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January

On **1 January**, **new regulations on business names**, which had been rushed through parliament over the Christmas break, came into effect. The requirements for companies and LLP's to display their corporate details (i.e. full registered name, registration number, place of registration and registered office address) were now ***extended to emails and websites***.

Adjudication of disputes in the construction industry pursuant to the Housing Grants Construction and Regeneration Act 1996 continued to give rise to legal challenges. On **4 January**, in the case of **Humes Building Contracts Ltd v Charlotte Homes (Surrey) Ltd**, the employer to a building contract had not served a notice of intention to withhold a payment. The adjudicator wrongly treated this failure as depriving the employer of its right to make a counterclaim for defective work. An error on the part of the adjudicator does not of itself justify not complying with the adjudicator's decision. However, the parties had not had an opportunity to address the adjudicator on this point, and so the court held that ***the adjudicator's erroneous view amounted to a breach of natural justice*** and his decision could not be enforced.

On **19 January**, in the case of **Bennett (Electrical) Services Ltd v Inviron Ltd**, the court held that ***the adjudicator did not have jurisdiction, because there was no contract*** between the parties. The letter of intent did not give rise to a contract. Even if it had, not enough of the contract would have been contained or evidenced in writing to comply with the Act.

The requirement that the contract must be in writing in order to be covered by the Act is now being reviewed and may be removed under new legislation amending the Act.

On the same day, in the case of **Epping Electrical Co Ltd v Briggs & Forrester (Plumbing Services) Ltd**, the court held that an ***adjudicator's decision was invalid because it had not been reached in time*** – time had been extended subject to a condition that was not complied with. There have been conflicting decisions from the courts on whether the time limits for adjudicator's decisions are mandatory. The judge in this case took the view that ***the time limits are indeed mandatory, so that a decision reached out of time, by however short a time, will automatically be invalid.***

If this is correct, the Model Adjudication Procedure 3rd edition published by the Construction Industry Council, which allows for a decision reached out of time to be valid if no replacement adjudicator has been appointed, is inconsistent with the Act. If the provisions for adjudication in a contract are inconsistent with the Act, the statutory scheme for adjudication will apply instead. However, the Construction Industry Council has addressed this in their 4th edition, which is now available.

On **30 January**, in the case of **Lead Technical Services Ltd v CMS Medical Ltd**, involving a claim for engineer's fees, the Court of Appeal overruled a judge's decision giving summary judgment to enforce an adjudicator's decision, because there was evidence showing ***a real prospect that the adjudicator did not have jurisdiction***. The Court of Appeal has usually been reluctant to uphold challenges to adjudicator's decisions, but did so in this case.

Another issue that continued to occupy the time of the courts was that of ***limitation*** – ***whether an action has been commenced within the relevant statutory period*** of limitation. The length of the period of limitation is straightforward – usually, 6 years or 3 years. The problem is nearly always – ***when does the period start running***?

In the case of a claim for personal injuries, the period of time (3 years) runs from when the claimant has the requisite degree of knowledge about the injury in question. This includes ***knowledge that the injury was significant***. In the case of **McCoubrey v Ministry of Defence**, a soldier sued the MOD for hearing loss caused by a thunderflash during a training exercise in 1993. An ENT consultant recorded early in 1994 that he was suffering marked sensorineural hearing loss. However, for him, his injury did not assume real significance until it began to affect his military career, which was not until 2002. He issued proceedings in 2004.

The Court of Appeal held, on **24 January**, that the proceedings had been commenced out of time. The Court observed that the law as previously understood had changed. ***The test for determining the significance of the injury in question is objective and concerns the injury itself, not its possible consequences***, let alone how the claimant perceived those consequences. The subjective attitude and characteristics of the claimant could not be taken into account. On this basis, the claimant clearly had the relevant knowledge by early 1994 at the latest.

However, in a claim for personal injuries, the court has discretion to override the limitation period. The Court of Appeal did not feel able to decide on this question itself and referred it back to the judge below.

February

On **1 February**, in the case of **Aveat Heating Ltd v Jerram Falkus Construction Ltd**, the question again arose of ***whether the adjudicator's decision had been reached in time***. The same judge as in the Epping case on 19 January again held that the time limit for the adjudicator to reach a decision was mandatory. Thus section 38A of the GC/Works sub-contract conditions, on which the parties had contracted, is non-compliant and the statutory scheme applied to this dispute. The result was that the adjudicator's award of costs could not be enforced, because the statutory scheme does not give the adjudicator power to award costs.

Otherwise the adjudicator's decision was enforceable. The fact that the notice of referral did not comply with the statutory scheme did not matter; the relevant provisions of the scheme are directory only. The adjudicator's decision was reached in time: ***time runs from the date of the referral of the dispute to the adjudicator and this only takes place on receipt of the notice of referral by the adjudicator*** (not on its dispatch to the adjudicator, as had been argued).

