

a presentation by

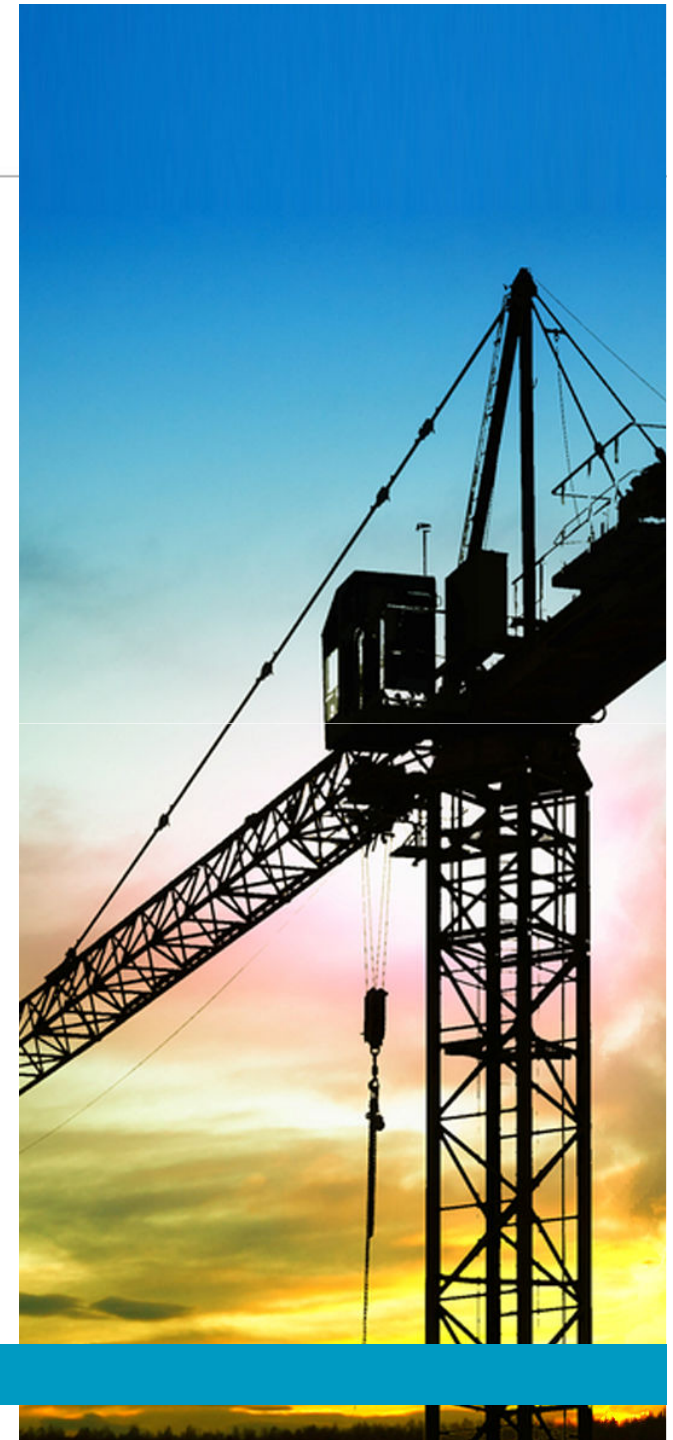
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Construction is a risky business: reducing risk and limiting loss

Introduction

- Contractually limiting loss;
- Avoiding the consequences of statutory adjudication; and
- Taking advantage of Mitchell.



Contractually limiting loss

Net contribution clauses (NCC)

Previously:

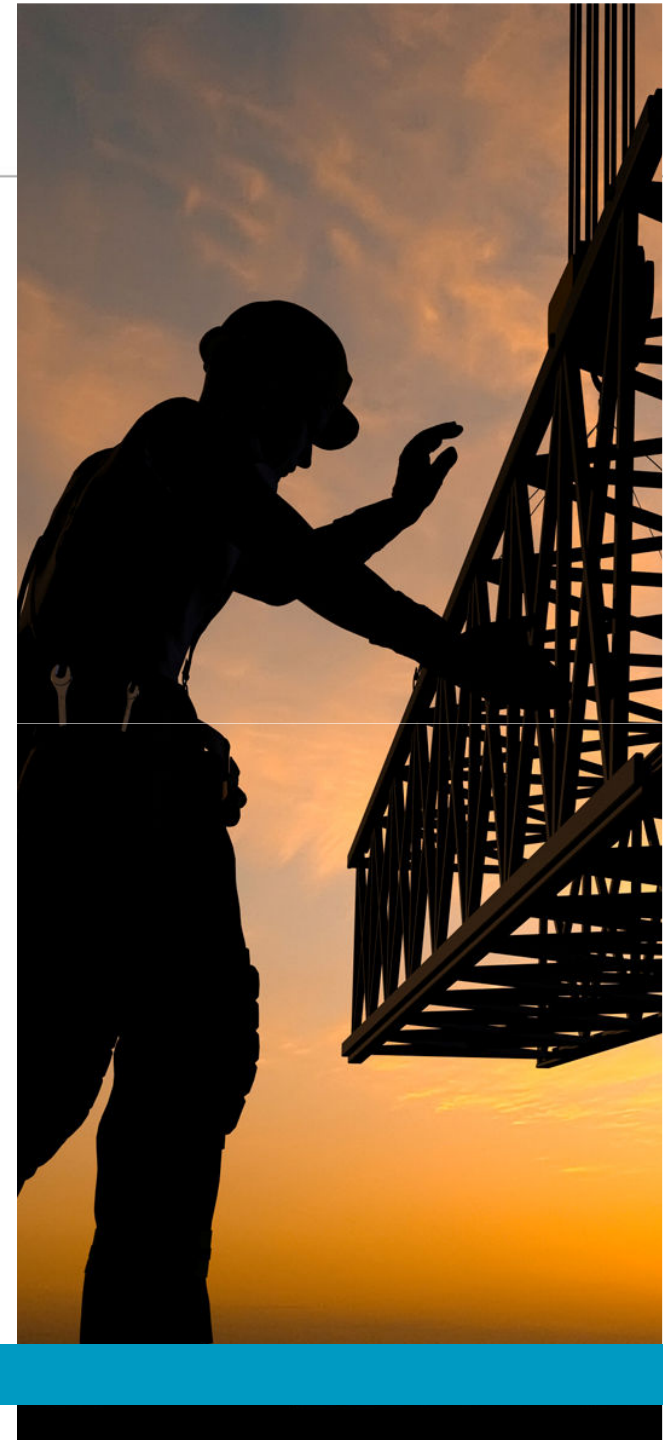
Langstane v Riverside & Others (Scotland, 3 April 2009):

- The Court of Session held that the Unfair Contract Terms Act 1977 ('UCTA') did not apply to the NCC in the ACE Conditions 1998 revision as it did not seek to exclude the promisors liability for breach of duty.

Now:

Royal Bank of Scotland v Halcrow Waterman Ltd (Scotland, 8 November 2013):

- D (a Structural Engineer) was appointed by the Contractor on a construction project.

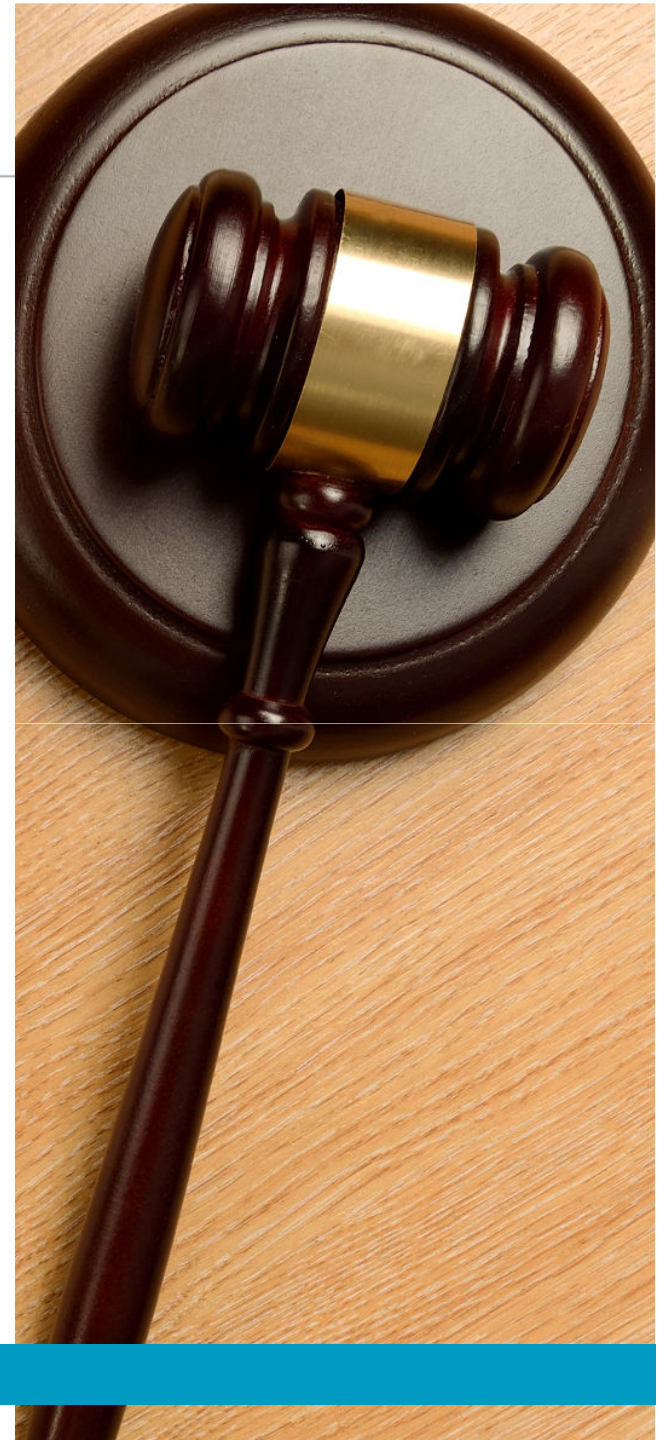


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- The property was let to C who received the benefit of a collateral warranty with an NCC which limited D's liability to C's '*losses which it would be just and equitable to require the Consultant to pay having regard to the Consultants responsibility for the same and on the basis that all other Consultants shall...have provided...[similar]... contractual undertakings*'.
- C made a claim against D for, inter alia, the cost of remedying defective works.
- D contended that responsibility for C's losses also lay with the Contractor/its Sub-Contractors, and that:
 - i. the Contractor should be construed as falling within the scope of '*other Consultants*', or
 - ii. the clause should in any event restrict the D's liability to that proportion of C's losses that it would be just and equitable to require D to pay.



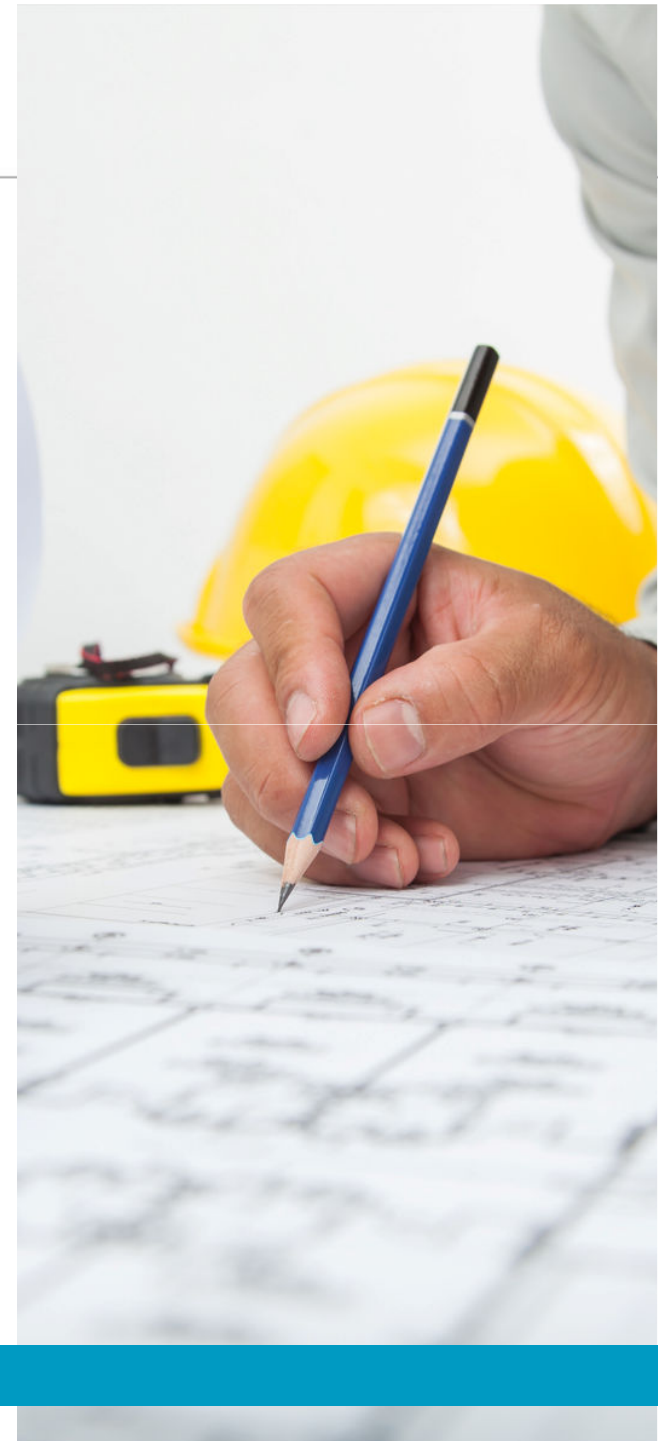
- The Court of Session did not agree. It held:
 - i. A clear and well recognised distinction was drawn throughout the contractual documentation between the Contractor and the Consultants; to interpret the words ‘other Consultants’ as including the Contractor would amount to re-writing it.
 - ii. D’s second argument would, in effect, require reading the clause as if it stopped after the word ‘*responsibility for the same*’.




West v Ian Finlay & Associates (Court of Appeal, 27 March 2014)

- C appointed D (Architects) in relation to the alteration and refurbishment of a property. The appointment included the following clause:

‘Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you’
- D put the main contract out to tender and C appointed Armour. C also directly procured several aspects of the works, which did not form part of the main contract.
- There were a number of defects following completion and C commenced a claim against D. Armour was insolvent.



- At first instance, Edwards-Stuart J held:
 - the NCC was not unfair under the Unfair Terms in Consumer Contracts Regulations (UTCCR – which only applies to contracts with consumers) and was therefore enforceable and;
 - the losses were caused to some extent by Armour's breach of contract.
- **BUT:**
 - the words '*other consultants, contractors and specialists appointed by you*' could either mean: (a) everyone with whom C had entered into a contract in relation to the contract, other than D or (b) only those with whom C had contracted directly and not the main contractor who had been appointed by C through the agency of D.
 - As clause 7.2 of UTCCR requires the court to give the interpretation most favourable to C, meaning (b) applied.

- Fortunately the Court of Appeal did not agree:
‘The first consideration in any construction exercise is to consider the normal meaning of the words. Here the normal meaning is crystal clear. We do not accept that there is any ambiguity. There was no limitation on the words “other consultants, contractors and specialists appointed by [the Claimants]” and they must be taken to mean any such persons, including the main contractor....but of course excepting... [the Defendant]...We do not therefore think that the judges construction of the NCC was an available meaning’.
 - The CA went on to consider the questions of unfairness under regulation 5 of the UTCC Regulations and (contrary to the Scottish case of Halcrow) reasonableness under UCTA.
 - The Court found the NCC was both ‘fair’ and ‘reasonable’ and therefore enforceable, taking into account the following:
 - The prevalence of the usage of the NCC in standard RIBA forms;
 - The fact the clause would not be regarded as unusual in a commercial contract;
 - The fact that C would be taking the final decision on the choice of main contractor, very likely being alive to the fact that the contractors financial stability was a matter of importance;
 - C was in an equal bargaining position with D;
 - Cs ought to have known of the existence of the NCC.
- 

Limit/exclusion of liability clauses

Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd (High Court, 24 May 2013):

The facts

- C appointed D to complete a planning application by a specified date;
- The appointment contained the following clauses:
 - D *‘shall NOT be responsible for any consequential, incidental or indirect damages’*;
 - D’s liability is limited to *‘the total compensation actually paid to AMEC for the services or £50,000 whichever is less’*;
 - *‘All claims by the CLIENT shall be deemed relinquished unless filed within (1) year after substantial completion of the Services’*;
- D failed to complete the planning application by the specified date and C brought proceedings against D to recover the profit it would have allegedly made if the application had been completed on time.


The decision

- Coulson J found in favour of D, mainly because the most significant delays in the planning application could be attributed to C.
- Obiter, he went on to consider the clauses limiting/excluding liability. He found:
 - They were all ‘reasonable’ under UCTA and therefore enforceable on the basis that:
 - the bargaining positions of both parties were broadly equal;
 - C received no inducement to agree to any of the terms;
 - there was nothing to suggest that C did not know what D’s terms said and;
 - terms limiting liability in various ways are not uncommon in contracts for the supply of goods and/or services.

- Re the exclusion of consequential/indirect damages, if the loss of profit being claimed was too remote, it would be '*indirect damages*' and therefore excluded by this clause.
- Re the clause capping liability, it is not uncommon for those providing professional services to limit their liability. It is also common for those providing goods and services to seek to limit their liability to the value of the contract, particularly where their goods or services are only a small component in an otherwise much larger machine or structure.
- Re the time limit clause, the requirement for '*all claims*' to be '*filed*' within one year, required '*the provision of something akin to a Letter of Claim in the Pre-Action Protocols*'.

SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd (High Court, 10 October 2013):

The facts

- C appointed Simon Carves Ltd (SCL), a subsidiary of D, to construct a low density polyethylene plant. It included the following limit of liability:
‘....the aggregate liability of the Contractor under or in connection with the Contract (whether or not as a result of the Contractor’s negligence and whether in contract, tort or otherwise at law)....shall not exceed 20%of the Contract Price’.
 - Under the contract SCL provided an Advance Payment Guarantee and a Performance Guarantee.
 - D provided a Parent Company Guarantee (PCG) to C guaranteeing the performance of SCL under the contract.
 - It became apparent that SCL would not be able to meet an already revised completion date and C terminated the contract and completed the project itself.
 - SCL went into administration and C (a) called in the Advance Payment Guarantee and Performance Guarantee and (b) sued D under the PCG.
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The issues

- The contract provided that if the total loss in completing the works following termination exceeded the total amount which would have been payable to SCL had they completed the works, the difference would be recoverable by C. An issue arose as to whether this fell within the aggregate cap of 20% of the contract price.
- An issue also arose as to whether, in calculating its losses, it should deduct the amount it had received under the Advance Payment Guarantee and the Performance Guarantee, before the cap was applied.

The decision

- Stuart Smith J held, obiter:
 - In the context of the contract as a whole, notwithstanding the very wide wording of the capping clause, the parties did not intend the cap to apply to the costs incurred by C in completing the works.
 - The monies paid out under the Advance Payment Guarantee and the Performance Guarantee should be deducted from the amount recoverable by C for completing the works before the cap on liability is applied.
- As such, C was entitled to recover its losses up to the 20% cap + its costs incurred in completing the works + the amounts recovered under the Advance Payment and Performance Guarantees.

No greater liability clauses

Oakapple Homes (Glossop) Ltd v DTR (2009) Ltd (High Court, 31 July 2013)


The facts:

- C appointed D (an architect) in connection with the conversion of a former cotton mill to residential apartments and commercial units. The appointment required D to enter into collateral warranties for the benefit of purchasers and tenants of the property containing the following 'no greater liability' clause:

'The Consultant has no greater liability hereunder which is greater or of longer duration than it would have had if the Beneficiary had been a party to the Appointment as joint employer PROVIDED THAT the Consultant shall not be entitled to raise under this Deed any set-off or counterclaim in respect of the sums due under the Appointment'

- C subsequently appointed Oakapple Construction, ('the Contractor'), and D's appointment was novated to the Contractor.
- 

The issues

- After completion of the project, the property was largely destroyed by fire. C alleged that the fire and its rapid spread was the fault of D.
 - At this stage D had not executed collateral warranties in favour of the purchasers of apartments.
 - Consequently, C sought an order compelling D to execute those warranties.
 - One of the issues that the Court had to decide was whether D would be entitled to defend claims by beneficiaries of the residential tenant collateral warranties on the basis of the Contractor's contributory negligence.
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The decision

- Ramsay J held:
 - Under the '*no greater liability*' clause, D's liability to the Beneficiary would be no greater or of longer duration than it would have been if the Beneficiary had been a party to the Appointment as joint employer. The Appointment is the agreement between C and D and not the Appointment '*as novated*'.
 - D could not allege against C that the damages due to C fell to be reduced to take account of contributory negligence by Oakapple Construction.
 - As the damages due to C could not be reduced to take account of the alleged contributory negligence, the '*equivalent rights of defence*' clause would not reduce the damages payable to a Beneficiary.
 - Furthermore, the position would not change, even if the collateral warranty referred to the Appointment '*as novated*'. If Oakapple Construction was contributory negligent, that would still mean that D was liable to Oakapple Construction. That liability would not be affected, but the damages recoverable for that liability would be reduced.

Conclusion

- There are various contractual clauses that can be used to limit exposure.

BUT:

- They may be less effective or even ineffective if not carefully drafted.




Avoiding the consequences of statutory adjudication

Why should you want to avoid them?

- Whilst expeditious and relatively cheap it is a rough and ready process.
- As Lord Chadwick put it in ***Carillion Construction Ltd –v- Davenport Royal Dockyard Ltd (2005)***, “*the need to have the ‘right’ answer has been subordinated to the need to have an answer quickly*”.


How might you avoid them?

- where the adjudicator lacked or exceeded his jurisdiction;
 - where the adjudicator breached the rules of Natural Justice;
 - where the receiving party is in liquidation or receivership or there is serious doubt about its ability to repay an adjudicator's award, obtaining a stay of execution.
 - As an adjudicator's award is not final and binding, you can also pay the award and have the dispute heard afresh in arbitration or proceedings.
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Jurisdiction

- Two instances where an adjudicator will lack jurisdiction have recently been looked at by the Courts:
 - Where there is no construction contract and;
 - Where there is a construction contract, but it is with a residential occupier.

Is a collateral warranty a construction contract?


- Construction contract is defined in section 104 of the Housing Grants, Construction and Regeneration Act 1996 as including making an agreement with a person for:
 - The carrying out of construction operations;
 - Arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise.
- 

Parkwood Leisure Ltd v Laing O'Rourke Wales & West Ltd (29 August 2013)

Akenhead J held that the warranty D had provided to C was a construction contract because:

- D warranted acknowledged and undertook that, inter alia, *'it has carried out and shall carry out and complete the Works'*;
- As such, D was *'not merely warranting or guaranteeing a past state of affairs'* it was providing an undertaking that it would *'actually carry out and complete the Works'* ;
- *'Thus, this Collateral Warranty is clearly one "for the carrying out of construction operations by others"....'*

BUT, it does not follow that all collateral warranties given in connection with construction developments will be construction contracts.



The residential occupier exception

Westfields Construction Ltd v Clive Lewis (27 February 2013)

- Concerned refurbishment works to a dwelling house.
- A dispute arose, C referred the matter to adjudication and the adjudicator made an award to C. The award remained unpaid and C applied to enforce the adjudicator's decision.
- D argued that because he occupied the property at the time that the parties contracted (although he did not do so subsequently), the residential occupation exception applied.
- Coulson J did not agree. He held:
 - *'...occupation is not to be tested by a single snapshot in time...,but instead requires on going occupation (including, if appropriate, an intention to occupy in the future)'*
 - As D *'did not occupy the property as his residence after the contract was made...., neither did he intend to occupy the property as his residence thereafter'*, the residential occupation exception did not apply.

What about human rights?


- Numerous challenges made to adjudicator's decisions under Article 6 (the right to a fair hearing).
- Consistently rejected on basis the adjudicator does not finally determine the parties' rights and obligations.

However:

- **Whyte and Mackay v Blyth & Blyth (Scotland, 9 April 2013)**



The facts

- In 2004, D designed the structure of a new bottling plant on C's Grangemouth premises. C have a lease of the premises which expires in 2036.
 - The works were completed in January 2006 and cracks were subsequently discovered. In or about June 2009, C was advised that the cracking was caused by a lack of adequate piling, resulting from defective design.
 - To avoid business interruption, C proposed carrying out interim remedial works and then, as they were required to return the building in a satisfactory condition at the end of the lease, to vacate the premises one year early, to allow the reinstatement of the main production area floor slab.
 - In January 2011, C intimated a claim against D and, on 2 March 2012, they referred the dispute to adjudication.
 - C claimed the cost of their proposed scheme of remedial works as well as for the loss of use of the premises for the final year of the lease, when the main works would be carried out.
 - On 9 April 2012, the adjudicator issued his decision, which required D to pay C almost £3 million *'forthwith'*. On the adjudicator's findings, the cost savings enjoyed by C in not incurring the cost of the additional piling works could be set against almost all of the works to be done prior to the final year of the lease.
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The decision: Protocol 1 Art. 1 of the ECHR

- Protocol 1 Art 1 of the ECHR states '*Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest....*'
- There were therefore two questions for the Court to decide:



Would enforcement of the award amount to an interference with D's possessions?

- Lord Malcolm found that it did:
 - The fact that D enjoyed the benefit of PI insurance was an '*irrelevant circumstance*', which the law is 'traditionally....blind to....'.
 - In any event there could be no guarantee that D's assets would '*remain wholly unaffected*'.



Was that interference justified as being in the public interest?

Lord Malcolm found that it was not:

- Adjudication provides a provisional award. *'There was no pressing need for a speedy provisional decision'* in this case. C would not incur major losses for many years and in the meantime they were *'considerably in pocket, in the sense that they did not incur the extra costs involved in the piling works'*.
- If D were ultimately successful, there was no guarantee that they would recoup any monies paid to C.
- *'None of the public interest justifications which underpin the compulsory statutory scheme'* were present.

The impact in England and Wales

- Even if followed its impact is likely to be limited.
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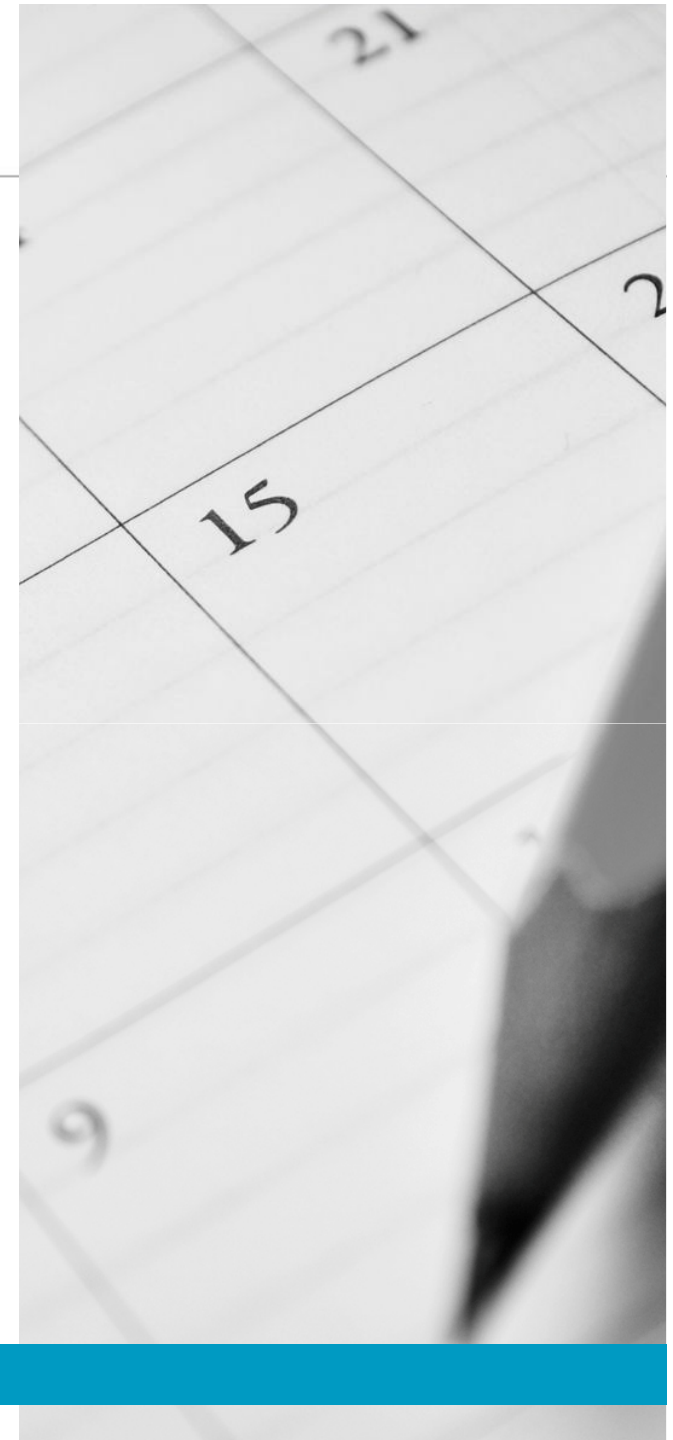
How long have you got get your money back?

Jim Ennis Construction Ltd v Premier Asphalt Limited (24 July 2009)

- C appointed D to carry out the laying and rolling of bituminous macadam surfacing. The contract contained no express adjudication provision.
- S108 of the Housing Grants Construction and Regeneration Act 1998 states:
'(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement....
(5) If the Contract does not comply....the adjudication provisions of the Scheme for Construction Contracts apply.'



- The Scheme provides:
‘2 Where a construction contract does not comply....the adjudication provisions in Part I of the Schedule to these Regulations shall apply.’
- The Schedule provides:
‘23(2) The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement....’



The decision

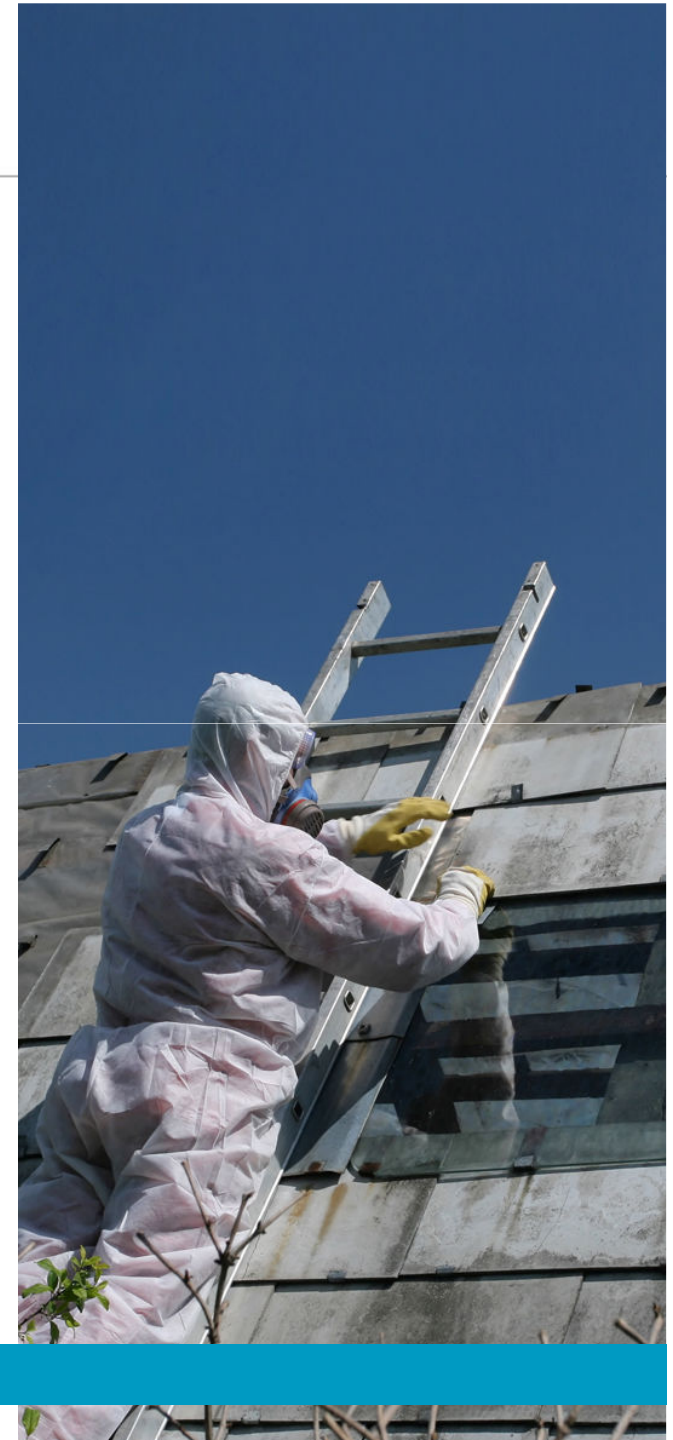
- His Honour Judge Stephen Davies held:
 - *‘Both s.108(3) of HGCRA and paragraph 23(2) of the Scheme make it clear that the decision of the adjudicator is only binding on the parties until the dispute is finally determined by legal proceedings, by arbitration (if provided for) or by agreement.’*
 - *‘It seems to me that the implied term is necessary to make fully workable the concept of the temporary finality of the adjudicator’s decision which lies at the heart of the policy behind the adjudication provisions of the HGCRA.’*
 - *‘...the cause of action under the implied term can only arise when the losing party pays monies to the winning party in compliance with the adjudicator’s decision....because it is a claim founded on a simple contract...the losing party has 6 years from the date of payment in which to bring legal proceedings to recover that payment’.*

Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc

D instructed C to carry out an asbestos survey. There was no express adjudication clause in the contract.

The decision

- At First Instance (23 May 2013), Akenhead J declined to follow *Jim Ennis* and held the usual limitation of 6 years from breach of contract applied.
- Fortunately, the Court of Appeal did not agree (29 November 2013) and followed *Jim Ennis*.



Taking advantage of Mitchell

New CPR 3.8 and 3.9

CPR 3.8

- Any sanction for failure to comply imposed by a rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.
- Where a rule, practice direction or court order requires something to be done in a specified time and specifies the consequences for failure to comply, unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.



CPR 3.9

On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need:

- a) for litigation to be conducted efficiently and at proportionate cost; and
- b) to enforce compliance with rules, practice directions and orders.



The possible sanctions

- A specific sanction may be set out in a rule, practice direction or court order e.g. CPR 3.14, 32.10, 35.13, 44.3B;
- If a specific sanction is not set out in a rule, practice direction or court order, the Court may still impose its own sanction:
 - **Mitchell -v- News Group Newspapers Ltd (Court of Appeal, 27 November 2013):**
 - **Webb Resolution Ltd and E-Surv Ltd (High Court, 20 January 2014):**
 - **Baho & Ors and Meerza (Court of Appeal, 10 April 2014)**

The test for relief from sanction

The Mitchell test

- **Mitchell v News Group Newspapers Ltd (Court of Appeal, 27 November 2013):**

- Finding that:

- *‘regard should be had to all of the circumstances of the case’* but that:
 - The two considerations specifically mentioned in CPR 3.9 *‘should now be regarded as of paramount importance and be given great weight’*,

- The Court of Appeal set out the following test:

- 1. Is the non-compliance trivial?**

- Yes – ‘the court will usually grant relief provided that an application is made promptly’.
 - No - go to step 2.

- 2. If the non-compliance is not trivial, is there a good reason for it?**

- Yes – ‘the court will be likely to decide that relief should be granted’.
 - ‘the weaker the reason, the more likely the court will be to refuse to grant...’ relief from sanction.



The Mitchell test re-interpreted

• **Denton and Others v TH White Ltd & Another; Decadent Vapours Ltd v Bevan and Others; Utilise TDS Ltd v Davies and Others (Court of Appeal 4 July 2014)**

• *‘...the guidance given ...[in]...Mitchell remains substantially sound. However, in view of the way in which it has been interpreted we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanction in three stages’:*

1. Is the non-compliance serious or significant?

- Yes – *‘the second and third stages assume greater importance’*
- No – *‘relief from sanction will usually be granted and it will usually be unnecessary to spend much time on the second and third stages.’*

2. Is there a good reason for it?

- Yes or No – go to stage 3

3. In all of the circumstances of the case, would it be just to grant relief from sanction?



When does the test apply?

1. **There needs to be a sanction requiring relief.**
 - *Bank of Ireland v Pank (High Court, 12 February 2014).*
2. **There needs to be an application for relief from sanction as distinct from:**
 - an application to vary or revoke under CPR 3.1 (7) the order imposing the sanction (*Thevarajah v Riordan (Court of Appeal, 16 January 2014)*).
 - ‘*An application for an extension of the time allowed to take any particular step in litigation....provided that the applicant files his application notice before the expiry of the permitted period. This is the case even if the court deals with the application after the expiry of the relevant period*’ (**Hallam Estates -v- Baker (Court of Appeal, 19 May 2014)**) As stated in **Mitchell:**
‘.... applications for an extension of time made before time has expired will be looked upon on more favourably than applications for relief from sanction made after the event’.

When is non-compliance 'serious or significant'?

- It will depend on the facts of every case, but we do have some guidance.
- Guidance in ***Denton, Decadent, Utilise***:
 - *'It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant.*
 - *'But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example ...is a failure to pay court fees.'*
 - *'... the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought' (i.e. it should not at this stage consider other unrelated failures or the defaulter's previous conduct).*

- **Serious or significant breaches:**
 - *Denton*
 - *Decadent*
- **Non-trivial breaches which are also likely to be ‘Serious or Significant’:**
 - *Mitchell*
 - *Durrant v Avon & Somerset Constabulary* (Court of Appeal, 17 December 2013)
 - *Karbhari v Ahmed* (High Court, 17 December 2013)
 - *MA Lloyd & Sons Ltd v PPC International Ltd* (High Court, 20 January 2014)
 - *Samara v MBI & Partners UK Ltd* (High Court, 4 March 2014)
- **Not serious or significant breaches:**
 - *Utilise*
- **Trivial breaches which are also unlikely to be ‘Serious or Significant’:**
 - *Aldington & 133 others v ELS International Lawyers LLP* (High Court, 12 December 2013)
 - *Durrant v Avon & Somerset Constabulary* (Court of Appeal, 17 December 2013)
 - *Summit Navigation Ltd v Generali Romania* (High Court, 21 February 2014)

What is a good reason?

- Again, it will depend on the facts of every case. As The Court of Appeal said in **Denton, Decadent & Utilise**:
'It would be inappropriate to produce an encyclopaedia of all good and bad reasons to comply with rules, practice directions or court orders.'
- However, we do have some guidance:

Good reasons

- Guidance in **Mitchell**:
 - *'....ifa party or his solicitor suffered from a debilitating illness or was involved in an accident then, depending on the circumstances, that may constitute a good reason...'*
 - *'Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable at the time and could not realistically have been the subject of an appeal'*
 - *'in short, good reasons are likely to arise from circumstances outside the control of the party in default'*
- **Aldington**
- **Summit**

Bad reasons

- **Guidance in *Mitchell*:**

- ‘...mere overlooking a deadline, whether on account of work or otherwise, is unlikely to be a good reason...’
- ‘well intentioned incompetence for which there is no good reason should not normally attract relief from a sanction...’

- **Durrant**

- **Karbhari**

- **Samara**


- **Denton**



How does stage 3 of the test operate?

• ***Denton, Decadent & Utilise*** did not introduce the requirement to consider all of the circumstances of the case. It was stated in ***Mitchell*** that *‘regard should be had to all of the circumstances of the case’*.

• ***Chartwell v Fergies Properties (Court of Appeal, 16 April 2014):***

- Both parties failed to exchange witness statements by the deadline in a Court Order. C maintained that it could not do so until it had additional disclosure from D;
 - Over 2 months later, C made an application to extend the time for exchange of witness statements;
 - It was found that the non-compliance on the part of C was not trivial and that no good reason had been advanced to explain this. They simply appeared to have a *‘lack of the real understanding of the requirements of the revised rules’*.
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- Nevertheless, considering all the circumstances of the case, the parties were granted relief from sanction. As Laws LJ stated:

‘...this was one of those cases in which, notwithstanding the paramount importance and great weight to be given to the two matters specified in CPR 3.9, those matters could reasonably be assessed as outweighed by all the other circumstances’ .


- The ‘other circumstances’ included:
 - The trial date would not be lost and a fair trial could still be had;
 - No significant extra cost would be occasioned if relief were granted;
 - A refusal to grant relief would effectively mean the end of the claim: since C would have no evidence to prove its case and;
 - Ds were also in default, having failed to serve their witness evidence on time and having failed to make their own application for relief.

- Guidance from the Master of the Rolls and Von LJ in *Denton, Decadent & Utilise*:
 - ‘...the court must, in considering all of the circumstances of the case so as to enable it to deal with the application justly, give particular weight to the two considerations specifically mentioned in CPR 3.9 (i.e (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) to enforce compliance with rules, practice directions and orders).
 - In giving particular weight to these two important factors, ‘it will take account of the seriousness and significance of the breach (which has been assessed at the first stage’) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is good reason for it. Where there is good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
 - *‘But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case’*. Factors that may be relevant include:
 - the promptness of the application; and
 - other past or current breaches of the rules, practice directions and court orders.

- Conflicting guidance from Jackson LJ:
 - *‘I take a somewhat different view...in relation to the third stage. Rule 3.9 requires the court to consider all the circumstances of the case as well as factor (a) and factor (b).... What the rule requires is that the two factors be specifically considered in every case. The weight to be attached to those two factors is a matter for the court having regard to all the circumstances...factors (a) and (b) should “have a seat at the table, not the top seat at the table”’.*



- **Denton:**

- *‘Factor (a) militated heavily in favour of refusing relief from sanctions and holding the trial date.’*
 - *‘Factor (b) also militated heavily in favour of refusing relief from sanctions, because the delay was a most serious or significant breach of the courts earlier orders for the exchange of witness statements, which impacted upon the orderly progress of litigation.’*
 - *‘There was very little to weigh in the balance...under the heading of “all the circumstances of the case”. The claimants had had ample opportunity to serve their additional evidence long before December 2013....An adjournment of proceedings would result in the protraction of proceedings which had already dragged on far too long. It would cause a waste of court resources and generate substantial extra costs for the parties. It would cause inconvenience to a large number of busy people, who had carved out space in their diaries for the anticipated trial.’*
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- **Decadent:**

- *‘...factor (a) pointed in favour of relief, since the late payment of fees, did not prevent the litigation being conducted efficiently and at proportionate cost’*
- *‘Factor (b) also pointed in favour of the grant of relief since the breach was near the bottom of the range of seriousness.*
- *....even taking account of the history of breaches...this was not a case where, in all the circumstances of the case, it was proportionate to strike out the entire claim.*

- **Utilise:**

- Re the filling of the costs budget 45 minutes late *‘neither factor (a) nor factor (b) pointed towards a refusal of relief for the simple reason that ...the breach did not prevent the litigation being conducted efficiently and at proportionate cost, and did not imperil any future hearing date or otherwise disrupt the conduct of this or any other litigation.*
- Other circumstances to be taken into account included:
 - the fact C applied for relief as soon as he became aware of the position and;
 - the fact of the additional breach – the failure to notify the court timeously of the outcome of negotiations.

Should the non-defaulting party co-operate?

- **Summit:**

- Where C provided security 18 hours later than the deadline provided for in a Court Order, resulting in an automatic stay, Mr Justice Leggatt found that D's conduct in refusing to consent to C's application to lift the stay was unreasonable and that their arguments that C's default was material were without merit. Consequently he ordered D to pay costs:

'The Defendant's stance disregarded the duty of the parties and their representatives to co-operate with each other in the conduct of proceedings and the need for litigation to be conducted efficiently and at proportionate cost. It stood Mitchell on its head'.




- Guidance in **Denton, Decadent & Utilise**:
 - *‘In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation.’*
 - *‘The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days...’*
 - *‘The court will be more ready in the future to penalise opportunism....Heavy costs sanctions should...be imposed on parties who behave unreasonably.....’*
 - *‘An order to pay the costs of the application under rule 3.9 may not be sufficient. The court can....also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account ...when costs are dealt with at the end of the case. If the offending party...wins, the court may make a substantial reduction in its costs recovery....If the offending party...loses, then its conduct may be a good reason to order it to pay indemnity costs.’*
- In both **Decadent** and **Utilise**, the Court of Appeal considered that the Ds ought to have consented to the grant of relief from sanctions.

Our experience

- Following Mitchell our experience has been mixed e.g.
 - C applied 3 weeks before trial to adjourn as new evidence was needed on loss of earnings. We didn't oppose the adjournment as it would give us time to reach a negotiated settlement (we had already admitted liability). The judge called a CMC, was critical of the C for having repeatedly missed directions and struck out the claim.
 - C attempted to admit new witness evidence shortly before trial in breach of the Court ordered directions. The judge said that he had not even heard of Mitchell and allowed the evidence.
- We will have to wait and see what our experience is following *Denton, Decadent & Utilise*.

How can you take advantage of Mitchell?

- There are clearly opportunities to see sanctions imposed on other parties, which could be devastating to their case, reducing your losses.
 - To maximise those opportunities (and to avoid being on the receiving end) you should try and ensure that you are not also in breach (see *Chartwell*).
 - **BUT BE WARNED:** you should carefully consider whether it is the right tactic in any given case to refuse to agree an extension to a deadline or to oppose an application for relief from sanction, as you could put yourself at risk of an adverse costs order (see *Summit, Denton, Decadent & Utilise*).
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a presentation by

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