

November 2007

# HILL DICKINSON

Commercial Property Newsletter

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## Welcome

Welcome to the November 2007 edition of the Hill Dickinson commercial property newsletter.

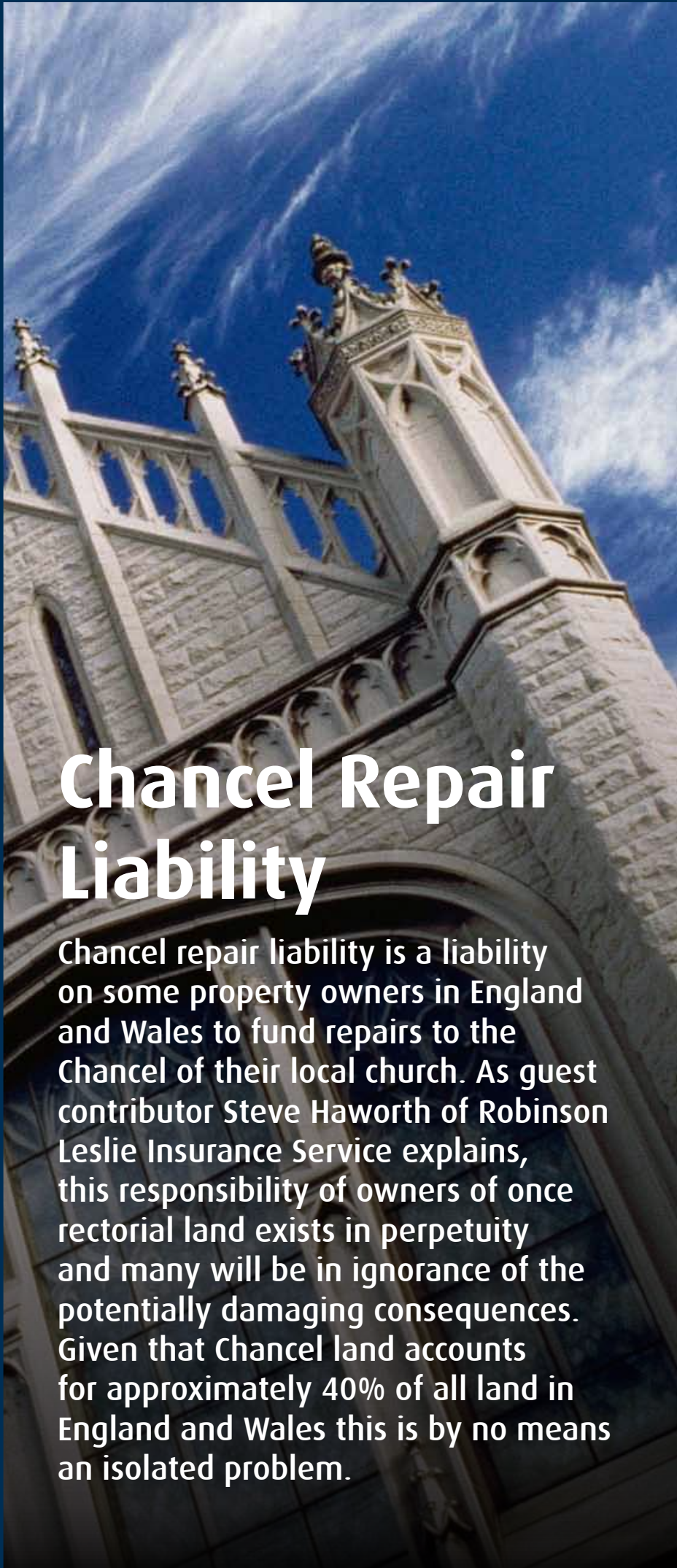
This edition includes contributions from two areas of Hill Dickinson's wider property capabilities, construction and property litigation, as well as the regular guest article, which this quarter discusses the controversial issue of Chancel repair liability.

Our Liverpool office relocation to St Paul's Square, Old Hall Street, continues to make good progress as we are set to move in the first part of 2008. The relocation has, as expected, been an extensive and intricate project, from initial negotiations and build through to furnishing and finishing. We are now at the stage where we can look forward to sharing with our clients and our people in the benefits brought by improved working practices in this enhanced, state of the art environment.

Pamela Jones & David Swaffield  
Joint Heads of the Property and  
Construction Practice Group

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# Chancel Repair Liability

Chancel repair liability is a liability on some property owners in England and Wales to fund repairs to the Chancel of their local church. As guest contributor Steve Haworth of Robinson Leslie Insurance Service explains, this responsibility of owners of once rectorial land exists in perpetuity and many will be in ignorance of the potentially damaging consequences. Given that Chancel land accounts for approximately 40% of all land in England and Wales this is by no means an isolated problem.

