THE TOWER OF BABEL
WHAT HAPPENS WHEN A BUILDING PROJECT GOES WRONG

(The 2006 Denning Lecture given by Mr Justice Jackson on 28th November 2006) (towerofbabel9)

Lord Denning

Lord Denning was a judge of wide vision and great humanity. He was a master of the *ex tempore* judgment. His contribution to the common law during the twentieth century was outstanding. He also treated junior counsel with great kindness, which was not the approach of all his brethren.

A lecture series in honour of Lord Denning is entirely fitting. For me personally, it is a great but undeserved honour to give the Denning lecture of 2006. I have been asked to talk about construction litigation and recent court reforms.

The Tower of Babel

The tower of Babel was a construction project in which everything went wrong. The design was over-ambitious, the builders walked off site and the parties found that they could not talk to each other, because they did not speak the same language.

Babel may have been the first building project to suffer these problems. It was not the last.

The range of construction disputes

Disasters on building projects usually come in two forms. First, there are crises when the project is in progress, such as unexpected delay or the need for major extra works. Secondly there is building failure after the event – the building may have to be evacuated, the bridge may have to be closed or whatever.

Disasters of the first kind usually result in escalation, sometimes massive escalation of the project cost. Disasters of the second kind usually result in expensive remedial works. Sometimes (as in the Tower of Babel) the building or the whole project may be abandoned. The question in all situations is the same. Who should pay and in what proportions? The candidates are (in no particular order) the building owner, the contractor, the designers, the sub-contractors and any insurers who may be on risk.

At the moment of crisis, there is often an acute dilemma for all involved. On the one hand, it is in their collective interest to collaborate so as to put matters right at minimum cost. On the other hand, each party is anxious (sometimes desperate) to protect its own position. This dilemma is particularly acute in the case of disasters which occur mid-project. But the same dilemma can arise after the event, when the original design and contracting team is re-convened to deal with the problem.

Sometimes collaboration proves impossible and each party simply looks after its own interest. But very often a sensible commercial agreement is reached in the short term. For example, there may be a supplemental agreement or successive supplemental agreements to keep the project on track, to provide additional funding and possibly to share the pain. Sometimes, in the case of major defects, all parties agree on a suitable remedial scheme and agree to implement that scheme without prejudice to their arguments on liability.

Sooner or later, however, the underlying dispute has to be resolved. Indeed that dispute may well have expanded. In my experience, the interpretation of a supplemental agreements hammered out at times of crisis often gives rise to yet further argument. If bilateral negotiation fails, the parties have four principal options for resolving their differences: adjudication, arbitration, mediation and litigation.

If the parties choose to litigate, then the courts will provide a one-stop service. If the parties choose one of the other three procedures, then the courts will provide an essential back up service. The courts will enforce the awards of adjudicators and arbitrators, deal with challenges to their jurisdiction and so forth. The courts also provide vital support for mediation. For example, the judge may build mediation windows into the litigation timetable, or he may be asked to decide points of principle as preliminary issues before the case goes off to mediation. Also, of course,

the courts will enforce the outcome of mediation if any party resiles from an agreement reached.

Thus the construction industry and building owners need a specialist court not only to decide disputes which are litigated, but also to provide essential back up for all other methods of dispute resolution.

The users of this court are almost always businesses or public authorities. What the business community expects from the court is not only good quality judgments, but also a swift and efficient service, delivered at proportionate cost. A judgment, however learned, which is only achieved at prohibitive cost or after inordinate delay may be of little value to the businesses who are involved.

The existence of a court which resolves construction disputes correctly and swiftly is necessary not only for those disputes which are litigated, but also for a much wider purpose. If the construction industry and building users know that such a court exists, they are more likely to perform their obligations or, failing that, at least to settle meritorious claims promptly. At the present time major construction projects are under way and more are planned for the 2012 Olympic Games. Thus there is a high public interest in the existence and maintenance of such a court.

It will be my submission this evening that the Technology and Construction Court, formerly the Official Referees' courts, provides such a service to the business community. It has done so for over a century and has pioneered many developments in civil justice, but we cannot afford to be complacent. That court must continue to adapt to the changing needs of society. Let me now turn briefly to the history of that court.

