The JCT Povey Lecture

Let’s make friends with reality

Tony Bingham

13 November 2014

Introduction

On Thursday 13 November the JCT Povey Lecture was given by Tony Bingham, Barrister at Law, Arbitrator, Adjudicator. His lecture, entitled 'Let's make friends with reality', was presented at the Bevin Hall, Local Government House, Smith Square, London.

The JCT Povey Lecture is an annual event at which an eminent person is invited to give his/her thoughts on significant matters that are relevant to the construction and property industry.

The JCT Povey Lecture was inaugurated in 2003 as a public acknowledgement and tribute to Philip Povey who served the Joint Contracts Tribunal for 50 years.

Biographical Details

Philip John Povey – Barrister – commenced in construction as a legal adviser to the NFBTE, later became the Construction Confederation, in 1951. At the same time he began to assist the Joint Secretaries of the Joint Contracts Tribunal (the JCT).

Philip first became Director of Legal Services at the Confederation and then its Director General. He later became the first Secretary-General of the restructured Joint Contracts Tribunal Limited in 1998.

Philip's work for the JCT became well known through the publication of JCT Standard Forms of Contract, which in time found their way to many parts of the world. He had a keen mind, which steered him around what he viewed as the less important or parochial issues for which the industry seems to have a particular attraction and enabled him to get to the core of a problem and to resolve it. He was an extremely skilful draftsman who invariably managed to satisfy the demands of many disparate, often competing, bodies.

Although there were committees, working parties and individuals that provided valuable input, it was Philip who shouldered the burden of writing the text.

He retired from the JCT at the end of 1999 but died suddenly only 18 months later, in 2001.

About JCT

The Joint Contracts Tribunal was established in 1931 and has for over 80 years produced standard forms of contracts, guidance notes and other standard documentation for use in the construction industry.

The Joint Contracts Tribunal is an independent organisation representing all parts of the construction industry and is the leading provider of standard forms of building contract. The following are Members of JCT:

British Property Federation Limited
Contractors Legal Grp Limited
Local Government Association
National Specialist Contractors Council Limited
Royal Institute of British Architects
The Royal Institution of Chartered Surveyors
Scottish Building Contract Committee Limited

and JCT Council is comprised of five Colleges representing:

employers/clients (including local authorities)
consultants
contractors
specialists and sub-contractors
Scottish building industry interests.

Chairman: Peter Hibberd MSc, FRICS

Chief Executive: Neil Gower BA Hons, Solicitor

Past Chairmen:

1931 – 1956	Sydney Tatchell CBE, FRIBA
1956 – 1960	Sir Percy Thomas OBE, PRIBA
1960 – 1973	A. B. Waters CBE, GM, FRIBA, FRIAS, PPCIArb
1973 – 1978	P. H. Bennett CBE, MA, FRIBA, FRSA
1978 – 1983	Norman Royce FRIBA, PPCIArb
1984 – 1988	Patrick H. Barry OBE, RIBA
1988 – 1995	Roger M. Squire MA, FRICS, FRSA
	A. M. Millwood OBE, FRICS, FCIOB (Acting Chairman – May to September 1995)
1995 – 2002	Roy Swanston Hon DSc, FRICS, FIMgt, FRSA
2002 – 2007	Christopher Vickers CBE, FRICS, ACIArb
	Neil Smith FRICS, MCIArb (Acting Chairman – December 2007 to February 2009)

Let's make friends with reality

Tony Bingham
Barrister at Law
Arbitrator, Adjudicator, Mediator

The Introduction in each year's Povey Lecture paper explains, "*The JCT Povey Lecture is an annual event at which an eminent person is invited to give his/her thoughts . . . "*. So I looked up the meaning of 'eminent'. And I looked up the previous eminent people and their thoughts. As to 'eminent' it may be going too far to say that about this year's guest speaker; notorious, mischievous or plain speaking may be a better fit. As to thoughts, it is true that I have had a great deal of fun in putting thoughts to you in these 27-years of my weekly page in Building magazine. Don't believe everything I say there, or here, for that matter. Yet the page did get me thinking . . . about our industry. Our construction world attracts a lot of whinging, or rather has attracted over the decades a fair number of eminent whingers . . . ready to lambaste the industry I adore. Most of these chaps have not attempted to do what I want to do with you, in and arising out of this lecture. I want us to use our insight into our construction world to come clean about how and why we do things . . . let's get real, face reality, stop moaning and make friends with reality.