## History

Since medieval times, churches in England and Wales have been ministered by either a vicar (who received a salary or stipend) or a rector (who received tithes from the parish).

The rectors (of around 5,200 churches) were responsible for the repairs to the Chancel of their church, while the parish members were responsible for the rest.

Many Monasteries acquired rectorships and thus became liable for Chancel repairs. When Henry VIII dissolved the monasteries and sold their land the Chancel repair liability passed to the new owners and continues to this day even after subdivision of the land. These new owners are called lay rectors, the majority of whom are now private individuals and who are probably unaware that this medieval law still remains in force.

The recovery of funds from lay rectors is governed by the Chancel Repairs Act 1932.

The difficulty many face in assessing their potential liability is compounded by the fact that the land may not have been adjacent to the church and the liability may not have been recorded or identified on the deeds or at the Land Registry.

Whilst the Chancel repair liabilities are normally confined to rural communities, homeowners, purchasers and their solicitors should also be wary of settlements that have grown considerably in size, Fulham and Warwick being examples.

Although this ongoing liability has only occasionally been enforced or claimed by the Church, it remains nonetheless.

## A modern example

A recent high profile court case has highlighted the problem and has given cause for many people to reassess their own situation:

[Aston Cantlow -v- Wallbanks \(2003\)](#)

Mr and Mrs Wallbanks inherited a farm building in 1986 which was within the historical parish boundaries. However, when they inherited the property they also inherited the Chancel repair liabilities by succession.

In 1990 the church (Chancel) was in need of repairs and in 1994 the Parochial Church Council requested the Wallbanks to pay for the cost of the repairs.

The Wallbanks chose to dispute their liability and ultimately lost their case in the House of Lords, being ordered to pay in the region of £200,000 towards repairs in addition to a substantial bill for legal expenses incurred by the church.

## What can be done?

The first thing is to assess whether a property or piece of land is within a parish that still retains a potential liability for the cost of Chancel repairs.



Unfortunately, determining whether a property is subject to Chancel repair liability is fraught with difficulty and ambiguity as there is no single register which can be used to identify Chancel repair liabilities attached to properties in England and Wales and existing records are often incomplete.

Various companies offer a service to carry out "searches" of historical parish boundary data to provide an indication of whether potential liability exists or not.

## An insurance solution

There is no watertight solution to protect fully against the liability for Chancel repairs but indemnity insurance is available to mitigate the risk as far as possible and this is really the only viable option to provide protection should an assessment of the risk factors point to a potential liability.

Policies are available at a modest premium to cover property for up to 25 years and can also cover successors in title to the property, which will be necessary should the property be sold. In addition to covering the cost of any repairs cover may also be available for diminution of value.

## The future

Following the highlighting of the problem in the courts, the Government has now intervened and a Transitional Provision Order was made which came into effect on 13 October 2003. This effectively means that all Chancel repair obligations will cease on 13 October 2013 unless the Chancel of any church has noted their interest in any particular property or land with the Land Registry before this date.

Although this does not affect unregistered land, it does mean that new owners of registered land will only be bound by Chancel repair liability if it is protected by an entry in the land register and such entry will obviously put them on notice as to their potential liability.

Until then, only an awareness of the existence of the problem and the availability of indemnity insurance will assist in avoiding an unexpected and potentially damaging repair bill.

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## Section 17 Notices – Are you getting it right?

Whether a lease is classed as a 'new' or 'old' tenancy, section 17 of the Landlord and Tenant (Covenants) Act 1995 ("the Act") requires landlords to move swiftly to protect their right to recover arrears from former tenants and their guarantors. Property litigation specialist Matthew Forrest explores some traps for the unwary in the light of a recent significant case.

### The legislation

In simple terms, section 17 requires a landlord to serve a notice on a former tenant or its guarantor informing them that:

1. a sum is due; and
2. the landlord intends to recover that sum from them.

The Notice must be in a prescribed form and must be served:

'within the period of 6 months beginning with the date when the charge becomes due'.

This will include the date on which any sum, whether rent, service charge or any other sum specified under the terms of the lease, falls due.

### The case: Scottish & Newcastle plc -v- Raguz

Scottish & Newcastle (S&N), the original tenant, assigned its lease to Mr Raguz in 1982. The lease was then subject to further assignments. A rent review fell due on 17 April 1995 but was not settled until September 2000. The current tenant stopped paying rent in 1999 due to financial difficulties. The landlord served a section 17 notice on S&N in respect of the passing rent. The notice did not refer to any uplift of rent which would follow the determination of the outstanding rent review.

