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EDITORIAL :

As the curtain starts to fall on the final days of the current administrations second term of office in the UK there is scope for reflection on the impact the government has had on ADR practice and on the court system in general and to speculate on what the future holds. There is little doubt that this administration has done much to encourage ADR, particularly in respect of the use of alternatives to litigation for the settlement of public sector disputes. However, not all the initiatives have been directed at the private ADR. The number of state controlled and managed adjudicatory bodies, which are in reality tribunals by another name, have proliferated. The aim appears to be to provide cheaper and quicker forms of justice both for the state and the public and to widen access to justice.

Stepping firmly into the arena of private dispute settlement the Department of Constitutional Affairs announced the launch of the National Mediation helpline pilot for the 1 March 2005 in conjunction with the National Mediation Council. The Automatic Referral to Mediation Scheme (ARMS) piloted at Central London Civil Justice completed its trial period in March 2005. A full report of the evaluation of the scheme led by Professor Hazel Genn from University College London, will be published late in 2005.

The Human Rights Act has come in for much criticism in recent times and there are calls for its reform or even abolition. Since all ADR practitioners have to take the legislation into account during practice to ensure compliance with the requirements of due process, any change to the legislations has implications for those practicing in the field. Questions have been raised about the balance between the rights and duties of the individual and society by recent cases regarding a wide variety of issues, including : retrospective planning permission and planning enforcement orders with regard to land occupied by travellers ; the procedures adopted by school governors for the setting down of school uniform rules that impact upon religious dress codes ; the rights of individuals to gainfully engage in hunting; the rule of law and the power of the administration to impose restrictions on the freedom of the individual without resort to trial. It at least appears that high noon is rapidly approaching for political correctness.

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In order to celebrate the 90th anniversary of the formation of Chartered Institute of Arbitrators, the Institute held it's first congress in Cyprus on 1st March 2005. The Congress considered "Education and Training for the Future" with particular reference to assessing practitioner competence, the global remit of the CIArb and expansion of membership. On Friday 29th April 2005 The Wales Branch, the Chartered Institute of Arbitrators presents its annual ADR Day at the University of Glamorgan. The topic for the day is **LANDLORD AND TENANT DISPUTES -** Public sector rent disputes and private sector construction disputes. Details are on the back page. We encourage our readers to support this event. All comers are welcome.

Members are reminded that 1st April 2005 is the due date for renewal of membership. The membership fee for 2005/2006 has been set at £75, a modest rise over 2004, reflecting the increased levels of nomination now taking place in the UK by NADR.

G.R.Thomas : Editor

THE ROLE OF JUDGES AND ADVOCATES

Introduction

The aim of this short paper is to briefly set out and examine the roles undertaken by the two central players in the dispute resolution process, namely the advocates and the judges[1]. The objective is to provide a blue print for the structured resolution of disputes for the benefit of those who aspire to dispute resolution practice, be it as client representatives, attorneys (solicitors or barristers), judges, arbitrators or adjudicators.

It is easy for those who set out to study the law to lose sight of the way that the judicial process works as they become engrossed in the business of learning as many legal rules as possible. The type of court and the area of law involved may differ, as demonstrated below, but the basic process is the same.

- The disputing parties may be an individual and the state, as in a criminal trial, where the dispute centres on whether or not the individual has committed a crime
- It may be a public law matter where the dispute centres on whether or not the authorities have acted within the law in the exercise of public rights and duties
- It may be a civil matter where the dispute centres on the respective reciprocal legal rights and responsibilities of the parties arising out of contract, tort, trust, property relationships or family matters.

The Role of Judges.

The final outcome of the judicial process is a decision that states which of the parties has prevailed coupled with the consequences the court determines should follow from that decision.

- In criminal law the terminology involves a decision of guilt or innocence and, if the former, a sentence designed to protect society from the criminal activities of the person convicted and to deter others from emulating that wrongful conduct, rehabilitate the law breaker and punish the wrongdoer as a symbol of retribution and justice.
- The civil suit firstly determines whether or not entitlement is established. Success will lead to an award of damages/compensation for loss, or some other appropriate civil remedy, which protects the innocent party's legal interests. The court thus then rules on quantum – i.e. how much (if any) is due.
- By contrast public law proceedings are designed to regulate the conduct of the state leading to orders that quash the unlawful decisions of the authorities, prevent them acting unlawfully or compel them to comply with their statutory duties. The availability of compensation is limited to interests protected by EC law.

As a secondary matter the decision maker will also address the question of allocation of costs involved in the trial between the parties. The judge also has a role to play in managing the entire trial process.

The final outcome is arrived at by

- Conducting an investigation of the facts followed by a determination of facts (by a judge or jury).
- Conducting an investigation of and determination of the relevant law (by a judge).
- Applying the law to the facts – the judge declares that where XYZ facts are established that conduct amounts to a crime/civil wrong/public wrong etc and requires that ABC consequences should follow.

The Role of Advocates.

The role of the advocate is to advocate, to put their client's case to the court, to persuade the court and to influence it to reach just decisions favourable to their client at each stage of the decision making process.

Before a court of first instance the advocate seeks

- In appropriate circumstances[2] to persuade the court of relevant facts favourable to their client's case.
- In appropriate circumstances[3] to persuade the court that the law supports the client's case.
- To persuade the court by applying the law to the facts, to find for the client.
- To make appropriate orders pursuant to that decision, in order to do justice as between the parties.

[1] The term judge is used here to embrace all forms of third party dispute determiner ranging from the judiciary to private practitioners including arbitrators and adjudicators but excluding expert determiners and conciliators.

[2] It should be noted that the facts may not be in dispute.

[3] It should be noted that the law may not be in dispute.

Before an appeal court the advocate seeks

- To persuade the court that the lower court erred in its finding of law and to overturn that ruling.
- To persuade the court by applying the amended finding of law to the facts, to find for the client.
- To make appropriate orders pursuant to that decision, in order to do justice as between the parties.

The objective of the review of a judicial process, unlike an appeal aimed at overturning a prior decision, is to set a decision aside and thereby render it unenforceable. The advocate seeks

- To persuade the court that the lower court erred in its finding of fact in that no reasonable decision maker could have reached that conclusion in the light of the evidence before it. (factual)
- To persuade the court that the power exercised by the lower court was beyond its powers or alternatively was used for the wrong purpose and hence an invalid exercise of power (legal)
- To persuade the court that some breach of due process took place which renders the earlier decision unsafe or by applying the amended finding of law to the facts, to find for the client. (procedural)
- To make appropriate enforcement, prohibition or quashing orders, in support of the administrative proves.

Determining fact.

Two distinct methods may be employed to determine fact, namely the adversarial or the inquisitorial process.

The adversarial process involves the respective parties introducing evidence, be it of fact or opinion, to the court. The proofs may be in written form, supported perhaps by affidavit or orally. When proof is offered in person the other party is afforded the opportunity to challenge that proof through cross-questioning.

- The judge acts as an umpire, ensuring the parties comply with court procedures. The judge may ask questions to clarify any matters about which there is some element of uncertainty.
- The advocate will summarise the evidence and invite the court to conclude what that evidence has established.
- The basic premise is that there can be no liability without proof, established by the parties. The burden of proof lies with the claimant / prosecution, reinforced by the concept of *"innocence until proof of guilt."*
- The burden of proof is *"beyond all reasonable doubt"* in criminal trials and *"on the balance of probability"* in civil trials.

By contrast

- The inquisitorial process involves the judge taking a proactive investigative role in ascertaining the facts. Proofs may equally be in written form or oral. The judge then presents his preliminary findings to the parties who are afforded an opportunity to persuade the court that the findings are unfounded.
- The burden of proof vests initially with the investigating magistrate to establish a prima facie case, where after the burden shifts to the defence advocate to rebut that finding whilst the claimant/prosecution will seek to reinforce that prima facie finding, or alternatively,
- If no prima facie case is established, the claimant/prosecution will seek to rebut the absence of a prima facie case whilst the defence seeks to reinforce the preliminary finding of the judge.

