ADR NEWS

Volume 7 Issue No 1 April 2007

For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

EDITORIAL :

Assuming the ***Legal Services Bill*** and the ***Tribunals, Courts and Enforcement Bill*** make it onto the statute book, the legal landscape will be faced with two significant changes, both of which have implications for ADR. The ***Legal Services Act*** would usher in a new era of regulation of legal services, looking down from above over the regulatory functions of the Law Society and the Bar, paving the way for multi-disciplinary service provision, with specific reference to financial services and funding of legal actions. The small print appears to embrace regulation of all services for the resolution of disputes before the courts or otherwise, raising the possibility that those who provide advice to parties to adjudication, arbitration and mediation may be subject to regulation, increased paperwork and the costs inherent in complying with the regulatory regime. However, it appears that ADR practice itself will not be subject to regulation, at least for the time being.

The Tribunals, Courts and Enforcement Act would introduce a two tier tribunal process and introduce a new remedy of replacing the original decision with the decision of the tribunal in the event of an error of law, in essence a limited form of appeal process. In the fullness of times many of the current tribunals in existence would have their business transferred to the tribunal at the behest of the relevant Secretary of State. The members of the Tribunals will be designated as and exercise the powers of high court judges. Where the parties to a tribunal action consent, a Tribunal Judge may act as a mediator. This appear to build upon the TCC judicial mediation service concept, taking it one step further by formally incorporating mediation as an integral part of the tribunal service. This development is further recognition of the value of promoting dispute settlement as an integral part of case management, but detracts from the notion that mediation is an alternative to judicial dispute resolution. It provides further evidence that for Her Majesties Court Service, an ADR is not ADR as we have known it in the past.

Adjudication progress Down Under. The unrelenting march of construction adjudication goes on. The two remaining Australian jurisdictions of South Australia and Tasmania are due to introduce payment provision legislation in 2007. Unfortunately each of the jurisdictions has introduced variations on the theme so that there is no standardised provision. The current Western Australian and Northern Territory legislation most closely resembles the HGCRA but without mirroring it exactly. It would appear that a bill for construction payments is also to be introduced into the Malaysian Legislature in 2007 along Australian lines.

Contents

The TCC. The ability of ADR processes to resolve disputes promptly has been one of its main selling points. Recent developments in the modus operandi of the TCC challenge the assumption that litigation is less timely than ADR. The average turn around time for cases before the TCC has been radically reduced. In addition, case management of interim issues before the TCC is quite impressive. The court has the ability to identify short windows of opportunity to hear single issues at very short notice, determine the matter and even publish the outcome within days of the matter arising. The spate of brief judgements, emanating from the court this year, bears witness to this. The court has the advantage that it provides a permanent presence. ADR is hard pressed to compete. Mediation takes time to set in motion. Adjudication is constrained by the jurisdictional scope of the notice and referral documents. Arbitration case management is reliant upon the co-operation of the parties and their willingness to agree to prompt pre-trial preparation and submission of documentation. Parties are less likely to complain to the judge that they cannot respond within the offered time frame. The TCC occupies a special position as arbiter of technical disputes. The model may not be capable of replication beyond this court but the challenge for ADR is this area is significant.

G.R.Thomas : Editor

Notice of important changes from April 2006. HMCS : BULLETIN No1

In April 2006 important changes to the Civil Procedure Rules come into force. This notice explains what the changes are and how they will affect you.

Q. What are the changes?

A. • There will be new rules and practice directions detailing the information that should be provided to the court to issue a claim

- The provision of a postcode for any address supplied will be mandatory
- Defendants will be asked to provide their date of birth when replying to a claim
- Claimants will be asked to provide the defendant's date of birth to the court (where known) when applying for judgment

Q. What information will need to be provided to the court to issue a claim?

A. You must provide the full name of each party where known. The full name means:

- In the case of an individual, his full unabbreviated name, including the title by which he is known (i.e Mr, Mrs, Dr, etc,)
- In the case of an individual trading under another name, his full unabbreviated name and the title by which he is known and the full name under which he is trading, e.g. Mr John Smith T/As JS Autos
- In the case of a partnership (other than a limited liability partnership) the full name of the business followed by the suffix 'a firm'
- In the case of a registered company or limited liability partnership, the full name of the company or partnership followed by the appropriate suffix, i.e. Ltd, Plc, LLP
- In the case of any other company or corporation, its full name and any suffix if appropriate

(Civil Procedure Rules Part 16 Practice Direction, para 2.6)

Q. Why does the court need this information?

A. These rules clarify existing law on how parties to a claim must be described. Supplying better quality information to the court at the outset may improve your chances of successful recovery of the debt. It will also ensure that, if the judgment is registered on the Register of Judgments Orders and Fines, the defendant can be properly identified.

Q. What if I don't know all the defendant's details?

A. You should find out as much information as possible about the person you want to sue before coming to court. The courts will not be able to deal with any defective claims submitted to them, but may accept claims against individuals if you are unable to provide their full unabbreviated name as long as you provide as much information as you can find out about the person.

Q. Where can I find information about the defendant?

A. If the defendant is an individual, you may be able to find their details on the Electoral Register. This is available for inspection from your local council. If the defendant is a business, you may be able to find out about them from their headed notepaper, or any cheques or invoices they have sent you.

Registered companies should be registered at Companies House. If you cannot find out the full name of the company any other way, you may search the Companies Register. Further information about this can be found at ***www.companieshouse.gov.uk.***

If you are in any doubt, court staff may be able to help you. **But remember, court staff cannot give legal advice.**

Q. Why does the court need a postcode for any address supplied to the court?

A. The postcode is an integral part of an address. Ensuring every address includes a postcode will help the court ensure the accuracy of registered judgments, and ensure the claim reaches the defendant. Again the more information you provide the court the better your chances of recovery may be.

Q. What if I do not know the Defendant's postcode?

A. The postcode for any address in the United Kingdom may be obtained free from the Royal Mail Address Management Guide, or their website at ***www.royalmail.com.*** If an address does not have a postcode you will need to ask the judge for permission to serve your claim with this information missing when you submit your claim to the court for issue, explaining your reasons. There is no additional fee for this, but if you omit a postcode and fail to ask permission of the judge the court will not allow your claim to be served on the defendant until you supply the missing postcode or a judge permits service without it. *(Rule 6.5(2), Part 16 PD, para 2.4 and Part 23 PD, para 2.1(4))*.

Q. Why are the courts collecting the defendant's date of birth?

A. This will be added with the defendant's name and address to the Register of Judgments, Orders and Fines if the judgment is registered. This will help better identify debtors, particularly where his/her full name is unknown, and avoid inappropriate credit being granted to the debtor where the data is used for credit referencing. It will also assist with enforcement.

Q. How will the defendant inform the court of his/her date of birth?

A. The Defendant is required to supply this information when replying to a claim, even if they are defending it. *(Part 16 Practice Direction, paragraph 10.7)*.

Q. What if the defendant fails to supply the court with his/her date of birth?

A. The defendant is required to supply his/her date of birth when replying to a claim but the court will not be able to refuse to process a reply simply because the defendant has failed to supply a date of birth. But if the Defendant does not reply to the claim at all or replies but does not provide his/her date of birth, claimants may supply the defendant's date of birth when applying for judgment if this is known from their own records. *(Rule 12.4(2) and Part 12 PD para.3.2)*. If the defendant attends a hearing, the judge may ask the defendant to inform the court of his/her date of birth at the hearing.

Q. If the defendant admits the claim they are required to send the notice of admission direct to the claimant. How then will the court obtain this information?

A. The claimant is required to include the defendant's date of birth on the form of application for judgment.

Q. What about the Data Protection Act?

A. There is nothing preventing you supplying personal information about a Defendant to the court for the purposes of making a claim or complying with court rules. The Information Commissioner has been consulted and is content.

Q. Where can I obtain further information about these rule changes?

A. Please contact the court in the first instance, which may pass your query to HMCS HQ if necessary.

Notice of important changes from April 2006. HMCS : BULLETIN No2

On 6 April 2006 important changes affecting High Court judgments come into force. This notice explains what the changes are and how they will affect you.

Q. What are the changes?

A. From 6 April 2006, High Court judgments will be registered in a public register, the Register of Judgments, Orders and Fines.

Q. What is the effect of inclusion in the Register?

A. As with registered county court judgments, the information in the register is passed to credit reference agencies and others who will supply details of the judgments to credit grantors seeking information on the financial standing of the registered debtor. **Inclusion in the register may make it difficult for the registered debtor to get credit.** The information also helps those wanting to make a claim or enforce a judgment against a particular debtor assess their prospects for success.

Q. What legislation provides for this?

A. Section 98(1)(a) of the Courts Act 2003 and The Register of Judgments, Orders and Fines Regulations 2005 (SI No. 2005/3595).

Q. Why are High Court judgments being registered?

A. Making High Court judgments available for public search will assist enforcement and responsible lending. While details of registered county court judgments (or 'CCJs') have become widely accessible, there is no central repository of High Court judgments. As such a person with a High Court judgment might be advanced credit while a person with a CCJ may not. This inequity needed to be removed.

Q. When is a High Court judgment entered in the Register?

A. (i) As with county court judgments, **only judgments for payment of money will be registered**.

(ii) Judgments will be automatically entered in the Register on entry of a judgment in default.

(iii) Where the hearing of a case is contested, the judgment will not be registered until-

- An order is made for payment of the outstanding judgment by instalments, following an application by either the judgment creditor or judgment debtor, or
- The judgment creditor takes steps to enforce the judgment, or
- The judgment creditor applies for an order under Part 71 of the Civil Procedure Rules for an order to obtain information from the judgment debtor

(iv) Judgments transferred from a county court to the High Court for enforcement will be registered by the county court on transfer, if not already registered.

(v) Orders for possession of land containing a money judgment will be registered on enforcement or on transfer from a county court to the High Court for enforcement *(regulation 9(c) The Register of Judgments Orders and Fines Regulations 2005)*.

Q. How are judgments registered?

A. The court staff will send a return to the Registrar. However, if you are asking the court the enforce a judgment where the hearing was contested by issue of a writ of fieri facias, possession or delivery, you will need to inform the court that the judgment requires registration on the request Form PF86A.

Q. Are all claims in the High Court included?

A. No. Judgments entered-

- in Family proceedings,
- by the Administrative Court,
- by the Technology and Construction Court,

are **exempt** from registration *(regulation 9(a))*.

Q. What details will be entered in the Register?

A. The Register includes the-

- debtor's name
- debtor's date of birth (if an individual and where this is known)
- debtor's address at the date of judgment
- name of the High Court Division or district registry
- amount of the judgment
- date of judgment
- The claim number

(Regulation 10)

Q. How long does the judgment remain in the Register?

A. Normally six calendar years from the date of judgment *(regulation 26(a))*. However, if the judgment is paid within one month of the date of judgment the court can be asked to cancel (delete) the entry in the Register. If the judgment is paid after one month from the date of judgment, the court may be asked to mark the entry as 'satisfied' if the debtor can provide proof of payment in full. However, entries marked 'satisfied' will remain on the Register for six years *(regulation 11)*.

If a judgment is set aside or reversed, the court will cancel the registration.

Q. Where is the Register kept and who keeps it?

A. The Register is kept for the Lord Chancellor by Registry Trust Ltd (the Registrar), whose address is 173/175 Cleveland Street, London, W1T 6QR. Registry Trust can be contacted on Tel. 020 7380 0133.

Q. How can I find out how to search the Register?

A. Searches can be made by post or via the web at ***www.registry-trust.org.uk.*** There is a fee payable to carry out a search.

Q. Where can I obtain further information about this?

A. Further information can be found on the HMCS website at - ***www.hmcourts-service.gov.uk/judgments.htm***

The Courts Act 2003 and the regulations are available from ***www.opsi.gov.uk.***

For other queries you may contact the court.

CPR RULE CHANGES

PART 37 MISCELLANEOUS PROVISIONS ABOUT PAYMENTS INTO COURT

Money paid into court under a court order

37.1 A party who makes a payment into court under a court order must –

(a) serve notice of the payment on every other party; and

(b) in relation to each such notice, file a certificate of service.

37.2 Money paid into court where defendant wishes to rely on a defence of tender before claim

(1) Where a defendant wishes to rely on a defence of tender before claim he must make a payment into court of the amount he says was tendered.

(2) If the defendant does not make a payment in accordance with paragraph (1), the defence of tender before claim will not be available to him until he does so.

37.3 Payment out of money paid into court

(1) Money paid into court under a court order or in support of a defence of tender before claim may not be paid out without the court's permission except where –

(a) a Part 36 offer is accepted without needing the permission of the court; and

(b) the defendant agrees that a sum paid into court by him should be used to satisfy the offer (in whole or in part).

