

## **Submission by David Mabbs**

### **Comments regarding Access to Justice in Jersey**

This is an optional form, which you can use in order to submit written comments to the Access to Justice Review, should you choose to do so.

Your comments should address matters contained within the Terms of Reference of the Review, which can be found on the States Assembly website from the link below.

[Read the Access to Justice in Jersey: Review document](#)

It should concentrate on issues where you have an interest, experience or expertise and provide factual information of which you would like the review to be aware.

#### **1. About you and/or the organisation which you represent**

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Organisation (if relevant)	
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#### **2. A brief introduction about you or your organisation**

CIBSE, FID, Rutherford CAT & IIT (USA), Cryogenics. Formally principal of ACJ of 9, New St, St Helier) est.1972, Multidisciplinary Building Services Engineers and Manufacturers. Employed 100 technicians (peak), 70 (av), 45 at liquidation. Specialised in air conditioning and projects of scale and/or complexity. Turnover av £5m pa, contracts up to £6m in both private and public sector. Operated pan island with sister company BTS Building & Technical Services (CI) Ltd inc, occasional projects in the UK.

[ACJ Air Conditioning Jersey Ltd went into liquidation in March 2013.](#)

I am therefore representing myself as the beneficial owner of the company who has suffered loss.

#### **3. Your comments regarding Access to Justice in Jersey**

These comments come from a position of my own personal experience as the principal of ACJ/BTS & AMP, (Associated Metal Products the groups fabrication facility) and the consensus views of my two ex fellow directors - Stephen Jacobs, Managing and Patrick O'Connell, Contracts.

##### **Background**

An encounter in the 1980's a first real experience with "access to justice" evolved out of issues relating to the JEC contracting department who were at that time becoming an unfair competitive threat to the continuing development of ACJ's business. The JEC as a States majority shareholder of the statutory monopoly utility, were in a position to seriously distort free market forces which they

did. Failed conventional attempts at maintaining fair tendering (level playing field) led me to chair Chambers Building sub Committee together with representing construction matters on the IOD's committee. They jointly sponsored the formation of the then Jersey Construction Forum (now Council) which was chaired by Senator Tony Chinn, co-ordinated by myself and Jim Naish). Amongst many initiatives we brought over to speak to the States and the industry Sir Michael Latham (The **Latham Report**, titled ***Constructing the Team***, was an influential report written by Sir [Michael Latham](#), published in July 1994. Latham was commissioned by the [United Kingdom](#) government and industry organisations to review [procurement](#) and [contractual](#) arrangements in the [UK construction industry](#), aiming to tackle controversial issues facing the industry during a period of lapse in growth as a whole).

This in support of lobbying the States and a series of excellent States reports by Tony Chinn for the construction industry to gain a stronger political voice and an industry in partnership with government etc. Frank Walker agreed to an Industries committee so as to ensure a sustainable arrangement, but the committee floundered. The Construction Council assumed this role but it is now less well represented by specialist contractors, the emphasis being the interests of client team "professionals."

Depressingly all the issues and the potential for an improved climate that this initiative was intended to achieve failed with conditions for construction industry practitioners continuing to deteriorate. The increasing and at times exclusive use of "domestic" JCT contracts used by the States (and it follows the private sector likewise) to bind sub contractors into Main Contractors contracts has resulted in potential and real abuse of sub contractors contractual rights of legal redress when disputes arise.

In recession with conditions distorted, attempts to resolve reoccurrences survive until the economy recovers and it cyclically starts again. A particular difficulty making risk management matters significantly onerous during this recession was the ill-timed introduction of the local employment laws and the tolerant abusive use of illegal zero hour contracts increasing the risk of abortive competitive tendering for labour intensive contracts. Not least the juggling of bid values to take on contracts so as to reduce recession led redundancies and the related severance payments. (In ACJ's worst case scenario this added around a £.5m direct tax on our business). Our "war chest" budgeting for this during better years and for trading out of the current recession was wiped out at a stroke by Main Contractors bankruptcies. In particular a significant and very well established builder for whom we were their preferred contractor.

### **Current (2007 to date)**

As the recession continued the settlement of interim applications for payments were taking much longer, breaching contract terms etc. or not paid at all in some instances. With Main Contractor liquidations continuing to directly affect our cash flow an application to HSBC to renew a trading facility after some 20 years or more met with almost a negative response. Having once borrowed with the banks enthusiasm up to £1m in the late 80's/early 90's even a modest amount to assist with covering retentions being held as fiduciary ring fenced sums could not be covered. Banks had effectively closed their books to construction related businesses.

We have chosen to illustrate conditions prevailing which were and continue to have a direct bearing on our engaging a contractual and legal mechanism to have main contractors settle accounts for completed contracts.

Recent progress to assist with this has included some problems we have encountered just obtaining clarification of dates and values which is making the cost of legal redress prohibitive.

For example there is a real need for improved contracts dispute resolution clauses to allow the speedy resolutions of issues such as those on the following list:-

1. Dates and time scales when they are found to conflict need agreement between the relevant parties?
2. Values that are identified as incorrect require co-operation to be amended and confirmed as

such?

3. Distortion as a consequence or for whatever reason requires to be addressed?
4. Matters such as those described should be dealt with as a current event asap when they become apparent?
5. Should a reasoned threshold be applied as to what constitutes commercial confidentiality and basic information such as that described should not be denied on this basis?
6. Is a contract with dispute resolution clauses requiring both parties to agree to a procedure fundamentally flawed when one party pays another?
7. In the event of disagreements should costs incurred in order to implement the contracts dispute resolution clauses have to be financed by the aggrieved party to trigger the mechanism for settlement?
8. What safeguards should be in place to avoid one party pricing the other out of legal redress?
9. If as can be demonstrated domestic contracts in the construction industry allow for the unilateral withholding of payments with limited current event redress, should this be a matter for public concern on States tax funded projects?
10. Specialist contractors subscribe willingly to client risk being relocated where it can best be managed. Do the PAC agree that the resourcing of "skills" employed in and by the public sector should not be restricted to the client team and denied to the practitioners employed to execute the project works?

*As a guideline, your comments should not normally exceed 3,000 words.*

Once completed, this template should be emailed to [A2JR@gov.je](mailto:A2JR@gov.je) or printed and posted to Access to Justice Review, Chief Minister's Department, Cyril Le Marquand House, St. Helier, Jersey, JE4 8QT.