Law students engaged upon practice courses [4] will have to deal with matters concerning proof of facts. Normally candidates are required to advise and or represent a client. This can include interviewing a client and witnesses as well as acting as an advocate and presenting the proof to a court. However, students on a dispute resolution course will be required to go one step further and determine facts on the basis of evidence presented to a tribunal.

Law students engaged upon academic courses in law are rarely concerned with the ascertainment of facts.

- Traditionally, the examination candidate is presented with a set of facts. The facts are seldom sufficient for a trial but set the scene for an academic exposition of a particular point of law.
- The facts provided will be highly selective and relevant either to the point of law.

[4] E.g. Legal Practice Course, Bar Finals, Part III and Award examinations for the Chartered Institute of Arbitrators.

- A given fact may be a red herring, having no import but designed to test the candidate's ability to identify facts relevant to the legal issue being examined.
- Occasionally facts are provided to ensure that candidates do not discuss matters outside the examiner's chosen topic.
- The absence of facts is frequently deliberate. A legal issue may classically involve several distinct scenario which have different outcomes. Without knowing which scenario applies it may not be possible to provide any analysis. The candidate may therefore be required to speculate, *"if ABC applies, then …. If XYZ applies then ….."*
- Care should be taken not to speculate on any facts not provided which are not required to respond to the question. The danger is that by broadening out a question, the candidate responds to *"the question they would have liked to have been asked"* rather than *"the question they have been asked"*. Thus a student should not turn a question about assault and battery into an examination of murder by speculating what would have happened if the injured individual in a scenario had died.

The relationship between facts and law

Relevant facts are the factual affairs specified by the rules of law concerning the matter at hand. There is a symbiotic relationship between law and facts, preventing a seamless progression from the determination of facts to the determination of law. The existence of certain facts may indicate that a range of different legal principles could apply to a situation. The legal requirements to establish legal liability / responsibility then invites a further examination of the facts required by each legal principle in turn, in order to determine whether or not the necessary facts exist to establish legal liability in relation to each of those legal principles.

For example : an initial examination of facts might indicate that that an incident could involve the criminal offence of grievous bodily harm, the tort of trespass to the person or the tort of trespass. Certain facts such as identity and causation would need to be established for all three hypothesis, viz., whether or not the wrong doer was actually involved as opposed to some other person and whether or not the incident caused the alleged injury. However specific facts would have to be proved in relation to each legal hypothesis.

- Grievous bodily harm requires proof of mens rea in the accused coupled with a specific level of injury.
- Trespass to the person requires proof of intention to carry out the act and an absence of consent.
- Negligence requires an intention to carry out the act.

The state of an individual's mind and in particular awareness of dangers/potential consequences of actions, or whether or not an individual held a particular opinion are facts that may fall to be determined by a court.

Foreign law is treated as a question of fact by an English court, which has to be proved to the court, though it would be a matter of law in the foreign court. Expert witness statements may therefore be used to prove what that law is and what it means.

The contents of a contract are a question of fact. Proof in respect of a written contract may appear to be uncomplicated, particularly when contrasted with the need to call the parties to attest to the terms of an oral contract. However, whether oral or written, it is frequently necessary to establish the meaning of the terms. Different interpretations of the contract can lead to very different results. Somewhat like statutory interpretation, this can involve consideration of the intentions of the parties. Often the terms of long standing contracts have already received judicial attention. In consequence, precedent may play a role in contract interpretation.

Questions of fact and law can be very closely bound up together. Thus, having established that a contract contained an exclusion clause purporting to exclude liability for death and personal injury and having secondly established the meaning of the provision as contemplated by the parties, a legal question as to whether or not that exclusion is lawful and thus effective might also fall to be decided, but that decision would be a legal decision, not a factual decision even though in common parlance one might say that *"everyone knows as a fact that such exclusion clauses are unenforceable."*

Managing the process.

Care should be taken to distinguish between the inquisitorial process and the modern interactive case management role undertaken by judges, arbitrators

and adjudicators. Note however that the management power of the judge arises out of the Civil Procedure Rules whereas the management powers of the arbitrator / adjudicator are default powers set out in the Arbitration Act 1996, the Housing Grants Construction and Regeneration Act 1996 and related Schemes, subject to the right of the parties to otherwise agree.

- Justice can be expedited if the parties are encouraged to agree common facts and relevant law, ensuring that the court does not waste time and effort unnecessarily. The case manager may thus direct the parties to identify in advance any matters upon which they can agree.
- The case manager may identify factors that need to be addressed by the advocates, including areas that need proof or clarification.
- The court may appoint a joint expert or limit the amount of resources that will be expended upon proofs.
- What the court, whilst exercising its management role must avoid, is pursing a course of action that assists one party to the detriment of another, by for instance introducing new avenues of investigation or by averting council to a cause of action that had been overlooked. It is not for the judge to help either party to make their case
- The court will on the other-hand set the agenda, prioritise issues, establish the running order and order exchanges to facilitate the smooth running of the trial.

Determining the law.[5]

Whilst the sources of law differ from civil law codes, which rely exclusively upon codes, to those in common law countries where the law is an amalgam of judicial precedent and statute, the central task remains the same, in that before a judge can apply the law, he has to first understand the established legal principles.

The basic task involved in interpreting codes and statutes is the same, but under the common law judicial interpretation of a statute establishes a binding precedent. Where the two systems diverge is in respect of the concept of judge made law.

The judicial task of determining the meaning of a statute and hence, under English law, of the intention of parliament is a consequence firstly of the inherent ambiguity of language and secondly of the legislative device of employing generic categories and adjectives rather than setting out specifics. Thus a statute may prescribe *"noxious substances"* or *"noxious substances such as …."* thereby invoking the ***eusdem generis rule***.

Where an ambiguity or uncertainty exists, the advocate will seek to persuade the court of an interpretation favourable to the client. Whilst the aim is at all times to determine the intentions of parliament, the existence of three classic tests, namely ***the literal rule***, ***the golden rule*** and ***the mischief rule***, recently reinforced by the European concepts of proportionality and context open up considerable scope for persuasion.

Thus the advocate can urge the court to

- Apply the clear, unambiguous intentions of parliament evident in the words of the statute.
- Adopt a meaning avoiding a manifest absurdity (all the time demonstrating that the other interpretation is absurd and thus could never have been contemplated by parliament)
- Adopt a meaning that addresses the intention of parliament revealed by an examination of the evil that the statute addresses.
- Adopt a meaning that matches the spirit of the legislative provision.
- Adopt a meaning evident within the broader context of the legislative provision and not limited to a specific section of the legislation.

An interpretation laid down by the courts and consistently applied thereafter may be immoveable, but there are times when there may be scope to argue that a prior court incorrectly interpreted a statutory provision. A higher court, particularly the House of Lords, may be persuaded to overturn that interpretation.

The role of the court as law-maker may be invoked where a gap exists in the law, in that there is no statutory guidance and the courts have not dealt with issue before. The judge has to make a decision. It is not open to the judge to find that there is no answer to the problem. In order to make a decision, the judge has to apply a legal rule. If there and so legal rule, he will have to discover one. Whilst opportunities for this pure form of judicial precedent are few and far between today,

[5] The following commentary applies equally to problem based course works, problem based exam questions and to moots.

nonetheless the ever changing nature of society continues to bring about situations that require judicial regulation where pre-existing law cannot provide a solution. The many actions that take their name from a precedent such as the ***Anton Pillar Order***, the ***Mareva Injunction***, the Tort of ***Rylands v Fletcher*** are all testament to this. Sometimes the changing attitudes of society are recognised by the courts and a remedy is eventually provided by courts, which have previously resisted invitations to do so, as exemplified by recent developments in the law of privacy.