(Rule 36.9 sets out when the court's permission is required to accept a Part 36 offer)

Payment into court under enactments

37.4 A practice direction may set out special provisions with regard to payments into court under various enactments.

PART 52

52.12 Non-disclosure of Part 36 offers and payments

(1) The fact that a Part 36 offer or payment into court has been made must not be disclosed to any judge of the appeal court who is to hear or determine –

(a) an application for permission to appeal; or

(b) an appeal,

until all questions (other than costs) have been determined.

(2) Paragraph (1) does not apply if the Part 36 offer or payment into court is relevant to the substance of the appeal.

(3) Paragraph (1) does not prevent disclosure in any application in the appeal proceedings if disclosure of the fact that a Part 36 offer or payment into court has been made is properly relevant to the matter to be decided.

(Rule 36.3 has the effect that a Part 36 offer made in proceedings at first instance will not have consequences in any appeal proceedings. Therefore, a fresh Part 36 offer needs to be made in appeal proceedings. However, rule 52.12 applies to a Part 36 offer whether made in the original proceedings or in the appeal.)

PRACTICE DIRECTION – OFFERS TO SETTLE SUPPLEMENTING CPR PART 36

FORMALITIES OF PART 36 OFFERS AND OTHER NOTICES UNDER THIS PART

1.1 A Part 36 offer may be made using Form N242A.

1.2 Where a Part 36 offer, notice of acceptance or notice of withdrawal or change of terms is to be served on a party who is legally represented, the document to be served must be served on the legal representative.

APPLICATION FOR PERMISSION TO WITHDRAW A PART 36 OFFER

2.1 Rule 36.3(4) provides that before expiry of the relevant period a Part 36 offer may only be withdrawn or its terms changed to be less advantageous to the offeree with the permission of the court.

2.2 The permission of the court must be sought –

(1) by making an application under Part 23, which must be dealt with by a judge other than the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application;

(2) at a trial or other hearing, provided that it is not to the trial judge or to the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application.

ACCEPTANCE OF A PART 36 OFFER

3.1 Where a Part 36 offer is accepted in accordance with rule 36.9(1) the notice of acceptance must be served on the offeror and filed with the court where the case is proceeding.

3.2 Where the court's permission is required to accept a Part 36 offer, the permission of the court must be sought –

(1) by making an application under Part 23, which must be dealt with by a judge other than the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application;

(2) at a trial or other hearing, provided that it is not to the trial judge or to the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application.

3.3 Where rule 36.9(3)(b) applies, the application for permission to accept the offer must –

(1) state

(a) the net amount offered in the Part 36 offer;

(b) the deductible benefits that had accrued at the date the offer was made;

(c) the deductible benefits that have subsequently accrued; and

(2) be accompanied by a copy of the current certificate of recoverable benefits.

PRACTICE DIRECTION – 36B SUPPLEMENTING CPR PART 36

Offers and Payments made before 6th April 2007

1.1 Paragraph (2) of rule 7 provides that where a Part 36 offer or Part 36 payment was made before 6th April 2007, if it would have had the consequences set out in the rules of court contained in Part 36 as it was in force immediately before 6th April 2007, it will have the consequences set out in rules 36.10, 36.11 and 36.14 after that date.

1.2 This provision makes clear that a Part 36 offer or Part 36 payment that was valid before 6th April 2007, will continue to be a valid Part 36 offer under the rules in force from 6th April 2007, and will have the consequences set out in those rules, specifically in relation to costs and the effect of acceptance.

Permission of the court

2.1 Paragraph (3) of rule 7 provides that where a Part 36 offer or Part 36 payment was made before 6th April 2007, the permission of the court is required to accept that offer or payment, if permission would have been required under the rules of court contained in Part 36 as it was in force immediately before 6th April 2007.

2.2 This provision preserves the requirement to obtain the permission of the court to accept an offer as it existed under the rules in force immediately before 6th April 2007. Therefore, if permission would have been required before 6th April 2007, it will be required after that date. But, if permission would not have been required because the parties have been able to agree liability for costs, or if a further offer has been made triggering a new period for acceptance, permission will not be required after 6th April 2007.

Payments into court made before 6th April 2007

3.1 Paragraph (4) of rule 7 provides that rule 37.3 will apply to a Part 36 payment made before 6th April 2007 as if that payment into court had been made under a court order.

3.2 Rule 37.3 applies to all payments under Part 37, including payments into court under order, and permission is required to take the money out of court.

3.3 By applying rule 37.3 to payments into court made before 6th April 2007, this provision preserves in particular the requirement that permission be obtained to withdraw such payment.

3.4 But, rule 37.3 also provides that money may be taken out of court without the court's permission where a Part 36 offer (including an offer underlying a Part 36 payment) is accepted without needing the permission of the court and the defendant agrees that the sum may be paid out in satisfaction of the offer. Paragraph 3.4 of the Practice Direction to Part 37 makes provision about how to take money out of court.

3.5 This exception to the permission requirement preserves the right under rule 37.2, as it was in force immediately before 6th April 2007, to treat a payment into court made under order or by way of a defence of tender before claim as a Part 36 payment.

3.6 This provision has the effect that a Part 36 payment made before 6th April 2007 may be taken out of court simply by filing a request for payment if the offer underlying the Part 36 payment is accepted without needing permission. In those circumstances, it may be assumed that the defendant agrees to the money being used in satisfaction of the sum offered, and the requirement in paragraph 3.4 of the Practice Direction to Part 37 to file a Form 202 will not apply.

Offers remaining open for acceptance

4.1 Paragraph (5) of rule 7 provides that the rules of court contained in Part 36 as it was in force immediately before 6th April 2007 shall continue to apply to a Part 36 offer or Part 36 payment made less than 21 days before 6th April 2007.

4.2 This provision preserves those rules in their entirety in relation to offers and payments made less than 21 days before 6th April 2007 for the period that they are expressed to remain open for acceptance.

4.3 Paragraph (6) of rule 7 provides that paragraph (5) ceases to apply at the expiry of 21 days from the date that the offer or payment was made, unless the trial has started within that period.

4.4 This provision has the effect that once the 21 day period has expired, the new regime (including the modifications at paragraphs (2), (3) and (4) of rule 7) will apply to the offer or payment.

4.5 If the trial has started within the 21 day period, the rules that were in force before 6th April 2007 will continue to apply to the offer or payment.

Offers made before commencement of proceedings

5.1 Paragraph (7) of rule 7 deals with the position where, before 6th April 2007, a person made an offer to settle before commencement of proceedings which complied with the provisions of rule 36.10 as it was in force immediately before 6th April 2007.

5.2 The court will take that offer into account when making any order as to costs. This preserves the discretion of the court to take into account an offer made before commencement of proceedings as it existed before 6th April 2007.

5.3 The permission of the court will be required to accept such an offer after proceedings have been commenced. This preserves the position under rule 36.10(4) as it was in force immediately before 6th April 2007.

5.4 If proceedings are commenced after 6th April 2007, the requirement to pay money into court in respect of a defendant's money offer under rule 36.10(3)(a) (as it was in force before 6th April 2007) will not an apply to a defendant's money offer made before the proceedings were commenced.

REVISED PRE-ACTION PROTOCOL FOR CONSTRUCTION AND ENGINEERING DISPUTES 2007

1 Introduction

1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).

Exceptions

1.2 A claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings (i) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act'), (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (iv) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

Objectives

1.3 The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:

(i) to encourage the exchange of early and full information about the prospective legal claim;

(ii) to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and

(iii) to support the efficient management of proceedings where litigation cannot be avoided

Compliance

1.4 If proceedings are commenced, the court will be able to treat the standards set in this Protocol as the normal reasonable approach to pre-action conduct. If the court has to consider the question of compliance after proceedings have begun, it will be concerned with substantial compliance and not minor departures, e.g. failure by a short period to provide relevant information. Minor departures will not exempt the 'innocent' party from following the Protocol. The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions. For sanctions generally, see paragraph 2 of the Practice Direction-Protocols 'Compliance with Protocols'.

Proportionality

1.5 The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In lower value claims (such as those likely to proceed in the county court), the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level. In all cases the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The Protocol does not impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation.

2 OVERVIEW OF PROTOCOL

General Aim

2 The general aim of this Protocol is to ensure that before court proceedings commence:

(i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;

(ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;

(iii) there is more pre-action contact between the parties;

(iv) better and earlier exchange of information occurs;

(v) there is better pre-action investigation by the parties;

(vi) the parties have met formally on at least one occasion with a view to

- defining and agreeing the issues between them; and
- exploring possible ways by which the claim may be resolved;

(vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and

(viii) proceedings will be conducted efficiently if litigation does become necessary.

3 THE LETTER OF CLAIM

3 Prior to commencing proceedings, the claimant or his solicitor shall send to each proposed defendant (if appropriate to his registered address) a copy of a letter of claim which shall contain the following information:

(i) the claimant's full name and address;

(ii) the full name and address of each proposed defendant;

(iii) a clear summary of the facts on which each claim is based;

(iv) the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;

(v) the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;

(vi) where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;

(vii) the names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

4 THE DEFENDANT'S RESPONSE

The Defendant's Acknowledgement

4.1 Within 14 calendar days of receipt of the letter of claim, the defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any). If there has been no acknowledgment by or on behalf of the defendant within 14 days, the claimant will be entitled to commence proceedings without further compliance with this Protocol.

Objections to the Court's Jurisdiction

4.2 Objections to the court's jurisdiction or the named defendant

4.2.1 If the defendant intends to take any objection to all or any part of the claimant's claim on the grounds that (i) the court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the defendant named in the letter of claim is the wrong defendant, that objection should be raised by the defendant within 28 days after receipt of the letter of claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct defendant (if known). Any failure to take such objection shall not prejudice the defendant's rights to do so in any subsequent proceedings, but the court may take such failure into account when considering the question of costs.

4.2.2 Where such notice of objection is given, the defendant is not required to send a letter of response in accordance with paragraph 4.3.1 in relation to the claim or those parts of it to which the objection relates (as the case may be).

4.2.3 If at any stage before the claimant commences proceedings, the defendant withdraws his objection, then paragraph 4.3 and the remaining part of this Protocol will apply to the claim or those parts of it to which the objection related as if the letter of claim had been received on the date on which notice of withdrawal of the objection had been given.

4.3 The Defendant's Response

4.3.1 Within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 3 months), the defendant shall send a letter of response to the claimant which shall contain the following information:

(i) the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;

(ii) which claims are accepted and which are rejected, and if rejected, the basis of the rejection;

(iii) if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection;(iv) if contributory negligence is alleged against the claimant, a summary of the facts relied on;

(v) whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim by paragraph 3(iii) to (vi) above;

(vi) the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;

4.3.2 If no response is received by the claimant within the period of 28 days (or such other period as has been agreed between the parties), the claimant shall be entitled to commence proceedings without further compliance with this Protocol.

Claimant's Response to Counter-Claim

4.4 The claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim under paragraph 4.3.1 above.

5 PREACTION MEETING

5.1 Within 28 days after receipt by the claimant of the defendant's letter of response, or (if the claimant intends to respond to the counterclaim) after receipt by the defendant of the claimant's letter of response to the counterclaim, the parties should normally meet.

5.2 The aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in rule 1.1 of the Civil Procedure Rules.

5.3 In some circumstances, it may be necessary to convene more than one meeting. It is not intended by this Protocol to prescribe in detail the manner in which the meetings should be conducted. But the court will normally expect that those attending will include:

(i) where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;

(ii) a legal representative of each party (if one has been instructed);

(iii) where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and

(iv) where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.

5.4 In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure

would be more suitable than litigation, and if so, endeavour to agree which form to adopt. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.

5.5 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should use their best endeavours to agree:
- (i) if there is any area where expert evidence is likely to be required, how the relevant issues are to be defined and how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable)
- (ii) the extent of disclosure of documents with a view to saving costs; and
- (iii) the conduct of the litigation with the aim of minimising cost and delay.

5.6 Any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the court:
- (i) that the meeting took place, when and who attended;
- (ii) the identity of any party who refused to attend, and the grounds for such refusal;
- (iii) if the meeting did not take place, why not; and
- (iv) any agreements concluded between the parties.
- (v) the fact of whether alternative means of resolving the dispute were considered or agreed.

5.7 Except as provided in paragraph 5.6, everything said at a pre-action meeting shall be treated as 'without prejudice'.

6 LIMITATION OF ACTION

6. If by reason of complying with any part of this protocol a claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the claimant may commence proceedings without complying with this Protocol. In such circumstances, a claimant who commences proceedings without complying with all, or any part, of this Protocol must apply to the court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the court to issue proceedings. The court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this Protocol.

NEW CPR PROVISIONS

14.1.A Admissions made before commencement of proceedings.

(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of the Practice Direction to this Part if one of the following conditions is met –
- (a) it is made after the party making it has received a letter of claim in accordance with the relevant pre-action protocol; or
- (b) it is made before such letter of claim has been received, but it is stated to be made under Part 14.