On the same day, in the case of **HG Construction Ltd v Ashwell Homes (East Anglia) Ltd**, the court held that an adjudicator's decision could not be enforced because the adjudicator had adjudicated on an issue (concerning the validity of a contractual provision for liquidated damages) that had already been decided in an earlier adjudication. The arguments may have been new but the underlying issue was the same.

On **7 February**, in the case of **Intel Incorporation (UK) Ltd v Daw**, there was another warning for employers about the effect of stress, where a Company was held ***liable to an employee who had suffered a breakdown*** caused by overwork. The court held that there had been management failure in the form of confused reporting lines, insufficient assistance for the employee and frequent representations from the employee not being acted upon. It was not enough merely to have stress counsellors available and the fact that the employee did not give up her job did not obviate the duty of care owed to her. The employee was awarded £134,000 in damages.

On **15 February**, the case of **Chattan Developments Ltd v Reigill Civil Engineering Contractors Ltd** concerned a situation in a building contract where the right to liquidated damages had been excluded by the contract. The question was – could the employer claim unliquidated damages for late completion? The answer in this case was that they could not.

On **21 February**, in the case of **Pearson Education Ltd v Charter Partnership Ltd**, ***architects*** who designed the rainwater system of a building in the late 1980s were held ***liable to subsequent occupiers*** of the building for flood damage that occurred in 2002. An earlier flood had occurred in 1994 as a result of the same defect in the architects' design, when the building was in different occupation, and ***it was argued by the architects that the occurrence of this earlier flood should cancel any duty of care*** that the architects may owe to the new occupiers in the event of the later flood. The Court of Appeal ***rejected this argument***.

In doing so, the court shed doubt on a principle stated in a similar case a few years ago - **Baxall Securities Ltd v Sheard Walshaw Partnership** – that an architect's duty of care in respect of a design defect would come to an end in the event of a survey of the building taking place that should have disclosed the defect in question, whether or not it in fact disclosed the defect, or in the event of circumstances when one would reasonably expect such a survey to take place - for example, a change of ownership of the building – whether or not such a survey in fact took place. The point may eventually have to be decided by the House of Lords.

It is worth pointing out that the case was concerned with ***physical damage, not with economic loss***, even though the physical damage caused serious financial losses. The duty of care owed by the architects to the subsequent occupiers was thus a duty in respect of physical damage. It is generally ***easier to show that a duty of care exists in respect of physical damage than in respect of economic loss***, as that expression is understood in this context. Economic loss would include the cost of remedying the design defect.

March

In March, ***cost-capping*** was the subject of two cases. The ***costs of litigation*** continue to cause concern, especially when they seem to be out of proportion to the amounts at stake in the litigation. Courts can order costs to be assessed at any stage and parties to litigation usually have to provide estimates of the costs they have incurred and expect to incur. Some judges have been making orders ***putting a cap on the costs*** that either party would be able to recover from the other on assessment of costs at the end of the action.

On **5 March**, in the case of **Kelly v Fannon**, a district judge, concerned about costs that had already been incurred, had made a costs-capping order that would cover all costs in the case, past and future. On appeal, it was held that this could not be done and that cost-capping orders could only cover future costs.

On **13 March**, in the case of **Willis v Nicolson**, the Court of Appeal made some general ***observations on cost-capping orders and on costs in civil litigation*** proceedings generally. The problem was illustrated in that case, where the Claimant's estimate of total costs (including those already incurred) had been £200,000 to £250,000 on 19 October 2005, on 19 June 2006 it had risen to £564,189, and on 31 July 2006 it had risen to £959,342.

The court noted that there had been ***conflicting opinions among judges about the desirability of costs-capping orders,*** with first instance judges tending to be rather cautious, while more enthusiastic comments about such orders had been made by some court of appeal judges. The court said that this difference of opinion was in need of resolution but did not feel able to resolve it.

The court made some interesting comments on the high cost of civil litigation, saying that the problem in essence was that the process of assessment of costs by the court accepts the market rates charged by the legal professions. As the court put it:

One element in the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged

by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work.

It was apparently hoped, when the new Civil Procedure Rules were brought in, as part of the Woolf reforms, that this would change. But, in the event, nothing changed, because the focus in limiting costs, or achieving proportionality, was placed on enquiring whether it was necessary to incur particular items of cost. This means that the focus of cost limitation is on the way in which the professionals intend to conduct the case. To limit the way in which professionals intend to conduct the case is, as the court put it, a delicate matter, but this would be the likely effect of putting a cap on costs. Perhaps not surprisingly, the court felt that further guidance on this issue should come from the Civil Procedure Rules committee.

