

## NEWS UPDATE

# Construction shows real initiative

Two new initiatives, designed to help construction clients, have been launched by Wright Hassall.

Firstly, there is our go-between service. We are happy to offer a service as brokers, helping people to do deals and form alliances.

If you are interested in approaching another party to set up either a short-term or long-term trading arrangement, then we will be happy to organise a meeting at our offices, either over lunch, or during the working day, or in the evening. We may be able to provide a short presentation on a topic which is relevant to both parties.

Where a dispute has arisen between two parties who wish to restore trading, we are happy to offer either formal or informal mediation to restore good relations.

We are also offering, what we are calling our continuous service to professionals.

The role of professionals, such as architects, engineers and surveyors and other specialists, is essential to construction projects. Too often lawyers look to construction professionals with a predatory eye, in the hope of



dealing with professional negligence claims.

We are conscious of the need to provide a continuous helpline to other professionals on legal and contractual issues. We advise many professionals on a this basis dealing with professional appointments, warranties, bonds and general contractual advice both on building contracts and professional engagements. We are happy to do this in conjunction with insurance brokers. Some of our clients retain us on a monthly or annual basis.

If you are interested in pursuing these initiatives please contact Philip Harris on 01926 880766 or via email.

[philip.harris@wrightshassall.co.uk](mailto:philip.harris@wrightshassall.co.uk)

## Essential lesson learned

Philip Harris looks at some recent cases, the main theme of which is adjudication.

### *Gray & Sons Builders (Bedford) Limited v Essential Box Company Limited*

In this case Essential Box engaged Gray to demolish and rebuild an industrial unit in Bedford. In a first decision the adjudicator decided that Essential Box had repudiated the contract. In a second decision he decided that over £100,000 plus interest, was due to Gray.

Essential Box did not pay. Gray commenced enforcement proceedings. Essential Box did not submit any evidence in opposition but did not state that

the claim was accepted. Its solicitors wrote raising technical points. Essential Box offered payment of the sum by four instalments, which was not accepted. The day before the hearing Essential Box submitted its written argument stating that the application to enforce the adjudicator's decision would not be opposed.

The issue before the court was liability for costs. The court does not normally award full costs on an indemnity basis. Instead it assesses costs taking into account guideline rates and the proportionality of the costs to the amount in dispute.

Continued on page 4

## INSIDE THIS ISSUE

**Is your bargaining position as good as you think?**

Peter Tugwell reports, Page 2

**Spotlight on architect  
Ralph Erskine**

Page 3

**What you need to know about Public Procurement and Framework Agreements**

Page 2-3

# Is your bargaining position as good as you think?

Two parties were at loggerheads as to valuations and interim payments until, eventually, the claimant took their labour off site.

As you might have guessed, this ended up in the Technology & Construction Court before His Honour Judge David Wilcox. In the case [*Capital Structures PLC v Time & Tide Construction Ltd* [2006] EWHC 591], there was an application for summary judgment to enforce an adjudicator's decision, but not in the way you might have expected. What happened was that the parties, following negotiations, entered into a settlement agreement that, among other things allowed either party to take the dispute to adjudication if the other default-



**PETER TUGWELL** considers a recent case in which the defendant claimed that a settlement agreement has been reached under "economic duress".

ed on the terms of the agreement.

The main terms were that the claimant (sub-contractor) would release certain goods and the defendant (main contractor) would pay the claimant a sum of about £100,000, and then a further £20,000. The first payment was made, but not the second, so the claimant referred the dispute over the non-payment of the £20,000 to an adjudicator.

The defendant complained that the settlement agreement had in fact been obtained under "economic duress". It appears that the defendant's employer told the claimant that its failure to deliver the goods would lead to the employer stepping in and taking over the development from the defendant. The defendant claimed that such action would cause it financial difficulties, to the extent of a possible liqui-



dated. A representative of the defendant said that because of the pressure brought to bear he had no alternative but to agree to the settlement.

The defendant's plea of economic duress was rejected by the adjudicator. What is "economic duress"? The judge reviewed the authorities and summarised the law by saying that it involved pressure having the practical effect of meaning that the victim was under compulsion or with a lack of practical choice, where that pressure was illegitimate and which was a significant cause in inducing the victim to enter into the agreement.

The judge pointed out that the illegitimate pressure had to be "distinguished from the rough and tumble of the pressures of normal commercial bargaining", and that "commercial

pressure without coercion is insufficient".

A contract entered into under duress is voidable, not void. That means that the victim must take steps to set it aside as soon as he is free of the duress, otherwise he may be taken to have affirmed it.

The appropriate steps range from formal, unequivocal correspondence to seeking a declaration from the court.

In this case - where the words "commercial blackmail" were used, the judge found that there was an arguable ("albeit shadowy") case, and refused enforcement.

For more information, please contact Peter Tugwell on 01926 884635 or via email.

[peter.tugwell@wrightshassall.co.uk](mailto:peter.tugwell@wrightshassall.co.uk)

# The A, B and G of Ralph Erskine

The announcement in January 2007 that the Byker Wall, a part of the internationally acclaimed Byker Wall Redevelopment in Newcastle, had been given a Grade II\* listing, was yet another accolade for its architect, the late Ralph Erskine. Two other English works of this iconic architect are the Ark, in Hammersmith, London, and the Greenwich Millennium Village.

Ralph Erskine was born in London in 1914. The main influences on his early years were his Scottish Presbyterian parents and his attendance at the Friends School Saffron Walden, where he became committed to Quakerism. These ideals carried through to his views on society, man's place in it, and into his perspective on architecture.

After studying architecture at the Regent Street Polytechnic, London, including the requisite study of classical architecture, he and his contemporaries were allowed to follow their own ideas. Among those contemporaries was Gordon Cullen, the architect who developed the idea of "townscape". After qualification, Erskine worked for Louis de Soisson's office designing the Garden City of Welwyn. He managed to find time to study town planning and that increased his awareness of, and further stimulated his interest in, the concept of the inter-relationship between the built environment and the community.

He went to Sweden in 1938 where he founded an architectural practice. Much of his work was in Sweden where the Scandinavian landscape and climate, along with his socialist principles, were the major influences on his work. He was known for his designs being ecologically

conscious and the fact that his developments balanced the interests of the community and the individual. He was a very inclusive architect and it is said that the Byker redevelopment in Newcastle on Tyne is one of the largest and most thorough examples of user participation in design.

The main feature of the Byker redevelopment, started in 1969 and finished in 1982, is the Byker Wall. It was intended as a barrier against a motorway, which was never in fact built, but it shielded a mix of low rise and individual houses, together with a network of public, private and semi-private spaces. The development was planned so that its inhabitants had a view towards the River Tyne.

The Byker Wall is a long unbroken block of 620 maisonettes in the Functionalist Romantic style, with textured complex facades, colourful brick, wood and plastic panels. Its innovative and visionary design has won many awards including the Civic Trust Award, the Eternit Award, the Veronica Rudge Green Prize for Urban Design from Harvard University, and the Wall has been placed on Unesco's List of Outstanding 20th Century Buildings. Its recent Grade II\* listing is, therefore, another fitting accolade.

As a contrast to Erskine's visionary development in the context of social housing, the Ark, in Hammersmith, is an office block in the centre of a roundabout. This building too, shows Erskine's commitment to social and environmental responsibility. Its users have the benefit of an architectural space which, through the cleft and the atrium, brought daylight to every level. It was built in 1992 and its shape suggests its name - with its hull being easily recognisable, with a cutaway in

the façade which is believed to be for a large ramp leading up to the entrance but this was not carried through to the finished design. Its enlightened design has, unfortunately, led to it being described as being "at the cost of inefficient use of space in conventional office terms".

The last but by no means least of our "A B ...G" is the Greenwich Millennium Village. This innovative, modern, urban village is part of the regeneration of the whole of the Greenwich Peninsula, home of the ill-fated Millennium Dome. The village has 670 residences of an environmentally friendly design as can be expected from Erskine and has integrated village shopping and community centres.

He won the RIBA Gold Medal of Architecture in 1987 and was appointed a CBE in 1979. His own words tell of his personal beliefs: "architecture, like the shaft of an axe, must beautifully and precisely symbolise its own good reasons for its necessary existence. Insight and sincerity will tell us which reasons are good." He also said: "Architecture and urban planning - be it at macro or micro level, a private villa or an office block - must not only be a showpiece of design and technology, but give expression to those democratic ideals of respect for human dignity, equality and freedom that are fostered in our society".

Ralph Erskine died in March 2005 aged 91, in Drottingholm, near Stockholm, Sweden.

## Public Procurement and Framework Agreements

The new EU Public Sector Procurement Directive replaces the existing Directives covering public procurement of services, supplies and works. The Directive includes a provision for framework agreements under Article 32.

The Directive defines a framework agreement as "an agreement with suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and quantity".

This applies when public authorities seek to acquire goods, services, or works. The framework agreement may, itself, be a contract to which the EU procurement rules apply. Alternatively it may simply be an agreement under which contracts are only formed when goods, works and services are called off.

The UK Regulations, which implement the Directive, came into force in the UK on January 31 last year.

### Setting up the framework agreement

■ The framework should contain a mechanism that will be applied to pricing particular requirements for the duration of the framework. It should also be possible to establish the scope and types of goods and/or services that will need to be called off.

■ Obligations on issues of sustainability, Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and The Code of Practice on Workforce matters should be met.

■ It is necessary to advertise the framework agreement in the Official Journal of the European Union (OJEU) if its estimated maximum value over its lifetime exceeds the relevant EU threshold (5,278,000 euros for works, and 137,000 euros up to 750,000 euros for supplies or services.), and if the procurements in question are not covered by one of the exclusions set out in the Directives

In an OJEU Notice for a Framework Agreement the Notice must make it clear that an agreement is being awarded; include the contacting authorities entitled to call-off under the terms of the agreement; state the length of the agreement (maximum of four years "except in exceptional circumstances"); include the estimated total value of the goods, works or services for which call offs are to be placed and, so far as is possible, the value and frequency of the call-offs to be awarded.