(3) A person may, by giving notice in writing, withdraw a pre-action admission –
- (a) before commencement of proceedings, if the person to whom the admission was made agrees;
- (b) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court.

(4) After commencement of proceedings –
- (a) any party may apply for judgment on the pre-action admission; and
- (b) the party who made the pre-action admission may apply to withdraw it.

(5) An application to withdraw a pre-action admission or to enter judgment on such an admission –
- (a) must be made in accordance with Part 23;
- (b) may be made as a cross-application.

PRACTICE DIRECTION – MISCELLANEOUS PROVISIONS ABOUT PAYMENTS INTO COURT SUPPLEMENTING CPR PART 37

PAYMENT INTO COURT UNDER AN ORDER, ETC

1.1 Except where paragraph 1.2 applies, a party paying money into court under an order or in support of a defence of tender before claim must –
- (1) send to the Court Funds Office –
  - (a) the payment, usually a cheque made payable to the Accountant General of the Supreme Court;
  - (b) a sealed copy of the order or a copy of the defence; and
  - (b) a sealed copy of the order or a copy of the defence; and
  - (c) Court Funds Office form 100;
- (2) serve notice of payment on the other parties; and
- (3) file at the court –
  - (a) a copy of the notice of payment; and
  - (b) a certificate of service confirming service of the notice on each party served.

1.2 Instead of complying with paragraph 1.1(1), a litigant in person without a current account may, in a claim proceeding in a county court or District Registry, make a payment into court by –
- (1) lodging the payment in cash with the court; and
- (2) giving the court a completed Court Funds Office form 100.

Sections 2-8 omitted.

EXPERT WITNESSES AND BIAS

Halliburton Energy Services Inc v Smith International (North Sea) Ltd. [2006] EWCA Civ 1599

Lord Justices Buxton, Sedley and Dyson. 31.10.2006

Disputes arose between YEDL and Telewest over disturbance and damage to underground cabling. Six test cases were appealed to the Court of Appeal which upheld all the first instance decisions of fact. The CA held that none of the cases were amenable to appeal.

It would appear that from the CA's perspective none of the cases were ideally suited to or required judicial determination in the first place. The disputes and the thousand or so others waiting in the wings, on the outcome of this litigation, were best suited to expert determination, as questions of fact that would vary from case to case. Such disputes were best dealt with by an expert, in this case electrical engineers. A scheme was required to deal with such disputes.

The court set down a challenge to the parties to institute such a scheme and to have recourse to it for future disputes. The CA made it clear there would be cost implications in future regarding litigation on these matters where the parties had failed to employ private ADR / expert determination procedures to resolve disputes.

"The way forward

42. We therefore dismiss all five appeals. The time of this court would, however, have been entirely wasted if the matter were left there. The judge said, in his § 109(xii), that there was an urgent need for a protocol to be agreed between YEDL and Telewest to deal with these situations appropriately. Thus far, that exhortation has fallen on deaf ears. We will try to reinforce that, with respect, eminently sensible attempt to assist the parties.

43. The basic rule is simple. If YEDL causes or requires damage to Telewest's ducting in the course of street works, whoever it is that actually does the work that constitutes the damage, YEDL must pay for the making good of that damage unless it can establish negligence or misconduct under section 82(4). The mere laying of ducting without giving section 69 notice to YEDL will not count as such misconduct; the issue is where the ducting is and how it has been laid. If it obstructs access to YEDL's cables and has been laid outside the dimensions laid down in NJUG7 it will be assumed that the case is one of negligence or misconduct, unless Telewest can demonstrate circumstances preventing the application of the NJUG7 guidance. If the ducting has been laid by a contractor whose instructions permitted him to depart from NJUG7 without having to show good reason, it will be assumed that such departure has occurred. When contemplating interference with Telewest's ducting, whether or not in a case where a section 82(4) defence is or may be available, YEDL must so far as reasonably practicable give Telewest the opportunity to monitor the execution of the works envisaged by section 69, and comply with any reasonable requirement (including that Telewest itself should undertake the works) that Telewest imposes. The effect of YEDL omitting to follow that course would be to expose it to claims by Telewest that the work had been unnecessary, or that damage had been caused because of lack of skill or understanding on the part of the operatives. Where physical damage is caused, either by YEDL or by Telewest in reasonably meeting YEDL's requirements, YEDL is liable for it unless it can establish a defence under section 82(4). YEDL is not liable for the cost of Telewest attending on site if nothing that can be described as "damage" occurs: see §32 above.

44. How should all this work in practice? The judge said that the essence of the scheme must be communication between the parties, something that so far has been conspicuously lacking. He made various suggestions, that we venture to adopt and expand on.

45. First, to the extent that it has not already been done, both parties must now give full disclosure to the other of the location of their various apparatus. Although we have held that a failure in the past to give a section 69 notice would not necessarily count as misconduct in the laying of ducting, now that a scheme has been suggested that depends on notification a failure to co-operate on Telewest's part will count as misconduct on Telewest's part. Second, when YEDL is contemplating pre-planned repair work (as in the great majority of the test cases) in any location where Telewest has notified the presence of ducting it must give notice to Telewest, to enable Telewest to consider how and under what conditions its ducting was laid. Third, as soon as YEDL decides that ducting needs to be moved or otherwise interfered with, whether or not working in a location in respect of which Telewest has not given notice, and whether or not in the course of pre-planned work, YEDL must give immediate notice to Telewest: since that at least will always be practicable even if the work has to start at once. Fourth, Telewest must make arrangements to attend promptly on site to enable it to determine what directions it needs to give to YEDL, or whether it should undertake the work itself. It would plainly be a good idea, as the judge suggested, if Telewest trained a number of YEDL operatives so that it could sub-contract the work to one of them. If Telewest does not take the opportunity to give directions or undertake the work itself, then it will forefeit any right to complain of excessive or incompetent work.

46. Who pays to make good any damage (in the sense in which the term is used in section 82) depends on whether negligence or misconduct can be established on the part of Telewest, as already exhaustively discussed in this judgment. That is very much a fact-related issue, and we have already given as much guidance as we think to be possible in abstract terms. The judge suggested that that, and any issue of the reasonableness of Telewest's response, should be decided by a simple mediation system, or failing that in the Small Claims court. We respectfully agree with the spirit of that approach, but not with its detail.

47. First, recourse to any court must be avoided in future. Second, the process between the parties should not be one of mediation, which carries too much potential for the leisurely ventilation of extensive issues such as has occurred so far in this matter, but one of arbitration or, rather, determination by an expert. The parties should arrange to refer any dispute to a single engineer, agreed by them or in default appointed by the President of the Institute of Electrical Engineers, who will determine any dispute on the basis of short written submissions with photographs of the site. He will apply the principles set out in this judgment so far as they are relevant to the case, and because he will deal with every case he will rapidly become familiar with the issues. Because he will act as expert his decisions will not be subject to appeal. And as a body of decisions developes the parties should be less and less in need of his assistance.

48. We cannot of course order or require any of this. However, should the parties reappear in court, and the more so in this court, in circumstances that have led them to litigation because of a failure to operate the system that we and, in essence, the judge have suggested, they are likely to receive short shrift, and certainly to encounter an unsympathetic approach to costs."

The Court of Appeal has laid down the challenge. It is for the mainstream dispute resolution providers and the engineering institutes to work with this and other industries that find themselves in similar positions, to provide solutions to the every day problems of adapting to changing technology in a UK with an extremely crowded infrastructural environment.

MANDATORY OR DIRECTORY

Jeyeanthan v SS Home Department [1999] EWCA 3010

The issue before the court concerned whether or not a failure to follow procedural requirements laid down by statute deprived a tribunal of jurisdiction. This issue was stated to be one of general importance with implications for the failure to observe procedural requirements beyond the instant field of immigration. The test set down by the CA was not referred to in the recent TCC judgements in ***Epping v Briggs, Cubbit v Fleetgate*** *and* ***Aveat v Jerram.***[1] The question that arises therefore is whether or not those cases would have been decided the way they were if ***Jeyeanthan*** had been considered and what implications the judgement might have on any possible appeals.

Jeyeanthan considered the approach that the court should adopt when dealing with instances of procedural irregularity. Lord Woolf MR noted that the conventional approach was first to categorise statutory requirements as mandatory or directory. Thereafter, breach of a directory requirement can usually be ignored whilst breach of a mandatory requirement is usually assumed to be un-remedial leading to subsequent events being made without jurisdiction and thus of no effect. His Lordship asserted that this approach distracted attention from what the legislator intended should be the consequence of non-compliance. Whilst the word ***"shall"*** and ***"must"*** are effective indicators that a provision is mandatory, few statutes throw much light on whether or not it is necessary or desirable to apply a test of ***"Strict Compliance"*** in respect of all breaches, be they substantial or minimal in nature. Lord Hailsham addressed the question of the consequences of breach of statutory requirements in ***London & Clydesdale Estates v Aberdeen DC*** [1980].[2] He noted that a spectrum of circumstances might apply ranging from the flagrant breach through to the trivial, indicating that the courts, exercising discretion, should strike down the flagrant but ignore the trivial. His Lordship noted that whilst helpful, words such as mandatory, directory, void, voidable and nullity may also be misleading and tend to place the courts in a straightjacket not intended by Parliament. Accordingly rigid legal categories are best avoided.

Lord Woolf proposed that the mandatory / discretionary test should form stage one of an inquiry, followed by the following questions :-

(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (***The substantial compliance question.***)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (***The discretionary question.***) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (***The consequences question.)***

Lord Woolf went on to state that *"The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where* ***it does not otherwise exist by consent or waiver****."*

What is pertinent here is that the focus of attention of the court was not on whether or not the regulations permitted derogation but rather on whether or not the parties had consented to a derogation. This is not quite the same as saying that by consent parties could or should be allowed to deliberately set out to side step regulations. The court was concerned with situations where there had been an omission which subsequently came to light. Thus in the conjoined action of ***Ravishandran*** the complaint only arose after the first instance decision in ***Jeyeanthan*** had been delivered. The court was particularly keen to address situations where the parties had at one stage been under the impression that what had been done was lawful, but subsequently took a point that came to light after the event.

Much of this bears a striking resemblance to the facts of both ***Epping*** and ***Aveat*** where the courts had previously heaped praise on the respective contractual provisions within the CIC adjudication provisions and the GC Works contract mechanisms. Similarly in all three cases, the points in respect of non-compliance were raised at later rather than earlier stages, either in the contract dealings or at the tail end of litigation. Indeed, it is striking that in ***Epping*** the issue was raised not by the parties but by the judge and in ***Aveat*** the issue was raised at the very end of the trial by counsel after becoming aware of the ***Epping*** judgment. Since the same judge was involved in both cases, the outcome became inevitable in the latter case.

The problem here is that the contract draftsmen are struggling to deal with the potential undesirable implications of a technical default in the adjudicatory process. The value of imposing strict timetables on the adjudicatory process to ensure rapid decision making, albeit of a temporarily final nature, is not doubted in the industry. No one is suggesting carte blanche contractual terms that would drive a coach and horses through the statutory regime. None-the-less, given the huge amount of both time and expense that is often involved in the adjudicatory process, draftsmen have sought to find a way of ensuring that mere technical breaches which are almost inevitable in such a complex process do not result in invalidating all that hard work and effort. Given the judicial compliments in respect of the relevant provisions the industry had thought that the contractual devices were effective. It would appear that they were not.

If Lord Woolf's tests were applied it is submitted that these cases would have survived, but with a message being sent out to provide a fix for the future. It should be possible to devise contractual language that will work. It is submitted that it is in the interests of the industry that such a form of words is found to mitigate against the unintended consequences of mere technical breaches. Whilst it might be possible for parties to engage in non-HGCRA adjudication, it is less clear whether or not the courts would provide it the same degree of robust enforcement that has been accorded to statutory adjudication. What is called for is a lighter touch.

[1] See Construction Case commentaries below.

[2] ***London & Clydesdale Estates Ltd v Aberdeen DC*** [1980] 1 WLR 182 at 188-190

Banking Services Quality Assurance Management with regard to Small – Medium Enterprises (SMEs) in emerging and developing markets[3]

Introduction

In the service sector commercial enterprises are never slow to extol the superior quality of the services that they offer. Consumer satisfaction, we are given to believe, is guaranteed. Clients are treated with respect. Clients are valued. Service is both prompt and effective. The service provider can be counted on to cater for our every need and above all when our chips are down they will not turn molehills into mountains. We can count on them to put Humpty-Dumpty together again without any fuss.

The reality, after we have parted with our hard earned cash, and are looking for a return on our good faith investment but have no more to offer the provider is not always so wonderful. We lawyers are often called upon to pick up the pieces. Hence, the opening part of a recent judgement from the Technology Court.