<u>The specialist court for construction disputes</u>

The Official Referees' courts were established by the Judicature Act 1873. The Official Referees were judicial officers to whom scientific or technical or detailed issues were referred for inquiry or trial. By the end of the nineteenth century the Official Referees' courts had become established as the natural forum in which construction disputes were litigated.

The Official Referees delivered a service which was widely appreciated. In the 1920's there were three Official Referees, namely Sir Edward Pollock,

Sir Francis Newbolt and Mr G. Scott. It was Mr Scott who invented the device of the Scott Schedule. This tool, which is still in regular use, is an excellent way to crystallise a myriad of detailed disputes.

It can be seen from articles and reports which were written during the 1940's and 1950's that the Official Referees' courts were a magnet for business and their workload steadily grew. In 1969 Sir William Stabb QC became an Offical Referee. He was a judge of great distinction, who rose to become the senior Official Referee. I remember not only the wisdom of his judgments, but also the kindness which he (like Lord Denning) showed to inexperienced advocates such as myself. The workload of the Official Referees' courts steadily grew through the 1970s and the 1980s. This was the era of juggernaut trials with numerous parties and lorry loads of bundles. Sometimes no courtroom was big enough for those trials, so that the vast and cavernous basement of the National Liberal Club had to be hired for the purpose.

In 1987 the Official Referees moved out of their corridor in the Royal Courts of Justice and into St Dunstan's House, a building which we share with the Commercial Court. However, Official Referees were not confined to London. Suitable circuit judges at court centres outside London were also authorised to despatch Official Referees' business.

During the 1970s and 1980s the London Official Referees pioneered developments in civil procedure, such as the early exchange of expert reports or the use of written witness statements in place of lengthy evidence-in-chief.

During the 1990s a whirlwind hit the civil justice system and another whirlwind hit the construction industry. The whirlwind which hit the civil justice system was Lord Woolf's inquiry into "Access to Justice". The whirlwind which hit the construction industry was Sir Michael Latham's inquiry.

Let me take first the Woolf Inquiry. This inquiry got under way in 1994 against a background of growing pressure for radical reform of civil procedure. It was no longer acceptable for civil litigation to dawdle on for many years, and then perhaps be struck out for want of prosecution. Trials and hearings were taking too long. The delays and cost of civil litigation were inhibiting access to justice. Furthermore, although mediation and other

forms of dispute resolution were emerging as respectable and effective techniques, they were not being sufficiently used. During the two years of his inquiry Lord Woolf consulted a wide range of lawyers, experts and court users through public seminars, private meetings, working groups and so forth. In his interim report of July 1995 and his final report of 1996 Lord Woolf not only articulated the feelings of court users and professionals, but also produced a coherent scheme for achieving the necessary reforms. This scheme was embodied in the Civil Procedure Rules 1998, the first complete re-write of civil procedure for 120 years.

Although it is fashionable to carp about detailed glitches and infelicities in the Civil Procedure Rules 1998, it is worth pausing for a moment to note the huge benefits which they have brought to court users. The scandal of civil litigation dragging on ineffectively for many years and then being struck out for want of prosecution has come to an end. An increasing number of disputes are now resolved without any formal legal process at all. Pre-action protocols (one of Lord Woolf's innovations) lead to many cases settling before they start. Mediation is now encouraged by the courts and often leads to earlier settlements.

The Civil Procedure Rules 1998 have had two important consequences for the civil courts. First, there has been a drop off in the workload of the courts. Secondly, those civil cases which are pursued proceed from issue to trial much more rapidly than they did under the old regime. Both of these developments have proved highly beneficial to litigants.