One aspect of the Woolf reforms that is believed to have had a beneficial effect is the requirement on the prospective parties to litigation to take part in a ***pre-action protocol***, whereby, before proceedings are commenced, the parties exchange information about their respective cases and then attend a meeting. This often leads to the claim being settled without the need of proceedings, or at least to some issues being resolved. On **23 March**, in the case of **Church v Stent Foundations and anor**, a costs order was made against the claimant in a construction case who had ***commenced proceedings without first complying with the pre-action protocol*** for construction and engineering disputes. The judge held that this non-compliance was a serious matter and that the costs consequences should be dealt with at an early stage in the action, not left till the end of the action. Of course, costs would have been incurred anyway in complying with the procedure, but the court held that these costs would have been greater when incurred in the higher-cost atmosphere of court proceedings than they would have been in the lower-cost atmosphere of pre-action protocol procedure. The court ordered the Claimant to pay 50% of the Defendant's costs to date and to bear 50% of their own costs to date, whatever the eventual outcome of the case.

Towards the end of March, there were two significant cases, concerning ***architects and engineers*** respectively, both concerned with liability of these professionals for the shortcomings of contractors.

On **28 March**, judgment was given in the case of **McGlinn v Waltham Contractors Ltd & Ors**, which involved a claim against architects and others arising out of an unhappy building project.

The judge made a number of interesting comments on ***architects' inspection duties*** The case was certainly a classic example of what architects fear – not only was the contractor in administration, leaving only the architect and other professionals to be sued; the works had also come to a halt before handover, at which stage a snagging list would have been prepared and many of the defects thereafter put right by the contractors. Would the architects be liable for not having had these sort of defects rectified earlier?

On inspections generally, the judge said that the ***frequency and duration of inspections*** should be tailored to the nature of the works going on at site, so that all the important elements of the works are inspected at the appropriate stages. In particular, it is not good enough for an inspecting professional religiously to carry out an inspection of the work either before or after fortnightly or monthly site meetings and not otherwise.

As for leaving ***defects to be rectified under the snagging process***, the judge drew a distinction between temporary disconformities, where the work has not yet been finished, and defective work which has been completed. In the latter case, the inspecting professional should usually require the work to be rectified as the works progress, and not wait for the snagging process.

The judge also had some comments on ***what the inspecting professional should do*** when he notices a defect. Generally, it is not sufficient simply to point it out verbally to the contractor, or even to write to the contractor, without any follow-up (if this is necessary). He must take all possible steps to ensure that the defective item is replaced.

On **30 March**, in the case of **Hart Investments Ltd v Fidler**, a structural engineer was held liable for a collapse during excavation that occurred due to the contractors failing to provide temporary underpinning. The judge held that the ***engineer should have warned the contractor of the need for temporary support*** and did not do so. He held that the engineer was thus liable to the owner for breach of contract for the losses that occurred.

He also considered whether, if he was wrong in holding that the engineer owed a contractual duty to the owner in respect of this incident, the engineer owed a duty in tort to the client covering the loss that had occurred, which the judge held was, for this purpose, economic loss. The judge held that the engineer did owe such a duty.

April

On **4 April**, in the case of **Kosmar Villa Holidays Plc v Trustees of Syndicate 1243**, Insurers who could have avoided a claim under a liability policy due to late notification were held to have elected to accept it. The case is a ***salutary warning to insurers*** who do not make it clear at the appropriate time, in relation to a claim that they may not be liable to cover, that they ***reserve their position***.

In the event, on 23 October, the claim against the insured, for which the insurers had been held to be on cover, was overturned in the court of appeal (see below).

The **new CDM regulations** came into force on **6 April 2007**. They replaced the previous regulations (i.e. the Construction (Design and Management) Regulations 1994). They also replaced the Construction (Health, Safety and Welfare) Regulations 1996 (which are in effect incorporated into the new CDM regulations).

In the new regulations, the emphasis is on ***the duty holders and the duties of each duty holder*** on any construction project. Many of these duties are new, or were not expressly stated under the old regulations.

The ***duties of designers*** are expanded to avoid foreseeable risks to the health and safety of people using a structure designed as a workplace, in addition to people carrying out construction work, or liable to be affected by construction work, or carrying out cleaning or maintenance work.

A client (which means a client acting in the course or furtherance of a business) now has more duties than under the old regulations. The planning supervisor is replaced by the CDM co-ordinator, with some variations to the previous duties of planning supervisor. There are express duties on all duty holders concerning co-ordination and co-operation.

There is a new approved code of practice to accompany the regulations.

Also on **6 April**, **new civil procedure rules** came into effect, affecting ***pre-action admissions*** and ***offers to settle under Part 36*** of the Civil Procedure Rules.

As regards admissions, the effect is to give admissions made before proceedings during the pre-action protocol procedure equal weight with those made during proceedings, by having similar rules for how such admissions may be withdrawn (if at all).

As for Part 36 offers, there is ***now no requirement for defendants to accompany such offers with a payment into court***, and there is a new regime for offers to settle. Once an offer is accepted, however, the amount must be paid into court within 14 days.