Tonkin v UK Insurance Ltd No1 [2006] EWHC 1120 (TCC)

"*On 29 September 2002, a major fire destroyed the Claimants' home, Curls Barn, in the village of Ripe in Sussex. Almost all the property was destroyed in the fire. The Claimants had insured both the building and its contents with the Defendant. With their three children, they moved into a small separate building adjacent to the ruins of the property, known as The Gallery, and waited for the property to be rebuilt. Extraordinarily, 3½ years on, that has yet to happen. One of the principal issues in this case is how it has come about that, to paraphrase an old insurance slogan, a drama has been turned into such a significant crisis.*" per His Honour Judge Peter Coulson QC, 18th May 2006

It might come as no surprise to learn that Mr Tonkin had fallen out of love with the professions that he had placed so much faith in, ranging from his bankers, his insurers and the building professionals, who had not yet reassembled his family home.

Mr Tonkin did not fare well in court either. He was partly the author of his own woes, but the professionals were not without fault. Much harm to all concerned **could** and **should** have been avoided but the problems were badly managed by all concerned, exacerbating rather than ameliorating the situation. It is submitted that what was need was an effective dispute management process, for both service provider and client.

Background to the development of Dispute Management Processes

The "*soit disant*" graceful, demure, subservient nature of Victorian commerce at the turn of the 19th/20th century, which crowned the consumer as king has failed to survive the cut and thrust of the evolving mass market of self service consumerism.

There has been a revolution in the way that the business sector operates. In no area has this been more evident than in the banking sector. The Monday to Friday 10:00 am to mid-day and 2:00 pm – 3:30 pm trading day of the traditional bank of my youth has given way to 6 day trading, 24/7 ATMs and open-access internet banking. Banking represents a small part of the services offered by the high street bank, which now embraces property surveying & conveying, financial & legal advice, insurance and mortgage facilities as well as international factoring and currency exchange.

The revolution however has brought with it great changes in attitude, not all for the good. The Victorian axiom that ***"The Client is Always Right"*** had by the 1970'ies, given way to an over bearing attitude by major goods and service providers with a stranglehold on the market, which regarded the client as a barely tolerated necessity. The hall-mark of business became the disinterested, surly shop assistant and secretarial staff who could barely force themselves to answer client queries. Returning and replacing defective goods and receiving compensation for poor service was often an uphill struggle. Clients became extremely disaffected and gradually, the worm turned.

Consumer legislation in the UK in the 1980'ies did much to empower the consumer, resulting in expensive, time-consuming litigation which by enlarge supported the consumer, but by the same token damaged the image of many traditional businesses, which have been forced by the market to adapt to a newer more competitive environment or fade away.

Enhanced communication and delivery services have ensured that the consumer in the UK is able to call, easily and conveniently, upon a wide range of alternative sources of both goods and services. This is evident in the banking sector. Gone are the days when wages were paid in cash, on a Friday evening in little brown envelopes, to be promptly gathered in by "*she who must be obeyed*" and doled out grudgingly from the household budget as pocket money. Then, only a minority had bank accounts. Today salaries are banked directly, as are government benefits. Females have embraced paid employment. Both sexes control the disposition of personal income. So, everyone in the UK needs a bank account to operate effectively and efficiently. Cash has largely given way to plastic. Banking is no longer a daunting mystery for the British public and bank managers are no longer treated with awe and respect. One consequence of this familiarity is that traditional brand loyalty can no longer be relied upon. In order to retain clients. Thus "***quality of service & product"*** have once more become paramount.

The upshot of this is that goods suppliers and service providers can no longer afford to be complacent about :-

i) client satisfaction with the pre-existing quality of goods and/or services and
ii) the way that complaints are dealt with.

[3] A paper presented to the ***Small Business Finance and Banking Services in Emerging and Developing Countries Conference. April 2007. University of Glamorgan by Corbett Haselgrove Spurin.***

The combined effect of these factors is forcing commerce to re-evaluate the consumer / supplier interface and the ways that management conduct their affairs.

Accordingly, in the West, the last decade of the 20th century witnessed a "Management Revolution" in commercial practice involving the development of new "Dispute Avoidance," "Conflict Management" and "Dispute Settlement Processes," centred around :-

a) the enhancement of service provider / client communications,
b) improvements in consumer relations techniques and
c) the development and implementation of alternative mechanisms for dispute resolution, popularly known as ADR (Alternative Dispute Resolution).

The generic term for this development is **"The Dispute Management Revolution"**

What Is Dispute Management ? Dispute Management embraces good practices and techniques

1 for the avoidance of disputes
2 for the minimising of disputes
3 for the settlement of disputes

The concept of Managing Disputes arose from the realisation that whilst disagreements & differences of opinion are part & parcel of the day to day interactions between members of our modern sophisticated society, it is not inevitable that disagreements & differences of opinion should lead to dispute. Through co-operation potential problems can be addressed at an early stage thereby preventing disputes from developing.

Furthermore, even where an issue rapidly develops into a confrontation, it is not necessarily too late to do something about it. If the parties **acknowledge** the existence of a problem at an early stage and **co-operate** together to address the problem before either party has suffered any significant adverse consequences, the problem will often cease to be a major divisive issue.

Traditionally, businessmen have given little thought to the settlement of disputes when, full of enthusiasm for a project, commercial relationships were formed. In consequence, if things subsequently went wrong, the parties had to go to court to get a judge to decide the rights and wrongs of the situation.

From early times, the maritime & construction industries have preferred to settle disputes through arbitration, which tended to be quicker & cheaper than going to court. Arbitration has the advantage also of being private, keeping disputes out of the public domain. The fact that many arbitrators had industry knowledge also helped to ensure that the arbitrator's decision took industry customs and practices into account and reduced the need to call expert witnesses to explain complex industry related issues.

However, arbitration made little impact on commerce in general. In recent times a wide range of ADR / Settlement mechanisms have developed to provide cheap, fast, effective ways of settling disputes, either by agreement between the parties, ranging from conciliation and mediation to fast track arbitration and adjudication.

To varying extents these mechanisms require a degree of co-operation in discussions or in procedure. By providing in contracts for these mechanisms and by participating in them, the parties continue to manage their dispute, rather than hand it over to a formal judicial dispute settlement process, over which they have little or no influence.

Dispute Avoidance

A Communications Systems. Prevention is better than cure. Direct contact with clients when potential problems appear can lead to instant remedial action. A phone call is better than a mailed "*shot over the bows*". Many disputes result from a failure to look beyond personal aims, interests & objectives to consider

a) the effect of one's actions on others or
b) to make a realistic assessment of what others can legitimately expect to receive from you in return for their co-operation & support.

The central problem is poor interaction between individuals & organisations which can be addressed by establishing effective channels for communication *(not mere small type in contracts)* that require both parties to set out, & regularly update

i) what they want out of a relationship
ii) what they are prepared to contribute to the relationship, and
iii) ensure that both parties actually listen and take on board the concerns & interests of the other party.

Commercial relationships usually achieve the first (i) & second (ii) of these, namely what each party wants out of the relationship and what they are prepared to contribute, at least at the outset, since the starting point for relations is likely to be a contract or agreement. This was normally sufficient to ensure that simple, straight-forward projects would proceed smoothly, though, where the agreement is not committed to writing a minimum requirement should be that the parties recapitulate & run through a check list at the end of negotiations, to confirm that both parties fully understand what they have committed themselves to. Complex on-going relations require more.

The advent of long term, complex commercial relations (e.g. *agency, insurance & service contracts*) has forced commerce to develop updating mechanisms to deal with extended timelines on projects that evolve and where requirements continually change These include :-

1) **Follow Through Supplier/Client Communications Pro-forma**. At a basic level problems related to ongoing relations can be addressed by the introduction of regular paper-work exercises designed to keep a project on track and ensure that all involved in the project are aware of changes to the original project design. It is far better to be pro-active, initiating check-lists and updating communications than to be reactive. The key to such systems is to monitor only critical information with built in response mechanisms whilst avoiding excess bureaucracy.

   Client satisfaction monitoring systems also provide valuable insights into the quality of service and enable the provider to adapt business practices and relations to ensure that the business responds to the changing needs of the market place.

   The danger here however is that such surveys often elicit "*appropriate*" responses both by the nature of the questions asked and through the careful selection of the target audience, particularly where the objective is to provide material for advertising rather than as part of a pro-active problem identification and solving program. Accordingly, disaffected clients are frequently ignored.

2) **Co-operative Management Systems.** At a more sophisticated level where a high level of co-operation in the delivery of a project is required good relations and high quality communication can be assured by the introduction of Project Team Management Systems, which should include consultation with financial backers.

   The traditional management model often results in two or more separate teams working simultaneously but in isolation on the same project. Team or Project Management involves the establishment of temporary management teams to oversee the execution of a project. The concept operates on the notion that "*too many cooks spoil the broth*". The setting up of a steering group for the project, with members from each of the organisations involved, who can protect the interests of their organisation ensures that the team, operating from a common data base, provides the same information & instructions to all of the organisations, avoiding misunderstandings & confusion, reducing the scope for dispute.

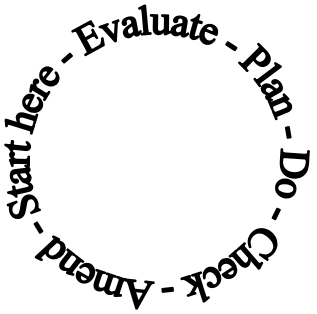
3) **Acknowledgement Mechanisms.** The third element (iii) regarding listening and taking concerns on-board are addressed by introducing acknowledgement systems that require the other party to not only confirm receipt of new information but also to provide a statement about intended/proposed action to address the new situation.

B **Quality Management Mechanisms.** Poor quality services and a failure to deliver what the client (i.e. the customer in the quality chain) requires, or to deliver what the customer is entitled to *(or at least what he believes he is entitled to)* under the bargain, lie at the root of many disputes.

It is far too simplistic simply to assert that the solution is to deliver quality each and every time by implementing quality inspection systems. Quality inspection systems "pick up" failures that have occurred after the product or service has been completed, used or the service provided. Such systems identify failures. They do not however, put in place mechanisms to "*get it right next time.*"

Total Quality or Total Quality Management Systems are systems of quality management designed to reduce future variability in output and conformance to specification whether it is a product or a service.

Quality improvement "spiral helix" that begins **evaluation** of the product



is a never-ending with the **initial** or the service.

The concept of the ***"Evaluate – Plan – Do – Check – Amend"*** (EPDCA) cycle is a never ending quest for improvement reducing variation in product to a minimum.

The adoption of Total Quality Management Systems requires for most organisations a fundamental change in philosophy compared to the tried and trusted quality assurance systems of identifying failures produced by the system rather than identifying failures in the system. In the modern business world, it has long been recognised that :-

i) Familiarity tends to lead to lower service standards, which need to be regularly monitored.
ii) The standards expected by clients are continually rising, requiring re-evaluation of the quality of service.
iii) Competitive pricing can have an adverse impact on quality of service delivery. In order to maintain quality it is necessary to invest on a regular basis in order to embrace time saving modern facilities & business practices.
iv) The concept of "best value" produces more discerning service clients who value quality of service over the lowest market price.

A complete quality management system based on concepts of "Total Quality" has the potential for most organisations, whether producing a product or providing a service, to provide a better product more efficiently. The question is whether an organisation or an individual is prepared to adopt methods that can be considered radical by some, but standard procedure by others.

The question that should be asked is "Are you prepared to learn from your mistakes and if so how ?"

If the answer is yes then you should consider implementing ***"A Total Quality System of Management."***

Minimising Disputes

It is not always possible, even with the best co-operation in the world, to prevent a dispute arising. Miscommunications can never be completely avoided. Unforeseen circumstances can result in accidents, which no degree of planning can prevent. Unexpected changes in the market can alter the viability of projects. Minimising resultant disputes is an exercise in damage limitation. Such measures are often referred to as ensuring a **"drama does not turn into a crisis"** or **"preventing molehills turning into insurmountable mountains."**

Co-operative Management Systems

Project Team Management Systems also provide a mechanism for the resolution of minor disputes as well as for the identification of potential problems, which if left un-addressed would inevitably lead to disputes. Providing there are built in contractual mechanisms for the adjustment of costs, to cover minor expenditure where the responsible person is easily identifiable, or even to share the cost of adjustments, where no particular person or organisation is clearly responsible for the problem, then a dispute can be quickly settled by the in house project management team.

Dispute Management Systems.

It is becoming increasingly common for a Dispute Management Board (DMB) to be attached to a Project Management Team. The DMB is an Independent Advisory Board which observes the early proceedings of the Project Management Team and subsequently pays regular updating visits during the life of the project, with a view to identifying potential problems. Those closely attached to a project on a daily basis often fail to see tell tale signs of pending problems whereas the problems are often obvious to the disinterested outside observer.

