


# Construction Newsletter
# Issue No. 1

**Court of Appeal decision on payment provisions in JCT Form of Contract**

*Reinwood Ltd v L Brown & Sons Ltd* [2007] EWCA Civ 601
The Court of Appeal considered a point of construction on a standard JCT Form of Contract on which there appears to be no previous authority. The appeal concerned the relationship between clauses 24 (damages for non-completion), 25 (extension of time), 28 (the two-stage mechanism of determination by the contractor for "specified default" by the employer) and 30 (certificates and payment).

The project was delayed and the employer (Reinwood) gave notice under clauses 24 and 30 that it intended to deduct LADs and withhold a sum from payment of an interim certificate (due for payment on 25 January 2006). However, by then the employer already knew that an extension of time was imminent, which would reduce its LADs entitlement. The employer paid the interim certificate less LADs early; several days later (on 23 January 2006) an extension of time was issued to the contractor. On 26 January 2006, the contractor gave notice of a specified default under clause 28 for the failure to make payment against the interim certificate by the final date for payment. The employer paid the balance due under the interim certificate several days later.

Six months later, when the employer was in breach of contract for late payment, the contractor gave notice of determination for the employer's repeat of a specified default under clause 28. The employer commenced proceedings in the TCC alleging that the contractor had repudiated the contract because the contractor's clause 28 notice issued in January 2006 was invalid. The contractor (represented by **Alexander Hickey**) succeeded at first instance before HHJ Gilliland QC [2007] BLR 10. The Judge held that the contractor's January 2006 notice of specified default was valid. The Judge also held that the contractor did not serve the determination notice unreasonably or vexatiously, and gave guidance on what this meant.

The employer appealed the decision on the validity of the January 2006 notice. The Court of Appeal (Dyson LJ giving the substantive judgment) allowed the employer's appeal and declared that the January 2006 notice was invalid. The Court found that the right to deduct LADs specified in a notice given pursuant to clause 30.1.1.4 crystallises on the giving of the notice. If the conditions for the deduction of LADs from a payment certificate are satisfied at the time when the Employer gives notice of intention to deduct, then the Employer is entitled to deduct those LADs, even if the certificate of non-completion is cancelled by the subsequent grant of an extension of time. There is no additional requirement that the underlying condition for giving a notice (the issue of a certificate of non-completion) must continue to subsist at the final date for payment, although any LADs so deducted must be repaid by the employer pursuant to clause 24.2.2.

The contractor intends to seek permission to appeal to the House of Lords. The Court of Appeal's decision is heavily in favour of employers. It is a surprising result which has removed the protections for contractors concerning interim payment and cash-flow, and leaves open the potential for abuse. Even though an extension of time has been granted the employer may still deduct LADs on the final date for payment. Instead of the contractor having certainty about payment and definite payment dates, the employer's set-off of LADs has only to be repaid under clause 24.2.2 "within a reasonable time". Worse for the contractor is that, if the employer fails to repay the money withheld, the non-payment is not a "specified default" under clause 28. Employers who do not want to pay the full amount can use this route to avoid payment and protect themselves from the threat of determination.

**Adjudication: time limits for reaching decision**

*AC Yule Ltd v Speedwell Roofing and Cladding Ltd* [2007] EWHC 1360 (TCC)
HHJ Peter Coulson QC considered an adjudication enforcement case where the ground for resisting enforcement was the fact that the decision was reached out of time, an issue which has been the subject of much recent case-law.

The parties had granted the adjudicator a 14 day extension of time for issue of the decision (to 3 April). Shortly before the decision was due, the Claimant provided responses by letter to queries raised by the adjudicator. The Defendant sought further time to respond. The adjudicator agreed to give the Defendant a further two days to respond, on condition that the parties agree a further extension of time of two days for his decision (to 5 April). The Claimant expressly consented to the adjudicator's request; the Defendant did not respond to the request for an extension of time, but provided a substantive reply to the Claimant's letter. The adjudicator issued his decision on 4 April.