Do you sometimes become bewildered about how much complexity surrounds us? And the stuff keeps coming. I begin to wander if my brain has become jam-packed, overloaded, can't keep up. Lucy has to take the chocolates off the conveyor belt and get them into a box. The conveyor belt starts speeding-up and suddenly she can't grab the chocolates fast enough. So things start unraveling quickly unless we figure out a way to slow down the conveyor belt or grab the chocolates faster. Ideally we'd do both. Some of the chocolates are starting to fall on the floor. Lucy has to think faster but hang on a moment, it may well be that the pace at which the human brain evolves can't keep up. Lucy starts stuffing the chocolates in her mouth, her shirt, trying to hide the problem. But the conveyor belt keeps speeding up, and the chocolates just keep coming. Then, when we can't eat or hide the sweets anymore, we freeze. We become mentally grid locked as chocolates start falling faster and faster to the ground. Eventually, we are forced to stop the conveyor belt and shut the factory down. With any luck, a little while later we re-organize, open up under new management and start all over again. Then things go fine again – for a while. But the conveyor belt starts picking up speed again and . . . The problem solving capacity buried inside of us is insight . . . enough to suddenly realize that all we have to do is hold the box at the end of the conveyor belt and let the chocolates drop in, one by one. So no matter how fast the belt gets going, keeping up is easy. You and I, if we are real constructors, have massive insight . . . let's use it.

REALITY

The Contract Documents: Reality

- Like the chocolates, they keep coming
- Insight tells us of Standard Forms
    - They have spread like a virus (Let's have a go at counting up)
    - No one reads them (that bottom draw is still there)
    - No one understands them (we all pretend)
    - They are physically unattractive
    - No one *likes* them
    - No one follows the rules machinery therein (the lawyers pretend!)
    - We just build, we construct regardless of the form of contract: **Reality**
    - We all play Monopoly . . . have you ever read the rules?

The <u>amended</u> Standard Forms: Reality

- Insight tells us
    - They are resented
    - They heap risk
    - They are a PR disaster
    - Here is an example of curious behaviour: -
        - *It is an NEC3 Option 'A' Standard Form for works at Charing Cross Station. It contains amendments to the NEC "Core Clauses" and then Z clause alterations to NEC 3 amount to 220. Yes 220. Yet it pretends to be a Standard Form.*

The in-house ad-hoc Forms of Contract: Reality

- Insight tells us that these too create tension from the outset. There is no chance that any trust and confidence arises between the parties. The bond is never made from the outset.

The Subcontract Contracts:

- No Main Contractor can hope to develop a team approach when it flies its 'Scull & Cross-bones' flag.

TEAMWORK . . . THE REALITY

- **Latham in 'Trust & Money' [1993] said:**

"Two Vital Concerns – Trust and Money

Two words have permeated all the discussions in this Review. They are the gatekeepers to any real progress. Even when not mentioned explicitly by a participant, they have certainly been implied. These words are *"trust"* and *"money"*. They are totally interlocked. For example: -

(1) Clients are the key to the whole construction process. Since ultimately they fund it, their wants and needs should be paramount. They want – and have the right to expect – buildings or projects which meet their needs and aspirations fully. But they are distrustful of other sectors of the construction process. They feel the need to hire consultants to defend their interests, even when they have chosen the procurement route of contractor-led design, or even if they have commissioned original designs and then Novated the design practice to the design-build contractor.

(2) Professional consultants fear that they will be held personally responsible by clients for unforeseen extra expenditure on contracts. They particularly worry that clients, as employers, will seek to detach them from their traditional role of professional impartiality when they are seeking to adjudicate between client and contractor under JCT or ICE conditions.