The DMB will comprise a number of different specialists or experts and one or more members of the DMB can often adopt the role of a conciliator, advising the Project Team on the best way to address problems identified by the DMB. Alternatively the DMB may adopt the role of a mediator, facilitating discussions between members of the Project Team aimed at producing a dispute settlement agreement.

Experience indicates that the number of disputes avoided or settled amicably at an early stage significantly reduces the on-going legal costs of large-scale projects but they can apply to small players as well. DMB have been developed for both telecoms and banking services and successfully implemented in the Middle East.

Dispute Settlement (ADR).

Co-operative Dispute Settlement. There are two principal forms of negotiated dispute settlement, namely conciliation and mediation. These are not terms of art and are sometimes used interchangeably. However, it is convenient to ascribe certain discernible features to each of them in order to be able distinguish between different mechanisms. The common feature is that a third party acts as a facilitator for negotiations enabling the parties to explore potential ways of settling the dispute without running immediately into confrontation before the advantages and disadvantages of the initiatives have been considered and weighed up by the parties. The facilitator will provide both parties with an opportunity to set out their view-point regarding the causes of the dispute and what they want out of, or are prepared to give to, the settlement process. The facilitator will then explore the issues further with each of the parties in turn ensuring that they both take into account the views of the other, until hopefully, a settlement can be brokered. The process concludes with an agreement, which is normally reduced to writing and signed by the parties.

Conciliation. The distinguishing features are

a) The conciliator takes an active role in formulating the outcome.
b) Most sessions are conducted with everybody present, though private sessions with each party in turn are possible.
c) Representation, particularly by a lawyer is possible but not common.
d) The resulting agreement is normally binding in honour only and thus not enforceable by the courts but is likely to be made public. Non-compliance is rare but not unknown.
e) The process may be short but tends to last for several days or even weeks.

Mediation. The distinguishing features are

a) The mediator may explore and even suggest ways of settling the dispute but will rarely formulate or pressure either party to accept a particular solution.
b) Private sessions or caucuses are used for private discussions with each of the parties in turn where avenues for settlement can be explored without prejudice. Only that information which is sanctioned by the party can be passed to the other side by the mediator.
c) It is usual for the parties to be represented, often by a lawyer. Mediators do not provide the parties with advice.
d) The resulting agreement is normally legally binding and thus enforceable by the court. Neither the terms of the agreement, nor the fact that a settlement has been reached is unlikely to be made public. Compliance is the norm.
e) The process may take several days or weeks but one day is the norm.

Third Party Dispute (Determination) Settlement.

Arbitration is the best known form of private third party determination of disputes. However, there are in fact a wide range of processes where a third party is required to act as a private judge, to make a ruling as to which of the parties is in the right and which is in the wrong, and to decide how much, if any, compensation is payable. Traditionally the loser pays the costs of the process. The arbitration may be stated to be final without any avenue for appeal, though judicial review of the process by the courts is always possible. Arbitral awards are easily enforceable both by domestic courts and international awards are enforceable by foreign courts as well.

Arbitration is best described as a private court. The private nature of arbitration is favoured by commerce. Ideally, arbitration should be quicker and cheaper than the courts. Procedures may mirror the courts but tend to be more relaxed and less formal.

Fast Track Arbitration differs from traditional arbitration in that the time for commencing the process is strictly controlled, usually within 28 days from submission and the parties agree in advance to short time limits for the arbitral hearing. Costs are often fixed in advance but in any event are kept to a minimum.

Paper Only Arbitration is ideal for small disputes. All the claims, defences and evidence are submitted in written form. There is no hearing. The process can be very quick and is inexpensive.

Adjudication differs from arbitration in that the decision is temporary, pending final determination either by arbitration or through the courts. The process usually takes 28 days only. If no further challenge is made the dispute is brought to an end. However, even if one of the parties chooses to take the matter further the losing party must comply with the decision pending a subsequent hearing. Adjudication is very effective at ensuring that tradesmen and sub-contractors receive prompt payment. Subsequent hearings are rare. Adjudication is inexpensive.

Expert Determination is a valuable, though less frequently used form of dispute resolution used to settle disputed facts where questions of law are not in dispute. The process is most commonly used to settle technical disputes in engineering. However, it is also used to fix the contract price for the sale of real estate, art and antiquities where the expert is known as a valuer. The process is speedy, inexpensive and legally binding.

Dispute Review Boards (DRB) are an extension of the Dispute Management Board (DMS) outlined above, embracing the role played by members of the DMS as conciliators and mediators but also extending it to interim or final third party determination of disputes as either adjudicators or arbitrators. Since the members of the DRB are already familiar with all the surrounding facts and the background to the dispute, there is little need to call witnesses and an adjudicatory or arbitral panel can quickly be convened at very little additional cost. Hearings tend to be brief and the parties get a decision very quickly. The process is private so disputes are kept out of the public domain.

Experience indicates that satisfaction levels with DRB's are high and the process is cost effective compared to normal arbitration and judicial settlement of disputes.

Completing the quality management circle post settlement.

The crucial element here is to learn lessons, where applicable, from the episodes that have led to the dispute. Dispute resolution processes in their different ways provide indicators as to what went wrong and thus provide the key to avoiding repetition in the future.

The compromise that arises out of negotiated settlement is largely based on a risk assessment of potential exposure arising out of self acknowledgment of the shortcomings of the organisations actions. The settlement limits the damage but remedial action can recoup that cost by preventing repetition. Acknowledgement of shortcomings is the first step towards providing a future fix. That opportunity should not be squandered.

Similarly, where a third party expert determination process is involved, the cost of the process should not only be viewed as an inevitable litigation cost, but also as an investment in the procuring of an independent expert opinion as to the efficacy of a businesses practices and procedures.

It is worthwhile taking a pause for thought at this stage to contrast the decision making processes involved with in house problem solving mechanisms.

Without wishing to take anything away from the value of operating a client complaints service, nonetheless it is rare for organisations to track complaints beyond the event. The complaints desk operative is normally empowered to either pacify the complainant through apologies & explanations (excuses) or alternatively or to offer a replacement product or provide a refund. The pacification technique is cost effective in the short term. Robust individuals frequently undertake such posts, reinforced with in-depth training in the rules, regulations and codes of practice of the organisation. It often requires a very determined complainant to convince the operative that the computer actually was wrong, that the customer was given inaccurate advice or that staff were rude and inconsiderate. There is often an institutional pride and trust (frequently misplaced) in the infallibility of colleagues and institutional procedures. Particularly in the service sector, such individuals are skilled at presenting the organisations practices as effective and fair. They, more than any others, lack the capacity to recognise short comings in an organisations procedures, or to provide critical reports that might lead to future remedial action. The independent third party facilitator or adjudicator by contrast, owes no such allegiances and thus can provide an objective assessment of the situation.

Global Transferable Skills.

Cultural Imperialism or Good Management Practice ?

Simply because the West has pioneered Dispute Management to its own advantage does not mean that the same techniques will necessarily benefit commercial and government organisations outside the West. It is important to question whether or not these new management skills are culturally transferable. There is little doubt that certain elements of human behaviour are universal, so it is not unreasonable to assume that management techniques that address such behavioural patterns should likewise be universally applicable. However, to the extent that human behaviour is modelled and shaped by local culture, there is a need to evaluate and consider ways of adapting and remodelling management techniques to take cultural differences into account. In order to achieve this it is important to identify

a) Management techniques that apply to universal aspects of human behaviour.
b) Management techniques that are culturally-centric and non-transferable.
c) Management techniques that are culturally sensitive but which are nonetheless adaptable and culturally transferable with appropriate modifications.

Whilst conflict is a universal phenomenon it would be wrong to assume that the causes of conflict are equally universal. Even so, there are identifiable universal causes of conflict, just as there are identifiable universal base standards of socially acceptable behaviour. Furthermore, the ways in which individuals relate to and treat conflict vary, reflecting socio-cultural values and local social conditions and practices. Nonetheless, there are identifiable universal consequences that follow on from the breach of universal base standards of socially acceptable behaviour which are likely to produce very similar reactions from the adversely affected party.

The cultural fault-lines between Asian, Eastern and Western culture are self evident. Nonetheless, The Napoleonic Code has provided the model for much of the world, whilst the English Legal System has been widely adopted and assimilated. This has occurred despite the fact that both systems have their roots firmly planted in the western culture. Although in principle able to resolve conflicts between entities belonging to different cultures practice exposed shortcomings. Western legal systems have failed to deal with certain aspects of conflict, amongst them underlying issues, interests and the special needs of the parties involved. In particular judicial settlement of conflict (based on formal procedures and evidence), does not afford the parties with an opportunity to relate to the psychological and cultural elements involved in conflict. Added to this, the length of judicial procedures, high costs and the adversarial nature of the legal process have forced the West to consider alternatives methods of settling disputes outside the courts.

ADR differs from legal proceedings in that a neutral, professional party is involved in the process, assisting the parties to negotiate and resolve their dispute, while taking into account the particular needs and interests at the base of the dispute. All evidence and arguments deemed by the parties as relevant are considered. The parties themselves, as opposed to the judge, are the decision-makers. Research has based the advantages of ADR on the opportunity it offers to settle disputes to the mutual benefit and satisfaction of all parties, at low cost, while empowering them, maintaining or even improving relationships, and reinforcing communal unity. If it can be shown that ADR can cross communal-boundaries then, since ADR forms the bed-rock of the Dispute Management Revolution, it would be reasonable to assume that the concept should in practice be culturally transferable.

Can ADR be successfully applied to cross-cultural conflict ?

Professionals have defined cross-cultural conflicts as "*a dispute or series of disputes relating to an issue between at least two persons, where an element of the dispute relates to the ethnicity of the parties &/or the parties belong to ethno-cultural groups.*" Since ADR enables the parties to a dispute to consider all the underlying issues and to conduct settlement negotiations, the process would appear to provide an opportunity to deal with & discuss cultural factors at the base of disputes & to provide satisfactory responses and solutions.

However, professional literature points to problems arising from attempts to apply models of mediation representing a particular culture to different cultural and cross-cultural contexts. The result is usually a partial and unsatisfactory solution, a failure to achieve results. "*Once bitten, twice shy*" is a natural reaction to failure and this has led to the avoidance of mediation amongst certain entities and groups.

The large number of disputes based on problems of identity & cultural differences arise from the multicultural & heterogeneous characteristics within societies, as well as from the development of relations, dependence & links between societies & states. Multicultural societies must deal with the necessity to recognise the unique nature of each group & entity, & the need to approach disputes in such a way as to reach a satisfactory solution whilst maintaining the relationships between the groups, vital for preserving the social structure.

Are the philosophic presumptions at the core of ADR universal & how far do the values they represent & reflect the values of Western culture? Are the models put forward for ADR sufficiently flexible to respond to the needs of cultural & ethnic groups? The tendency in the past has been to view ADR in terms of a universal model. With time it has become clear that an efficient response to conflicts requires a deeper understanding of both the tools available within ADR & the cultural background of the parties involved.

Mediation is a process characterised by direct communication, frontal confrontation between parties, & the intervention of a neutral professional, who has no authority to decide. These principles represent the values of a modern & individualistic society. The question is whether or not they can fit within cross-cultural contexts & be applied to disputes

arising out of different values & norms, where the parties have different perceptions of the causes & effects of the issues which have brought them into conflict.

Conclusions

1) Dispute Management Practices and Procedures can be used in respect of disputes of a universal nature and in appropriate circumstances are readily transferable over cultural boundaries.
2) In respect of domestic, regionalised disputes, Dispute Management Practices and Procedures may need to be adapted to reflect local cultural differences and domestic legal structures.
3) Considerable care needs to be exercised in applying such techniques to cross-cultural disputes.

Inculcating the dispute resolution culture in the workplace.

A valuable starting point to the adoption of a dispute resolution culture is the provision of open and apparent complaints procedures, disciplinary procedures and independent workplace mediated dispute resolution processes.

In as much as mediation is a process that is sympathetic to the maintenance of long term relationships, it provides the ideal mechanism for settling employment disputes, building confidence in workplace relationships and the self confidence of employees.

The employee imbued with self respect is better placed to respect customers, to see their point of view and thus to adopt policies and practices that protect the long term trading interests of the employer. A contented and self satisfied workforce is more likely to be a committed, caring and sharing workforce.

Postscript

It is virtually impossible to overstate the benefits that an open, effective banking system offers to the wellbeing of society in general. It provides the key to commodity exchange and the creation of wealth. Central to this is consumer confidence, be it of the individual or the commercial enterprise, particularly small and medium enterprises, for whom cash flow is the key to fluidity and ongoing commercial viability. Small businesses in their turn are the lifeblood of the community, providing all the essential day to day services upon which society relies. The responsibility placed upon the banking community as the cornerstone of the economic and social society is enormous. Some of the ideas presented above may go some small way to help fulfil that obligation.

