But it was approved… Building Control and Design Responsibility

By Frank Newbery

Procurement – A View From Dubai, Part 2

By Karen Pharaoh-Tillon

Access to Justice: Recent Developments in Alternative Dispute Resolution

By Katerina Hoey

PROBYN · MIERS

INTERNATIONAL CONSTRUCTION DISPUTE RESOLUTION

'Perspective'

These articles are a compilation of Perspective Newsletter, our quarterly digital publication and part of Probyn Miers knowledge sharing policy directed to the construction industry and our clients. Perspective brings you news, information and points of view on topical issues relevant to architects, engineers, surveyors, construction lawyers, contractors, insurers and all of our colleagues in the industry. The articles, intentionally short, are the bases for further in-depth discussions at in-house talks and workshops that Probyn Miers runs for our clients. Our articles are published in other journals with prior agreement.

Should you be interested to receive information on any of our events, do contact us at:

E: *info@probyn-miers.com*

Our Events:

- Probyn Miers Annual Conference / London-Dubai
- *'The Thing is...'*: A forward thinking gathering of construction leaders and specialists. These are breakfast sessions *'by personal invitation only'*
- Perspective Newsletter
- Webinars
- Workshops / Talks on our areas of expertise

Follow us

"We have found Probyn Miers to be a highly responsive and customer focused organisation, offering a range of forensic technical services. They bring a unique blend of technical competence, together with commercial and legal awareness which make them a natural first port of call".

- Major Contractor Client

Our Expertise

International Dispute Resolution & Avoidance • Architect Expert Witnesses • Adjudicators • Project Procurement • Project Management • International Arbitration • International Dispute Boards • Mediators • Expert & Forensic Investigation • FIDIC Contracts • Power & Energy • Technical Audits • Building Design and Specification • BID/ Tender Advisory • Building Defects • Litigation Support • Project Rescue Consultancy • Contract Management • Architectural Services • Contract Administration • Dispute Review of Construction Claims • Fire Cases Consultancy • Expert Determination • Remedial Works • Training & Workshops • Public Speaking

But it was approved… Building Control and Design Responsibility

By Frank Newbery

First Published February 21st, 2017

We are often asked to provide an opinion in cases where the adequacy of an architect's design is called into question. Under typical appointment terms and PI insurance conditions, an architect's design is not required to achieve *"fitness for purpose"* as long as the work has been carried out with the *"reasonable skill and care"* to be expected from a professional architect with experience appropriate for the project.

When economic loss is found to have been caused by defects in the design of a building, it is often also the case that the design had received *"full plans"* approval from the local authority's building control inspectorate ("Building Control"). It is then sometimes proposed that the existence of such approval serves to affirm that reasonable skill and care was indeed exercised by the architect. However, defence on these grounds alone will typically fail.

In the UK the current law on this issue was established by *Murphy v Brentwood District Council* (1991). In a departure from earlier decisions (notably *Anns v Merton* (1978)), it was held that the Council, who had approved a defective foundation design, was not liable for the cost of remedial work. Underlying principles include the view that a public authority is not obliged to safeguard commercial interests from pure economic loss - even if that loss has been incurred by remedying dangers to health or safety, which Building Control is intended to prevent.

A more recent case, *R (Gresty) v Knowsley MBC* (2012) appears to confirm Building Control "immunity" in this respect. It was found in this case that, despite having approved defective foundations under a new house extension, Building Control had neither any contractual obligation nor (following *Murphy*) any common law duty to the householders to compensate them for necessary repairs.

It follows that an architect exercising reasonable skill and care must produce designs in the knowledge that Building Control approval does not shield the employer from loss consequent upon design defects, or designers from responsibility to the employer for such defects. Current RIBA advice is that, irrespective of any received Building Control approval, an architect must take care independently to design in compliance with the Building Regulations themselves [1]. This will normally require careful conformity with the criteria set out in the Building Regulations' Approved Documents A-P unless alternative means for meeting the Regulations are thoroughly considered in consultation with the relevant public authorities. A strategy of *"getting things past"* Building Control will protect neither the employer nor the architect.

The appointment of an Approved Inspector ("AI") as an alternative to Building Control has the potential to shift this balance of responsibility somewhat. Unlike public authorities, AIs have appointment contracts that specify the services that they will provide to the employer and PI insurance to cover the economic results of any negligence. Current RIBA advice is that use of AIs therefore has an important potential advantage over submission to the local authority service [2]. An AI might be deemed to share at least some responsibility for any non-compliances with Building Regulations, and might be expected to be proactive in helping to avoid them.

Architects should however maintain an independent grasp of compliance in these circumstances, especially as standard appointment conditions offered by AIs are drafted explicitly to limit their responsibility. For instance, the Construction Industry Council's standard form of *Contract for the Appointment of an Approved Inspector* (2nd edition 2013) states at paragraph 3-4.1:

> *"The Client shall be responsible for the Project's compliance with the Building Regulations and the* [AI's] *Services do not include advising the Client or managing the Project to ensure that compliance is achieved"*

and at paragraph 3-4.2:

> *"The Approved Inspector shall take such steps as are reasonable to enable it to be satisfied as to the Project's compliance with the Building Regulations, and if so satisfied, it shall issue a final certificate. The final certificate is not a representation that every aspect of the Project complies with the Building Regulations"*.

These disclaimers appear to be an attempt to shroud AIs with the same effective immunity that Local Authority Building Control departments enjoy, though it remains to be seen how the courts will interpret such clauses in the light of the Consumer Rights Act 2015. As things stand, therefore, it is difficult to predict how responsibility for non-compliance with Building Regulations might be apportioned between an Architect on the one hand, and an Approved Inspector on the other.

[1] *John Wevill, Law in Practice – The RIBA Legal Handbook (2013), 7.5.1*

[2] *ibid*

Frank Newbery *is a Chartered Architect with over thirty years' experience in the construction industry. He has been active in expert witness consultancy since 2004. He is experienced in all the key professional tasks including client liaison, design, planning and building control consents, technical detailing and production information, contract administration and obtaining resolution of defects. Frank has given expert evidence in court and has been a key participant in several mediations. In recent years Frank has taken a special interest in the evolution of BIM procedures and conventions, and gives public presentations on the topic.*

fnewbery@probyn-miers.com

Procurement – A View From Dubai, Part 2

By Karen Pharaoh-Tillon

First Published February 21st, 2017

6: Team Selection

Designing and constructing a new building is subject to many risks and uncertainties and usually involves a number of organisations especially assembled for the project. Overall success can be determined by the relationships formed between the Client and the various designers, contractors and suppliers and the way in which they work together as a team.

Team selection is, therefore, one of the most important aspects of putting a Tender together, particularly as it is something that is scrutinised heavily by the Client.

- Impressions do count. Present a strong and forward thinking team that can demonstrate its ability to oversee the entire project. Select professionals who can communicate their sense of ownership and their ability to provide sound advice and guidance to the Client. This is essential and can often yield surprising results;
- Choose the most appropriate person for each role. In addition to having the necessary skills, knowledge and experience, your team must be able to demonstrate an understanding of not only the Tender but also the project and its specific requirements; and
- Management matters. Particularly on large projects the team selected must be capable of providing first class management throughout the project from structure to fit-out. The fit-out is invariably seen by Clients as the most important phase of the works and there is nothing worse than changing personnel half way though.

If you are invited to attend a Post Tender Clarification meeting, it is vitally important that you bring only those individuals who have been identified within your tender as part of your project team.
Sending too many representatives, particularly anyone who has not been involved in the preparation of the Tender, is a sure way to be disregarded by the Tender Committee.

7: Collaborate

Although the construction market in the GCC and more specifically the UAE continues to become more sophisticated, conflict and low oil prices are weighing heavily on their economic prospects. As a result, countries within the region are diversifying into non-oil sectors and rapidly curtailing government spending to try and bring budget deficits under control.

Thus, for many large and significant projects, such as EXPO 2020 and FIFA 2022, which will require substantial investments from the governments of Dubai and Qatar respectively, there is an increased drive to promote trade and attract more foreign direct investment. There is also an increased appetite on the part of international businesses to assist with the finance and construction of such projects.
Engagement with local experienced partners helps such businesses to minimise and share the inherent risks associated with entering a new market while providing the local partners with an expanded pool of skills and resources together with much wanted finance.

Accordingly finding new and innovative ways to collaborate, is increasingly important. Exploring the formation of joint ventures (JV) can help to ensure, not only that ambitious plans are delivered, but also that the limitations of the local market are addressed by the development of joint strategies that recognise, and embrace, these limitations. The formation of a JV, allows both risks and rewards to be shared and a team culture to be developed leading to greater efficiency, reduced costs and added value. Clients are certainly favouring main contractors with this type of arrangement. The importance of doing due diligence on prospective partners cannot be overstated, however, to ensure commitment to a potentially unfamiliar financial planning and delivery mechanism.

8: FITD Technique

Your tender must, of course, promote the fact that consideration, awareness and knowledge have been imparted within the documents. In addition, however, being mindful of the following points may help to get your "foot in the door":

- Identify your USP - Unique Selling Point. – Often overlooked, but essential in competitive overcrowded markets/industries. What can you offer that your competition doesn't;
- Suggest new and innovative ideas. Clients love to explore alternatives particularly if they offer reduced time and cost;
- Foster industry collaboration. This can avoid adversarial relationships during project execution;
- Allocate a sensible timeframe for pre-qualification and the tender period. If possible request advance notification from the Client to ensure the correct allocation and availability of bid resources;
- Submit clear tender information with good quality documentation and a clearly defined BOQ;
- Ensure compliance with contractual obligations and try to propose contract mechanisms that have positive impacts on tender price and the overall commercial offer;
- Offer the inclusion of early trade, where possible, to secure some element of fixed price in the first stage;
- Stand out. Look at particular aspects of construction that are gaining global scrutiny, such as safety, quality and environment sustainability. For example, governments within the UAE and GCC region are looking to develop projects that are greener than ever; and finally

- Encourage your Client to invest in a qualified and experienced Risk Manager. By studying historical failures, industry best practices and successes, innovation and technological advancements, and by monitoring the project's risk exposures he will make a significant contribution to achieving the required balance between time, cost and quality.

9: Check – Make The Cut

Every detail matters when you are writing and submitting a tender. Formulate a checklist to ensure you don't miss anything. Cogitating the following do's and don'ts, should maximise your chances;

- Do assess the risks carefully; not every Tender needs to be won at any price;
- Do demonstrate how you will avoid cost escalation;
- Do keep the design flexible so that it can be adapted to meet Client variations;
- Do demonstrate how you will deliver quality design on time;
- Do produce high quality design and tender information, so that the client can see that you understand his aspirations and requirements;
- Do ensure maximum credibility. Supporting documentation must be consistent and have high production quality. This will give the Client confidence in what they are about to read;
- Do ensure your Tender demonstrates your attributes and methodologies. Provide plenty of evidence and examples;
- Do invest time engaging with your Client throughout the Tender period.
- Do invest greater effort into ensuring that your tender attracts the best possible interest;
- Don't underestimate the Client;
- Don't take shortcuts. Focus on eliminating risks and present risk management and contingency clearly. This will instil confidence; and finally
- Don't expect that you will get a second chance to resubmit a Tender or submit at a later date than stipulated in the Tender document.

10: Get Ahead

In a climate where payment issues still linger throughout the supply chain it is important that: (1) all procurement and tendering opportunities are carefully scrutinized irrespective of the increase in competition to win work; and (2) every attempt is made to "get ahead".

Tendering activity is expected to decrease on the back of fewer projects. With the fast approaching events of EXPO 2020 and FIFA 2022, however, and a small number of mega projects in the pipeline, procurement complexity is likely to challenge existing ways of delivery. This is most likely to occur where sectors are disproportionately affected by supply-chain pressures and governments look to alternative means for financing and investment. So:

- Plan ahead – allow plenty of time for checking and submitting your Tender;
- Collect documentation, addendums and drawings, ask questions and allow time for response;
- Research and explore new laws and regulations. For example, the UAE's new Fire and Life Safety Code is now being enforced. Also, there is renewed interest in Public-Private Partnerships (PPP) as a way of restructuring public sector spending commitments. It is important to be clued up.