Let me turn next to the Latham Inquiry. During the 1990s, at the request of the Government, a team led by Sir Michael Latham carried out a review of contractual arrangements in the construction industry. The outcome of this review was Sir Michael Latham's report entitled "Constructing the Team", which contained a penetrating review of the problems of the industry and some enlightened proposals for reform. The Latham Report proposed legislation to make construction contracts fairer. Chapter 9 of the report proposed a system of compulsory adjudication, which would lead to a swift resolution of disputes on an interim basis, leaving final resolution for a later date. This would enable, for example, money to be passed down the line to a sub-contractor, pending the final evaluation of his claim either by arbitration or litigation. Many of the Latham proposals, including adjudication, were implemented by the Housing Grants, Construction and Regeneration Act 1996, which came into force on 1st May 1998. This

legislation had important consequences for the courts. In many cases adjudicators' decisions, although interim, were accepted by the parties as final. Thus a new form of dispute resolution sprang up. This development at a stroke further reduced the volume of old style litigation, but it also generated a new area of work for the courts, namely policing the adjudication system.

Against the background of these developments on several fronts, it was not possible for the Official Referees' courts to remain unaffected. The first great change came in October 1998, when the Official Referees' courts were transformed. They became the "Technology and Construction Court", which is generally abbreviated to "TCC". The title of Official Referee was abolished. The distinguished circuit judges and senior circuit judges who sat as Official Referees were re-christened "TCC judges". Another innovation was that a High Court judge, Mr Justice Dyson, was appointed to be judge in charge of the TCC. Mr Justice Dyson spent approximately half of his working time hearing TCC cases and the other half on general Queen's Bench business.

This last innovation was a radical break with tradition. For 120 years the Official Referees' courts had been trying building cases, both large and small, without a High Court judge taking any part whatsoever in the work of the court. Although the Official Referees were deservedly held in the highest regard, there was a widespread perception that construction litigation was not properly respected by the powers that be. Throughout the 25 years that I practised at the Bar, I heard the constant refrain: "Why are the judges who hear these complex, high value cases not High Court judges?" "Why is our litigation regarded as inferior?" Indeed one journalist suggested to me that this was consequence of the English class system. Builders were regarded as tradesmen. Their affairs did not merit the attention of a High Court judge.

This analysis was misguided. The form and structure of the Official Referees' courts in the 1980s and 1990s was the product of a historic, evolutionary process. In truth nobody regarded construction litigation as in any sense inferior.

As mentioned just now, the appointment of Mr Justice Dyson to the TCC in October 1998 went some way to meet the concerns which had been expressed. However, this reform created new anomaly. The London TCC

now consisted of nine senior circuit judges and half a High Court judge. Mr Justice Dyson made a major contribution to construction law during his three years as judge in charge. In particular, he decided *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, a landmark case on the enforcement of adjudicators' decisions. This decision, which was subsequently approved by the Court of Appeal, has enabled the adjudication system to function smoothly. This is for the overall benefit of the construction industry and building owners. Despite such Herculean labours, the fact remained that the one High Court judge in the TCC was only there half time. This meant that he was generally shut out from undertaking the case management or trial of the largest cases which were passing through that court.

In 2001 Mr Justice Forbes succeeded Mr Justice Dyson as judge in charge of the TCC. He too has had a lasting and beneficial impact on construction law. See, for example, *Yorkshire Water Services v Taylor Woodrow Construction Northern Ltd* [2005] EWCA Civ 894; [2005] BLR 395, a decision which was upheld, indeed applauded, by the Court of Appeal. Nevertheless, Mr Justice Forbes was operating under the same handicap, namely that he was only half time in the TCC.

I succeeded Mr Justice Forbes as judge in charge of the TCC in September 2004. I had two hard acts to follow. I am grateful to both of my predecessors for their support. From time to time over the last two years I have continued to seek the advice of both Lord Justice Dyson and Mr Justice Forbes about TCC matters and they have been extremely helpful. Nevertheless responsibility for all mistakes made since September 2004 rests firmly on my shoulders.

It seemed to me on coming to the TCC that the reforms initiated in 1998 needed to be carried through to their logical conclusion. The Lord Chancellor (Lord Falconer), the then Lord Chief Justice (Lord Woolf) and other senior judges took a similar view. On 7th June 2005 Lord Woolf CJ issued a practice statement on behalf of himself and the Lord Chancellor. Lord Woolf rightly paid tribute to the outstanding contribution which the official referees had made and the regular TCC judges were continuing to make to the trial and management of construction and technology litigation. I echo that tribute, having many times appeared as advocate before those judges and having read their judgments with admiration. Nevertheless the Lord Chief Justice stated that the time had come for High Court judges to

make a proper contribution to the work of the court. The Lord Chief Justice then set out interim arrangements which would enable this to be achieved.

