Review of recent construction related case law

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Abstract

This paper gives an insight into case law, predominately from 2005, which is of particular relevance to the construction industry. The five categories covered relate to different stages in the contractual relationship, covering the initial stages when the relationship is formed, the entering of the contract, the use of standard terms and liquidated damages clauses and finally the breakdown of a relationship after breach.

The negotiation, agreement and execution of a contract is not always straightforward. There is often a necessity for work to proceed before final agreement has been reached. This gap is often filled by a letter of intent until the contract has been executed. If a dispute arises, issues are frequently raised as to whether a contractual relationship has been formed and whether the terms of the contract are enforceable. In specific instances, the court will intervene in a contract to protect one of the parties. Statutory provisions allow this where the consumer requires protection and, in the case of liquidated damages, a court can intervene if the sum payable is deemed to be a penalty.

Keywords:

construction contract, standard terms, liquidated damages, without prejudice

WHEN DOES A CONTRACTUAL RELATIONSHIP EXIST?

Letters of intent are particularly common in the construction industry — usually between employer and contractor or contractor and subcontractor. They are often used where the employer wishes to press on with construction but contract terms have not been finalised.

The letter of intent indicates an intention or commitment to enter into a contract at some point in the future, but the nature of the letter means that the parties do not create any liability with regard to that future contract because its purpose is to facilitate the commencement of works prior to agreement of the contract.

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The effect of the letter of intent depends very much upon the intention of the parties as set out in the letter — essentially as to whether it constitutes a contract and what it covers.

A letter of intent may create an ‘if’ contract. To be an effective contract, such a letter must set out an instruction for the recipient to perform on the basis that, on completion, he will be remunerated. Acceptance of the offer is through performance of the instruction and therefore the letter must also set out the terms necessary to allow performance of the instruction.

If the intended contract is subsequently drawn up and signed, the letter of intent ceases to have effect and instead the signed contract governs the relationship between the signatories. The letter of intent cannot, of itself, create any liability regarding a later contract.

If there is a dispute, the court may find that no contract exists, due to a lack of agreement between the parties, but may still impose an obligation to pay a reasonable amount for the work that has been carried out under such an instruction.

The recent case of *Mowlem v Stena Line Ports*¹ explores the situation where a letter of intent was upheld by the court. This may be done where a failure to do so would not make commercial sense.

Stena Line wrote a series of letters of intent to Mowlem setting out their instructions concerning the construction of a new ferry terminal.

This case differs from many letter of intent cases as it was common ground between Mowlem and Stena that each of the relevant letters of intent took effect in law as an offer capable of acceptance by performance, creating an ‘if’ contract, ie where one party requests the other to carry out certain works in return for a benefit or payment. Each letter superseded the last, creating a new contract each time Mowlem undertook performance.

The 14th and final letter of 4th July 2003 confirmed Stena’s commitment to a maximum expenditure of £10 million to enable the programmed works to continue until 18th July.

In fact, Mowlem’s work carried on beyond that date and exceeded the agreed £10 million. Mowlem claimed that it was due payment of a reasonable sum for work done beyond 18th July and exceeding the £10 million limit. In addition, it claimed that Stena had waived its right and/or was estopped from relying upon the limits contained within the letter of intent. The estoppel and waiver arguments were, however, dismissed by the trial judge on the evidence provided.

With regard to the letters of intent issued, the Court held that the last letter governed the relationship whereby Stena had agreed to pay Mowlem in respect of the works, including any variations, subject to a limit of £10 million. The terms of this letter were unaffected by work done after the 18th July or work done over and above the £10 million limit.

Mowlem argued that the letter of intent only applied to work carried out up to 18th July 2003. The court considered that commercially it would not make sense if the limit set out in the letter of intent could be avoided by Mowlem carrying out more work or exceeding the financial limit.

The judge, His Honour Judge Seymour QC stated; ‘it would make no commercial sense to have a financial limit on Stena’s obligations to make payment which could be avoided by [Mowlem] . . . continuing to carry out work after 18th July 2003’.

This case highlights the reluctance of the court to interfere with commercial, contractual agreements, especially where the parties have had the opportunity to negotiate and have reached an agreement upon which one party has acted. The terms had been clearly set out in the letter, with no subsequent communication altering those terms or giving further instruction. Parties should therefore be aware of the potential for the terms of a letter of intent being found to govern the relationship. The stringency with which the court approaches letters of intent depends on the terms themselves and the individual circumstances.