Corbett Haeelgrove-Spurin

****

Seven Point test for applications for Summary Judgment

Nigeria v Santolina Investment Corp [2007] EWHC 437 (Ch)

Summary judgement: the test

3. Part 24 of the CPR enables the court to give summary judgment against a defendant on the whole of a claim or on a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the claim or issue should not be disposed of at a trial.

4. The courts have now given guidance on the principles to be applied in deciding whether or not to give summary judgment. For present purposes I summarise the relevant ones as follows:
   i) The court must consider whether the defendant has a "*realistic*" as opposed to a *"fanciful"* prospect of success: ***Swain v Hillman*** [2001] 2 All ER 91;
   ii) A *"realistic"* defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** [2003] EWCA Civ 472 at [8]
   iii) In reaching its conclusion the court must not conduct a "*mini-trial*": ***Swain v Hillman***
   iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** at [10]
   v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** [2001] EWCA Civ 550;
   vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63;
   vii) Although there is no longer an absolute bar on obtaining summary judgment when fraud is alleged, the fact that a claim is based on fraud is a relevant factor. The risk of a finding of dishonesty may itself provide a compelling reason for allowing a case to proceed to trial, even where the case looks strong on the papers: ***Wrexham Association Football Club Ltd v Crucialmove Ltd*** [2006] EWCA Civ 237 at [57].

Mr Justice Lewison : 7th March 2007

MEDIATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

Aird v Prime Meridian Ltd [2006] EWCA Civ 1866

This involved a successful appeal from the judgement of Coulson J. The CA held that a joint statement was a court document under Rule 35(12) CPR issued in the normal way, whatever the intention of the issuing judge. Parties had agreed to issue a joint statement before cross examination. They had undertaken the risk that they might resile from that view later and could not subsequently complain. Accordingly the document admissible and not subject to mediation privilege. CA before May LJ; Smith LJ; Sir Martin Nourse. 21st December 2006.

Ali v Abdur [2006] EWHC 3420 (Ch)

This case concerned a charity dispute and court advised mediation, a development which appears to be the norm for charities to avoid the dissipation of charitable funds. The parties were ordered to provide reports to the court within 14 days stating what arrangements had been made for an urgent mediation of the dispute and, if no arrangements had been made, an explanation as to why. Chancery Div. Robin Knowles QC. 21st December 2006.

Brown v Rice [2007] All ER (D) 252 (Mar)

Without prejudice : Were mediations proceedings admissible to determine whether or not a settlement offer had been made and accepted? Held : Yes - an established exception to the privilege rules. In the event, no valid offer had been made. The claim remained alive and was set down for trial accordingly. Stuart Isaacs QC. Chancery. 14th March 2007

Brunel University v Vaseghi [2006] UKEAT 0307_06_1610

The central issue in this failed appeal was Negotiation Privilege and waiver established by the conduct of the parties in the course of the proceedings. The court held that there had been no abuse of process. The court conducted a major review of the cases on piercing veil through waiver by the parties and rules on abuse of procedure.

Ansel J. EAT. 16th October 2006

Finster v Arriva [2007] Lawtel AC0112766

Mediation rejected. Quantum settlement : Costs. Personal injury claim established : Claimant rejected offer of mediation. Initially a payment in of £10K was rejected, but then accepted post trial of entitlement pending quantum hearing together with standard costs. Initial claim was for £1M+ for lost job opportunity. Job offer, the loss of which formed the basis of the claim, was verbal and no corroborating evidence provided to court. Claim exaggerated. 3 day trial excessive. Standard costs for 1 days trial only granted. Deputy Master Williams. Cost Office. 11th December 2006.

Liaquat Ali v Robert Lane [2006] EWCA Civ 1532

Professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind (petty boundary disputes) and of the possibilities of alternative dispute procedures - but provides no indication of the potential consequences of not fulfilling that duty.

CA before Waller LJ; Carnwath LJ; Maurice Kay LJ. 21st November 2006.

National Westminster Bank Plc v Feeney [2006] ADR.L.R. 11/30

Where the parties agree to bear their own costs of a mediation a Tomlin Order should, with respect to costs, respect that agreement, which would accordingly override any aspect of a Tomlin Order that failed to do so.

Master Campbell: Supreme Court Costs Office. 30th November 2006

Palfrey v Wilson [2007] EWCA Civ 94

Rejection of settlement offer versus rejection of mediation offer and costs. Dispute about ownership of a wall. Defendant offered for wall to be designated a party wall. Rejected - counter offer of mediation not taken up. Claim ultimately failed and costs ordered on an indemnity basis upon rejection of the initial offer. Failed appeals both on ownership and on costs. Having made constructive offers there was no requirement to enter into mediation.

Tuckey LJ; Arden LJ; Lawrence Collins LJ. 15th February 2007.

Stocking v Montila [2007] EWHC 56 (Ch)

Rejected settlement offer : Costs. Partnership dispute. Settlement offer made without any terms of reference. At trial expert reports produced regarding respective shares in business and rent due for occupation of partnership property. Court held : the reports were needed not just for the trial but for dissolution of partnership. Rejection of a bare offer without explanation of how calculated was justifiable. No costs order made. Rimer J. Ch.Div. 26th January 2007.

Trustees of Morden College v Mayrick [2007] EWCA Civ 4

Enforcement : Settlement agreement : assertion of mistake : Held : Where the facts were known at the time a settlement agreement cannot be reopened on grounds of mistake, otherwise all compromise agreements including mediated settlements would be liable to further litigation. CA before Chadwick, Hallett LJJ and Lindsay J. 12th January 2007.

CONSTRUCTION CASE CORNER

Corbett Haselgrove Spurin

Ale Heavylift v MSD (Darlington) Ltd [2006] EWHC 2080 (TCC)

This concerned a contract for the hire of cranes for the Wembley stadium. It commenced with a written contract which was followed by asserted unwritten contract variations, which it was later alleged fell outside the scope of the HGCRA raising further issues of contract interpretation: ***Macob v Morrison*** [1999]; ***Bouygues v Dahl-Jensen*** [2000]; ***C & B v Isobars*** *[2002];* ***Carillion v Devonport*** [2006]; ***Grovedeck v Capital Demolition*** [2001]; ***RJT v DM Engineering*** [2002] considered.

The defendant sought to establish a right to set off for subsequent events during enforcement proceedings. ***Interserve v Cleveland Bridge*** [2006]; ***Modem Engineering v Gilbert Ash*** [1974] considered. The fairness of the process and natural justice was raised as a potential defence. ***Amec v Whitefriars*** [2005] considered.Issues arose as to withholding notice procedure. ***VHE v RBSTV*** [2002]; ***Balfour Beatty v Serco*** [2004]; ***Rupert Morgan v Jervis*** [2004]; ***Ferson v Levolux*** [2003]; ***Gleeson v Devonshire*** (2004) considered. Finally the financial insecurity of applicant was asserted in furtherance of an application for stay of enforcement. ***Herschell v Breen (***2000); ***Wimbledon v Vago*** [2005] considered.

All aspects of the challenge were rejected and enforcement ordered. The principal judgement relates to the jurisdiction challenge which was not raised during adjudication proceedings. The court held that there had been a waiver – it was too late to raise at this late stage. The paperwork involved a great deal of duplication which raised issues as to costs and the case went to the cost judge to sort this out, though interest was agreed on the day.

HHJ Toulmin. TCC. 31st July 2006.

Aveat Heating Ltd v Jerram Falkus Construction Ltd [2007] EWHC 131 (TCC)

The court held that a contractual requirement that the 28 day time limit runs from receipt of referral is HGCRA compliant. The date of posting a referral was unreliable since the document might not arrive or might be delayed – an event outside the control of the referring party. Clause 38A5 JC Works / SC provided that a decision would be valid even if delivered after 28 days or after any agreed time. Following ***Epping*** such a provision is non-compliant with s108 HGCRA and hence the Scheme applies. The court acknowledged that the parties could validly refer a dispute to a non-HGCRA adjudicatory process but this would have to be expressly set out an agreed by the parties. It was not in this case since the GC Works alleged to comply with the HGCRA.

As above regarding contractual references, time runs from receipt under the Scheme (***Ritchie*** distinguished). A decision sent on the due date will be deemed to be valid even if sent after business hours. The court will not work in parts of days – only complete days. The court further held that the dispute as set out in the notice and the referral essentially the same and the dispute had crystallised. Accordingly the decision was enforced except for the portion related to costs which – was not allowed under Scheme. This was provided for under the invalid GC Works reference and hence not enforceable.

Epping v Briggs [2007]: ***Ritchie v Philp*** [2005]: ***Mowlem v Hydra-Tight*** *(2002):* ***Pegram v Tally Weijl*** [2003]: ***AMEC v Whitefriars*** [2004]: ***Ken Griffin v Midas Homes*** 2000: ***Edmund Nuttall v Carter Ltd*** [2002]: considered. His Honour Judge Richard Havery QC. TCC. 1st February 2007

COMMENT : The consequences of the respective judgements in ***Epping v Briggs, Cubbit v Fleetgate*** *and* ***Aveat v Jerram*** will be that many of the standard form adjudication provisions in current use are likely to be treated as non-HGCRA compliant and could give rise to successful challenges to otherwise enforceable adjudication decisions. Perhaps in the longer term as the standard forms are corrected, the result will arguably be a sounder regulatory system, but in the meantime adjudicator's will need to take extra care to ensure that the Scheme is applied and that the parties expressly consent to the process, to avoid later problems. In the absence of agreement, much time, cost and effort might be avoided if the parties seek declarations to clarify their specific situation. None of this can be what was originally intended by the HGCRA and whether or not it will have been worth all the effort and disruption is questionable.

Bennett (Electrical) Services Limited v Inviron Limited [2007] EWHC 49 (QB)

The parties to this dispute which was submitted to adjudication proceeded on the basis if a Letter of Intent, headed "Subject to Contract", which provided for remuneration on the basis of *"reasonable and substantiated direct costs of complying with this instruction"* in the event that no contract is subsequently concluded.

The first adjudicator appointed expressed a non-binding view that there was no contract. A second adjudicator subsequently determined there was a contract and proceeded to issue a decision. However, a challenge on the grounds of double jeopardy was not addressed by the court. Nonetheless, in the course of enforcement proceedings the court held that an agreement based on *"request and restitution"* is not a contract and further held that oral agreements regarding *"working hours, mechanisms of payment, variations, insurance and health and safety"* were key provision which if not written precluded HGCRA adjudication by virtue of s107. Accordingly the adjudicator had no jurisdiction and the decision was not enforceable in summary proceedings.

BSC v Cleveland Bridge and Engineering Company Limited [1984] 1 All ER 504 and ***RJT Consulting Engineers Ltd v DM Engineering Ltd*** [2002] WLR 2344 CA quoting ***Grovedeck Ltd v Capital Demolition*** [2000] BLR at p185 applied.

His Honour Judge David Wilcox : TCC. 19th January 2007.

COMMENT : It is not clear why the court held that an agreement to pay on a remuneration or quantum meruit basis is anything less than a contract. Furthermore, why would the issues canvassed in the oral agreement be key issues not amenable to quantification via quantum meruit and thus contrary to the HGCRA s107? It is after all the type of function that an adjudicator is well suited to performing and within the spirit both of the CPR and the objectives of Lord Woolfe and the HGCRA draftsmen. How much of a precedent this case sets is unclear since the court referred to the following statement from ***Rossiter v Miller*** (1878) 3 App. Cas.1124 where Lord Blackburn said: "*I think the decisions settle that it is a question of construction, whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.*" Thus it may be a mere decision upon the facts of the case and no more.

Birse Construction Ltd v HLC Engenharia E Gestäo De Projectos Sa [2006] EWHC 1258 (TCC)

This involved an application for discoveries to facilitate a challenge to an adjudicator's decision. Applications for pre-action disclosures whilst unusual, were in this case acceded to in part. The court determined that the applicant was out of the loop in respect of matters that concerned on going obligations and further that the information could facilitate settlement and also help to determine issues in respect of lawfulness of determination of contract, thus avoiding further litigation. ***XL London Market Ltd v Zenith Syndicate Management Ltd*** [2004] EWHC 1182 (Comm) : ***Briggs & Forrester Electrical Ltd v The Governors Of Southfield School for Girls*** [2005] BLR 468 : ***First Gulf Bank v Wachovia Bank National Association*** [2005] EWHC 2827 (Comm) considered.

