

# Poor Performance

Calum Lamont, Keating Chambers

- *“What options are open to you when dealing with a poorly performing contractor – so as not to jeopardise the remaining scope of the work or put yourself at risk legally?”*

# Matters for consideration



- Contract/no contract
- Claims and contract administration
- Termination

- Starting point is always: look at the contract
  
- What if there is no formal contract?
  - No contractual right to terminate – common law only
  - Delay: no EOT machinery? Possibly time at large?
  - Delay: notice to make time of essence
  - Defects: no DLP, so no entitlement or obligation to remediate

# Arcadis Consulting (UK) Limited v AMEC (BSC) Limited [2016] EWHC 2509 (TCC)



- Structural Engineering Services
- No executed contract
- Dispute over incorporation of exclusion clause
- Manifestly defective Car Park

- Paragraph of Schedule 1
  - "The limit, if any, on the Consultant's liability (as referred to in clause 2A) is £610,515 – 10% of sub-contract package for uninsured losses"
  
- Arcadis: operates as total cap. AMEC's wording!
  
- AMEC: limited to "uninsured" losses, so can take benefit of any PI cover

- 2 letters sent on same day
  - One (LOI) referring to historic T&Cs which had Paragraph M of Schedule 1 left blank
  - One attaching updated draft T&Cs for agreement with Paragraph M of Schedule 1 filled in
  
- AMEC asserting no contract and T&Cs incapable of agreement in any event
  
- Arcadis asserting historic T&Cs apply with "new" Schedule 1



- 45. “It depends not on their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”

- Courts eager to find a contract
  
- Neither set of T&Cs nor any Schedules incorporated. But if "new" Schedule 1 incorporated, would have capped liability at £610k
  
- Do not take RTS too far:
  - Need to establish certainty
  - Need to prove that document incorporated before Court can consider questions of interpretation

# Lessons learned (1)



- Always look to conclude a contract
- Always fill in contract particulars

- Critical to protect Employer's position re. claims if contractor is performing poorly
  
- Valuation and certificates:
  - Deductions for defective work
  
- Notice provisions:
  - LADs
  - "Claims control" clauses – e.g. clause 20.1 FIDIC

- Running the contract. Part and parcel of professional function
  - Architect/Contract Administrator (SBC)
  - Employer's Agent (D&B)
  
- Must act impartially
  - [Merton v Leach \(1985\)](#)
  
- Immediate tension?

# Administrators beware!



- Will generally be liable if negligently overcertify or fail to issue compliant notices
  - [Sutcliffe v Thackrah](#) (1974)
  
- Final certificate: conclusivity undermined
  - [Cantrell v Wright & Fuller](#) (2004)
  
- Failure to issue pay less notice

# Classic claims control: FIDIC Clause 20.1



*If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor **shall give notice** to the Engineer, describing the event or circumstance giving rise to the claim. **The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware of the event or circumstance.***

***If the contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim...***

Failure to comply with the procedure limited the amount to which the contractor was entitled to that considered “*to be verified by contemporary records*”.

*Her Majesty’s Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Ltd (2003).*

# Non compliance with claims control procedures



- Not just a bar to claims up the line!
- Effect will depend on the wording of the contract.
- If wording is clear, Failure to notify will bar claim
  - Bremer Handelsgesellschaft [1978]
    - MANDATORY NOTICE
    - SANCTION/DEBARRING WORDING
  - Multiplex v Honeywell [2007]
  - Obrascon v Gibraltar [2015]
  - Steria v Sigma [2011]
- If in control of issuing notices, may attract PI liability

# Lessons learned (2)



- Comply with notice provisions – protect Employer's position
- Hold contractors to notice provisions
- Beware variation/waiver/estoppel
- Beware UCTA – CMI v Regorco (2016)

- The exocet option
  
- Contract or common law?
  - Contractual regime
  - Common law: repudiatory breach and acceptance
  - NB defects and delay are not normally repudiatory conduct
  
- If get wrong, will be repudiatory breach of contract
  - Architectural Installation Services (1989)

- Termination “for cause”:
  - Insolvency
  - “material” breach
  
- Termination “for convenience”
  - Legality (Abbey Developments)

- Exclusive remedies provisions
- Notices

- *Woodar v Wimpey* (1980)

*"... Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations".*

- Tension: may not be able to hedge bets – depends on consequences of taking divergent routes

- Option of last resort
- Must adhere to contractual rules