The role of the advocate is to propose rational rules to the judge and invite the court to apply those rules to the instant case, thereby creating a new precedent. The advocate will draw upon general jurisprudential principles, namely the function and purpose of law, to indicate what the law should seek to achieve in relation to that specific area. In the pursuit of a new test / criteria the advocate can advise for example on

- The balance between the conflicting rights and interests of individuals, organisations and society.
- The need for clarity and simplicity.
- The need for a solution – identification of the wrong in society that needs to be dealt with.
- Ethical, moral and professional issues.
- Modern developments in society and novel imperatives.
- Obiter dicta, dissenting judgements and persuasive dicta from the Privy Council and foreign jurisdictions in support of a proposed test may be offered up.

The existence of a binding precedent will not necessarily act as a bar to further judicial creativity. Whilst it may be difficult to displace a long-standing and frequently applied precedent, there are nonetheless a variety of techniques that may be successfully employed to get around a troublesome precedent.

- A precedent established by a lower court is always susceptible to challenge in a superior court. Thus a high court decision can be over-ruled by the Court of Appeal or House of Lords and a Court of Appeal decision may be over-ruled by the House of Lords, which has the power to even over-rule its own previous decisions. Vehicles for persuasion include
  - The previous decision reflects outdated social mores. Even if apparently suitable for the needs of society at the time the precedent was established, the court produced a rule, which could not past the test of time. For that reason it was incorrect as needs to be changed.
  - The previous court got the law wrong. The law fails to strike the correct balance between the conflicting rights and interests of individuals, organisation and society.[6]
  - The previous court incorrectly interpreted the provisions of a statute and failed to apply the intentions of parliament.
- There are several situations where any court of the Supreme Court of Judicature can develop the law.
  - Cassus omissus : A relevant issue was not raised by counsel at the original trial, when the precedent was established. That omission led the court to err. In the light of this omission the law should be changed.
  - Distinguishing a case on the facts from the facts of the preceding case and advising the court that in the light of the novel facts a different course of action should be pursued by the court.
  - Sui generis : The court may find that whilst a previous case was correct upon its own very special facts, the precedent is not of general application.[7]
  - Conflicting precedents. Where it can be demonstrated that previous precedents provide conflicting rules there is an opportunity to urge the court to adopt the reasoning of one case and to reject the other.

[6] As in **Murphy v Brentwood** with regard to **Anns v Merton LBC** etc.

[7] As with **Junior Books v Veitchie** etc.

What is a dispute ? [8]

Questions by Annie McCartney
Responses by Corbett H Spurin

Question 1 : What do you understand by the meaning of *"dispute"* and does this include a claim - if so what do you understand by the reference to the word *"claim"* when applied to construction contracts? Does it include claims made under and sanctioned by the contract or is it something more formal such as that recorded on a Statement of Claim/Claim Form?

I am of the opinion that a civil dispute arises when *"one party asserts a legal entitlement (founded in tort or contract etc) to something, be it a right to damages/compensation, goods, services or the commencement of a process such as valuation or certification and the other party either denies that assertion or fails to respond within the requested time scale (if any), the contractually specified time or within a reasonable period of time for a considered response to be delivered, thereby demonstrating that preliminary discussions are at an end and a dispute has consequently crystallised."* What is being asked for must be clear and specific or determinable by application of a formula.

Frequently the assertion is in the form of a demand for payment of a sum of money. The demand may be expressed as a claim for money but does not have to be headed "Statement of Claim/Claim Form" etc (*unless the contract specifies a particular form*) provided the request for payment is clear and unambiguous. An inquiry is not a claim. In order to amount to a demand there is no requirement that it be a claim in court.

All disputes have two elements, namely entitlement and quantum though it should be noted that there may be no dispute about a particular element, as in either *"provided there is entitlement, we accept £5,000 is due"* or *"we accept that there is entitlement but only admit to £1,000"*. It is also possible to ask for a ruling on entitlement, leaving it to the parties to settle quantum on an amicable basis, a practice common in the US.

Not all claims are valid. The mere fact that a claim ultimately proves to have been invalid does not prevent a dispute arising, rather the dispute becomes one of entitlement, i.e. whether or not the claim is valid becomes the crux of what falls to be determined. Frequently the entitlement dispute will centre on whether or not a certificate or evaluation was accurate or alternatively whether the claimant was entitled to receive a certificate or evaluation. Depending on the outcome of that element of the dispute, the second element, namely quantum will or will not then fall to be determined, though if the question is whether a certificate or evaluation is due under the contract, then the contract procedure may require the certificator or evaluator to do that job so that the adjudicator has no more to do at that stage. It is now clear that an adjudicator has jurisdiction to open up and re-determine certifications and evaluations, but the adjudicator must be asked to do so by the claimant.

The factors that determine whether or not a claim is valid are many and varied :

- Was there a contract? If not there may be no claim or at best an accounting for undeserved benefit
- Entitlement may be subject to the fulfilment of contract procedures such as
  - the occurrence of some event – often by an outsider, time or date requirement, time bar,
  - a variation order,
  - certification and passage of specified time post certification,
  - application for payment etc in the manner specified by the contract including passage of time post application,
  - failure to issue a withholding notice, passage of time if any post failure to issue, reckoned from due date of payment etc and
- proof that the sum claimed has been earned in accordance with contract specifications. This may not in fact be a distinct and separate issue from the above since the absence of a certificate may well indicate that no service or benefit has been rendered, or alternatively has become due under the contract.

The scope of the dispute thus referred is another matter. Much may depend on whether the dispute concerns an interim payment, a final payment or occurs at an even later stage. Whilst an arbitrator may seek to ensure that all disputes arising out of a contract are dealt with by the arbitrator and are within his jurisdiction, the jurisdiction of the construction adjudicator is limited by the terms of reference set out in the referral notice, to all matters relevant to that notice and no further in the absence

[8] *This exercise formed part of the empirical research conducted by A.McCartney into the meaning of a dispute for the purposes of construction dispute settlement.*

of consent by both parties to broaden it out to include counter-claims on distinct and separate issues, though it is possible that a set off for outstanding prior sums owed by the claimant to the respondent may form part of the final accounting process in order to establish the sum due from one to another.

Question 2 : The wide definition of dispute espoused by Halki has been interpreted to mean *"there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."* **How workable is such a wide definition in reality when applied to the construction contract?**

There can be no dispute until the respondent has had sufficient opportunity to respond and either responds rejecting the claim, fails to pay on the due date for payment (if any), fails to issue a withholding notice where applicable under the contract mechanism, or fails to respond in a timely manner. The above interpretation makes no allowance for these factors.

Question 3 : The middle / touchy feely definition of dispute is best described in the case of Beck Peppiatt where the judge held, *" for there to be a dispute for the purposes of exercising the statutory right of adjudication it must be clear that a point has emerged from the process of discussion or negotiation which has ended and that there is something which needs to be decided."* **How useful a definition is this in reality?**

The value of this lies in that it goes to the root of whether or not there is sufficient time, within the construction adjudication process for the parties and the adjudicator to give due consideration to matters. It helps to eliminate the danger, inherent within the process, of ambush. However, in a simple dispute, by the time the respondent has submitted all his documentation, both parties may well have had sufficient time and similarly the adjudicator, and to stop the adjudication process on a technicality may serve very little purpose and merely force the parties to resubmit and go through the entire process. A judge requested to enforce a decision in such a situation may well be advised to consider whether or not justice is served by striking down an otherwise sound decision.

It is too simplistic to state that negotiations must always have come to an end, since the respondent may have tried to employ delaying tactics and half-heartedly engage in negotiations to buy time or wear the other party down by attrition. A negotiation in good faith or mediation clause cannot prevent a party referring a dispute to construction adjudication though a mediation clause as opposed to a good faith clause can give rise to a stay of arbitration or litigation. The fact that negotiations are underway demonstrates the existence of a dispute. A party can cut to the chase, bypass / truncate negotiations and call for an umpire. But preliminaries about a claim and reasonable time for consideration/evaluation of a claim must have passed.