This announcement brings technology and construction litigation into line with the rest of the justice system. Take, for example, the Central Criminal Court, better known as the Old Bailey. This has a team of full time senior circuit judges, whose expertise in criminal law and deft handling of criminal litigation is respected throughout this country and beyond. Nevertheless a number of High Court judges regularly sit at the Old Bailey and help out with some of the most difficult cases passing through that court. Similar comments could be made about the chancery courts in the regions and the Chancery Division in London. Indeed similar comments could be made about all parts of the civil and criminal justice system.

Let me turn to the details of the interim arrangements for the TCC which were announced in June last year. The judge in charge became a full time TCC judge. At a stroke, this freed me up to share the burdens of my colleagues and to undertake the management and trial of juggernaut cases which were passing through the court. At the same time a reserve panel panel of five High Court judges was set up, who could be called upon to sit in the TCC occasionally and by special arrangement with Lord Justice May. The Lord Chief Justice also announced a new system for classifying all new cases beginning in the London TCC. In a nutshell, cases to be managed and tried by a High Court judge would be classified "HCJ" and cases to be managed and tried by a senior circuit judge would be classified "SCJ".

The next event in the saga was the promulgation of the second edition of the TCC Guide. This new Guide had been foreshadowed by the Lord Chief Justice in paragraph 6 of his practice statement dated 7th June. The new Guide had been the subject of widespread consultation over a period of twelve months. Successive drafts had been submitted for the critical scrutiny – sometimes the very critical scrutiny – of court users and the profession. Quite apart from the written responses of many bodies such as TeCSA, TECBAR and the Society of computers and the Law, my colleagues also had input from TCC user committees around the country. Indeed I attended TCC user committee meetings in Birmingham, Cardiff, Liverpool, Leeds, London and Manchester, where the requirements for the new Guide were discussed in detail. The new Guide was intended to identify best practices, as they had been developed by individual judges, and to extend them to the whole TCC. The Guide was also intended to promote a more

harmonious approach to case management across all TCC courts. At this point may I thank the following for the particular contribution which they have made to the Guide: Judge Coulson, Judge Gilliland, Judge Havery, Judge Kirkham, Judge Mackay, Judge Thornton, Judge Toulmin and Judge Wilcox. Those judges have not only developed case management practices which are now enshrined in the Guide, but also they have made invaluable contributions to the process of drafting the Guide.

Section 3 of the Guide sets out, amongst much else, the criteria upon which cases are classified "SCJ" or "HCJ". One paragraph in section 3 invites the parties to write in to the court, setting out matters relevant to classification. It is remarkable how seldom litigants take up this opportunity to assist the court. However, I do sometimes receive letters from the parties, suggesting that "SCJ" or "HCJ" is the appropriate classification. These letters are invariably constructive and sensible. Indeed I almost always to decide to classify in the manner suggested in those letters.

The next stage in this process came on 1st November 2005. On that date Vivian Ramsey, the head of Keating Chambers and an editor of Keating on Building Contracts, was appointed to the High Court bench. Mr Justice Ramsey was appointed for the express purpose of sitting in the TCC. Thus the number of High Court judges attached to the TCC on a regular basis increased from 1 to 2. Furthermore, this is the first occasion ever when a TCC specialist has been appointed to the High Court bench for the specific purpose of trying TCC cases. In the past, on the relatively rare occasions when such practitioners were appointed to the High Court bench, they were appointed despite being construction specialists and not because of it and they were appointed in the expectation that they would sit in a completely different jurisdiction. All this was in stark contrast to the Commercial Court. For over a century outstanding commercial practitioners have been appointed to the High Court bench for the express purpose of trying commercial cases. Now at last the same thing is happening in the field of technology and construction.