S&N paid all of the outstanding rent (including the uplift arising out of the rent review) and sought to recover these payments from Mr Raguz under the indemnity implied in the assignment from S&N to Mr Raguz. Mr Raguz claimed that section 17 prevented a landlord from recovering the uplift element unless section 17 notices had been served in respect thereof within 6 months after each rent payment date between the rent review date and the date on which the review was settled.

As the landlord did not serve notices in respect of the increase until September 2000 it was successfully argued by Mr Raguz that:

1. the increased rent could not lawfully be recovered from S&N; and
2. because S&N could not have been obliged to pay, S&N could not recover this from Mr Raguz under the indemnity.

Much to the surprise of most practitioners and landlords, this decision was recently confirmed by the Court of Appeal. And whilst a further appeal is expected, for now landlords need to act in accordance with the procedure required by the Raguz case.

### The procedure - rent review & balancing service charges

Where rent is undergoing a review or there is a balancing service charge, the final sum payable will not be certain and therefore cannot be demanded as required by section 17.

#### Pre-Raguz:

Common practice in these situations was to serve a section 17 notice that:

1. claimed the level of rent known at the time of service; and
2. reserved the right to claim for a higher amount once determined by serving a second notice within 3 months of the new rent being determined.

#### Post-Raguz:

Best practice now must be to:

1. Serve a s17(2) notice within 6 months of the actual review date (assuming it is also a rent payment date);
2. Serve a s17(2) notice within 6 months of each subsequent rent payment date (e.g. quarter days) until the reviewed rent is determined; and
3. Serve a s17(4) notice within three months of the reviewed rent being determined.

This procedure will apply whether or not the current tenant is actually in default and failure to do so will prevent a landlord from recovering backdated uplifts in rent from a former tenant and its guarantor if there is a default by the current tenant in paying the balancing sum after the review date.

### What does Raguz mean to you?

The Court of Appeal's decision to uphold the original outcome of the Raguz case means that landlords must now ensure that they are fully aware of rent review dates in leases which have former tenants and/or guarantors in order that they may protect their position by serving the appropriate notices.

However, many landlords have already taken a commercial view, balancing the cost of serving notices against the risks of not doing so, bearing in mind the covenant strength provided by each tenant. The cost of this review process may in itself be significant.

For tenants, Raguz has created yet another administrative burden and cost as they may now have to deal with multiple notices relating to former leases where in reality the current tenant is perfectly secure and in full compliance with the terms of the lease.

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# Energy Performance – Not just for residential properties



Energy performance certificates for residential properties have been in the news this year as part of the Home Information Pack saga, but over the next 12 months they will become increasingly necessary for commercial properties. Bill Chandler reviews what is going to happen and what preparations you should be considering now.

## Background

Climate change has become (if you'll forgive the pun) a hot topic in recent years. The United Nations' Kyoto Protocol of 1997 has now been ratified by 175 countries and requires the European Union as a whole (and other countries individually) to reduce greenhouse gas emissions. Since buildings account for roughly half of all emissions, it was inevitable that they would be targeted and in 2003 the European Directive for the Energy Performance of Buildings was passed, requiring member states to make provision for energy assessments and other matters relating to energy performance. The Directive is now being implemented through the Energy Performance of Buildings (Certificates and Inspections)(England and Wales) Regulations 2007.

## So, where are we now?

The Government has always seen the Home Information Pack as the vehicle to introduce Energy Performance Certificates into the residential property market and it is now illegal to market most residential properties without a HIP (and therefore without an EPC). The next debate will be how old the EPC must be, since the EU Directive only requires it to be not more than 10 years old, whereas the Government was originally proposing a 3 month shelf life for residential properties. The Government has compromised at 12 months for residential properties (the 10 year rule will apply to commercial properties) but it is likely that this will be revisited at some point in the not too distant future.

## What will change in the next 12 months?

### Energy Performance Certificates (EPC)

The Government revised its timetable for implementation in the last week of October and now intends that from 6 April 2008 (less than 6 months away) an EPC will be required on the construction, sale or letting of any commercial property with a floor area exceeding 10,000 sq metres (and on the construction of all dwellings). Commercial properties with a floor area exceeding 2,500 sq metres will be included from

1 July 2008 and from 1 October 2008 an EPC will be required on the construction, sale or letting of virtually any building (residential or commercial).