The moral here is that when acting under a letter of intent, no work should be carried out unless specifically covered within its terms.

Letters of intent are most frequently used between employers and contractors — probably due to the outlay required in respect of materials and labour/subcontractors.

On a practical level, when drafting such letters of intent on your own behalf or on behalf of a client, the terms are of vital importance and this also means reviewing those terms on a regular basis throughout its duration. Changes, particularly in workscope and price, will occur which may require a new letter of intent.

Letters of intent are used infrequently in respect of relationships between professionals and employers/contractors. However, there is often a requirement to start work prior to contract — especially for architects and design engineers. Work is often commenced on the basis of a verbal agreement, or even worse, no agreement at all. This can cause its own problems, particularly when a letter of intent governs the relationship between the contractor and employer. This leaves the professional with the dual problem in interpreting its employer’s responsibilities from a letter of intent together with its own responsibilities from a verbal or incomplete agreement. It is easy to see how problems occur in such circumstances, particularly where professionals misinterpret their responsibilities, sometimes even exceeding them.

A further case where a letter of intent was upheld as creating legal relations is *Allen Wilson Shopfitters v Anthony Buckingham*² where Buckingham used a letter of intent to engage Allen Wilson to carry out works to his home (such works to residential premises being excluded from the provisions of the Housing Grants Construction & Regeneration Act 1996).

In the letter of intent, Buckingham stated, ‘. . . we are issuing a letter of intent . . . for works . . . based on the following:

1. Works to be carried out under the terms and conditions of the JCT 1998 Private Without Quantities 1998 Edition’ (which, of course, includes provision for adjudication).

A dispute arose between the parties and Allen Wilson referred the dispute to adjudication. Buckingham refused to pay an adjudication award on two grounds of lack of jurisdiction, specifically the dwelling house

exclusion in Housing Grants Construction & Regeneration Act 1996, and secondly that no contract was in existence. Allen Wilson therefore sought enforcement of the award.

His Honour Judge Coulson QC confirmed the adjudicator's jurisdiction on the grounds that the letter of intent was a contract in writing and also that it expressly incorporated the adjudication terms of the JCT contract. Had the adjudication been pursuant to the Housing Grants Construction & Regeneration Act 1996, Buckingham would have had the benefit of the dwelling exclusion.

The judge noted that the lack of preparation of a formal contract is all too common in the construction industry. A letter of intent leaves the parties in an uncertain position as to whether terms are binding which could lead to lengthy, expensive dispute resolution. This can be avoided by the drawing up and signing of a contract to set out and govern the relationship between the parties. Clearly, this is good advice but not always achievable.

This case reinforces the lessons in *Mowlem* (above), namely that if a letter of intent is necessary, it requires careful drafting to achieve the status and extent required, and particular care should be taken when wide-ranging clauses are incorporated (in this case the incorporation of the JCT contract).

WHEN DOES A CONTRACTUAL RELATIONSHIP NOT EXIST?

As stated above, the purpose of a contract is to set out the terms agreed between the parties determining the relationship between them and how that relationship will be governed. The best way of achieving this is by way of a written document signed by both parties, clearly setting out the terms.

However, commercial realities often overtake the negotiation period and performance is undertaken without a written contract. In this situation, the Court will look at the communications and actions of the parties to identify if and when a contractual relationship has been entered into. The terms of the contract are required to be sufficiently certain and complete for the agreement to be enforceable.

Offer and acceptance are the key to an agreement. However, negotiations, particularly in construction contracts, may make it difficult to determine whether a contract has been agreed and finalised. Further difficulties are caused by counter-offers which will change the terms of the negotiations and themselves require agreement by both parties before a contract can be said to have been formed. An offer cannot be accepted once it has been rejected or the subject of a counter-offer.

Such issues were considered in 2004 by the Court of Appeal in *Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd*.³

The brief facts of this case are that Sir Robert McAlpine were main contractor to Summit Healthcare for construction and refurbishment work at an existing hospital. A large part of the work, totalling £34.25 m, was for mechanical and electrical work.

The disputing parties had been in negotiation, for Drake & Scull to carry out the mechanical and electrical work, for almost a year. A price

was agreed, in principle, but the subcontract terms were not. Therefore, to proceed with the work, Sir Robert McAlpine issued a number of purchase orders to Drake & Scull who carried out such works over an 18-month period. Sir Robert McAlpine produced a formal subcontract but the terms were not consistent with those negotiated, so Drake & Scull did not sign it.

