR, before it will be pursued as a first route and be instrumental in reducing the cost of dispute resolution.

As you will gather I am not confident that the Latham and Woolf reports will have much direct benefit to the construction industry.

Roger Trett

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Author : P Harvey
Title : Witness to the Event

Way back in the mid sixties, when the construction world was young, I worked as a site engineer on the Severn bridge. Unmarried, I lived with my two dogs in a caravan tucked under the Beachley Anchorage - I gave my address as 'Beachley Towers' if anyone asked.

I found that cooking an evening meal was irksome on two main counts, deciding what to cook (I finally degenerated to three standard meals eaten in strict rotation, a system which ensured a three week interval before the same meal was repeated on the same weekday - work it out), and disposing of the rubbish. My final solution to the latter was to collect several weeks debris into a large plastic sack so I could deposit it in one of the concrete rubbish bins beside the ferry queue just outside the site gates. I didn't have the nerve to drive up and dump the bag in broad daylight whilst people were queuing so waited till the ferry had stopped in the late evening. I then decided to wait till dark, and then again until after the pubs had closed. In the end I crept out about 1 a.m. As I pulled into the layby a police car drew up about 20 yards behind me.

Well, why should I worry? Wasn't doing anything wrong, was I? It's a free country, in it? The bin was subject to use 24 hours a day wasn't it? All my lights were working and my tax disc was properly displayed, weren't they? Just act normally. In the dark I backed up to the bin, opened the boot and struggled to transfer an enormous black sack from one to the other - but at the same time trying to suggest it was something I did frequently at any time of the day or night. I even tried to whistle, but my mouth was too dry.

Whilst I worked the police car pulled forward to about 10 yards distance, switched off and sat silent behind its side lights. In a cold sweat I fumbled the door, crashed the gears and drove 20 yards to the site gate without indicating. Convinced I was being followed I conspicuously left the car unlocked - I'd nothing to hide, had I? - and went to bed without putting the lights on. Although the expected crunch of boots on the gravel, the knock on the door, the handcuffs, never materialised, the feeling of guilt is with me still. I decided to eat out in future.

I made an arrangement with a nearby pub and used to read the local paper, the Citizen, with my meal. It was in the edition of Thursday, 20 June 1966, that I read the following letter:

"As secretary of the Cam bridge U. F. O. club I would be pleased to hear from any of your readers who heard or observed anything strange in the early hours of Tuesday morning. We have had two reports of some form of aerial activity which suggest that further reports might be forthcoming from your area. Yours etc. S. Miller".

I was able to reply that, with an assistant, I had been using a theodolite (which incorporates a telescope) to take tower verticality readings on the bridge in the early hours of Tuesday morning (survey was done at night when temperatures were more stable) and had seen what "appeared to be a cylinder with domed ends. At the bottom was a glowing light which pulsated at about the same frequency as a car indicator". It had disappeared from view across the Welsh side of the river.

I still have the four page response from Mr Miller in which he confirmed the compatibility of my observations with those of other people. He appreciated his good fortune in contacting a "reliable and responsible witness" who was actually using a telescope at the time, and asked many questions as to precisely what I had seen. In reply I was able to elaborate on my experience in a manner which conformed with other reports and which provided accurate information on the telescope, timing, my height above river level, (i.e. on the tower pier) and so forth.

After further exchanges, in which my description became increasingly precise and conclusive, Mr Miller sent me a four page printed document published by "The British Unidentified Flying Object Research Association", Report Form for U.F.O. Sighting. I have it in front of me now as I write, 30 years on.

I see question 32 "In your opinion, what was the object?" was answered, apparently with some confidence, "A flying saucer scout ship spying on earth's development of nuclear weapons", and question 34 "What experience have you, if any, of observing objects in the sky?" prompted the response "3 months long vacation employment playing the piano in the Windmill Theatre pit orchestra".

But I never sent it back. There were no copying facilities in those days, so if I had returned the form it would have gone forever and it exuded such an air of trust, naivety and absurdity as to prove irresistible.

As a result Mr Miller next heard from a certain Mr Hilton, who advised him that the Form had come into his (Mr Hilton's) possession following my extraordinary disappearance. A colleague helping with a verticality survey had recounted how our work had been interrupted by the appearance of a "saucer shaped object" above the Aust Tower from which "a long tentacle, some eighteen inches in diameter, had snaked down, lifted Mr Harvey off his feet, up into the saucer, before making off rapidly towards the west at a speed estimated at about that of a fighter plane".

