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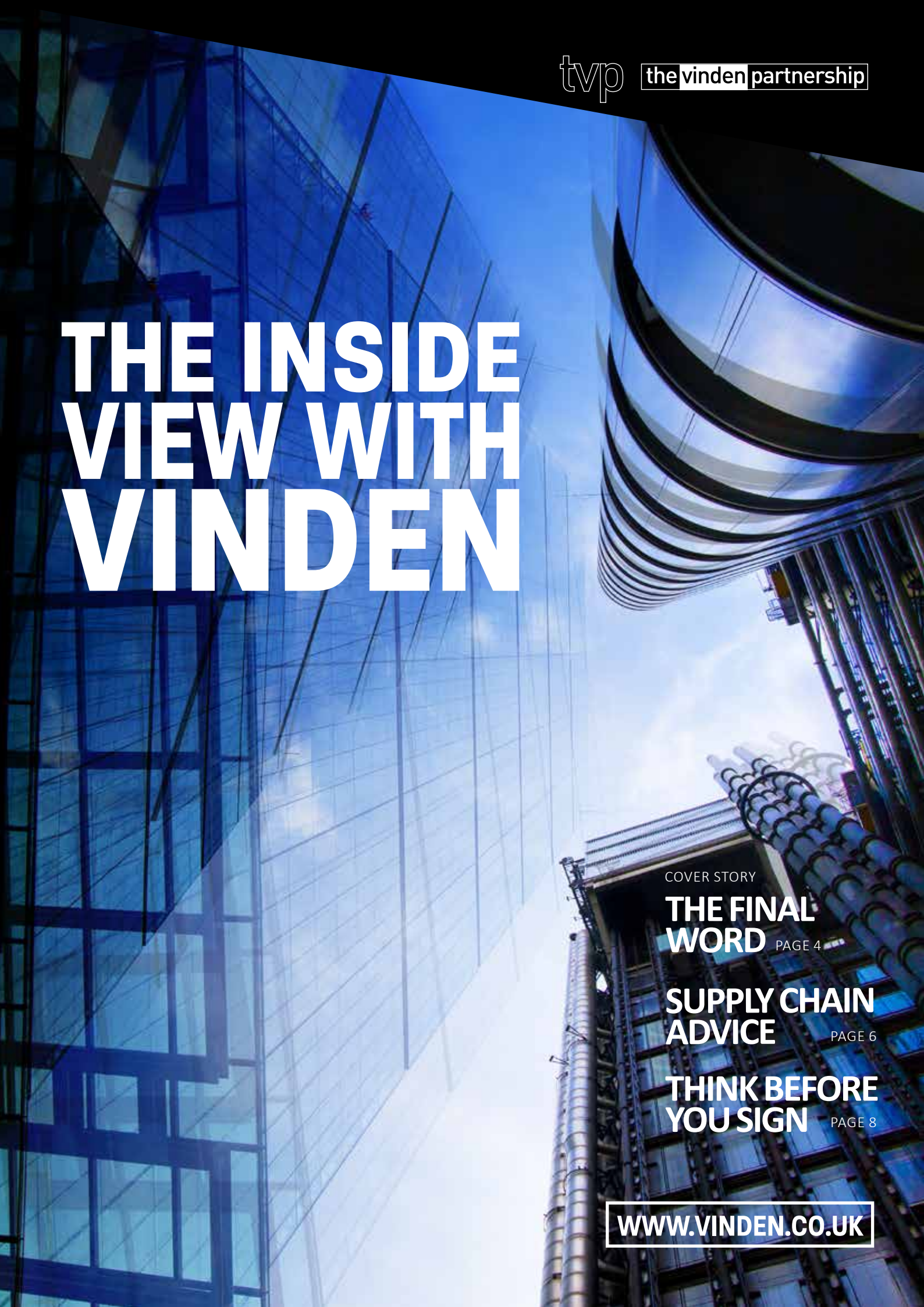

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Working with an extensive range of clients within both the public and private sectors, The Vinden Partnership (Vinden) offers the construction industry a huge variety of services, delivered by an exceptionally talented and experienced team.