On **20 April**, in the case of **Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners International Ltd**, consulting engineers whose negligence had been held to have caused a

foundation failure during the construction of a power station were held not liable for any damages. The foundation failure was not a significant cause of subsequent delay, and the rectification costs were covered by moneys from project insurance.

Some of the damages claimed were for loss suffered by the claimant's sister company, which had had no contract with the engineers, and not by the claimant, with whom the engineers had contracted. However, the court held, on the basis of recent authority, that the claimant would have been able to claim those damages on behalf of the sister company.

On **25 April**, in the case of **Melville Dundas Ltd and Others v George Wimpey UK Ltd & Others**, the House of Lords delivered a judgment on the effect of failing to serve a ***notice of withholding payment*** under section 111 (1) of the Housing Grants, Construction and Regeneration Act on ***clause 27 of the JCT standard form*** of building contract 1998. The Employer had failed to serve, within the prescribed period, a notice of withholding payment in respect of an interim payment that was due, and so, in accordance with the Act, the full amount of the payment had to be paid. The Employer had then terminated the contract.

Under clause 27, the effect of the termination is that all further payments due to the contractor cease to be payable. The Contractor argued that clause 27 does not apply to payments that are already due; alternatively, if it does, it is inconsistent with section 111(1) of the Act and cannot apply.

The House of Lords held that clause 27 of the JCT contract does apply to payments that are already due but that section 111(1) of the Act does not apply to a situation where the Employer could not have known within the prescribed period that there would be grounds for withholding payment. This was the case here because the Employer could not have realised that it had ground for withholding payment until receivers were appointed for the Contractor, which was after the end of the period for serving the notice. Therefore, the Employer, having determined the contractor's employment under the contract, could rely on clause 27 and did not have to make the payment in question.

The decision has excited much comment and caused fear that employers will be encouraged to determine the employment of contractors under the JCT contract as a way of avoiding payment of interim sums in respect of which they have not served a notice of withholding payment; in short, that the decision drives a coach and horses through an important part of the 1996 Act.

However, these fears may be considerably allayed by the approach taken in a case later in the year (Pearce Design International v Mark Johnston, on 17 July – see below).

May

The effect of failing to serve a ***notice of withholding payment*** came up again at the beginning of May in a ***contract with a residential owner***. The Housing Grants Construction and Regeneration Act does not apply to such contracts. However, because provisions that comply with the Act have now been written into all the standard forms of contract, it is likely that such provisions will apply to many domestic contracts anyway.

Thus on **4 May**, in the case of **Domsalla v Dyason**, the court was concerned with the provisions for serving a notice of withholding payment in the JCT Minor Building Works form of contract, which applied to the building contract with a residential owner. A dispute following failure by the owner to serve such a notice had been referred to adjudication, in accordance with the JCT contract.

The court held that the provisions in the contract concerning the effect of failing to serve a notice of withholding payment were ***unfair under the Unfair Terms in Consumer Contracts Regulations 1999***, which apply to contracts where the client is not contracting in the course of a business. This

rendered the adjudicator's decision unfair and unenforceable on summary judgment, because the application of these provisions had shut out the owner's defences of abatement and set-off.

The court also said that the doctrine of unreviewable error – i.e. that adjudicators' decisions can not be challenged on the ground of an error by the adjudicator – does not apply to a contract which is outside the scope of the Act.

Whitehead & Anor v Searle & Ors, the judgment in which was given on **9 May**, was a case of ***solicitors' negligence***. The solicitors were liable for ***not prosecuting a claim with sufficient expedition***.

The argument was put forward that there could only be a case against the solicitors for delay if the delay had created a situation where the claim could be struck out for want of prosecution. However, the court rejected that argument. The solicitors' client was a mother with a claim of alleged negligence against a health authority following the birth of her child with spina bifida. The mother committed suicide before her claim came to trial or was settled. Her claim for the future costs of caring for her child died with her. The court held that, if the solicitors had not been negligent in prosecuting the claim, the claim would have been resolved, by trial or settlement, before her death and the award to the mother would then have included future care costs.

The court also found that the solicitors and the barrister involved were negligent in eventually settling the claim, on behalf of the mother's estate, ***at an undervalue***. The court considered that the solicitor and barrister had been too much influenced by the threat of the claim being struck out for want of prosecution (a threat which by now had materialised) and also that insufficiently informed consent had not been obtained from those representing the estate. The situation illustrates the danger that solicitors face in continuing to act in litigation (and the same would apply in any other sort of matter) where problems may have been created by their own default, without at the least ensuring that the client has independent advice.

Earl of Malmesbury & Ors v Strutt & Parker & Ors, judgment in which was given on **11 May**, was a case of ***surveyors' negligence***. It was held that surveyors advising landowners leasing out car parking space should have negotiated a turnover rent. The court held, however, that the correct basis for damages was ***diminution of the value of the reversion*** at the time of the transaction, not the (potentially greater) difference in future earnings that would have been obtained and those likely now to be obtained.