### Display Energy Certificates (DEC)

From 1 October 2008 a Display Energy Certificate (slightly different from an EPC and valid for 12 months from issue) must be displayed in a prominent position clearly visible to the public in any building with a floor area exceeding 1,000 sq metres which is occupied by public authorities or by institutions providing public services to a large number of persons. The occupier will also need to have a valid advisory report (which will be valid for 7 years from issue).

## And in the long term?

Plant and machinery within buildings is likely to become the focus of greater scrutiny.

Air conditioning systems must now be inspected every 5 years with the first such inspections for existing systems required by 4 January 2009 for systems with an effective rated output of more than 250kW and by 4 January 2011 for systems between 12kW and 250kW.

The Government is also recommending energy assessments of boilers and heating apparatus and these are likely to become mandatory.

The logical next step is for buildings and apparatus not simply to be assessed but to require improvement where inefficiency is revealed. This may be by way of direct obligation or indirectly by factoring energy performance into business rates and council tax calculations.

It is almost inevitable that in time the use, repair or replacement of some existing apparatus will be restricted or even banned, which could have serious implications for landlords and tenants who have obligations to repair and possibly replace existing air conditioning, heating and other systems.

It is also likely that the requirement for DECs will be extended to include private sector buildings visited by the public.

## What should you be doing now?

- Scheduling assessments for properties likely to be sold or let after (as appropriate depending on size) April, July or October 2008.
- For properties subject to DECs, scheduling assessments and assembling information on actual energy consumption.
- Owners of large property portfolios may wish to consider training or recruiting in-house assessors.
- If taking leases of older and/or less efficient properties, consider negotiating qualified repairing obligations, service charge caps and/or break clauses in case the increasing burden of compliance becomes too much.
- Contacting your usual Hill Dickinson contacts if you require any further advice or assistance on this topic, either on a case-by-case basis or generally.

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# Construction Focus: Please let me stay a while?



Nick Warrington of Hill Dickinson's construction team considers two recent cases where the Court has demonstrated that in appropriate circumstances it will exercise its discretionary power to stay litigation where parties have failed to comply with the Construction and Engineering Pre-Action Protocol or with a contractually agreed dispute resolution procedure.

## Compliance with contractual dispute resolution procedure

The recent case of DGT Steel and Cladding Limited –v- Cubitt Building and Interiors Limited [2007] EWHC 1584 (TCC) considered whether or not a party was contractually bound to refer a dispute to adjudication prior to commencing Court proceedings.

Cubitt, a main contractor, engaged DGT to carry out external cladding works on a property in London. Cubitt's standard terms of sub-contract included an adjudication provision that:

"Any dispute, question or difference arising under or in connection with the subcontract shall, in the first instance, be submitted to adjudication in accordance with the Association of Independent Construction Adjudicators (AICA) Adjudication Rules and thereafter to the exclusive jurisdiction of the English Courts."

A dispute arose and notwithstanding the agreement DGT commenced Court proceedings against Cubitt for a claim for outstanding monies. Cubitt applied to the Court seeking an order that the proceedings be stayed until DGT had complied with its obligation to first adjudicate.

The Court had to consider whether the agreement to adjudicate was binding and, if so, whether it should exercise its discretion to stay proceedings whilst the adjudication was undertaken.

On considering the construction of the clause, Judge Coulson decided that the use of the word "shall" as opposed to "may" meant that the party had a mandatory obligation to refer disputes to adjudication prior to litigation. Judge Coulson also determined that although s108 of the Construction Act only created a right (not an obligation) for a party to refer a dispute to adjudication, this did not prevent the parties to a construction contract creating an obligation which made adjudication mandatory.

Having also determined that the dispute was materially different to a dispute dealt with by way of an earlier adjudication, the judge went on to consider factors influencing whether or not the Court should grant a stay in proceedings, including:

- the claimant had failed to comply with the Construction and Engineering Pre-Action Protocol;
- the Court considered an experienced construction adjudicator to be a suitable tribunal to deal with a dispute concerning valuation of works;
- the Court considered the costs of adjudication would be less than that of litigating the same dispute;
- as the proceedings were merely stayed, the parties would not be debarred from litigating the matter later if the adjudication did not resolve the dispute; and
- the parties had freely chosen to contract on terms where adjudication was mandatory.

For these reasons the Court ordered that the litigation should be stayed to allow the adjudication to be undertaken.

## Failure to comply with the Construction and Engineering Pre-Action Protocol

In the recent case of Cundall Johnson and Partners LLP –v- Whipps Cross University Hospital NHS Trust [2007] EWHC 2178 (TCC) the Court were again asked to stay proceedings, this time as a consequence of a party's failure to comply with the Construction and Engineering Pre-Action Protocol ("the Protocol").