Question 4 : The narrow approach to the meaning of dispute is often considered to be found in Nuttall v Carter where His Honour Judge Seymour stated *"In my judgment a dispute is something different from a claim…While a dispute can be about a claim there is more to a dispute than simply a claim which has not been accepted….For there to be a dispute there must have been an opportunity for the protagonists each to consider the position of the other and to formulate arguments of a reasoned kind…"* **This definition somewhat removed from Halki could be considered too narrow for the Legislator's intentions in the 1996 Act - do you agree?**

This goes to the root of what is sufficient time to respond. It is a gloss – adding detail – useful where vast bundles of documentation are landed on an unsuspecting party or where no response can be delivered until an expert has had the opportunity to inspect works and do some valuation/accounting. On the other-hand, if the contract procedure lays down rules for response, such as issue of a withholding notice then it will not apply. Thus, the only "***opportunity***" will be that specified in the contract, not ***"such reasonable opportunity"*** as judged by a court.

Question 5 : For the construction contract and following the principle that contract is all about the manifestation of voluntary agreement Durtnell v Kaduna has a ring of sense to the meaning of dispute; the judge is quoted as saying *" …it is not easy to see how a dispute as to the entitlement to an extension of time could arise until …. The Architect had made his determination or the time permitted for so doing had expired….Until the Architect has made his assessment or failed to do so within the time permitted by the Standard Form, there is just nothing to argue about , no dispute"* **As practising lawyers do you consider that this judgment has much to offer?**

This spells out the fact that entitlement is subject to the terms and procedures of the contract, something very relevant for instance to construction contracts but not applicable to a wide range of trade/maritime disputes.

Question 6 : **In line with *Durtnell v Kaduna* I was very arrogantly minded to produce a fairly basic pro-forma advice that should be issued by one party to another to establish that a dispute has arisen):**
"For the purposes of a construction arbitration and adjudication a statutory dispute or difference shall arise between us or crystallise as an adjudicable dispute once the contract machinery for the administration of construction claims as sanctioned by the contract itself has been fully complied with and no satisfactory outcome has been reached. If there is a failure to comply with the contractual machinery the responding party must be advised of this and be afforded [ ] days to remedy the situation and respond to the complaint before him. If no formal contract has been concluded a referring party must give the responding party a fair and reasonable opportunity to comment upon the potential dispute referred to him. The letter accompanying any potential complaint should be headed with simple words "Formal Complaint for immediate response within [ ] days to avoid a reference to adjudication or arbitration." **Your comments on this would be welcomed.**

As a proposed term to insert as part of a dispute resolution clause in a contract, this appears to be somewhat cumbersome, potentially repetitive since some of the detail may already be spelt out within the contract and introduces a restrictive formula. The more technicalities in a contract the worse it is particularly since sub-contractors in particular are often prone to failure to comply with technicalities and fall victim to the prescriptions. Main contractors tend to know the rules inside out and often exploit them.

On the other-hand, there is value in spelling out time requirements for responses and the consequence of failure to do so. However, it may be wise to temper such advice in a demand for payment, request for certification etc by "reserving the right to" rather than threatening, since this can force a matter away from cooperation and into formal dispute resolution mechanisms.

It is always useful to use a bold capitalised header e.g. **CLAIM – APPLICATION FOR PAYMENT** etc

A clarification of contract terms may be considered worthwhile e.g. *Pursuant to clause 30 XYZ contract, the sum claimed will become due 7 days from submission of this claim in the absence of a reasoned withholding notice. If payment is not then received on the due date, ABC Co reserves the right to submit the matter to adjudication* etc.

Rather than a pro-forma for all occasions, I would recommend a range of languages appropriate to differing circumstances, but following a standardised form, that could be usefully incorporated into claims, applications etc.

Question 7 : The 7 propositions set out by Mr Justice Jackson in *Amec Civil Engineering v Secretary of State for Transport* and commented upon in *Collins Contractors v Baltic Quay* does serve to provide some useful guidance on the meaning of dispute. How if at all could this guidance be improved?

For ease of reference, selected extracts from Collins are set out below: -

Collins (Contractors Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA Civ 1757

53. The remaining question which arises is whether there is a dispute which the parties have agreed to refer to arbitration. The clause is in wide terms. There is no doubt that if there is a dispute between the parties it is within the scope of the clause. In this regard we were referred to a considerable number of decisions on the existence or otherwise of a dispute in the course of oral argument yesterday. A number of different, and not entirely consistent, strands of thought can be discerned in them. There are, I think, a number of such strands.

54. In particular they include these: (1) A dispute requires both a claim and a rejection ***Monmouthshire C.C v Costelloe & Kemple*** *[1977] 5 BLR 83.*

55. (2) Such rejection is not necessary. As it was put by Templeman LJ in ***Ellerine Brothers (Pty) Ltd v Klinger*** *at page 1381: "... it seems to me that ... if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree'. If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."*

That approach received support from the reasoning of the majority in ***The Halki.***

56. (3) In ***Fastrack Contractors Ltd v Morrison Construction Ltd & Anr*** *[2000] 1 BLR 168, HHJ Thornton QC sought to reconcile the above cases by deriving this principle at paragraph 27:*

"A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

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57. (4) In two cases, namely ***Ken Griffin v John Tomlinson T/a K & D Contractors v Midas Homes Ltd*** *(unreported) 21st July 2000, and* ***Sindall Ltd v Solland & Ors*** *(unreported) 15th June 2001, HHJ Humphrey Lloyd QC introduced the notion that adjudication was intended to resolve what has not been settled by the normal process of discussion and agreement. In that regard he said in the* ***Ken Griffin*** *case that a dispute was not likely to be inferred. That approach was, at least to some extent, reflected in the decision of HHJ Seymour QC in* ***Edmund Nuttall Ltd v RG Carter Ltd*** *[2002] 1 BLR 312 and by Forbes J in* ***Beck Peppiatt v Norwest Holst*** *[2003] 1 BLR 316.*

58. (5) There are cases in which a dispute has been held not to exist where one party has simply sought further information and not made a claim, or where the party has not given enough information to enable the other party to decide whether or not to admit the claim. Examples are ***Cruden Construction Ltd v Commission for the New Towns*** *[1995] 2 Lloyd's Rep 387 per HHJ Gilliland QC and* ***Carillion Construction Ltd v Devonport Royal Dockyard*** *[2003] 1 BLR 79 per HHJ Peter Bowsher QC.*

59. *(6) In two cases, namely* ***Cowlin Construction Ltd v CFW Architects (A firm)*** *[2003] 1 BLR 241 and* ***Orange EBS Ltd v ABB Ltd*** *[2003] 1 BLR 323, HHJ Frances Kirkham, in careful judgments in which, as I read them, she referred to many if not at all the cases, recognised that they are not all entirely consistent and preferred the test in* ***The Halki*** *following the approach of Templeman LJ in* ***Ellerine v Klinger.***

60. (7) After the conclusion of the argument, as promised by Miss Houghton, we were sent a copy of the decision of HHJ Moseley QC in ***Lovell Projects Ltd v Legg and Carver*** *[2003] 1 BLR 452 which essentially followed* ***The Halki*** *in much the same way as HHJ Kirkham had done.*

61. *More importantly, we learned of a judgment of Jackson J delivered on 11th October 2004 in* ***AMEC Civil Engineering Ltd v The Secretary of State for Transport.*** *In the course of that judgment he considered many of the cases to which we have been referred, namely* ***Monmouthshire County Council v Costelloe, Tradax International v Cerrahogullari, Ellerine v Klinger, Cruden Construction Ltd v Commission for the New Towns, Halki, Fastrack Contractors Ltd v Morrison Construction Ltd, Sindall Ltd v Solland*** *and* ***Beck Peppiatt Ltd v Norwest Holst Construction Ltd.***

AMEC Civil Engineering Ltd v The Secretary Of State For Transport *[2004] EWHC 2339 per Jackson J*

"From this review of the authorities I derive the following seven propositions:

1. *The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*
2. *Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*
3. *The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.*
4. *The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.*
5. *The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent*

who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. *If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."*

63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. *It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J.*

It seems to me that **Amec Civil Engineering Ltd v The Secretary Of State For Transport** and **Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd** do little more than rehearse some of the central issues that have already been canvassed by previous cases in respect of what is a dispute. I agree (***Collins*** *63 above*) that the 7 points of **Amec** are broadly correct. The devil as always lies in the detail. However, if am wary of the use of the word discussion (*Collins 64*) in that ***"to discuss"*** is not ***"to dispute"*** though note that it is used merely as indicative viz. ***"likely to be more consistent with."*** A heated discussion may possibly be synonymous with a dispute but a preliminary discussion certainly is not. "***Crystallisation***" has become a useful term of art to indicate the stage when ***"discussions with dispute potential"*** break down and is to be preferred to the bland expression ***"absence of dispute"*** which could convey the impression that there is nothing to dispute.