On **17 May**, the dispute in the case of **Mast Electrical Services v Kendall Cross Holdings Ltd** was held to be another dispute that ***could not be referred to adjudication*** because of uncertainty over what agreements, if any, had been reached for the carrying out of certain electrical work, in particular over what rates had been agreed, and the fact that the documents relied upon did not, in any event, contain all the main terms of the contract.

The new proposals to bring ***oral or partly oral contracts*** within the scope of the Act will not enable disputes to be referred to adjudication where there was no contract at all. In many cases, where there is no contract in writing, there are often problems in proving that there was a contract at all, as this case illustrates.

On **23 May**, in the case of **Mott MacDonald v London & Regional Properties Ltd**, yet again an ***adjudicator's decision*** was held not to be enforceable because the ***contract between the parties had not been in writing*** or sufficiently evidenced in writing. The adjudicator's erroneous view that the letter of intent applied to the relations between the parties was not binding because he did not have jurisdiction. The decision was also unenforceable because the adjudicator imposed a condition that the referring party pay his fees before he releases his decision, thereby (as it was held) failing to act impartially, and he was in breach of the rule requiring him to release his decision as soon as it was reached.

The case of **Framlington Group and anor v Barnetson**, on **24 May**, was concerned with the question of ***when negotiations are to be treated as being "without prejudice"*** and therefore protected from disclosure in legal proceedings. It is now well settled that merely stating a communication to be "without prejudice", or not doing so, are not likely to resolve the matter. What matters is the actual purpose and substance of the communication. The court held in this case that negotiations may be without prejudice even though there is no litigation or even a threat of litigation, if the parties might reasonably contemplate that ***there may be litigation if they do not agree***. Temporal conditions in relation to litigation – i.e. how near or far away in time litigation may be - are irrelevant.

On **31 May**, in the case of **AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd**, the ***effect of an adjudicator's decision being late*** was again considered. The judge (not the same one as before) also held that an adjudicator's decision reached outside the statutory period would be invalid. However, the adjudicator's decision was held not to be late. The adjudicator's time can be extended with the agreement of the parties. The adjudicator requested an extension of time and one party failed to respond. The judge held that this ***failure to respond*** to the adjudicator's request for an extension of time ***amounted to acquiescence***; alternatively, the party in question was estopped from contending that the decision was out of time.

June

On **21 June**, in the case of **Reinwood Ltd v L Brown & Sons Ltd**, concerning a dispute under a JCT contract, a notice of intention to ***deduct liquidated and ascertained damages***, following a notice of non-completion, was held not to be invalidated when the notice of non-completion was later cancelled by the grant of an extension of time. The Employer was still entitled, therefore, to deduct damages and a notice of default issued by the Contractor was invalid.

Also on **21 June**, the court gave judgment in the case of **Seele Austria GMBH & Co v Tokio Marine Europe Insurance Ltd**, which involved a dispute between sub-contractors and insurers over ***the ambit of a contractors all risks policy***. Glazing subcontractors had to have access to windows already installed in order to rectify defects in the windows. In doing so, damage was caused to internal finishes and cladding. The court held that the sub-contractors were not entitled to an indemnity under the policy in respect of this damage.

On **25 June**, the **European Court of Justice** gave a decision on whether ***the duty on employers to ensure the health, safety and welfare*** of their employees *so far as is reasonably practicable* is compatible with community law.

The Court of Appeal has held that the qualifying words, *so far as is reasonably practicable*, mean that the cost of taking measures to remove a risk in relation to the likelihood of the risk eventuating can legitimately be taken into consideration in deciding whether to take those measures.

However, the European Commission applied for a declaration that, in restricting the duty upon employers to ensure the safety of workers ***only to the extent that it is reasonably practicable to do so***, the United Kingdom is not complying with its obligation to give effect to the relevant European directive on the safety and health of workers. It argued that the intention of the directive is to make employers subject to a regime of no-fault liability.

In January, the Advocate General prepared an opinion for the European Court, which refuted the Commission's argument on no-fault liability. However, he also expressed the view that the duty on employers should be to take whatever steps are technically feasible to eliminate or reduce a risk, and said that the concept of what is reasonably practicable, being less rigorous than technical feasibility, is incompatible with the duty laid down by the directive. He also said (as would seem to follow) that the test approved by the English courts involving a cost-benefit analysis is not permissible under the community system.

However, the European Court of Justice's decision was that the *reasonably practicable* test in English law ***did comply with community law***.

On **27 June**, in the case of **John F Hunt Demolition Ltd v Asme Engineering Ltd**, the court had to decide the question of ***whether a sub-contractor on a building project owed a duty of care to the employer*** to the main contract in respect of damage caused by a fire. In fact, the sub-contractor had already settled the employer's claim by making a payment to the employer. The reason why the court was concerned now with the question of whether the sub-contractor had owed a duty to the employer was because the sub-contractor was seeking to recover this payment in a claim that it in turn was making against its sub-sub-contractor.