I express the hope and belief that the appointment of Mr Justice Ramsey is the sign of things to come, not an isolated event. In future, when appointments are made to the High Court bench, the claims of the TCC can no longer be overlooked. Solicitors specialising in TCC work, barristers at the Construction Bar and existing TCC judges should all be considered for appointment or promotion to the High Court bench, on the basis that

whoever is most suitable will be appointed. Once appointed these new High Court judges should not be instantly siphoned off to other courts. Instead the IT industry, the construction industry and building owners should all have the benefit of their services for at least part of the time.

Let me now stand back and look at the TCC as a whole. The TCC operates at eleven court centres. Birmingham has a full time TCC judge, Frances Kirkham. Birmingham attracts work from a wide area and has a growing TCC caseload. Judge Kirkham has always made extensive use of telephone hearings. Liverpool has a full time TCC judge, David Mackay. Judge Mackay developed the idea of having a TCC liaison district judge for his area. This concept has now, through the TCC Guide, been extended across the country. Salford (Manchester) now has two full time TCC judges, namely Judge Gilliland and Judge Raynor, who between them despatch a huge amount of business. Indeed this is a centre of excellence for the north of England. Time does not allow me to mention the many outstanding judges around the country who sit part time in the TCC. Suffice it to say that the court could not function without their invaluable service. Last, but not least, I come to the London TCC. Each of the senior circuit judges here carries a heavy workload. On top of that Judge Toulmin has devoted much time over the last two years to developing a scheme, whereby in appropriate cases judges may offer their services as mediators. If any court users wish to take this scheme up during the pilot study, it is my hope that Judge Toulmin will act as mediator. Although I found the training sessions enlightening, I would not feel competent to act as mediator myself.

Let me now look at the shape of the London TCC. Not so long ago it comprised nine senior circuit judges, all sitting full time on TCC business. That number reduced to seven, owing to the drop off of civil litigation for reasons mentioned earlier. Last year the number of senior circuit judges reduced to five owing to retirement and judicial redeployment. In a few weeks time that number will reduce to four owing to another retirement. At the same time, as can be seen from our latest annual report, the workload of the London TCC is gradually growing. In particular the number heavy and complex cases being launched in the TCC is growing. This marks a reversal of the general trend of the last decade. If the workload of the London TCC is growing and the number of senior circuit judges in the court is diminishing, consideration should be given to appointing a third and perhaps even a fourth High Court judge as regular TCC judges who sit in that court for at least half of every term.. I appreciate that High Court judges are a

scarce resource and many parts of the court system are pressing for their proper share of that resource. Nevertheless there are 108 High Court judges in all. No less than thirteen of them are assigned to the Commercial Court (leaving aside the "reserve" High Court judges, who also have a Commercial Court ticket). I have the highest respect for the Commercial Court and for the judges who sit in that court. Nevertheless, I would respectfully submit that the work of the TCC is no less important. The TCC, like the Commercial Court, deals with complex high value disputes and sometimes with international disputes.

The construction industry accounts for some 10% of this country's GDP. It is vital to our economy, our infrastructure and our public services. The construction industry will be crucial to the success of the Olympic Games in 2012. Precisely the same comments can be made about the IT sector and its role in our economy and public services. Dispute resolution within these industries is a matter of obvious importance. In dealing with such disputes the TCC is providing a much needed service to the business community. The official referees and the TCC judges have always been pioneers in civil procedure and they still are. The TCC is committed to resolving every case in a manner which is fair, expeditious and, so far as possible, causes the least disruption and cost to court users.

Let me end this lecture, where I started, namely at Babel. The builders of that ill fated tower, after the failure of their enterprise, did not start suing each other. Instead, according to the book of Genesis, they were scattered abroad across the face of the Earth. In modern parlance, they moved on.

What distinguishes construction litigation from certain other forms of litigation is that the parties have priorities which lie beyond the dispute in hand. The parties want to find some sensible resolution of their problem, and then get back to their real business. That is what the courts must help them to do.

Rupert Jackson 28th November 2006
Judge in charge of the Technology and Construction Court