Managing the Client

by Peter Webster MA (Cantab), Solicitor and Mediator, Director of Thea Limited

Introduction

Good afternoon, my name is Peter Webster. A bit about me: I have a Master of Arts degree in Classics and Modern Languages from Cambridge University; I got my Diplomas in Law and Legal Practice from the College of Law in Central London; I trained as a solicitor in the City of London with Penningtons; after qualifying, I worked for Masons (now Pinsent Masons), Fenwick Elliott, and Capsticks in different parts of London before setting up my own practice, Thea Limited, in 2007. Although I have specialised in construction and engineering law since I qualified, I do not pretend to be in any way technical: my job is to help people define their commercial relationships, or redefine them where something unexpected has happened. My desire to qualify into a construction and engineering legal practice stemmed from the many alternatives to court available to members of the construction industry to resolve their disputes. I am also a mediator qualified to mediate commercial, family, neighbour, and workplace disputes, and spent three years as project manager of a conciliation project for Rwanda after the 1994 genocide.

I would like everyone to think of a good project they have been involved in. Got that? Okay, now think of a bad project. Ready? Can I ask a few of you: what made you think of that project as good? And one or two others: why did you remember that project as being bad?

[Answers]

Thank you. My brief today is to share with you some recollections of six projects which turned "bad" for the professionals involved because the client was not happy. As I am sure all of you are aware, keeping clients happy is not an exact science; they can become unhappy when you have done nothing legally, technically or personally wrong. I am not therefore aiming to set out for you a systematic method of keeping clients happy (although if any of you think this can be done, I'd be very glad to collaborate with you on another paper!): rather, I wish to explore with you the challenges for professional and client together of facing **the unusual**.

1. Unusual Material

1.1 The year is 2003. It's August, the height of summer, and the thermometer is hitting 37 degrees centigrade outside. The weatherman is saying that it is the highest temperature on record in London. I am sweltering in an office in the Strand without proper air-conditioning and wishing I was on the golf course in Barbados from which my client was trying to get payment for the condominiums he had built. Meanwhile, three miles away down the Old Kent Road, and on my bus route home, a project is progressing which is destined to become a major part of my life for four years between 2005 and 2009.

1.2 The project is an extension and refurbishment of a children's nursery. What makes this project different from the similar project just a few hundred yards up the road is the material that is being used to construct the walls. This is not a conventional material like blockwork; it is rammed earth.

1.3 Now, can I have a show of hands in the room: who has managed a project involving rammed earth? Well, funnily enough, neither the architect, the structural engineer, the surveyors nor the main contractor on this project had ever done so. The nominated sub-contractor, of course, had one or two moderately high profile projects under his belt. But this project was intended by all the professionals involved to blaze a trail for sustainable construction in an urban setting; it would be a showcase for the potential of the material.

1.4 And what of the client? Well, owing to funding conditions which I will not trouble you with, the client had three heads. One head was the nursery. The second was the developer of some affordable flats which were being built on top of the nursery as part of the development. The third was an NHS Trust. The nursery and the developer had a Development Agreement with the NHS Trust, who in turn contracted with the contractor and the professional team. My client was the NHS Trust.

1.5 The three clients were aware that rammed earth was a non-standard building material. Nevertheless, its sustainable credentials – the feasibility study envisaged earth being dug straight out of the ground on site and used to build walls – and the low cost of the works package (little more than £20,000.00) ticked the boxes. The structural engineer assured the developer that the walls when built would bear the load of the flats above.

1.6 By August 2003, the idea of using earth from site to build the walls had been dropped. Earth next to a main road out of London in use since Roman times had the debris of millennia inside it. So the earth had to be brought in from a specially chosen quarry in the Home Counties. It then had to be stockpiled on site until it could be rammed and cast into blocks. Reflecting on what came next over a few drinks in April 2011, the QS on the job was clear: they should have reverted to conventional materials once the sustainability motive of using earth from site was gone.