As it happens, the court held that the sub-contractor did not owe a duty to the employer. However, the fact that no such duty was found to have been owed ***did not, in principle, render unreasonable the settlement*** between the sub-contractor and the employer for the purposes of a claim by the sub-contractor against its sub-sub-contractor, so the sub-contractor could still seek to recover from the sub-sub-contractor the payment it had made to the employer under the settlement.

The case of **Iggleden and another v Fairview New Homes (Shooters Hill) Ltd**, in which judgment was given on **27 June**, involved a ***dispute between house owners and builders*** over defects in a new house. The owners sacked the builders without letting them rectify the defects. The court held that the owners did not thereby fail to ***mitigate their loss***. However, damages for some of the defects were assessed by reference to the builders' remedial scheme, not the more expensive rival one. In other words, the builders only had to pay for what their remedial scheme would have cost, in relation to those defects. The court also held that the owners, not the builders, were responsible for delay.

The possibility of ***withdrawing admissions*** has been mentioned above, in connection with the new rules on the matter. On **28 June**, in the case of **White v BSF Consulting Engineers**, engineers faced with a claim for negligence in the design of foundations had at first ***admitted that they had designed the foundations***. They later discovered that the design had been carried out by another party and sought to withdraw this admission. The court took into account the possible prejudice to the claimant arising from the original admission, which meant that they may not have been pursuing the right party. The engineers were, however, eventually given permission, by the Court of Appeal, to withdraw the admission.

On **29 June**, in the case of **Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd**, the court had to consider the liability of the installers of a sprinkler system for damage that would have been covered by ***joint insurance*** if such insurance had been taken out by the employer, as it should have been. The court held that, in those circumstances, the installers were not liable for that damage, even though it was caused by their negligence, and were entitled to be repaid sums that they had been ordered to pay by an adjudicator.

July

Most judges still seem committed to making ***adjudication*** in the construction industry a success. On **4 July**, in the case of **DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd**, the court ***stayed court proceedings*** over a building dispute in order to allow adjudication pursuant to the contract to take place, even though adjudication under the Act, unlike arbitration, does not exclude the right of either party to have the dispute finally determined in court (or by arbitration, if there is an arbitration agreement).

In this case, the agreement to adjudicate in the contract was mandatory, but even if it had not been and one party had wanted to exercise its right to refer the dispute to adjudication, the court may still have granted a stay of court proceedings for this purpose.

On **11 July**, the case of **R v P & Anor** in the Court of Appeal concerned the question of what the prosecution has to prove in order to make good a ***charge of neglect under section 37 of the Health and Safety at Work etc Act***. If a company is guilty of an offence under sections 2 or 3 of the Act, there is the possibility of ***a director or other officer of the company facing a charge of neglect under section 37***, on the basis that his or her neglect allowed the offence to be committed.

The trial judge had indicated that the crown has to prove that the person in question had actual knowledge of the material facts that gave rise to the offence. In another case - the prosecution of those alleged to have been responsible for the Hatfield rail crash - it had been suggested that the question is whether the defendants ought to have been aware in the sense that they had turned a "blind eye" (what is sometimes called "blind eye knowledge").

The Court of Appeal ruled that the crown does not have to prove as much as that in order to make good the charge. The test is, where the person charged had no actual knowledge of the state of facts, ***should he nonetheless have been, by reason of the surrounding circumstances, put on enquiry***, so as to require him to check that relevant safety procedures were in place?

This lower standard of proof for the prosecution may give rise to more prosecutions of individuals under section 37 where a company is charged with an offence under sections 2 or 3.

The case of **Pierce Design International Ltd v Mark Johnstone & anor** on **17 July**
again raised the issue of an employer in a JCT contract ***not serving a notice of withholding payment*** in respect of an interim payment and ***then determining the contract***, as in the **Melville Dundas** case referred to above (25 April). The law laid down by the House of Lords in the **Melville Dundas** case was, therefore, applied, to the extent that the court accepted that clause 27 of the JCT contract is not inconsistent with section 111 of the Housing Grants etc Act.

However, clause 27 is subject to a proviso that it does not prevent the contractor from enforcing payment of sums properly due which the employer has unreasonably not paid and which became due more than 28 days before the determination of the contract. Consideration of this proviso did not arise in the **Melville Dundas** case because the sum in question had become due less than 28 days before the determination of the contract.

Where the proviso may apply, the question that arises, therefore, is – was the non-payment of the sum due unreasonable? The court held in this case that, ***as no notice of withholding had been served, the non-payment of the sums due had not been reasonable.*** Thus the contractor was successful in obtaining summary judgment following determination of the contract for the interim payments in respect of which no notice of withholding payment had been served.

If the reasoning in this case is generally accepted, the scope of **Melville Dundas** decision will be considerably restricted.