(3) Contractors worry that they will not be properly paid by clients, either because the employer will fail financially, or because the certified monthly payment will not properly reflect what they believe to be the true value of the work carried out. They also suspect that their specialist subcontractors will seek to overcharge them, and that they will be squeezed in the middle between their own original fierce tender price, rising costs of materials, and inflated demands from specialists.

(4) Conversely, specialists fear that they will be underpaid by main contractors for work, which they have done, or will be paid late, or subject to unreasonable discounts, set-offs, or other withholdings of monies, which are properly due to them. Specialist sub-subcontractors have the same concerns about the specialists for whom they are working. (They are usually the last to receive the "cascade" of cash and the least articulate voice of protest.)

The disturbing atmosphere was summed up for me by one medium sized specialist contractor, with years of experience, who said bluntly that *"there is no trust at all in this industry anymore"*. It was reflected by a large

international main contractor who said that if he was treated fairly by clients and able to make a reasonable profit, he would respond appropriately and give his client a good deal. He felt that many of the difficulties which currently beset the industry would then simply disappear. Too little trust – not enough money. A mighty machine which requires oil in its engine to drive it, has grit instead."

- **Sir Earnest Simon (The Simon Report [1944-1948]):**

"A more collaborative approach to design and construction".

- **Sir Harold Emerson (The Emerson Report [1962])**

(A survey of problems before the Construction Industry)
Adversarial and conflict ridden relationships.

- **Sir Harold Banwell [1964]**

(The Banwell Report: and Action on Banwell)
"1.1 In the first short chapter, which is the most important in the report, the Banwell committee outlined the main problem, namely that 'the various sections of the industry have long acted independently.' And this chapter includes what is probably the most important single sentence in the committee's report: *"While we make suggestions for alterations in practices and procedures, these will be of no avail until those engaged in the industry themselves think and act together"*.

- **Alfred Bossoms' [1934] book, *"Reaching for the Skies"*** said:

"The process of UK Construction, instead of being an orderly and consecutive advance down the line, is all too apt to become a scramble and a muddle."

And a favorite comment:

- **Denys Hinton Architect [1974] 'International Conference on Architectural Registration':**

"This brings me to the point that I promised to come back to when I referred to the 'so-called' building team. As teams go it really is rather peculiar, not at all like a cricket eleven, more like a scratch bunch consisting of one batsman, one goalkeeper, a pole-vaulter and a polo player. Normally brought together for a single enterprise – each member has different objectives, different training and techniques, and different rules. The relationship is unstable, even unreliable, with very little functional cohesion and no loyalty to a common end beyond that of coming through unscathed. What this calls for, of course, is leadership of a very high order."

Now then, does anyone accept that today in 2014, we have achieved these aspirations of teamwork, collaboration, co-operation and partnering?

AND when actually doing the work: Reality

- The architect does not want the responsibility of design
- The pricing/estimating for the construction work is a fiction
- The work itself will be a mass of variations
- The design build notion is loony
- Payment is a survival game
- Construction is best at going bust

'NOW LET'S MAKE FRIENDS WITH REALITY'

TEAMWORK – HOW?

There has to be a common purpose:

How do we make friends so as to produce teamwork, collaboration, co-operation, partnering? Insight tells us that these ingredients produce a successful project: But how?

Think of a team . . . any team . . . say a soccer team. That team wants to win. It has a mission. The members work together *to win* . . . that and the *common purpose.* And it includes beating the other team. There is no common purpose for *both* teams to work on. *Each* has a *separate* common purpose; not the same. You can test for this key ingredient in numerous circumstances . . . a family. . . a marriage. It can survive (just) without teamwork, without co-operation, without collaboration. But if you want to obtain those ingredients (let's call it teamwork) you have to agree a *common purpose.*

Now then, what is the *common purpose* in a construction project?
The employer, architect, engineer, PQS, project manager, the contractor, the sub-contractor, the sub-subcontractor, and the supplier? They do not have a *common purpose.* Let's make friends; try to find a *common purpose* between employer and contractor.

(1) The employer wants a fair quality product on time and on budget (Whatever that means)
(2) The contractor wants the same *and to make a profit*.
(3) Can we make friends?