There is little specific or concrete enough about the meaning of a dispute in either dictum to usefully employ in an action, so that litigants are more likely to resort to the detail of the plethora of dictum from which the reflections were drawn. Still it is all extra padding for the commentators.

The significance of **Collins** lies more in the question of forum than in respect of the existence of a dispute. The crucial distinction between **Collins** and **Rupert Morgan v Jervis** lies in the fact that the latter did not involve an arbitration clause. Even though in both cases there was no obvious defence to the claim, the claim was disputed in **Collins**. In **Rupert Morgan** the contract permitted construction adjudication, in accordance with the HGCRA but the court had default jurisdiction since neither party had commenced adjudication and the employer did not dispute that the Interim Certificate had been issued by the Architect, thereby giving rise to a sum due under the contract. Hence, the court had jurisdiction to deliver a summary judgement on a ***"pay now, argue latter"*** basis.

In **Collins**, a construction dispute should have been referred to arbitration pursuant to an arbitration agreement. The CA heard an appeal in respect of an application for stay of action. Neither party invoked construction adjudication. Collins asserted that there was no dispute. The court disagreed holding that the effect of **Rupert Morgan** was not to convert the claim into one for an undisputed sum of money due which would only be amenable to enforcement through the courts. A dispute existed which could only be settled, under the terms of the contract, by arbitration. Any other conclusion would result in rendering arbitral awards unenforceable, the exact opposite of the objective of the Arbitration Act 1996. The dispute was thus deferred to arbitration, albeit that the only obvious defence was a questionable reliance on a mere technicality, in that a claim had the "wrong" heading and was submitted outside a

specified 14 day period. The court considered that it was not an insuperable task to overcome these defences and felt that this was a matter that could be quickly dealt with by an arbitrator, perhaps by issuing an interim award. Hence, there was no real danger of the claimant being kept out of funds for any undue period of time. The granting of a stay of action would not impede justice.

No doubt there will be further attempts to produce a definitive judicial definition of what is a dispute that might serve for all purposes, but I doubt that that it is possible to do so. Each case will fall on its special facts and since new situations will always arise, so further glosses on the general rules can be anticipated.

Furthermore, we can rely, I am confident, on the good offices of novel contract draftsmen, to provide the opportunity and need for further judicial elucidation. With a revised version of the HGCRA Adjudication process waiting in the wings, the scope for judicial activity extends even further over the horizon.

For the present, it is rather the academics and literary minded legal practitioners who are likely to produce all encompassing guidance lists of greater or lesser value, liberally peppered with references to decided cases. Now is not the time for the gospel according to Saint Corbett, but much of what it might contain is set out against and in response to the various questions and propositions explored above.

MEDIATION CASE CORNER

Agricultural Profiles Ltd v Performance & Deck Roofing Ltd [2005] EWHC 65

His Honour Judge Coulson QC had to consider whether or not a **b**inding compromise had been reached on an action where one party had entered into a CVA. He set out the essentials for a valid agreement, which has general application and informs what needs to be in a valid mediation settlement agreement, in the following terms :-.

(a) Unless all the material terms of the proposed contract are agreed, there is no binding agreement: ***Foley v. Classique Coaches*** [1934] 2 KB 1 ;

(b) Where it is plain that a material element in the negotiations remains unresolved, the Court is likely to conclude that no binding agreement has been reached : ***Yorwerth v Sonnyplaster*** (1973) C.A.T. 255 , cited at paragraph 3-50 of the 5th Edition of The Law and Practice of Compromise by David Foskett ;

(c) Where the parties' agreement is expressed in terms that are too vague to be enforced, the Court will decline to hold that a sufficiently certain agreement has been reached: ***Wilson & Whitworth Limited v. Express and Independent Newspapers Limited*** [1969] 1 WLR 197 ;

(d) An agreement to agree is not a binding agreement: ***Walford v. Miles*** [1992] A.C. 128.

ADVERT

Nationwide Mediation Academy

Professional Training and
Accreditation for Arbitration,
Adjudication Mediation and DRB Practice

Introduction to Mediation Course

(2 Law Society CPD Points)

Why do I need to know about mediation?

Mediation is a voluntary third party assisted negotiation process amenable to the settlement of all forms of civil dispute. It is strongly supported by the Lord Chancellor's Office, the Civil Procedure Rules 1998 and is increasingly being recommended by judges during case conferences, where it is felt that the process is appropriate and where the cost and expense of a full trial is deemed disproportionate to the dispute. **NO PRACTISING SOLICITOR CAN AFFORD NOT TO KNOW ABOUT THE PROCESS.**

What will I learn?

This course aims to introduce you to the key concepts of mediation, outlining:

- How and why Mediation works,
- The distinction between Mediation and private adjudicative processes such as arbitration,
- The advantages of Mediation for the settlement of disputes over adjudicative processes,
- The advantages of Mediation as a service that advisors can offer their clients,
- Which forms of dispute are suitable for and which are not suitable for mediation,
- The steps that need to be taken to submit a dispute to Mediation, and
- Guidance through the various stages of the Mediation process.

Who Should Attend ?

- All Solicitors in general practice needing an introduction to mediation.
- The course is aimed at business advisors, legal and industry practitioners, and acts as a primer for the 40 hour Mediation Practice Course.

Date:	**Friday 22nd April 2005**	**Cost:**	**£75 + VAT per delegate**
Time:	**3.00pm – 6.00pm**	**Venue:**	**Law School, University of Glamorgan**

Course Leader : Corbett Haselgrove Spurin

Course Schedule

14:45 **Registration**

15:00 **Introduction: Solicitors and Mediation and What is ADR ?**
The current role of mediation in the UK and background to reforms under the Civil Procedure Rules: Where ADR is and is not applicable and where 3rd party settlement is more appropriate.

15:40 **Definitions of ADR Processes and Commentary:** The importance of ADR and regulation. Comparison of principal forms of dispute resolution. The significance of ADR practice and the regulation and professional status of ADR practitioners.

16:15 **Coffee Break**

16:30 **Litigation and ADR contrasted : Advantages of Mediation**
ADR Personnel: Time and cost savings, Privacy, Co-operation: Informality: Party Autonomy: ADR Agreements. Advantages of mediation for solicitors and clients.

17:15 **The Mediation Process:** What is needed to make mediation work: reasons why it works.

17:45 **Questions and Discussion.**

18:00 **Close**

Mediation Practice Course

What will I learn?

This course enables participants to:

- Maximise potential for advantageous outcomes from public, commercial, non-contentious legal and social negotiations.
- Assist and advise in the preparation of and participate with others in negotiations.
- Represent a party in a negotiation.
- Represent a party at a mediation.
- Act as a third party conciliator.
- Act as a party neutral in a third party assisted negotiation.
- Act professionally as a mediator in domestic and international disputes.

Who should attend?