On **26 July**, the **Corporate Manslaughter and Corporate Homicide Act** finally passed through parliament and became law, though it does not come into force ***until 6 April 2008.***

Legislation on criminal liability of companies for fatalities at work has been promised for a long time. The Act provides for there to be such liability where, in essence. ***management failure*** causes the death in question.

The Act does not, however, create any new liability on individuals (e.g. company directors), which has caused disappointment in some quarters.

August

As is well known, solicitors can and now do a lot of work for claimants under ***conditional fee agreements*** (CFAs), under which the solicitor is only entitled to charge fees if the claim is successful. However, the solicitors' entitlement to charge fees under a CFA is subject to ***strict compliance with the rules governing CFAs***. One of these is that the CFA must be signed by the solicitor. In the case of **Preece v Caerphilly County Borough Council**, in which judgment was given on **15 August**, the solicitors ***had not signed the CFA*** and the court held that this made it unenforceable.

The irony is that it is not the solicitor's client who gains from a situation like this (although the rules are presumably intended to protect solicitors' clients) but the losing party in the case. If the client wins the case, the other side usually has to pay the costs, but not if there is no liability on the client to pay any costs, because, for example, the client's solicitor did not sign the CFA.

This underlines the point that the doctrine of substantial compliance – as it is called - does not concern consequences but rather compliance with the requirement.

September

No year goes by without a case on ***liability in tort to a third party for economic loss***, for which, as already indicated, special factors are normally required to give rise to a duty of care. Often the question arises in relation to auditors of company accounts. The auditor's client is the company, but other parties may rely on the accounts, for example, a party purchasing the company or simply investing in it. If the accounts have been negligently prepared and the third party suffers loss in relying on them, can the auditors be liable to that party? Did they owe that party a duty of care in respect of that loss?

The case of **Man Nutzfarzeuge Ag & Anor v Freightliner Ltd & Ernst & Young**, in which judgment was given on **12 September**, concerned a situation where there were defects in the accounts due to fraudulent information supplied to the auditors. The company's parent company sold the company but was then held liable to the purchasing company for fraudulent misrepresentations made to the purchasing company by the company's financial controller to the effect that the accounts were accurate.

The parent company (which was not, of course, the auditors' client) blamed the auditors for the situation in which it found itself. It was held that, with reasonable skill and care, the auditors should have spotted the defects in the accounts. However, the court held that ***no duty was owed by the auditors to the parent company*** in respect of the misrepresentations that had been made.

The case of **Tesco Stores Ltd v Constable**, in which judgment was given on **14 September**, involved an ***insurance dispute***, which arose out of the collapse of a section of tunnel at Gerrards Cross, where a Tesco store was being built. The railway had to be closed for a while and Tesco incurred ***liability to the train operating company for lost revenue***, under the terms of a deed between Tesco and the train operating company containing a wide indemnity.

It was held that this liability was ***not covered by Tesco's public liability policy***, even though the policy included an extension for cover assumed by Tesco under a contract. Only tortious liability was covered by the policy.

On **19 September**, in the case of **Cundall Johnson & Partners v Whipps Cross University Hospital NHS Trust**, engineers brought a claim for fees in the Technology and Construction Court ***without first complying with the Pre-Action Protocol*** for Construction and Engineering Disputes. Invoices had of course been submitted before the action and there had been correspondence about the claim, but the court held that the information provided in this correspondence did not constitute sufficient compliance with the pre-action protocol. The court also confirmed that the ***pre-action***

protocol does apply to a claim for fees, even though the claim might be characterised simply as debt collection. The Court, therefore, exercised its discretion to stay the action to enable the parties to comply with the protocol.

The importance of complying with pre-action protocols has already featured in another case.

October

On **17 October**, in the case of **Johnston v NEI International Combustion Ltd**, the House of Lords gave another judgment, to add to those in recent years, on ***liability for asbestos-related disease***. This judgment concerned the ***presence of pleural plaques*** in people who have at some time been exposed to asbestos fumes. Pleural plaques are not themselves harmful or the cause of any harm but they indicate the possibility of harmful conditions developing. It was argued that, while pleural plaques do not constitute actionable damage in themselves, giving rise to a right of action, they do when aggregated with the risk of future disease and consequent anxiety.

The House of Lords rejected this argument. Conditions that do not constitute actionable damage in themselves (such as anxiety or an increased risk) can not do so when aggregated together. ***These claims were, therefore, rejected***.

One claimant had suffered actual psychiatric injury as a result of his condition. This could constitute actionable damage, but the House of Lords rejected his claim on the ground that this damage was not a reasonably foreseeable consequence of the employer's breach of duty.

On the same day, the House of Lords gave judgment in the case of **Fiona Trust & Holding Corporation & Ors v Yuri Privalov & Ors**. This case concerned ***the scope of an arbitration clause*** in a commercial agreement and whether it applied to a dispute over the validity of the agreement itself, more particularly a contention that the agreement had been procured by bribery.

