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Trebor Basset – A case of 'Suck it and See'

By Bart Kavangh

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Must a design and build contractor provide a product which is fit for purpose or simply use reasonable skill and care in its design? Since ***Greaves v Baynham Meikle & Partners*** [1], ***IBA v BICC*** [2] and several cases which followed them [3] the stock answer has been that he provides a product, which should be fit for purpose. However, when the question was most recently considered in ***Trebor Bassett Holdings Limited and the Cadbury UK Partnership v ADT Fire and Security plc*** [4], the Court of Appeal concluded otherwise.

The contract was for the supply of a fire suppression system for a popcorn production line in Trebor Basset's UK factory. The cause of action was a smouldering popcorn kernel that started a fire, which destroyed not only the production line but also the factory. It was common ground between the parties that Trebor Bassett's standard terms applied, that these terms referred to 'Goods' and that s13 of the Supply of Goods and Services Act 1982 implied a term about care and skill.

At first instance, Coulson LJ decided that ADT had breached concurrent duties in contract and tort by failing to exercise reasonable skill and care in the design of the system. He also decided, however, that there was contributory negligence on the part of Trebor Bassett and reduced the damages awarded by 75% as a result.

Trebor Bassett appealed on the grounds that ADT had also breached further, strictly contractual, duties. These required ADT to:

- Take account of particular representations in the specification,
- Comply with BS5306 Part 4 and,
- Comply with terms implied by virtue of Sections 4 (2) and 4 (4) of the Supply of Goods and Services Act with the effect that the system should be reasonably fit for the purpose for which it was required.

If these further breaches of contract were found then s.1 of the Law Reform (Contributory Negligence) Act 1945, would no longer provide the court with the power to reduce the damages. As Tomlinson LJ explained:

"The success of any of these arguments would have led the judge to find breaches of contract of a nature which precluded the application of the 1945 Act because the relevant contractual duty would extend beyond the tortious duty also owed." [5]

At the heart of this matter lies the distinction between the concept of goods and the notion of a series of components which, though goods in themselves, have been assembled into a coherent but novel system through the process of design. Coulson LJ was clear not only that there was such a distinction but also that the resulting system could not be considered as goods:

"…it is not a natural or accurate use of language in this context to regard "the system" as simply "goods" attracting without more the well-known statutory incidents of quality and fitness for purpose. What ADT was agreeing to supply was primarily design skills and care in exercising them, not goods, and the goods which they did supply were of good quality." [6]

The Court of Appeal agreed with him.

This distinction between "Goods" and a "System", to adopt Coulson LJ's terminology, is important. It determines whether a supplier is obliged to provide something which is fit for purpose or to use reasonable skill and care in its production, which is less onerous. It follows, then, that being able to distinguish between these two things is equally, if not more, important.

Whilst every case is likely to turn on its facts I would argue that, in this context, the principal distinguishing characteristic of Goods is the existence of objective knowledge as to how they will perform in a particular set of circumstances. Objective knowledge is essential if a supplier is to have the confidence to warrant fitness for purpose. This is gained, typically through the processes of testing, development and reproduction.

- Testing involves observation and measurement. A system can be subjected to a much broader range of conditions than those it will be subjected to in service. This can reveal potential weaknesses or deficiencies and allow comparative assessment of alternative components or arrangements.
- Development establishes consistent performance. It allows adjustments, informed by observations and data from testing and from prototype installations put to use in controlled conditions, to be made both to the components and to their arrangement. Weaknesses can be mitigated and a level

- Reproduction develops confidence. Successful use of the same arrangements repeatedly over a number of projects or for a number of units demonstrates consistent performance over time. The confidence that this engenders, together with any additional knowledge gained, is what ultimately characterises the step from System to Goods.

Absent these three processes assessment of performance must be based on judgment; and what is design but the exercise of judgment in the appraisal, selection and combination of components? The more a design is informed by shrewd assumptions, knowledge of analogous parameters and extensive experience the better it will be. But without testing, reproduction and development, its performance can only be judged; it cannot be objectively established.

In short the distinction boils down to this; if you have to 'suck it and see' to know how a product will perform, the law as it currently stands is more likely to say System than Goods.

[1] [1975] 1 W.L.R. 1095
[2] (1980) 14 BLR 1
[3] iking Grain Storage Ltd –v- T H White Installations Ltd (1985) 33 BLR 103, John Lelliott (Contracts)
[4] [1012] EWCA Civ 1158
[5] At paragraph 41
[6] At paragraph 46

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Dispute Avoidance Under FIDIC Contracts

By Christopher Miers

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Why is it that one of the most important functions of a standing [1] Dispute Board (DB) – assisting the parties in the avoidance of formal disputes occurring during the project – is not mentioned in the most popular FIDIC contract; the 1999 'Red Book' [2]?

It is widely accepted amongst DB members that one of the most valuable services which can be provided by the standing DB is that of helping the parties to address matters of concern and potential disagreement as they arise. In this way differences can be resolved before they escalate into formal disputes. This critical role, which can be of immense value to the project and the parties, is referred to expressly only in the Gold Book (2008) [3], and in the MDB Harmonised Edition (2006 & 2010). This latter edition was introduced at the initiative of the Multilateral Development Banks and includes a number of standard modifications which are intended to enhance particular aspects of the standard form of the Red Book.

At paragraph 2 of the Annex: Procedural Rules which refers to site visits, the standard Red Book states: "The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims." It is left to the MDB version to add; "and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes."

Notwithstanding this, DB members operating under standard Red Book conditions will customarily consider that they have such a role. It should be noted, however, that despite this intention of assisting the parties to avoid formal disputes the role of the DB is not akin to that of a mediator; DB members would be unlikely to seek to adopt procedures similar to those used in mediation. The difference is important, particularly bearing in mind that under English law, at least, a distinction has to be drawn between the role of the mediator and that of the adjudicator as per HHJ Humphrey LLoyd QC in Glencot Development & Design Ltd v Ben Barrett and Son (Contractors) [4].

The DB role in dispute avoidance is set out more extensively within the ICC Dispute Board Rules 2004 [5] under Article 16, 'Informal Assistance with Disagreements'. Here the express provisions provide that, subject to the prior agreement of both parties; "The informal assistance of the DB may take the form of a conversation among the DB and the Parties; separate meetings between the DB and any Party with the prior agreement of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance which may help the Parties resolve the disagreement." Notwithstanding the express provisions, and as noted above in the light of the need in some jurisdictions to avoid the potential conflict between the role of a mediator and that of an adjudicator, many DB members would avoid meeting with one party only, in order to avoid potential

concerns from either party that the DB is privy to prejudicial information which the other party is not in a position to address.

As readers may well be aware, the FIDIC 'rainbow suite' of contracts is currently under review and updated editions are expected. It is to be hoped that the next edition of the Red Book will expressly include the MDB provision for dispute avoidance as set out above. In the meantime, it is open to parties to introduce the same term through the Particular Conditions by amending paragraph 2 of the Annex: Procedural Rules to add the same final clause, "and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes."

[1] A Dispute Board which is "full term", appointed at the commencement of the project, as per the Red Book and MDB Harmonised Edition FIDIC contracts Sub-Clauses 20.2 & 20.3
[2] Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, First Edition 1999
[3] Conditions of Contract for Design, Build and Operate Projects, 2008. Sub clause 20.5
[4] [2001] BLR 207
[5] These Rules are currently under review and the new Rules are likely to contain enhanced provisions in relation to the dispute avoidance process

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Planning Reform Proposals

By Martin Edwards

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The UK Government has long been anxious that the planning process is burdened by "unnecessary bureaucracy that can hinder sustainable growth." Last year, the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 allowed permitted development rights for Change of Use:

From offices to residential: B1(a) to C3 Use Class.

From offices, hotels, residential, institutional, assembly and leisure to a state-funded school: B1, C1, C2, C2A & D2 to D1

From agricultural to a number of other uses: to A1, A2, A3, B1, B8, C1 and D2.

The Order also increased permitted development rights for extensions to residential premises in non-protected locations, for a three-year period until 30 May 2016. Single storey extensions up to 4 metres in height may now extend beyond the rear wall of the original house by up to 8 metres if detached, or 6 metres otherwise, subject to the neighbour consultation scheme. (36 urban councils or parishes are exempt from the permitted development rights)

Also last year, the House of Commons published details of reforms intended to promote growth and speed up the planning system in the Growth and Infrastructure Act 2013, including:

- Allowing planning applications to be decided by the Secretary of State, if the local authority has been designated as not performing adequately in determining planning applications;
- Allowing renegotiation of planning obligations (Section 106 agreements or 'developer contributions') pertaining to affordable housing to address the economic viability of the development;
- Enabling the Secretary of State to direct that projects of national significance be considered under the procedures of the Planning Act 2008; and
- Enabling the Mayor of London to delegate decisions concerning planning applications of potential strategic importance.

Further proposed reforms announced by the UK Government cover:

- An increase in the permitted height of telecommunications antenna on existing buildings and structures from 4 metres to 6 metres;
- An increase in the permitted height of telecommunications masts on non-protected land from 15 to 20 metres;
- Greater flexibilities for Change of Use, with new permitted development rights:

From shop or professional financial to residential use: A1/A2 to C3

From retail to bank/building society: A1 to A2

From agricultural to residential (C3)

From offices, hotels, residential, institutional, assembly and leisure to state-funded school, or to nursery providing childcare: B1, C1, C2, C2A, D1 & D2 to D1

From agricultural to state-funded school, or to nursery providing childcare (D1)

From retail to restaurant: A1 to A3

From retail to assembly and leisure: A1 to D2

- Raising the threshold for proposals requiring an Environmental Impact Assessment;
- Relief from the Community Infrastructure Levy (CIL) for self-builders;
- Relief from the CIL for refurbishment of long-term vacant buildings;
- Raising the threshold for Section 106 contributions relating to affordable housing contributions to 10 units;

A phased programme will reduce the number of technical planning regulations down to 78: a reduction of 57%. Most of the proposals apply to England only.

A link to a House of Commons library note and full report follows [1]

[1] http://www.parliament.uk/briefing-papers/SN06418

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Procurement Advice: The Role of the Architect

By Gerard Mclean

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Architects very often give advice on the best way of procuring a project. This traditionally includes advice on the form of contract to be used and, in professional negligence claims, that advice is often alleged to have been incorrect. If the form of contract used is inappropriate, this can lead to substantial avoidable expense for the employer.

Until this year, advice on procurement was included in the UK RIBA Plan of Work at Stage B "Design Brief", which included "Identification of procurement method ….". This was to be reviewed at Stage C "Concept". The Stage B tasks also included identification of the "range of consultants and others to be engaged for the project", which seemed to be taken to be a separate issue; on traditionally procured projects, consultants were to be selected and confirmed in Stages C and D. The 2008 edition of RIBA's Architect's Job Book expected the architect to, "Explain to the client the options for procurement …" as part of the normal services in Stages A-B.

The 2013 Plan of Work sets things out quite differently. Stage 0 "Strategic Definition" includes "Procurement", for which the only task is, "Initial considerations for assembling the project team". The "Procurement" tasks required at Stage 1 "Preparation and Brief" are: "Prepare Project Roles Table and Contractual Tree and continue assembling the project team". For subsequent Stages, the "procurement" tasks are stated to be dependent on the procurement route "determined during Stage 1". Neither the 2013 Plan of Work nor the accompanying UK RIBA Guide refers to the architect giving any advice on the form of contract. The 2013 edition of the Job Book mentions "advising on methods of procurement, and on tendering and the appointment of the main contractor" as a task that "might be added" in specific circumstances.

Although the RIBA does not now seem to envisage architects routinely providing advice on the benefits of different procurement routes, and specifically of different forms of contract, many architects still expect to do so. This is particularly the case when working with private clients; often there is no one else involved who would be able to offer such advice at the time when it is required, and those clients rely almost entirely on the architect's experience and integrity. Commercial and public clients will more often seek advice from a wider range of consultants, with the architect contributing to that advice, but many clients in these sectors also rely to a significant extent on the architect.

Different procurement routes are appropriate to different project circumstances, and most commonly more than one type might be suitable. In assessing the options, the balance of priorities is most often expressed in terms of time, cost and quality, sometimes refined by the addition of other categories such as cost certainty, early commencement or opportunity to alter the design during the works.

Determining the suitability of a particular contract may be a complex process: the advice will be affected by the employer's expectations and the extent to which s/he wishes to be directly involved during the works; by the availability of contractors with the right kind of experience, and by the skills of the consultant team. However, the advice given may be affected, to an unreasonable extent, by the limitations of the architect's own past experience, particularly when the architect's practice has operated within a limited range of project types.

Using the wrong type of contract can be costly for an employer. There are good books on the subject – the RIBA's *"Which Contract?"* covers all of the commonly used standard forms (although it has not been updated since 2007) – and an architect referring to one of these books could claim to have exercised reasonable skill and care.Problems are more likely to arise where the architect recommends a particular contract without giving proper regard to the alternatives available, or overlooks specific project characteristics, such as the restrictions imposed due to the property being listed, a limited budget or programme, or an employer's known propensity to change his/her mind.

The risks for an architect making recommendations in the area are obvious. But, even where it is clear that the contract used was inappropriate, and that some avoidable consequential loss probably occurred, demonstrating the extent of that loss with certainty will usually be very difficult. Where the loss claimed is a straightforward financial claim that the works cost more than they would have done if the work had been procured by a different route, a comparison may be made of the price paid and a of the price that would have been paid had the architect given better advice. However, where the claim concerns the time taken or the quality of the work done, the quantification of the loss claimed may be much more difficult.

Gerard Mclean *is a Chartered Architect with more than 20 years'experience in construction in the U.K and internationally and he is an Associate Director of Probyn Miers. He has worked extensively on Listed Buildings and in Conservation Areas, and has run projects under management contracts, construction management forms and bespoke partnering arrangements, as well as under more common standard forms. Gerard is instructed regularly as a party appointed Expert Witness on behalf of insurers, employers, architects, contractors and subcontractors, in a wide range of construction disputes valued at up to £10million. These disputes most commonly relate to allegations of breach of contract on the part of the contractor and/or claims of professional negligence against architects.*

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