The course is aimed at legal and industry practitioners

Dates:	Friday 13th May 2005	**Times**	1.00pm – 6.00pm	**Dates:**	Friday 27th May 2005	**Times:**	1.00pm – 6.00pm
	Saturday 14th May 2005		9.00am – 6.30pm		Saturday 28th May 2005		9.00am – 6.30pm
	Sunday 15th May 2005		9.00am – 4.30pm		Sunday 29th May 2005		9.00am – 4.30pm
Cost:	**£1500 + VAT per delegate**				**Venue: University of Glamorgan Law School**		

N.M.A. Speakers and workshop leaders for the seminars and courses on Mediation are drawn from the following panel

Judge Professor Richard D Faulkner J.D. LL.M FCIArb. M.DRBF

Trial Judge, Arbitrator, Attorney, Mediator, Dispute Review Board panellist / chairperson and Professor of Law. Author or co-author of 20 articles on Dispute Resolution Systems. Trainer of mediators and arbitrators in America, Europe and South East Asia. Co-chairman of the American Judges Association; Alternative Dispute Resolution Committee. Dispute Resolution Systems Designer.

Professor Geoffrey M Beresford Hartwell C.Eng FIMechE FCIArb

Chartered Engineer, Registered Mediator and Conciliator. President of the Society of Construction Arbitrators and past chairman and Senior Vice-President at the Chartered Institute of Arbitrators (CIArb), Professor of Arbitration, University of Glamorgan, NMA Director of Education. He has acted as an arbitrator with experience in the UK,, Switzerland, India, France, Nigeria, Korea & Hong Kong.

Corbett Haselgrove-Spurin LLB LLM FCIArb FNADR US M.DRBF

Arbitrator, Mediator, Adjudicator, Scheme Leader, LLM Dispute Resolution, Senior lecturer, Commercial & Construction Law at Glamorgan University. Construction Law & Maritime Law Consultant. Director NADR UK Ltd

Judge (Supreme Court, Texas) Bob Gammage J.D. F.NADR Int

Attorney, Arbitrator, Adjudicator, DRB Panel Member and Chairman, Mediator and highly experienced international Mediation Trainer.

Gareth Rowland Thomas, BDS, Dip.Law, LL.M Clinical Negligence, MSc, Environmental Waste Management, LL.M CDR, M.CIArb, MIQA, MCIWM, F.

Mr Thomas is a qualified dental surgeon, solicitor, construction adjudicator, mediator and party neutral, medico-legal consultant and environmental management specialist.

Nicholas Turner, BSc Hons, LL.M MRCIS, MCIArb FNADR Int

Quantity Surveyor, construction consultant and construction contract claims consultant, practising out of Cardiff. Much of his construction claims workload is adjudication based. Director of Turner Construction Consultancy. He is a Chartered Surveyor with ten years experience working for both contracting and private clients both in Civil Engineering and in building projects up to £250 million in value, in the UK and overseas.

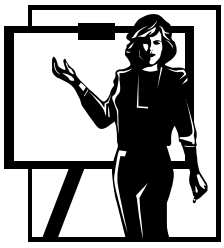
Dr Mair Coombes Davies, B.Sc., B.Arch., Ph.D. RIBA, F.C.I.Arb. FNADR Int

Dr Coombes-Davies is a Barrister, Mediator, Arbitrator, Adjudicator, and Architect specialising in alternative dispute resolution for commercial, construction and land disputes. A practising arbitrator, adjudicator, and mediator, head of the alternative dispute resolution team at Barristers Chambers. She is a member of the South and West Wales Court Mediation Scheme working party.

Course Schedule

Friday 13th May 2005 **Week 1**

12:45	Registration		
13:00	Faculty Introductions. Lecture		
13:15	Active Listening & Communications Exercise.		
14:00	Introduction, Overview, Mediation Theory. Lecture	**15:00**	**Break**
15:15	Demonstration of a Mediation Conference (Opening Joint Session).		
16:00	Handling Special Problems-Classic Errors. Lecture		
17:00	Starting the Mediation Process & Techniques. Lecture		
17:30	A "Mediator's Opening Statement". Homework :	**18:00**	**End of session**



Saturday 14th May 2005

09:00	Presenting a Mediator's "Opening Statement". Exercise		
09:45	Processes & Techniques - 5 Stages of Mediation. Lecture	**10:45**	**Break**
11:00	Mediation Video.		
11:30	Faculty Critiques and Class Discussions of video		
12:00	Opening Statement Role Play Exercise	**13:00**	**Lunch**
14:00	Ethics I : Codes & Standards of Conduct. Lecture		
15:00	Negotiation Strategies - Negotiation Role Play No1.	**15:15**	**Working break**
16:00	Faculty Critiques and Class Discussions of RP No1		
16:30	Use of "Principled Negotiation" in Mediation. Lecture		
17:30	Introduction to Negotiation Role Play Exercise No 2 - homework.		
18:00	Faculty Critique	**18:30**	**Close**

Sunday 15th May 2005

09:00	Negotiation Role Play Exercise No 2.		
10:00	Faculty Critiques. Class Discussion of Role Play No2.	**10:30**	**Break**
11:15	Why Cases Settle. Lecture		
11:45	Negotiation Ex No 2 followed by Faculty Critiques	**12:30**	**Lunch.**
13:30	Short Mediation Ex No 1 followed by Faculty Critiques		
14:30	Short Mediation Ex No 2 followed by Faculty Critiques		
15:30	Short Mediation Ex No 3 followed by Faculty Critiques	**16:30**	**End of Session**

Friday 27thMay 2005 **Week 2**

13:00	Negotiation Ethics I Lecture		
14:00	Mediation Ethics II Lecture	**15:00**	**Break**
15:30	Mediation Ex No 4 – Employment Dispute (One group as demonstration)		
17:00	Faculty Critique, Class Discussion of Ex No4		
17:30	Lawyers and Mediation. Lecture		
18:00	Intro to Mediation Exercises No 5 & No6 : Homework	**18:00**	**End of Session**

Saturday 28th May 2005

09:00	Interpersonal Dynamics of Mediation. Lecture		
10:00	Mediation Ex No 5 -"Accident Liability"	**10:30**	**Working break**
11:30	Faculty Critique, Class Discussion of Ex No5		
12:00	Special Issues in ADR; Creating a New Profession. Lecture		
13:00	Mediation Ex No 6 -- Medical Malpractice Case.	**15:30**	**Working break**
16:30	Faculty Critique, Class Discussion of Ex No 6		
18:00	Introduction to Exercises 7 and 8 : Homework	**18:30**	**End of Session**

Sunday 29th May 2005

09:00	Mediator Ethics III : Lecture		
10:00	Mediation Ex No 7 -- A Typical Business Dispute.	**10:30**	**Working break**
12:00	Faculty Critique, Class Discussion Ex No 7	**12:30**	**Lunch**
13:30	Impasse Strategy, what to do when all else fails. Lecture		
14:00	Mediation Ex No 8 – Multi-party Dispute.	**15:00**	**Working break**
15:45	Faculty Critique, Class Discussion Ex No 8		
16:00	Final Faculty Question and Answer Session.		
16:15	Closing Session and Class Certificate Presentations.	**16:30**	**End**

CONSTRUCTION CASE CORNER

C.H.Spurin

Amec Capital Project Ltd v White Friars City Estate Ltd [2003] EWHC 2443; [2004] EWHC 393; EWCA 1418

Whitefriars terminated a contract. The final two applications for payment were outstanding. Amec commenced adjudication. The JCT Standard Form of Building Contract with Contractors Design, 1998 Ed with amendments provided for reference of disputes to *" George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him."* There was a Geoffrey but not a George Ashworth. Amec applied to RIBA who appointed M.Biscoe. He found for the applicants. Whitefriars resisted enforcement on the basis that Biscoe had no jurisdiction and had breached due process. The court held he had no jurisdiction because the appointment procedure in the contract had not been followed. In the meantime Geoffrey Ashworth died and Amec reapplied to RIBA who in turn reappointed Biscoe who again found for Amec. Whitefriars again resisted enforcement on the same grounds as before. The court held that Biscoe had jurisdiction in the circumstances but upheld allegations of breach of due process, namely actual / perceived bias and an inability to respond to undisclosed legal advice received by the adjudicator. Amec appealed.