Holding that this dispute was covered by the agreement to arbitrate, the House of Lords said that it was ***time to end the distinction between "disputes arising under" and "disputes arising out of" an agreement***. Unless it is clear that certain questions are to be excluded from the arbitration agreement, it should be assumed that the parties, as rational businessmen, would want any dispute arising out of their relationship to be dealt with by arbitration.

The House of Lords said that, since the Arbitration Act 1996, the principle of severability applied. The agreement to arbitrate could be severed from and treated separately from the rest of the agreement. Thus the invalidity of the main agreement, if it was invalid, would not affect the validity of the agreement to arbitrate, unless the reasons for the invalidity particularly concerned the agreement to arbitrate.

The case of **Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd**, judgment in which was given on **23 October**, concerned a dispute over ***payments due to a contractor under a JCT contract***. The contractor had submitted a draft final account and prolonged correspondence had followed over the draft final account. The contractor submitted an interim application and the parties agreed to refer their disagreement over the sums covered by this interim application to adjudication.

The adjudicator held that the contractor was entitled to payment of this application, simply because, after receiving it, ***the employer had failed to give the requisite notices under clause 30 of the contract*** in relation to an interim application.

The employer complained to the court that the adjudicator was not entitled to approach the matter in this way and so his decision was outside his jurisdiction. However, the court held that the adjudicator's approach was correct.

On the same day, in the case of **James Evans v Kosmar Villa Holidays Plc**, the court of appeal held that a tour operator was ***not liable to a holiday maker injured as a result of an obvious risk*** - diving into a shallow pool. On behalf of the claimant, complaint was made that the "no diving" signs were insufficient, but the court held that this was irrelevant, given that the risk was obvious.

Following the judgment in **Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd** on 23 October (above), the court gave a further judgment on **30 October** on ***the question of interest***. The successful contractor argued that the adjudicator should have awarded interest from an earlier date than he did and that the court had jurisdiction to make its own award. The court held that the court only had jurisdiction to award interest ***from the date when the paying party failed to comply with the adjudicator's award***, so the adjudicator's award of interest was unaffected.

In **October**, the **new edition of the RIBA Agreement** for appointment of a consultant was published. Many people will find this agreement disappointing. The agreement contains terms which may have the effect of imposing strict liability on consultants, or at least standards that are more onerous than the normal standard to exercise reasonable skill and care. Some of the terms also seem unfair to employers.

The linguistic style, all in the present tense, is also to be regretted, in our opinion.

November

In 2006, there were two major judgments given by the House of Lords (**Sephton v Law Society** and **Hawards v Fawcett**) on the question of ***when the limitation period starts running in a claim in tort for economic loss***. On **8 November**, in the case of **Shore v Sedgwick Financial Services Ltd and Ors**, judgment was given in a claim for loss suffered as a result of negligent failures in financial advice relating to pension provision. Last year's judgments were applied to the issues of (1) when damage was suffered (when the claimant was demonstrably worse off) and (2) when the requisite knowledge was acquired by the claimant (when the claimant had knowledge of the "essence" of the relevant act or omission).

The judgment in **Harris Calnan Construction Co ltd v Ridgewood (Kensington) Ltd** on **15 November** concerned another application to enforce an adjudicator's decision. This time, the court was ***robust in rejecting any challenge to the adjudicator's decision***. The adjudicator had ruled on the question of his jurisdiction. The respondent had not declined at the time to agree to the adjudicator's ruling and was accordingly bound by the adjudicator's ruling (which was, in any event, the court held, correct).

The court said that a party who resists enforcement of an adjudicator's decision when it knows or ought to know that it has no grounds for doing so should have to pay costs on an indemnity basis.

On **23 November**, in the case of **Mastercigars Direct Ltd v Withers LLP**, the court ruled on the question of ***whether solicitors were entitled to charge more than their cost estimate***. The court said that there was no reason why they should not. On assessment of costs, the court could have regard to the estimate and it is a factor in assessing the reasonableness of the solicitors' charges, but not in any sense binding.

In **November**, the **CIC Agreement for Appointment of Consultants** was at last published. The main conditions were made generally available and commented upon in 2006.

The agreement contains a comprehensive list of services which may have to be performed on any major project. This document containing the services is perhaps the main feature of this new agreement.

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December

On **21 December**, the Court of Appeal gave judgment in the case of **Petromec Inc v Petroleo Brasileiro SA Petrobras & Ors**, on an appeal against the first instance decision that was given in July. The case concerned ***the way of assessing a contractor's claim for additional costs*** as a result of an amended specification and other variations.

The contractor argued that the claim should be assessed by deducting what it would have cost to carry out the works to the original specification from what it actually cost to carry out the works as varied to the amended specification.

The court of appeal, upholding the judgment in the court below, said that this was not the correct approach and that the work content of each variation due to the amended specification or to instructions had to be identified and costed.

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