Work later ceased and Drake & Scull left the site due to a dispute over payment for the works. Sir Robert McAlpine purported to accept what it classified as a repudiatory breach by Drake & Scull of its contract to perform the whole of the works.

The Court of Appeal had to decide what Drake & Scull's obligations were and therefore what the terms of the contract were.

It found that Drake & Scull had no duty to carry out any work which exceeded the scope of the orders. The subcontract produced by Sir Robert McAlpine had been significantly different in terms to that which was being negotiated between the parties. There was no substantial agreement.

Drake & Scull had agreed to carry out the terms of the various orders issued by Sir Robert McAlpine but no more. That was the full extent of the agreement.

For obvious reasons, huge practical problems are created, where a subcontractor, and particularly a major subcontractor, does not carry out all its intended work-scope. Not only is there the issue of engaging a new subcontractor, but also the problematic issues of interfacing and guarantees. This is an obvious potential problem with work carried out under a letter of intent when parties subsequently cannot agree on the terms of the contract or, as in this case, where part orders were issued from time to time in advance of contract.

The pertinence of comments made by His Honour Judge Coulson in *Allen Wilson Shopfitters* (above) with regard to the need for certainty in the form of a contract from the commencement of work becomes even more apparent in this case. Furthermore, in both of these cases it is interesting to note that it was the employer who fell foul of its own need for the contractor to progress works on site without having the contract in place. The lesson to be learnt here is to be aware of the terms of the contract and not to exceed them. It is common to find, when a dispute arises, that one or both of the parties either do not have a copy of the terms of the contract or that they are not clear as to what the terms are. In such circumstances, it is unsurprising that disputes arise. It also makes resolving disputes more problematic because the terms need to be first ascertained.

WHEN THE COURTS WILL INTERVENE IN STANDARD TERMS OF TRADING

Many businesses use standard contract terms, which can be those of their company or industry-wide terms. The advantages are:

- avoidance of the need to draft and negotiate each individual contract;
- familiarity of the terms;
- advantageous terms.

For obvious reasons, standard terms will be drafted to benefit the company issuing them. There are, therefore, restraints upon what can be imposed, to prevent certain liabilities being contracted out of and thereby leaving the other party with no form of protection. These restraints are particularly stringent in relation to consumers. The Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 are the main statutory controls.

Standard terms can cause problems to the issuer if they are not carefully drafted. In the 2005 case of *Munkenbeck & Marshall v Harold*,⁴ Mr Harold employed Munkenbeck and Marshall, a firm of architects, but then failed to pay their fees. The architects issued proceedings to recover their fees. This fee claim was settled prior to trial, but then the parties could not agree the architects' claim for time spent on the proceedings. Therefore satellite litigation arose to determine this issue.

Munkenbeck and Marshall's letter of appointment had referred to the Royal Institute of British Architect's Standard Form of Appointment 1999 as defining the terms and conditions of the agreement. The architects relied upon clause 9.6 which obliges the client to indemnify the architect for any time spent on litigation where the architect's claim had been successful.

However, crucially, at the time the contract was made, the architects did not supply Mr Harold with a copy of Standard Form of Appointment 1999 and did not draw his attention to what the court decided were onerous and unusual clauses.

The Unfair Terms in Consumer Contracts Regulations 1999 applied as Mr Harold was a consumer. Regulation 5 stipulates that where a contract term has not been individually negotiated, the term will be regarded as unfair where, 'contrary to good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.' A standard term is usually an indication of a lack of negotiation as the consumer has not had the opportunity to influence or negotiate the term.

Regulation 6 states that such a term is to be judged regarding fairness at the time the contract was concluded, with reference to all the relevant circumstances and to all the other terms of the contract.

Regulation 8 provides that if a term is classified as unfair, it is unenforceable.

In addition, the court held that clause 9.6 was unusual and onerous and as such should have been drawn to the attention of Mr Harold.

Judge Richard Havery QC considered that there was force in the architects' arguments that the provisions were to protect them from unfair treatment by the client. He also noted that Mr Harold had managed to negotiate a reduction in the architects' fees.

However, the fact that there was no mirror agreement for the architect to pay a successful client for time spent in connection with the litigation was an indication of unfairness. In addition, the imbalance, in the judge's view, was to the detriment of the consumer and this led to the finding that the term was unfair and not enforceable.

A number of lessons can be learnt from this case. The first is that standard terms require careful drafting so that account is taken for the likely recipient. Very often businesses have a specialist or niche clientele and regard should be had to this in drafting.

