

It was also suggested that simply carrying out the most obvious of things such as, reading the full contract, issuing notices in a timely manner and importantly, keeping contemporaneous records of delay and cost impacts were useful tools in claims' avoidance. Many of the forms of contract used within the energy sector are, in addition to setting out the rights and obligations of the parties, effective project management tools in their own right and therefore the procedures in those contracts should be followed by both parties.

The theme of claims avoidance was addressed later in the seminar by Marte Maeland who gave her thoughts on the subject from a Norwegian perspective.

The Norwegian perspective

Marte Maeland, attorney at law for the Norwegian law firm Lindh Stabell Horten, gave a very interesting presentation on how claims and disputes are avoided in the Norwegian energy sector. Marte focused on two standard forms of Norwegian contract, the Norwegian Fabrication Contract (NF92) and the Norwegian Total Contract (NTK2000) and explained how the Expert System included within those standard forms dealt with potential disputes, in particular those often associated with change or variation work. Of significant interest was the way in which the Expert System provides a mechanism for dealing with the common situation where a Contractor considers an instruction from an Owner to be a Variation whereas the Owner considers it to form part of the original scope of work.

In such circumstances, the Expert System requires the Contractor to continue with the work in question but on the basis of a Disputed Variation Order, with the validity of any Variation to be decided upon by an Expert. The Expert is appointed by the parties using a voting system whereby each of the proposed Experts is scored by the parties according to certain agreed parameters and the

Expert securing the most points is appointed. There are certain similarities, but also significant differences, between the Expert System used in Norway and Adjudication under the Housing Grants Construction and Regeneration Act 1996, in that, both parties make submissions to the Expert within seven days of appointment, the Expert is required to reach a decision within thirty days of appointment, the Expert's decision is final if not appealed against by either party within six months and the losing party is responsible for the Expert's costs.

It is interesting to note that the NF 92 and NTK 2000 forms of contract are primarily for use on offshore contracts in Norway. In the United Kingdom such operations would ordinarily be "excluded operations" under section 105 (2) of the Housing Grants Construction and Regeneration Act 1996 and therefore not subject to statutory adjudication.

Wise Man at Site

Marte also explained the concept of the "Wise Man at Site" which is used in the NTK 2000 form of contract as a means of dispute avoidance. The Wise Man concept runs in parallel with the Expert System and is basically an experienced professional who is appointed by the parties at the outset of a project with the aim of improving communications between the parties. The Wise Man also gives the parties the benefit of his experience and even perhaps highlights potential future problems for the parties. The entire process is non-binding and each party

is free to accept or reject any proposal made by the Wise Man, whose costs are shared on a 50/50 basis as are any solutions reached at the Wise Man's suggestion. The Wise Man is prohibited from acting as a witness in any future proceedings between the parties, which in theory allows him to be more open with the parties. The overriding aim of the Wise Man concept is to avoid disputes in a cost effective manner.

Interesting presentations were also given at the seminar by Mark Watson of AMEC, Bill Barton of DLA, John Colegrave of Stolt Offshore and Alan Lewendon of EIC.

Stapleton International Limited

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SOUNDING a warning

Traditionally, contractors were both required and entitled to stick to the task of following the design given to them by the client's architect or engineer. They were not expected to think about the design but to build it. Any flaws in the design were the responsibility of the consultant who prepared it and no-one else. However, the ability of the contractor to shelter behind this position has been significantly restricted by the development in the courts of the 'duty to warn'. Leaving aside design and build contracts (where self-evidently the contractor accepts primary responsibility for design), the duty to warn means that contractors may incur duties with regard to the designs they are asked to build. But these duties are not open-ended. The purpose of this article is to consider the development and current extent of this duty.

Contractual provision

To some extent, standard form (and other) contracts routinely place some responsibility upon the contractor regarding design. Thus, for example, Clause 2.3 of JCT 98 deals with the situation where the Contractor finds "any discrepancy in or divergence between" contractual documents, whether Contract Drawings, Contract Bills, instructions or drawings/documents issued by the Architect/Contract Administrator. The Contractor must "immediately give to the Architect/Contract Administrator a written notice specifying the discrepancy or divergence." Similar provisions can be found in many major construction and engineering contracts.

However, these express provisions are relatively modest. They do not amount to much more than requirements of common sense. The Contractor would actually have to know of the problem for the obligation to arise.