1.7 The exceptionally hot weather posed a challenge for the builders using the mounds of imported earth. The earth needed to have a moisture content within a specific range when placed into formwork. If this was too high or too low, the earth could become "friable" and therefore brittle when finished. In a worst case scenario, its load-bearing capacity could be impaired.

1.8 The architect did initially condemn one or two walls and require them to be rebuilt. However, these decisions were based upon very visible shortcomings in their appearance. The professional team felt they had to make some allowances for the fact that this was, after all, earth, and would inevitably have a "rustic" appearance.

1.9 But once the walls were up, a string of problems occurred:

1.9.1 Reports came back from the independent testing laboratory suggesting that the moisture content in the earth was unacceptably high;

1.9.2 The contractor failed to protect the walls properly, with the result that a sudden burst of heavy rain severely damaged some of them; and

1.9.3 The structural engineer would not categorically reassure the remainder of the professional team that the walls would bear the load of the flats above, and as a result, recommended a change in the specification to include steel supports to take the load off the walls.

1.10 Not surprisingly, the client team – particularly those representing the nursery and the developer – began to get very uneasy about the whole concept of rammed earth walls. Whilst they could express these concerns verbally at meetings to the professional team,

however, they had to deal on a formal level with the other member of the client team, with which they had the Development Agreement. My client therefore found itself caught between its fellow client team members who were starting to panic, and the professional team who were assuring it that all would yet be well.

1.11 My client (I hasten to add before it became my client) had entered into contracts with everyone based on unrelated precedents or standard forms. When the nursery and the developer refused to accept the reassurances of the professional team, therefore, and invoked the expert determination procedure under the Development Agreement, there were no provisions in the contracts with the contractors and the professional team which made the outcome binding upon them. As the nursery and developer already had a number of consultants advising them, the professional team probably assumed that the expert determiner was just another one of these.

1.12 The expert determiner condemned most of the rammed earth walls. The life expectancy and cost of maintenance that he estimated for the remainder dissuaded the NHS Trust from trying to argue for their retention. The professional team found themselves being asked to redesign the entire scheme based upon blockwork walls. The contractor declined to rebuild the walls in blockwork at no additional cost, and so a new contractor had to be appointed for the remedial works, with a contract price set at about 30 times the cost of the original rammed earth walls package.

1.13 There followed a claim in the Technology and Construction Court, two adjudications and a mediation between the NHS Trust and the architect, structural engineer, main contractor, and specialist sub-contractor. The headline amount claimed was several million pounds (remember, the rammed earth walls works package was little more than £20,000.00), and much of this was the costs of the various dispute resolution processes and the expert input required for them. These claims settled shortly before a final trial, and then another expert determination was almost needed as the NHS Trust resumed the argument with the nursery and the developer over who should bear how much of the excess over the grants and other funding available for the project.

1.14 The architect and the structural engineer avoided the enduring bad publicity that a trial would have brought them, but the project architect moved on, and the practice probably noticed an increase in their insurance premiums on renewal. The contractor and the nominated sub-contractor did not have professional indemnity insurers to pay their share of the damages, however, so they were wound up by their owners. The quantity surveyor took over the contract administration role from the architect for the remedial works and so did fairly well out of the extended project, as (of course) did the lawyers and the swarm of independent experts supporting them.

1.15 So, what mistakes did the professional team make when managing a project involving unusual material for their client?

1.15.1 First and foremost, they did not manage their expectations adequately. "Managing expectations" has become a bit of a cliché, and you probably picked up one or two attempts to do this in the brief account I have just given you of the project, such as the warning that the walls would have a "rustic" appearance. But to manage expectations adequately, you must be clear in your own mind what is of fundamental importance for your client, and what is of more marginal concern. This was a tricky situation for the professional team, because their "client" in contractual terms was not the owner or end user of the building, but an intermediate body which was involved because of funding requirements. Nevertheless, that should have been a clue to the NHS Trust's major preoccupation, which was cost and financial risk.