Mr Justice Jackson. TCC. 2nd May 2006

Bothma D & T t/a DAB Builders v Mayhaven Healthcare Ltd [2006] TCC Bristol 6BS90599

This dispute involved a Scheme Adjudication since the adjudication provisions under the JCT contract had been deleted. ***Pring v Hafner : Fastrack v Morrision : Barr v Law Mining ; Sindall v Solland : David McClean v Swansea HA*** considered regarding the requirement for only one dispute to be referred to adjudication at a time. The court found on the facts that multiple disputes had been referred without consent to jurisdiction. These included progress payment No9, plus a dispute as to the due date for completion under the contract. The disputes were not interrelated, neither being an integral part of the other. The court held that a general objection to jurisdiction is sufficient to override assertions of waiver - a party can successfully resist enforcement on new jurisdictional grounds not put to the adjudicator. ***Project Consultancy v Gray Trust : Durtnell v Kaduna*** applied. ***Carillion v Devonport*** considered. The two grounds of objection to jurisdiction, namely one on personality and another on whether the notice of adjudication was effective. Both grounds were not pursued as a defence to enforcement. Instead Mayhaven relied on the two dispute issue instead.

Havelock-Allan QC. TCC Bristol Registry. 16th November 2006

COMMENT : It is submitted that if this decision is correct it is unhelpful in that a respondent could raise a non-specified objection to adjudication, take part subject to the reservation and if unsuccessful resist enforcement on specific jurisdictional grounds not raised during the course of the adjudication - which if established would prevent enforcement.

Whilst an adjudicator does not (unless specifically granted) have jurisdiction over jurisdiction, the adjudicator and the other party will wish to take on board any objections to jurisdiction, evaluate their validity and make a considered choice as to whether to proceed or not. This decision, if correct, would allow the respondent to hold an unspecified complaint over everyone's head, only revealing his hand latter. Indeed, it would allow a respondent to wait till everything is over, analyse the events and winkle out allegations of jurisdictional errors thereafter. This, it is submitted is not helpful to the adjudication process, though given the small amount at stake one imagines that an appeal is unlikely.

Chorus Group v Berner (BVI) Ltd [2006] EWHC 3622 (TCC)

This concerned a post adjudication settlement agreement, with due date of payment and interest. Cheque from overseas bounced. Employers incorporated off-shore. This hearing was preceded by a successful ex-parte application to Mr Justice Jackson for a freezing order. The present hearing involved a successful application to renew the freezing order and extend its scope together with an application for summary enforcement of the debt arising out of the cheque. The defence unsuccessfully asserted there had been non-disclosure during the original ex part application. ***Brink's Mat v. Elcombe*** [1988] 1 WLR 1350 considered. Regarding the risk of dissipation of funds, an essential ingredient of an application for a freezing order, ***The Niedersachsen*** [1983] 2 Lloyd's Rep. 600 applied.

Mr Justice Ramsey. 1st November 2006.

Cubitt Building & Interiors Ltd v Fleetglade Ltd [2006] EWHC 3413 (TCC)

This concerned an adjudication subject to JCT 1998 and the application of clauses 30 and 41A. The adjudicator was nominated at the end of the working day on day 7 after the request to nominate and the notice had been made. In consequence the referral was made on day 8 which on the face of it is a late referral and a potential breach of s108 HGCRA. The court held that in the circumstances it was nonetheless a valid referral and not out of time. The court was reluctant to visit the tardiness of the appointing body on the referring body, since this was a matter beyond his control.

The defendant also resisted enforcement on the grounds that the decision was both made late and furthermore delivered outside the agreed extension time and was thus late and invalid on both grounds. The decision was finalised late in the evening of the final date provided by an agreed extension or time and emailed to the parties 12 1/2 hours later. These delays arose out of two separate factors :

a) The adjudicator asserted that he had "reached his decision" a day earlier but had not committed the reasons to paper and was not ready to release the decision until put into a polished state and proof read, and

b) The adjudicator sought to exercise a contractual lien over the decision that he had introduced as a term of accepting the appointment (without demure by the parties at the time), but following subsequent adverse comments from the parties decided to release the decision.

The court determined

1) The decision was made on the final day (albeit after working hours) and was thus lawful. Attempts to establish that the decision was made a day earlier were brushed aside without comment.
2) After making a decision it must be issued forthwith. In the circumstances, the court found that what occurred was just within the meaning of delivery "*forthwith*" and hence the decision was validly made and issued and accordingly enforceable.
3) The court made it clear that in its view any attempt to exercise a lien over a decision was against the contractual regime that applied by virtue of the JCT Contract and contrary to the legal regime established by the HGCRA.

Ritchie v David Philp [2005] 1 BLR 384: ***Hart v Fidler*** [2006] EWHC 2857 TCC. ***William Verry v North West London Communal Mikva*** (2004) BLR 3008. ***Carter v Nuttall*** [2004] BLR 308. ***Palmac v Park Lane*** [2005] BLR 30. ***Bloor v Bowmer*** [2000] TCC 764. ***St Andrew's Bay v HBG Management*** [2003] Scot CS 103. ***Barnes & Elliott v Taylor Woodrow*** [2004] 1 BLR 111, ***Simons v Aardvaark*** [2004] 1 BLR 117 considered.

His Honour Judge Peter Coulson Q.C.. TCC. 21st December 2006.

COMMENT : Amongst other things it would appear that we have entered the realm of 24/7 construction adjudication – like the Grantham shopkeeper, the adjudicator is "*open all hours*." Technology and the electronic age is wonderful, n'est pas? Contrast ***Epping v Briggs*** where Havery J was less accommodating.

The court also served a warning to adjudicators that they may not be protected by the good faith exemption within the HGCRA if they breached their contractual obligations to deliver a decision in time. In this case, the adjudication concerned an otherwise time barred opportunity to challenge an evaluation. The adjudicator could have been subject to an action to recover damages for the lost opportunity to challenge that evaluation and in addition his entitlement to fees was also put in jeopardy by his last minute brinksmanship. The moral of the story here is secure a further extension of time, if only for another 24 hours if there is a danger of not meeting the deadline. Otherwise, prioritise!

Epping Electrical Company Ltd v Briggs & Forrester (Plumbing Services) Ltd [2007] EWHC 4 (TCC)

This case involved an application for summary enforcement of an adjudicator's decision. The parties had agreed an extension of time. However, having apparently made the decision in time (though this was doubted by one of the parties), the adjudicator declined to issue the decision pending payment of fees. The adjudicator had not contracted on pre-payment terms but subsequently notified the parties of this intention to assert a lien. He released the decision two days later following adverse comment by the parties, despite not having been paid, in an unsuccessful attempt to avoid further problems and complications.

The court held that an adjudication decision had to be released before expiry of the statutory deadline or any extended deadline, as the case might be. On the facts it was not released on time. Accordingly the adjudicator was out of jurisdiction and the decision was unenforceable. ***Ritchie Brothers (PWC) Ltd. v. David Philp (Commercials) Ltd.*** [2005] BLR 384.: ***St. Andrew's Bay Development Ltd. v. HBG Management Ltd.*** [2003] Scot CS 103. ***Barnes & Elliot Ltd. v. Taylor Woodrow Holdings Ltd.*** [2004] BLR 111, 113. considered. The HGCRA deadline is not advisory, it is mandatory. A term in a contract that seeks to remedy a breach renders the contract non-compliant and the scheme will apply instead.

His Honour Judge Richard Havery. TCC. 19th January 2007.

COMMENT : This decision puts in jeopardy the entire contractual adjudication mechanism governed by the CIC Model Adjudication Procedural Rules, and Paragraph 25 in particular, which is incorporated into many standard form contracts, and is likely to result in a rapid redrafting of the rules. As currently drafted the rules state :

25 If the Adjudicator fails to reach his decision within the time permitted by this procedure, his decision shall nonetheless be effective if reached before the referral of the dispute to any replacement adjudicator under paragraph 11 but not otherwise. If he fails to reach such an effective decision, he shall not be entitled to any fees and expenses (save for the cost of any legal or technical advice subject to the Parties having received such advice).

It should be noted that the rules have on a number of occasions met with judicial approval and prior to this had been considered to be HGCRA compliant.

HG Construction Ltd v Ashwell Homes (East Anglia) Ltd. [2007] EWHC 144 (TCC)

This case concerns the issue of double jeopardy in adjudication. In Adjudication No 1 the applicant sought an adjudicator's declaration that contract terms were sufficiently clear to enable sums allocated to sections of a project to be calculated thus giving rise to a right to levy LADs. Whilst there were problems in so doing, the adjudicator held it was possible to do that. In adjudication 3 before a different adjudicator a return of LADs previously deducted on the basis of the first decision was sought, on grounds that it was not possible to allocate sums in respect of that section. However the adjudicator determined that it was not possible to calculate sums in general terms rather than in the specific terms of that particular deduction, concluding that the withheld sum be paid. In this action to enforce that decision, enforcement was refused. The court held that it was essentially the same dispute as previously canvassed and decided in the first adjudication. ***Woodrow Holdings v. Barnes & Elliott Ltd*** [2004]: ***Quietfield Ltd v. Vascroft Construction Ltd*** [2006]; *on* ***Henderson v. Henderson*** *(1843) 3 Hare 100; in* ***Johnson v. Gore Wood & Co (a firm)*** *[2002] 2 AC 1 30H-31G* considered.

Mr Justice Ramsey. TCC. 1st February 2007.

COMMENT : This decision raises an interesting potential problem for subsequent adjudicators. Whilst it is clearly desirable for a general question of entitlement to be established by adjudication, nonetheless, subsequent adjudicators may well have to then grapple with the question of quantum. Whilst the first adjudicator may feel that everything is sufficiently clearly demarcated to allow a task to be performed, a subsequent adjudicator blessed with the task of applying it to subsequent events may find it a more challenging task than perceived by the first adjudicator. In the event that a subsequent adjudicator finds the task too difficult to perform, perhaps it would be open to determine that whilst in principle such a task is possible, in the context of the given facts of a particular claim, it is not possible to do so. Here the court held the adjudicator had relied upon contract terms, not new facts, so it did not work this particular time.

Lead Technical Services Ltd v CMS Medical Ltd (2007) Lawtel AC9400739

Appeal from the summary enforcement of an adjudication decision by Grenfell J with regard to a payment / fees dispute over planning permission services. The CA overturned the summary enforcement decision. There was an arguable case that there was a valid deed that supplanted the original construction contract, to the effect that the relevant ANB was governed by the T&C.Solicitors Rules and that there was a fee capping agreement in place. Judge had failed to explain why this evidence was dismissed. If these facts were established then the dispute would have been referred to the wrong AND accordingly the adjudicator would have had no jurisdiction to hear and determine the dispute.

CA. Buxton LJ, Rix LJ, Moses LJ. 30th January 2007.

COMMENT : Presumably the case would then be remitted to the High Court for a determination as to whether or not the deed prevailed and if so what impact it had upon the dispute between the parties, in particular a determination as to whether or not the capping order prevailed.

Melville Dundas Ltd v Hotel Corporation Of Edinburgh Ltd [2006] ScotCS CSOH_136

This case involved an application for summary enforcement of a settlement agreement of a construction dispute. The Court held that a dispute arising out of a compromise agreement to a construction dispute is not a construction dispute for the purposes of the HGCRA. It could not be referred to adjudication and thus was not amenable to enforcement by way of summary judgement. Lord Drummond Young, Outer House Court of Session. 7th September 2006

Monavon Construction Ltd v Davenport No. 2 [2006] EWHC 1810 (TCC)

The parties to a construction dispute opted to litigate rather than adjudicate the dispute. In the event the result was a "No Score Draw" and applying the CPR s44 Rules, the court held that each party bear its own costs. In the circumstances no adverse consequence for spurning adjudication would be visited on either party. This firmly places adjudication on a different plane to mediation, making it clear that there is no statutory pressure to adjudicate, ensuring that it is a cost free choice of the parties whether to do so or not. His Honour Judge Thornton. TCC. 17th July 2006

Multiplex Constructions (UK) Ltd v Mott Macdonald Ltd [2007] EWHC 20 (TCC)

In this action for summary enforcement of an adjudicator's decision the court was asked to determine whether the adjudicator had jurisdiction to determine which documents the contract required to be made available to the main contractor by the design consultant post novation of the design contract from employer to contractor and what remedies if any were available by summary judgment in the event of non-compliance. The court held that the adjudicator had jurisdiction to determine the issue, rejecting a narrow versus broad interpretation of what had been submitted for determination; that the adjudicator did not hold to the submissions on interpretation of either party, but rather formulated a separate interpretation did not take him outside his jurisdiction. He had ruled on the point at issue.

However, the question of compliance with the decision was not amenable to summary judgment and the issue was set down for trial. His Honour Mr Justice Jackson. TC C. 10th January 2007

Multiplex Constructions (UK) Ltd v West India Quay Dev. Co (Eastern) Ltd [2006] EWHC 1569 (TCC)

This concerned an application for summary enforcement of an adjudicator's decision. Multiplex, the referring party, relied upon an "*impacted as planned analysis*" to establish three EOTs. WIQ relied on an "*as-built windows analysis*" in defence. Whilst adopting a cautionary approach to the ISP analysis the adjudicator determined that there were entitlements to extensions of time and awarded repayment of £1.1M that had been retained as liquidated damages for late completion. Enforcement was resisted. WIQ asserted ***Balfour Beatty v Lambeth*** [2002] BLR 228 bias in that the adjudicator made his own analysis - without putting it to the parties for comment and consideration. The court held that this was not the case. The adjudicator had found on the evidence and accordingly enforcement was ordered. ***Construction Ltd. v. Davenport*** [2006] BLR 15; ***Discain Project Services Ltd. (No. 1)*** [2000] BLR 402 considered.