The 'duty to warn' goes further, is implied into contracts and may not be dependent on the

contractor having actual knowledge of the design deficiency.

Development of the duty to warn - the leading cases

EDAC v William Moss [1984] 2 Con LR 1. Contractors were held liable for failure to warn of a lack of buildability inherent in curtain walling design: "they must have come to know of the lack of buildability in the design.... by failing to warn..... of that defect Moss became in breach of the implied term requiring them to give such warning."

Victoria University of Manchester v Hugh Wilson [1984] 2 Con LR 43. The court went a step further in holding a contractor to be obliged to warn of defects in a cladding design: "a term was to be implied in each contract requiring the contractors, to warn the architects as the University's agents, of defects in design which they believed to exist. Belief that there were defects required more than mere doubt as to the correctness of the design, but less than actual knowledge of errors."

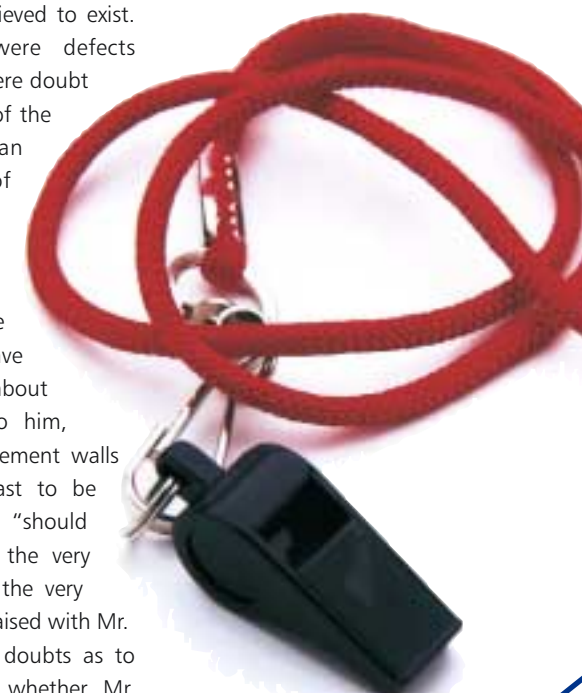
Edward Lindenberg v Joe Canning [1992] 62 BLR 147. The contractor should have had 'grave doubts' about the plans supplied to him, which showed all basement walls and the chimney-breast to be non-load bearing and "should have proceeded with the very greatest caution. At the very least, he should have raised with Mr. Carlish (the architect) doubts as to his plans and asked whether Mr. Carlish was sure that the 9" walls were not load-bearing."

Restriction of the duty to warn?

University of Glasgow v William Whitfield [1988] 42 BLR 70. HH Judge Bowsher QC sought to restrict the duty to warn: "where there is a detailed contract of the nature found here, there is no room for the implication of a duty to warn about possible defects in design."

However, the following points should be noted about this decision:

- it is inconsistent with the EDAC and University of Manchester cases, which also had detailed contracts;
- Judge Bowsher made it clear that he was "not saying that there are no circumstances in which a term may be implied or a duty owed in tort requiring a contractor to warn a building owner of defects in the design".



Oxford University Press v John Stedman Design Group [1990] 34 Con LR 1. HH Judge Lewis QC approved the reasoning in *University of Glasgow v William Whitfield*: "it would be undesirable, as it would give rise to practical difficulties, if builders were obliged to raise with their employer matters of design for which they had no express contractual responsibility where the employer has commissioned the design from an expert."

HH Judge Esyr Lewis could not see scope for implication of a duty to warn of design defects "unless it was a defect which might give rise to danger to the safety of persons or damage to some property other than that which was the subject matter of the design defect."

Nevertheless, the duty to warn has continued to develop, albeit in restricted form.

The effect of the latest cases

Plant Construction v Clive Adams Associates [2000] BLR 137. The Court of Appeal placed an obligation upon a sub-contractor to warn of defects in temporary works design, notwithstanding a direct instruction from the client's engineer to proceed with the design. The sub-contractor, knowing of the danger, should have made a more vigorous protest. An 80% contributory negligence finding was, however, made against the main contractor.