Regard should also be had to the constraints enforced by Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. In *Munkenbeck & Marshall* a standard term was unenforceable despite the fact it was prepared and issued by the Royal Institute of Architects and that it is an industry standard for the terms of appointment of architects. Bear in mind, in the event of a dispute, that the court can intervene in the construction of a contract, particularly where standard terms and conditions apply. In some cases it may be advisable to adopt a more flexible approach to settlement.

Any unusual or unreasonable terms require a greater degree of notice to be given, especially in relation to a consumer. Ensure, as a minimum, that you can show that a copy of all terms and conditions have been issued. Consider putting onerous terms in bold or drawing attention to them. This may result in negotiation at contract stage but certainty with less beneficial terms is better than uncertainty resulting in dispute. In any event, standard terms and conditions are rarely queried by the recipient at contract stage.

Finally, there is the commercial risk element because if you want the cost and time benefits of standard terms you must also accept the disadvantage of not having a 'tailor made' contract — there will be occasions, as in *Munkenbeck*, where a particular clause is simply not suitable to a particular situation.

PENALTY CLAUSE OR VALID LIQUIDATED DAMAGES?

Liquidated damages are a fixed, agreed amount stipulated in the contract payable for breach of contract. In a building contract, the typical term would provide that if the contractor fails to complete by the stipulated date, he is *prima facie* liable to pay liquidated damages at the rate set by the contract until his obligations have been fulfilled.

A sum for liquidated damages is common in a construction contract. The sum is usually negotiated between the parties prior to the contract being signed. However, care should be taken to ensure the liquidated damages figure is a genuine pre-estimate of loss. The Court will not enforce liquidated damages which it deems to be a penalty to the party in breach.

The description of the term in the contract as 'liquidated damages' or as a 'penalty' is not conclusive to its status and the court will look behind the description to ascertain the reality of the sum claimed. For example, a fixed sum for a variety of breaches of differing importance would be a penalty. In addition, it should be noted that the reasonableness of the term will be judged as at the time that the contract was concluded and not at the time the breach occurred.

The recent case of *Alfred McAlpine Capital Projects Ltd v Tilebox Limited*⁵ reinforces the necessity of a rationale to justify a formula used to calculate a liquidated damages figure.

In this case, Tilebox purchased a lease of premises with a view to developing it for use as headquarters by a substantial corporation. Tilebox entered into a development funding agreement with a third party, Standard Life, whereby they provided finance, a management fee and a development completion payment for Tilebox on completion, (set to decrease incrementally if completion was delayed). In return, Standard Life was given a long lease on the development.

McAlpine was engaged as the main contractor. The contract provided for liquidated and ascertained damages in case of delay of £45,000 per week to completion where the time had not been extended. This figure had been negotiated between the parties.

The completion of the works was severely delayed, so much so that the development completion payment was non-existent.

McAlpine applied for a declaration that the liquidated damages clause was a penalty and as such, unenforceable.

Having reviewed the previous case law, the Judge, Mr Justice Jackson, provided a four-point summary in relation to this case, as follows:

1. The case law indicates two strands: first whether the difference between the contractual damages and actual damages likely to be suffered is unconscionable or extravagant; and second whether the contractual damages were reasonable. The Judge reconciled the two strands on the grounds that a pre-estimate of damages can be reasonable though not necessarily correct and that to be unreasonable there must be a 'substantial discrepancy'.
2. The examination of the clause does not turn on honesty or genuineness of the pre-estimate but is primarily an objective test. The court will, however, have regard to the parties' thought process at contract stage.
3. The Court is keen to uphold contractual terms, especially those in commercial contracts, where parties have had the opportunity to negotiate and agree terms because it would not make commercial sense to discard these agreements as soon as a dispute arises.
4. There needs to be 'a very wide gulf' between the liquidated damages and the actual damage before the clause will be held to be a penalty. Indeed, the Judge commented that out of the authorities cited, there were only four cases where the clause had been struck out as a penalty, and in each of these cases there had been 'a very wide gulf.'

McAlpine highlights that it is not enough simply to choose a figure without evidence to support it. The Court needs to be persuaded that the pre-estimate is genuine. In practice, if a figure can be justified, it is much more likely to be upheld as a genuine pre-estimate of loss.