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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RECOVERING PARTY COSTS IN ADJUDICATION – THE FINAL WORD?

The costs of representing a party in adjudication can be significant. Not surprisingly parties are keen, where they can, to recover these costs and there have been a number of reported cases where, for one reason or another, a party has managed to persuade an adjudicator to award the recovery of one party's costs from its opponents.

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Although Section 108 of The Housing Grants Construction& Regeneration Act 1996 ("the Act") is silent on whether this was permitted or not, in the early days it was believed by some that such power was automatically bestowed on the Adjudicator. It was argued that, because the Act provided the express power to apportion liability for the payment of his fees, there was an implied power to order the apportionment and recovery of other party costs. This notion was, however, quashed in Northern Developments (Cumbria) Ltd v J & J Nichol [2000] BLR 158 in which HHJ Bowsher QC concluded that an Adjudicator had no jurisdiction to decide that one party's cost of the adjudication should be paid by the other party.

As we know, the Local Democracy, Economic Development & Construction Act 2009 amended the Act and introduced a new section 108A to deal specifically with party costs. The provision says:

108A Adjudication costs: effectiveness of provision

(1) This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of cost relating to the adjudication of a dispute arising under the construction contract.

(2) The contractual provision referred to in subsection (1) is ineffective unless-

(a) It is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or

(b) It is made in writing after the giving of notice of intention to refer the dispute to adjudication.

There has been some confusion concerning what Section 108A actually means. Did paragraph (2) (a) allow parties to lawfully include express provisions in their contracts allowing for one party to recover cost from the other or did this provision solely relate to allocation by the adjudicator of his fees and expenses? We now have an answer.

In **Enviroflow Management Limited -v- Redhill Works (Nottingham) Limited [2017] EWHC 2159 (TCC)** this very point was addressed by Mrs Justice O'Farrell DBE in which she said at paragraph 52 of the decision:

"In my judgement section 108A makes an express provision in relation to the costs of the parties relating to adjudication. It provides that such costs incurred by the parties in the adjudication process will only be recoverable where an agreement to that effect is ***made in writing after the giving of notice of intention to refer*** *the dispute to adjudication (unless it is a contractual provision relating to the adjudicator's fees and expenses)"* [my emphasis]

This is an important judgement because Enviroflow was relying on the implied term set out in Section 5A of the Late Payment of Commercial Debts (Interest) Act 1998 to claim its reasonable costs in recovering the debt Enviroflow considered was owed to it.

This very point was addressed in the next paragraph of the decision:

"In this case, by reason of the Late Payment Act, Enviroflow was entitled to seek its reasonable costs in recovering the sums due in respect of interim applications for payment by reason of an implied term. That implied term falls within the definition on "any contractual provision made between the parties to a construction contract which concerns the allocation between those parties of costs relating to the adjudication of a dispute under the construction contract". *Therefore, it is caught by section108A, subsection (2), and is ineffective unless the subject of an agreement made in writing after the notice of adjudication."*

So, it seems that two very clear points arise from this judgment.

Firstly, any agreement relating to the recovery of inter-party costs will only be recoverable if an agreement is put in writing after the notice has been issued.

Secondly, a party to an adjudication cannot rely on The Late Payment of Commercial Debts (interest) Act 1998, if it applies, to seek recovery of its reasonable costs in an adjudication unless a specific agreement made in writing after the notice of intention has been issued.

Don't you just love it when we have clarity?

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CARILLION
– SUPPLY CHAIN ADVICE






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If you are a director of a company that worked for one of the Carillion companies now in compulsory liquidation, you must feel like you have just awakened from an extremely bad dream. You also have, for what it's worth, my complete sympathy. The demise of this large Contractor was sudden, unexpected by most and will undoubtedly cause considerable damage in the UK construction industry.