**Simon Henderson** for the Defendant argued that the adjudicator's decision was unenforceable because it had been issued late, relying on (among other cases) *Epping Electrical Company Ltd v. Briggs and Forrester (Plumbing Services) Ltd* [2007] BLR 1126. **James Leabeater** for the Claimant argued that the Defendant had by its silence consented to the further extension of time, or at the least was estopped from asserting that it had not, on the particular facts of the case. HHJ Peter Coulson QC agreed with the Claimant, stating that where an adjudicator asks for more time, there is a clear obligation on the part of both parties to the adjudication to respond plainly and promptly to the request. If, in breach of that obligation, one party does not respond at all, there must be a very strong case for saying that they accepted, by their silence, the need for the required extension; alternatively, they will be estopped from asserting that they did not accept the extension of time.

The Judge, however, rejected the Claimant's alternative submissions that even if a decision is issued late, it may still be enforced. Reviewing the extensive recent case-law on this subject, the Judge stated that an adjudicator's decision is valid and enforceable only if "completed" within the timescale provided at paragraph 19 of the Scheme for Construction Contracts (England and Wales) Regulations 1998.

**Court of Appeal guidance on withdrawing admission of liability**

*White v Greensand Homes Ltd and BSF Consulting Engineers Ltd* [2007] EWCA Civ 643.
The Court of Appeal recently handed down guidance about withdrawing an admission in a professional negligence claim.

In June 2006 household insurers sued BSF, a consulting engineering company, under the Defective Premises Act 1972 ("DPA") and at common law for damage caused to a house (completed in July 2000) by subsidence in 2003 as a result of alleged defective foundations design in 1999. BSF admitted that it had been appointed as designer of the foundations in pre-action correspondence in January 2006, and repeated the admission in its Defence in October 2006, but denied liability. In February 2007, BSF realised that it had not in fact been appointed to design the foundations after all, and applied to amend its Defence to withdraw the admission. The Insurers objected to the amendment on the basis that they would be prejudiced because, in reliance on the admission, they had not investigated a potential claim against consulting engineers KWE Design Ltd, alleged by BSF to be the actual designer. By this time, a DPA claim against KWE was statute-barred. BSF argued that a pre-action admission was not binding (*Sowerby v Charlton* [2006] 1 WLR 568), and that no prejudice flowed as a result of an admission made on the pleadings because, by that stage, any DPA claim against KWE was already statute-barred. BSF also contended that no prejudice in fact resulted because KWE had been dissolved in September 2003 and was not a target worth suing.

At first instance in the TCC, His Honour Judge Toulmin CMG QC refused to allow the amendment. The Judge held that the Insurers were prejudiced by the withdrawal because it would not be able to pursue KWE under the DPA. However, the Judge did not address the fact (which was common ground) that KWE had been dissolved.

The Court of Appeal (Chadwick LJ giving the leading Judgment) allowed BSF's appeal and permitted the amendment. **Alexander Hickey** was instructed for BSF. The Court noted that limitation in respect of the common law claim against KWE had not yet expired, and there would be an extended period of limitation under S14A of the Limitation Act 1980 because it was arguably not until January 2007 that Insurers became aware that

the correct defendant was KWE. Chadwick LJ held that the Court should have regard to the pre-action admission, but the relevant question was whether the Insurers would have been able to strike out BSF's denial as an abuse of process or obstructing the just disposal of the claim under CPR 3.4(2)(b) had the defence served in October 2006 contained the denial sought to be made by way of the proposed amendment (*Stoke-on-Trent City Council v Walley* [2007] 1 WLR 352.) The Court held that the answer to this question would have been no, because the balance of prejudice fell firmly in BSF's favour. The Court noted that refusal of permission to withdraw the admission would expose BSF to a trial on liability on a wholly false basis – i.e. that BSF was responsible for the design of the foundations of the property – and, in circumstances where there were plainly grounds on which BSF could deny responsibility for the design, this would pose a serious risk of unfairness. The Court weighed this risk of unfairness against the fact that the Insurers' claim under the DPA against KWE was statute-barred. In reaching its decision, the Court noted that KWE was insolvent, and there was no evidence that KWE was insured for the claim.