■ If the framework is not advertised, then in cases where the procurement is subject to the EU rules, an OJEU notice may be required for individual call-offs. It is therefore generally a good idea to advertise the framework agreement itself so that there is no need to consider the need for advertising as each call-off arises.

■ Once the OJEU notice has been dispatched, the authorities setting up the framework agreement should follow the rules for all phases of the procurement process covered by the Directives.

■ When awarding the individual call-offs the authorities do not have to go through the full procedural steps in the EU Directives again as long as they were followed properly in the setting up of the framework agreement. The relevant EU Treaty provisions and Treaty-based principles will still apply (ie non-discrimination/non-distortion of competition).

■ The length of individual call-offs is not specifically limited by the Directives and therefore they may take the total period of the framework agreement over the four year time limit. This is allowed, although call-offs should not be granted very close to the end of the framework period in order to circumvent the framework maximum period of four years.

# Holding out for full payment proves the right move

Continued from front page

However, in this case, the court said that the right basis for assessment of costs, where a defendant resists enforcement of an adjudicator's decision until the date of the enforcement hearing, is indemnity costs, since the defendant knew or ought to have known that it had no defence. Gray was not to be deprived of any of its costs only because an offer to pay by instalments had been made. Gray had done better by obtaining judgment for the full amount, than by accepting instalments.

## *Hart Investments Limited v Fidler and Another*

This case shows how an adjudicator's decision can be defeated on a narrow procedural, technical point. It emphasises the need to comply strictly with the regime for adjudication under the Housing Grants Construction and Regeneration Act and the Government Scheme for Construction Contracts.

In the Hart Investments case the second defendant



**PHILIP HARRIS reports on recent case law including one in which an adjudicator's decision was overturned on a technical point.**

was Larchpark. Larchpark had carried out building works in Muswell Hill, London, for Hart. Larchpark obtained an adjudicator's decision for approximately £145,000 against Hart.

One of the grounds on which Hart resisted Larchpark's application for summary judgment to enforce the decision was that the referral notice was served out of time, being eight days rather than seven after the notice of intention to refer to adjudication. On that basis it was said the adjudicator had no jurisdiction. The court agreed with Hart and said that

**CONSTRUCTION NEWS UPDATE** contains material for general information purposes and does not constitute legal or other professional advice. Every effort is made to ensure that the content is accurate and up to date but users should always seek specific legal advice before taking, or refraining from, an action or relying on the legal information given here.



since the referral notice was not served within seven days of the notice of intention to adjudicate and since Hart had not waived that irregularity, the adjudicator had no jurisdiction.

Section 108 of the Housing Grants Construction and Regeneration Act requires that a construction contract shall provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of notice of adjudication.

The Scheme for Construction Contracts provides at paragraph 7(1) that the referring party shall not later than seven days from the date of the notice of adjudication, refer the dispute in writing to the adjudicator.

The Judge took the view that if the timetable for adjudication can be extended without consent by simply serving a referral late, there is a great danger of uncertainty and of watering-down the critical importance of the tight timetable on which the adjudication process is based.

## *R J Knapman Limited v Richards and Others*

What happens if an adjudicator decides that a sum of money is due and payable to the contractor, but in the same decision he also decides that the contractor is in culpable delay in circumstances where the employer is entitled to recover liquidated damages? That important issue appeared to have been comprehensively decided in the case of *Balfour Beatty Construction v Serco Limited* 2004 EWHC 3336. In the *Balfour Beatty* case the court said:

"Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained dam-

ages then the employer may set-off that sum against the monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer has given proper notice..."

The case of *R J Knapman Limited v Richards and Others* comes after and restricts the scope of the *Balfour Beatty* decision. *Knapman* was the contractor. *Richards* was the employer. It decides that if it does not strictly "follow logically" from the adjudicator's decision that a sum is due by way of liquidated damages, then no set-off can be made by the employer. In the *Knapman* case, the adjudicator had decided that *Knapman* was entitled to an extension of time of 13 weeks and that liquidated damages and interest were therefore repayable in part. *Richards* therefore took the line that they were entitled to set off liquidated damages for the balance of the delay period up to practical completion. However, the court decided that there were three grounds for saying that the right to deduct liquidated damages did not follow logically:-

1. The adjudicator had not carried out an exhaustive review of delay within the adjudication.
2. *Knapman* had put its claim on the basis that practical completion occurred at the end of April 2006. It did not claim, in the alternative, that if there were a later practical completion date, it was entitled to an extension of time to that date. The court concluded that "the adjudicator was not dealing with any full extension claim in the adjudication".
3. *Richards'* entitlement to deduct liquidated damages depended on there being a non-completion certificate. The contract administrator had not issued a non-completion certificate. Hence there was no entitlement to take liquidated damages.

The *Knapman* case illustrates that, even though the adjudicator has only awarded a partial extension of time, the employer cannot set-off liquidated damages unless the adjudicator's review of delay is comprehensive and all relevant notices and procedures under the contract have been complied with.

[philip.harris@wrighthassall.co.uk](mailto:philip.harris@wrighthassall.co.uk)