There are increasing calls for public enquiries into the role of Carillion's directors, its bankers and even Government ministers in the collapse. All of this will take time and let's be totally blunt about this, for many, if not all, any good coming out of any such enquiries will simply come too late to make any difference. It is over the next few harsh months that the impact on the cash-flow of Carillion's supply chain will wound many and may even prove to be fatal for some.

There are some 43,000 employees affected by this news as well as countless Sub-Contractors and Suppliers. The Official Receiver has appointed PwC to assist it and issued the following advice:

"Unless advised otherwise, all agents, subcontractors and suppliers should continue to work and provide goods and services as normal, under their existing contracts, terms and conditions.

You will get paid for goods and services you supply from the date of the Official Receiver's appointment onwards. Over the coming days we will review supplier contracts and we'll contact you concerning these soon. Goods and services you supply during the liquidation will be paid for. A letter will be sent to suppliers shortly containing further instructions."

If you are a Sub-Contractor or Supplier with an existing contract with Carillion, here are a few basic steps to take to protect and safeguard your position.

1. Identify all contracts in place with Carillion. Review the conditions, particularly those on insolvency.

2. If you are unsure of your contractual position, seek advice.

3. The PwC undertaking to make payments going forward only applies to goods and services supplied from 16 January 2018.

4. If your contracts provide for automatic termination on the insolvency of either party this may mean that you will need a new order from PwC if you choose to continue to supply good and/or services.

5. Any new order issued by or on behalf of the Official Receiver needs to be considered carefully.

6. If existing contracts are to continue, payment notices are still required and you need to monitor these.

7. If you have provided any collateral warranties, remember that the beneficiaries of these warranties remain able to pursue you under the warranties.

8. If you are in possession of key certificates, licences or other sensitive materials, do not rush to hand these over. These documents may provide you with a stronger negotiating position when dealing with PwC.

9. It is possible that new parties will be introduced to take over elements of Carillion's works. You are not obliged to contract with these entities but it may be in your interests to do so.

10. If you have loose materials on site (subject to any contractual terms) you may wish to think about removing them until a way forward is agreed with PwC.

11. If you have provided a design or specification you may have retained your intellectual property rights and this may provide you with a good bargaining tool.

Although the damage caused by Carillion is not your fault, you still have a responsibility as a director to satisfy yourself that your business is not trading insolvently. You have to assume that any monies owed to you by Carillion are gone but you still have to pay your creditors. Does this give you a negative balance sheet? Can you still pay your creditors as and when they fall due? Will you get support from your bank? Do you need access to an emergency funding line? These are all questions that you need to address, and quickly.

If you need help, whatever you do, don't leave it to the last minute to seek professional advice.

For responses to specific queries call 01204 362888 and ask for Peter Vinden or Chris Duffill or email Peter at pvinden@vinden.co.uk or Chris at cduffill@vinden.co.uk

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CONTRACTORS AND CONCURRENT DELAY – THINK BEFORE YOU SIGN...

If you have read the judgement in North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC) you will understand why I and many of my industry colleagues are a little worried about the impact this case will have on our industry. Am I being melodramatic? Is this case really that important to the construction industry? I think it is. Let me illustrate what I am referring to by explaining what this case is all about.

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In September 2009, North Midland Building Ltd ("North Midland") and Cyden Homes Ltd ("Cyden") entered into a building contract incorporating the JCT Design and Build Contract (2005 Edition) with a bespoke schedule of amendments ("the Contract").
The Contract involved the construction of a very large house, barns and associated works in Lincolnshire.
It is clear that the project ran into many problems on site and delays were suffered as a consequence. Some of these delays were events for which, under "normal" circumstances, North Midland would have been entitled to receive an extension of time and relief from the payment of liquidated damages. I say normal circumstances because the bespoke amendments to the Contract I refer to above contained two alterations to the extension of time provisions of the JCT provisions which would prove to have, some would say (and I am one of those people) unfair consequences.
The first amendment required the Contractor to make "reasonable and proper efforts to mitigate" to overcome any delay which Cyden was responsible for. I don't have any quarrel with this first amendment. It is, I consider, simply an express provision which many would argue would be an implied provision in any event. The second amendment though, made to redistribute the allocation of risk in cases of concurrent delay, is a completely different matter and provided that "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account" in assessing extensions of time.
It is clear that North Midland realised, probably too late in the day, that this second amendment would deny North Midland an extension of time where there was clearly a delaying event(s) for which Cyden was responsible simply because North Midland was suffering from delaying events, for which it was responsible, at the same time.
North Midland decided to seek clarification from the courts on the effects of these amendments and in a Part 8 claim sought a declaration that: (i) the amendments made time at large where there was a cause of delay for which North Midland was responsible which was concurrent with another delay for which Cyden was responsible; and (ii) that therefore, North Midland's obligation was to complete the works within a reasonable time with any liquidated damages provisions becoming void.
North Midland's case relied heavily on the "prevention principle" which states that no party can require another party to comply with a contractual obligation in circumstances where that party has itself prevented such compliance. So, if an Employer prevents a Contractor from carrying out works on time and in accordance with the timeframes in the contract then the Employer cannot insist that the Contractor meets the original completion date. Furthermore, if there is an act of prevention by the employer and there is no mechanism to extend time for completion in such circumstances then time would be "at large", the contractor would only be obligated to complete the works within a reasonable time and any liquidated damages would not apply.
North Midland argued that because the contract amendments provided that no extension of time could be made in a period of concurrent delay, this meant that time for completion could not be extended, even in circumstances of Cyden's acts of prevention, and that as a result the prevention principle applied, causing time to become at large.

The judgement
The court upheld the amendments made to the extension of time provisions by Cyden and disallowed North Midland's claim for an extension of time.
Although North Midland was allowed a partial extension of time (due to delays caused by weather), North Midland was not awarded the remainder of the extension of time since these delays were caused by Relevant Events which were concurrent with delays for which North Midland was culpable. The court maintained that the concurrent delay provisions in the Contract expressly disallowed North Midland's claim for an extension of time, that the wording in the Contract was "crystal clear" and that no interpretation of the meaning of such provisions was necessary. In addition, as the definition of Relevant Events included any act of prevention by Cyden, this supported the view that parties had agreed how acts of prevention were to be taken into account.
In reaching his decision, the Honourable Mr Justice Fraser considered the prevention principle, relied upon by North Midland, finding that the prevention principle could not arise where the acts of Cyden did not actually prevent completion because of North Midland's own concurrent delays.
The judgement referred to the cases of Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) and Jerram Falkus Construction Ltd v Fenice Investments Inc [2011] EWHC 1935 (TCC) to comment that the prevention principle does not apply in cases of concurrent delay since "if there were two concurrent causes of delay, one which was the contractor's responsibility, and one which was said to trigger the prevention principle, the principle would not in fact be triggered because the contractor could not show that the employer's conduct made it impossible for him to complete within the stipulated time. The existence of a delay for which the contractor is responsible, covering the same period of delay which was caused by an act of prevention, would mean that the employer had not prevented actual completion".
Finally, the court dismissed North Midland's argument that its liability for liquidated damages fell away where there was an act of prevention. The court agreed that there was no authority to support North Midland's argument that if the Contract specified how to deal with extensions of time in such circumstances, then this could void any liquidated damages.
The court stated that the parties had made "a considerable number of amendments" to the JCT Design and Build Contract but only minor amendments to the standard clauses dealing with the payment and allowance of liquidated damages.

Summary
This is clearly an important judgement as it confirms that parties are free to decide how to allocate the risk for concurrent delay in contracts. It also follows on from a line of recent cases where there appears to be a leaning towards relying on a literal interpretation of contract provisions. The decision also provides contract amendments which have now been judicially approved. No doubt lawyers acting for Employers up and down the country will be rushing to include these amendments in their Contracts. BUT, before Employers and their lawyers get too excited, I understand that North Midland has just been given permission to appeal the judgement so this may not be the last word on the subject. Watch this space. The Court of Appeal may prove to have a very different take on the effects of these amendments. Only time will tell.

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