**Limitation – New cause of action based on facts in defence**

*Charles Church Developments Ltd v Stent Foundations Ltd & anr* [2007] 1 WLR 1203
Mr Justice Jackson considered an application by a claimant to plead a new claim after the expiry of limitation. The case concerned a project to redevelop a site in central London. Serious problems had been encountered in connection with piling works. The Claimant developer sued two Defendants (the piling contractor and the structural engineers) for losses arising from separate, albeit closely connected, incidents. By the proposed amendments to the Particulars of Claim, the Claimant sought to advance a claim against the piling contractor in respect of an incident which had previously only been the subject of a claim against the structural engineers. The piling contractor resisted the application on the basis that the claim was new, and was made after the expiry of limitation. The Claimant accepted that the claim was new, and was made after the expiry of limitation, but relied on the fact that the new claim arose out of the same or substantially the same facts as were already in issue in the claim being advanced against the engineers.

Mr Justice Jackson held that the court had a discretionary power to allow a claimant to plead the new claim. He based his decision on CPR 17.4(2) and section 35(5)(a) of the *Limitation Act 1980*, as interpreted by the Court of Appeal in *Goode v Martin* [2001] EWCA Civ 1899; [2002] 1 WLR 1828. **David Friedman QC** and **Benjamin Pilling** were instructed for the Claimant. The First Defendant was granted permission to appeal.

**Cost consequences of breach of TCC Pre-Action Protocol**

*Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 855 (TCC)
This case came back before the Court several months later, prior to a stay for mediation, when the Defendant sought a costs order due to the Claimant's failure to comply with the pre-action protocol.

The claim was served in June 2006 (having been issued in February 2006), nearly two years after the last communication with the Defendant, and without any claim having been intimated to the Defendant. Mr Justice Ramsey found that there had been a serious breach of the pre-action protocol. The claim came within paragraph 6 of the pre-action protocol because there were potential limitation difficulties. Mr Justice Ramsey strongly emphasised that the Claimant should have applied to the Court under paragraph 6 on notice for directions as to the timetable in February 2006, when the claim was issued.

Applying paragraph 2.3 of the Practice Direction – Protocols, Mr Justice Ramsey found that, had the protocol been complied with, it was likely that the matter would have been resolved without recourse to court proceedings. He accepted the Defendant's submissions that the failure to comply with the pre-action protocol meant that the parties were entering into mediation with an additional issue to resolve, namely the increased costs incurred due to that non-compliance, and that the court was in as good a position as it would ever be to assess the effect of that non-compliance. The Judge held that the courts should generally deal with the cost consequences of a failure to comply with the pre-action protocol at an early stage (*Daejan Investments v Park West Club Ltd* [2004] BLR 223 applied). He awarded the Defendant 50% of its costs from service of the claim until start of the stay for mediation, and ordered that the Claimant should in any event bear 50% of its own costs from issue of the claim until start of the stay for mediation. As before, **David Friedman QC** and **Benjamin Pilling** were for the Claimant.

**Costs order made against architects' PI Insurers**

*Plymouth & South-West Co-operative Society v Architecture Structure & Management Ltd*, 111 Con LR 189
A non-party costs order was made against the professional indemnity insurers of an insolvent firm of architects on the basis that the insurers had funded and directed the architect's unsuccessful defence against a claim in professional negligence in their own interests.

The claimant, the owner of a large department store, had succeeded in a claim for professional negligence against the defendant architect in respect of a refurbishment project which went considerably over budget. HHJ Thornton QC awarded the claimant over £2 million (including interest) in respect of the overspend (a decision reported at 108 Con LR 77). At the handing down of the judgment, the defendant revealed that its professional indemnity insurance cover was limited to £2 million. Shortly afterwards, the defendant went into liquidation.

The claimant applied to join the defendant's insurers to the proceedings for the purpose of costs, and applied for a non-party costs order against the insurers under section 51 of the Supreme Court Act 1981. Applying the guidelines set out in *T.G.A. Chapman Ltd. v. Christopher* [1998] 1 W.L.R. 12, HHJ Thornton granted the order on the basis that the insurers, not the defendant, had determined that the claim would be defended and had conducted the defence in their own interests.

This decision is notable because it is rare for non-party costs orders to be made against insurers. The House of Lords has held in previous cases that such orders can only be made in exceptional circumstances. Central to the court's decision in this case was the fact that the defendant had ceased trading, and its then sole director had died, prior to the issue of the claim. In those circumstances HHJ Thornton QC accepted that the defendant had no reputation and no substantial assets to protect. **David Friedman QC** and **Lynne McCafferty** were instructed for the Claimant.

Editor: Lynne McCafferty
Lmccafferty@4pumpcourt.com