The court found that the development funding agreement did require Tilebox to secure completion of the works pursuant to the terms of the building contract with McAlpine and that a reduction in the development completion payment would result as a result of failure to achieve the completion dates stipulated in the building contract. Other losses that Tilebox could have anticipated in the event of late completion of the

building contract were their own direct losses and damages due to Standard Life.

The court carried out a detailed examination as to the value that Tilebox would have assessed these losses at, at the time of entry into the building contract and found that on one analysis the figure was more than the liquidated damages figure and on another analysis that it was less than the liquidated damages figure. However, with regard to the second analysis, the court went on to find that it was still not a penalty because the liquidated damages figure was at the very top of the range of possible losses and the gap between the two figures was not wide enough to warrant striking out the liquidated damages clause.

It is common to find that no calculation has been carried out prior to inserting the liquidated damages figure in the contract. This may not cause a problem, particularly because the courts are becoming less and less inclined to interfere with a liquidated damages clause entered into by contracting parties. However, contracts are all about setting out limits and reducing/defining risks. It is always wise therefore to err on the side of caution and calculate likely delay damages at the time of contracting. Such a calculation should then be retained on file as justification for the liquidated damages figure and may well avert an allegation of penalty. Even if it does not, such calculation will be of great assistance to the court in determining whether or not a clause is a penalty.

An additional benefit of carrying out such a calculation at contract stage is that it may well justify a higher liquidated damages figure inserted into the contract.

THE MEANING OF WITHOUT PREJUDICE

If there has been a dispute, it would be common for parties to communicate with each other regarding this. To resolve a dispute, it may be necessary to take a commercial view and try to compromise a claim.

‘Without prejudice’ is the phrase used to protect such negotiations between disputants from disclosure to the court.

The reasoning behind the without prejudice rule is that public policy discourages the resolution of disputes through litigation, preferring this as a last resort after other forms of dispute resolution have failed. Early settlement is the aim to avoid spending the time and money required to proceed with litigation. The rule encourages parties to be open about their situation while at the same time reassuring them that if negotiations are unsuccessful, the communication is protected and cannot be used against them in litigation.

There is a general misconception that using the phrase ‘without prejudice’ in correspondence, documents or discussions will automatically protect such correspondence, but this is not the case. Not all communications between parties are privileged. To fall into the protected category, the communication has to be a negotiation ‘genuinely aimed at settlement’.⁶

Mr Justice Laddie reviewed the principles in 2004 in *Schering Corporation v Cipla Ltd & Another*.⁷

The facts of this case are that in June 2004, Cipla sent a letter to the Schering Corporation marked 'without prejudice' about a product they wished to launch in the UK. Cipla wanted Schering to know that it was aware of Schering's patent for the product but believed it to be invalid. Cipla wanted to avoid litigation over the patent, and instead wanted to attempt to reach a commercial solution with Schering. The letter gave Schering three weeks in which to respond before Cipla would proceed to seek revocation of the patent.

Schering did not respond directly to the letter but instead issued infringement proceedings on Cipla, who, in turn, applied to strike out the proceedings.

The issue addressed by the court was simply a question of whether or not the letter was privileged. If it was, the action would be struck out as Schering would have nothing to support its claim.

In its conclusion, the Court led a brief review of case law, beginning with *Standrin v Yenton Minster Holmes Ltd*⁸ and quoting Lord Justice Lloyd as follows:

'The principle to be derived from these authorities, if it can be called a principle, is that the opening shot in negotiations may well be subject to privilege where, for example, a person puts forward a claim and in the same breath offers to take something less in settlement . . . But where the opening shot is an assertion of a person's claim and nothing more than that, then prima facie, it is not protected.'

Mr Justice Laddie then went on to note that the rule is important because of the public policy aspect, namely the need to encourage and facilitate negotiation and compromise, and also because of implied agreement. In addition, he explained that it covers not only the document initially setting out any offer, but also any subsequent negotiations relating to that offer.

The Court also highlighted the importance of considering all the circumstances of the communication, for example, looking at the intentions of the author as well as how it would be read by the reasonable person, to determine whether it is a bona fide attempt to be part of or to promote negotiations.

A document simply marked 'without prejudice' will not guarantee its privilege, but will give some indication of the author's intention as well as, in many cases, alerting the recipient to the author's intentions. Such a marking will not prevent the court from looking beyond this and to the actual content of the letter and the intentions of its author.

Cipla's letter was held to be an invitation to negotiate, emphasised by the without prejudice heading and the reference to avoiding confrontation if there was 'an alternative commercial solution acceptable to both parties'. The cumulative effect of these factors led to the court upholding the privilege to the letter.