The CA agreed with Thonton J that Biscoe's second appointment was valid and went on to consider an assertion of perceived bias, the other grounds of breach of due process having been dropped. The test for apparent bias is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: ***Porter v Magill***. Reversing the finding of perceived bias, the CA held that the mere fact, without more, that the same adjudicator was reengaged was insufficient to establish bias. Attempts to establish further grounds were rejected. In particular, whilst an adjudicator must share legal advice he receives that contributes to the decision with the parties and afford an opportunity to comment, advice on jurisdiction leads to a personal decision to continue with the adjudication, not to a binding decision and so does not have to be shared. It might however be sound practice to consult with both parties.

Amec Civil Engineering v Secretary of State for Transport [2004] EWHC 2339

Amec were contractors for the Thelwall Viaduct. Subsequently problems arose with the viaduct. The S.S. referred the problems to an engineer for a preliminary decision without advising Amec. The S.S. then advised Amec of the decision and advised that unless Amec indicated acceptance of the decision, the matter would be referred to an arbitrator. Amec challenged the arbitrator's appointment. The arbitrator found that he had jurisdiction. Amec unsuccessfully challenged that decision. The judge considered the principal arbitration and adjudication cases on what constitutes a dispute. The court found 1) that there is no requirement of notification to refer to an expert for preliminary determination, since the expert could have reached a decision without receiving submissions from Amec. Further, if the expert had wished to hear from Amec he could have asked; 2) that Amec were fully aware of the situation and it was clear that Amec would not simply accept liability. The requirement to respond by a 5pm deadline the very day of notification, whilst at first sight unreasonable, was more a formality than anything else. The parties were already in dispute. Amec had no intention of agreeing. No injustice was done to Amec. The S.S. had to act quickly as both parties were fully aware because the statutory time limit was imminent.

Bryen & Langley v Boston [2004] EWHC 2450

Domestic contract to convert two newly acquired flats into one ready for occupation by the client. The householder invited the adjudicator invited to consider his jurisdiction in respect of a dispute about money. The original contract was for £450K and the client declined to pay more when an application would have taken payments up to £660K. The adjudicator ruled that he had jurisdiction and went on to decide that the application was due. The household resisted enforcement on the grounds that there was no written contract and that the adjudicator had no jurisdiction. The court held that in the absence of an agreement to refer jurisdiction to the adjudicator for a decision or a contract term giving him jurisdiction on jurisdictional matter, questions of jurisdiction fall to be finally determined by the court. The adjudicator merely considers his jurisdiction but does not make a decision as such. Further, whilst the parties had intended to contract on JCT terms, work commenced without the signing of a contract. The adjudicator had no jurisdiction to hear the dispute and had no jurisdiction to rule on his own jurisdiction.

Cartright v Fay [2005] EV300106 Bath County Court.

A dispute arose between Fay and a builder under a consumer construction which incorporated an optional adjudication clause. Fay engaged in adjudication subject to without prejudice on grounds that variations went beyond adjudication of issues arising out of the works. The court held that this included variations so adjudicator had jurisdiction. Main issues were firstly whether the adjudicator was privy to the agreement. The court held that, by virtue of the Third Parties Act, there was privity. Secondly, whether the fee arrangement, 50/50 under capped fee of £750 inclusive of VAT was a fair term, the court held that the provision was compatible with the UTCCR 1999 and ordered Fay to pay the adjudicator's fee.

CIB Properties Ltd v Birse Construction [2004] EWHC 2365

Birse contracted to build the Riverdale Data Centre for CIB. CIB terminated the contract. Birse submitted a final account and loss of profit for wrongful termination. CIB asserted to recover the additional cost of employing alternative contractors to complete the job. Two adjudication followed, the first held that the termination was lawful and the second held that on balance CIB was entitled to £2M+ compensation to cover alternative completion costs. Birse resisted enforcement on the grounds that 1) the dispute was too complicated to be decided by adjudication and 2) no dispute had crystallised 3) the adjudication was not fair or impartial because of a) ambush b) time constraints c) a slip that turned victory into a loss and 4) either the adjudicator should correct the slip or the court should instruct him to do so. The court upheld the decision.

By statute any dispute can be referred to adjudication. The adjudicator can request the parties agree sufficient time to do justice to the dispute. If the request is refused the adjudicator can resign. In the event sufficient extension was given by the parties.

However, **CIB v Birse** is authority for the view that if insufficient time is granted for the adjudicator to reach an informed decision, the adjudicator should resign. The decision would be susceptible to a successful challenge for a failure to resign in such circumstances.

Birse had itself been the perpetrator of an ambush in the 1st adjudication but was given 14 weeks before notice was served, so no ambush, even though the files were extensive. Birse attempted to prevent a dispute from arising by pushing for more information and a continuous stream of negotiations – which CIB took part in without prejudice to their asserted claims. Birse at all times were aware that a notice might be served and that whilst negotiations might stave off litigation, nonetheless a dispute had arises – evident from the fact that they had engaged in a failed mediation. Continued post mediation discussions did not change the fact that there was a dispute. Whilst the time constraints mean that the extent of the settlement process is proscribed, the adjudicator had sufficient time to reach a decision and the parties had sufficient time to put their cases and to counter the assertions of the other side. There was in fact no slip, rather the adjudicator reached a valuation taking all matters into account setting off aspects of claims from counter-claims, so no issue of correction arose.

Citex Professional Services Ltd v Kenmore Developments Ltd. [2004] A1195/02

Employer indicted to the contractor that insurance was in place. This was not the case and the contractor claimed for breach of contract and indemnity against the employer. He succeeded and the employer sought to establish that the adjudicator did not have jurisdiction; that the contractor had to prove his case and that he was contributorily negligent for not taking out his own insurance. The court agreed that an adjudicator cannot reverse the burden of proof but this does not apply to questions of law and contract construction. Both parties argue their case and the adjudicator decides. Since there was an arguable case that the contractor had not discharged his burden of proof in respect of the counter-claim this portion of the case was held over, though the court felt that the contractor was likely to discharge that burden.

Connex S.E. Ltd v MJ Building Services Group [2004] EWHC 1518 : [2005] EWCA Civ 193

This concerned a contract for the installation of CCTV on railway property. The contract was terminated resulting in a dispute which was referred to adjudication. The initial oral contract terms had subsequently been written up in a memo. The court held that at first instance that termination of a contract does not terminate right to adjudication and there was a written agreement compliant with the HGCRA. The court dismissed an appeal o this basis but reversed the finding that there had been no compromise. Accordingly there was no dispute capable of being referred to adjudication.

Conor Engineering Ltd v Les Constructions Industrielles de la Mèditerranèe (CNIM). [2004] EWHC 899

CNIM, the main contractor in a waste development/power generation complex sub-contracted boiler making and pipework to CEL. The sub-contract incorporated adjudication provisions. CEL prevailed in an adjudication in respect of asserted LADs. Ten days after the date of the decision CNIM sought to assert a set off for cross claims. CNIM sought to establish that the contract concerned Power Generation and was outside the HGCRA. The court disagreed. The primary purpose was waste disposal which involved some power generation and thus it was within s105 HGCRA.

CNIM also sought to show that if HGCRA applied, nonetheless the adjudicator's dates for payments do not act as the final date to submit LADs under the scheme and further that the due date for payment runs from the date of communication of decision, not the date the decision is made. In addition, the invoices for payment of the decision extended the final date for due payment a further 30 days under the scheme. The court rejected each of these arguments. The due date was as ordered by the adjudicator. No extension arose out of a letter requesting compliance. The notice of withholding against the decision was ineffective.

