

## The "Prevention Principle" is Alive and Kicking

The Scottish Decision in *City Inn v Shepherd Construction*, in which it was decided that where concurrent delays occurred, an apportionment of delays approach is to be taken, appears to contradict previous decisions which adopted the "prevention principle".

The "prevention principle" determines that a party cannot benefit from its own breach of contract. Put simply, one party to a contract cannot rely on the other party's performance of an obligation under the contract between them, if the cause of the non performance is of the former's own making.

The "prevention principle" has been a part of English Law for a long time, albeit its origin is unclear. One of the very early construction cases involving the "prevention principle" was in *Holme v Guppy* in 1838.

The "prevention principle" has recently been upheld in the Technology & Construction Court by Mr Justice Edwards-Stuart in the case of *DeBeers UK Limited v Atos Origin IT Services UK Limited*.

This was a case involving computer software systems which similar to construction contracts often over-run. The contract between DeBeers and Atos included both extension of time and delay costs provisions. The judgement determined that Atos were entitled to extension of time for delays for which both DeBeers and Atos themselves were responsible and that Atos were not entitled to delay costs due to them being in part to blame for the delays.

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## Is Adjudication Too Expensive?

The right to adjudicate a dispute under a "Construction Contract" came into force in 1998 when the Housing Grants Construction and Regeneration Act 1996 (the Act) became statute.

One of the primary objectives of the Act was to assist with ensuring that cash flowed down the supply chain. The adjudication provisions were amongst other things intended to assist in this process by providing a relatively quick and inexpensive means of settling disputes about payment issues as they arise.

Reading trade journals, twitter and speaking to fellow professionals at networking and technical briefings, the current consensus appears to be that the Adjudication procedure is too expensive. It also appears that the finger of blame is pointed at the lawyers.

The lodging of challenges to an appointed adjudicator's jurisdiction and seeking to establish a similar level of case presentation as is produced for arbitration or litigation are the main reasons cited. These circumstances it is suggested, lead to expensive legal fees which make all but substantial monetary claims commercially unviable to pursue, given that the parties bear their own costs.

This raises a number of questions:

- Are the lawyers entirely to blame?
- Are the costs of adjudication high due to jurisdictional challenges introduced by lawyers?
- Has the industry brought upon itself this outcome due to using the adjudication procedure for resolving major final account disputes?
- Was the Act introduced with final accounts disputes in mind?
- Has adjudicating final accounts contributed to the need to ensure Referrals contain a similar level of detail as pleadings?
- Is adjudication the right forum for final account disputes?

Large final account disputes often include extension of time and loss and/or expense claims along with large variation accounts, involving numerous items in dispute. All of these matters usually require expert reports in support of the claims being made which add significantly to the costs.

What can be done to make adjudication more affordable? Are the costs of adjudication to become even higher to the Referring Party?

We will share our views on these matters in our summer edition.

## Charity Event 2011

This Years Charity event falls to Mark. On June 25th Mark will be Climbing Snowdon whilst Blind folded. In support of a little known Charity, Retinitis Pigmentosa.

Retinitis pigmentosa (RP) is the name given to a group of inherited diseases of the retina that all lead to a gradual progressive reduction in vision and potentially a complete loss of sight.

Mark says, *'RP is close to my heart after my Wife was diagnosed with the condition five years ago. Lisa has already lost her peripheral vision resulting in a reduction of approximately 50% of her total sight. I aim to raise some money for the Charity and with climbing blindfolded I hope that I can also raise the awareness of the condition.'*

If you would like to Sponsor me please visit my Just giving page:

[www.justgiving.com/Snowdon-blindfolded](http://www.justgiving.com/Snowdon-blindfolded)

Brant associates raise money and support a charity each year. If you would like to join us on our 2012 event, or suggest a charity to support in 2012, please do not hesitate to contact us.

Good luck Mark on the 25th June.



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