Mr Miller never replied and the correspondence terminated.

And what, you might ask, has all this to do with our business, with contractual claims and counter claims, with disputes and arbitration? It's about evidence, isn't it.

All witnesses are suspect, particularly those who are absolutely reliable.

It's almost impossible to do something without being seen by someone. One is wary of claims to have done something wholly unobserved or unrecorded. Okay, it may happen, but it's never happened to me.

In my experience people, including myself, prove never to be as devious as I fear them to be. They just haven't got the time. How many disputes stem from groundless mistrust?

It's very easy to be convinced when you want to be, and equally easy to be misled. How many contractual arguments, held with conviction, are found to be based on little else?

We often reveal more by our questions than is revealed by the answers, don't we?

P.S. If by any chance after all these years, Mr S Miller is reading this, please will he contact me at our Darlington office when I will be pleased to give him any more information he might require with respect to what I actually saw in the early hours of that Tuesday morning, 18 June 1966, so long ago.

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Author : Anthony Farrow
Title : The Problems of Being a Sub-Contractor - Part I

The Problems of Being a Sub-Contractor - Following through a project from start to finish

PART ONE

In this three part article, Tony Farrow looks at some of the difficulties of being a sub-Contractor. Part One considers matters during the tender period. Part Two will review the post-tender / precontract period and Part Three the time on-site.

INTRODUCTION

In the 1980s, I worked for a leading mechanical and electrical engineering contractor, who undertook projects in the Building Services sector. I held two positions during that time. The first was primarily **advisory**:-

- pre-contract, it was vetting tender documents, negotiating contract terms, approving bonds and warranties;
- during project execution, I would assist when main contractors were being difficult, when payment was in issue or when we were alleged to be in delay;
- in the post completion stage, when there was a need to pursue a claim, or to defend allegations of bad workmanship.
- Later, when claims had become disputes, it was time to appoint solicitors and take more formal steps.

My other role was a line manager; I was in charge of tendering, supervising the company accounts and banking, office administration, purchasing and the quantity surveyors. Along with the local Director, I was responsible for ensuring we made a profit.

My point in highlighting the positions I held is that, so far as commercial and contractual problems are concerned, there are tremendous differences between an **advisory role** and a **line role**.

As an **adviser**, you tend to work on the basis of providing the best possible advice, perhaps like answering an exam question. I would write reams of comments on proposed contract documents and send them to the profit centre bidding the project. I would reformulate onerous terms, remove severe 'notice' clauses and blank out 'paid when paid' clauses. It was relatively straight forward.

However, in the **line role**, the task was to make profit and in order to make profit, we had to secure work. To secure work, you had to submit tenders, which meant competitive tenders. The consequence was that heavily qualified tenders, no matter how reasonable and sensible the qualification, could significantly influence your chances of your bid being taken seriously.

Hence, there was always a conflict between what the **adviser** recommended and what had to be done by **line** management in order to secure workload. This irreconcilable situation repeats itself throughout the project's life cycle, ie, *what is contractually recommended in any circumstance is different from what is commercially achievable.*

Legal Advice

Lawyers advising the company fell into two categories; those who provided 'text book' legal advice and those that offered legal advice but with an 'accent' on the 'real world'. Where there was an issue on a current project, say concerning the unreasonable actions by a main

contractor, line managers were often let down by advice which, if followed, would result in a further deterioration in the developing situation. The advice was always legally correct, of course, but was practically inappropriate for the circumstances.

The best advice in these 'live' situations covered legal, commercial and project management aspects, ie it was good business advice. Hence, the lawyers we employed had to know our business. If they did, long term relationships developed.

Commercial and Contractual Problems

Turning to the problems regularly encountered by mechanical and electrical sub-contractors, I have identified these at the various stages of the project's life cycle:

- during the tender process
- contract negotiations
- prior to start-on-site
- whilst carrying out the works
- post completion

PROBLEMS DURING THE TENDER PROCESS

-1-

The first problem is that there is never enough time to bid a project.

Even if there is enough time, the second problem in tendering is that you only win one in eight jobs. Consequently, you always have several bids going through the estimating department at one time and a degree of repetition develops. Drawings are measured, quantities are obtained and entered into a computer, which generates the estimate. It is all rather routine and relatively little attention is given to the particulars of any given project. I perhaps exaggerate a bit but this is an important point when claims develop in the future.