Plant Construction v Clive Adams Associates (No 2) [2000] BLR 205. The court resolved the causation question which had been left undecided in the above case: i.e. whether the failure to warn had actually been an

effective cause of the collapse. "Either there would have been a new design which the sub-contractor, (JM) could consistently with its safety responsibility, accept or JM would have declined to execute what it believed to be an unsafe scheme.... the consequence of fulfillment by JM of its duty would have been that, on the balance of probabilities, the collapse would not have occurred."

Aurum Investments Ltd v Avonforce Ltd (In Liquidation) [2001] CILL 1729. An underpinning subcontractor was held not to be liable under the duty to warn principle when part of the excavation work collapsed; the sub-contractor could not know of the (design and build) contractor's method of work: "the law is moving with caution in this area... a court should not hold a contractor to be under a duty to warn his client unless it is reasonable to do so."

Summary of current position

Contractors may be under a limited express contractual duty to point out discrepancies in design documents of which they become actually aware.

Beyond that, there may be scope for implication of a duty to warn; there will be more scope for this in the absence of

a detailed contract.

Buildability, meaning whether the design can actually be built, being within the contractor's expertise, is an obvious candidate for application of the duty to warn.

The duty to warn could extend to situations where the contractor was not actually aware of the design error, but ought to have been.

Where health and safety are at risk in particular, going through the formality of objection may be insufficient; the contractor may need to lodge a vigorous protest, and even refuse to implement a design it knows to contain unacceptable levels of risk.

The courts will resist unjustified expansion where it is not reasonable to burden a contractor with the duty to warn:

"The law is moving with caution in this area".

This article was written by Ellis Baker and Anthony Lavers of White & Case LLP.

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A Seminar on Avoiding Claims in the energy sector

Over 60 delegates attended a seminar at Ardoe House Aberdeen on 12 November 2002 on the subject of Avoiding Claims in the Energy Sector. The seminar was sponsored by Dibb Lupton Alsop, the Energy Industries Council and Stapleton International Limited.

Following a thought providing key-note speech by Larry Farmer, former Chief Executive of Halliburton, Brown & Root Limited, Paul Tracey, Executive Director of Stapleton International Limited looked at how claims may be avoided but initially considered whether claims are, in fact, entirely avoidable. Set out below is an outline of Paul Tracey's presentation.

Firstly, it is important to distinguish between a claim and a dispute. A claim, in its simplest form, is merely a statement of an entitlement by a party to a contract. Whereas a dispute arises where a claim, made by one of the parties, is rejected or ignored by the other party which then crystallises into a dispute. In certain respects claim mechanisms are an essential part of any contract in that they enable the parties to deal with the inherent uncertainties associated with contracting in the energy sector.

Claim mechanisms within contracts enable the parties to agree a procedure in advance whereby uncertainties such as ground conditions, weather, force majeure and other matters and the associated responsibility for their risk may be dealt with under the contract.

Paul Tracey suggested that all professionals within the industry should try to ensure that they operate the claim mechanisms under contracts properly and therefore hopefully reduce the number of disputes. It was accepted that disputes are expensive and damaging to relationships and also

divert the parties' attentions away from achieving a successfully completed project.

Causes of claims

In order to avoid claims it is firstly necessary to consider the causes of claims. In view of the fact that claims are not uncommon within the energy sector it is surprising to note the lack of empirical research as to the causes of claims. Inevitably therefore one tends to rely upon personal experience as evidence of the causes of claims. Some of the potential causes of claims that were considered were, change orders, modifications, variations, poorly drafted contract documents, inappropriate selection of Contractors /Owners, pressure on margins, unforeseen conditions, force majeure, poor tender preparation/evaluation, defective design/workmanship/materials and the unclear allocation of design responsibility.

How to avoid claims

In outlining some of the ways claims can be avoided it was felt that a clear contract strategy from the inception stage of a project was essential, together with a systematic approach to risk management. In considering how risks should be apportioned under a contract, consideration was given to the theory that the party best able to control the events which give rise to risk should ideally be the party who assumes that risk under the contract. What is absolutely essential is that risk is clearly and unequivocally apportioned under a contract.

The importance of effective project control requirements and professional

contract administration was recognised, not only as effective management tools, but also as means of avoiding claims and disputes. The importance of change management both in the implementation of change into a project and also in order to accurately ascertain the true impact of change, so that hopefully the parties may agree to any modification to the contract prior to the execution of the modification, was seen as effective means of avoiding claims. Consideration was also given to the standardisation of contract terms and procedures as means of avoiding claims and disputes.