1.15.2 Second, they did not mitigate damage. When the matter entered formal dispute resolution proceedings, the professional team's lawyers tried to argue that the NHS Trust should have changed plan at an earlier stage, when the extra cost involved would have been a fraction of what it ultimately was. But of course the questions came straight

back: why did you keep telling us everything was fine? And why should we have gone against what you were telling us?

1.15.3 Third, they should have known their stuff and made sure that everyone on site was aware of the peculiar challenges posed by the material. Allowing building materials and other junk to become mixed up in the earth before it was rammed; building test walls in distant laboratories which did not match conditions on site; failing to protect walls from rain; changing the design to include steel supports when questions were asked about threats to the walls from fire hoses and leaks from the flats above; these were just some of the issues which sapped at the confidence of the nursery and the developer. The clients felt "used" as guinea pigs for a speculative scheme when so many unforeseen matters cropped up, and with some justification, as the professional team and the contractors were all hoping that the project would "break new ground" (so to speak) in establishing rammed earth as a load-bearing building material in a modern urban setting.

2. Unusual Constraints

2.1 We now move forward two years to the summer of 2005. A hospital has commissioned some work to its Victorian steam main. A firm of engineers has been retained to prepare a specification, and an experienced installer has been contracted to fit new pipework.

2.2 The unusual aspect of this job was the fact that it had to be complete before the so-called "heating season" at the hospital began. This was because the commissioning of the steam main required several shut-downs of the hospital's heating system. This was unproblematic in the summer months, but after about the end of September, shutting down the heating system would make temperatures on the wards and in the operating theatres too cold, and would therefore put patients at risk.

2.3 The works package was once again a relatively small one (about £35,000) in the context of a larger programme of works. The installer therefore assigned some young and relatively inexperienced workmen to it, who had only recently obtained their welding certificates. The works the proceeded in fits and starts, as unexpected quantities of asbestos were discovered, and all workmen were denied access to the site whilst decontamination took place.

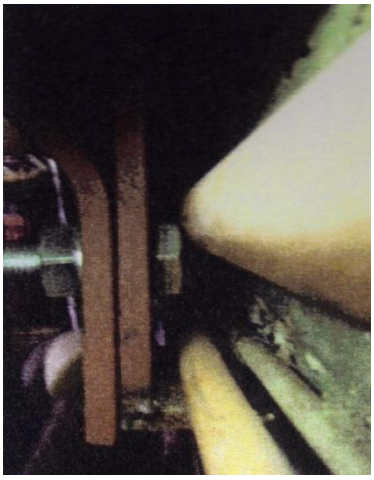
2.4 The result, inevitably, was that the "heating season" grew imminent, with the new pipework still to be commissioned.

2.5 Commissioning tests took place at the end of September. The installer claimed the installation was ready. Some welds failed pressure tests. The hospital's head of engineering stepped in and terminated the contract, on the basis that as there were still outstanding issues, it would be too late to commission the works by the time they were resolved because it would be impossible to shut down the hospital's heating system.

2.6 The installer sought payment for the work it had done. The external engineer administering the contract certified some payments. The hospital's head of engineering

was unhappy that the works were defective and had not been completed by the time the "heating season" began, and asked the external engineer to agree a payment with the installer which took account of these shortcomings.

2.7 The engineer was in a difficult position, since the payments he had certified were more than the likely cost of completing the works. The installer naturally wanted to attend to any "snags" themselves and receive full payment rather than accept a deduction and let others finish the works. Negotiations continued inconclusively through the winter months until finally the installer lost patience and issued legal proceedings.



2.8 Instructed by the head of engineering of the hospital, my immediate reaction was to seek a stay of proceedings so that further negotiations could take place. I encouraged the head of engineering to agree upon an independent engineer to inspect the installation with the installer, and to join the engineer who had been the contract administrator to the proceedings. Unfortunately, the installer's solicitor declined to agree upon a joint appointment of an independent engineer at this stage, and so my client proceeded to instruct another engineer who was an external consultant on another part of the project.