A great deal of the retrospective analysis can be carried out by lawyers, surveyors and consultants into the background of the contract and the underlying tender. Tender allowances are questioned, tender programmes asserted as identifying how long the project would take to complete the works and method statements identifying how the project was to be built deemed as something certain and absolute.

However, what the estimator is really saying to himself at the time of submitting his bid is that he believes the overall tender price to be sufficient to complete the works in the broadly indicated timescale. He would not be surprised if the actual boiler price was 10% over the tender allowance or pipework 5% under the allowance.

In fact, later on in the process, when the tender becomes a secured job and a project engineer is appointed by the sub-contractor, the very first thing the engineer does is revisit the estimate. He obtains re-quotes from suppliers and sub-contractors, and produces two lists:-

- estimate shortfalls
- buying savings

The estimate shortfalls are notified to management, because the engineer is saying "this job cannot be built for this price". The buying savings he keeps up his sleeve for a rainy day!

The point is that the engineer produces what he believes to be a more realistic estimate of what it will cost to carry out the secured contract.

-2-

When tender documents are received, an estimator will be appointed to oversee the bid. His first task is to arrange volumes of photocopying of the tender documents. I would estimate that in the order of 100 supplier and subcontract quotes may be obtained for a £5million project. This is where repetition produces a lot of problems. Ductwork subcontractors, for example, may be given the mechanical drawings to take-off, or the ductwork bill of quantities, together with the ductwork specification. However, they may not receive the preliminaries section, the preambles to the BQ, the commissioning specification or the general requirements section of the specification. All these documents could have a bearing on cost and price, yet the sub-sub-contractor or supplier will not know of them.

This is usually sorted out by the project engineer later on, when on awarding the ductwork sub-subcontract, but items may be missed. Hence, in subsequent litigation between sub-contractor and sub-sub-contractor, it is important to compare each parties documents to establish any liability 'gaps'.

For a lawyer conducting discovery, a worthwhile enquiry is the existence of all the unsuccessful supplier and sub-contractor quotes, particularly if he is trying to establish tender insufficiency. The band of prices can be substantial, and the mean price can be 25% higher than the accepted lowest!

-3-

The tender documents themselves will contain errors, inconsistencies and anomalies - some glaring howlers at times! However, the work of the estimator is to prepare a tender within the short timescale, knowing he only has a limited chance of success. Hence, he does not always read the large print, let alone the small print! So, when you are looking at the contract documents 3 years down the road and thinking, "why on earth didn't the estimator clarify this tender rubbish" - you are giving him too much credit - he is unlikely to have read it! I exaggerate, of course, but these circumstances do prevail and are perhaps one of the main causes of the contractual disputes arising in the months and years ahead.

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In my experience, the single greatest cause of mechanical and electrical disputes arises from the poor management of M&E design and design coordination. In M&E work, it is usual for the M&E subcontractor to carry out a varying amount of design work. This ranges from a substantial requirement based on a consultant's performance specification, to straight forward shop drawings, where the consultant has located all plant, pipes and ductwork, and the subcontractor is only required to carry out minor working details and bracketry.