The Judge used the phrase 'negotiating documents' throughout the judgment and this seems to be a good test. Essentially, if a document is a 'negotiating document' then it is properly without prejudice. If it is not a negotiating document then it is not without prejudice.

It is always wise to err on the side of caution as nothing can be lost by the use of the phrase 'without prejudice'.

At the same time, however, care needs to be taken in the drafting of such a letter. For example, beware of making admissions or concessions. For a communication to be privileged it must contain an offer/negotiation. An admission or a part concession will not be privileged without an element of negotiation to resolve or partially resolve a dispute. From time to time one sees letters admitting part of a claim and denying the remainder. Whether or not headed 'without prejudice', such letters are not, generally, privileged and the admission is binding.

Care should be taken before disclosing a without prejudice communication to a judge, arbitrator or adjudicator. This means that all correspondence (both marked 'without prejudice' and not) needs to be checked to ensure that no communication that is properly without prejudice (whether so marked or not) is disclosed. The risk in disclosing without prejudice correspondence is that the tribunal will consider it has been prejudiced and therefore refuse to hear the case with the resulting costs of appointing a new tribunal.

One further point to note, is that a without prejudice communication loses its privilege making it disclosable (to judge, arbitrator etc) as a binding agreement if the offer contained therein is accepted.

CONCLUSION

These cases show that the courts are particularly reluctant to interfere in agreements reached between commercial organisations. However, the court will analyse the documentation to determine what the parties have and have not agreed — this can involve extensive evidence and can therefore be time consuming and costly. There are a number of steps which avoid this.

Prior to agreement, all terms should be reviewed and carefully considered. Do not negotiate if the terms are not suitable and, if in any doubt, take advice because a subsequent dispute can seriously reduce any profit on a project.

When considering commencing work prior to having a contract in place, first consider whether such a course of action is really necessary. If it is, ensure that the terms of 'early commencement' are fully covered in writing, particularly scope of work, price, timescale and programme. Those terms should be regularly reviewed while work is ongoing to ensure that the terms are not exceeded.

It is extremely common within the construction industry to find that work has started before any contract regulating that work has been finalised. This has the potential to cause costly future problems. Being aware of this is a valuable tool in itself. Contemporaneous documentation is crucial to that process and so, therefore, is a good system of document control and record keeping. Very often documentation is lacking from the early stages of a project, sometimes because parties can see no possibility of a dispute arising, or alternatively that religiously written records may be seen as sign of lack of confidence in the relationship. However, producing and retaining notes, minutes and correspondence from the outset of the project sets a standard and should reduce the risk of misunderstanding and dispute.

Contemporaneous documentation is equally crucial to show the logic behind sums in liquidated damages clauses in the event that one party claims the clause is a penalty. Having such documentation may avoid a dispute, but if it does not, it is strong evidence as to the reasonableness of the sum.

In all cases, it is crucial that parties have a copy of the contract or terms that they are working to. The contract should be referred to and consulted throughout the project — not locked away in a drawer somewhere. It does, after all, govern the works.

Generally, the court will only intervene in contract terms in extreme circumstances and in all of the cases discussed above (with the exception of *Munkenbeck & Marshall v Harold*) the court upheld what it determined had been the agreement. For this reason the importance of knowing the contract cannot be stressed enough.

Disclaimer

This article is designed to alert professionals. It cannot nor is it designed to replace the need for advice on specific issues or circumstance.

Notes

- 1 *Building Law Monthly*, Vol. 22, No. 2, 2005; High Court of England & Wales (Technology & Construction Court), 2004, at page 2206.
- 2 High Court of England & Wales (Technology & Construction Court), 2005, at page 1165.
- 3 High Court of England & Wales (Technology & Construction Court), 2004, at page 1017.
- 4 Technology & Construction Court, 17 March 2005, reported on *Lawtel* (www.lawtel.com, requires subscription); High Court of England & Wales (Technology & Construction Court), 2005, at page 356.
- 5 High Court of England & Wales (Technology & Construction Court), 2005, at page 281.
- 6 Per Lord Griffiths in *Rush & Tompkins v Greater London Council* [1989], House of Lords, Appeal Cases (Law Reports) p1280, at page 1299.
- 7 High Court of England & Wales (Chancery Division) 2004, at page 2587.
- 8 Reported on *Lawtel* (www.lawtel.com) on 22nd July 1991 and in *The Times*, 22nd July 1991.