2.9 This engineer joined me, the hospital's head of engineering, the managing director of the installer and his solicitor, and one of the partners of the engineer/contract administrator, for a meeting at the hospital. We all went and had a look at the installation. The new external engineer found many more things wrong with the installation than had previously been highlighted, some of which visibly embarrassed the installer's managing director, whilst others he, and the contract administrator's colleague, dismissed as hair-splitting motivated by a desire to "muscle out" a professional competitor.

2.10 I am going to fast-forward from here, as matters developed in the worst possible way. There was eventually a trial in which the engineer was found to have been professionally negligent, the installer was awarded just £3,000 with around £60,000 of irrecoverable legal costs after damages for defective work wiped almost the whole of his contract price, and the hospital picked up the lion's share of the costs because it did not beat a

settlement offer by the engineer's insurers. The hospital then unsuccessfully sought permission to appeal to the Court of Appeal on the basis that the level of damages and cost assessments were not supported by the evidence.

2.11 So, how should the professional involved, in this case the engineer, have managed his client? It was small comfort to him that his insurers had to pay out relatively little, as his professional reputation with a major client was in tatters after the judge found that he had failed to spot obvious defects, and that even if he had spotted them, he would not have been able to persuade the installer to rectify them. We return to the same three issues:

2.11.1 He did not manage his client's expectations adequately. Fundamentally, the client wanted the job done before the "heating season". He needed to make sure that the works were specified and administered in such a way that the installer was clear that he had until 30th September at the absolute latest to commission and hand over the installation. He also needed to make sure that the hospital could legitimately bring the contract to an end, with or without contractual penalties for non-completion depending upon where responsibility for any delay rested, on 30th September no matter what.

2.11.2 He did not mitigate damage. The judge pointed out that he did not in fact have authority to issue payment certificates (although technically, a regime for assessing periodic payments would be implied by statute into this type of contract if it were not included expressly). The certificates he did issue turned out to be far in excess of the value of the works carried out, once the defective work (which was obviously not in accordance with the contract) was taken into account. This meant that when he tried to negotiate a conclusion to the contract with the installer being paid for what he had done, the installer not unnaturally took the amounts already certified as a starting point.

2.11.3 He did not know his stuff. He inspected the works, and did not pick up obvious defects. He tried to hide behind the fact that the installer had not formally submitted the installation to him as complete, but it was clear that his legal duty to inspect the works with reasonable skill and care required him to spot and point out serious issues such as cables that had been pinched by part of the installation. His mistake may have been more that he did not think he needed to take a long hard look rather than that he could not see things that were staring him in the face even when actively checking for them, but either way he fell short of the standard of competence required.

3. Unusual Conditions

3.1 Subsidence is an unusual enough condition that home insurers will normally cover the risk of it occurring.

3.2 When it does occur, however, arguments often occur about what needs to be done to address it, and professionals can find themselves caught in a cross-fire between the home owner and the insurer.

3.3 The situation is usually further complicated by the fact that there will be other properties, often sharing a party wall, which are not covered under the insurance policy, but which are nevertheless affected both by the subsidence and by efforts undertaken to address it on behalf of their neighbours.

3.4 The insurers tend to start from the position that they are not contracting to give the home owner a better property than the one they insured. So they will pay for repairs to the damage caused by subsidence, so as to restore it to the condition it was in when it was insured. Paying for schemes to eliminate the cause of the subsidence is much more problematic for them, and the cheapest options are naturally preferred.

3.5 The neighbours obviously do not want next door to have repairs or remedial schemes done to their property which might transfer the problem to them or create fresh problems. They probably also do not want their favourite mature tree dug up by the roots either, especially if it is not causing them any problems. The professional who is involved as a loss adjuster or as a consultant or party wall surveyor of one of the occupiers has to manage a situation where a number of parties will be pulling in different directions.