The problems are twofold:-

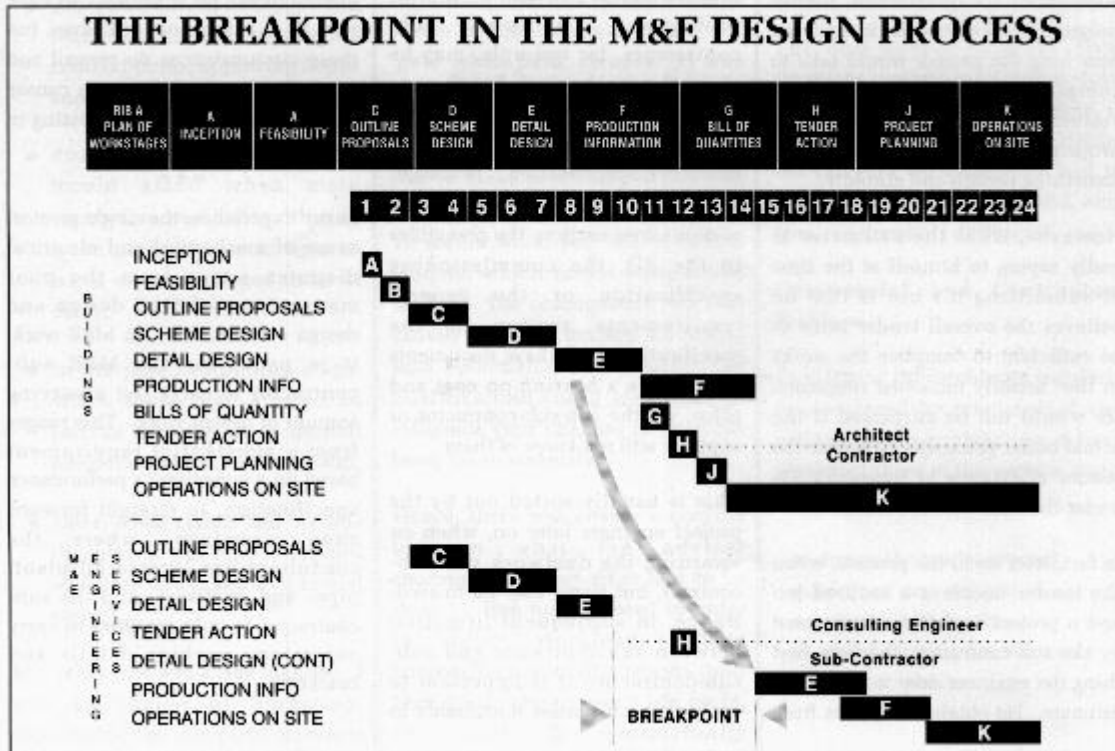
- The role between consultant and sub-contractor is frequently ill-defined. Employers squeeze the consultants' fees and consultants perhaps try and get more design work carried out by the sub-contractor. The consequence is that when the sub-contractor starts his detailed design work, he believes he is completing a well developed design and assumes too much. For example, he may produce layout drawings following the routes indicated on the consultant's drawing, but these have yet to be coordinated with the architectural layouts or structure. Hence, when the 3 sets of drawings are compared, clashes appear.

Major claims develop from these circumstances.

- A related problem occurs because there is 'break' in the M&E design process (see chart), whereas there is no break in the developing architectural process. By this, I mean that the architectural and structural scheme develops from **Outline Proposals to Scheme Design to Detailed Design**. However, the services consultant completes the Scheme Design and then awaits the appointment of a M&E sub-contractor,

perhaps 6 months later. In the meantime, the architectural and structural designs have been advancing and when the sub-contractor completes the M&E design, the final routing solutions may affect building work already completed.

The foregoing problems usually manifest themselves when the subcontractor tries to complete the detailed design, or, more worrying, when he tries to install ductwork and pipework on site.



Another problem at tender stage, is that sub-contractors are reluctant to draw too many points of clarification to the attention of main contractors or consultants, for fear of appearing overly commercial or difficult. One approach is to insert a sentence such as "should our tender be of interest, we have a number of points we would like to discuss with you". Then depending upon the keenness of the price and the main contractor's willingness to negotiate, a list of questions or points can be drawn up, on such issues as interpretation of the documents, programme requirements, terms and conditions etc. However, I have to say that if the line managers need the work, they will accept that there are problems with the documents and not raise too many questions and take the risk of there being no financial problems in the future.

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A rather unique feature about M&E work concerns the selection of equipment and its implications on design. Take an air conditioning system where air is sucked into a building and passed through Air Handling Units which can clean the air, dampen or dry it and then pass it over coils of pipework through which is flowing chilled water to cool the air. Every manufacturer of Air Handling Units will adopt different technology and designs; hence, their physical sizes will differ, as will pipework and ductwork configuration connecting into the units. What happens, therefore, is that the consultant produces his design based on the characteristics of a particular manufacturer. He will then specify performance criteria and ask tenders to make their own selection of equipment. Realistically, however, there is only one manufacturer's equipment that exactly fits the bill (and that manufacturer will quote relatively high prices).

However, the tendering subcontractor will obtain the cheapest prices from alternative manufactures and the trick, or the risk, is to say your bid is compliant with the tender requirements but using alternative equipment. You then hope that you can convince the consultant that your proposed equipment is technically sound and will not involve him in further design work, because the original design does not quite suit the alternative equipment.

All sorts of problems arise from the selection of plant and the manner in which the construction industry organises itself.

In 1990, I was involved in a project that required the refurbishment of a high quality office building. A new plant room was created on the roof of this tower block. Two large fans were installed and these, when operating, would supply conditioned air to the floors below via external ducting. The employer's consultant engineer had carried out his design selection based upon a certain fan manufacturer's catalogue and so he specified performance criteria based on those particular fans. He then nominated three manufacturers of large fans that he considered capable of manufacturing such fans, although the reality was that only one manufacturer produced a fan that exactly complied with the specification. The appointed main contractor sub-contracted the M&E works to an M&E sub-contractor, who placed an order with the fan manufacturer whose catalogues had been used by the employer's engineer.

The fans were installed in December 1990, and were put into operation but failed to deliver the expected volume and pressure of conditioned air. However, the employer needed the space and so the building was put into occupation. Unfortunately, the engineer refused to issue a taking-over certificate, giving the reason as the defective fans, ie engineer blames main contractor; the main contractor then blamed the M&E sub-contractor; the M&E subcontractor initially blamed the fan manufacturer, but the fan manufacturer blamed the design configuration of the plant room and said the fans would deliver the right pressure and volume of air if tested under British Standard 'Test Bed' conditions (ie the duties stated in the fan manufacturers catalogue were based on a BS 'Test Bed' situation). So the M&E subcontractor later blamed the engineer for making the dimensions of the plant room too small, but the engineer blamed the M&E subcontractor because it was he who had ultimately selected the location of the plant in the said plant room. The main contractor was then dragged in by the engineer's site agent discovering that the external ducts had been poorly installed by him and this had contributed to the reduction in performance of the fans ie, engineer blames the main contractor.

The employer reluctantly sat back and listened to the various organisations blaming each other. Perhaps the employer should have been advised to pay the fan manufacturer to put right the installation irrespective of responsibility. Notwithstanding that it may not have provided the right legal or contractual solution, it was a very pragmatic and practical method of dealing with the situation. I would say that where there is a complex organisational and contractual relationship between parties involved in a problem, steps such as dealing outside the contractual chain could well be the most sensible route to get things corrected.

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One final point on the tender process. It is likely that the subcontractor will have an internal adjudication policy ie, tenders over £1 million to be signed-off by a branch manager, tenders over £5 million to be approved by the managing director. Some potentially interesting information is prepared for these adjudications:-

- strategic appraisal programmes
- risk assessment report
- Bid document check lists
- Alternative bids

It is at this time in the adjudication meeting that the final commercial decisions are being taken by management and the bid marked up (unlikely!) or down (likely!).

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Author : A Hartmann
Title : Expert Evidence - The Woolf Report and Beyond

Lord Woolf has been busy, particularly in reviewing the use of expert evidence. The July 1996 'Access to Justice' final report follows the June 1995 interim report and a January 1996 issues paper concentrating on expert evidence. Although initially focused on the use of medical evidence in personal injury cases, Lord Woolf has widened the scope of his review, making specific comment on the use of experts in construction disputes.

Lord Woolf has not pulled his punches, stating that uncontrolled expert evidence and discovery constitute two of the major generators of unnecessary cost in civil litigation. He adds that his proposals on experts have proved to be more controversial than any of his other recommendations.

The Expert's Role

Lord Woolf stated that the role of the expert is to:

- assist in establishing the facts and merits of the claim;
- provide the Court with expert opinion;
- provide factual evidence where it carries significant weight by virtue of the witness being an expert;
- conduct enquiries and report to the Court; and
- sit as assessors to help the Judge understand technical evidence.

What The Cases Say

Two years before the Woolf Report, case, Cresswell J. expressed his concern with the conduct of experts in the "**Ikarian Reefer**" and identified seven guidelines;

1. Expert evidence presented to the Court should be independent and uninfluenced by the demands of litigation.
2. An expert should never assume the role of advocate. His opinion should be unbiased and objective.
3. An expert witness should state the facts and assumptions upon which his opinion is based and should not omit facts which may detract from the opinion.
4. An expert witness should draw attention to any relevant matters which fall outside his field of expertise.
5. An expert must clarify whether his opinion is provisional, ie if there is insufficient information to finalise a report.
6. An expert who changes his opinion following the exchange of experts reports must make this immediately clear to the other parties.
7. All plans and documents referred to by an expert must be provided to other parties on exchange of reports.

Mr Justice Laddie also expressed concern with the conduct of an expert in the 1995 "**Cala Homes**" case. He criticised an article written by an expert architect several years before the trial, in which the expert had expressed the view that it was appropriate to use selective "sleight of mind" when presenting information to the Court.

Mr Justice Laddie was understandably concerned that the expert could hold such views, particularly as he was a Fellow of the Academy of Experts and an experienced arbitrator. In his Judgment, Mr Justice Laddie stated that he "went on to re-read [the expert's] report on the

understanding that it was drafted as a partisan tract with the objective of selling the Defendant's case to the Court and ignoring virtually everything that could harm that objective".

The Future - The Court's Own Expert?

Lord Woolf considers that the appointment of an independent and impartial expert by the Court would save time and expense. Several criticisms have been directed at this proposal:

- Judges do not have the experience and resources to properly select and instruct an independent expert.
- the Court-appointed expert could usurp the Judge's role.
- appointment of a Court expert will increase costs as the parties will still appoint their own experts to advise on the merits of their claim before litigation begins.
- the Court will lose the opportunity to consider the legitimate shades of opinion within many expert fields.

Court Rules which already allow for Court-appointed experts are rarely used. The Official Referee's Court is currently investigating the potential for wider use of these provisions. Scope remains for improving the current arrangements involving opposing experts, particularly in encouraging experts to narrow disputed issues by identifying and agreeing noncontroversial areas.

The Report also makes the radical suggestion that the Court should have the power to order examinations or tests to be carried out before the commencement of legal proceedings by or at the cost of either the intending plaintiff or defendant.

The Way Forward

In the future it is fundamental that experts, lawyers and the Court all change their attitude towards expert evidence.

Experts and lawyers must abandon their perception of the expert as a partisan 'hired gun' whose duty to advise the Court impartially does not arise until trial, if at all.

Lawyers must adapt, rejecting the practice of directing experts not to reach agreement at meetings ordered by the Court. Lord Woolf is concerned at the prevalence of this practice designed to gain short term tactical advantage jeopardising the interest of justice and the chance of reaching a commercial resolution of the dispute. The Report even recommends that this practice should be treated as unprofessional conduct, punishable by disciplinary proceedings.

The Court must give clear guidelines as to what is expected from experts. To save time and expense, lengthy trials should be timetabled for the experts' convenience. An expert should not be expected to keep lengthy periods free until called to give evidence. Lord Woolf suggests that live video links could avoid the need for experts to attend Court.

To achieve consistency, the British Academy of Experts has prepared a precedent standard form report to simplify the preparation and presentation of expert evidence. This responds to judicial concern expressed at the length of many reports and experts' tendency to mix matters of fact and opinion. The use of appendices containing peripheral information such as a CV, chronology and Lists of Documents will make the report more concise. Experts' opinions should be comparable paragraph by paragraph, and adoption of the standard format should be encouraged.

Recommendations of the Woolf Report

- the use of expert evidence should be strictly controlled by the Court;
- single experts should be used wherever possible;
- the Court should have discretion to appoint its own experts or assessors;
- guidance will be given to experts that their primary duty is to the Court and not their client;
- experts' reports should be addressed to the Court, not their clients.
- opposing experts should cooperate, carrying out joint investigations and producing a single report wherever possible;
- all reports should include a declaration recognising the expert's duties (independence, accuracy, to disclose the existence of contrary expert views);
- experts must not be given or accept instructions not to reach agreement with their counterpart, and if agreement is not reached, they should specify their reasons for failure to do so;
- experts' meetings should be private, generally excluding legal advisers;
- all written instructions (and a note of any verbal instructions) are to be disclosed as part of any expert report;
- the court to be given wide powers (including before the start of legal proceedings) to order examination or tests to be carried out and a report submitted to the court;
- training courses (non-compulsory), and codes of practice should be drawn up jointly by the appropriate professional bodies representing experts who testify in Court.

Summary

Changing judicial attitudes will compel litigants and their experts to adopt a different approach to the use of expert evidence. When implemented the Woolf reforms are intended to reduce cost and delay whilst returning the expert's role to that of independent, impartial adviser to the Court. Whilst projected costs and time savings remain debateable, it is clear that clients, experts, Courts and lawyers will be expected to meet higher standards in the use and presentation of expert evidence.