The litigation concerned two projects where Cundall had been employed as an engineering consultant by Whipps Cross. The parties had been in protracted correspondence concerning Cundall's claim for fees arising from the first contract. However, the Court considered that during this chain of correspondence Cundall had failed to address Whipps Cross's requests for further information concerning the terms of the contract and the basis of the sums claimed. In relation to the second project, following a brief exchange of correspondence Cundall issued proceedings for outstanding fees.

The Court had to decide whether the Protocol applied to the contracts in dispute, whether or not the Protocol had been complied with and, if not, whether to stay proceedings whilst this was done.

In considering the requirements of the Protocol, Justice Jackson said:

“The Protocol sets out a procedure for the exchange of information between the parties followed by a meeting. Neither the letter of claim nor the defendant’s response are required to resemble pleadings either in their length or in their detail. What is required from each side is a clear and concise summary of their respective cases.

“If both the letter and the spirit of the Protocol are complied with, many disputes can be resolved at proportionate cost without the need for proceedings. Furthermore, disputes which are litigated can be more sharply focused at the outset.”

Justice Jackson considered the specific exceptions set out in paragraph 1.2 of the Protocol and decided that none of these covered the recovery of disputed professional fees and accordingly the Protocol applied to the dispute.

Justice Jackson then went on to determine whether or not, on the facts, the claimant had complied with the Protocol. He decided it had not done so, the reasons included:

- The contractual basis of the claimant’s claim in relation to the first project remained obscure until proceedings were issued, in particular the claimant’s solicitors never sent a letter of claim which complied with the requirements of paragraph 3 of the Protocol.
- In relation to the second project, whilst the claimant issued to the defendant an expert’s report it had had prepared, the claimant’s solicitors had again failed to issue a compliant letter of claim.

Justice Jackson also rejected the claimant’s arguments that the defendant had failed to issue a letter of response (as required by paragraph 4.3 of the Protocol) and had declined to attend a Protocol meeting between the parties. This was because the requirement to do these things did not arise until a compliant letter of claim had been issued and in this case this had not happened.

Having decided that Cundall had failed to comply with the Protocol, the Court had to decide whether to exercise its discretion and grant a stay in proceedings whilst the Protocol was complied with.

Justice Jackson granted the stay, giving three main reasons for doing so;

- 1) On the facts he considered there was a real prospect of settlement if the Protocol process was complied with;
- 2) It would be in the best interests of the parties because settlement may be achieved earlier and therefore avoid the parties incurring unnecessary litigation costs; and
- 3) It was unfair on the defendant when it had not been notified with a proper summary of claim in advance of the litigation.

Accordingly, the claim was stayed to allow compliance with the Protocol by treating the Claim Form as the letter of Claim.

## The effect of these decisions

The above cases indicate the importance of parties ensuring compliance with either a contractual dispute resolution procedure and/or the Construction and Engineering Pre-Action Protocol. These recent decisions are also consistent with the Court’s approach in enforcing agreements to undertake other forms of alternative dispute resolution (ADR). In the earlier case of Cable & Wireless Plc –v- IBM United Kingdom Limited [2002] EWHC 2059 (Comm) the Court found that an agreement to commit to ADR recommended by the Centre for Dispute Resolution (CEDR) was binding and ordered a stay in the proceedings to allow this process to occur. As such, it is suggested that an agreement to mediate would be similarly enforced.

All these cases show that the Court is willing to exercise its discretionary powers and grant a stay in proceedings for compliance with ADR procedures.

This approach encourages parties to use adjudication and other forms of ADR (where they have previously agreed to do so) together with the Protocol so as to attempt to resolve disputes without the use of litigation - and penalises those who do not. It can also be seen that non-compliance may ultimately lead to a dispute being unduly protracted.

Prior to entering into a contract, the parties should consider whether they want to make adjudication prior to litigation a mandatory obligation and draft the contract terms accordingly.

Where the contract is already in existence, the parties should consider:

- Does the contract make adjudication of disputes mandatory prior to commencing litigation? If it does, it should be complied with.
- If it does not, a claimant should decide whether adjudication or litigation (or some other form of ADR) is the most suitable resolution process for the dispute in question.
- If the claimant decides to litigate it should ensure (other than where one of the limited exceptions apply) compliance with the Protocol prior to commencing proceedings.
- If you are a party defending a claim, has the proposed claimant provided a compliant letter of claim? If the claimant has not, the defendant should consider whether it is appropriate to provide a detailed response or attend a “without prejudice” meeting until the claimant has done so.

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## About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

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