3.6 I was the mediator at the end of one long-running dispute of this nature. The case had followed a fairly typical course: a claim had been made on the policy; an investigation

had been carried out by the insurers' loss adjuster which resulted in a remedial scheme; the contractor who carried out the remedial scheme had been obliged to alter the design under pressure from the neighbours' party wall surveyor; the design as altered allowed the problem to recur with increased severity, forcing the occupiers to vacate the house for months whilst a fresh remedial scheme was carried out; the insurers were unhappy at the amount they had had to pay out, and pursued the contractor under their rights of subrogation. The contractor of course sought to pass the buck on to the loss adjuster.

3.7 The issue between the parties boiled down to whether the instruction issued by the loss adjuster to the contractor in the autumn of 2000 had imposed a duty upon the contractor to design movement joints in a revised scheme which excluded a party wall. The contractor maintained that the loss adjuster produced the original specification, and that design responsibility rested with him. The loss adjuster said that the variation letter that it issued amounted to a performance specification, and that the contractor failed to allow for the vertical movement in the joints which it was his responsibility to do.

3.8 The detail of the mediation and its outcome are confidential. If I tell you, however, that it took place in January 2010, you can perhaps appreciate that the insurer, its loss adjuster, the contractor, and the unfortunate couple who had been forced out of their home by further remedial work, were wishing that communication 10 years earlier had been a little better. These situations are tricky ones for professionals, as your client is the insurance company, but your performance is open to criticism both by the home owners and any contractors engaged. I do not wish to point the finger specifically at the loss adjuster in this case, but here are some general thoughts based upon this and other similar scenarios that I have encountered.

3.8.1 Manage the client's expectations adequately. An insurer is stuck with a risk that it has insured. It wants to deal with risks that materialise as economically as possible, and wants to be able to collect future premiums without having to pay out over and again for the same risk. It does not want to end up pursuing contractors, who may not be good for the money, to recoup what it has had to pay out, and have insured parties reporting it to the ombudsman. Professional loss adjusters are expected to ensure this does not happen.

3.8.2 Mitigate damage. It is easy with the benefit of hindsight to suggest that more thorough investigations should be carried out. The professional is only expected in law to do what is reasonable at the time with the knowledge then available. Nevertheless, if a scheme that you have specified does not work and has to be revisited, no insurer is likely to be very pleased. It also exposes an insurer commercially if you pass a potential liability to a party who may not be good for the money if a claim is brought against them.

3.8.3 Know your stuff. The unusual aspect of the situation in our example was the need to exclude from a scheme a wall which was likely to be affected by the absence of anti-heave material in the foundations of the two houses which were constructed on a pile and beam foundation in an area of previously dense woodland. The contractor pointed

out in his defence that he and the loss adjuster regularly worked together, and that the loss adjuster knew that he sub-contracted out design elements of his work. The loss adjuster therefore knew that there was a potential "knowledge gap" in his solution for excluding the wall, even if his instruction to the contractor was correct as far as it went. He should have acted upon this and made doubly sure the contractor's design was fine.

4. Unusual Contract

4.1 We all know that the construction industry is full of standard forms of contract. Most of us will also know that for different reasons, members of the industry and their clients like to think that they can do without them. This may mean that they sign a contract and then throw it in the back of a drawer, or that they simply proceed on the basis of a few conversations and, perhaps, an exchange of letters.

4.2 When contracts are put forward by sophisticated clients backed by expensive lawyers, on the other hand, they tend to be heavily amended versions of standard forms, or bespoke contracts adapted from a standard form. There will usually be not just a contract between the client and the contractor, but annexed to it, forms of contract, warranty, guarantee, bond and so on between everyone else involved in the project, with a stipulation that terms must be negotiated as close as possible to the template form. The aim of the amendments is, of course, to back off as much risk from the client as possible.

4.3 Both of these scenarios are familiar ones. But occasionally, one finds a situation which combines elements of both. The particular contract which I have in mind as an example involved an entrepreneur who was developing his elderly mother's large former home into flats for rental purposes. He ran a software business and had an engineering background, and reckoned that he could tie down the building company he engaged to a favourable commercial deal. He duly put forward a JCT 2005 Minor Works contract with some suitable amendments and the builder signed it. He then put it in the drawer and forgot about it, and did not even ask the person he had named as the contract administrator to inspect the works and certify payments – instead, he did this himself.