The court noted that there is no general duty on an adjudicator to give reasons unless asked. Reasons may be cursory. ***Amec v. Whitefriars*** [2005] BLR 1: ***Gillies Ramsay Diamond v. PJW Enterprises*** [2004] BLR 131: ***Carillion v Devonport*** (2005) BLR 310: Sufficient reasons were given. The rationale was self evident. Mr Justice Ramsay. TCC. 8th June 2006

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No2) [2007] EWHC 447 (TCC)

Where the employer prevents the contractor from completing in time, does time become at large, ie. does time for completion become a moveable feast – thereby depriving the employer of the right to claim LADs for late completion? The court held that it did not in the circumstances of the case. Where a contract provides for notices for EOTs in the event of a preventative action by the employer, such notices must be provided - a default by the employer does not automatically put time at large. Contract provisions do not however inhibit a court or adjudicator from determining further extensions of time. However, a failure to provide prompt notices in accordance with contract provisions can result in a loss of right to an EOT. Application to appeal refused.

Holme v Guppy (1838) 3 M&W 387, ***Dodd v Churton*** [1897] 1 QB 566, ***Westwood v. The Secretary of State for India***, ***Peak Construction (Liverpool) Limited v McKinney Foundations Limited*** [1970] 1 BLR 111, ***Trollope & Colls Limited v North West Metropolitan Regional Hospital Board*** [1973] 1 WLR 601 considered.

Gaymark Investments Pty Limited v Walter Construction Group Limited [1999] NTSC 143; (2005) 21 Construction Law Journal 71 not followed. ***Corporation Limited (Receiver and Manager Appointed) v Austotel Pty Limited*** (2nd June 1994); 1997 13 BCL 378; ***Peninsula Balmain Pty. Limited v Abigroup Contractors Pty. Limited*** [2002[NSWCA 211, ***City Inn Limited v Shepard Construction Limited*** 2003 SLT 885 applied. Mr Justice Jackson. TCC. 6th March 2007

ROK Build Ltd v Harris Wharf Development Company Ltd [2006] EWHC 3573 (TCC)

Final Account Dispute – application of Cl 30 JCT 1998 with contractors design discussed. Identify of contractor changed during project - identify of subsidiary etc confused - resulting in an arguable case that adjudicator had no jurisdiction (*though identify whilst discussed does not appear to have been contested in the adjudication*) and thus arguable that claimant not entitled to summary judgement (actual outcome is not clear from the transcript). Meaning of Dispute - existence of dispute considered : There was clearly a dispute. ***Carillion Construction Limited v. Devonport Royal Dockyard*** [2005] 1 BLR p.310, ***Collins Limited v. Baltic Quay Management*** [2005] 1 BLR 63 considered. Finally, there was a dispute as to whether or not the parties had agreed not to enforce the adjudication whilst negotiations were on-going. A sum had been paid on account. The court held that the commencement of enforcement indicated that negotiations had ended. There could be no enforceable agreement to negotiate in good faith. ***Walford v. Miles*** [1992] 2 A.C. at p.128 applied.
HHJ David Wilcox. TCC. 15th December 2006

Shalson v D.F.Keane Ltd [2003] EWHC 599 (Ch)

Shalson engaged Keane to carry out construction works on JCT Intermediate form. On final completion a dispute arose as to payments on a number of interim certificates which were not honoured. The contractor went down the insolvency route, applying for a statutory demand as a precursor to winding up proceedings. Shalson wished to set off these debts against a counter claim and in this appeal against the statutory demand sought to stay the proceedings pending the outcome of arbitration proceedings on the counter claims. The question therefore for the court was whether a statutory demand, as a form of commencement of legal proceedings be subject to a stay to arbitration or alternatively to adjudication under the HGCRA 1996 both of which were the prescribed dispute resolution processes under the contract. The court refused a stay. In particular the court stated that an a applicant cannot sit back and refrain from instituting adjudication/arbitration proceedings yet procure a stay (discretionary in the circumstances) against the statutory demand. It might well have been a different matter if adjudication/arbitration proceedings had been applied for or were prospective. In the circumstances this was simply a ploy – clearly the court was not convinced about the substance or even of the quantum involved in the counter-claim. Mr Justice Blackburne. Ch.Div. 21st February 2003.

COMMENT : If no withholding notice has been issued, employers need to aware of the possibility of a statutory demand. If issued they will need to pay up – then argue later. Thus, where presented with a payment application, deal with it promptly and issue a withholding notice. Even if they are too late in doing so they would still be advised to commence adjudication / arbitration if they wish to pursue a set off. Otherwise it may well be too late to do so once a statutory demand is set in motion. If they have the funds to stave off insolvency proceedings they can be forced at that stage to pay now and argue later – putting them on the defence rather than the attack. Not a good plan, since momentum and cash flow is lost. If they enter administration the receiver may or may not chose to pursue their counter-claim – which is not that patent may not appear in the best interest of creditors. You will not be the trustees main priority.

Thomas Vale Construction Plc v Brookside Syston Ltd [2006] EWHC 3637 (TCC)

Following the adjudication of a final account TVC submitted an application for an interim payment. BSL issued a withholding notice which was challenged here on the basis that it sought a set off against an adjudication decision contrary to ***William Very v LB Cambden*** [2006]. The court held that a final account does not give rise to a right to immediate payment. Outstanding snagging meant that sums could continue to be withheld. The withholding notice was validly issued. HHJ Francis Kirkham. 14th November 2006

PRACTICE & PROCEDURE CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

Gort-Barten v M A Cherrington Ltd [2006] EWHC 2877 (TCC)

Costs of Appeal : Where parties reach an agreement as to costs of an arbitration, that agreement will extend to costs of appeal. Thus where agreement that each party bear its arbitration costs is concluded, the winning party to an appeal cannot recover costs of the appeal. Mr Justice Ramsay. TCC. 8th November 2006.

Halifax Life Ltd v The Equitable Life Assurance Society [2007] EWHC 503 (Comm)

Expert Determinator / duty to provide reasons : By analogy with s70(4) Arbitration Act 1996 the court can require an Umpire to provide adequate reasons for a decision - and here so ordered - to determine an appeal against the validity of the umpire's decision. Mr Justice Creswell. 13th March 2007

COMMENT : This is an important case regarding the duty of an expert determinator / umpire (as opposed to an arbitrator) to provide adequate reasons for a decision. The question arises as to whether or not the same principle might be applied to an adjudicator in respect of a challenge to the enforceability of a decision.

Hart Investments Ltd v Larchpark Ltd. [2007] EWHC 291 (TCC)

Security of Costs - counter-claim - stay pending payment : Post refusal of enforcement of adjudication litigation in respect of damages for collapse of building and counterclaim for payment. Security of costs in respect of counter claim ordered - with stay of counterclaim pending payment. Main issue to proceed to trial. ***Aquila Design (GRB) Products Ltd v Cornhill Insurance plc*** [1988] BCLC 134; ***Keary Developments Lt v Tarmac Construction Ltd*** [1995] 3 All E.R. 534; ***Kufaan Publishing Ltd v Al-Warrack Bookshop Ltd*** 2000, ***Neck v Taylor*** [1893] 1 QB 560, ***Hutchinson Telephone UK Ltd v Ultimate Response Ltd*** [1993] BCLC 307, ***Mapleson v Masini*** (1879) 5 QBD 144, ***Dominion Breweries v Foster*** [1897] 77LT 507 considered. Coulson J. TCC. 9th February 2007

Laing v Taylor Walton (a firm) [2007] EWHC 196 (QB))

Double Jeopardy : Issue Estoppel : Abuse of Process : Summary Judgement. Claim against solicitors for negligence in contract drafting resulting in exposure to a claim from another party. Mr Justice Langley. 20th February 2007

Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215

Award of costs where a claimant accepts a payment into court late in the light of new evidence indicating that the payment adequately reflects the value of his claim. Chadwick LJ; Lloyd LJ; Mr Justice Stanley Burnton. 14th March 2007

Michael J. Basso v Philip Estry; James A. Dempsey; Santhouse Pensioneer Trustee Co Ltd [2005] APP.L.R. 11/03

B & E, related trading partners established a retirement trust. Funds were loaned from the trust to a business which E and others had interests in. The loan was not repaid on the due date. Accordingly B was unable to draw on the fund during his retirement. In his opening gambit his solicitors indicated that they would be pursuing questions as to fraud and negligence by the trustees in not ensuring the debt was repaid, but the first action was initially limited to negligence. At the final stages B tried to amend to include fraud, apparently in the light of recent discoveries. The court refused the application to amend on the grounds that it was too late in t of process or subj he day and would involve detailed and costly financial re-examination which could have been avoided if the issue had been pursued promptly. B had made a choice not to do that previously. The negligence dispute was compromised. B commenced a 2nd action founded in fraud.

The question was 1) abuse of process/issue estoppel and 2) whether the doctrine of laches applied. Having considered ***Henderson v. Henderson*** (1833) 3 Hare 100, ***Banks v Bankside Ltd*** [1996] I WLR 257, ***Johnson v. Gore Wood & Co*** [2002] 2 AC 1, ***Bradford & Bingley Building Society v Seddon*** [1999] 1 WLR 1482 the court concluded that this was principally the same issue, which should have been part of the first action. It was an abuse of process to go behind the first court's conclusions regarding the refusal to amend. Action to strike approved. However having considered ***Annodeus Ltd v. Gibson*** 2000, ***Habib Bank v. Jaffner*** 2000. ***Jeffrey v. Flanders*** 2005, ***Grovit v. Doctor*** [1997] 1 WLR 640, the grounds to strike out for delay were rejected. Mr Mark Cawson Q.C. Chancery Div. Manchester District Reg. 3rd November 2005

Middleton (G) Ltd v Berry Creek Overseas Development Ltd [2007] EWHC 318 (TCC)

Insolvency : Stay of enforcement on the grounds of an asserted inability to repay - pending the outcome of the trial of cross claims. Whether cross claims arose out of the same matter. Adjudication and arbitration compared. Award enforced - appeal refused. HHJ Peter Coulson. TCC. 9th February 2007

Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 236 (TCC)

Disclosure : admissibility : 3rd party settlement provisions : Late application to appeal. Whether time was at large qua contractor / subcontractor as determined at adjudication. Whether terms of a settlement agreement involving the same issue admissible and subject to disclosure. Held No : Late application to appeal. Application heard but failed on the merits. Note : The "time at large" issue ongoing. ***Charlesworth v Relay Roads Ltd.*** [2000] 1WLR 230 applied – which in turn referred to ***Preston Banking Co v. William Allsup & Sons*** *[1895] 1 Ch. 141,* ***Millenstead v Grosvenor House (Park Lane) Ltd.*** *[1937] 1 K.B. 717,* ***In re Harrison's Share under a Settlement*** *[1955] Ch. 260,* ***R. v Cripps, Ex parte Muldoon*** *[1984] Q.B. 686,* ***Pittalis v. Sherefettin*** *[1986] Q.B. 868.* Mr Justice Jackson. TCC. 8th February 2007

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd No 3 [2007] EWHC 659 (TCC)

Power of the court to award interim costs in relation to a distinct aspect of litigation without regard to the question of global success of on-going litigation. ***AEI Rediffusion Music Ltd v Phonographic Performance Ltd*** [1999] 1 WLR 1507; ***David de Jongh Weill v Mean Fiddler Holdings Ltd*** [2003] EWCA Civ 1058; ***HSS Hire Services Group plc v BMB Builders Merchants Ltd*** [2005] EWCA Civ 626; ***Intense Investment Ltd v Development Ventures Ltd*** [2006] EWHC 1628 (TCC); ***Jackson v MOD*** [2006] EWCA Civ 46 considered. Re payment on account ***Mars UK Ltd v Teknowledge Ltd*** [1999] 2 Costs Law Reports 44 considered. Mr Justice Jackson. 12th March 2007

THIS NEWS LETTER IS AVAILABLE AS A FREE DOWNLOAD AT
http://www.nadr.co.uk
PLEASE FEEL FREE TO PASS THE URL ON TO INTERESTED FRIENDS AND COLLEAGUES

NADR UK Ltd Company Number 4734831
Published by NADR UK Ltd. and NMA UK Ltd. Registered Office, Stockland Cottage, 11 James St, Treforest, Pontypridd, CF37 1BU
Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk