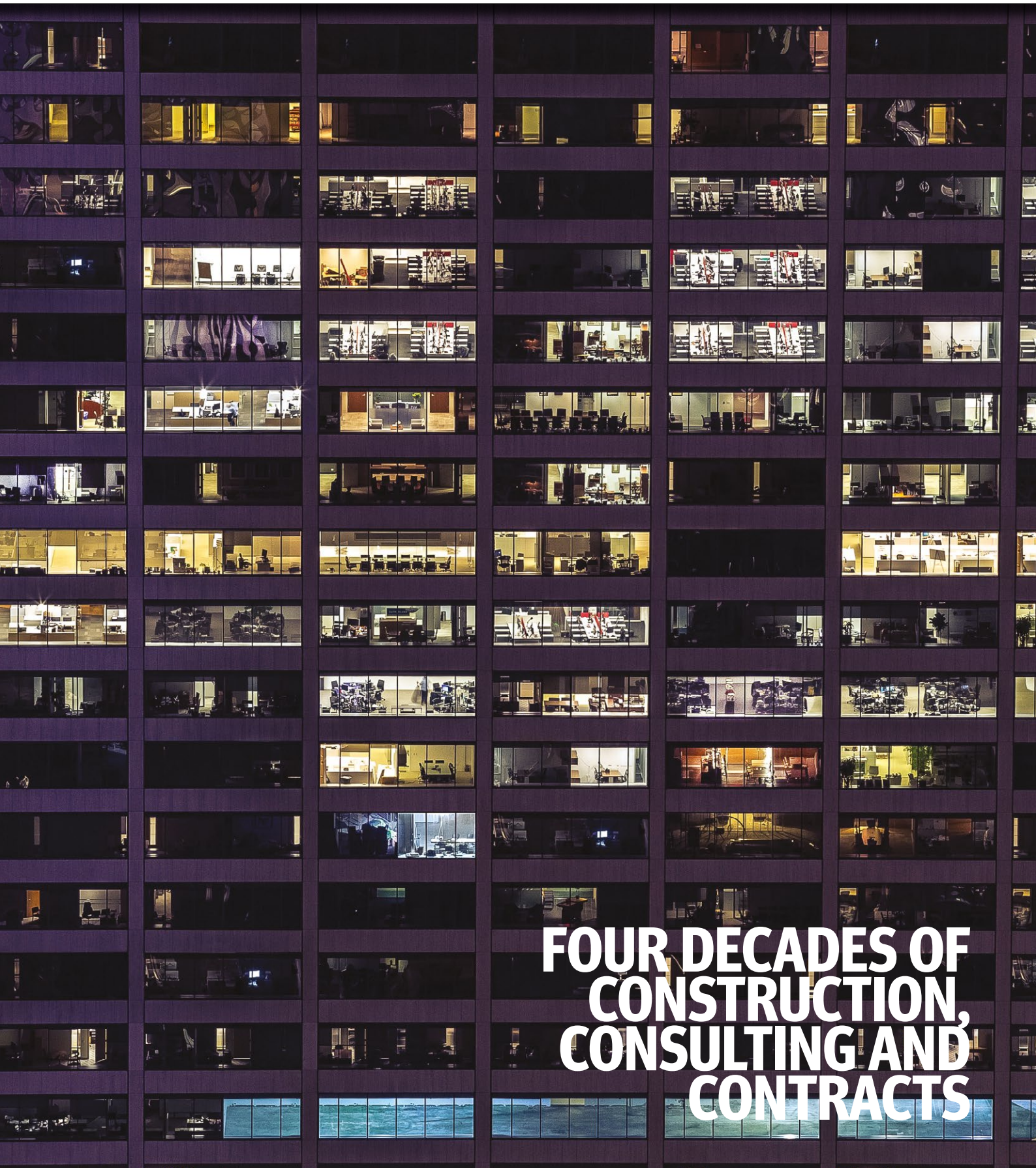
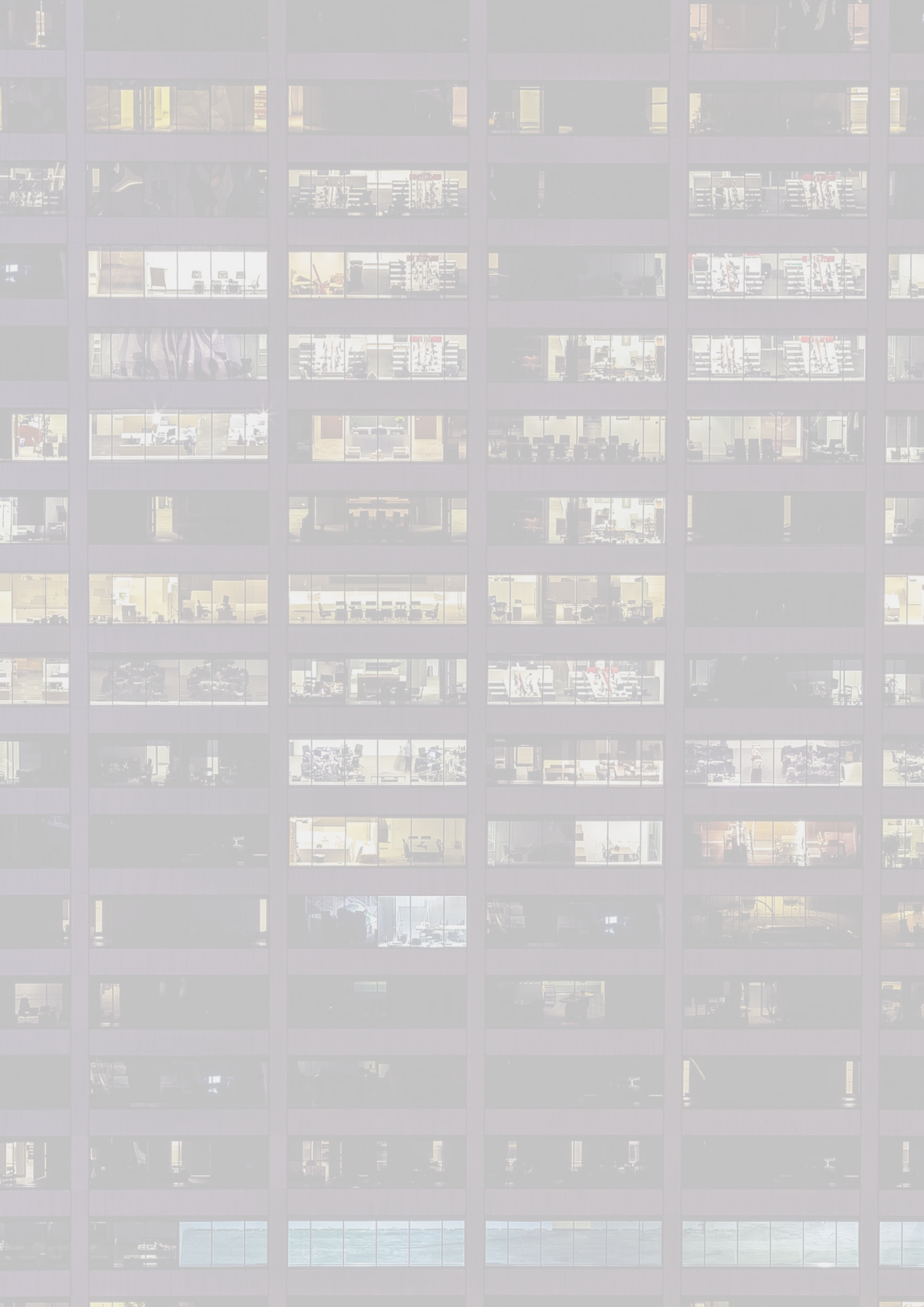
driver trett DIGEST

Issue 15 | March 2018



FOUR DECADES OF CONSTRUCTION, CONSULTING AND CONTRACTS



DIGEST

Issue 15 | March 2018

Welcome to the Driver Trett Digest

The 15th issue of the Driver Trett Digest celebrates that 2018 will mark 40 years since our business started in 1978, in Northampton, England. Pages 20-21 track our history through to a business which today operates from 28 offices around the world, in 32 different languages. Two things immediately come to mind; firstly, what would those who started the firm think about its development into a global brand, and secondly, perhaps more importantly, where will the next 40 years take us?

This issue includes some additional insight into our global teams with a variety of interviews featuring our regional directors, their views of the past and thoughts for the future. The team also look to the future in a selection of articles that turn attention to the need to develop and nurture a diverse, next generation as our industry moves forward.

For those regular readers of our Digest, you will find the usual high-quality mix of articles and analysis, commenting on hot topics including the new NEC4 and FIDIC forms of contract, next steps for adjudication in Canada, Paris's role as an international arbitration hub, and various viewpoints and contributions regarding the management of disputes, their solutions and resolution. Finally, in keeping with our anniversary theme, there is even a technical expert's view on the wonderful world of festival tents!

It's something of a cliché to talk about being 'a people business', but in the case of Driver Group this is completely true, the business starts and ends with our people. I would like to say a big thank you to all of those staff, past and present, who have contributed to our business over the last 40 years. The technical content in this issue finishes, appropriately, on page 40 - but 40 is of course not the end, but the beginning of the next chapter.

I hope you enjoy this special edition of the Driver Trett Digest.

Mark Wheeler
Global Chief Operating Officer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The downfall of being an optimist

DAVID WILEMAN – DIALES DELAY EXPERT ADDRESSES THE RISKS OF BEING AN OPTIMIST, ESPECIALLY WHEN IT LEADS TO SPENDING MORE THAN ORIGINALLY PLANNED.

I was sitting at my desk on 22 December 2017 thinking, "there's lots of shopping days left until Christmas...". Quite frankly, once again I was kidding myself and it looked as though my good lady wife would be getting the same as last year. A last minute panic buy. The problem with a panic buy, of course, is that they are always expensive. Always!

How did this happen again? How did I lull myself into thinking I had lots of time and how does that lack of time always end up costing me more?

My problem is that I am an optimist.

Misplaced optimism, it seems, is not limited to me and my seasonal purchases but rather to the construction industry as a whole. A quick Google of the word 'optimism' provides the definition, "hopefulness and confidence about the future or the success of something".

Optimism is prevalent in the construction industry, to the extent that the National Audit Office prepared a report (issued in December 2013) entitled Over-optimism in government projects. The foreword advises that: "This report looks at a particularly persistent risk management problem – the difficulties caused for government projects by unrealistic expectations and over-optimism."

The report sets out that there are many reasons why projects fail to meet expectations, such as poor project management and the impact of external factors beyond the control of those responsible. Further, that the challenges of delivering the projects are, "compounded by the endemic over-optimism which characterises decisions to commit to projects and the subsequent management of them."

This report follows The Green Book (2003), Appraisal and Evaluation in Central Government prepared on behalf of HM Treasury. Annex 4, Risk and Uncertainty, includes a section entitled Optimism Bias which helps to explain why engineers, and the construction industry in general, seems to suffer from its optimistic point of view. The headline point of Annex 4 describes optimism bias and the systematic tendency to be over-optimistic about key project parameters in relation to:

- Capital costs.
- Works duration.
- Operating costs.
- Under delivery of benefits.

Given that I am a planner, who takes instructions as an expert witness, I will concentrate on the second bullet point. The Green Book says:

1. Estimate the time taken to complete the works.
2. Apply adjustments to these estimates, based on the best empirical evidence relevant to the stage of the appraisal.
3. Subsequently, reduce these adjustments according to the extent of confidence in the works duration estimates, the extent of management of generic risks, and the extent of work undertaken to identify and mitigate project specific risks.
4. The estimates of works' duration, and the adjustments for optimism, should ideally be reviewed independently.

Delay experts are often instructed to review programmes and to provide an opinion as to whether the original (or baseline) programme/timescale is reasonable or not. More often than not this instruction is received after the project in question has suffered delay and late completion. Such an analysis should be done before the project commences and at key stages throughout the project.

The latest statistics show that in 2016, 55% of projects reviewed for the survey were completed within (or bettered) the planned out-turn time. The trend over the past ten years as shown in Fig. 1 (P3).

This leaves 45% which ultimately took longer than planned. As shown in Fig. 1, within the construction industry there is (and has been for many years) a systematic tendency to be over-optimistic about how quickly projects can be delivered.

The question that keeps resounding around the construction and engineering industries year-on-year is, "How do we prevent optimism bias?".

The answer is not complicated and is the same question posed to delay experts after the event. That question being, "whether the programme/timescale is reasonable or not?". The only difference is the timing of the question.

The Green Book suggests that optimism bias can be minimised as follows:

- Project managers, suitably competent and experienced for the role, should be identified.

- Project sponsor roles should be clearly defined.
- Recognised project management structures should be in place.
- Performance management systems should be set up.
- For large or complex projects:
  - Simpler alternatives should be developed wherever possible.
  - Consideration should be given to breaking down large, ambitious projects into smaller ones with more easily defined and achievable goals.
  - Knowledge transfer processes should be set up, so that changes in individual personnel do not disrupt the smooth implementation of a project.

Minimising optimism bias is expanded upon with the Supplementary Green Book Guidance prepared from advice provided by Mott MacDonald (2002) in Review of Large Public Procurement in the UK. The objectives of this supplement are to ensure that companies:

- Make adjustments to their estimates of capital and operating costs, benefits values and time profiles.
- Provide a better estimate of the likely capital costs and works' duration.

The guidance recommends that adjustments are made to activity/project durations based on data from past and similar projects, as adjusted for the unique characteristics of the project in question. By way of example, Table 1 within the supplementary paper provides adjustment percentages to be used to counter optimism bias (to be used in the absence of more robust evidence) as follows:

Within the supplementary note, the following good practice stage reviews of the project to be developed are advised (with respect to planned programme durations):

Step 1: Decide which project type (from Table 1) to use in order to ensure the level of risk pertaining to the most appropriate project type is utilised.

Step 2: Always start with the upper band to provide a less optimistic assessment.

Step 3: Consider whether the optimism bias factor can be reduced by assessing the upper band percentage against how contributory factors to delay can be managed.

Step 4: Apply the optimism bias factor to the planned contract duration.

Step 5: Review the optimism bias adjustment.

These recommendations, if followed, would at least provide a framework for the programme to be assessed. Such a framework is beneficial when reviewing programmes at high-level but has limited applications when assessing more detailed programmes prepared at the tender stage, prior to commencement of the works or shortly prior to award of contract.

In order to provide a robust programme for the works, prior to mobilisation, I would suggest that the following process should be followed, expanding on the recommendations above:

1. Ensure a robust estimate for the works has been prepared and that this estimate does not suffer from similar optimism bias.
2. Review the programme to ensure that the estimate is accurately reflected by manhour/manpower allocation and requirements for equipment/plant/materials embedded within the programme activities.
3. Ensure that the programme is robustly logically linked.
4. Ensure that the critical and near critical paths are reasonable and that no activities have excessive float.

Only after (and not before) points one to four have been satisfied, then the progress of removing optimism bias should be addressed. The importance of ensuring a robust logically linked programme is in place, before optimism bias is assessed, being of primary importance because such programme reviews provide little benefit if they are imposed on a deficient programme.

Factors can then be applied to the programme based on project type, prior experience, and the perceived expected management of risk factors. Further, such analyses do not need to relate to the entire project, as risk factors can be applied to a programme to deal with other issues which are often the subject of over optimistic thinking, such as:

- Growth expectancy.
- Individual subcontractor performance.
- Weather factors.
- Completion and close-out phase of the project.

Addressing the potential for problems and optimism bias before the project timescale is set will ultimately bring benefit to the out-turn duration of the works. Many readers will recognise the old adage that the last 10% takes 90% of the time. Whilst this phrase in itself is an over-estimate, it does accurately reflect that the works to complete a project are never simple. By removing the optimism bias from a project, the preceding works are started earlier by necessity, thereby reducing the strain on the back-end of the project timescale.

Therefore, in order to prepare a programme which is capable of being achieved and eradicating over optimism, I would recommend:

- Prepare a logically linked, fully resourced, robust programme.
- Have the programme checked by a third party who is experienced in such work.
- Ensure that the programme reflects the estimate and availability of resources (manpower/equipment/plant/materials).
- Undertake workshops to review for optimism bias relating to:
  - The baseline programme/work type.
  - Previous experience of similar projects/clients.
  - The possibility of growth.
  - The local workforce capacity.
  - Individual subcontractor performance.
  - Key deliverables.
  - Weather factors.
  - The completion and close-out phase of the project.

By accepting that programmes and planners are optimistic, we can readdress the balance by taking just a little time to ensure that the next project will not fall foul of optimism bias.

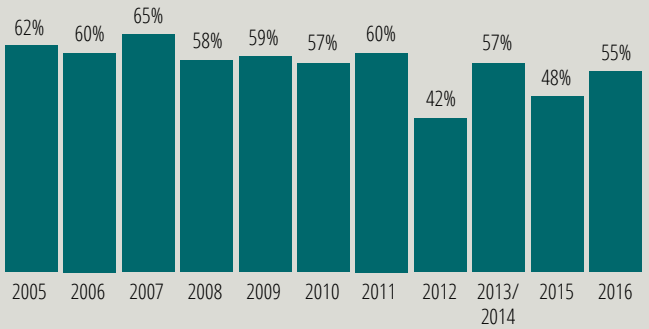
Of course the other downfall of being an optimist, is that you always end up paying way too much for your wife's Christmas present. ■

TABLE 1 PROJECT TYPE	Optimism Bias (%)[1]			
	Works Duration		Capital Expenditure	
	Upper	Lower	Upper	Lower
Standard Buildings	4	1	24	2
Non-standard Buildings	39	2	51	4
Standard Civil Engineering	20	1	44	3
Non-standard Civil Engineering	25	3	66	6
Equipment/Development	54	10	200	10
Outsourcing	N/A	N/A	41*	0*

** The optimism bias for outsourcing projects is measured for operating expenditure*

[1] Note that these values are indicative starting values for calculating optimism bias levels in current projects. The upper bound (U) does not represent the highest possible values for optimism bias that can result and the lower bound (L) does not represent the lowest possible values that can be achieved for optimism bias.

FIG.1 - 2016 GLENIGAN REPORT "UK INDUSTRY PERFORMANCE REPORT"



Is it time to call in the experts?

CRAIG SANDISON - ASSOCIATE DIRECTOR, DRIVER TRETT DUBAI OUTLINES THE PROCESS OF EXPERT DETERMINATION, ITS BENEFITS AND THE INCREASING ATTRACTION FOR USING THIS METHOD IN THE UNITED ARAB EMIRATES.

The use of alternative forms of dispute resolution (ADR) is becoming an increasingly attractive option in the United Arab Emirates (UAE) due to cost of formal dispute resolution processes, such as arbitration and litigation.

One method of ADR available is that of expert determination, but does this option provide a suitable means of resolving a dispute? And, why should parties consider this against the other alternative resolution methods? In answering these questions, the process needs to be explained and examined, with consideration of the relative merits and de-merits of appointing an expert to determine the dispute.

What is expert determination?

Expert determination can be defined as the process of dispute determination by an individual, independent third-party, who possess particular expertise relative to the dispute.

What are the benefits of expert determination?

There are numerous benefits associated with opting for expert determination, these can be summarised briefly as follows:

- **Privacy and confidentiality** - The only parties that will be privy to the process and the decision of the expert are those that are involved with the dispute, and naturally the expert determiner.
- **Freedom to choose** - The parties have flexibility in their ability to freely select the appropriate expert and also choose the rules, proceedings, and the effect of the expert's determination.
- **Impartiality** - The expert should possess a duty to act independently and fairly throughout the whole process.
- **Speed** - A dispute may be resolved quickly, although the nature of the dispute will have significant impact on this factor.
- **Lower cost** - The less formal nature of expert determination should result in a more cost-effective resolution process.
- **Technical expertise** - The appointed expert determiner will be likely to have greater expertise on the subject than an arbitrator or court judge.

Expert determination is suited to disputes and matters which concern detailed technical issues, and sometimes where the parties require a swift and quick resolution on a disputed matter.

However, it must be remembered that expert determination is not always suitable, as:

- The procedure lacks formality.
- It is not subject to rules of evidence.
- There is an absence of cross-examination.

Enforcement of the Determination

Under legal jurisdictions such as Australia and the United Kingdom, the enforcement of expert determination is strongly supported by the courts. Considered as a recognised method of ADR, the courts are reluctant to overrule a binding expert determination, unless the process has been subject to serious procedural fault, fraud, or bias.

In the UAE, the enforcement of expert determination was examined by the Court of Cassation in 2014. In the judgment the court decided that, even though the parties had agreed the expert determination shall be final and binding, it cannot have the effect of binding the parties and can only be considered a technical assessment or opinion of the matter.

Despite the ruling, expert determination should not be dismissed as a means of ADR resolution in the UAE. At present, the UAE laws do not provide a legal basis for any of the other ADR methods. Therefore, other means, such as mediation and adjudication, could face similar interpretation by the court.

If the parties still choose to select expert determination as a means of ADR, even if the expert's decision is ruled unenforceable by the courts, the expert's decision would still hold significant weight if the matter were referred to arbitration or litigation.

In summary, expert determination is a viable and credible method of ADR. The greatest appeal of this is that an expert, with suitable technical knowledge of the disputed matter, will be undertaking and determining the dispute, with the added benefits of expert determination being a flexible, speedy, and reliable means of dispute resolution. However, for parties in dispute, the primary advantage of expert determination could be the avoidance of a lengthy and costly resolution in either arbitration or litigation. ■

USING EXPERT DETERMINATION CLAUSES AND AGREEMENTS

The parties may choose to insert a clause within the contract conditions as a dispute resolution clause. If such clause does not exist, the parties have the option to form an ad-hoc agreement for expert determination, once the dispute arises.

Institutions, such as the Academy of Experts or the Chartered Institute of Arbitrators, are able to provide model clauses for expert determination.

In the drafting of an expert determination clause, the following matters are recommended for inclusion:

- Procedures for referral to expert determination.
- Procedures for appointment of an expert determiner and, if required, replacement of the expert.
- Procedures for disclosure of conflict or any other matter that may affect impartiality of the expert.
- Requirements for confidentiality.
- Roles and powers of the expert.
- Obligations of the disputing parties in connection with the procedure.
- Requirements for meetings.
- Requirements for the determination of the expert, such as the decision to be in writing and shall be final and binding.
- Parties liability for costs.
- Procedure for referring or disputing the determination.

NB: In some jurisdictions, such as the UK, such a clause will need to account for local statutory arrangements such as adjudication to ensure validity.

SELECTION AND APPOINTMENT OF THE EXPERT

The parties can agree upon the selection of any individual considered suitable to be the expert determiner. However, the parties' freedom of choice can be limited by the provisions contained within the expert determination clause or ad-hoc agreement. This may stipulate that the expert determiner must be associated with a specified professional body, such as the Royal Institution of Chartered Surveyors or the Chartered Institute of Arbitrators.

The parties must apply caution when selecting the expert determiner to ensure that the process is successful, provides a fair determination, and prevents the unsuccessful party protesting the expert's determination on the basis of a procedural fault.

It should be of foremost consideration that the expert possesses suitable experience related to the field of the disputed matters. It would also be recommended (although not imperative) that the selected expert has a reasonable track record of performing expert determination appointments.

THE EXPERT DETERMINATION PROCEDURE

Comparative to arbitration or litigation, expert determination is much less formal. The procedure can operate with greater flexibility. Procedural requirements will be set out within the applicable contract clause or, in the absence of such a clause, the ad-hoc agreement.

The procedure would usually require an initial meeting. Depending on the requirements of the expert determination agreement, this can either be undertaken in person or by teleconference.

After this meeting, depending on the requirement of the clause or ad-hoc agreement, the parties will submit the evidence and submissions to timetables set out or agreed with the expert. If required, the expert may set further directions to the parties for further submissions or additional evidence. Following the submissions and provision of evidence, the expert will determine the dispute between the parties, and provide their decision in writing to each of the parties.

Q&A: Back in APAC

JOHN BRELLS - MANAGING DIRECTOR, DRIVER TRETT ASIA PACIFIC TALKS TO THE DIGEST ABOUT THE FUTURE FOR DRIVER TRETT ACROSS THE REGION.

Is it good to be back in Asia Pacific (APAC)?

In a previous life, I had spent four years working in Asia and loved every minute of it! Having recently joined the global management team of Driver Trett as managing director of APAC, I can honestly say it's good to be back after a six-year focus on the natural resources boom in Australia. I am based in Perth, Australia; a good central stepping stone to the overall Australasia territory with great connections to the wider region.

What does the current APAC business look like?

Our APAC team has shifted in structure and approach to market changes over the past couple of years, with the regions' recent growth primarily being driven by our Diales (Driver international arbitration litigation expert support) delay, quantum, and technical expert witness capabilities.

We are currently operating out of four country bases; Australia, Hong Kong, Malaysia, and Singapore with 67 staff spread between six regional offices.

Driver Trett in APAC grew this year, with the Australia team now operating out of Sydney, Brisbane, and Perth providing planning, dispute resolution, and expert witness delay and quantum services. Perth had been a virtual office until this year and we now have three additional professionals based there. We have an eye on expanding to a fourth office in Melbourne in 2018 and are currently searching for an exceptional leader to develop our offering there.

The Malaysian team has grown this last year because of the management's target on a more APAC regional focus. Not only has the team been able to extend existing commissions, but they are also winning work on commissions outside of Malaysia. They provide expert witness assistance to our Singapore office and other regional offices, resulting in continued utilisation throughout the year.

John Brells - Managing Director, Asia Pacific

Having inherited a small, but seriously talented team of delay, quantum, and contracts specialists in Hong Kong, their focus over the next year will be on delivering quality services and products from our core strengths that include planning, contract-commercial support, and dispute advisory services. This team provides expert witness assistance to our Diales experts, spread across APAC and Driver Trett's other global offices.

Our Singapore team is the crown jewel of the APAC region, with a diverse team of over 34 professionals strictly specialising in supporting six Singapore based Diales testifying experts. We are delivering expert witness services in delay, quantum, and technical engineering for our oil and gas, roads, transport, infrastructure, and commercial development clients not only in Singapore, but across the globe.

> Having an electronic system to assist us in organising this data makes us time and quality efficient, at a significant cost saving to our clients.

Are there any further improvements to be made this year?

As with any organisation there are always ways to improve. We are currently in the process of implementing APAC wide use of an eDiscovery system to assist with analysis of 'big data'. On most of our commissions, especially the liquified natural gas (LNG) and oil and gas projects, we are deluged with massive amounts of data that we have to get our arms around in a short period of time. Having an electronic system to assist us in organising this data makes us time and quality efficient, at a significant cost saving to our clients.

In addition to my previous answer, our two key focus points this year will be in externalising our Diales expert witness offering across the APAC region and developing our next generation of expert witnesses. Initially, this will focus on three team members who we will mentor towards, and assist in gaining, their first expert appointment.

What shape would you like the APAC business to take in future years?

Over the next five years, I would like APAC to grow in a controlled and focused manner, building on our in-house skills and adjusting to market requirements. We will achieve success and continued growth through wise and well placed acquisitions of talent and key experts in the region. These will enhance our skills and knowledge in the areas where we see the need to expand.

Needless to say, I am excited about APAC's future prospects and growth potential that will enhance our ability to deliver quality services all the time, every time, everywhere. ■

The future rules... on NEC4

MICHAEL FOSTER – DIRECTOR, DRIVER TRETT UK EXPLAINS FOUR KEY AREAS OF CHANGE, AFFECTING QUANTITY SURVEYORS, IN THE APPLICATION OF NEC4

It is rare that change is made to the rules of evaluation that govern change. Just look at JCT and how often it tinkers with the valuation fences. You know what I mean, bill rates, adjusted rates, fair rates and daywork. Those rules have remained static since the day I put a tie on and became a quantity surveyor (QS). Now look at the NEC, its rules have evolved over four generations and development has been driven by both industry and end users. The end user that I focus on is the QS, and that includes me.

When it comes to NEC you have to be ahead of the wave. I refer back to my surfing days in Newquay - if the wave was ahead of you, you weren't going far. Lots has been written, and said in seminars, on the topic of NEC4 during recent months running through the detail, clause by clause. This is all very useful but, like most things in the life of a QS (including valuation rules) I have had to do the graft and work it out myself. In surf speak, I am now ahead of the wave.

When it comes to valuing compensation events (CEs), the recent step change is significant. Tendering departments must ensure that they are ahead of the wave, or at least on top of it during this transitional period. Decisions made now, at tender stage, will have a direct impact on profitability because the site QS will be applying those decisions at some point in the near future.

The ethos behind NEC is that the contractor should not be out of pocket if events arise post contract award that are outside of its control. The contractor should be no better or worse off than had the event not occurred. NEC invented the Defined Cost plus Fee mechanism for evaluating change, which was in opposition to the principles under JCT, where the heart of its valuation rules lie in the unit rates and prices used to price the whole project. If a contractor under-priced a JCT job, then it lived and died by those unit rates and prices when pricing change, because a tender insufficiency would magnify into a greater loss when used to price a variation.

NEC attempted to avoid the valuation disputes that arose under JCT evaluation rules by developing its Defined Cost plus Fee concept. NEC has a greater level of fairness built into its core, and those rules have worked well over the years, but they did include some inherent practical difficulties that caused disputes. NEC has clearly listened to industry and the result is simplification. Key changes are shown in Boxes 1-4. →

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BOX 1 - DEFINING DEFINED COST – EVALUATING COMPENSATION EVENTS

Under NEC3, Defined Cost has a unique definition depending on the Main Option Clause selected, with one area of divergence between the options being the approach to pricing subcontractors. The changes made in NEC4, in pursuit of simplification, are pointed:

Option	NEC3	NEC4
A & B	"Defined Cost is the cost of the components in the Shorter Schedule of Cost Components whether work is subcontracted or not..."	"Defined Cost is the cost of the components in the Short Schedule of Cost Components"
C & D	"Defined Cost is the amount of payments due to Subcontractors..." and "the cost of components in the Schedule of Cost Components for other work"	"Defined Cost is the cost of the components in the Schedule of Cost Components...."

Under Option A&B, the QS follows the same route and refers to the Short Schedule of Cost Components, irrespective of whether or not the CE includes subcontracted elements. The sharp-eyed QS will have noticed we are now using the Short Schedule, not the Shorter Schedule, but will have also concluded that the new schedule is longer. In this case, more is less and I expand upon this later on.

The above change has greater effect under Options C&D. Under NEC3, the contractor previously priced its own in-house resource using the Schedule of Cost Components but would separately evaluate the subcontracted element based upon payments due to its subcontractors. There were two separate parts to the evaluation. However, in the new NEC4, the distinction between subcontractor and contractor resource has disappeared from the definition of Defined Cost.

When valuing CEs the rule is simple: Under Option A&B, go to the Short Schedule of Cost Components and when on Option C&D, go to the Schedule of Cost Components. There is now no divergence on subcontractors as they are now included in both schedules, at Item 4.

BOX 2 - APPLICATION OF FEES

The old and new provisions are as follows:

NEC3	"The Fee is the sum of the amounts calculated by applying the subcontracted fee percentage to the Defined Cost of subcontracted work and the direct fee percentage of the Defined Cost of other work"
NEC4	"The Fee is the amount calculated by applying the fee percentage to the amount of Defined Cost"

Under NEC3, the contractor pre-priced two different percentages. One that is applied to the subcontractor element and a second applied to those resources provided by the contractor. Those percentages could differ but were quite often identical, typically reflecting the fact that a contractor did not see the need to differentiate. NEC4 has conflated them into one fee percentage, leading to less burden on the QS when preparing quotations and the removal of arguments over fee-on-fee that frequently existed.

BOX 3 - THE SHORT SCHEDULE OF COST COMPONENTS UNDER OPTION A&B

Putting aside the minor change in title, the first noticeable change is an increase in length as it is devised to capture more cost than the previous edition. The second change results from the deletion of several add-on percentages that were embedded in the schedule.

It was the application of numerous percentages that generated complication. There were in fact several other fees to be applied before applying the subcontracted fee and direct fee, including the people overhead percentage and design overhead percentage.

NEC4 has been successful in eliminating unnecessary complication by deleting the add-on percentages. From an estimator's perspective, this is a good thing as only one percentage requires pre-price at tender stage: the fee. It is also much simpler for the on-site QS, who now uses one percentage rather than several applied to different parts of the evaluation.

The Short Schedule is longer because expenditure previously captured by the pre-agreed percentage additions must now be captured as cost under each respective cost component. Other broad amendments to the cost components are:

- **People** - Previously calculated by reference to amounts paid but are now evaluated using pre-agreed hourly rates in the contract data. It is therefore necessary at tender stage for estimators to determine what those hourly rates are and to ensure that they capture the overhead percentages that no longer apply.
- **Subcontractors** - A new stand-alone cost component, meaning all subcontractor cost associated with a CE is evaluated using the Short Schedule of Cost Components (Item 4).
- **Charges** - Evolved into a longer list to compensate for the removal of the people overhead percentage. The QS now separately identifies and prices in the CE quotation around a dozen additional heads of cost.
- **Manufacture and fabrication** - Previously assessed by calculating amounts paid but now assessed by reference to pre-agreed hourly rates included in the contract data.
- **Design** - Still assessed by reference to hourly rates stated in the contract data. However, the percentage addition no longer applies meaning that the pre-agreed hourly rates must be increased to compensate for the loss of the percentage addition.

Overall, the changes pretty much reflect what industry wants. Pre-agreed hourly rates are nothing new and the elimination of unnecessarily complicated multiple percentages should also avoid some valuation arguments.

BOX 4 - THE SCHEDULE OF COST COMPONENTS UNDER OPTION C&D

The full schedule has also been redrafted, but the change is different. A summary of the main points is as follows:

- **People** - Remains largely unaltered. NEC4 has resisted the switch to pre-agreed hourly rates, which is likely to arise from the need for clients and the project manager (PM) wanting to audit actual cost. This is because the Schedule of Cost Components serves a dual role for valuing CEs but also in ascertaining the Price for Works Done to Date.
- **Subcontractors** - Also recognised as a new stand-alone cost component, meaning all subcontractor cost associated with a CE must be recorded.
- **Charges** - Significantly amended as the Working Area overhead percentage has been deleted.
- **Design** - Still assessed by reference to hourly rates stated in the contract data. However, the percentage addition has been deleted and accordingly the agreed hourly rates must be increased to compensate for the deletion of the percentage addition.

The Future Benefits

On the basis that I have just been instructed on an NEC2 dispute, I am sure NEC3 will be around for years to come. However, by giving the end user what it wants in the new NEC4, including conflating several percentages into one, increasing the use of agreed hourly rates, and including subcontractors within the schedules should streamline the CE quotation process. That said, I will not be getting rid of my NEC3 and users guides, just like I still have those for NEC2. ■

Longest path and elevated bike paths

ANDREW AGATHANGELOU – DIALES DELAY EXPERT EXPLORES THE VARIOUS PATHS OPEN TO DELAY ANALYSTS.

In February 2017, China opened the longest elevated bike path in the world in a city in South-East China. The five-mile long, 16-feet wide bicycle-only pathway – dubbed 'the winding viaduct' – has been built in the city of Xiamen. It takes a very meandering path between the start and end points, in order to achieve the status of the longest elevated bike path in the world.

In the world of delay analysis, the use of retrospective techniques, which require the delay analyst to establish 'longest path' through the works, is becoming very common. In simple terms, the longest path can be thought of as the longest chain of connected construction activities which determine the overall completion date of the works. In this respect, the 'longest path' can also be considered to be the critical path, a term familiar with those who work in this field. It is generally accepted that for an event to cause delay, it must either lie upon the critical (longest) path, or directly impact another activity which lies upon the critical path.

A common feature of the various techniques used to establish the longest path through the works retrospectively, after the works are complete, is the ability to establish the path manually, by visual examination of the as-built programme, as opposed to using programme software.

The longest path between the start and finish points, on the as-built programme, is established by first examining the actual finish date and then determining which construction activities were directly connected to the completion date, or which activities were completed on the actual completion date.

The analyst then works backwards to the actual start date, examining numerous links in the chain of construction activities occurring between those dates in order to establish which took the longest. Thereby ultimately determining the actual completion date. This 'longest path' is often referred to as the 'as-built critical path'.

This approach is becoming more common with delay analysts. Some experts deliberately avoid the use of programme software on the basis it is sometimes seen as a 'dark art'. Disputes involving expert delay evidence are often distracted and undermined by arguments over the robustness of the baseline programme; whether it is correctly logic linked or whether it accurately reflects the true scope or sequence of the works. Perhaps this is due to results and analysis being overly reliant on an answer produced by programme software rather than by a detailed review combined with common sense and experience.

Some experts deliberately avoid the use of programme software on the basis it is sometimes seen as a 'dark art'.

Like the elevated bike path in Xiamen, it remains to be seen whether manual inspection and establishment of the 'longest path' will catch on or become a passing fad. For those delay experts who refuse to use any kind of programme software, it remains the only method of establishing a critical path of some kind, essential to demonstrating that a delay to completion has occurred. ■

Q&A: Canada

DEREK SAYERS – ASSOCIATE DIRECTOR, DRIVER TRETT CANADA TALKS TO THE DIGEST ABOUT THE GROWTH OF CONSTRUCTION IN THE COUNTRY AND THE CHANGING APPROACH TO CONTRACT MANAGEMENT AND CLAIMS.

What does the current Canadian business look like?

Driver Trett expanded their business in Canada, from our Toronto base, in January 2016 with the opening of offices in both Calgary and Vancouver.

Since opening these new offices, we have continued to grow. The work across our offices in Canada comes from varied sources; owners, contractors, subcontractors, and law firms. The great news is that, in the vast majority of cases, Driver Trett have been able to assist their clients to reach an economic, mutually acceptable resolution to their disputes prior to the point of formal arbitration or litigation. This has saved our clients substantial time and expense in avoiding ongoing litigation.

A direct result of our success helping our clients here in Canada has been repeat work from the clients that have engaged our services. Just as importantly, due to word of mouth recommendations from our existing clients, we have gained the ability to secure further opportunities to help new clients avoid lengthy litigation and reach effective, efficient resolution.

And, what about the team?

Driver Trett have successfully brought together high-quality professionals with a wealth of international experience in quantum, scheduling, and expert work and created a formidable team. They are able to quickly and efficiently analyse all aspects of a dispute, draw out the critical factors, and lead our clients and their counterparts on the other side of the dispute to an effective resolution.

Is Canada different to other construction markets?

Given our international experience, we can see the factors that make the Canadian market different to other markets around the world. The primary difference we see, is that many international markets are more litigious. The Canadian conventional approach is very much to endeavour to avoid litigation and settle disputes by amicable negotiation. While highly laudable, one consequence that we have seen from this mindset is a lack of attention to the giving of timely notices to protect entitlements and in keeping adequate records to enable prompt resolution of disputes.

Derek Sayers – Associate Director

To assist our fellow Canadians in addressing these factors, Driver Trett have a number of free presentations that we offer as interactive discussion sessions. During these we provide insights on how to best manage record keeping, how to manage the risks inherent in various construction projects, and to avoid or mitigate disputed situations. These interactive sessions are very well received with positive feedback. As awareness of them spreads throughout the market, the presentations are in constant demand, keeping our team busy travelling around Canada.

What do you see as the future of construction in Canada?

Canada is a young, dynamic economy and the future for the construction industry is robust. With its vast natural resources, there is no doubt that Canada will continue to grow. The population of Canada is small for its size and each and every year Canada welcomes many skilled immigrants. With each new injection of talent the economy continues to grow both in size and diversity. It is natural for different parts of the economy to grow at different rates, and we see the construction industry responding quickly to evolving trends, providing support at every moment. One such trend has been the arrival of more international contractors to the Canadian market who may have a different, more forceful approach to addressing their claims.

Driver Trett is very happy to be a part of the Canadian economy, to be here to assist our clients, to raise awareness on how best to manage risk and, when needed, to directly help our clients resolve their disputes. ■

Canada Adjudication Seminars

Driver Trett (Canada) Ltd. is taking the lead in providing training on Prompt Payment and Adjudication to the legal and construction communities in Ontario. Our Toronto staff are experienced in these matters, having assisted in some of our adjudication cases in the UK. We are currently holding seminars across the province.

If you would like to attend our next seminar, please contact kevin.oneill@drivertrett.com for more information.

The evolution of the festival tent: flexibility and freedom but... potential for failure (Part 1)

STUART HOLDSWORTH - DIALES TECHNICAL EXPERT EXPLORES THE DEVELOPMENT OF TENSILE STRUCTURES OVER THE PAST TWENTY FIVE YEARS TO PROVIDE SHELTER FOR EVENTS, AND THE OPERATION OF THESE STRUCTURES, INCLUDING CAUSES OF FAILURES THAT HAVE OCCURRED AND HOW SUCH FAILURES CAN BE MITIGATED.

The rise in demand for tensile structures

It is the flexibility, adaptability, and affordability of tensile structures that makes them a desirable option for providing shelter at events, particularly events of a temporary nature. Over the past twenty-five years, tensile structures have become a standard feature of large gatherings requiring covered spaces, and have taken on increasingly substantial and sophisticated forms. Those older, regular attendees of the Glastonbury Festival, who can still remember the festival tents used prior to the 1990s, and compare those with the tents used today, can more readily appreciate this.

The original impetus for these large temporary structures was the development of 'festival culture' in the 1950s and 60s, cumulating in the arrival of events such as Glastonbury in the 1970s. In the 1980s, dance acts also began to use tents to provide weather protection for raves (Fig.1). The existing concept of the circus tent provided an acceptable venue, particularly as the dance acts did not require an audience facing proscenium stage. The traditional circus tent was adapted in size to suit this change of use, with the scaling-up of the tent being made possible by the transition from canvas to a plasticised material for the covering tent membrane. The form of these tents consisted of a circular footprint, with a single central king-pole, and a diameter of up to 44m.

This new generation of demountable covered venues also began to replace the traditional outdoor stages used at rock festivals. Unlike dance artists, rock groups required an audience facing proscenium stage and, coupled with a coincidental reduction in size of speaker stacks, this ultimately led to the evolution of the 'festival tent'.

The festival tent

These large festival tents (with some covering areas of 1.5 to 2 hectares) evolved to fulfil a desire for covered space that included not only staging, but eventually also seating. The popularity of these larger tents was underpinned by the cheap and ready alternative that they offered to the hire of fixed venues.

The availability of new fabric materials, →

Fig. 1 - A modern circus tent, the central 'cupola' structure supports aerial performance above the 'ring'

Fig. 2 - Kayam tent with 'lifted catenaries' at the right-hand side

Fig. 3 - Kayam tent in a triangular layout that allows a proscenium stage for rock music.

Fig. 4 - MT66 series 'palisade' tent, note that the three in-line 'king-poles' precludes using this structure for anything other than dance/rave events

which were waterproof, retained strength, could be folded without damage, and could be fabricated simply, allowed new forms of tented structures to be created. The Kayam series of festival tents, which were developed in the 1990s and are still in use today, utilised these innovations and were the first forms of festival tents to have a different form of construction from previous concepts.

The Kayam is large enough to hold a stage and allows theatre lighting rigs or other paraphernalia to be supported. It has several essential features that remain common to all tents of this type:

- The structure can be transported using standard flatbed lorries.
- It is quick to erect and dismantle (with no cranes being required).
- It is portable enough to be handled using simple construction equipment such as fork lifts and telehandlers.

The Kayam geometry and form is based upon the work of pioneers of tensile structures, particularly Frei Otto. Structurally, the Kayam features some novel characteristics, which makes the tent extremely flexible. The Kayam tent can, for example, be erected without prior installation of all of the side-poles, which allows easy access for the interior fit-out. This feature has resulted from the use of a catenary (scalloped) edge with discrete anchorage points (Fig.2). Openings of 15m width or greater can be achieved around the whole of the tent perimeter. Also, the number and arrangement of the Kayam tent masts are variable, allowing flexibility in the size of the structure for different events and locations.

A variant of the Kayam tent features lifted catenaries (Fig.3), which allows the audience to stand outside the tent and look-in. By cutting back the catenary ends, and lifting these clear of the ground, the overall height of the entry points can be considerably increased.

A further development of the large tent system, the MT66 series, (Fig.4) followed on from the original Kayam series, removing the catenary edges that project beyond the side walls of Kayam tents altogether, thereby allowing a larger structure to be placed in a more constricted area. This change replicated the more traditional palisaded side pole anchorage systems used for the Big Top circus tents, and hence is known as a 'palisade tent'. The tent form relies upon side poles to pull the fabric of the structure into shape.

The flexibility provided by these new tent types, combined with the innovations that allowed them to take on increasingly substantial and sophisticated forms, also led to the extension of the traditional April to September hire season. Around the millennium, tensile structures became increasingly popular for winter events, such as ice shows and circus acts, operated by Feld Entertainment, Barnum & Bailey Circus, and Disney on Ice.

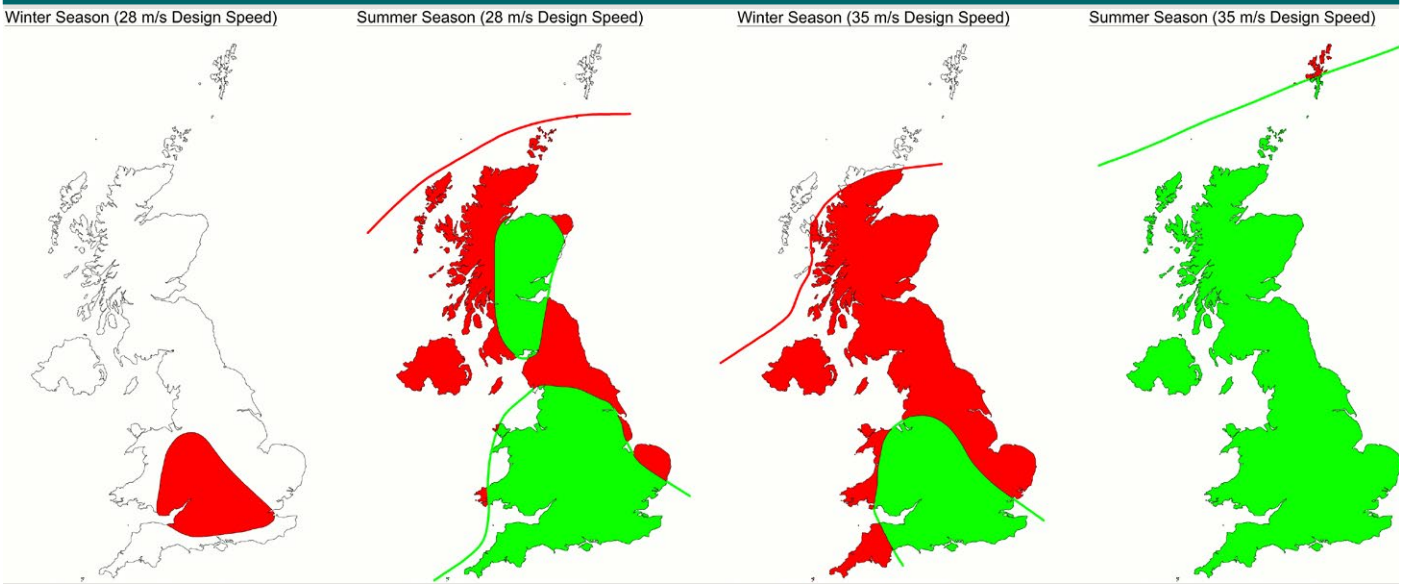
Safety considerations

Whilst the benefits of adopting large tensile structures to provide shelter at events are readily apparent, the success of these structures can only be made possible by a consideration of how they can be safely erected, operated, and dismantled. Important breakthroughs, such as improvements in the accuracy of weather forecasting, have assisted with this.

The design wind speed (the maximum wind speed that a structure is designed to withstand) is a critical consideration when evaluating the anticipated performance of the structure, as the predominant risk of failure for tensile structures is that they will be pulled out of the ground by gusts of wind.

The initial design of the Kayam tent was designed for use on sites with wind speeds of up to 35m/s, which was considered to be the minimum magnitude likely to be acceptable for the structure to be

FIG. 5 - WIND MAPS



used widely throughout the UK. As with all innovation, these early festival tents soon attracted attention and copies were made. A significant production source of these copies were the continental circus tent manufacturers; artisans working in traditional ways, whilst adapting the tents to suit the new plasticised materials and structural forms. For the most part, continental designers resorted to designs based upon the principles used for frame and small circus tents, rather than the methods used for tensile structures developed from the work of Barnes in the UK, and Otto in Germany. The adoption of simpler calculation methods included the use of a lower design wind speed of 28 - 30m/s.

Using the principles expounded within the IStructE publication, 'Temporary Demountable Structures', as a basis for evaluating the suitability of a site on which to place a large tent, it can be seen that the design wind speed of the structure will dictate which regions of the UK are suitable locations for erecting the tent. To illustrate this, I have mapped out the suitability of UK locations (Fig.5) both summer and winter seasons, for tents designed for both 35m/s (the wind speed used as a basis for the design of the Kayam) and for 28 m/s (the standard wind speed used for the design of frame tents). It is clear that adopting a lower design wind speed severely limits the location and season in which these structures can be used.

More recently, since the extension of the traditional hire season around the millennium (which removed the safeguard of traditional circuses and funfairs retiring to winter quarters that prevented exposure of the tents to the worst of the winter's weather), higher design wind speeds have been adopted to allow the tents to be more widely used during these winter months. The Tensile 1 (now Valhalla) tent, has for example, been designed to a wind speed of 50m/s, which has also allowed it to be used internationally.

Despite the guidance given within the IStructE publication, in reality few of the tent suppliers undertake a review using these methods, and instead rely upon weather forecasting and previous knowledge of the sites. In the event of high forecasted winds, the tents are taken out of use and various safeguarding measures, such as double staking, are taken to protect the structure. However, in reality failures do happen, and injuries have resulted from some of these failures. Fortunately, most have occurred when the tent has been taken out of use, or during the build-up or breakdown phases, and, to date, a festival tent failure has not resulted in a serious disaster whilst in public use. The risk of failure should nevertheless be mitigated as far as possible, to prevent any injuries or damage to property. I will discuss the causes of failures that have occurred and precautions that ought to be taken to prevent such failures in a future Digest. ■

The Minerva effect

IRINA COMAROMI - CONSULTANT, DRIVER TRETT UK DISCUSSES HER JOURNEY THROUGH THE COMPANY'S MINERVA PROGRAMME AND THE OPPORTUNITIES OPEN TO THE NEXT GENERATION OF CONSTRUCTION CONSULTANTS AND EXPERTS.

Over the last two years, Driver Trett has taken a proactive approach to recruiting and developing junior members of staff. This has incorporated structured in-house and external training, secondment to contractor and employer businesses, and assisting senior members of the Driver Trett and Diales teams.

'Minerva' is a structured training programme which has been developed and implemented by the senior management team, supported by directors within the business. Minerva candidates are expected to undertake several training programmes, including an additional, relevant post-graduate qualification. With the support of their mentor or director, they must fulfil strict criteria over a minimum of two years. Once this is achieved, the candidates will graduate from the programme. The hope is that these candidates will be the senior management, or Diales experts, of the future.

During 2018, several of the first tranche of candidates to undertake the Minerva programme will be hoping to graduate. One of these candidates is Irina Comaromi, a planner based in the Driver Trett Bristol office. The Digest caught up with Irina to discuss her thoughts on the programme.

Irina, what was your background prior to joining the Driver Trett team?

I was working for a consultancy firm in Romania, specialising in planning on large civil engineering projects, such as major infrastructure, roads, and rail. I had also spent time working in Europe and the Middle East. In addition to my planning experience, I have a qualification in quantity surveying.

What prompted you to apply to join Driver Trett?

I was always keen to be a part of an international team and deal with new challenges. The UK has a tendency to constantly develop, which made it a fertile ground for disputes. I was interviewed by different people from the business and one of the first things I noticed was the fact that they were passionate about their job, as well as having been with the company for a long time.

At the beginning of my employment I went to one of our UK offices and one of the quotes from their notice board caught my attention:

"CFO: What happens if we train them and they leave? CEO: What happens if we don't and they stay?"

It was then that I realised that there was no better place for me to be. As a young and enthusiastic employee, it seemed to be exactly what I was looking for. I was eager to learn and expand my knowledge, and needed support from experienced people in the industry in order to do so. Driver Trett has not let me down. A few months later I was offered the opportunity to take part in the Minerva programme. It came as a new challenge for me and a very good opportunity to grow within the business.

It was explained to me that I would be required to work through a large number of competencies, some of which I was confident that I could already achieve, some that would be a challenge, and a number of them that were completely out of my comfort zone. However, I was given guidance on how the competencies could be achieved and who I could work with to improve those areas. This involved working with people in other regions, who work on different projects, and attending external events; getting to grips with the way the company is run and marketed as well as getting involved in complex dispute work with some of the experts.

To date, I have had a number of these more difficult competencies signed off and am being well supported to work towards the remainder and graduate from the scheme. I have had very positive feedback on my achievements over the last two years and have accomplished a great deal. I can honestly say that I am sure that making the move to the UK and to Driver Trett has been very positive for me, and I haven't looked back.

What makes the Driver Trett team special?

Driver Trett is a rewarding company to work for because you get to work with some of the industry's leading experts and pick up tips and skills from them. You get the benefit of on the job training whilst being exposed to real issues that clients are facing on important projects from various sectors.

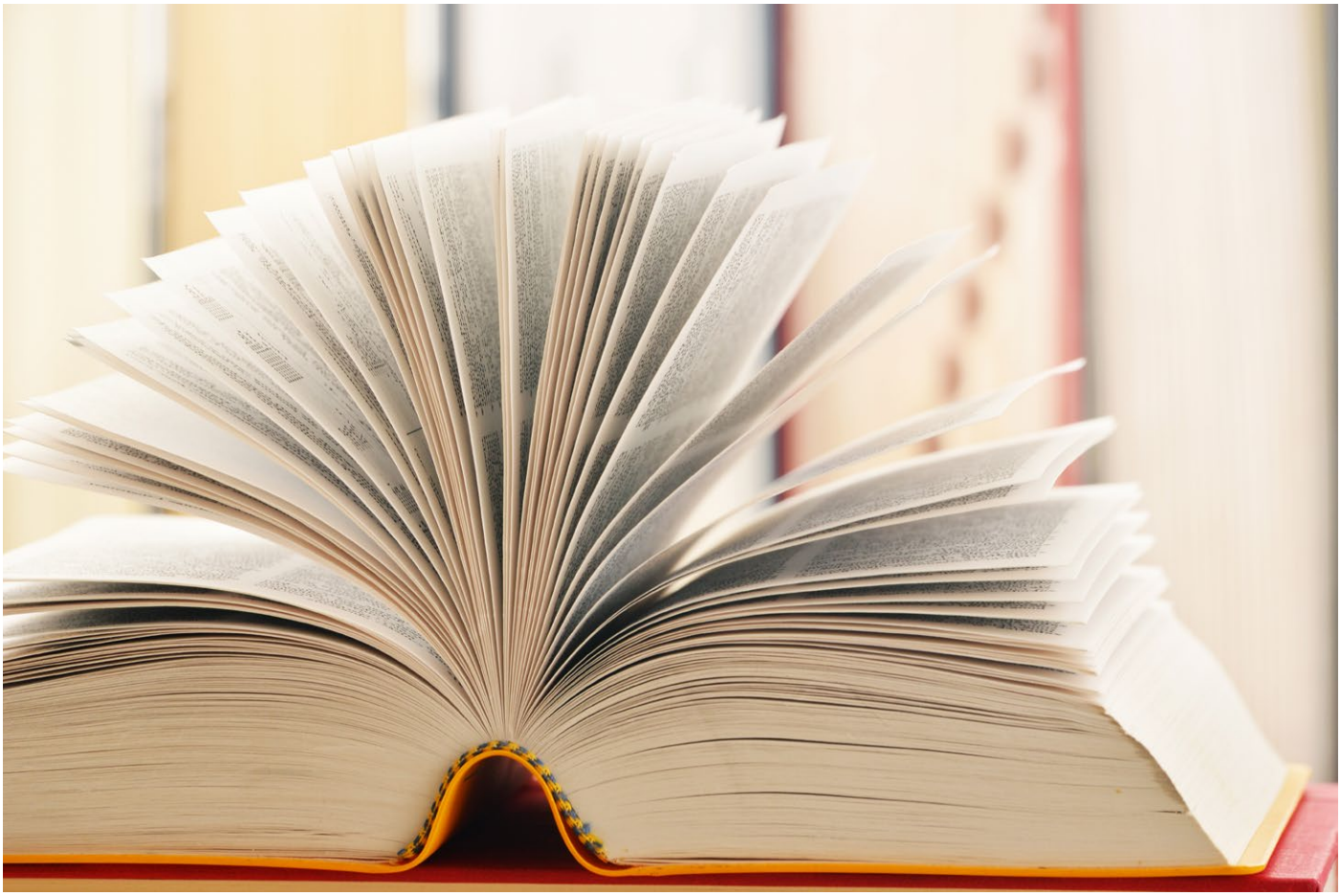
Driver Trett is a team more than a business. The main concern is adding value to our clients' projects. The idea of growing and developing within the business is one of the most satisfying aspects of my job.

I also get to work with members of staff from different offices and different specialisms. Although my background before moving to Driver Trett was mainly heavy civils, since joining Driver Trett I have worked on building projects, power projects, consultancy, and supporting the expert teams in their expert commissions. I have had the opportunity to work overseas and I have always found that senior staff are willing to take the time to explain what they are doing as well as what my role involves.

What would you say to someone looking to join Driver Trett?

I would definitely encourage people to join Driver Trett. For the ones who are confident and are looking for a challenge, I'm sure there will be future opportunities to join the Minerva programme.

I cannot say it is easy, working and studying at the same time can be a bit of a challenge. Although it can be a bit frustrating that you cannot enjoy the only sunny Saturday of the summer, because you need to finish your coursework (this would not be an issue in another climate ... or maybe you don't like summer anyway!). On a serious note, determination and ambition are the key requirements. ■



Contractual interpretation, expert independence and reasonable settlements – a jam-packed judgment

DAN PRESTON – PARTNER, RPC'S CONSTRUCTION AND PROJECT TEAM SUMMARISES THE KEY POINTS AND LESSONS TO BE LEARNED FROM A RECENT COURT JUDGMENT.

RPC and Driver Trett acted for the claimants in the recent case of OBS 125 (Nominees 1) and anr v Lend Lease Construction (Europe) Limited and anr [2017]. The judgment raised a number of important points, summarised below, and the success of the case highlighted the benefits of the legal and expert teams working together from an early stage.

Background

RPC and Michael King of Diales acted for Hammerson in a claim concerning spontaneous glass breakages on the Old Stock Exchange building in London. The claimants had engaged the defendants to undertake the full refurbishment of the building and, in the four years following the date of Practical Completion, 17 panes of glass failed with a number falling from the building. The cause was established as the presence of nickel sulphide inclusions (NiS).

Contractual interpretation

The courts' approach to interpreting commercial contracts has been recently restated by the Supreme Court in Wood v Capita Insurance Services Limited and also the highly publicised MT Hojgaard case. The present claim was heard before the reporting of those Supreme Court decisions, but it provides a practical example of the literal and commercial approaches to interpretation being used as, "two tools forming part of the same approach".

The contract for the works on 125 OBS stipulated that toughened glass, heat soaked in accordance with European Standard BS EN 14179 (the 2005 Standard) with a bespoke extended holding period should be used. Heat soaking glass is accepted to reduce the risk of NiS breakages on the building. The contract also stated that the contractor should complete the works in accordance with the employer's requirements and contractor's proposals, using materials of good quality which were appropriate for their purpose.

In MT Hojgaard, it was held that →

requiring a contractor to comply with a particular specification did not prevent the contract from imposing, through clear language, an obligation to achieve a particular result. The judge in 125 OBS took the same approach and held that the parties had intended to impose multiple obligations on the defendants. The defendants were obliged to use glass heat soaked in accordance with the 2005 standard and, in addition, to comply with the aforementioned documents. These contained provisions stipulating the design and service life of the curtain walling system and the appropriateness of the materials.

These additional obligations were found to be consistent with the parties' commercial intention to limit the impact of the residual risk of NiS breakages.

Exclusion clauses

The court restated that clear language will be required to exclude a party's liability under a contract. In 125 OBS, the defendants sought to argue that a provision, which stated that they were responsible for breakages caused by NiS up to the end of the defects liability period, meant that the claimants had assumed responsibility for any breakages which occurred thereafter. The court disagreed that this provision, and a provision stating that the claimants were responsible for 'third party risks' after the date of practical completion, were sufficiently clear to exclude the defendants' liability for NiS failures.

Record keeping

The judgment also emphasised the importance of keeping good records, particularly when the contract requires it. In this case, the absence of contemporaneous evidence that the defendants had complied with their contractual obligation (coupled with a contractual obligation to keep such records) was fatal to their defence.

Experts

The judgment reiterated two important points on experts and their evidence. Firstly, that the court will not allow experts to opine on areas outside of their expertise. Secondly, that an expert's primary duty is to the court and that their independence is of paramount importance.

The first point arose from the defendants' quantum expert's criticisms of the settlements which the claimants had entered into with third parties; the amounts of which formed part of their claim against the defendants. The court recognised that the quantum experts did not have the expertise to opine on the reasonableness of the settlements. They also did not have the necessary expertise to comment on legal costs incurred by the claimants while negotiating the settlements. The claimants' experts were not levied with the same criticism. Diales had stuck within the remit of their expertise and not sought to opine on matters which would not generally fall to a quantity surveyor.

The judge's second point arose from the defendants' technical expert's failure to make clear in his reports or evidence that he was aware that documentation relied upon by the defendants had been fabricated. The documentation had been provided by the defendants' supply chain and the defendants asserted that it evidenced compliance with its contractual obligations to heat soak. The expert knew that its authenticity had been questioned but did not flag this to the defendants or the court.

This is one of a number of recent cases which emphasise the importance of independence and experts not being seen to try to advocate their client's case. Experts owe their duties to the court rather than those paying their bills and the court will not be assisted by experts advocating their client's case, particularly where the arguments are patently deficient.

It was testament to the independent approach taken by Diales and the claimants' technical expert that the claimants were able to recover some £14.75m of their circa £15m claim. Indeed, by the commencement of trial, and largely due to the early involvement of the expert team, the quantum experts had agreed some £12m of the amount claimed on a 'figures as figures' basis, whilst liability remained in dispute. The result was a shortening of the original planned trial length and a saving on costs for all parties.

Reasonable settlements

As set out above, the reasonableness of the settlements entered into by the claimants was a contentious element of the quantum. In his decision, the judge reiterated now well-established principles relating to the reasonableness of a settlement and went on to add:

1. The court encourages reasonable settlements, particularly where strict proof would be very expensive.
2. The test of reasonableness is generous, reflecting the fact that the paying party has been put in a difficult situation by the breach.
3. Reasonableness is evaluated as at the time of the settlement.
4. A claim will generally have to be so weak as to be obviously hopeless before it can be said that settling it is unreasonable.
5. The evidential burden of proving unreasonableness falls upon the defendants.

> ...the absence of contemporaneous evidence that the defendants had complied with their contractual obligation was fatal to their defence.

Applying those principles to the facts before him, the court had no time for a forensic, retrospective audit of the initial third parties' claims to assess their merits as the defendants' expert had sought to undertake. The judge took a commercial approach to assessing whether a settlement should have been made and whether the amount it settled for was reasonable; deciding it was not proportionate to test the merits of the claim as rigorously and forensically as if that particular dispute was before the court. Contemporaneous evidence of an attempt to mitigate loss and reach a sensible commercial agreement, to buy off risk, was held to be sufficient and the claimants put forward compelling evidence about the difficulties faced by them, their tenants, and third parties due to the defendants' breaches. The witness evidence documented circumstances where claims had been intimated but had been resolved through negotiation or relationship management. In this context, it was clear from the settlements that the claimants did seek to recover from the defendants that they were not weak or hopeless, which made it easier to assess the reasonableness of the compromise.

This case reiterates the court's reluctance to go behind commercial settlement agreements when a party seeks to recover payments made under them. The defendants need to demonstrate either that settling the claim at all, or the value at which the claim was settled for, was unreasonable. ■

Emphasising the importance of recognition!

ALASDAIR SNADDEN – COUNTRY MANAGER, DRIVER TRETT SINGAPORE OUTLINES THE HUMAN NEED FOR RECOGNITION AND ITS ROLE IN THE CONTINUAL DEVELOPMENT OF SUCCESSFUL PROFESSIONALS.

Introduction

This year is my fifth working at Driver Trett. In this time, I am incredibly lucky and grateful to have been given so many fantastic challenges and opportunities and to see so many around me excel and attain wonderful achievements and successes. It has been quite exceptional.

So, when asked what I feel is the most beneficial aspect of being part of the Driver Trett team, my overwhelming thought is summed up in one word – recognition!

Why is effective recognition so important?

The idea of recognition may wish to be seen as some sort of tangible reward - a pat on the back, promotion, or money perhaps? These are, for sure, great things to receive. However, the recognition I put forward here has a deeper meaning that stems from thoughts of the philosopher Hegel. That is, to recognise someone not only means accepting a person for who they are, but also appreciating that how you perceive and recognise them will, in turn, make that person become what they are. In other words, it is only through how a person is seen and treated that they will ultimately achieve a goal.

It is so important, because ability alone is never enough and it is seldom the case that raw talent does not need appropriate recognition which provides effective assistance. This is demonstrated well through something very close to my heart, football (or 'soccer' as my new Managing Director, John Brells (an American), would know it).

Without people willing to recognise and support a footballer, then irrespective of how good they are, they are unlikely to achieve their potential. Even Lionel Messi for example, arguably the greatest footballer to have graced our world, needed this. As a youth he required growth hormones, which proved too expensive for his family and his football club in Argentina. Had those around him not realised just how good he could be and pushed this very shy boy into the Barcelona system (who supported his treatment), then perhaps Messi's story would have had a differing conclusion to the one we are fortunate enough to know now.

So, by being part of Driver Trett, a company that overtly recognises the importance of embracing and encouraging talent, I have been able to realise just how essential this type of recognition is. You will only ever understand and develop what you are further if it is acknowledged, supported, encouraged, and advanced by the people around you.

How does Driver Trett achieve effective recognition?

There are broadly two ways effective recognition is attained by working for Driver Trett; internally and externally.

INTERNAL RECOGNITION

This recognition is provided by those within Driver Trett and it happens in so many ways. To explain why this occurs, perhaps the best understanding comes from something that happened to me →

when I first joined Driver Trett and worked on a case for Mark Wheeler (Driver Trett global chief operating officer). As a young and incredibly nervous consultant, I managed to get Mark lost in Singapore, one of the smallest countries in the world. During which time we were speaking about the business and Mark told me that Driver Trett can only afford to have the best people within the company.

At that point, given what had just happened, I took a big gulp and thought my days were numbered. However, given time, along with obtaining an improved sense of direction in Singapore, I came to realise Mark was emphasising that, as a business, if we are surrounded by those who want to be and are considered the best, it perpetuates excellence, where everyone enhances everyone. This can only be a great thing for the business and something I have clearly seen and felt in the last five years in Singapore, where Driver Trett has gone from strength to strength.

It happens when peers work closely together and appreciate each other, talking and sharing ideas on how best to move forward with a commission or deal with a problem faced. Many a time I thought I had the answer, shared it with a genius colleague and then, once receiving their advice, decided I needed to go back to the drawing board.

Indeed, sometimes the simplest advice from peers goes the longest way. An obvious one for me is my IT skills, as those around me have made me shake off my Luddite tendencies and realise how powerful such skills will be to me and the business. Indeed our office, through Dr John Lancaster and David Pritchard's leadership, now has a dedicated team seeking to advance the use of artificial intelligence in bringing better efficiency to our data capturing on mega projects. It is quite remarkable.

Having leading figures in their field of expertise within Driver Trett also means opportunities arise to work on landmark cases. This provides a chance for many to showcase and enhance skills on commissions that they would have never been able to look at, if it were not for these key figures. Certainly, I know our three regional directors based in Singapore, Dr John Lancaster, Matthew Wills, and Sheuan Seen Chung, take nothing but great delight from leading our teams onto challenging commissions and watching them flourish.

Having leading figures in their field of expertise within Driver Trett also means opportunities arise to work on landmark cases.

Alongside this, almost organically, internal initiatives come along as our high achievers seek to give those around them their chance. For example, in the UK a positive internal programme has been set up where the next generation of stars are given structured learning courses from our most successful directors in order to improve their abilities as a consultant. In Singapore, where we have a diverse team (something I am very passionate about), our rising star Sandra Somers champions the improved participation of women in our business and recently created a fantastic mentoring scheme; more on these initiatives on pages 13, 32 and 33 of this Digest.

EXTERNAL RECOGNITION

Driver Trett not only gives you the chance to work with great people inside the business, but also exceptional people outside of the business too. The benefit of which cannot be underestimated.

By being part of a 500+ strong consultancy, it means that the structure is in place to handle any matter a client may have; be it acting as the claims consultant or providing our delay, quantum, and technical expert witness services. This means we are fortunate enough to work with the finest clients out there, who recognise our importance and provide the support we need. My recent work has given me a chance to engage with some remarkable engineering brains, who have a thought process and knowledge that has been invaluable to my own development. Alongside this, there are other project team members who realise how important information and documentation is to our work and understand that we need a chance to dissect (sometimes re-dissect) the information provided before putting a position or understanding forward. On two of my recent commissions, this support was essential in order to reach the conclusions found. It simply would not have happened had this crucial support and active assistance not been provided.

As well as working directly with client teams, you also get a chance to work with other third parties brought in to assist on a matter. This will very often mean working with a client's external counsel. At times this can seem daunting. I remember once the lead partner on a case did not even say hello to me before deciding he needed to start his interrogation on a matter I had been working on. But, having such phenomenal brains recognise that you can provide a crucial contribution means that their questioning, and even critiquing, is really only benefiting you; even when it does mean literally accounting for each and every last cent, late into the night.

Finally, working for Driver Trett provides opportunities to participate with external bodies, such as academic and professional institutions, who recognise the abilities possessed by our team members. For example, we are often asked to partake in conferences which provide the chance for us to be at the forefront of new ways of thinking, or trying to digest recent changes that have happened in the engineering and construction sectors. Likewise, our team members get exposure to, and acceptance on, courses at leading academic institutions that enhance their recognition and capabilities. This has very recently seen reciprocation in Singapore as our regional director, Sheuan Seen Chung, and our director and quantum expert, Faye Yeo, have now started an initiative with the National University of Singapore whereby students are offered internships with Driver Trett. This is an excellent initiative and a crucial way in which we recognise and introduce the new wave of young and enthusiastic talent into our industry. This not only helps the interns but brings important assistance, and even new ways of thinking, to our senior staff too.

Concluding remarks

I hope the above has given food for thought on just how important effective recognition will be.

Since taking the role as Country Manager, I have seen our numbers in the Singapore office rise six-fold in just over two years. This has included 13 members of staff receiving promotion for their excellent contributions and I am in no doubt many more will follow.

For this, I can only thank the people around these special individuals for recognising such magnificent talent and letting them shine! ■

Q&A: Mainland Europe

HUGO-FRANS BOL – DIRECTOR, DRIVER TRETT MAINLAND EUROPE TALKS TO THE DIGEST ABOUT THE GROUP'S REGIONAL PRESENCE AND GROWING CROSS-CONTINENTAL COLLABORATION.

What does the current mainland Europe business look like?

It is perhaps not known by many of our international clients, but the Driver Group is very active on the European continent with offices in France, Germany, and the Netherlands. From these offices, our clients are assisted with the traditional Driver Trett contracts and claims services, as well as expert services via our Diales brand.

One of the factors that makes these offices distinct, is that we assist clients who are active in the international construction and engineering market as well as those clients who work domestically. Our mainland European based team all have experience in both markets, live in the respective countries and, very importantly, can communicate with our clients and undertake work in English, the local language (i.e. French, German and Dutch) and also, if needed, in other European languages such as Spanish, Italian, or Russian.

This capability means that we assist and support our clients not only when they are working in their own language, but also when they are working in English and there may be a need to understand certain documents or to communicate with certain people in the local language.

Is that 'local' element important to your clients?

Yes, our local presence means that our staff understand the various different cultures that exist in mainland Europe and how this impacts the way our clients undertake their business. This capability is further extended by the fact that our business has a worldwide network of offices, meaning that we can assist our clients who work outside of mainland Europe as well as those located further afield who work in mainland Europe. This is an important and appreciated part of our service offering.

Hugo-Frans Bol – Director

> We assist and support our clients not only when they are working in their own language, but also when they are working in English...

The growth of our German and French offices in recent years shows the appetite for a local knowledge base. The Munich office was established nearly five years ago with the Paris office opening nearly four years ago. Both operations are now sizeable and well established in their local markets, and have their own specialisms. The Munich office works extensively in the power and plant and offshore wind businesses, with the Paris office kept very busy providing training in commercial awareness, FIDIC, and NEC contracts alongside contract management on various French language projects and undertaking expert appointments. Founded almost twenty years ago, the Dutch office is very well established, and has developed its own (inter) national client base, which it serves with the Group's full array of services.

What does all this mean for the future of the mainland Europe business?

More recently, the three offices have started to increase cooperation to improve and align the service offering to our clients as they often operate throughout the various European countries. Our aim is to provide our clients with the best possible service that they need, at the various levels of their organisation, wherever they operate in mainland Europe and abroad. An important step towards this was taken recently by the organisation of a mainland European team conference in Strasbourg where we focussed on increased cooperation, integration of our service offering, and knowledge management. This will enable us to continue the current growth in our home markets and develop new exciting ventures on the mainland of Europe through our unique service offering and established client base. ■

driver trett

40 years of Driver Trett

The business that eventually became Driver Group plc has roots dating back to Northampton in the early 1970s as the idea of Charles King, a partner in the practice Baker Wilkins & Smith, Chartered Quantity Surveyors. Charles had found himself fielding increasing numbers of requests from contractors and subcontractors for help with commercial management, both in the UK and overseas. To service that demand, in 1973 he employed a contractor's quantity surveyor, Malcolm Sarjeant.

From Baker Wilkins & Smith's Northampton office Malcolm set about providing contractors and specialists with services ranging from the measurement and pricing of tenders through to claims and final accounts, under the business name BWS International Construction Consultants ("BWSICC"). Internationally, early clients were the likes of Philip Holzmann, Hyundai, Fujita and Fujiko, where they were working outside of their home jurisdictions, particularly in the Middle East where there was a proliferation of British engineers, proffering English language contracts based upon British standard forms.

In the early days the UK market was rife with what many subcontractors considered "Subbie Bashing" and key early clients included specialists in the fields of cladding, glazing, mechanical and electrical services, refrigeration, partitioning, and refractory linings.

1978

In 1978, the early growth of BWSICC saw it established as a separate partnership to Baker Wilkins and Smith, with Malcom as its Executive Director.

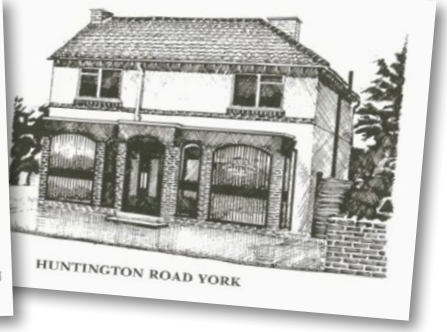
BWS International Construction Consultants

BWS INTERNATIONAL CONSTRUCTION CONSULTANTS

BWS B W S International Construction Consultants

Malcolm Sarjeant

WIMPOLE STREET LONDON

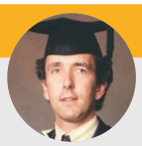


HUNTINGTON ROAD YORK

1979

In 1979, Paul Battrick joined the firm from George Wimpey.

1983



In 1983, he was followed by John Mullen from Taylor Woodrow.

1986

The 1980s saw steady organic growth in the practice, which was boosted in 1986 when BWSICC merged with the partnership Davison George. Peter Davison and Peter George brought extensive experience in the heavy engineering sector of the construction industry, with particular emphasis on offshore oil and gas projects, petrochemical plants, and pipelines. Their services included contract, time, and cost.

Clients included many of the world's major oil and gas companies and heavy engineering contractors.

BWS Group Partners 1986

1990

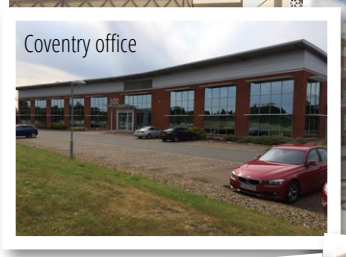
In 1990, Steve Driver joined BWSICC from Mowlem and set up an office in Rossendale, Lancashire, which would later become the practice's head office.

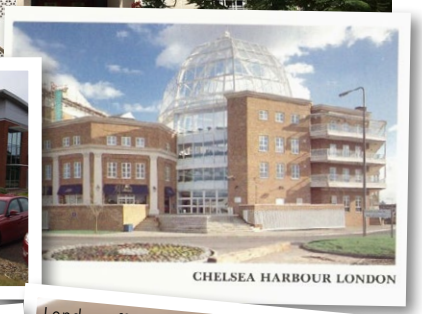
In that decade, the client base matured further to include most of the UK's major building and engineering contractors and some of the world's largest petrochemical companies. Services particularly expanded into project and forensic planning, to which the building and civil engineering industries were applying increasing emphasis and sophistication.

Expert witness services also became a growing part of the service offering, with Peter Davison particularly gaining appointments on some major cases in the UK courts and in international arbitration. The opening of several new offices, including London, brought the practice closer to that city's market for both domestic litigation and international arbitration.

1998

By 1998, BWSICC had significantly outgrown the firm of Chartered Quantity Surveyors that had spawned it, and the old partnership vehicle was considered unsuitable to facilitate the next phase of the business's growth.





2003

In 2003, BWS Consulting Ltd became Driver Consult Ltd. Peter George's business (seconding contract, time, and cost staff into the offshore oil and gas industries) continued, for a short period, as BWS International.

2005

For Driver Consult, the early 'noughties' saw growth continue apace.

By 2005 BWS International demerged to allow Driver Consult to focus on its core business of providing the construction and engineering industries with commercial, programming, and dispute resolution services.

Five offices were established in the UK along with local vehicles in Belgium and Abu Dhabi.

With the UK offices thriving, emphasis was now on both growing the business in international markets and acquisitions, as the next steps in the growth of the Driver business.

The Board considered that these were best achieved by listing the company on AIM on the London Stock Exchange to bring in the necessary financial capital.

2008-2009

Among the early significant results of the listing were the acquisition of Commercial Management Consultants Ltd (CMC later rebranded as Driver Project Services) and the establishment of Driver Consult (Oman) LLC in 2008 and Driver Consult (UAE) LLC Dubai branch in 2009.

2012

2012 saw the acquisition of Trett Consulting in May and the launch of the expert witness brand Diales in June.

Further offices were opened in Africa, North America, Asia Pacific, Europe, and the Middle East.

TRETT CONSULTING 1977-2012

Trett Consulting was launched in 1977 by Roger Trett, with its first offices above a fish and chip shop in Great Yarmouth

The company developed into a distinctive commercial and contract consultancy across the UK with offices in Stirling, Leeds, Manchester, Coventry, London, and Great Yarmouth

Roger focused mainly on the engineering sector, the success of which resulted in further offices in Darlington and the Netherlands which specialised in these sectors.

Trett Consulting was renowned for the provision of construction expert witnesses specialising in quantum and forensic delay analysis.

Roger Trett was one of the founding members of the academy of experts.

Trett was bought by a Dutch engineering firm in 2008 before finally joining the Driver Group in 2012.

2014

In 2014 the Diales delay and quantum experts were joined by a team of world-class technical experts meaning that Diales could provide expert teams for diverse and complex international disputes from one main point of contact.

2018

These are just some of the highlights in the evolution of a global business that now has 28 offices around the world and a turnover of over £60 million.

As Driver celebrates its 40th anniversary in 2018, thoughts turn to what the future may hold.

CELEBRATING 40 YEARS 1978-2018

Charles and Malcolm would hardly recognise the business, but they would surely be very proud.

driver trett

Somewhere over the rainbow

PAUL BATTRICK – MANAGING DIRECTOR, DRIVER TRETT AND CO-AUTHOR OF THE FIDIC RAINBOW SUITE ARTICLES* ATTENDED THE FIDIC USERS CONFERENCE HELD IN LONDON DURING DECEMBER 2017. THE EVENT SAW THE RELEASE OF THE 2017 EDITIONS OF THE FIDIC RED, YELLOW, AND SILVER BOOKS. DRIVER TRETT DIGEST ASKED PAUL WHAT HE THOUGHT OF THE EVENT AND THE NEW FORMS, ESPECIALLY THE YELLOW BOOK.

*https://www.driver-group.com/europe/knowledge/articles/

This year's FIDIC Users Conference saw the release of the second edition of the Red, Yellow, and Silver Books - how did that affect the conference?

FIDIC had announced, some eight or nine years ago, that they were revising the Red, Yellow, and Silver Books. The 2016 London conference saw a pre-release second edition of the Yellow Book, so when it was finally confirmed that the second editions would actually be released this year, there was a last minute rush for seats; so much so that there were over 300 excited delegates in attendance instead of the usual 150 or so.

Why the excitement if the Yellow Book, albeit not in final form, was released 12 months before?

You may recall the interview I gave you twelve months ago, in issue 13, discussing the pre-release edition. The controversy and mixed feelings towards its content continued throughout 2017. Fortunately, the 'friendly reviewers' (those FIDIC rely upon to comment upon any draft) were successful in obtaining some significant revisions to make the final version more palatable to many more potential users within the contracting fraternity. Although, it has been said that FIDIC did not enter into enough dialogue with organisations that represent, for instance, engineering and mechanical contractors. I certainly look forward to seeing the commentaries on the new books drafted by the European International Contractors (EIC).

Have FIDIC released a set of contracts that will be welcomed by all?

As I noted last year, there are many that took, and still take, the view, "if it ain't broke why fix it?". However, the construction industry moves on, there is the influence of case law to consider and the experiences of some eighteen years of contracting under the old Rainbow Suite to take into account.

In addition, FIDIC will have noted the growing popularity of the NEC forms in many jurisdictions. So, welcomed or not, FIDIC were probably correct in making revisions.

So, what did FIDIC try to achieve?

In their own words FIDIC sought:

1. Greater detail and clarity on the requirements for Notices and other communications.
2. Provisions to address Employers' and Contractors' claims treated equally and separated from disputes.
3. Mechanisms for dispute avoidance.
4. Detailed provisions for quality management, and verification of Contractor's contractual compliance.

How have FIDIC achieved their goals?

In many ways the contracts are far, far more prescriptive than the previous versions. I always tell my clients that the 1999 edition of the FIDIC books are a good project management handbook, that will assist a contractor. First glance of the new versions could be considered a straight-jacket by comparison. For instance, there are many more Notices to be submitted, admittedly by all Parties, and more time bars or time limits to consider. If contracts were put in a contractor's site office filing cabinets in the past, any contractor that continues in the same fashion in the future, when using the 2017 editions, will surely have a hard time. The well-known phrase, "fail to prepare, prepare to fail" will be trotted out ad nauseam.

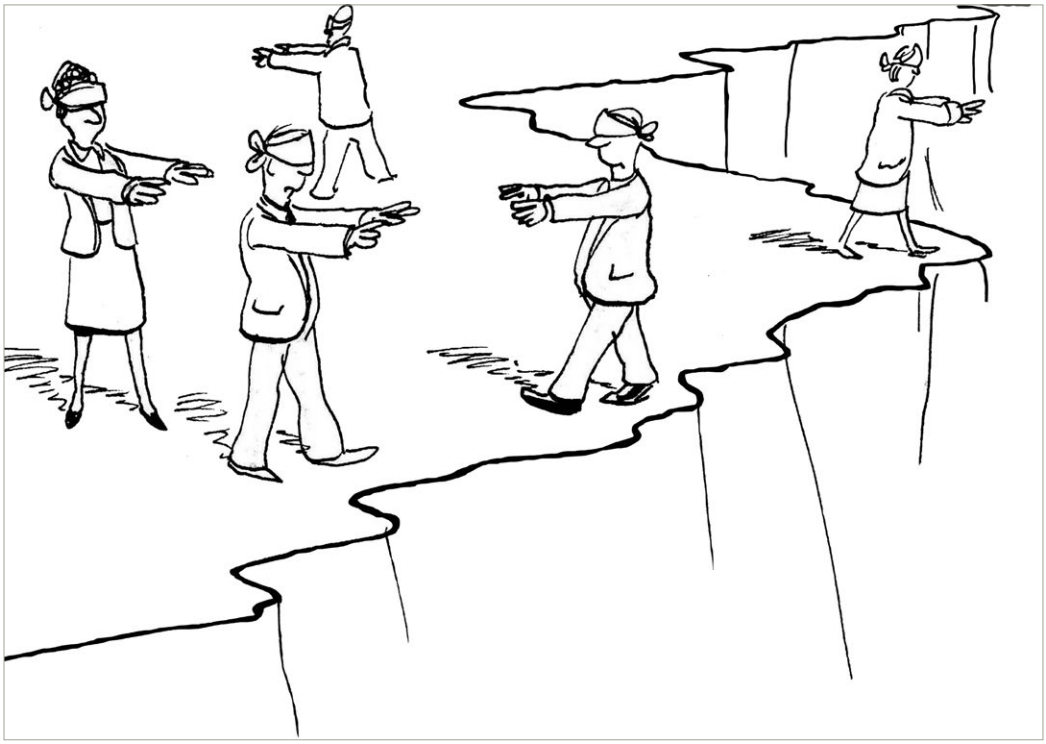
Are the new contracts that different?

I haven't carried out a word count myself but a commentator has noted that the 1999 Yellow Book had some 30,400 words. The 2017 Yellow Book has over 50,000 words. The same commentator also noted that the new contracts weigh almost 1kg each.

That's a big increase in words. Are there many more clauses?

No, the 1999 edition had twenty clauses and the 2017 edition has twenty-

one. The change being that the old clause 20 - Claims, Disputes and Arbitration has been split into two clauses; clause 20 - Employer's and Contractor's Claims and clause 21 - Disputes and Arbitration. This being a result of FIDIC's desire to promote more dispute avoidance, by splitting the old clause it is hoped that a claim will not be so synonymous with a dispute. Going on from that, clause 21 introduces a dispute avoidance/adjudication board (DAAB) in all the forms. A standard DAAB, appointed at the outset of the contract, will seek to avoid issues becoming disputes by regular visits to the site and discussions with the parties, amongst others. The DAAB will facilitate the Parties in reaching their own decisions, rather than asking the Engineer to make a determination, the DAAB to make a decision or, if all else fails, an arbitral tribunal to make an award. For me this can be only a good thing, although I believe there should be some mechanism to ensure that all bidding contractors include the same amount for this process within their tenders.



Clause 20 notes both Employer's and Contractor's Claims, what is that all about?

In the past, FIDIC were often criticised that contractors had to risk losing an entitlement to an extension of time (EOT), cost, or both by failing to provide a notice to the Engineer within the prescribed 28 days, whilst the Employer had no such precedent.

In the 2017 editions the same rules or precedents apply to both the Employer and the Contractor. These rules include the fatal 28-day notice, albeit it is not quite so fatal since there are levels of appeal which may be in recognition of the judgment in the OHL case[1].

Surely it is a good thing that the Employer and Contractor are treated the same?

Obviously yes, but in reality how many claims do Employers raise compared to Contractors? A very, very small number I would guess. So yes, it is a good thing, but numerous notices, time bars and time limits, and deeming provisions introduced throughout the rest of clause 20 will ensure that only contractors that are on top of their game will succeed with their claims.

Are there any other new provisions that stand out for you?

Where do I start and where do I finish? There are so many. I quite like that amongst the definitions (90 in total compared to 68 in the Yellow Book) that Notice is defined. It should now be totally clear when a contractor is saying, "an event has taken place which is not in my risk area and I need more time or more money". It brings matters out into the open, such that they can be resolved quickly, and the project moves on.

Contractor's will no longer be able to seek to rely upon an ambiguous phrase buried within a monthly report, or minutes of meeting and claim, "there's my notice". Again contractors will have to be at the top of their game.

I believe that in general terms, as stated by FIDIC, it is a contract drafted by Engineers for Engineers. Contractors may need a small army of contract administrators to ensure that the contract provisions are fully understood and complied with. In doing so, I believe the Engineer will be even more aware of any frailties within the Contractor's organisation. Even more so, the Contractor has to bare its soul via programme updates, monthly reports, and so on. On the other hand, why should the unprofessional Contractor succeed with ill-founded claims?

Do you have one final thought?

FIDIC has set out its objectives and has largely achieved those, although perhaps it could have achieved those objectives by using fewer words. Whilst clarity was an objective, when amended, as no doubt this edition will be, lengthy contracts become overly complicated and contradictory within their own terms. FIDIC have recognised that amendments beyond the clarifications noted within the guidance section will occur, and strongly recommend that all drafters of the Special Provisions, "take all due regard of the five FIDIC Golden Principles (see Box 1).

I have rarely seen a FIDIC contract that has not been amended by an Employer (and its Engineer) not to better its own position at the expense of the Contractor's. I wonder how many Employer's will abide by FIDIC's honourable recommendation? ■

BOX 1 - FIDIC GOLDEN PRINCIPLES

GP1: The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.

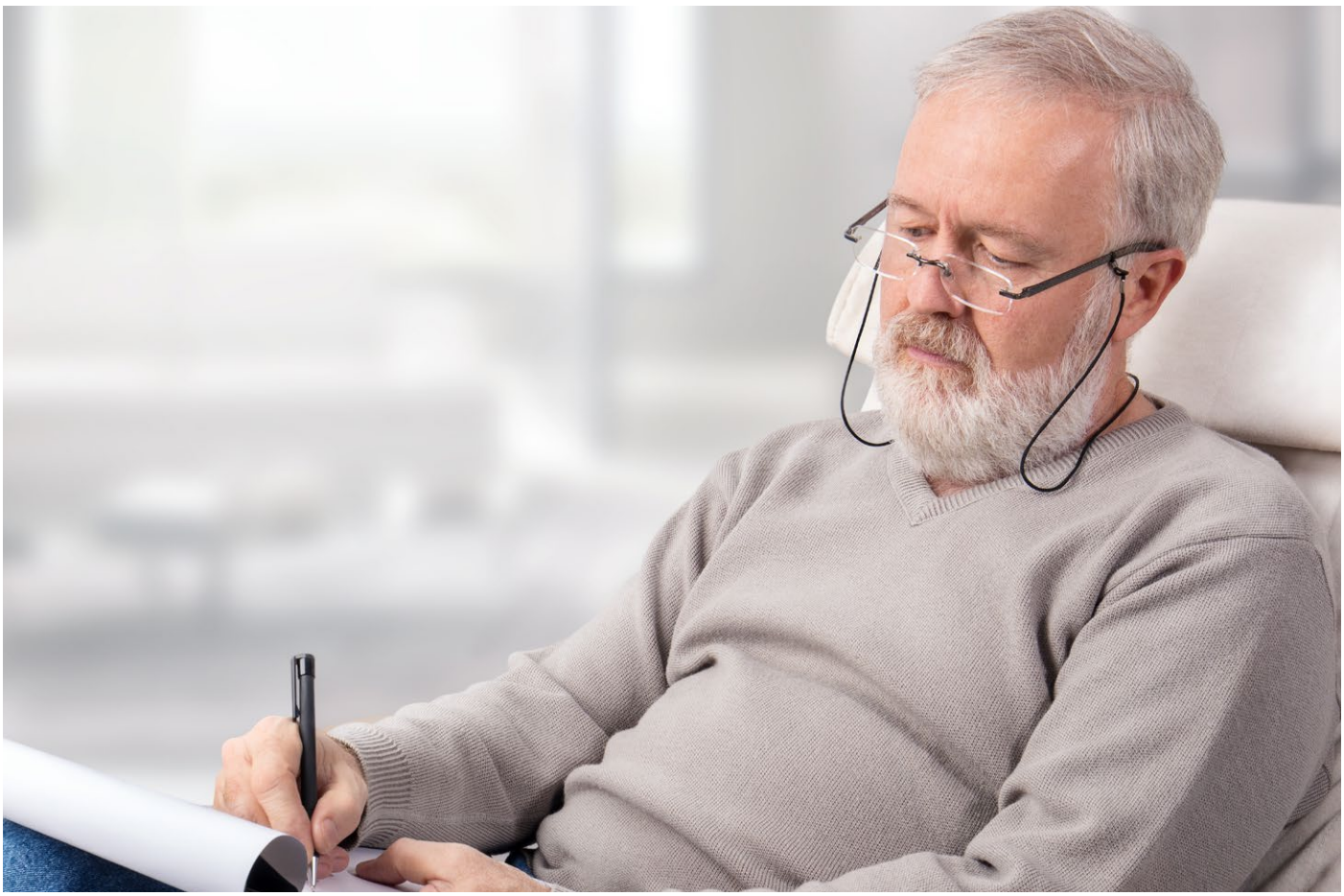
GP2: The Particular Conditions must be drafted clearly and unambiguously.

GP3: The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.

GP4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.

GP5: All formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

[1]Obrascon Huarte Lain SA vs Attorney General for Gibraltar [2015] EWCA Civ 712.



A 'grey haired' view on dispute avoidance and resolution in mainland Europe

MARK CASTELL – REGIONAL MANAGING DIRECTOR AND DELAY AND QUANTUM EXPERT HIGHLIGHTS SOME OF THE KEY NUANCES OF CONTRACT MANAGEMENT IN MAINLAND EUROPE AND ITS EFFECT ON THE REGION'S CONSTRUCTION DISPUTES.

'Grey hair' is sometimes a term that is associated with consultants, although its use is perhaps unfair given that there are many who retain their original hair colour by natural or other means. It is however, also the name given to a type of work undertaken by consultancies.

David Maister, who until his retirement in 2009 was widely acknowledged as one of the world's leading authorities on the management of professional service firms (such as law, accounting and consulting firms), defined 'grey hair' consultancy as being one of three types of client work. He said that 'grey hair' consultancy was based on knowledge exploitation, whereby the consultant would solve problems using their knowledge, experience and judgement[1] .

Unfortunately, I have not retained my original hair colour. This is probably due to the effect of working for 34 years within the construction and engineering industries, the last 14 years of which have been spent in consultancy, based in the Netherlands, doing a variety of work including that of being an expert witness. With this background, the term 'grey hair' is probably appropriate for me. Therefore this article draws on some of my personal experience and looks at some aspects of dispute avoidance and resolution from a mainland European perspective.

Non-adversarial nature of contracting

The construction industry in the Netherlands, and elsewhere in mainland Europe, is generally not adversarial by nature. Many contractors will still proceed on the basis of good faith ("execute a good job and we'll be able to agree commercial settlement at the end.")

This attitude has cultural foundations

and defined how business was conducted for many years. Despite the introduction of different commercial and contractual conditions that require a greater focus on more formal contract administration (i.e. the FIDIC standard forms), the increased domestic and international competition since the creation of a single European market, and the more recent move towards globalisation, this view is still held today.

As a result, the various parties involved in a construction or engineering project (i.e. employer, employer's representative, contractor, subcontractor) may have different views on the importance of contract administration to the avoidance and, if required, the resolution of disputes. This may not be the case on projects in the UK, the Americas, the Middle East, and across Asia Pacific.

This potential difference in attitude or understanding is often not explored or considered at the tender stage, or at the outset of the execution stage. The result is that this difference itself can cause issues and strained relationships, which are then exacerbated if the project encounters problems such as unforeseen conditions, or if significant change is required.

Effect on dispute avoidance

It is not always understood that proper administration of contracts is helpful to the avoidance of disputes. Furthermore, that contract management is a fundamental part of the commercial strategy that should be put in place at the outset of a project, for minimising risk and (for a contracting party) maximising the possibility of securing commercial return (i.e. profit).

This can manifest as follows:

- A lack of practical understanding of the contract provisions dealing with day-to-day matters (i.e. covering submission of time schedules and progress updates, correspondence and reporting, the management of change, and interim payments).

Without knowing what the contract administration requirements are, a party simply cannot adhere to them.

- Not having the specific processes and procedures that are required to be put in place at the commencement of the project.

If set up, these processes and procedures are then often not consistently followed.

- A reluctance to submit written communications, especially when concerning the identification of change (i.e. notices) or other potentially 'contentious' matters.

The importance of proper written communication cannot be underestimated. Doing this well means that an organisation has to firstly create awareness and appreciation of this issue across the project and management teams. Individuals must then understand the need to bring relevant matters to the attention of those who are more qualified to investigate, then draft and submit the required communication. It should be appreciated that it is generally better to address potentially 'contentious' matters at the time, but using appropriate language.

- A hesitancy in recognising the need to reply to written communications on potentially 'contentious' matters that are received from another party.

The importance of making your position clear in the written records is sometimes not appreciated by parties. This can be a time consuming activity and divert key project staff from other priorities, like progressing the works, and so additional resources sometimes need to be contemplated.

- The absence of sufficient relevant and appropriate records.

The importance of records is well known even if, for example, there is no agreement between the parties as to whether a change has taken place and where the liability for the change rests. In practice however, and notwithstanding that many contracts require them to be kept and submitted, and the burden of proof rests with the party asking for time and money, the quality and extent of record keeping is sometimes found to be lacking.

- An unwillingness or inability to identify and then quantify the time and money impact of any changes.

This needs to be considered at an early stage of the project in order that appropriate processes and record keeping systems are set up. The systems then need to be followed, because change will surely occur and the output will need to be properly used to maximise a contractor's chances of substantial recovery. Furthermore, the contract may also specify a time frame for the submission of such evaluations, with a failure to achieve those time frames often acting as a bar to recovery. Notwithstanding that it may be possible to argue that such time bars are unenforceable under many civil law jurisdictions, this may not be an ultimately successful argument.

- A reluctance to prepare and then submit a detailed claim that addresses entitlement, cause, and effect. This is not the same as a conscious decision to only prepare a more general document for commercial discussions.

Detailed claims are sometimes seen as a barrier to amicable settlement rather than a way in which a party can positively set out its case, or position, in advance of any discussions. In fact, the absence of a detailed submission and understanding of the respective party's strengths and weaknesses, prior to amicable settlement discussions, can often prevent agreement.

In my experience, if one party has not followed the contract (i.e. notice provisions), or set out its case in sufficient detail and at the appropriate time, then the other party may use this as the prime reason for not coming to an amicable settlement, or even not entering into discussions in the first place.

A failure to properly administer the contract can therefore often be the cause of a dispute.

> ...a party who has not properly administered the contract is likely to be in a weaker position, in the event of a dispute.

Impact on dispute resolution

Clearly, a party who has not properly administered the contract is likely to be in a weaker position, in the event of a dispute, regardless of whether it is a common or civil law jurisdiction. This would also include the situation where there is only a more general document that was prepared for commercial discussions (that is perhaps global in nature), or even no such document in existence.

In such a scenario, a detailed claim that addresses entitlement, cause, and effect will need to be put together prior to referral to formal dispute resolution. The required level of detail will be high, it will clearly be more difficult to achieve this if it is prepared sometime after the events that will be relied upon occurred, or if insufficient records were retained.

In the alternative scenario that a party proceeds to formal dispute resolution on the basis of a more general document that was only prepared for commercial discussions, it is again likely that this will need to be re-visited and challenged, sometimes by a more objective 'outsider', or a formally appointed expert witness.

Both scenarios will often involve an extensive forensic exercise, which may require a reconstruction of particular aspects of the project, based on the documentation and the outsider's or expert's judgement. Such an exercise is more difficult to do, and more costly, than if it had been undertaken at the time of the events that are being relied upon.

Conclusion

The requirements of today's construction and engineering industry demand more focused attention to the need for proper contract administration. This does, and will continue to, create cultural and attitude challenges to individuals and businesses within many parts of the world, including mainland Europe.

It starts with awareness and consideration by both project and management teams and should be an inherent part of a contracting party's commercial strategy.

In many cases, the early involvement of external objective assistance, or even an expert, can assist both the avoidance of disputes and then, if required, their resolution. ■

[1]Managing the Professional Service Firm by David H Maister.

Q&A: The Middle East

PETER BANATHY – REGIONAL MANAGING DIRECTOR, DRIVER TRETT MIDDLE EAST TALKS TO THE DIGEST ABOUT CLIENT SUPPORT IN THE REGION AND PLANS FOR THE FUTURE.

Peter Banathy – Regional Managing Director

We have grown steadily over the years and currently have some 145 consultants working from these offices across the region.

What does the current Middle East business look like?

Having had an established presence in the Middle East for numerous years, initially in the shape of our United Arab Emirates and Sultanate of Oman offices, we have successfully expanded our footprint over recent years to include offices in Qatar and Kuwait. The former having been established in 2010 and the latter over the preceding two years.

Our regional head office is in Dubai and we have grown steadily over the years and currently have some 145 consultants working from these offices across the region.

What capabilities does the regional team have?

We are one of, if not the largest, providers of dispute resolution services to the construction and engineering industry in the Middle East. Allied to our claims specialists we also provide project services support to our clients in the form of contractual, commercial, and planning services both pre-contract and post contract.

Having such a range of disciplines in-house, and staff at all levels from consultant through to directors, allows us to provide blended teams tailored to the specific requirements of our clients and to the specific requirements of the issues they require support with.

Because of the regional spread of our offices, we are also in an ideal position to very easily and readily supplement resource requirements in any of our offices as workloads, and as our clients, may require.

In recent years we have been, and continue to be, involved with many of the regions largest, complex and iconic projects ranging from aviation and metro schemes through to museum projects.

All our work is subject to our quality management system (QMS) and we recently attained ISO 9001 accreditation of our United Arab Emirates and Kuwait offices.

What about expert witness support for your clients?

Since its Middle East launch in 2014, Driver international arbitration litigation expert support (Diales) has provided expert services on a large range of high-profile and complicated matters throughout all sectors. Diales has over 40 experts worldwide and many of these experts consistently work on projects in the Middle East.

As well as having a strong team of delay and quantum experts, Diales has recent employed locally based technical experts. This provides our clients with the opportunity to appoint multi-discipline experts from one consultancy.

What shape would you like to see the Middle East business take in the future?

Immediate plans include the development and growth of the support we provide to our clients in the Kingdom of Saudi Arabia. Whilst this has, to date, predominantly been provided out of our United Arab Emirates offices, we are actively looking to establish a permanent presence in the Kingdom within the next 12-18 months.

We are also looking forward to consolidating our position as one of the largest providers of our specialisms to the construction and engineering industry. We will continue to work closely with our existing clients, their advisors, and consultants and establish working relationships with new clients.

We also look forward to celebrating the Group's 40th anniversary this year with a special event in the Middle East in April and I look forward to seeing some of you there. ■

Feeling constrained by budget?

STEPHEN HOMER – PARTNER, ASHFORDS LLP OUTLINES THE RESPONSIBILITY OF ARCHITECTS WHEN PROPOSING DESIGNS, IN PARTICULAR IN RELATION TO A RECENT CASE HE ACTED ON WITH A DIALES QUANTUM EXPERT.

The English High Court recently ruled on a case concerning the duties of an architect in relation to budgetary constraints on a project. The decision involved the world-famous architects, Foster & Partners and the design of a proposed five star hotel at Heathrow airport. The judgment Riva Properties Limited, Riva Bowl Limited, Riva Bowl LLP and Wellstone Management ("Riva") against Foster + Partners Limited ("Fosters") [2017] EWHC 2574 (TCC) gives much food for thought for designers and architects alike.

Judgment was given by Fraser J on 18 October 2017. The case concerned Fosters and their duty to design a five-star hotel in line with a budget indicated by their client, Riva. The design included a 600 bed, five-star hotel with conferencing and leisure facilities, a bowling alley, and parking set out in a village theme. The proposed hotel had seven floors above ground, seven floors below ground and a large glass biosphere around the outside containing the 'village'. Riva notified Fosters of an intended overall budget of £70 million (later increased to £100 million). However, when the hotel design was costed in January 2008, the estimated cost was more than double the original budget, coming in at £195 million. Notwithstanding this high cost, the hotel design was submitted to and granted planning permission. However, the hotel was never built as it was not possible to obtain funding for a hotel scheme with such a high build cost.

Key points in relation to Fosters' appointment were that:

- Fosters were said to have no responsibility for costs advice.
- There was no mention of budget in the appointment.

The appointment did not refer to the Royal Institute of British Architects (RIBA) guide, 'The RIBA Job Book', but did refer to Fosters carrying out Stages A and B (now work stages 0 - 1) of the Royal Institute of British Architects Plan of Work.

Riva alleged three key breaches against Fosters:

1. Fosters failed to carry out the Royal Institute of British Architects Plan of Work Stages A and B (now work stages 0 - 1), including failing to establish the budget and as a result Riva was left with a hotel design that would cost more than twice its original intended budget to build.
2. Fosters advised Riva, after receipt of the first costings, that the hotel design could be value engineered to within a budget of £100 million, the parties' respective expert witnesses having subsequently agreed that it was impossible to value engineer the design to such an extent.
3. In the alternative to 2, Fosters failed to warn Riva, when informed that Riva intended to value engineer the design to within a budget of £100 million, that this was not possible.

Riva claimed the fees required to have a new hotel designed and planning permission obtained, or in the alternative, reimbursement of the fees wasted on the Fosters' design. Riva also claimed lost profits due to the inevitable delay that will occur until the hotel is built and trading.

Over the course of an 11-day trial, Fosters raised a number of defences including:

1. They were never informed of the budget and denied there was any budget.
2. They denied they had a duty to establish budget or design to a budget as they were not required to advise on costs under their appointment.

→

3. Any cost advice could not be expected from Fosters and Fosters informed Riva that they needed to appoint a quantity surveyor.
4. Fosters denied that they had failed to carry out RIBA Stages A and B and denied that they were required to prepare the Strategic Brief under RIBA Stage B.
5. Fosters alleged that despite the cost advice received from the quantity surveyor, Riva decided to proceed to planning.
6. Fosters denied any advice was given to Riva that the project could be value engineered.
7. Fosters alleged Riva was contributorily negligent for, inter alia, delaying in the appointment of a cost consultant and failing to proceed with the project diligently or at all following the cessation of Fosters' appointment.

In a lengthy judgment, Fraser J found in favour of Riva on each of the alleged breaches on the following basis:

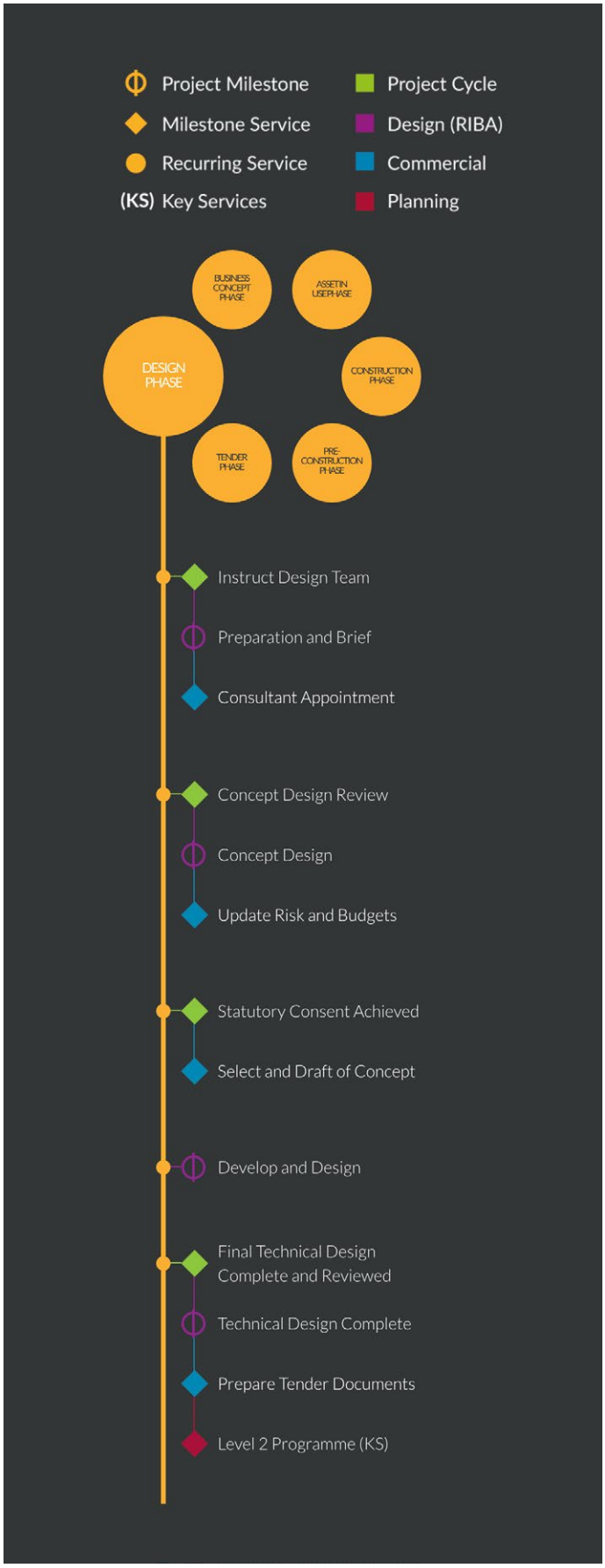
1. RIBA Stage A required Fosters to, "identify requirements and possible constraints". Stage B required Fosters to "confirm key requirements and constraints". Fraser J held that, "a client's budget for a project is plainly a constraint (it could also be argued that it is a requirement too)". In the circumstances, Fraser J considered that an Architect must, "establish whether there was a budget or not at an early stage, as that is the only way that all of the key requirements and constraints could have been identified". Having found that Fosters were aware of the budget, or in any event, should have identified the budget, Fraser J found Fosters in breach of contract for failing to complete RIBA Stages A and B with the reasonable skill and care to be expected. Fosters were required to identify any constraints and ultimately design the project to match the constraint of budget. However, Fosters appeared to have jumped straight to Stage C and designed without any thought for costs.

   Fosters' liability was not diminished by any delay in Riva not appointing a quantity surveyor until December 2007, as Fosters had not expressed any urgency when advising Riva to appoint a quantity surveyor. Indeed, Fosters themselves delayed in contacting potential quantity surveyors until November 2007. Further, and importantly, designing a project to match the constraint of budget is not synonymous with providing advice on costs.

2. So, what was Fosters' obligation in relation to value engineering the too expensive scheme? Fraser J found that Fosters undoubtedly knew that Riva intended to value engineer the Fosters design to a figure of £100 million and, in such circumstances, Fraser J considered Fosters to be under a duty to warn that this was not possible. Fraser J also accepted Riva's evidence that Fosters advised Riva positively that the scheme could be value engineered down to £100 million. Given the fact it was so, "blindingly obvious" that the Fosters design could not be value engineered to £100 million, Fraser J found Fosters in breach of contract for positively advising it could be value engineered or, in the alternative, failing to warn to the contrary.

Although Riva were not successful in claiming lost profits for reasons of causation, as a result of the breaches established, and the losses suffered in instructing new architects and consultants to design a hotel scheme that fulfils Riva's brief, they were awarded £3,604,694.

This case serves as a warning to designers that they cannot design in a vacuum. Cost and budget are a key constraint and should always be identified and considered when designing any project, even when the provision of cost advice is expressly excluded from the designer's obligations. The court also decided an architect has a duty to advise a client that a too expensive project cannot be value engineered down to a client's budget, at least in circumstances where this is obvious, and cannot simply stand by and remain silent. The judge's willingness to accept the guidance in the RIBA Job Book, as to what an architect should do at each stage of a project, is also noteworthy. ■



Q&A: Switching lanes

DOMINIQUE AUGER – DIRECTOR, DRIVER TRETT PARIS RECENTLY JOINED THE TEAM HAVING PREVIOUSLY WORKED WITH DRIVER TRETT AS A CLIENT. THE DIGEST ASKS FOR HER THOUGHTS AND INSIGHTS INTO THE CLIENT'S VIEW OF CONSULTING:

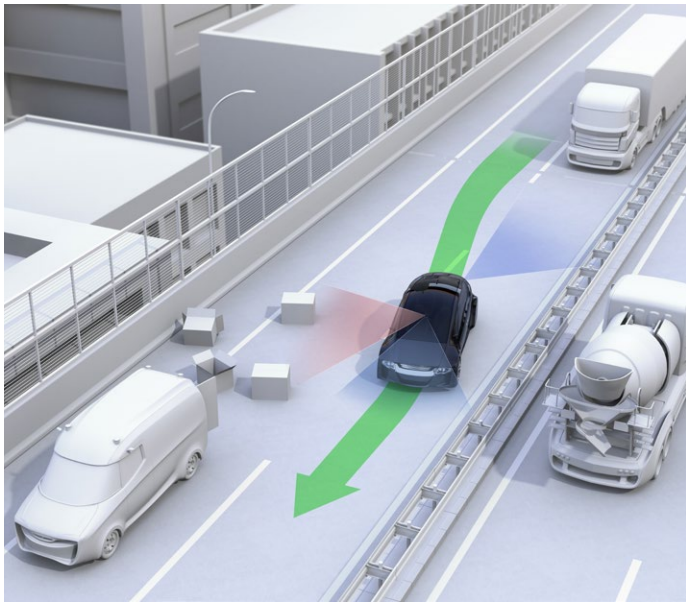
Did you often use consultants as part of your previous role?

Yes, as the head of contracts department for the French office of one of the leading contractors in oil and gas, offshore, subsea construction, I had regular opportunities to hire external consultants.

In your experience, what are the main reasons clients use consultants?

From a client perspective, and to the exception of the appointment of expert witnesses which are performed by the appointed lawyers, there are three main reasons for a client to go to consultants:

1. Temporary lack of internal resources.
2. Lack of competencies.
3. A need for a third-party opinion on a contractual analysis or claim.



Regarding lack of resources, it is a matter of hiring individuals, but it is not merely putting 'a bottom on a chair'.

As the client, you are ideally looking for somebody who knows your business, who is immediately operational and who will fit within your team and, no need to say it, 'somebody who is going to pay for his rate'. To find such resource, there are two main options, either contacting a freelance agency or a consultancy firm. Freelance agencies are plentiful, they all have numerous CVs available, but unless you have a good track record with one of them, you are left facing the pile of CVs and trying to figure out which one could be the one. This is time consuming, stressful, and risky if you do not make the right choice. Hence the alternative, go to a consultancy firm. Then the situation is different, you do not hire a person, you hire a person whose CV is endorsed by the consultancy firm, a person who is somehow guaranteed as to their competencies, behavior, and who you know can benefit from back-up support, if required. On this basis, the extra cost you will have to pay will be justified.

Is trust an important factor?

Yes, this is the key factor. As the client, you need to trust the firm in order to trust the consultant(s) that it will propose. It is all the more paramount when you need to source competencies which are not internally available to prepare a claim, a contractual analysis, or strategy or when you are seeking a third party opinion. In all these instances, you put your commercial destiny into external hands. You need to have full confidence .

Once you have decided to work with a consultancy firm, how do you select it? What are the criteria?

An objective means of selection is 'beauty contest'. However, this is a rather long process and usually, when it comes to getting a third-party opinion or putting a claim together, you (as the client) are in a rush. It is most likely that you have not been granted more than a few weeks by your top management for the commission to be complete. Therefore, the selection process should be short and simple.

How did you come to work with Driver Trett?

The firm I was then working with had internally prepared a significant extension of time claim and submitted it to its client, who had turned it down based on a concurrent delay analysis. Three years ago, this type of defence was pretty new in the oil and gas industry. The client was coming with US considerations and rules on concurrent delay, whereas the contract was under English law. Although the contracts and legal team was pretty confident on the strength of the claim based on the SCL protocol recommendations, the top management of the company needed some more comfort and was ready to pay for it.

As the French office had never worked with consultancy firms on claims, I called my boss in the UK. He mentioned a consultancy firm, that had done an excellent job for the Group on a series of claims in Australia, had just opened an office in Paris and I should contact them. So, I did. Within a week, contact was made, meeting held, proposal on the table and, within a few weeks, work done!

I should mention that there were two key factors which led to hiring Driver Trett (on top of the recommendation):

- The reactivity of the Paris team.
- Their immediate understanding of our needs.

This was proved by the proposal that they put together which reflected their understanding. Then they performed well, and we settled the claim.

Now that you have joined the consultancy business, are there any services we offer that surprised you?

I realise that I should have mentioned training as one of the reason to hire consultants. However, I did not mention it because, as a client, I would not have requested such service from a consultancy firm simply because I did not know that they offer such services. As head of contracts, I had never been approached with this type of service in four years. Neither had my predecessor.

Finally, what would you say is the best thing about the Driver Trett team?

I would say that the most precious assets of consultancy firms, whether industry or lawyers, are their reputation and their visibility. Reputation comes from the quality of their people, their recognised competencies and the quality of the work they produce, either as individuals or as teams. This is also essential in developing a rapport between clients and consultants that is essential to repeated engagements and working well together. As to visibility, it is the result of marketing and business development efforts and the knowledge that a team can demonstrate (training being a key area). From my experience, Driver Trett delivers on all counts and is a great team to work with. ■

driver trett

Adjudication begins in Canada

KEVIN O'NEILL – OPERATIONS DIRECTOR, DRIVER TRETT CANADA CONTINUES THE STORY OF ADJUDICATION'S EMERGENCE IN CANADA* AND THE NEXT STEPS IN ITS INTRODUCTION IN ONTARIO.

*following on from his interview in issue 14 of the Driver Trett Digest, P.25

2018 started out with a bang for the construction industry in Ontario. The long-awaited revisions to the Construction Lien Act (which, when put into effect, will be called "The Construction Act") received Royal Assent in December 2017, just in time for the holiday season. The revisions to the existing legislation, for the first time in over 30 years, brings the lien legislation into line with the realities of construction in Ontario. The addition of prompt payment regulations, and in particular the introduction of adjudication into the mix, are a major change for the industry, from owners down to sub-trades and suppliers.

Changes to the lien legislation include, among other things, extension of time periods for preserving and perfecting a lien action from 90 days to 150 days, increasing the threshold for determining a contract to be complete to $5,000 from $1,000, among other things. Construction liens under $25,000 can now proceed in the Small Claims Court.

One of the key matters that may be overlooked by industry participants is the clarification and strengthening of the trust provisions related to holdback monies. Section 8 represents perhaps the largest administrative change to the manner in which funds are received and paid. These changes may prove difficult for many industry participants in the early days.

There has been a modernisation in the matter of holdback release, which more properly addresses the issues of long duration contracts and agreements under P3 (public-private-partnership) contracts. The Province of Ontario is a world-leader in the procurement and construction of public infrastructure under such agreements. The new Act allows for varied payment of holdbacks, including:

- On an annual basis for projects with a completion schedule longer than a year, and where the contract itself permits.
- On a phased basis, where provided for in the contract.
- On completion of the design phase (now specifically identified), which is key for addressing the needs of the design community on these types of projects.

Of course, the most sweeping changes to the Act are the introduction of a prompt payment regime and the provision of construction dispute interim adjudication. These two matters go hand-in-hand. In introducing the new legislation, the Attorney General noted that, "the average collection period in construction went up from approximately 57 days to 71 days" between 2002 and 2013. The prompt payment rules will result in the general

contractor being paid within 28 days, with each cascading payment from general contractor to subcontractor, etc., made within seven days. If there are disputes related to the payment process, the parties are free to invoke the adjudication protocols.

The goal of the prompt payment rules (see Box 1, page 31) is to provide certainty to the entire industry regarding the determination of the invoice amounts, and the timing of payments. While the industry lauds the spirit of the Act overall, there are many parties that have highlighted some of the challenges that will be faced in implementing the new requirements.

The Association of Municipalities of Ontario (AMO), in its submission to the Standing Committee of the Legislative Assembly, highlighted the short timeframes for determining if the work being invoiced has been properly completed. This would have to occur within 14 days of the issuance of a 'proper invoice' so that a notice of non-payment could be issued. The AMO also stated that the new Act will "require every municipality to redraft all of their construction contracts, develop new project management procedures and change processes to ensure faster payment."

Taking these concerns to heart, the Government will not implement the prompt payment and adjudication procedures until October 2019, to allow the industry to prepare for these changes.

The introduction of adjudication as a means for interim dispute resolution is a dramatic change for the industry. Taking heavily from the experience of the UK, the construction interim dispute resolution provides quick justice for disputes related to a specific set of matters. These are:

- Valuation of services or materials provided under the contract.
- Payment under the contract, including change orders or proposed change orders (approved or not).
- Disputes related to a notice of non-payment.
- Amounts related to set-off by trustee or lien set-off.
- Non-payment of holdback.
- Any other matter which the parties to the adjudication agree to, or that may be prescribed.

The adjudication procedure is designed to address issues mostly related to money, unless the parties have agreed to include other matters in their contract. In what is a unique arrangement, lien provisions continue to exist, even with the introduction of adjudication. Of course, being an interim dispute mechanism, the determinations of the adjudication are binding on the parties, but may later be subject to determination by a court or an arbitrator.

The adjudication process is straightforward. The party which initiates the adjudication proceeding provides a written notice to the other party, outlining the matter in dispute, the nature of the redress being sought, and the name of the proposed adjudicator. If the parties do not agree on the adjudicator, they may request that the authorised nominating authority appoints an adjudicator.

Once the adjudicator is appointed, the party which gave notice must provide the adjudicator with a copy of the contract and its supporting documents. The adjudicator then has 30 days to make their determination but may request an extension of up to 14 days.

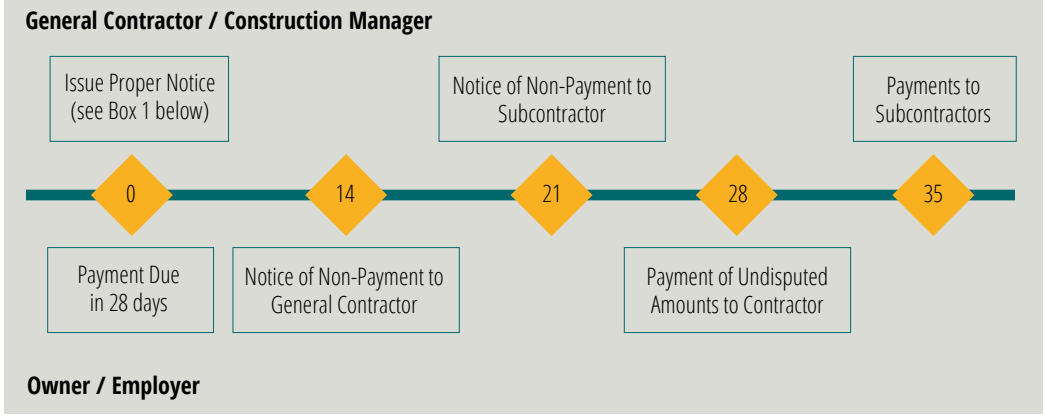
Without any means of enforcing a decision, the entire process of adjudication would be meaningless. The Act provides for many courses of action. Once the determination is made, any amount owning must be paid within 10 days. If not paid, the contractor or subcontractor may suspend further work until the payment of:

a) the amount of the determination.
b) any interest accrued on the amount.
c) any reasonable costs incurred as a result of suspension of the work, including any costs for resumption of work.

The contractor or subcontractor may also file a certified copy of the determination of the adjudicator with the court, and that determination is enforceable as if it were an order of the court. At an industry gathering in November, speakers suggested that the new prompt payment and adjudication measures would produce a major shift in power in the contractual relationship, particularly for very small contractors. Smaller subtrades would be able to enforce matters determined by adjudicators without threat of termination.

The Construction Act will come into force in stages over the next two years. The administrative changes regarding liens and trust matters come into effect on July 1, 2018. The prompt payment and adjudication aspects do not come into effect until October 1, 2019. In the interim, the entire construction industry, from owners to consultants, contractors, subcontractors, and suppliers will be preparing for the profound changes to come. ■

PROMPT PAYMENT TIMELINES



BOX 1 - PROMPT PAYMENT REGIME

The prompt payment regime clearly defines the various documents and notices to be produced by the parties. The payment timeline is triggered by submission of a 'proper invoice' by the party. A proper invoice must contain certain standard information such as:

- the contractor's name and address
- the date of the invoice and the period in question
- the contract or agreement number, a description of the services or materials that were supplied
- the amount payable with the payment terms
- the detailed information as to where the payment is to be sent
- any other information as the contract may require

In contrast to typical current practice, the giving of a proper invoice can no longer be subject to the prior certification by a payment certifier or the owner's prior approval.

Payment of a proper invoice must occur within 28 days (see Fig. 1 for further details).

An owner who disputes a proper invoice must issue a notice of non-payment within 14 days of receiving a proper invoice. For any amounts which are not disputed, the owner must pay those amounts, in full, within the original 28 day timeframe.

Contractors must pay their subcontractors and suppliers within 35 days of the initial 'proper invoice' subject to any notice(s) of non-payment. If a subcontractor's work is subject to a notice of non-payment from the owner, the contractor must pass on a notice to the subcontractor within seven days of receipt of the initial notice of non-payment.

Q&A: A decade in Oman

KOBUS HAVEMANN – COUNTRY MANAGER, DRIVER TRETT OMAN LOOKS BACK AT THE GROUP'S HISTORY IN OMAN AND AT WHAT THE FUTURE HOLDS.

Kobus Havemann, Country Manager

How did Driver Trett first start working in Oman?

Our first commission was with the Ministry of Transport and Communication (MOTC) in 2007. On the back of that initial commission, the Group formally registered an office in the Sultanate of Oman in June 2008.

What services are now offered by the Oman team?

The Oman office has grown considerably with our services expanding to include quantity surveying, project management, claims, planning, and dispute resolution.

We support both private and public sectors including on various projects of national importance. Some examples of which include:

- Project management consultancy for the Batinah Expressway project. One of the biggest road projects in the region, it involves the construction of 265km of expressway extending the Muscat Expressway to the Oman-United Arab Emirates border.
- Commercial and contractual services for the Public Authority for Electricity and Water (PAEW).
- Claims and advisory services for Muscat International Airport and Salalah International Airport, including three regional airports.
- Procurement and contract services for Oman Airports Management Company (OAMC). Procuring all supply and maintenance contracts for Muscat International Airport and Salalah International Airport, including three regional airports.
- A hospitality portfolio that includes work on 18 hotel projects (part of the 2020 vision that expects the market to reach a value of $1 billion).

> We have 60 fee-earning staff permanently based here, making it one of the biggest offices in the Group.

What about the team in Oman?

The Oman office is culturally diverse with team members coming from countries including Oman, India, Sri Lanka, United Kingdom, Greece, South Africa, Ireland, and Russia. Being a culturally diverse office is positive but at the same time can be challenging. Differing opinions, viewpoints, and work styles combine to make for an enriched work environment, one that we are sure most of our staff find enjoyable.

How has the Oman office changed over the last decade?

Through hard work and a diverse workload, the office has managed to remain relatively unaffected by the global economic slowdown from 2007/08 onwards. Our presence in the Sultanate spreads over a large geographical footprint that covers the length and breadth of Oman. We now have 60 fee-earning staff permanently based here, making it one of the biggest offices in the Group.

And finally, what does the future hold for Driver Trett in Oman?

Since 2016, we have been reviewing our business strategy to ensure that we retain the level and quality of service we provide, with a view to expanding our services associated with dispute resolution.

This review will continue throughout 2018 and will help us to retain our position as market leaders, in a market that, according to projections by the International Monetary Fund (IMF), is expected to grow at more than four per cent in 2018. ■

Where are the women?

SANDRA SOMERS – DIRECTOR, DRIVER TRETT SINGAPORE EXPLORES THE SLOW GROWTH OF THE NUMBERS OF WOMEN ENTERING THE CONSTRUCTION INDUSTRY AND HIGHLIGHTS SOME OF THE STEPS BEING TAKEN TO SUPPORT THOSE WHO WISH TO DEVELOP AND PROGRESS AS EXPERT WITNESSES.

Driver Trett is committed to delivering 'great quality service and real value'. We recruit 'only the best professionals in the business' and strive to be 'the employer of choice in our industry'.

These commitments are reflected in the fact that we house some of the world's leading experts and work on the best projects. Delivering high quality work means having the highest calibre workforce and to achieve that, we need diversity.

In terms of why diversity is needed, The Wall Street Journal coins this nicely:

"Research shows that gender equality is as good for business as it is for individuals. Diverse teams and companies produce better results and higher revenue and profits, which lead to more opportunity for everyone, not just women."[1]

We all know how the statistics for women in construction are challenging at best. So much so that the subject even makes headlines in global media. For instance, the Guardian newspaper reported that women made up just 11% of the UK construction workforce in 2015. This is a slight improvement since 2002/03, where women accounted for 9%[2].

Interestingly, these statistics are actually worse when looking at the appointment of female arbitrators. The London Court of International Arbitration (LCIA) showed in their 2013 annual report that just 9.8% of the 162 appointees selected by the LCIA, and 6.9% of the 160 appointees selected by the parties, were female.

However, all is not lost. The construction industry in the UK is proactive in attracting women. For instance, the government launched the #notjustforboys campaign which highlights issues surrounding getting women to work in industries like construction, where they are under-represented. Similarly, the Equal Opportunities Commission (EOC) also launched a campaign 'Know your place' encouraging women to consider a career in construction.

Further, there is the Equal Representation in Arbitration (ERA) Pledge, which calls on the international dispute resolution community to commit to increasing the number of female arbitrators on an equal opportunity basis[3].

> *"Research shows that gender equality is as good for business as it is for individuals. Diverse teams and companies produce better results and higher revenue and profits, which lead to more opportunity for everyone, not just women."*
> Wall Street Journal
> September 2016

Notwithstanding this, it might be understandable that construction does not appeal to everyone, regardless of gender. Many years ago, I remember my dad's not quite so supportive reaction when I told him I was leaving my cosy job in an engineering office, "to go build a road!" and despite that, I have not looked back since.

The same cannot be said for the legal profession, where regardless of the fact that approximately 60% of all law graduates are women, this figure steadily decreases over time and rank; such that, by the time we get to the managing partner level, only 4% are women[4].

So, what does that mean for us? In terms of dispute resolution services, Driver Trett generally consists of construction professionals, engineers, and quantity surveyors. Many of us also have advanced qualifications in law and alternative dispute resolution (ADR), we may even be non-practising barristers. In →

terms of the work that we do, this places us somewhere between the two arenas of construction and law. Insofar as the numbers of women are concerned, needless to say the implication is severe.

Looking at the overall number of fee-earners in Driver Trett, currently around 15% are women[5], this is an improvement from 13% in June 2017 so we are heading in the right direction. Within the Diales expert witness team around 12% are female (a massive improvement on the 0% figure that the service launched with in 2012), this percentage of female experts appears to be mirrored across our industry[6]. In addition, the number of females within the Diales development group and showing interest in our Minerva programme is encouraging for the future.

Focussing on the role of experts, I asked several outside professionals their views.

Generally, female experts are a rare breed. However, the feedback on how well they perform is positive. Both Rashda Rana SC[7] and Annalise Day QC agree that the female experts they have worked with were excellent: clearer in their reports and in the witness box, and tend to have done more work themselves.

Head of Dispute Resolution at Drew Napier states that he has seen good and bad experts of both sexes (this is inclusive of other industry sectors such as medical). Notwithstanding the general rarity, he states that he would not consciously insert the gender debate into any expert selection process, it's all about competence and steadiness which overshadows sensitivities over gender.

This feedback is very encouraging. So, aside from the obvious reason of family (if that may count), what is holding us back?

To start with, it's not the easiest job. The Academy of Experts state: "Firstly being an expert is certainly not for everyone irrespective of gender. In addition to knowledge and experience, one has to be prepared to be 'shot at in public', work totally anti-social long hours frequently at very short notice. It is important to recognise that you cannot become an Expert overnight."

The Society of Women Engineers state that there isn't a strong network of females in engineering. The American Society of Mechanical Engineers (ASME) and UK organisation #ChicksWithBricks also include the lack of female role models as a factor. Further, the Institution of Engineering Designers[8] state that the lack of females choosing to study science related subjects is the lowest in Europe and that diversity is required to overcome this problem. Overall, confidence came up as a key factor.

On the legal side, our female friends appear to face different challenges. According to a report by the Institute for Continuing Legal Education in California, 85% of the women lawyers surveyed perceived a subtle, but pervasive, gender bias within the legal profession. Almost two-thirds agreed women lawyers are not accepted as equals by their male peers. As a result, women are often overlooked or passed over.

Annalise Day points out that the tendency is to appoint the same experts, in the same way that people appoint the same arbitrators, and those experts tend to end up being men. Rashda Rana also states that:

"Just as most people think of men when you say 'Arbitrator' or even 'Counsel', they think of men when you say, 'Expert Witness'. You have to get out there and press the flesh to make sure people know about you."

Making sure people know about you is a key piece of advice for any potential expert (whether male or female). However, how do we do this and what else can we do?

Rashda suggests:

- Networking – this is equally as important for lawyers as it is for experts.
- Build a profile – attend seminars and events where possible.
- Help yourself and help others. This includes being assertive without being aggressive, promote your skills and expertise.
- Find support - surround yourself with supportive people: family, friends, colleagues, bosses, mentors.
- Make sure you get credit for the work you have done.

Further and most importantly – don't give up! Rashda tells us that perseverance and courage has been key for her personally in overcoming obstacles. She shares:

"The best way is to show them your brilliance which means working doubly hard and being doubly good at whatever it is you do."

Both Rashda Rana SC and Annalise Day QC agree that the female experts they have worked with were excellent: clearer in their reports and in the witness box, and tend to have done more work themselves.

On a more practical level, Annalise suggests:

"...finding a mentor whether male or female. You can also reach out to supportive lawyers for guidance and feedback – don't be afraid to ask for help!"

In line with this, the Driver Trett Singapore office has set up a mentoring initiative for female consultants in both delay and quantum. Going against the trend for Asia, Singapore and Hong Kong have an unusually high proportion of female consultants (there is also a high proportion of female consultants in the France office). The initiative is not to exclude the male consultants, but has been set up to support and encourage our team should they wish to participate. Experts Faye Yeo from Singapore, Ashlea Read in Hong Kong, Karen Wenham, and myself have kindly agreed to act as mentors for the Singapore and Hong Kong teams. We hope that this initiative will start the ball rolling and extend further into other regions and across the globe.

The mentoring initiative has already proven successful with both individual and group mentoring sessions having taken place. In fact, a similar initiative for our male consultants is currently being discussed. We have also been reaching out to our female experts in Europe to see what we can achieve.

To improve networking and profile building, the Singapore office has also set up an events calendar for local and regional seminars, conferences and networking events. The team is notified on a weekly basis of upcoming events and participation is encouraged.

Outside of Driver Trett, there are several organisations specifically for supporting the fairer sex in a professional capacity, such as www.arbitralwomen.org and www.nawic.co.uk[9].

There may be networking groups in your area (Singapore has 'Women in Arbitration' that meets regularly), or it may be worth seeing what is available within existing institutions such as CIOB and RICS.

To conclude, despite the significant challenges, progress is being made. Support is out there, and things are slowly changing. At Driver Trett, despite some offices employing a high proportion of females for the industry, when it comes to female experts, it seems we are yet to stand out. Ultimately, it is up to the individual to determine how they wish to progress and this applies to both males and females alike. Certainly, in Asia and parts of Europe, Driver Trett appears to be the employer of choice as far as female consultants are concerned, offering a work place that is not only open to diversity but also supportive of its growth, which the industry so badly needs – and who knows, with these types of environment now being set up, we may even see the number of female experts in the industry rise. ■

[1] https://www.wsj.com/articles/sheryl-sandberg-women-are-leaning-inbut-they-face-pushback-1474963980 dated 27 September 2016
[2] Article 'The Changing Role of Women in the Construction Workforce' published by the Chartered Institute of Building
[3] www.arbitrationpledge.com
[4] Interview of Rashda Rana by LexisNexis "Is there a Gender Gap in Arbitration?" dated 07 April 2015
[5] Based on internal HR stats as at December 2017
[6] From looking at information available on competitors' websites, the ratio of male to female experts in construction was generally similar
[7] President of Arbitral Women
[8] May/June 2017
[9] The National Association of Women in Construction

A reasonable settlement? A reaffirmation of principles

MICHAEL KING - DIRECTOR, DRIVER TRETT GLASGOW AND DIALES QUANTUM EXPERT APPEARED AS QUANTUM EXPERT IN THE TECHNOLOGY AND CONSTRUCTION COURT IN APRIL 2017 ON BEHALF OF THE CLAIMANTS. HE LOOKS AT ONE ASPECT OF THE CASE WHICH DEALS WITH THE SETTLEMENT OF CLAIMS WITH THIRD PARTIES AFFECTED BY THE CONSTRUCTION WORKS.

Background

125 Old Broad Street is a 26-storey office building with a lower level podium building in the heart of the City of London, it provides 320,000 square feet of category A office space and 6,400 square feet of retail space at ground-floor level.

Between 2006 and 2008 the building, which formerly housed the London Stock Exchange, was redeveloped and the building was clad with storey height curtain walling.

Between 2008 and 2012, seventeen of the glass panels shattered due to nickel sulphide inclusions. The building was clad in scaffolding as an emergency measure and was eventually re-glazed between 2012 and 2013.

As a result of the glazing failures, and subsequent re-glazing works, some of the building tenants and adjacent occupiers raised claims for business interruption, loss of profit, and disruption.

These claims were negotiated and settled by the building owners in the sum of £792,785.77. Subsequently this sum was then sought from the defendants as part of the court action.

The Issue

Settlements between parties in the construction and engineering industries are a commonplace event. These occur at all levels between contractor, subcontractor, designer, employer, and third-parties.

In the recent case of 125 OBS Nominees v Lend Lease Construction (Europe) Ltd, the judge, Mr Justice Stuart-Smith, reaffirmed the principles which apply where one party settles a claim with another party and then seeks to recover that amount from a third-party.

As Mr Justice Stuart-Smith noted, the applicable principles of law were usefully summarised by Mr Justice Ramsey in Siemens Building Technology FE Ltd v Supershield Ltd [2009] EWHC 927 (TCC) as follows:

→

(1) For C to be liable to A in respect of A's liability to B which was the subject of a settlement it is not necessary for A to prove on the balance of probabilities that A was or would have been liable to B or that A was or would have been liable for the amount of the settlement.
(2) For C to be liable to A in respect of the settlement, A must show that the specified eventuality (in the case of an indemnity given by C to A) or the breach of contract (in the case of a breach of contract between C and A) has caused the loss incurred in satisfying the settlement in the manner set out in the indemnity or as required for causation of damages and that the loss was within the loss covered by the indemnity or the damages were not too remote.
(3) Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. In assessing the strength of the claim, unless the claim is so weak that no reasonable party would take it sufficiently seriously to negotiate any settlement involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the eventuality or the breach.
(4) In general if, when a party is in breach of contract, a claim by a third party is in the reasonable contemplation of the parties as a probable result of the breach, then it will generally also be in the reasonable contemplation of the parties that there might be a reasonable settlement of any such claim by the other party.
(5) The test of whether the amount paid in settlement was reasonable is whether the settlement was, in all the circumstances, within the range of settlements which reasonable people in the position of the settling party might have made. Such circumstances will generally include:
(a) the strength of the claim;
(b) Whether the settlement was the result of legal advice;
(c) The uncertainties and expenses of litigation;
(d) The benefits of settling the case rather than disputing it.
(6) The question of whether a settlement was reasonable is to be assessed at the date of the settlement when necessarily the issues between A and B remained unresolved. "

[Settlements] occur at all levels between contractor, subcontractor, designer, employer, and third-parties.

