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Working with an extensive range of clients within both the public and private sectors, The Vinden Partnership (Vinden) offers the construction industry a huge variety of services, delivered by an exceptionally talented and experienced team.

Here we present some of the highlights from articles The Vinden Partnership has produced this year to date.

From its offices in Greater Manchester, Nottingham and central London the company undertakes education, residential, industrial, affordable housing, office, retail and health sector projects delivered to a wide range of clients and project stakeholders.

Vinden has celebrated over 22 years of working for clients in the construction and property marketplace and continues to go from strength to strength.

All clients are treated as "life time" clients and its priority, regardless of which of the many services are being provided, remains the same; that is to ensure the highest levels of client service and satisfaction are achieved at all times.

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EXPRESS TERMS AND THE SCOVILLE METHOD OF MEASUREMENT

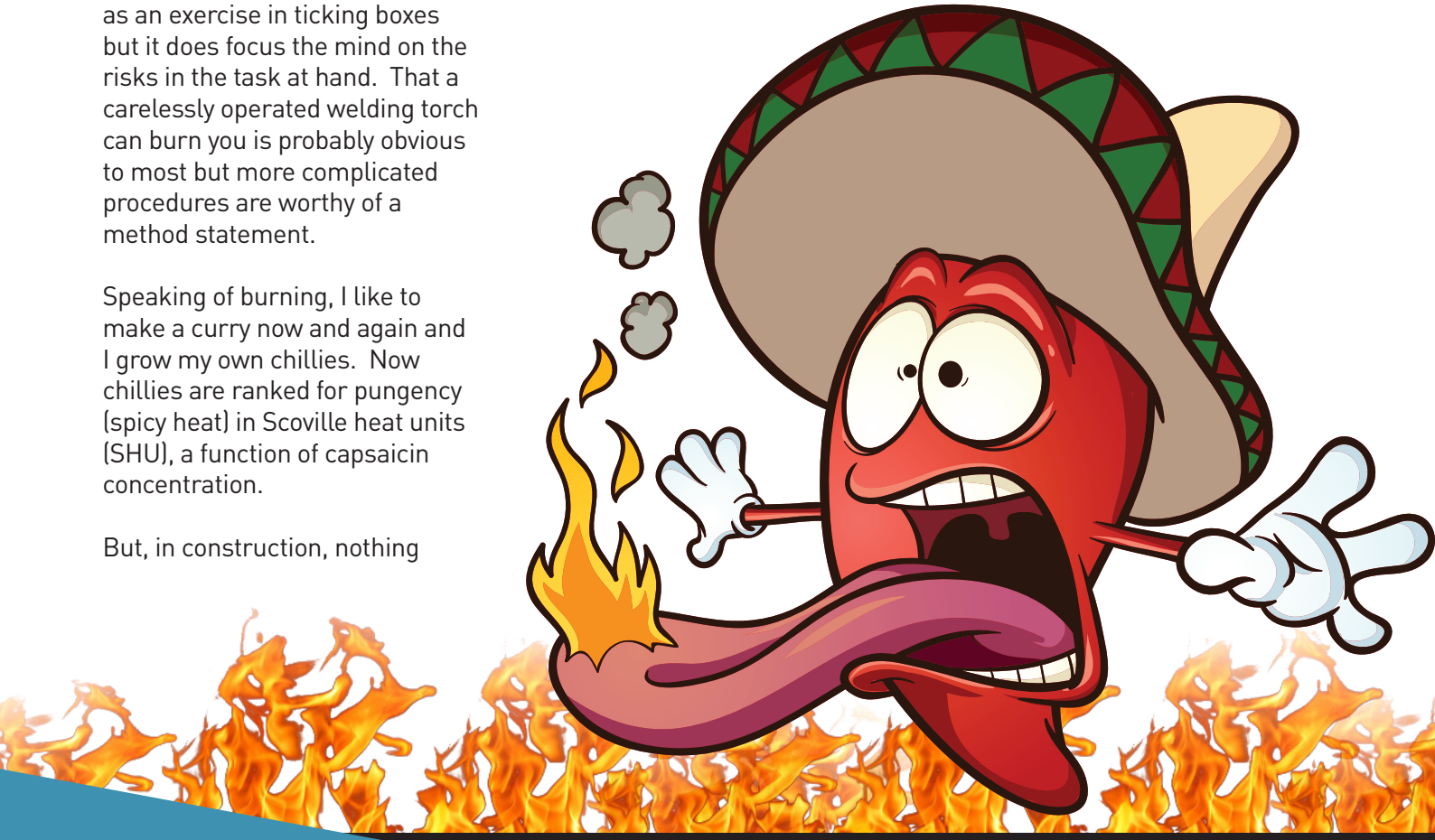
It's getting near that time of the year when everyone wants to round off with thoughts on what's gone right and wrong in our world and what might be done to change it for the better next year.

Health and safety regulations require risk assessments to be carried out for all activities, and rightly so. Gone are the days when you could put a ladder up against a wall, climb up and paint the gutters. The risk assessment might be dismissed, by some, as an exercise in ticking boxes but it does focus the mind on the risks in the task at hand. That a carelessly operated welding torch can burn you is probably obvious to most but more complicated procedures are worthy of a method statement.

Speaking of burning, I like to make a curry now and again and I grow my own chillies. Now chillies are ranked for pungency (spicy heat) in Scoville heat units (SHU), a function of capsaicin concentration.

But, in construction, nothing burns like an onerous contract. I spend quite a lot of my time reviewing proposed contracts for clients, trying to find the sneaky clauses inserted by the armies of lawyers employed nowadays to draft contracts for developers and employers, with a view to passing on all risks to the contractor. Or contractor to sub-contractor.

I try to find the most worrisome provisions and suggest alternative wording to arrive at a fairer solution. But for many contractors, and particularly the smaller sub-contractors, there is no such risk assessment involved and the contract is signed in order to get the work. The lawyer will say that's the sub-contractor's fault for not reading the document and the courts will uphold the principle that the two business entities were deemed fully capable of entering into an appropriate bargain.



But are they? In my experience, the average roofer knows a lot about roofing and the average bricklayer knows lots about bricks but neither of them will have a clue about contract law. In fact, how many reading this would know an effective pay-less notice if it knocked on their door?

The health of their employees depends on the success of these contracts yet, apart from the few who employ someone like me to review them, they are free to harm themselves, their sub-subcontractors and suppliers and the families of all of them.

I can't see any likelihood of a change to public policy involving new legislation to curtail the worst abuses in contract drafting but what about grading them on a standard scale? A standard JCT contract, for example, could attract a benchmark of (say) one chilli. As the onerous provisions mount up then so too would the contract march up the scale. Just like chillies.

Some of these contracts would be marked at such a scale that they would truly declare themselves to be capable of burning. No longer would a sub-contractor need to read the contract; when he needed any assistance, a high Scoville rating would send banks and suppliers running for the hills. The scale of the red chilli stamped on every page of the contract would serve as a strong disincentive to sign without further investigation. The fires started by these chillies would then be forced out.

So, if anyone has been sent a contract to sign recently and they want to know if they are looking at a sweet pepper or a bhut jolokia, send it over here and we'll check it out!

"But for many contractors, and particularly the smaller sub-contractors, there is no such risk assessment involved and the contract is signed in order to get the work."

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ARBITRATION CONFIDENTIALITY

In the United Kingdom, Parties entering into contracts can determine whether disputes will be decided by the Courts or elect to have their disputes decided by arbitration. As we all know, it may also be possible to adjudicate disputes that might arise under the contract either because there is a statutory right, as with construction contracts under The Housing Grants Construction and Regeneration Act (1996) or similar, or because the Parties elect to include a contractual provision allowing for adjudication within their agreement.

There are a number of reasons why Parties decide to choose arbitration as a means of determining disputes which might arise under a contract rather than relying on our Courts. I submit, however, that the main reasons are firstly that the tribunal will have, or at least ought to have, specialist knowledge of the issues in dispute and, secondly, to keep the fact of the legal proceedings and the resulting award private and confidential.

Once arbitration is selected as the means of resolving disputes that might arise under a contract it is quite rare for the courts to become involved in the arbitration. There are, however, three principal ways in which a court may be asked to intervene after the issue of the Arbitrator's award. There may be an appeal on a point of law which is said to have been wrongly decided by the tribunal (Parties can elect to exclude such appeals if they so wish). Action may be taken in Court to enforce an arbitral award. The Court may also be asked to intervene where it is alleged that there has been "serious irregularity affecting the tribunal, the proceedings or the award" [section 68 of the Arbitration Act 1996] and it is said that this irregularity undermines the very purpose and legality of the arbitration itself.

> *Once arbitration is selected as the means of resolving disputes that might arise under a contract it is quite rare for the courts to become involved in the arbitration.*

Of course, where legal action is taken in connection with an arbitration award, there is every likelihood that such proceedings will defeat the confidential features of arbitration. As we all know, it is not such a great idea to wash your laundry in public but this is exactly what Tony Pulis decided to do in what was to become a very public fall out with Crystal Palace Football Club.

In a judgement of the High Court issued on 18 November 2016, Mr Pulis was ordered to pay Crystal Palace £3.776 million pounds, interest, Crystal Palace's legal costs and to meet payment of his own costs which, it has been speculated, could be as much as £5 million – ouch!

We only know about this because Mr Pulis and his legal team had decided to apply to the Court under section 68 of the Arbitration Act challenging an earlier arbitration award made by a Premier League Manager's Arbitration Tribunal conducted by three leading QCs.

The judgement makes uncomfortable reading. It lays bare accusations of fraudulent misrepresentation on the part of Mr Pulis, with Crystal Palace successfully arguing in the arbitration that it paid over a survival bonus of £2 million in early August of that year which Mr Pulis was never entitled to because he had not fulfilled the second of two conditions set out in the Parties' contract, namely that he was still employed by the Club on 31 August 2014, and because he had deceived the club into making the payment early based on untrue representations concerning a family land transaction which in reality did not exist.

I have no doubt that Mr Pulis regrets his actions and then defending the original arbitration proceedings brought by Crystal Palace. I am also sure that his biggest regret is in deciding to challenge the arbitration award in Court which exposed what was supposed to be a private and confidential dispute to the full glare of the UK media. There are lessons for all of us to take from this case.

Peter Vinden is a practising Arbitrator, Adjudicator, Mediator and Expert. He is Managing Director of The Vinden Partnership and can be contacted by email at pvinden@vinden.co.uk. For similar articles please visit www.vinden.co.uk.

ADJUDICATION AND ORAL CONTRACTS

It is now well known that an adjudicator has jurisdiction to deal with disputes that arise under oral construction contracts for construction operations as defined in the Housing, Grants, Construction and Regeneration Act 1996 and amended by the Local Democracy, Economic Development & Construction Act 2009.

This is all great in theory but having "bought and worn the T-shirt" on a number of occasions, I can tell you that in practice it is far from easy to determine what the terms of an oral contract actually are. This is particularly the case in an adjudication confined to a 28-day timetable where you are presented with conflicting combatant witness statements, more often than not drafted by lawyers rather than the witness him or herself .....but that's a different topic for a different article to be written on a different day.

In contract or no contract arguments, more often than not, a meeting or hearing is needed to listen to and question the witnesses before you can begin to decide whose version of events you might prefer. But then you might find that the witnesses have been coached within an inch of their lives and you are left wondering why the witnesses don't just sell their tools and apply for jobs on stage in the West End? OK, rant over now, the bottom line is adjudicators are being called upon to decide these sorts of cases but what happens when the Courts are asked to enforce an adjudicator's decision(s) where the contract is alleged to have been formed orally?

Generally speaking, where only two parties are involved in

what is alleged to be a contract formed orally and services have been provided by one of these parties, the Court is very unlikely to find that there is not a contract in place. The position is somewhat different where there are arguments involving three or more parties and there is clearly confusion and conflicting arguments about who has appointed whom and who has provided services.

This type of dispute came before the Court in Dacy Building Services Limited -and- IDM Properties LLP [2016] EWHC 3007 (TCC). The case concerns an application to enforce an Adjudicator's Decision. The facts of the case are that Dacy became involved in providing building services in December 2015. The problem was that Dacy was initially approached by a company called HOC (UK) Limited ("HOC") who were performing services as Main Contractor under a contract with O'Loughlin Leisure (Jersey) Limited ("O'Loughlin"). IDM Properties LLP ("IDM") were acting as the Employer's Agent under the Main Contract between HOC and O'Loughlin. To complicate matters further O'Loughlin was in a joint venture with a company called Fastmild Ltd ("Fastmild") and Fastmild was a subsidiary of IDM Investment Holdings Limited.

It was well known to Dacy that HOC was suffering cash flow issues and Dacy argued throughout the life of the adjudication that it never agreed to work for HOC and that it had, in fact, agreed to work for, and be paid by, IDM following an oral exchange between Mr Kiernan for Dacy and a Mr O'Loughlin, which was said to have taken place on 3 December 2015. Regrettably, it appears that during the adjudication Mr O'Loughlin denied that any such agreement had been reached and it was always understood that Dacy would be working for HOC and not, as claimed by Dacy, IDM. The adjudicator was therefore left with conflicting versions of events as to which party had contracted with Dacy.

Whilst there was no doubt that Dacy had supplied labour, plant and materials to the project, getting paid proved to be something of a problem. Dacy therefore withdrew its labour from site and commenced adjudication against IDM.

From the outset of the adjudication proceedings, IDM challenged the jurisdiction of the appointed adjudicator arguing that as there was no contract between it and Dacy, the Adjudicator could not have jurisdiction.

Although the appointed adjudicator decided on a non-binding basis that an oral contract had been entered into by Dacy with IDM and awarded Dacy payment of its outstanding invoices, the Court was unwilling to enforce the Decision.

In reading the judgement it is clear that the Court readily accepted that Dacy had supplied labour, plant and materials and that HOC's financial difficulties were well known. It did not, however, believe that an Employer's Agent would readily accept responsibility to pay a Sub-Contractor. Moreover, this was a case where there were two possible parties that Dacy could have contracted with and the Court was not prepared to summarily enforce a decision where such uncertainty existed.

So where does this leave us? Well, in cases where there is an argument about whether or not there is a contract, a Court will almost invariably find that a contract has been concluded if services have been provided and will enforce an Adjudicator's decision to this effect. However, in cases where there is uncertainty about who is the contracting party and the facts and evidence are either too complex or not persuasive, don't be too surprised if the Court refuses to enforce an Adjudicator's decision concerning an oral contract.

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