Gleeson v Devonshire Green Holdings [2004] TCC01504

The contractor successfully claimed £9M in adjudication proceedings. The employer instituted proceedings counterclaiming £10M and issued a withholding notice against the adjudicator's decision before the end of the 14 days allowed for due payment. The employer sought to establish a set off. The court held that in the absence of a notice pursuant to clause 30.3/4 JCT "with contractor's design" under clause 30.5, there is an obligation to pay. JCT does not permit any set off or withholding against an adjudicator's decision for claims asserted after submission to adjudication.

Hurst Stores and Interiors Ltd v M.L.Europe Property Ltd [2003] EWHC 1650 : [2004] EWCA 490

This concerned a large contract for the installation of toiletry fixtures. The value of the work with variations rose from £2.5.M to £3.3M. Following issue of interim accounts, a final account of £6.5M was submitted embracing claims for bad management, interruption delay and lack of access. Final completion was 11 months late. In January at MLEP's behest Mr Mell , Hurst's on site project manager, produced a "final account" or costing of work, labour and material to that date, excluding any quantification of loss and delay. It was not Mell's job to produce Final Accounts. In April MLEP through Mace (a subsidiary Construction Management Company of MLEP) drew up a Final Payment document, based on Hurst's January figures. The document gave the appearance that it emanaged emanate from Hurst . MELP secured the signature of James Mell on the document which purported to establish a final payment of £600K outstanding in total discharge of contract price, being the balance between £3.4M total less prior payment of £2.8M., whilst retaining liability / responsibility for outstanding finishing works by to Hurst. MLEP's contention therefore was that that agreement precluded any further claims by Hurst.

The judge at first instance accepted that Mell had not intended to sign a Final Account and had neither read nor appreciated the implications of signing the document and had no authority to sign it. He thought he was signing off a cumulative interim account for works done to date and nothing more, in line with standard practice on site. Mace made no attempt to point out that the document differed in nature in anyway from previous interim accounts. In consequence the document had no legal standing and did not amount to a final settlement of account. The CA dismissed the appeal.

Murray Building Services v Spree [2004] TCC4804

The developer faxed instructions to the main contractor to complete electrical and mechanical installation as per consulting engineers scheme at the contract sum less 2½% main contractor's discount. The contractor successfully claimed via adjudication and sought enforcement of the decision. The developer resisted on the grounds that there was no written contract under s107 HGCRA and so no jurisdiction to the adjudicator.

The court considered whether the exact price had to be stated for the purposes of HGCRA or alternatively whether a mechanism to determine the price would suffice, and further whether or not there was an agreed mechanism. In the circumstances the court found that there was no agreement on the subcontractor's price so the 2½% calculator could not be applied. The court ordered that the claim be put down for trial to determine a quantum meruit.

If however, the parties had agreed 2½% of whatever the sub-contractor billed then, it is clear from the reasoning of the court that it would have provided an effective mechanism for establishing the price, which the court would have applied.

Stratfield Saye Estate Trustees v AHL Construction Ltd [2004] EWHC 3286

A contract was concluded on a cost plus basis to render an old building water-tight. The developer cancelled after 6 days of work. The builder claimed loss of profit. An adjudicator awarded loss of profit. The developer resisted asserting no written contract as required by HGCRA. The court disagreed stating *"An agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing."* The court held that in the event the works (albeit variable as needs arose) were defined and a formula for work rates established. Work was to be completed within a reasonable time – anticipated at about 3 months. Enforcement of decision ordered.

Westminster Building Company Ltd. v Beckingham . [2004] EWHC 138

This case concerned a domestic refurbishment contract subject either to specifications or to an amended JCT Intermediate 1998 Form. Enforcement of an adjudicators decision for payment of £125K of interim payments certified in compliance with JCT terms was resisted by Beckingham on the grounds that 1) JCT did not apply - rather subject to specification contract without adjudication clause 2) If JCT applies adjudication contravenes the UCTA 1977 3) the parties had concluded a capping agreement which over-rides any payment mechanism and was not subject to an adjudication provision applying qua **Shepherd v. Mecright**. A letter of intent included the JCT. Whilst rejected, a letter of comfort also included JCT. The court ruled that by conduct the JCT was thus incorporated, so adjudication applied; the adjudication process is not an Unfair contract provision; the Cap was not a settlement agreement. The adjudicator had found that the CAP contract was unenforceable because it lacked consideration of special **Williams v Roffey** circumstances and ordered payment of the certified sums. The court ordered enforcement of the decision.

William Verry (Glazing Systems) Ltd v Furlong Homes Ltd [2005] EWHC 138

Developer submitted a final account to adjudication. The adjudicator was invited to determine what extensions of time were validly due under the contract and to find against the contractor for late completion. In the event the adjudicator found that the contractor's version of extension of time (to February) was correct and accordingly there was no late completion. The decision found monies due to the contractor rather than LAD's to the developer.

The developer sought a declaration that the extension of time considered by the adjudicator (to July) was outside the scope of the reference which had referred only to a previous extension of time. The court reviewed the cases on the meaning and scope of a dispute and concluded that it as not open to a claimant to restrict the scope of a defence to matters referred to in the referral notice, so that the defendant could mount only *"half a defence"*. Any relevant matters could be raised, even if it gave an outward appearance of being an application for an additional extension of time. The court distinguished between situations were a claimant seeks to introduce new matter and the need for a defendant to discuss issues relevant to the defence. Effectively by submitting a final account and inviting a decision on what was the appropriate extension the claimant could not object if the court concluded that a greater extension was due than that which the claimant sought to rely upon. In the event the extension granted was longer than that requested originally by the defendant (to June), because work had continued after that date.

The developer also sought to establish breach of due process in that the adjudicator had insufficient time to make a decision and should thus have resigned. On this matter the court held that there was sufficient time and due consideration had been given to all matters.

William Verry Ltd. v North West London Communal Mikvah [2004] 1 BLISS 24

The court held that a construction contract must establish a mechanism aimed at securing referral within 7 days, but fulfilling that aim is not mandatory – an adjudicator can allow an extension. The terms of reference were limited to release of retention. The adjudicator did not consider the validity of defects notified to him. Since this went to the heart of the defence, the court advised NWLCM to commence adjudication on the defects and held that the previous retention award be stayed pending the outcome of adjudication No2.

On Friday 29th April 2005 The Wales Branch Chartered Institute of Arbitrators presents

LANDLORD AND TENANT DISPUTES

Public sector rent disputes and private sector construction disputes.

01.00-01.30	Registration
01:30-01:45	"***Welcome and Opening Address***" – Professor Michael Stuckey.
01:45-02.00	"***Key note Speech***"- Professor Geoffrey M Beresford-Hartwell.
02.00-02.25	***"Resolving Tenant and Leaseholder disputes by ADR"***, - Gregory Hunt
02.25-02.45	"***Mediating rent disputes***" Phillip Howell Richardson
02.45-03.00	***"Regulatory Reform (Business Tenancies) Order 2003 : Renewable business leases."***- Gerwyn Griffiths and Professor Michael Stuckey
03.00-03.30	Coffee / Teas for delegates and guests.
03.30-04.00	***"Avoiding disputes and what to do if things go wrong.*** "Contracts, negotiation, mediation, adjudication, arbitration and the Courts." – Christopher Dancaster
04:00-04:30	"***Questions and Answers – housekeeping – forthcoming events."*** – All speakers.

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- Keep up to date with developments in Landlord and Tenant law. **The Regulatory Reform (Business Tenancies) Order 2003** amended the provisions of the Landlord and Tenant Act 1954 governing renewable business leases.
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COSTS AND BOOKING DETAILS

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RESERVE BOOKINGS AND PARKING

Dennis Baldwin, *Chairman CIArb Wales Branch*
C/O Soma Contract Services Ltd
17 Gold Tops, Newport, Gwent, NP20 4PH
Fax: 01633 220046, **E-mail**: dennisbaldwin@btconnect.com

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Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk