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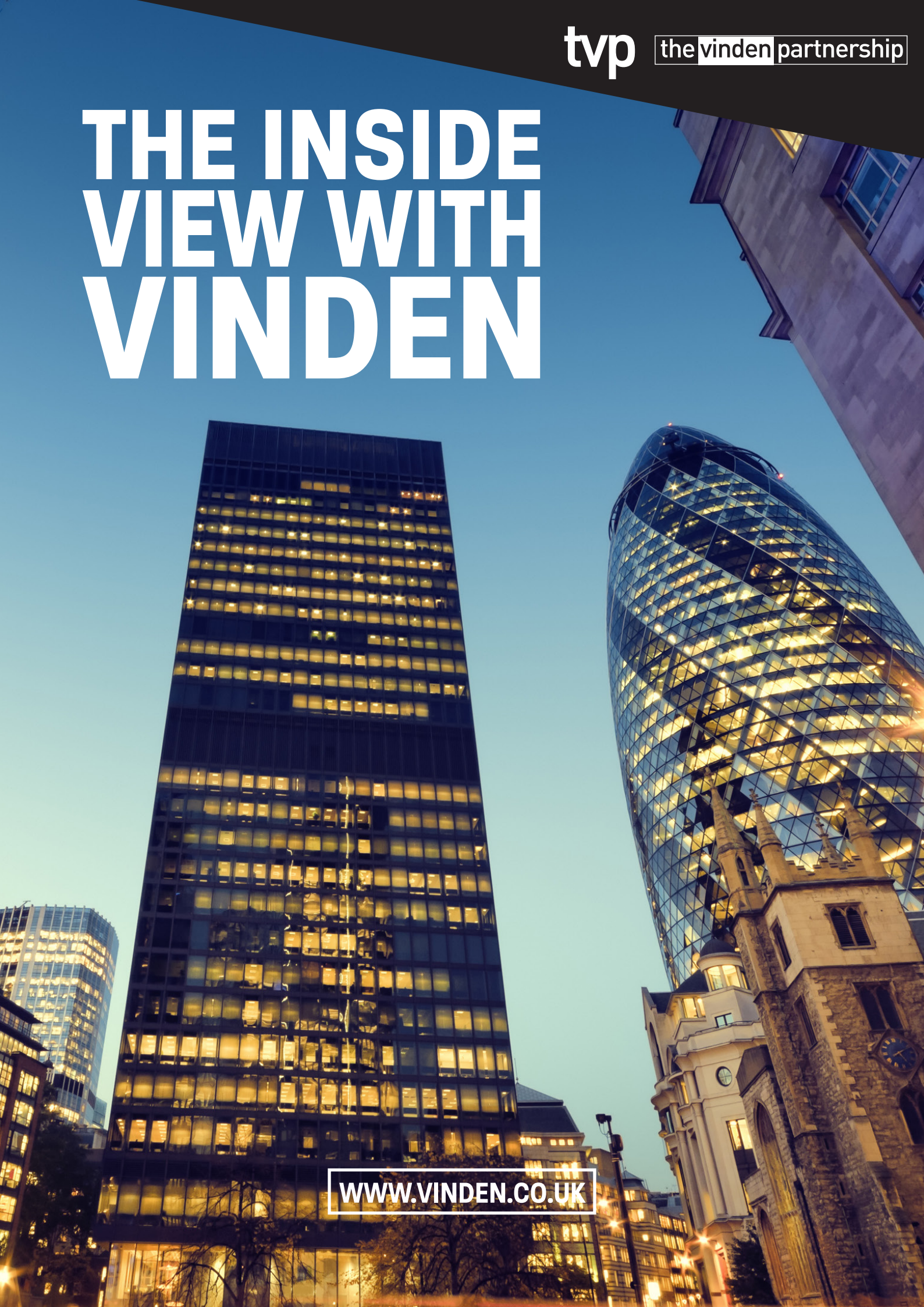

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VINDEN HAS CELEBRATED OVER 22 YEARS OF WORKING FOR CLIENTS IN THE CONSTRUCTION AND PROPERTY MARKETPLACE AND CONTINUES TO GO FROM STRENGTH TO STRENGTH.

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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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LATEST INDUSTRY COMMENTS

WHEN SORRY SEEMS TO BE THE HARDEST WORD

It was Elton John that sang the words "...oh it seems to me that sorry seems to be the hardest word.." What a great song. I am pretty sure Mr John was singing about unrequited love rather than legal claims but I just couldn't resist making the connection. Sorry about that.

We all know that in life things do not always go to plan. Accidents involving motor vehicles, poor professional advice, cock-ups in hospitals and so on are part of everyday life.

So, what do we do when things go wrong and we are involved? The instant human reaction is to want to apologise. But, more often than not, people are worried about making an apology, particularly if they are insured and their insurance arrangements make it abundantly clear that if they make any admission of liability their insurance cover will go out of the window and they will be left uninsured to face the claim alone.

If you doubt what I am saying, may I remind you of the Thomas Cook inquest into the deaths of two young children on a Greek holiday whose senior representative steadfastly refused to apologise at the inquest. Do you think the person wanted to say sorry? Could it be that the representative felt that an apology would amount to an admission of liability? Were Thomas Cook's insurers pulling strings behind the scenes? We will never know.

Now I am no psychology expert, far from it, but I have done my fair share of mediations and I know that a lack of an apology can stoke the fires of hell in the party that has been wronged. I have lost count of the number of times I have heard "if only he had said sorry at the start we wouldn't be here now".

An apology is often a part of a

> ***The lesson is that an early and genuine apology can do much good at no cost.***

mediated settlement so there is definitely something in this. Could it be that if a party that has committed a wrong apologised at an early stage, an escalation of the dispute might be avoided?

It seems that I am not the only person perturbed by the conceptual link between an apology and an admission of liability. My attention has recently been drawn to a pamphlet published by the NHS Resolution entitled "Saying Sorry". The front page includes the following very wise words. "Saying sorry meaningfully when things go wrong is vital for everyone involved in an incident, including the patient, their family, carers, and the staff that care for them". The pamphlet goes on to explain why, when, who and how the apology should be made. It is an excellent document and available at www.nhsla.com/claims/Documents/Saying%20Sorry%20-%20Leaflet.pdf . I am not sure who drafted the pamphlet but, whoever you are, well done!

So, does saying sorry amount to an admission of liability? Well, The Compensation Act 2006 clearly states that "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty", so the answer seems to be no. But be careful – how you make the apology is clearly going to be important. An insurer may not be too bothered about you saying "I am sorry X, Y and Z happened" but will probably be upset with you if you say "I am sorry I caused X,Y and Z – it is entirely my fault". Do you see the difference?

Even the making of an open offer to settle may not be seen as proof of guilt. The Court of Appeal in Amber v Stacey [2001] ALL ER 88 addressed this issue in which it was said "The lesson is that an early and genuine apology can do much good at no cost." But again, care needs to be taken in drafting any such offer.

Where does all this leave us? Well it seems obvious that if you are on the end of a claim, an early acknowledgement and apology is likely to take the heat out of an otherwise hostile situation. BUT. If you are insured, it is always a good idea to get your Insurer to approve any apology you are intending to make before it is made – just to be sure!

So, Mr John, sorry doesn't have to be the hardest word after all, or does it?

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CHALLENGING THE REFEREE

I confess to having a dislike for any sports person who challenges the decision of a referee. Being an umpire, referee or an adjudicator is not an easy task. The reality is that one of the parties to the game is not going to agree with your decision, will conclude that you are an idiot and you will go from hero to zero in a pretty short time. As the song goes... that's life.

We all know that the courts have made clear that there will only be very limited circumstances in which the courts will refuse to enforce an adjudicator's decision but it appears that parties are not keen to heed the message. The decision of the Technology and Construction Court (TCC) in Hutton Construction Ltd -v- Wilson Properties (London) Ltd [2017] EWHC 517 (TCC) once again sets out to try and reinforce the position. This is what happened.

Wilson engaged Hutton to convert a property known as Danbury Palace, Chelmsford, subject to the terms of a JCT Standard Building Contract Without Quantities. During the course of the works an argument arose between the parties concerning whether or not a valid Interim Certificate or Pay Less Notice had been issued in accordance with the terms of the contract. The adjudicator decided that Wilson had failed to issue either a valid Payment or Pay Less Notice and Hutton should be paid just over £490,000.

Wilson didn't agree with the adjudicator's decision, refused to pay and sought to challenge the decision. It did this at the enforcement hearing, by way of a Part 8 claim for summary judgment, claiming that the adjudicator's decision was wrong and should not be enforced. The Part 8 claim fell to be decided by Mr Justice Coulson in the TCC.

It appears that Mr Justice Coulson was not impressed with Wilson's Part 8 claim, rejecting all arguments and restating the basic principle that, provided the adjudicator's decision has answered the questions put to him broadly within the rules of natural justice, then that decision should be enforced, even if the adjudicator has made an error.

Mr Justice Coulson went on to identify two narrow exceptions

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to that principle. These are (1) where an error is admitted and accepted by everyone with no arbitration clause in the contract, so that the court has jurisdiction to deal with the issue or (2) where there is a dispute as to the proper timing, categorisation or description of the relevant payment application, notice or Pay Less Notice.

In rejecting Wilson's Part 8 claim, Mr Justice Coulson commented that its challenge should have been the subject of a prompt Part 8 claim, not one that was very late, incomplete and failed to seek any specific declarations. He went on to explain that Wilson was effectively seeking to re-run arguments that had already been aired in the adjudication and to introduce additional factual matters, both of which would have been inappropriate to consider at an enforcement hearing. Finally, Mr Justice Coulson commented that the adjudicator's decision was a lengthy 73 paragraph decision, based on a detailed consideration of the arguments and evidence. If the court was to reconsider that decision during an enforcement hearing it would relegate adjudication to the first of a two-stage process, which was unacceptable.

Summary

This decision of the TCC reinforces the principle that an adjudicator's decision can only be challenged in exceptional and narrow circumstances. It also makes clear that if a losing party wishes to bring a Part 8 claim to try and resist enforcement, it must do so at the earliest opportunity. Only short, self-contained issues that have arisen in the adjudication will be considered.

A Part 8 claim should clearly set out the issue(s) and declaration(s) it seeks at the earliest opportunity. In order to be considered, the issue(s) must be short, self-contained, have arisen in the adjudication and not require further oral evidence or any other elaboration beyond that capable of being provided during the enforcement hearing. Finally, the issue(s) must be such that it would be unconscionable for a court to ignore on such an application.

The TCC has again sent a very clear message that it will not allow disgruntled parties to defeat an adjudication at enforcement except in very limited circumstances. The question is, are parties listening?

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LOVE THY NEIGHBOUR .....JUST DON'T GIVE HIM ANY FREE ADVICE!

My wife absolutely loves offering my services as a matchmaker, job finder and building consultant to her many friends and colleagues and yes, you've guessed it, I don't get paid for any of these favours. Now I think it is fairly clear that when I succumb to my wife's promises and I find myself looking at a wonky wall, badly plastered ceiling or dodgy extension I am not entering into a contract with these people but the current Mrs Vinden (there will be only the one, I hope) might be surprised to learn that I could still be sued if I cock up in the granting of the requested favour. Why is this?

Well, even though there might not be a contract in place, I still owe a duty of care to anybody I have agreed to or been coerced into advising. If a loss is incurred as a result of free but dodgy advice and I am judged to have been negligent, then the person who has had the benefit of the free advice may also be able to sue me to recover any losses incurred as a consequence. Now you know where the saying "don't confuse the law with justice" comes from.

If you don't believe me, read the Court of Appeal's judgement in Lejonvarn v Burgess and another. The facts of the case are that Mrs Lejonvarn agreed to provide some unpaid project management services for some garden landscaping as a favour to her friends and neighbours, Mr and Mrs Burgess. What a nice gesture. Unfortunately, it appears that things started to go off the rails. The costs of the landscaping works started to escalate and it seems that Mr and Mrs Burgess did not fully approve of the quality of work undertaken by the appointed contractor.

Consequently, Mr and Mrs Burgess decided to dispense with Mrs Lejonvarn's free project management services and brought in another consultant to complete the project. Mr and Mrs Burgess then brought an action against Mrs Lejonvarn in the High Court claiming the

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If your better half volunteers you to give informal advice in a social context, it is possible, but probably unlikely, that a duty of care will arise if you offer an informal opinion and that advice proves to be wrong.

increased costs of completing the project.
The High Court decided that no contract had been formed between the parties. This was partly because Mrs Lejonvarn had not accepted payment for the project and there was no "offer" or "acceptance" to be found in the email correspondence passing between the Parties. However, the High Court still decided that Mrs Lejonvarn owed her neighbours a "duty of care" to exercise reasonable skill and care in acting as an architect and project manager and to prevent economic loss.
Mrs Lejonvarn's duty of care arose because she had "assumed responsibility" for the project. In reaching his decision, the judge noted that Mrs Lejonvarn:

- agreed to and provided a series of professional services over a period of time;

- expressed a degree of confidence in her ability to manage the project and control the budget;

- performed the services "in a professional context on a professional footing";

- and was, or should have been, well aware that her neighbours were relying on her to perform her services.

Perhaps not surprisingly Mrs Lejonvarn decided to appeal the judgement but that appeal was thrown out by the Court of Appeal.
From now on I will be telling Mrs Vinden to cease and desist from offering my services to friends and colleagues on a pro bono basis. Well, perhaps I won't go that far as the judge was careful to emphasise that the case before him did not relate to "brief ad-hoc advice" but something that started out as a casual conversation between friends at a party and quickly progressed to something which was "akin to a contract".
If your better half volunteers you to give informal advice in a social context, it is possible, but probably unlikely, that a duty of care will arise if you offer an informal opinion and that advice proves to be wrong. The fact that you have provided the advice for free and there is no contract will not necessarily prevent a duty of care arising. Why take the chance?
So, if you see me at a party, I will be the chap wearing ear defenders, gaffer tape over my mouth, drinking through a straw with the "no free advice given" label stuck to my forehead! Only joking.

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