4.4 Things began to get difficult as the project dragged on longer than anticipated and cost more than expected. The client sought to impose financial penalties for the delay, and then threatened to terminate the contract unless the contractor worked 6 days a week. This led to a confrontation on site, after which, according to the client, the contractor abandoned the contract, and according to the contractor, the client turned him out.

4.5 The contractor then went to some claims consultants, who advised him to treat the contract as repudiated, and claim his final payment – including lost profit – in adjudication. The client came to me just as this was about to happen. My first letter to the claims consultants was answered with a Notice of Adjudication.

4.6 We called in the quantity surveyor who had been named originally as the contract administrator. In an operation which involved swapping pictures over Christmas and New Year via Picasa whilst he was on holiday in Ireland, we put together a response to the contractor's referral which included an illustrated expert report which concluded that the contractor had been overpaid. The client had attempted to draft and price the contract so that the contractor would struggle to make any profit at all on the job, and the contractor's man had signed off the contract without challenging this.

4.7 The client nevertheless came to grief in the adjudication, because he had put his cunningly drafted contract in the drawer, and had neglected to follow its terms to the letter when withholding payments, giving notice of termination, and excluding the contractor from the site. The adjudicator, perhaps a little generously, did all the work the contractor had neglected to do in the contract negotiations, and worked out a reasonable rate of profit for the rest of the job. The contractor did have his ambitious final account substantially curtailed by the quantity surveyor's criticisms of his workmanship, however.

4.8 In this example, the client was the architect of his own downfall. But the errors that he made could equally well have been made by a contract administrator acting on his behalf; some of the steps were taken on the basis that the client had appointed himself as contract administrator. We therefore have to imagine that the quantity surveyor, and not the client, had taken the steps that led to the adjudication and its unfavourable outcome.

4.8.1 Manage the client's expectations adequately. You cannot afford to be arbitrary in disallowing all or part of a contractor's application for a stage payment. The contractor in our example not surprisingly alleged that the client's appointment of himself as contract administrator was itself a breach of contract, as he could not possibly hold a fair balance between himself and the contractor. This was however one of the terms of the contract which the client had amended to give him this flexibility, and the adjudicator accepted this. Nevertheless, because of the effect of sections 109-111 of the Housing Grants Construction and Regeneration Act 1996, unless the contract is specified or agreed to be of less than 45 days' duration, stage payments must have a date upon which they become due and a final date for payment fixed in the contract, or else the provisions of the statutory Scheme for Construction Contracts will be implied into the contract and displace any other payment provisions. They must also be confirmed in payment notices, and any sums withheld must be quantified exactly, and the grounds for withholding each sum explained. Any professional administering a construction contract today must make sure that their client understands and accepts this.

4.8.2 Mitigate damage. Threatening to terminate a contract, whether or not it is followed by actually excluding the contractor from site, is a step that should not be taken lightly. If it is done wrongly, which in practice means not strictly in accordance with any contractual termination procedure, or on the grounds of some identified fundamental breach of the contract by the contractor, then the contractor can treat it as a repudiation of the contract

by the client, and claim his lost profit as damages without having to do any more work. In our example, the client thought that he had obliged the contractor to attend site 6 days a week to work, and that if he did not and he fell behind the programme, then he could threaten to terminate unless he fell into line. The contractor considered that the contract merely gave him the option of Saturday morning working (Saturday afternoon being more problematic because of local by-laws) and that the days on which he did and did not work were a matter for him. The contractor's understanding is the more typical one in the industry, which made it very hard for the client to maintain that a fundamental breach of contract had occurred. This was all the more unfortunate because on the quantity surveyor's later analysis, the contractor faced a virtually impossible task to complete the job on time, and would therefore have almost certainly been legitimately penalised in liquidated and ascertained damages for delay if the client had allowed him to continue undisturbed.

