



## CHARTERED QUANTITY SURVEYORS CHARTERED BUILDING CONSULTANCY

DISPUTE RESOLUTION SPECIALISTS. CONTRACTUAL ADVISORS. EXPERT WITNESS

### Newsletter No.10 – Autumn 2007

RJC continues to be involved in a plethora of disputes Adjudications (often multiple on the same project) continue to occur unabated.

#### Business Development

RJC are developing contact with traditional PQS companies in order to explore areas of mutual interest.

#### Marketing

RJC hosted a day at the races in June 2007 at Sandown Park. The day was enjoyed by all, especially Ray Crabbe who backed 5 out of 6 winners!



#### Dispute Resolution Update

By Ray Crabbe

RJC continues to be involved in traditional claims work, pursuing and defending EOT and quantum claims. There also appears to be an upturn in arbitrations and court work as well as expert witness appointments.

Additionally, this year we are engaged in several professional negligence disputes.

Further advice or details, email:  
raycrabbe@rjc-consultants.co.uk

#### A Salutory Tale of a Dispute Between an Employer and his Architect

By Ray Crabbe

What do you do if you are an Employer under a JCT contract and do not like the EOT period awarded by your Architect/Contract Administrator? The answer is it depends on the level and nature of your dissatisfaction. In a case RJC have been involved in, the employer tried first to commence an adjudication against both the architect and the contractor claiming the EOT period granted was too long. He failed because the parties did not agree to a tri-partite adjudication.

Next he tried to adjudicate against the Architect. He withdrew from this on the Adjudicators advice.

So finally he tried to adjudicate against the Contractor. Will he be successful? Wait and see. We will reveal all in the next newsletter.

Whatever the outcome, it is clear that all three parties in this dispute feel properly aggrieved at the cost of defending their respective positions.

In real terms, Adjudication may not be the right way to deal with certain disputes and as in the case in point, may incur significant, unnecessary costs. This sort of case would be better resolved in Arbitration/Litigation where tripartite disputes can be properly dealt with and the innocent party can recover its costs.

For advice on dispute resolution, contact: raycrabbe@rjc-consultants.co.uk

#### Do I have a Single Dispute or Multiple Disputes?

By Roger Smith

The Scheme, operating by way of the Housing Grants, Construction and Regeneration Act 1996 provides parties to a qualifying construction contract with a right to refer a dispute under that contract to adjudication. Most standard forms of contract are also phrased in a similar way i.e. referring to 'dispute' in the singular. It follows then that two disputes should be referred to two separate adjudications. The question that then arises is one of distinguishing between one dispute and multiple disputes.

'Time' and 'Quantum' are matters that are frequently in dispute between parties and frequently referred to adjudication. The test would seem to be that if the time and quantum elements of a dispute were intrinsically linked then they would form one single dispute. For example, if a dispute over extension of time entitlement is referred to adjudication, the levying of liquidated and ascertained damages and the entitlement to reimbursement of prolongation costs are likely to also be in dispute and are intrinsically linked to the extension of time entitlement. However, other elements of a valuation may not be.

This issue has recently been considered in the Court of Appeal case of David and Teresa Bothma t/a DAB Builders v Mayhaven Healthcare Limited [2007] EWCA Civ 527 which upheld a decision of HHJ Havelock-Allan QC in the Bristol Technology and Construction Court. In this case, the Referring Party attempted to refer to adjudication 4 issues, 3 of which concerned the completion date and extensions of



## CHARTERED QUANTITY SURVEYORS CHARTERED BUILDING CONSULTANCY

DISPUTE RESOLUTION SPECIALISTS. CONTRACTUAL ADVISORS. EXPERT WITNESS

time and 1 of which concerned other matters of valuation. HHJ Havelock-Allan QC decided that 2 disputes had been referred to adjudication, that the adjudicator acted without jurisdiction and that the adjudicator's decision was therefore unenforceable.

Therefore, if you find yourself in dispute, and are minded to refer the matter to adjudication, make sure that you are referring only one dispute to each adjudication, to avoid the prospect of having the decision challenged and incurring wasted costs.

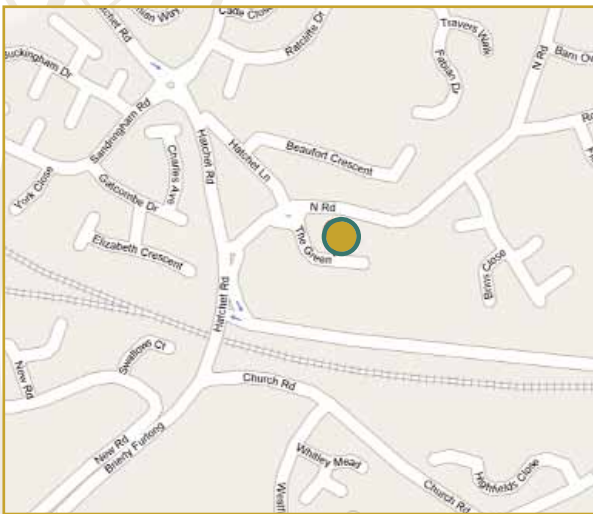
Further advice or details, email:  
rogersmith@rjc-consultants.co.uk

### RJC Website

This newsletter will be posted on our website shortly [www.rjc-consultants.co.uk](http://www.rjc-consultants.co.uk). We would be delighted to add your company's name on to our "Clients" page. Please email: [elaine@rjc-consultants.co.uk](mailto:elaine@rjc-consultants.co.uk) to arrange this.

We are located...

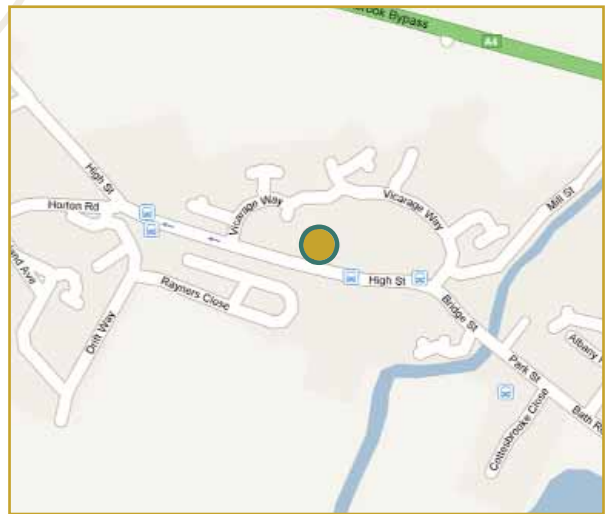
Bristol



#### HEAD OFFICE:

The Court Annex, The Green,  
Stoke Gifford, Bristol BS34 8PD  
Tel: 0117 931 9750 Fax: 0117 979 8234  
email: [bristol@rjc-consultants.co.uk](mailto:bristol@rjc-consultants.co.uk)

Slough



#### SLOUGH OFFICE:

Colne House, High Street  
Colnbrook, Slough SL3 0LX  
Tel: 01753 685 745 Fax: 01753 684 579  
email: [slough@rjc-consultants.co.uk](mailto:slough@rjc-consultants.co.uk)

[www.rjc-consultants.co.uk](http://www.rjc-consultants.co.uk)

UK REGISTER OF EXPERT WITNESS

INVESTOR IN PEOPLE

MEMBER OF BRISTOL & SLOUGH CHAMBERS OF COMMERCE

#### HEAD OFFICE:

The Court Annex, The Green,  
Stoke Gifford, Bristol BS34 8PD  
Tel: 0117 931 9750 Fax: 0117 979 8234  
email: [bristol@rjc-consultants.co.uk](mailto:bristol@rjc-consultants.co.uk)

#### SLOUGH OFFICE:

Colne House, High Street  
Colnbrook, Slough SL3 0LX  
Tel: 01753 685 745 Fax: 01753 684 579  
email: [slough@rjc-consultants.co.uk](mailto:slough@rjc-consultants.co.uk)

RJC Consultants is the trading name of RJC Consultants Ltd., a company registered in England.  
Registered Office: Llanover House, Llanover Road, Pontypridd CF37 4LB, Registered No 3704626  
Director: Ray Crabbe FRICS FCIQB



## CHARTERED QUANTITY SURVEYORS CHARTERED BUILDING CONSULTANCY

DISPUTE RESOLUTION SPECIALISTS. CONTRACTUAL ADVISORS. EXPERT WITNESS

### **Withholding Notices: Issue against the right payment notice or miss the boat!**

It is common practice for parties to a construction contract to make deductions from sums due either in a Final Account, or an Interim Valuation, on account of previous over-payments.

This could be, for example, because defects were not discovered during the period in which the goods were delivered and/or installed, or because a party has not ascertained costs incurred and to be set off, or simply because a party has made a conscious decision to "pay the money this month... we'll get it back later."

The party then, in a later payment cycle, issues a Notice of Payment [S110 Notice] detailing an amount due, followed by a Withholding Notice [S111 Notice] in respect of the earlier abatements or set offs and accordingly reduces the amount paid.

This practice often forms the basis of a dispute between the parties, which is then referred to adjudication. The question that the Adjudicator has to ask him/herself is "What is the effect of the failure to serve a Section 111 Notice during the course of the works and can this omission be rectified by the service of a Section 111 Withholding Notice at a later time when later interim, or final account monies become due for payment?"

A strict interpretation of the Act is that in the absence of an S111 Notice, full payment must be made and there can be no attempt to recover any overpayment in subsequent payments. In other words the S111 Notice, be it abatement or set off, must be applied to the S110 Notice to which the deductions relate.

This strict interpretation has been supported by nearly all English cases, the following being two examples:-

- Millers Specialist Joinery Company Limited v Nobles Construction Limited
- Whiteways Contractors (Sussex) Limited v Impresa Castelli Construction UK Limited

So the message is, if you are going to rely upon a Withholding Notice to deduct from monies otherwise due, be it abatement or set off, the Notice must be issued against the payment to which the deduction relates.

Should you require further information on the subject of Withholding Notices and/or to discuss us presenting a workshop on this topic, please contact Roger Smith at our Slough Office.

Telephone: 01753 530800  
Website: [www.rjc-consultants.co.uk](http://www.rjc-consultants.co.uk)  
E-mail: [slough@rjc-consultants.co.uk](mailto:slough@rjc-consultants.co.uk)

[www.rjc-consultants.co.uk](http://www.rjc-consultants.co.uk)

UK REGISTER OF EXPERT WITNESS

INVESTOR IN PEOPLE

MEMBER OF BRISTOL & SLOUGH CHAMBERS OF COMMERCE

RJC Consultants is the trading name of RJC Consultants Ltd., a company registered in England.  
Registered Office: Llanover House, Llanover Road, Pontypridd CF37 4LB, Registered No 3704626  
Director: Ray Crabbe FRICS FCIQB