

Issue No : 23
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Article No : 1
Author : Jonathan Tattersall
Title : Claims Management in Japan

Tony Farrow, responsible for Trett Consulting's international operations, visited Japan last year to present a seminar for OCAJI, the Overseas Construction Association of Japan. OCAJI is an association between the Ministry of Construction and contractors and consultants involved in construction work outside of Japan. Founded in 1955, it has a membership of 56 Japanese construction companies.

Eversheds, Solicitors, were invited to take part in the seminar and Jonathan Tattersall, now with Hammond Suddards Construction and Engineering Unit in Leeds, joined Tony to make the presentation. The title of the seminar was '**Management of Construction Claims**' and around 120 people attended. The day long seminar was simultaneously translated into Japanese by three translators. The seminar was extremely well received and OCAJI now intend to publish the Japanese transcript.

Japanese construction contracts have little in the way of formality and there is no claim culture. Claims are simply not made. A construction company will, if it is incurring a loss by reason of events outside its control, speak to the employer, but not expect in the usual course of events to recover any monies or obtain a remedy. Historically, margins in Japan have been high and so, if negotiations at the end of a project proved unsuccessful, losses would be put down to experience and be expected to be recovered in the margin on the next project.

Although Japanese firms have been working outside Japan in Asia and Europe since 1980's, they have had many problems, cultural in Europe and economic in Asia. However, following the burst of the 'bubble economy' of the 90's and the collapse of the Japanese economy, Japanese contractors have had no real option but to widen the sphere of their horizons outside their core business in Japan and their traditional loose form contractual frameworks. Their overseas operations are a major contributor to turnover.

As a result, they are having to enter into international construction contracts such as FIDIC, but are finding themselves unequipped to deal with the strict contractual conditions to which they are required to adhere. Not only is FIDIC unusual culturally, but domestic forms encountered have proved to be fraught with difficulty. In particular, they feel vulnerable in the area of making claims. They have little domestic experience in how to formulate a claim and do not feel comfortable with a culture of preparing and submitting required contractual notices. They are keen for any help at all in this area. Competing in the International sphere, margins are much tighter and Japanese contractors are realising that they have to submit very competitive bids and enforce the contract provisions i.e. make claims to maintain profit. They are simply no longer in a position to accept losses on the inevitable projects which do not run to plan.

With claims being so alien, the majority of contract managers, both on site and back in the head offices, are anxious to learn how to present a good claim document. The seminar, therefore, concentrated on two themes: the first was the legal basis and contractual framework for making claims, and the second, how to prepare a claim document. Questions raised from the floor indicated a worry that the service of contractual notices would not help the smooth running of a contract and hinder employer/contractor relations. (This is, of course, always a dilemma in any country, even for those who are experienced in correct contract and risk management!) However, most recognised that Japanese contractors must grab the nettle and devote considerable resource within their organisations to learning how to put claims together.

The other problem is that they are having to employ non Japanese subcontractors to do work and procure from outside Japan especially China. These subcontractors are far more experienced in contract frameworks and claims mechanisms. The Japanese are, therefore, finding themselves on the other end of claims!

The one thing they are not short of is the technology to present their claims graphically and effectively: what they are short of are the records to support the claims. Much of the afternoon session centred on the need to keep effective records with practical examples of how this could be achieved, completing the loop between site specific knowledge and commercial and negotiating skills in the head office.

OCAJI, in following up the seminar for their members, are looking for text books to translate into Japanese which contain examples of good construction claims in Britain, the Commonwealth or in those countries of South East Asia whose legal systems were originally based on the English common law system.

The Japanese construction industry is dominated by the 'Big 5': Shimizu, Taisei, ObayashiGumi, Kajima and Takenaka. Each of these companies has a turnover of £7,000 million. Of their substantial overseas work, 70% is undertaken in other Asian countries. Japanese contractors probably represent the most significant firms in the Far East market. However, they are investing in the European and UK markets: all of these firms now have UK operations.

PFI is another matter which is of particular interest to them. The large Japanese contractors have a history of working in partnership with the public sector and are more comfortable with the 'partnering' philosophy than traditional adversarial UK/US construction contracting. They are keen for as much information as possible on PFI. PFI procurement has begun in Japan, but in common with other markets around the world it is meeting some resistance from those who have profited from traditional contracting and those who are always suspicious of change. However, there is no doubt that PFI will take off as one of the most important procurement methods in Japan and the Pacific Rim and as such there are great opportunities for those who are well experienced in this area.

Tony and Jonathan have been invited back to Japan by OCAJI and it is likely that future presentations will cover public procurement issues in addition to continuing to provide advice and help on claim preparation.

Jonathan Tattersall is a Solicitor specialising in Construction and Engineering

Issue No : 23
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Article No : 2
Author : Steve Kennedy & Tan Swee Im
Title : Arbitration in Malaysia - A Question of Jurisdiction

A recent Court of Appeal case in Malaysia had to consider two issues:-

- whether orders for 'extra works' on a project incorporated the arbitration agreement of the original subcontract, and
- if not, did the Arbitrator appointed to hear disputes arising from the original subcontract have jurisdiction to hear disputes arising from the subsequent 'extra works' orders.

The project was a large construction site along Jalan Pudu in Kuala Lumpur. The main contractor was Daewoo Corporation and in May 1994, they entered into a subcontract with Bauer (Malaysia) Sdn Bhd for work associated with a diaphragm wall and ground anchors. The subcontract was the Malaysian standard 'PAM' form (identical in all material respects to JCT 1963) and incorporated an arbitration clause. During the course of the works, Daewoo issued further 'work orders' for additional work on the same project. Disputes arose relating to work in the original 'PAM' subcontract and there were disputes arising from the subsequent work orders. Arbitration proceedings were commenced by Bauer.

From the outset, Daewoo argued that the arbitration clause in the original PAM subcontract had not been incorporated into the subsequent work orders and so the Arbitrator had no jurisdiction to hear disputes arising from them. The Arbitrator disagreed and this case concerned Bauer's appeal against the High Court judgement which had decided that the Arbitrator did not have jurisdiction to hear the work orders disputes.

The primary issue was whether the subsequent work orders incorporated the provisions of the arbitration agreement in the original subcontract. Emphasis was placed on the wording of the arbitration clause, particularly *'in the event that any disputes or differences should arise ... either during the progress or after the completion or abandonment of the works'* and whether the definition of 'the works' included the subsequent work orders. On its construction of the contract, the Court of Appeal said 'the works' did not include the work orders and so the arbitration agreement did not apply.

However, the Court also considered whether the arbitration clause was incorporated into the work orders by the parties' conduct. Quoting from both Malaysian and English cases, the Court of Appeal upheld the High Court's decision that the original arbitration clause was not incorporated into the subsequent work orders.

Notwithstanding the lack of incorporation of the original arbitration clause into the work orders, the second issue for the Court of Appeal was whether the Arbitrator still had jurisdiction to hear the disputes arising from the subsequent work orders; under the Malaysian Arbitration Act, 1952, the Arbitrator had no jurisdiction if the parties had not made an agreement for their disputes to be so resolved. On this point Bauer's primary argument was that by its past conduct, Daewoo was estopped (precluded) from asserting lack of jurisdiction.

Mustill and Boyd (2nd Edition) at pages 133-34, states *'The most usual case of such an agreement [ie by a party's conduct] is where an arbitration is already in progress under an existing express agreement and a fresh claim is brought before the Arbitrator, which is outside the scope of the original [arbitration] agreement. If no objection is made to the Arbitrator's lack of jurisdiction to deal with the fresh claim, both parties will be bound by an award on the merits of the claim'*.

The Court of Appeal found that Daewoo, having strongly registered its disagreement on the Arbitrator's lack of jurisdiction over the disputes arising from the subsequent work orders, then proceeded to participate in the proceedings as if the Arbitrator had jurisdiction. The Court of Appeal said that any reasonable man would have been entitled to assume that Daewoo's actions in taking fresh steps in the arbitration after it had registered its disagreement on the Arbitrator's jurisdiction, indicated that it had in fact withdrawn its original arguments on lack of jurisdiction.

Consequently, having correctly argued that the original arbitration agreement was not incorporated into the subsequent work orders, Daewoo made the error of then participating in the arbitration proceedings concerning the work order disputes. By this conduct, Daewoo acceded to the Arbitrator's jurisdiction to make an award on the merits of the claims being made.

Trett Consulting (Malaysia) Sdn Bhd are Bauer (Malaysia) Sdn Bhd's claims advisors and are assisting Bauer's lawyers in the ongoing arbitration. Steve Kennedy, Director, can be contacted on (60) 3 704 5963.

Tan Swee Im of Tan Swee Im & Co acts as counsel for Bauer in the arbitration and with Dato R.R. Sethu on the Court of Appeal, Kuala Lumpur. She can be contacted at (60) 2 283 3918.

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Article No : 3
Author : Roddy Gordon
Title : Cutting a Record

Roddy Gordon of Solicitors, Robert Muckle, considers the importance of project records when pursuing disruption claims in arbitration or litigation.

It comes as a surprise to some contractors and sub-contractors that to recover sums lost in consequence of disruption it is not sufficient simply to show that the project has cost more than allowed for in the tender. Such a calculation does not prove that the contractor has any entitlement to payment for disruption, nor, if

entitlement is established, to prove the amount of that entitlement.

Many contractors will be aware that in order to prove a disruption claim, they must establish 'cause and effect.' This is a useful shorthand for a very complex process and what it means is that the contractor must prove what caused the disruption and what effect the disruptive event had on him. But that is not all, The contractor must also prove that the cause, as established, is something for which the employer bears responsibility.

The employer does not bear responsibility for everything that goes wrong on site. In the absence of express wording, the employer is not required to give uninterrupted access to the site, he makes no representations about conditions on site and if a power failure prevents work at all over the entire site for a period of days, that is unlikely to be the employer's responsibility. Moreover, in the absence of express wording, the employer is unlikely to bear any responsibility if his architect or engineer issues working drawings out of sequence with the contractor's intended method of working or instructs work in an uneconomical sequence.

You will have noticed the expression "*in the absence of express wording.*" What this means is that it all depends on what the contract says. And the contract does not always say what a contractor thinks it says. What is clear, is that if a particular sequence or method or timing of work is critical to the contractor's ability to run the project at a reasonable profit, the employer should be left in no uncertain terms before the contract is concluded. After the contract is concluded is too late.

Establishing responsibility for disruption is only the first hurdle. Of no less importance is the need to prove what effect it had on the contractor. For each disruptive event proved, every consequence both in terms of its physical effect on the project and its financial effect on the contractor must be proved. This is not a task to be underestimated and is not for the faint hearted. It is generally not sufficient to prove losses by theory. So, the fact that your trade body publishes lists of recommended tender rates for specific items of plant does not mean that you can recover at those rates for additional plant needed by reason of the disruption. If your claim is for double handling, it is not enough to prove it on the theory that you had anticipated a certain item of plant to achieve a certain output, therefore as it did not achieve that output that must be the cost of the double handling operation.

Rather, what you must prove is that on a certain day you carried out an operation. By reason of the disruptive event, it was necessary for you to double handle materials on another stated day. A specific item of plant was necessary for that job, it was driven by Joe Bloggs who took 7 hours and 34 minutes over it, including tea breaks. Joe Bloggs is paid £9.50 per hour, with NI and bonus that equates to! Get the picture?

Before discussing further the proof necessary for disruption claims, what of the global claim? A global claim is a claim which does not attribute each sum of money to each effect of each

cause. Most claims are global, in this sense, to some extent. It is rarely possible in a construction claim to account precisely for every penny spent on a project. That does not mean that global claims as commonly understood are acceptable. If a contractor fails to establish that the employer has caused disruption for which he is responsible, the contractor will fail. It is as simple as that. If the contractor fails to establish what effect the disruptive event complained of has had on him, he will fail. The employer's wrong will not be punished in a vacuum he will be penalised only if his wrong has caused loss. Unless the contractor can establish loss he will fail. If it is impossible (not difficult or expensive, but impossible) to attribute to each effect exactly the amount of the loss, the contractor's global claim will be allowed. But that is a long way down the line and it is obvious that the global claim is not a panacea for the contractor's failure to maintain proper records or for his failure to make the effort to prove his case properly.

So, how does the contractor prove his case? The best form of proof is records. What actually happened. What it actually cost. As we will see below, records cannot prove everything. Some things must be proved by estimates and opinions. But estimates and opinions, especially those emanating from an interested source - like the contractor himself! - should not be allowed to take the place of more definite proof in the form of records.

One of the factors which most often prevents contractors successfully recovering for disruption is lack of records. Records are documents, created contemporaneously with events on site which will prove what happened when, and often why. They will also prove how much it cost. It is an unusual job where the contractor cannot prove what the job actually cost. Materials supplied will usually have been purchased by reference to a job number. Similarly sub-contracted labour and hired plant. Owned plant and in-house labour when allocated to a job, will usually be recorded on allocation sheets of some description. But as we have noted above, actual costs are not sufficient.

If the cause of the disruption is, for example, out of sequence working, labour should be required to record in daily diaries factors such as:

- i. Standing time - how much time did they waste because access to a work area was unavailable, because they had to return to head office to requisition plant or tools for a different task than the one planned, because they were awaiting instructions as to which area to work next etc.
- ii. How much time per day was spent working on each programmed activity?
- iii. On a larger site, time may be wasted in travelling, particularly if hoists or limited access is involved.
- iv. Idle plant time should be recorded as should repeated or extended haulage distances etc.

Records which indicate factors such as the above will enable the contractor to work out and therefore establish the total time spent working on an activity, the time spent standing, the time spent travelling etc. From that he can ascertain time that was productive and time that was unproductive.

What often cannot be the subject of a record is simple decreased productivity by reason of the disruptive event. Taking again the example of out of sequence working, the loss of time across an entire labour force caused by piecemeal work can be very significant indeed but cannot sensibly be recorded or assessed by on site labour. It must be the result of opinion. But even opinion must be based upon something. The best base for an opinion must be records. Records as to what is the normal productivity for this contractor in normal circumstances. Records on other projects may be invaluable. Records establishing hours worked by individuals, distances travelled, objects causing physical obstruction, the state of work performed by preceding trades, etc, etc, etc. At the end of the day the better the records that are kept and can be produced in support of the claim, the more likely it is that the contractor will succeed - even where, for some parts of the claim, records cannot be produced and a more theoretical basis of claim is used, the fact that good records were kept generally

will tend to encourage the court, arbitrator or adjudicator to view sympathetically those parts of the claim.

Keep making records and good luck!

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Author : Tony Fletcher
Title : Changing Lives - Trett Consulting in India

INTRODUCTION

Since 1991, the liberalisation of India has continued in an environment of traditionalism, bureaucracy, technical innovation, and mind-numbing poverty. Liberalisation involves change; in the way people live, how they work, how business is conducted.

Our business in Trett Consulting is predominantly about change. *Why did the project take longer? What changes caused the extra time or cost? What caused the change?* This article is about the work we carry out in India, its differences from the European business, the special features that we have to contend with, and how we have to 'change' to enable us to deal with traditional attitudes in the fast changing development of this huge country.

BIG IS BEAUTIFUL?

India is BIG. For example, the Trett Consulting office is in New Delhi and our driver takes 3 days on the train to visit his family in Tamil Nadu. MY site visits to Jamnagar in Gujarat on the West coast take a day using two plane trips, and so a days' site visit takes three. By train the round trip with one day on site would take 5 days.

Inevitably, major projects such as refineries and power plants are miles from anywhere - in one case 250 miles from the nearest city. A car journey to that site, a power plant in Tamil Nadu, takes 8 hours from Madras (now known as Chennai), which is a 3 hour flight from New Delhi. These facts need to be considered when looking through reams of papers to schedule the labour resources being used on a project. *Where does the labour come from? What hours are worked? What skills does it possess?*

The refinery project in Gujarat had 25,000 operatives on site in May 1998. I still do not know if that included the children! The larger adjacent refinery project had 80,000 people on site at its peak and site roads exceeded 160 miles. Large projects like this are being run by western companies but using mostly local labour. The labour is a mix of the local village labour and itinerant teams and families. The women mostly do the labouring tasks, sometimes the children play together nearby, sometimes a crèche is provided. Any large project is required to employ the local villagers, under threat of local protest action. Huge projects can be badly disrupted by local protests.

Road development in India presents a significant opportunity for contractors and financiers. India's roads extend to around 3 million kms, the vast majority little more than dirt tracks. The network needs urgent and massive modernisation, requiring huge investment, as well as up to date construction and management methods. Latest assessments show the need for around 13,000 kms of expressways, together with the upgrading of 35,000 kms of national highways to 4-lane standard.

The World Bank and the Asian Development Bank (ADB) have decided to fund larger and longer road projects in order to attract larger and more experienced contractors to bid. India is also pushing hard for foreign contractors and investment to develop the expressway and national highway infrastructure, often using BOT principles or similar. The World Bank and ADB are instrumental in providing the procurement routes for these projects, and UNIDO has also provided excellent guidance in this form of procurement.

Whichever sector is considered, the figures, and the opportunities are BIG. The recent elections returned the BJP (Bharatiya Janata Party) as the leader of a new National Democratic Alliance coalition which has plans to concentrate on insurance, banking and other financial reforms, already begun in its previous tenure. Other areas of reform will be in infrastructure projects and public sector privatisation.

OUR EXPERIENCE IN INDIA

The Delhi office was set up in October 1996. One of our first appointments was to prepare an extension of time claim for a road contractor on an 80 km upgrade project in the state of Uttar Pradesh. The same contractor also appointed us to investigate its claim for loss and expense on a 240 km road in Rajasthan.

Both our projects were being engineered and supervised by the State Public Works Department (PWD). Because of performance issues of one engineer, the funding Bank replaced the PWD with an international consultant as the supervising engineer. By then the project was 2 years in delay. Some of the causes of delay were novel to say the least.

All trees are protected and cannot be removed without permission being granted by the appropriate Central Government Department. The necessary applications had not been made prior to the project start, and speed of response is not an option in such matters. Centre lines could not be set out, cross drainage culverts could not be constructed, and our client contractor could work on only 15 km of road after 1 year on site. Some roads I have travelled on still have the occasional tree growing in the surface. I am surprised that a Tata truck has not removed some of them by now ..!

Villages grow up along the road system and homes and temples exist right up to the edge of the road. These need to be moved when a road upgrade and widening is planned. None of the initial discussions with the local community had occurred by the time the work started and the contractor faced difficult, time-consuming and costly negotiations with the village elders.

There were numerous instances of design delays, some being described as a result of car or train delays in the transportation of such information to site. But all of this is our stock in trade. We set about collecting this information and imposing it on the agreed programme. Where is the agreed programme? In its absence, we recreated the programme based on progress reports and a later updated programme.

Much of the correspondence was in Hindi and had to be translated by our local staff. One of these documents was a PWD standard form for the request for extensions of time. No consideration to an EOT would be given unless this form was completed by the contractor. By completing the form, the small (Hindi) print said that the contractor agreed not to make any loss and expense claim in respect of any delay for which the EOT was subsequently granted. Remember, this project was already 2 years in delay!

Sub-base material was to be quarried at selected approved quarries in areas specified in the tender documents. During the course of the project, the Central government stopped all quarrying in certain localities for environmental reasons. A claim was made for additional transport costs for using approved quarries well outside the route of the road up to 115 kms away in one case on Indian roads a round trip of one day per load. On checking the papers, we found a passing reference to loads still being sourced from the original quarries via a subcontractor, whose wife's cousin's husband's brother was the manager. How should that be dealt with in the context of a claim already made by the contractor? If the claim is corrected, is the contractor admitting an illegal action? How does the client stand by benefiting from this act? Does the client know? Will he challenge the original claim? How should Trett Consulting deal with the matter?

THE FUTURE

The Delhi office is ideally placed to service public and private clients alike. The public clients remain steeped in traditional methods of contract and construction management. The potential inflow of international contractors and finance on major infrastructure projects will force the emergence of more modern techniques in both construction and management. The notorious overruns in time and cost will have to be reduced if the needs of the nation are to be realised.

We have gained significant experience in a short time in both publicly and privately financed projects. We have learnt much, and we like to believe so have our clients.

Tony Fletcher is Director of Trett Consulting (Singapore) Ltd with on-going responsibilities for India.

For more information on India, please contact Tony Farrow in the UK on (44) 161 928 9004 or Ajay Sharma at our New Delhi office (91) 11 371 1813.

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Article No : 5
Author : David Simons
Title : Adjudication - The Story so Far

David Simons of Trett Consulting, the adjudicator whose work was commended by HH Judge Thornton in **Fastrack -v- Morrison**, reviews adjudication experience to date.

Sir Michael Latham, in his landmark mid 1990's Report, recommended a quick and effective means of resolving construction disputes and the first drafts of what later became the Housing Grants Construction and Regeneration Act, 1996 looked to address these recommends. The Act came into force 1st May 1998, and experience of statutory adjudication to date suggests that Latham's objectives have largely been met. However, there are areas of concern.

S108(2)(f) of the Act requires adjudication provisions in construction contracts to "...enable the adjudicator to take the initiative in ascertaining the facts and the law..." This implies that the adjudicator will act inquisitorially, in other words he will investigate the referred matters in dispute, as appropriate. In most cases a proactive approach is essential if there is to be a resolution of the issues in the limited timescale permitted under the Act. For example, it would be reasonable to expect the adjudicator to query any matters in a complex referral which are unclear, before waiting for a response from the other party. Also, a party who has a potentially successful case but makes a poor submission in adjudication might still have a chance of winning, provided the adjudicator makes a thorough investigation.

However, it is said that some adjudicators are not making efforts to "...take the initiative..." and are making decisions reactively, purely on the basis of formal submissions. All effort seems to be concentrated into the last few days before the decision is due.

In one case, an adjudicator who was charging £120 per hour dealt with a complex dispute involving repudiation, disputed measurements, variations and loss and expense. The basic period of 28 days was extended by agreement, but the adjudicator made no enquiries, held no meetings and his decision was

reached on the basis of the parties submissions only. His fees came to approximately £3,500. In his

decision, he found against the referring party on parts of the case where he was unable to come to any firm conclusions and which he described as "*unsuitable for reference to adjudication*". However, the issues were typical of a referral and were capable of decision within the timescale; the adjudicator merely failed to investigate the matter in sufficient depth. His decision in favour of the referring party was unsatisfactory to both sides and whilst it was enforceable, it did not provide an effective resolution of the dispute. Unfortunately, I suspect there may well be other cases not unlike this one.

From an adjudicator's perspective, the involvement of lawyers in adjudication can be helpful. It is inevitable that construction lawyers will actively seek adjudication work and their involvement on behalf of the parties is of great benefit, where the requirements of the process are properly understood. However, some lawyers are trying to approach adjudication as the equivalent of short procedure arbitration based upon formal documents-only. This is inappropriate in cases where, as suggested above, the adjudicator's task is closer to that of making an expert determination than it is to a decision based solely upon the parties submissions.

Where legal representatives of the parties misunderstand the process, wasted costs and spurious jurisdiction arguments, etc. generally blight it. However, this is clearly a problem which will reduce in time, as familiarity with adjudication on the part of all concerned, increases.

The decision in *Cothliff -v- Allen Build* came as a surprise to many. The judge decided that in adjudication under *The Scheme for Construction Contracts*, the adjudicator has an implied power to award costs to the successful party. It had been assumed during the period before implementation of the Act, that in statutory adjudication at least, the general rule would be that the parties would meet their own costs and the adjudicator would not be required to deal with costs inter partes.

It is open to the parties to agree that the adjudicator will deal with costs, a point confirmed recently in *Northern Developments -v- J & J Nichol*, where there was rejection of the decision in *Cothliff*. However, should the adjudicator have the discretion to deal with costs when only one party applies? - There are arguments for and against.

Generally where construction disputes occur, typically as between main contractor and subcontractor, there is no particular reason why the parties should be legally represented in adjudication. The adjudicator, when acting inquisitorially, should be able to decide issues in dispute based upon the submissions and representations of the parties themselves. Additional time will be spent by construction professionals dealing with the contract as a result of the adjudication, but costs are not usually significant compared with the amounts in dispute. Legal representation of the parties will greatly assist the process by helping the adjudicator to focus on the real issues, but it is not always essential and where costs are not significant, it is reasonable to expect the parties to absorb them.

However, it can be argued that the adjudicator should have the discretion to deal with the parties' costs, where they are significant compared to the amounts in dispute, and/or where there is more obvious justification for legal or other representation.

Where for example, a designer who is also a sole trader, is owed a relatively small disputed sum under a contract for professional services (a construction contract under the Act), the sum may be significant to that individual. There is also more likely to be a need for advice and representation, the cost of which may be comparable to the amount claimed. In these circumstances, it should be possible for the adjudicator to award costs inter partes, a potential referring party with a 'winnable' case should not be deterred from adjudication by the prospect of unrecoverable costs.

Section 107(5) of the Act states "*...An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged...*"

This seems strange, since the intention of S107 is to exclude from the legislation, contracts which are not made or evidenced in writing. The provision was tested recently in *Grovedeck -v Capital Demolition*, where an adjudicator wrestled with its application to two demolition contracts, but the court refused to enforce his decision. H.H. Judge Bowsler reasoned that parliament could not have intended an adjudicator to be given, by virtue of S107(5), jurisdiction in an 'unauthorised' adjudication which he did not have when he was appointed. However Rudi Klein, who was involved in amendments to this section of the Act disagrees, he believes that parliament did intend S107(5) to have such an effect.

Clearly, the *Grovedeck* case may not be the end of the story as far as oral contracts are concerned, but practical difficulties should also be considered. Imagine an adjudicator trying to proceed with a reference arising from an oral agreement in accordance with S107(5), where the existence of the contract is not denied by the responding party, but the terms of the

agreement are disputed. A good proportion of the time available could be wasted trying to understand the contract, particularly if both sides give equally convincing but opposing arguments. There will be little or no opportunity to deal with the issues in dispute, where most of the time is spent in establishing the terms of the contract.

Frankly, if S107(5) were to be omitted from the Act, then the rest of S107 would make perfect sense. Are oral agreements best left to the courts?

Many recent cases have dealt with jurisdiction problems including *Fastrack - v - Morrison*. A competent adjudicator must cope with jurisdiction challenges and recognise whether they are real or spurious. Whilst he cannot in principle decide the issue, the adjudicator should know when it is appropriate to proceed with a reference and to what extent jurisdiction arguments will continue to be raised and will always be a feature of any formal dispute resolution procedure. Unfortunately, they will also continue to impact upon the enforcement of adjudicator's decisions, but with a decreasing frequency, as the parameters of adjudication become more clearly defined by the courts.

However, there are some possible solutions to the other problems discussed above and it might be argued that:

- The parties to an adjudication should have the right (by agreement) to dismiss an adjudicator who fails to proceed in accordance with S108(2)(f)
- The adjudicator should have discretionary power to award costs inter partes upon the application of one party to an adjudication unless such power is excluded in the contract.
- Oral contacts should be excluded from the coverage of the Act, at least as far as adjudication is concerned.

No doubt there are those who will disagree.

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Article No : 6
Author : Roger Trett
Title : Obituary of Phil Rawlins

Very sadly, Phil Rawlins, Manager of Trett Consulting's Leeds office passed away on Friday 14th July. The following is an extract from Roger Trett's dedication at Phil's funeral service held at Church of English Martyrs in York, on 21 July 2000.

"This is a very sad occasion for all of us but in particular for Angela, Erin, Mathew and Paul.

A Chartered Quantity Surveyor, Phil spent much of his working life on international assignments, in places such as Bahrain, Indonesia, Malaysia, Saudi Arabia and Bali. He began his QS career with the Department of the Environment and this led to his first international assignment, on a road construction project in Nepal.

He joined Trett Consulting in 1999, although his connections with Trett can be said to go back 25 years. Phil, Simon Olimi Kabuzi, Director of Trett's London office and Tony Farrow, Director of Trett International, were contemporaries at Newcastle upon Tyne Polytechnic.

In addition to the academic demands at Newcastle, Angela gave birth to (twins) Mathew and Paul, joining sister Erin, meaning that in addition to studying for his QS degree, there was the challenge of bringing up 3 children, all under the age of 5. No doubt as a result of the strength and support of Angela, Phil passed his degree with great success.

As I said, Phil joined Trett Consulting in 1999. I only wish he had made the move in 1989, because Phil was one of our best appointments over the past decade. He had an ideal balance of abilities: his broad range of construction experience and his considerable quantity surveying skills placed him in the role of Expert. He, therefore, handled the largest and most complex cases in our company and he did this with great competence.

He was excellent at client relations and Keith Hartley (Managing Partner at Masons, Leeds) reflecting on Phil's work, commented to me that Phil was unfailingly courteous, despite the great stresses and pressures generated by the nature of our work.

When Phil joined Trett, it was to run our Leeds office. However, his managerial qualities were obvious to all and our plans were for a much wider role in the business.

Sadly, it was not to be, but that does not stop us appreciating what Phil has achieved. Everyone at Trett and his colleagues and friends will miss him.

Our sincere condolences go to Angela; we thank you for sharing Phil with us; and to Mathew, Paul and Erin, I would like you to know how proud you can be of your Dad."

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The establishment of a reasoned 'plan' of how works are to be carried out can be fundamental to the success of any project. The representation of the 'plan' is often in the form of a programme. However, events can arise that result in project delays. These delays may influence activities on the programme, resulting in them taking longer than originally planned or even carried out in a different sequence. New activities or tasks may be introduced into the programme.

The aim of delay analysis is to investigate the impact of delay events upon the project. This analysis may involve various procedures and selection of the appropriate procedure will often depend upon the circumstances in each particular project. The type of analysis may be dependent upon the available information.

DELAY ANALYSIS

Delay analysis can include scheduling (ie, planning or programming) methods which require considerable mathematical processing capabilities; these days nearly always involving computers. However, there will also be a requirement for knowledge-based decisions, in terms of construction methods and programming techniques, such that the basis for the analysis is reasonable.

The terminology adopted for types of delay analysis vary. In the brief descriptions below, contractual 'frights' are not considered and the procedure alone is summarised.

AS PLANNED/ENTITLEMENT METHOD

In adopting this simple approach, the programme for the project is taken as 'gospel', in that the activity durations, timing and logic are assumed as being correct. The delaying event is introduced into the programme and the 'result' (or consequence) is found by rescheduling the programme to establish if there is a revised completion date. This relatively simplistic approach may give the answer that is wanted by the party delayed. It may not stand up to scrutiny in regard to being a reflection of obligations and reality.

'AS BUILT' PROGRAMME ANALYSIS

The analysis relies upon a programme of how the works were actually constructed and this is usually overlaid on the intended plan of works. If not available as a contemporaneous record, the asbuilt programme would be built up from available records. The programme so produced does not demonstrate the reason for delay, rather this would flow from investigations of any variances from the intended plan.

IMPACT ANALYSIS

Impact analysis can fall under a number of headings and can be utilised in different forms. Terminology such as 'update impact schedule analysis' or 'time slicing' are used as are 'simulated as-built analyses' and 'but for' and 'snapshot' analysis. However, the principle is that detailed analysis is carried out using a step by step approach. The approach requires that all circumstances at a point in time or at the occurrence of a particular event be recognised. Having recognised the conditions at the time of the event, if there is a change from the position originally envisaged, this must be established, and reflected in the next step of the analysis.

The programme through to completion must be established utilising this information. The impact of events can be assessed by analysing if and how the change affects the programme to completion.

The analysis will reflect the circumstances at the time of the event in question and it can be this consequence which is then asserted as being the effect of the event. Analysis may be carried out at periods through the project such that a 'time slice' picture is built up. This 'time slicing' will allow recognition to some extent of the dynamic nature of project work.

PRODUCTIVITY ANALYSIS

In using impact analysis, the basis of the delaying event may be productivity levels rather than periods of delay. The analysis will utilise the anticipated productivity and actual productivity as the basis for the analysis.

In future articles, 1 will give detailed examples of using delay analysis methodologies.

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