The judge, in 125 OBS, also noted that in such circumstances the court encourages reasonable settlements, particularly where strict proof would be very expensive, and also that the test of reasonableness is generous reflecting the fact that the paying party has put the other in a difficult situation by its breach.

It was also noted that a claim would have to be so weak as to be obviously hopeless before its settlement could be considered unreasonable.

Also of significance was the re-emphasis that the evidential burden of proving unreasonableness of any settlement falls upon the defendant. This principle is set out in two cases.

(1) In Mander v Commercial Union Assurance [1998] Lloyds Rep IR93 Mr Justice Rix stated that:

"The brokers (Commercial Union) submit that the settlement agreement was unreasonable. I suspect that in the circumstances the evidential burden of that is on the brokers....."

(2) Similarly, in BP plc v AON [2006] EWHC 424 Comm Mr Justice Colman noted that:

"...the fact that the terms of the settlement were entered into upon legal advice establishes, at least, that those terms were prima facie reasonable. It is then for the Defendant to displace that inference by evidence to the contrary, by establishing for example, that some vital matter was overlooked".

In conclusion, wherever you find yourself in the industry hierarchy, it is important to remember the established principles in Siemens Building Technology FE Ltd v Supershield Ltd [2009] EWHC 927 (TCC). These set out the framework that any party should adopt when considering the implications of settling claims, which it may ultimately seek to pass on to a third party. These principles endorse the post-civil justice reform stance of encouraging mediation and settlement, which diverts work from the already busy court system. ■

A DAB hand ... Dispute resolution under NEC4

Driver Trett is delighted to announce this year's UK spring seminar subject.

The Contractor has reached the final stages of the fit out of the Ritz Krakhaa Hotel. The project is close to completion, and yet the parties are far apart on various elements of the account. The accounts are currently £100M apart and relationships have deteriorated. The disputes involve major subcontract packages, extended time for completion and an allegation of a major defect.

This contract contains a Dispute Advisory Board (DAB). Does this method actually work? Can the disputes be effectively resolved this way? Is it possible for the relationships to survive and even improve between the parties?

Contact your local Driver Trett office or email marketing@drivertrett.com to find out more.

Last year, over 1,000 engineers, surveyors, and commercial managers attended these scenario based presentations, with feedback showing that 96% of delegates rated them good or excellent. Driver Trett offer other seminars and training on various topics and can provide in-house training to suit our clients' requirements. For more information on the training and seminars that we offer at Driver Trett please visit the knowledge page of our website. http://www.driver-group.com/europe/knowledge/events-and-seminars/ ■

Is Paris the home of international arbitration?

MARINE MAFFRE MAUCOUR & JOANNA CLOSA – CONSULTANTS, DRIVER TRETT PARIS HIGHLIGHT THE SUCCESS THAT PARIS HAS ACHIEVED IN BECOMING SYNONYMOUS AS A WORLD-CLASS LOCATION FOR INTERNATIONAL ARBITRATION AND WHAT THE CITY'S FUTURE MAY HOLD.

Paris has set the tone of its ambition to establish itself as the 'Home of international arbitration'. The organisation of the second annual Paris Arbitration Week (PAW) aims at consolidating a historical position in a competitive environment.

Since the 1960s, French law has been at the forefront of the development of international arbitration. More recently, positive signals were sent through the 2011 reform[1], thus reasserting the liberty and flexibility in terms of applicable laws and languages. To this can be added a clear jurisprudence which has been followed by laws in many other countries that have adopted principles similar to those established in France.

In this frame, the objective of PAW is clear: "the promotion of Paris as the world's leading site for international arbitration."

Benefitting from a long-standing reputation as an excellent arbitral seat and from a geographic and logistic advantage, Paris based arbitration is endowed with five arbitral affiliated institutions including the ICC Paris (now chosen for approximately 90 ICC arbitrations per year).

But Paris cannot rest on its laurels and must keep differentiating itself in a context where a British leadership pre-exists. Indeed, according to the ICC report[2] in 2016, common law, British practitioners and English language still dominate the discipline.

However, Paris can count on a new trend showing a growing demand for French speaking practitioners. Driver Trett's Paris office, through the increased demand for Diales[3] expertise, has noted an increasing demand for French speaking experts in the delay and quantum fields. This seems to be bolstered by the increased number of arbitration cases in French speaking countries, particularly in Africa.

Having hosted close to 300 participants from some 40 countries, the first PAW, in April 2017, fulfilled its commitments and ambitions to share information and best practices. Following on from this success, the second PAW, running from 9 to 13 April 2018, will provide arbitration practitioners and academics a unique forum for discussing the future of the profession. A wonderful show-case for anyone who would like to experience Paris as the home of international arbitration.

Driver Trett has provided services from its Parisian office since 2015 and will be participating in these discussions and sponsoring the overall event in 2018. ■

Sources: ICC-france.fr http://parisarbitration.net

[1]"Décret du 13 janvier 2011"

[2]Full 2016 ICC Dispute Resolution statistics published in Court Bulletin.

[3]Diales is the expert witness support services arm of the Driver Trett business.

Driver Trett France referenced as a training organisation by DataDock

Actively involved in the development of contract management in France, Driver Trett's local team provides support to its clients in the implementation and development of their company's contract management. The team assist them throughout the life of their contracts, including in the critical phases of preparing and defending claims.

The competencies of the team and the quality of their advice and submissions have led clients to consider Driver Trett France (DTF) as a key partner when they look for training. DTF is very active in the development of training courses, from standard introduction to contract management to entire programmes specifically designed for a client's needs, embracing their specific terms and requirements, and based on their own examples.

2018 sees the launch of a full training catalogue covering both contract and claim management through to expert courses, including those related to both FIDIC and NEC contracts.

The directors of DTF are involved in the first university degree created in France for contracts management, namely the DU Contract Management run by Panthéon - Assas Paris II University. They also bring their expertise to the contract management programmes led by Francis Lefebvre Formation, one of the key players for professional training in France. Indeed the session with Francis Lefebvre have already started.

In September 2017, Driver Trett France was accredited by DataDock, a French state body which references training organisations whose courses are recognised as being eligible for continuing education funding; as they meet the quality criteria in terms of setting-up, follow-up, and quality control of the training they offer. ■

Q&A: Driver Trett UK

TOM COMERFORD – REGIONAL MANAGING DIRECTOR, DRIVER TRETT UK AND DIALES QUANTUM EXPERT DISCUSSES THE UK TEAM AND HIS ASPIRATIONS FOR THE FUTURE OF THE BUSINESS.

What does the current UK business look like?

As Driver Group celebrates its fortieth birthday, the Driver Trett business in the UK is currently comprised of 117 staff located across seven regional offices in Glasgow, Teesside, Haslingden, Liverpool, Coventry, Bristol, and London. Each office provides a suite of services including planning and programming, delay analysis, commercial and contract management, quantity surveying, dispute resolution support services, and expert services.

Our clients operate in a variety of sectors including building, infrastructure, energy, oil and gas, marine, process, and transportation. We have been privileged to work with many of them for many years, on some of their most interesting and challenging projects.

Our joined-up approach means our team assist clients on commissions, not only across the UK but also in other parts of the world, either as a standalone service or as part of an integrated team. In addition to our growing languages capability in the UK, being part of a global business means we can also call upon over 30 different languages, local knowledge, and the cultural awareness of our colleagues in our twenty-seven offices across Europe, the Middle East, Asia Pacific, and Canada.

Have there been any significant changes in recent years?

We have seen notable growth in our Glasgow office and the strengthening of our teams in Coventry, Bristol, and London. Around the country, but particularly at our Teesside office, we work closely with the Driver Project Services business in the specialist areas of process and industrial engineering, oil and gas, and offshore structures.

It is nearly six years since Diales was formed to provide independent expert

Tom Comerford, Regional Managing Director

services. In 2014, the initial delay and quantum expertise was supplemented with architectural and building services. Those skill sets have now expanded further into civil and structural engineering, mechanical and electrical engineering, chemical process engineering, project management, and energy from waste. Our technical teams are involved in numerous projects across the UK and also in the Middle East and Australia.

What other capabilities does the team have?

We provide the complete spectrum of programming and delay analysis, including programme preparation at all levels, validation, updating, progress reporting, and recovery. Our Diales delay analysts regularly use leading software and their expertise to interrogate substantial and complex programmes to understand the reasons of change. Utilising an appropriate technique to suit the circumstances, they provide robust analysis on a prospective or retrospective basis across a range of project sizes and dispute values.

Using their considerable industry knowledge and experience, our commercial and quantum teams have been involved in some leading disputes. Our independent experts have given evidence in reported Technology and Construction Court (TCC) cases and in major arbitrations.

In addition to providing our breakfast seminars, plus regular contributions at industry conferences and lawyer hosted seminars, we continue to provide specialist training to client's personnel. Topics include commercial awareness and change management and this year we will also be rolling out training on the latest NEC4 and FIDIC suites of contract.

> We have been privileged to work with many of them for many years, on some of their most interesting and challenging projects.

What shape would you like the UK business to take in future years?

Our aim is to maintain the high-quality of reports, services, and assistance that we provide to clients and tribunals. The changing nature and volume of records in disputes, the methods by which they are communicated, combined with the evolution of data analytics, electronic data management, e-discovery and visualisation are just some the challenges that we will continue to address as we move forward.

We currently have around twenty-five Diales experts based in the UK and are looking to grow these, both internally from within our Diales development group and externally by attracting key experts with our existing capabilities, and those with new skill sets.

We will continue to work with our clients on their traditional projects, but also to provide support to new projects that will shape our future infrastructure such as HS2, nuclear-new-build projects, and highways schemes to name but a small few. Further afield, we look forward to continued collaboration with our colleagues around the world and supporting our clients with their global projects. ■

The power of 17, 19 and 25

ANTHONY CROWLEY – COUNTRY MANAGER, DRIVER TRETT KUWAIT EXPLAINS HOW HE CAME TO BE IN KUWAIT AND SOME OF THE JOYS AND CHALLENGES OF SETTING UP BUSINESS IN THE LAST TWO YEARS.

To start out, a quiz for all the learned people reading this article. What is the relevance of the simple series above and what do you think the next number in the series should be?

This is not intended to be a Facebook, or indeed a LinkedIn brain teaser but just an observation on life and doing business here in Kuwait. If you remain interested, and you can actually get through the monotony of the remainder of this article, then the answers are revealed in the final paragraphs. For those who are not interested, then you are obviously learned enough to see straight through my thinly veiled puzzle!

Puzzles aside, I wanted to share a little more about one of Driver Group's newest offices, in Kuwait; the work that we are doing here, what the market is like, and where the market may be in the next few years.

So where do we start? Oil price – ah, that old chestnut! No, not going to write about that; not one jot. It's been done to death and I cannot add anything more than the custodians of financial wisdom have already committed in droves elsewhere. No, what I'm going to focus on is the challenges of, or, perversely the joy of, doing business here in Kuwait.

Let me say that I had no intention of being in the Middle East, let alone Kuwait. I had no notion of becoming a 'country manager', but I was asked a simple question and, as I was one day away from finishing a claim in Mexico, and not necessarily knowing what I was going to do next, the request appeared to tick a number of boxes. Moreover, the wife was keen(ish).

Like the majority of you reading this, all I knew, or could recall, about Kuwait was on the news in the early 90s. No idea after that but, in good time, I packed my bags, moved over, and took over control of the office on 1 October 2015. When I say office, I mean the laundry room in my apartment. It was eight square meters and →

to be the Kuwait office for some time (as the building identified prior to my engagement never actually came to fruition – delays in permits, electrical supply, etc.). After much waiting and being provided with numerous completion dates we finally elected, in October 2016, to move into a villa in Mahboulah (rough translation 'mad lady') which we currently occupy and where I share the building with our sponsor, Energy Services Middle East and his Kuwaiti legal partner, MMA Law.

Since landing, I have been ably assisted in developing the business alongside my sponsor, Claude Jamal. Kuwait is not a market like any of the other GCC countries. Business is carried out here in a completely different fashion to that of other Middle East countries and it certainly took some getting used to. I am very grateful to Claude, and his partner Abu Sultan, who have assisted me in growing the business to where we are today. It's been a hard two years, but we are now starting to see the results of that hard work.

I am often asked whether having a business based in Kuwait, and living and working in Kuwait, is an imperative. Undoubtedly, the ability to meet clients, existing or new, on the same day as an enquiry being received cannot be measured. I think our 'competitors' have not yet fully understood this and have flown in their personnel on an 'as and when' basis (this is still the situation that exists today). When I say competition, there is a lack of competitor presence on the ground in Kuwait and this has also served to our advantage in our first two years, and will continue to be the case as we consolidate our position in the Kuwait market.

Our team of consultants has grown steadily and we are now in a position where we can readily expand to serve any size and type of project. As a business we have concentrated on steady growth and have expanded to a moderately sized team of consultants who have considerable collective experience across a wide range of industry sectors. We can provide specialist advice on contract, commercial, quantum and matters of planning and delay, irrespective of whether we are representing client, contractor, or specialist subcontractors alike.

There have been a number of notable acquisitions along the way and a number of notable departures also, but we continue to go from strength to strength. This is, perhaps, reflected in the type and nature of the commissions that we have been actively involved with since our inception. These include new refineries, electrical transmission projects, university buildings, residential and commercial developments, new harbours, road and bridge construction, tank farms, gathering centres, and water projects.

...the laundry room in my apartment. It was eight square meters and to be the Kuwait office for some time...

We have also been active in the wider Kuwait construction scene through our involvement in industry events such as the Leaders in Construction conference (where we were the platinum sponsor for 2017 and will be again in 2018), our joint seminars with our legal partners here in Kuwait, and our participation and presentation at the Royal Institution of Chartered Surveyors' (RICS) events in Kuwait. The Kuwait business fully intends to be the market leader in this respect and there are already a number of similar events planned for 2018 which will be announced shortly.

What about my brain teaser at the beginning of this article? Well, no real science or mathematics behind it, only to say that:

- In my research of the market in Kuwait, and before I actually travelled in-country, I read that the average number of visits to see a client before winning any work was seventeen (17) visits! That is a considerable amount of coffee drinking and certainly evidenced by the sheer volume of business development carried out by the Kuwait office!
- This figure is borne out in terms of one of our recently acquired clients where it took approximately nineteen (19) months to sign a consultancy agreement with us. I am almost certain that our number of visits to see him over this time was far in excess of the average of seventeen (17) visits referred to above.
- We undertook to register the business in October 2015 and were successful in formally (finally?) registering the Kuwait business in November 2017 which was a total of twenty-five (25) months from start to finish. On the same day, we also obtained confirmation of ISO 9001:2015 certification for the Kuwait business – not a bad day's work if I may say so myself!

Easy if you know the answers. However, I cannot imagine there were too many of you reading this article that would have been able to guess (but then you would need to be working in Kuwait to, perhaps, better understand).

What's the next number in the series? Who knows, but I would say one (1) as in one month's time, 12 April 2018 to be exact, we are looking forward to the formal launch of the Kuwait business and meeting with as many of our clients as possible (existing and prospective) to celebrate together.

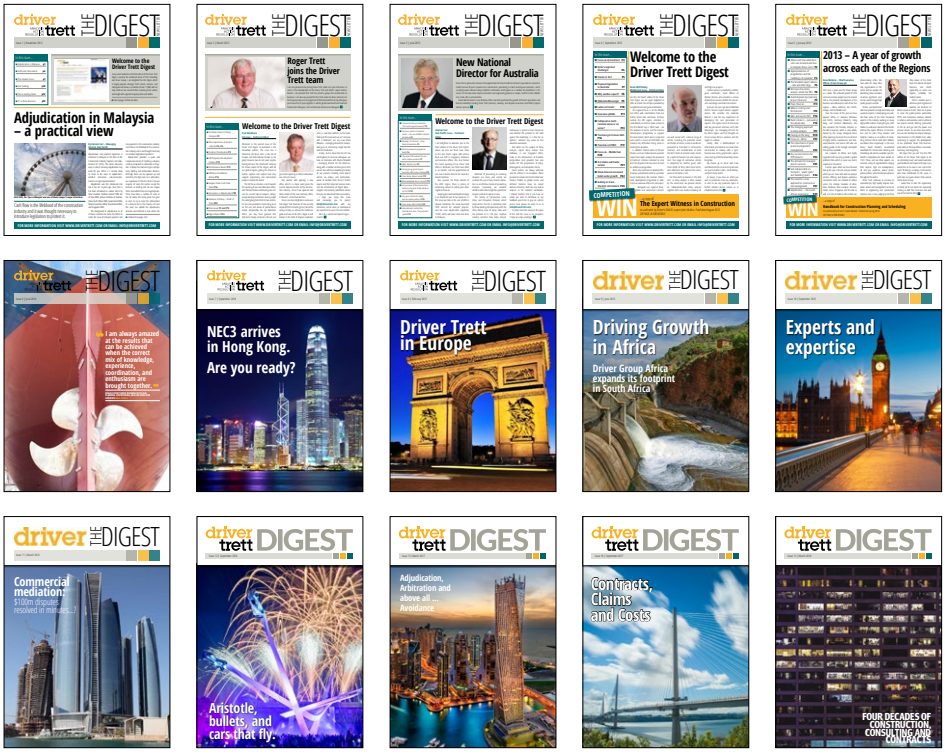
I hope to meet some of you then, or at one of our upcoming seminars. ■

BYTES

DIGEST BYTES RETROSPECTIVE

DRIVER TRETT DIGEST LOOKS BACK AT OUR BEST BYTES SO FAR...

Find all our Bytes and articles at www.driver-group.com/global/knowledge/articles/ or click the covers below to discover some of our best Bytes



IN THE NEXT ISSUE

The next issue of the Digest, as always, will be covering all industry sectors and include news and articles from around the globe. Please keep an eye on the website www.driver-group.com to keep up to date with ad hoc articles, Digest previews, seminars and training events. The Digest will always aim to be topical and respond to requests and questions from our readers through the articles we publish. If you would like to submit a question or an article request to the Digest team please email marketing@drivertrett.com with DIGEST in the email subject line. We are always pleased to receive feedback from our readers and welcome the opportunity to develop the Driver Trett Digest into a valuable read for those involved in the global engineering and construction industry.

CONTACT DRIVER TRETT WORLDWIDE

AFRICA

SOUTH AFRICA
Johannesburg
Tel: +27 11 315 9913

AMERICAS

CANADA
Calgary
Tel: +1 587 952 6228

Toronto
Tel: +1 905 247 0160

Vancouver
Tel: +1 604 692 1151

UNITED STATES
Washington
Tel: +1 202 434 8745

ASIA PACIFIC

AUSTRALIA
Brisbane
Tel: +61 7 3011 6302

Perth
Tel: +61 8 6316 4573

Sydney
Tel: +61 2 9248 0100

HONG KONG
Tel: +852 3460 7900

MALAYSIA
Tel: +603 2273 8098

SINGAPORE
Tel: +65 6226 4317

EUROPE

FRANCE
Tel: +33 1 73 79 58 68

GERMANY
Tel: +49 89 208 039 535

THE NETHERLANDS
Tel: +31 113 246 400

UNITED KINGDOM
Bristol
Tel: +44 1454 275 010

Coventry
Tel: +44 2476 697 977

Glasgow
Tel: +44 141 442 0300

Haslingden
Tel: +44 1706 223 999

Liverpool
Tel: +44 151 665 0665

London
Tel: +44 20 7377 0005

Reading
Tel: +44 1189 311 684

Teesside
Tel: +44 1740 665 466

MIDDLE EAST

KUWAIT
Tel: +965 5501 5657

OMAN
Tel: +968 2 461 3361

QATAR
Tel: +974 4 435 8663

UNITED ARAB EMIRATES
Abu Dhabi
Tel: +971 2 4410 112

Dubai
Tel: +971 4 453 9031

FOR MORE INFORMATION VISIT WWW.DRIVERTRETT.COM OR EMAIL MARKETING@DRIVERTRETT.COM

JACOB'S LADDER
Design and Production: Gerry Judah
Engineering: Diales Technical
Photography: David Hartley-Mitchell

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