Irrespective of what procurement route is adopted by Clients to appoint professional services, contractors and suppliers, it is important that every opportunity afforded to you is carefully looked at, analysed and assessed and the best way forward implemented to add the most value to the project and ultimately lead to your success.

There is no perfect solution to putting together a Tender but by considering these tips you can adopt an approach which gives you the best chance of success.

Bi't-tawfiq

Part 1 was published in our October 2016 edition

Oman Insurance Company – Preparing for a new GCC Landscape
Cunningham Lindsey – Construction Risks in Middle East Power Plants
Swiss RE – Low Oil Prices Change Risks and Opportunities
Newsweek Middle East
Nathan Clements - It's all about Collaboration

Karen Pharaoh-Tillon *is a Chartered Quantity Surveyor and Project Manager with a Masters Degree in Real Estate and Construction Management. Out of her 25 years in the industry she has spent over 18 years of her professional practice in Dubai being actively involved in some of the most complex and high profile projects. She has an extensive track record encompassing project management, commercial management, contract management, project monitoring, change management and procurement. Karen has a detailed understanding of the design and construction processes and the roles and responsibilities of the consultants, government entities, contractors and subcontractors on public and private contracts.*

ktillon@probyn-miers.com

Access to Justice: Recent Developments in Alternative Dispute Resolution

By Katerina Hoey

First Published February 21st, 2017

The past few years have seen a number of new dispute resolution schemes rolled out in an effort to bridge the gap between adjudication and traditional litigation in the resolution of construction disputes. The aim of each of the schemes outlined below is to provide accessible and streamlined processes that are suitable for less complex disputes, providing enforceable, cost effective results within a relatively short timescale.

CIArb Business Arbitration Scheme

Launched in December 2015, this scheme was developed to provide simple, timely and cost-effective dispute resolution, referring claims of low to medium monetary value (£5,000 - £100,000) to a sole arbitrator. It aims to provide the parties with a final, legal binding decision in less than 90 days from the appointment of the arbitrator. A fixed fee of £1,250 + VAT is payable by each party on commencement of the arbitration to cover the arbitrator's fees and administrative costs. The successful party can apply to reclaim their application fee and up to £1,000.00 towards their costs.

This scheme is likely to suit SMEs engaged in (relatively) low value disputes with limited time and money available for dispute resolution. The simplicity of the scheme will allow business to present their own case without legal representation and the recoverable costs limit of £1000 aims to dissuade parties from incurring high legal costs.

RICS Fast Track Arbitration

Two new arbitration services for construction and engineering disputes were launched by the RICS in November 2015. They both aim to offer fixed timelines for arbitrations with proportionate costs to allow greater deliberation for more complex disputes compared to the much shorter statutory adjudication process whilst providing a greater degree of cost effectiveness than litigation. The services are offered at two levels, depending on the value of the dispute.

The Fast Track Arbitration Service

- Designed for disputes with a maximum value of £100,000;
- RICS administration fee of £350 (recoverable);
- Awards to be published within 6 months;
- Arbitrators have a maximum hourly rate of £175 and a limit of 60 chargeable hours (unless there is a counterclaim);
- Recoverable costs are capped at £5,000 or 20% of the value of the claim plus the value of any counterclaim; and
- Parties can use this service by way of a RICS ad-hoc arbitration agreement where their contract does not provide for arbitration.

The fast track arbitration service is aimed to be a viable alternative to County Court judgments, for disputes that do not come within the scope of adjudication or where parties are reluctant to adjudicate or litigate.

The Select Arbitration Service

- Designed for disputes with a minimum value of £100,000;
- No administration fee payable;
- Awards to be published within 12 months;
- Arbitrators must provide a fee estimate at the outset and to update it throughout the arbitration (though fees will not be capped);
- Parties can use this service by way of a RICS ad-hoc arbitration agreement where their contract does not provide for arbitration.

The select arbitration service is aimed to be a viable alternative to the TCC and will be able to complete proceedings within 12 months, unlike normal TCC litigation. The issuing fee is also relatively modest and there is no pre-action process to follow, with its associated costs.