4.8.3 Know your stuff. As the contract administrator and the client were actually one and the same on this project, then it was no surprise that the actions prescribed for the contract administrator under the contract followed exactly the client's agenda. But this can happen too where there is a professional contract administrator. It is essential that such professionals have a clear understanding of the law covering the payment process under construction contracts, and how sanctions can be applied legitimately if the contractor is in default, so as to protect their clients from adverse consequences of arbitrary acts.

5. Unusual Client

5.1 Not all clients whose parents leave them with a large house with development potential are (or consider themselves) technically and commercially astute.

5.2 In my next example, the client is an artist living off her credit cards who is left a huge property with an extension which was built without planning permission many years earlier. She obtains a design for the conversion of the property into smaller saleable units from a firm of architects, but then goes to a designer providing "architectural services" to obtain planning permission and building regulations approval for a scheme which she lets to the "family builder". The designer also agrees to supervise the building works and be party wall surveyor, in a one-page letter to her summarising his services.

5.3 The designer proposes a two-stage planning application, one to extend the property, and the other to convert it into separate units. The existing extension is to be removed without any attempt to apply for a certificate of lawful use retrospectively. The first stage of the planning application is successful, and the builders move in to strip the property out and remove the existing extension.

5.4 Then the client runs short of money. The family builder urges her to take out bridging finance, but owing to her straitened financial circumstances, she takes fright at the sums involved and declines to do so. The builder pulls out amid some acrimony. The client hires other builders on a more casual basis to continue the stripping out work whilst the

designer applies for the second stage of the planning permission and submits the building regulation drawings. The casual builders construct a bay that is in breach of the first planning permission and contrary to the design; they also work erratically, and develop a bad working relationship with the designer. The designer eventually decides that he has had enough, and writes to the client terminating his supervisory services.

5.5 There follows an argument about how much the designer should receive as a final payment for his services. His original one-page letter of engagement had proposed a fee based upon a percentage of the "construction value", without defining precisely what was meant by this. He therefore calculates his fee by applying the percentage to the amount the client said in an email that she had spent on the project up to that point, and deducts the stage payments which he had already been paid.

5.6 The client initially puts him off by referring to her straitened financial circumstances, but then points out that the figure which he had used to calculate his fee was not money that she had paid to the builders only, but every payment that she had made in connection with the project, including the earlier payments to the designer himself. These clearly could not be taken into account, and nor could a number of others. She suggests that on a proper calculation he had been overpaid, but she sends a small cheque in further payment in the hope of closing the matter.

5.7 The designer seeks legal advice, and comes back with the claim that the client breached the contract by appointing incompetent builders, and that he was therefore entitled to terminate the contract and claim his full fee as damages for the client's fundamental breach. He also claims that the client is lying about her real costs. The client comes to me via a referral.

5.8 I am pleased to say that we managed to settle this one without the need for legal or any other formal proceedings. I am reasonably confident, however, that had the client been minded to go down the legal route, she would not only have defeated the designer's claim, but would have succeeded on a claim of her own for fundamental breach of contract, and very possibly for professional negligence as well. Let me explain why, under our now familiar three headings.

5.8.1 Manage the client's expectations adequately. Most clients want certainty of price, but not all of them can tell when they have or have not got it. Linking your total fee to the "construction value" is a common enough device to ensure that if the project turns out to be larger than originally anticipated, you as a professional can increase your fee commensurably. Clients like the one in this example, however, cannot be assumed to know what is meant by "construction value". It must be spelt out. The designer, with encouragement from his lawyer, sought to argue that there was in effect an "assumed minimum price" for his appointment, based upon estimates for the works allegedly provided verbally at the outset. Consumer legislation like the Unfair Terms in Consumer Contracts Regulations can strike down onerous contract terms for consumers where they are not individually negotiated and clearly set out, and would probably have done

so here. The payment the designer sought initially before going to a lawyer was also a stage payment, and the earlier stage payments had clearly borne no relation to the "construction value" up to that point; they were arbitrary demands, much as this one was. Most professional bodies have standards or codes of conduct which set out what is expected of their members in this area, and they should be heeded and followed.

5.8.2 Mitigate damage. The professional's duty of supervision has been reviewed by the Technology and Construction Court a number of times. Most standard forms of appointment produced by professional bodies for their members now avoid using the word, as the obligations that it implies are considered too onerous; they impose instead a duty to inspect only. Whilst it has always been accepted that the professional does not have to perform the role of a foreman, standing over the contractor's workforce every moment that they are on site, as supervisor he does have a duty to be vigilant for signs that all is not going according to plan, and to exercise closer supervision where the workforce shows signs of incompetence. To do the opposite, and walk away from the duty to supervise altogether in such circumstances, is in my view a fundamental breach of contract. Particularly when working for an inexperienced lay client, a professional must try and limit the damage in circumstances such as these, perhaps by investigating more closely which workmen are seriously incompetent (if indeed any of them are) and advising the client to discharge these particular workmen. If this seems like too much trouble, then the professional should avoid assuming a duty to supervise at the outset.

5.8.3 Know your stuff. What could have been the real sting for this designer, however, if he and the client had claimed and counterclaimed against each other, was his decision not to apply for a certificate of lawful use for the existing extension and to surrender it voluntarily in his planning application. The existing extension covered a substantial area, and if it could have been retained, it would have added hundreds of thousands of pounds to the total market value of the property when divided up into separate units. Of course he could have argued that the certificate of lawful use would not have been granted, but even the loss of a chance of a profit of this size would have been a substantial claim. It can be a good answer to a professional negligence claim to say that the client knew about a possibility already, and that it was not the professional's role to remind them of possibilities that they were already aware of, but this would be a very tenuous defence against an unsophisticated client dealing with a property left her by will.

6. Unusual Weather

6.1 You will I am sure all be familiar with provisions in standard forms of contract which allocate risk between the parties when particular weather events occur. We have covered an example earlier: the main contractor on the rammed earth walls project had a duty to protect the walls from rainfall. Tricky situations can arise, however, where the weather has an effect that had not been foreseen, at least as a problem.

6.2 My last example is of clattering cladding. A specialist subcontractor had designed, manufactured and installed the cladding for a new building in the North West of England.

He had submitted his final account and sought payment with the first tranche of his retention, only to be told by the main contractor that the client was unhappy. There had been complaints from the companies occupying the new building that the panels on the building were making too much noise when the wind blew against them strongly.

6.3 The subcontractor was nonplussed. What do they expect to happen when the wind blows against cladding? But of course, the noise was not happening when just any wind blew, only in strong gusts of wind.

6.4 From the client's perspective, the noise was a "defect", because it was making the occupiers of the building complain. The client in fact wanted to sell the building on quickly at a huge profit whilst the market was good, and did not want anything that would suggest to prospective purchasers that tenants might be put off renting space. It could therefore be included on a list of matters which the main contractor had to get sorted out if he wanted his retention and final payments released.

6.5 From the subcontractor's perspective, the noise was not a defect, because there was no performance specification indicating what wind levels he was required to allow for when manufacturing and installing the cladding. He considered that such a specification would have been impractical in any case, as it would have been impossible to recreate the wind conditions that prevailed in the centre of a large city in order to carry out meaningful wind tunnel performance tests. The noise was just part and parcel of having such a building in that particular part of the world.

6.6 You will I hope all be familiar by now with my three broad pieces of advice for managing the client in every unusual situation. I shall repeat them once more just to make sure: first; manage the client's expectations adequately; second, mitigate damage; third, know your stuff. I want to end this session where I started it, with some interactive discussion, so I am not going to attempt to suggest answers for this final scenario. Instead, I would like to hear some answers from the floor. Then, I shall be happy to take any other questions that delegates have not raised as we went along.

May I wish you all many good projects and happy clients.

Peter Webster

Thea Limited

218 Strand, 3rd Floor, London WC2R 1AT

Tel: 020 7277 8649

peter@thea.ltd.uk I www.thea.ltd.uk