Reality and insight tells me that we have to overcome "The English Disease". We English seem to have a problem with accepting that the supplier of services is welcome to make profit. I first became aware of this in the late 1970's. I visited the USA to inquire into building construction behaviour. Sir Maurice

Laing had given a paper in London; it inspired me. He spoke about the pace of construction work in the USA. He teed-up a visit for me to an office development in Atlanta. It shook me to realise that there was a real joint interest there in making the job work, *so as to make a profit*. If the contractor was making a profit, the job was going to turn out well for the client. Latham sideways touched on this: *"When contracts are won on a price, which can only produce a loss for the main contractor, the likelihood of a contract dominated by claims and of disputes between the main contractor and sub-contractor, is extremely high"*. Latham was not entirely right, my dispute work bears witness. It's not a likelihood; it is a damn certainty. Disputes, even conflict, between contractor and employer and architect and engineer and QS and all the sub-contractor: is the reality. Profit is the antidote. It is the lubricant that makes the machine work. So, how do we make friends? Let the contractor, and *help* the contractor: *Make a Profit!*

HOW? STOP THAT CHOCOLATE MACHINE.

Get the builder doing what he is good at . . . BUILDING:

Go back:

(1) Put the builder back in his place: A building contractor is very, very good at building buildings. *"Cobbler, stick to thy last"*. Stick to what you know … to BUILD.

AND

Go back:

(2) Put the architect, the engineer in his place: An architect is very, very good at designing buildings. *"Cobbler, stick to thy last"*.

(3) Sir Harold Emerson's *"Survey of problems in the Construction Industry"* [1962], was very misunderstood. I am told that he favoured Design and Build (as we now know it). He did not.

(4) Sir Harold Banwell [1964] was also said to favour Design and Build *"in no other industry is responsibility for design so far removed from the responsibility for production."*

(5) Sir Michael Latham [1994] talking about co-ordinated design. He (perhaps ambiguously) said, *"the traditional separation of design and construction has long been a source of controversy"*. And I was told that all this pointed him to Design and Build. It didn't.

Design Build contracts are real dispute territory and dangerous. Stop putting design responsibility 'risk' into builder's hands. All he does is to transfer the so-called design down to a sub-contractor. And if that sub-contractor is simply

a specialist builder of things, he will have no qualifications to design anything. The same goes for Design Portion contracts. The portion, on its face, is labelled highly specialised . . . so a sub-contractor takes on the design. Reality is lurking here. I am told that buildings and building construction is so complex that the architect cannot know what to specify or put on drawings. Hmmmm! More likely that the architect is worried stiff about the blame game. So he happily takes one step to the rear when it comes to design responsibility. Risk is the driving fear factor. Get real. My proposal is to take a step to the position where the person who has taken years to qualify as an architect or engineer, and has all those letters after its name is *the* person who *tells* everybody what to build. Pay better attention to Emerson, Banwell, and Latham. The design work must be and return to being:

(1) Pre-contract
(2) Pre-choice of building contractor
(3) Is time consuming
(4) Is worthy of good fees (Architects are under paid these days; Get real.)
(5) It's an on going very close relationship with his client
(6) Needs the input of a "Build-Ability person" in the design stage for a fee but not the same contractor who also builds the project.

These pre-bid people write the "script" to be eventually performed by the later chosen builder . . . transferring the risk of design, choice of product, fitness for purpose, fitness for particular purpose is quite outside the know how and qualifications of the builder. So why does a builder take the risk in Design Build Contracts (some call it Design & Dump), because reality makes him desperate for the work. So he runs the risk of losing money. He is commercially pressured (stupidly pressured) by Employer's wrong thinking. They like the idea of *"one bottom to kick"*. You are kicking the profit out of the builder, kicking the wrong bottom. Too much risk of no profit . . . no common purpose, no teamwork, no collaboration. The builder is looking every which way to somehow rescue a few bob. Stop this Design Build cop out. It is a barrier to *common purpose.*

TEAMWORK – HOW?

Make the Rules easier for builders to understand.

(1) Convert the contractual documents into a tool. Keep the legal language if you must (it is horrid), but introduce *tools* for contractors to use (print them in the form):
    - A form called "Contents of the Contract"
    - A standard form explaining the agreed programme (use tick boxes)

- A standard form (tick box) for weekly reporting and recording
- A *standard* CVI form. A piece of paper everyone will re-cognise.
- A *standard* CA/Architect weekly report form and same again
- A *standard* delay form. Yes tick box paper.
- A *standard* extension of time form: same again.
- A *standard* interim account form: Hurrah.
- And standard pieces of paper for the HGCRA system of "Pipe-up or Pay-up".

Do you all get the idea? It is to convert the legal bumf into practical everyday use by constructors. The lawyers designed the forms, but now we need *real* construction people to produce easy to use tools. Make friends with the legal bumf.

TEAMWORK – HOW?

(2) Amending Standard Forms: (in-house changes):
How to make friends with this item of behaviour?

The practice of amending industry agreed Standard Form contract documents collides with what arms-length industry negotiations of interested parties have regarded as a fair compromise of interests . . . a balance . . . Good Commercial Practice. If it comes to "freedom of contract", then it is attractive to argue that it is open to individuals to abandon or forgo the Standard Form. In real life (Reality) there is an imbalance of bargaining power. No true (real life) consent. One side will be in a better bargaining position than the other. Worse still is that the meaning and intention of amendments will require in-depth legal analysis and advice at bid stage. But that will not happen. And it is too glib to argue that the contractor will add a lump of cash to somehow account for the mysteries of the consequences arising out of the amendments. The party who proffers amended Standard Forms will be deviating from Good Commercial Practice. He puts himself at risk of being found to be doing something, which is grossly unfair, in breach of good faith and fair dealing. He risks getting a rotten job and a can of disputes.

These "Good Faith" labels are appearing in English Law. For example the Late Payments of Commercial Debts (Interest) Act [as amended in 2013] condemns payment terms, which industry would regard as "*grossly unfair*" to the supplier. It recognises inequality of bargaining power. A term in a contract as to when money is to flow is struck down by the act despite "*being agreed*" in the contract. Apply that "*grossly*

unfair" test to a Standard Form, which is amended and so called agreed, and then becomes "*the Contract*". It may well stumble if subsequently labelled as deviating from "*Good Practice*" and labelled in breach of "*Good Faith*" and "*Fair Dealing*"[1].

Make a note that for 80 years or so, commentator upon commentator has been beating a drum for co-operation, collaboration and teamwork in construction. It does not come at all if there is want of Good Faith and Fair Dealing. Both private sector and public procurement has to make friends with the Standard Forms.

TEAMWORK – Avoiding later disputes:

The real trick in dispute avoidance is to avoid variations, and avoid changes of mind. They lead to disruption, loss of time, claims for extension of time, prolongation costs and disruption costs . . . and disputes under all those heads.

(1) Get your design people to specify and detail precisely what the employer wants, pre bid.

(2) Leave no gaps.

(3) Only then go out to tender

In 1964 'The Banwell Report' said: -

"Variations have different effects. Some result in greater efficiency, but the vast majority impede the progress of a job and reduce productivity. Even where demolition and rebuilding are not required, variations delay the orderly progress of contracts. We consider that many variations are unnecessary and could be avoided if clients were more aware of the effect of their decisions, or lack of them on others. One common characteristic of almost all variations is that there has been insufficient forethought before starting work on site. Time spent on preparation before actual commencement of work on site is time well spent. Wider adherence to systematic methods such as those outlined in the publications we refer to in paragraph 2.2, particularly the 'Plan of Work', would undoubtedly help. The reduction of variations requires better pre-contract programming which will be carried out only if the parties themselves understand the full consequences of interrupting a programme. The RIBA has prepared a pamphlet 'Working with your Architect', which among other things advises clients of the desirability of avoiding variations because of the dislocation they cause. We hope that architects will bring this pamphlet to the attention of clients, particularly where major projects or new clients are involved.

[1] And see Mr Justice Leggatt [01/02/13] *Yam Seng v. International Trade* [para 119++]

A notion has grown up that variations are inevitable . . . part and parcel of the business of building something. But that is idle talk. The architect is not being robust enough with his client in warning about part complete design information and choices yet to be made. It is a fact that disputes thrive on change orders. The PQS will take a challenging attitude towards the contractor's claims for the consequences. The architect/contract administrator will take a jaundiced view of the extension of time consequences. Put a high priority on a fully detailed design and specification of the work before going out to tender.

Draw these pre-bid strands together – and make friends:

(1) The architect and engineer and project manager design and specify the Works . . . avoid Design & Build **("the Works")**.

(2) The contractual "stuff" is a Standard Form . . . un-amended **("the Rules"**).

(3) The bid package is fully detailed. No gaps for later instruction/ variations/change orders.

(4) The mentality is good faith and fair dealing.

The rush job: *Reality*

Latham [1994] said:
"*The client whose commercial requirements demand an early start on site and sequential design during the course of the work should choose a procurement route which will accommodate those wishes in a flexible manner and which avoids adversarial attitudes. Construction management or management contracting will be most appropriate. A lump sum contract such as JCT80 or a design and build route would be a recipe for disaster, if the work is intended to progress on site while design is still proceeding."*

In an interview in *Construction Manager* [Aug 2012], Sir John Armitt talked about procurement of building works on the Olympics. Some of the work was procured on a lump sum basis. Sir John said, *"lump sum contracting was where we had most of our commercial disputes. It's inevitable, that's the nature of lump sum contracting. I'm not a great fan of it. Clients and the design team rarely hone down design details sufficiently to make it work perfectly."* That is a perfect example of making friends with reality.

The reality is that if there is no time, no will, to produce a fully detailed specification you will have to put up with inevitable nature of the lump sum

disputes business OR find a way of massaging the procurement system or giving a clever title to cost plus. And at that there is a sharp intake of breath. In short, and if you do, you will have to team up and trust each other. Make friends with a 'Cost plus' project.

The bids:

It goes without saying that:

(1) Too low a price is a hostage to fortune;

(2) It takes a great deal of commercial strength and confidence to place the contract at a middle ground price.

Latham is worth repeating:
"When contracts are won on a price which can only produce a loss for the main contractor, the likelihood of a contract dominated by claims, and of disputes between main contractor and subcontractors, is extremely high."
You didn't need to be told that did you? You know it is true. So, let's make friends with reality. Do you see how I have come back to the *common purpose?*

"On time, on budget and with a profit".

Carrying out the Works:

The Contractor now comes on stage. He has a script. He knows what to build, he has his price and programme. Let him build.

Key features – Payment: Let's make it simple:

(1) There is to be monthly valuations by the contractor and separately by the PQS (for a Certificate).

(2) If there is a difference: compromise or adjudicate immediately.

(3) Meanwhile pay the lower of the two amounts.

(4) When to pay: Adopt the Network Rail 'Fair Payment Charter': -
- Pay the main contractor: Valuation date + 21-days;
- Main contractor pay the sub-contractor same valuation date + 28 days

Note: 33 main contractors have signed a concordat to this effect [April 2012].

Key Feature:

When compiling the monthly interim valuation do yourself a favour . . . . . explain the sum via chapter and verse. The temptation (reality) is for the payer's QS to take a jaundiced view of the payee's valuation and vice versa. If it comes to an adjudicator, the winner is likely to be the person who has given a fully detailed explanation of

- The total work done
- The reason why a variation is a variation
- The build-up value of the variation
- The cost of consequences of a variation (Disruption, EOT, Prolongation)
- The cost of multiple variations:
  - Disruption
  - Prolongation
- The claims for other disruptions: facts are explained in detail and costed[2]
- The claims for prolongation explained and costed in detail.

Key feature: Reporting and Recording facts

Reporting and recording: use a *weekly* tick-box reporting form (I have already recommended it be printed as part of any and all JCT Contract documents).

Note this carefully: I have said as Tribunal in numerous disputes that contemporaneous evidence is required. Disruption and Delays need facts recorded there and then. We need a "Standard Report Form".

Key feature: Make friends with Partisanship

The extension of time machinery as written in JCT/NEC and others is ham-fisted legalise. Convert it into a simple check-box tool. Print it in the Form (*i.e.* make it a Standard Form in the form):

(1) The architect/contract administrator/project manager is the first line in the extension of time machinery.

BUT

[2] Read Hamish Lal's book "*Qualifying and Managing Disruption Claims*"

(2) In law these folk are biased. Moreover they will be seen as obviously partisan.

(3) The job of the architect/contract administrator/project manager is to also wear the impartial, even handed, hat of a person holding the ring.

(4) Be seen to be impartial. Any item of extension of time, and/or disruption requires an inquiry. Be seen to carry out a detailed inquisitorial report. Make friends with facts.

(5) You employer's QS: be seen to be professionally thorough when evaluating extension of time/disruption and any other evaluation. Make friends with your unwitting bias. Confront it.

(6) If the employer attempts to interfere with these impartial decisions (it is very easy to be influenced by your client) give a plain reminder of your role as independent decision maker/certifier.

(7) But employers who are disappointed with decisions of the "independent" opinions of "his" team have the immediate avenue of calling for an adjudicator. Don't leave it to sweat; it will decompose the relationship. Make friends with a dispute.

(8) Make friends with extension of time. The contractor is put in real difficulty if he is deprived of a decision about his request for extension of time. Under JCT, the machinery is "prospective". The bad habit that has grown up is to "wait and see". That corrodes the relationship. There is no wait and see; Make friends with reality,
AND
If the contractor is disgruntled about no extension of time or low extension of time, adjudicate now, immediately. Get a decision.

Key feature: Reputation

Whether personal or corporate, you will suffer if you gain a doubtful reputation. In years gone by, some people and companies in construction saw thuggery as the way to win. That has changed. Large main contractors now (especially) work hard to gain a sound reputation not only with 'customers', but with their sub-contractors and suppliers. Treasure that reputation. Get shut of coercion, get consent.

Closing remarks:

Ever since coming to this industry as a young man, I have heard *"Teamwork, collaboration, co-operation, partnering, working together"* is the key to good construction. I believe it. Damned if I see it happening any more now, than then. Every day I decide disputes, I witness antagonism, conflict and partisanship.

And I believe in this: Most people in our industry want to co-operate, want to be friends of the building. But the human being hovers between co-operation and conflict. We co-operate conditionally . . . we will share, even with a stranger, yet, when that trust evaporates, each of us is primed to revert to conflict, lest we are bettered by the other.

If your policy is dump risk on that other party, the thread of trust is mighty thin at the outset. The evidence of "thin" behaviour is obvious. But if you want teamwork you have to find a *common purpose* . . . . . and if you can't hack it, do me a very big favour . . . . stop whinging about all this collaboration thing.

AND NOW LET ME MAKE FRIENDS WITH REALITY

The very first clause in the NEC form says: *"The Employer, the Contractor, the Project Manager and the Supervisor shall act in this contract in the spirit of mutual trust and co-operation"*.

My attempt in this paper is to ask "How"?

- Find profit in the common purpose
- Get rid of risk dumping in design and build
- Reform the Standard Forms of Contract into tools
- Oust risk dumping in fiddled forms
- Design the Project before beginning work
- Place the work at realistic prices
- Adopt the payment concordat
- Oust the partisanship in certifying extension of time, payments and more
- Treasure trust; keep it.

REALITY

THE REALITY is this:

There is absolutely no chance of achieving any of this!!

None of these ideas will be adopted. This is an industry which is hell bent on the blame game. That's why lawyers spend huge amounts of your money in designing circumstances, which will trap the other bloke. There is no *common purpose*, nor any chance of it. We love this adversarial, catch as catch can game; it is for ducking and diving.

All this talk (80 years of it) about collaboration, co-operation, partnering, working together, is all baloney. Latham, Simon, Emerson, and Egan are and were, not talking reality. Building is a business where disputes are so very ordinary . . . .that's why I make friends with it. Once you do too we have made friends with *Reality*.

The Joint Contracts Tribunal Limited
28 Ely Place
London
EC1N 6TD

E-mail: stanform@jctltd.co.uk

Website: www.jctltd.co.uk