The RICS claims that unlike adjudication, both schemes provide enough time to give full consideration to the evidence. In complex cases this may be preferable to the rough and ready approach of adjudication, and has the added advantage of providing a final and binding decision.

While these schemes may not be particularly useful for low value disputes, they are likely to be shorter and more cost effective than litigation in either the County Court or the TCC and the limitation on costs recoverable under the Fast Track Scheme will add some cost certainty to the process for the parties. It will be interesting to see if the Select Scheme has a high rate of take up, as it would appear to lack the fast track nature of adjudication whilst failing to provide the 'final answer' of a full trial with its common law principles of disclosure and cross examination.

Both the CIArb and RICS schemes share some characteristics with litigation whilst offering a number of advantages.

Shared characteristics with litigation include:

- the arbitrator is taken from a specialist panel (similar to the specialist judges in TCC);
- it provides a legally binding award, enforceable through the courts; and
- there is a limited right of appeal.

Advantages over litigation include:

- the process is quicker, taking between 6 - 12 months, depending upon the scheme used;
- it is likely to be cheaper than litigation (depending on the degree of professional support 'bought in' as part of the process);
- it is private and confidential; and
- limited costs are recoverable under the fast track scheme.

However, in both cases:

- Both parties must agree to arbitrate if there is no pre-existing contractual agreement to refer any disputes to arbitration under this scheme.

TCC Shorter Trials Scheme

Each of the arbitration schemes outlined above will effectively be in competition with the TCC Shorter Trials Scheme ("STS") and Flexible Trials Scheme ("FTS"), both launched in October 2015. The published aim of both schemes is to achieve shorter and earlier trials for business related litigation at a reasonable and proportionate cost. The procedures aim to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is often not necessary for justice to be achieved.

The Shorter Trials Scheme:

- the procedure is intended for cases which can be fairly tried on the basis of limited disclosure and oral evidence;
- the maximum length of trial would be 4 days, including reading time;
- cases will be case managed with the aim of reaching trial within approximately 10 months of issue of proceedings;
- judgment to be issued within 6 weeks thereafter; and
- 'docketed' judges to be used, who remain with the case from start to finish.

Practice Direction 51N advises that the Shorter Trials Scheme will not normally be suitable for certain cases, including:

- cases including an allegation of fraud or dishonesty;
- cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence; and
- public procurement cases.

A Flexible Trials Scheme was also launched at the same time, which was conceived of as something of a halfway house between the Shorter Trials Scheme and standard High Court proceedings, also offering reduced disclosure, focus on written rather than oral evidence and a time limited trial. A year after their launch, it was reported that ten cases were issued in or referred to the STS, and none in the FTS.

The Shorter Trials Scheme does appear to provide the opportunity for improved access to justice, whilst hopefully producing significant savings in the time, cost and complexity of traditional civil litigation.

Conclusion

While adjudication and litigation in both the County Courts and TCC may remain the first choice for many parties involved in larger or complex construction disputes, these alternative dispute resolution schemes are to be welcomed and could provide a viable option for the resolution of lower value disputes or where confidentiality may be important. However, it is worth noting that unlike litigation and adjudication, each of these schemes require either a pre-existing agreement, or an agreement put in place after the dispute has crystallised in order to use them. For this reason alone, many parties seeking access to justice will find themselves continuing to rely upon the classic models of adjudication and litigation, with their inherent trade-offs between time, cost, confidentiality and finality.

Katerina Hoey *is a Chartered Architect with over 20 years' experience in the construction industry and with a MSc in Construction Law. She has a broad experience in design, construction and urban regeneration projects in London, Beirut and the wider Middle East. Her expertise includes design, management, coordination and contract administration and under a broad range of standard form contracts. Katerina has worked on many expert investigations; extending from master planning to technical performance disputes, drafting/amendment of appointments, bespoke contracts, warranties and novation agreements.*

khoey@probyn-miers.com

London
Hamilton House
1 Temple Avenue, Temple
London, EC4Y 0HA
Tel: +44 (0)20 7583 2244
www.probyn-miers.com

Dubai
Emirates Towers, Level 41
Sheikh Zayed Road
Dubai, PO Box 31303
Tel: +971 4 313 2346
www.probyn-miers.ae

info@probyn-miers.com