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Author : Alastair Farr
Title : Entire Contract Clauses - How Effective

Entire Contract Clauses - How Effective ?

So, you've finally arrived at the time when you sign the contract, but are you certain that you know exactly what you are committing yourself to?

Implied terms, statutory provisions, oral representations prior to contract and so on. All of these could, at a later date, influence the interpretation of your contract.

Therefore, in many bespoke forms of contract, it is increasingly commonplace to find the inclusion of so called 'entire contract' clauses.

These can take many forms but in general the purpose of an entire contract clause is to limit the parties obligations and liabilities to those that appear in the text of the contract.

An entire contract clause could be used to exclude terms which would ordinarily be implied into a contract by statute. One example, which is of particular importance to the construction industry, is the Sale Of Goods Act 1979 (section 14(3)). Where goods are sold in the course of business, there is an implied condition that goods supplied under a contract are reasonably fit for purpose. This implied term might be excluded by an entire contract clause.

Although, a party to a contract will have comfort from the knowledge that such terms are excluded from their contract, the effectiveness of an entire contract clause may be weakened by the Unfair Contract Terms Act 1977, by common law, and by the wording of the clause itself.

Under the Unfair Contract Terms Act some contract terms which seek to exclude or restrict liabilities are automatically made completely ineffective. An example of this is liability for death and injury caused by negligence. A contract can never exclude this liability. In other cases exclusion clauses are valid only if they satisfy a test of reasonableness imposed by the Act. Under section 6(3) of the Act, liability under section 14 (3) of the Sale Of Goods Act can be excluded but only if the clause satisfies the reasonableness test. Common law also operates to render certain clauses ineffective although the number of limitations has been reduced by the Act.

The effectiveness of an entire contract clause may also depend on the wording itself. In the recent case of **Milburn Services Limited -v- United Trading Group (UK)Ltd**, United Trading had entered into a main contract for the blasting and painting of an anchored oil tanker. United Trading employed Milburn as Sub-Contractor on terms which incorporated some of the obligations from the main contract. The project fell behind programme and the employer, Yemen Hunt Oil Corporation Limited, terminated the main contract.

In the subsequent action brought by Milburn, United Trading sought to rely upon an entire contract clause which had been incorporated into the subcontract from the main contract. They sought firstly to exclude Milburn's common law right to damages and secondly to exclude an implied term that Milburn be allowed access to the works.

The entire contract clause incorporated into the sub-contract stated ;

"CLAUSE 19

This Contract constitutes the entire agreement between the parties hereto with respect to the subject matter of the exhibits hereto, and supersedes any understanding, oral or written, hereto before entered into or on account of the parties and may not be changed, modified or amended except in writing signed by a duly authorised officer of the parties hereto"

The sub-contract also stated that;

"CLAUSE 5.1

In the event that the [main] contract is terminated by the company [YH] for any reason attributable to UTC, then UTG hereby undertakes to reimburse, on demand all costs and expenses incurred by MSL as a result of such termination"

"CLAUSE 9.1

Subject as herein provided, the parties agree to bear their own costs"

In response to the first issue, His Honour Judge Bowsher QC found that clause 9.1 did not exclude any right to damages and was a means only of apportioning costs. Other clauses in the contract such as clause 5.1 could be explained on the basis that they merely extended ordinary rights to common law damages. As there were no express words in the sub-contract excluding common law rights to damages United Trading were unable to exclude this right.

Regarding the second implied term, Judge Bowsher found that it was reasonable and necessary that someone who undertakes work to be given access to the place where the work is to be done. Such an implied term was not excluded because it was clearly the parties intention by clause 19 that the contract should only be construed from the written agreement on its own without reference to anything written before or afterwards apart from written and authorised variations. Judge Bowsher did not see clause 19 as excluding vital implied terms such as the implied requirement of access.

The effectiveness of entire contract clauses in contracts can be dramatic and can be a useful mechanism for ensuring that the parties obligations and liabilities are set out from the start. If an entire contract clause is incorporated from main contract to sub-contract it should be done with caution to ensure that the wording is entirely compatible with the parties contractual relationship under the subcontract. If the clause is to be watertight it is clearly important that the clause is drafted carefully and precisely to avoid any uncertainty.