ADR NEWS

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

Small Claims Mediators – coming to a court near you!

"As a result of the success of the Small Claims mediation service piloted in Manchester, the service is now being extended to another 9 areas across HMCS. With three in the North East, one in the Midlands, two in the South West, three in London and the South East, and the one already in the North West, we will be covering almost half of the new HMCS Areas. The recruitment process is currently underway and we have been inundated with requests for more information about the posts from hopeful applicants. The new mediators are expected to be in post and training for their new roles in February 2007."

Out of Court. November 2006. issued by HMCS.

EDITORIAL :

The new rules on the availability of court documents to the media, introduced on the 2nd October 2006 mean that journalists will, on payment of the appropriate copying charges, be given access to any documents available to the court, unless a party has been successful in applying to the court for specific documents to be kept confidential. In the past the media had to apply to the court for access to witness statements, expert reports and documents attached to statements of case. Permission was rarely granted. All this has now changed and it may well be that the privacy offered by ADR will take on even greater importance for litigants who do not welcome the attentions of the press.

Adjudication and mediation have established themselves as an integral part of the ADR scene. They are no longer novel concepts. The number of providers in the market place has expanded exponentially over the last five years. Now, as scepticism of the processes grows in some quarters there is a movement towards quality assurance in all areas of ADR provision. The focus is on to the qualifications required to practice in ADR, on accreditation, continuing professional development and the availability of complaints procedures and potentially of disciplinary procedures so that ADR providers can demonstrate that the services they provide are of the highest quality. There are implications in all this both for entry into practice, the maintenance of practice status and the inherent costs to both practitioners and the public of instituting and maintaining quality assurance mechanisms. There are also questions as to how practicable and / or robust such mechanisms might prove to be. During 2007 NADR will put the credentials of dispute settlers under the microscope, starting in this edition with the judiciary.

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Over the last few years there has been an identifiable movement away from interests based towards evaluative mediation, particularly in the commercial sector, which has gone largely unchallenged. Now it would appear that the interests based mediators are starting to fight back. Articles from high profile mediators are starting to appear that challenge the assertions of the evaluative mediators and like minded legal practitioners that clients value a resolution mechanism that produces outcomes that approximate to those available from the court. Based on analysis of client feed back forms the assertion is that what clients most appreciate from the mediation process is an environment that facilitates communication and a mediator who can empathise with the clients: whether or not the market place agrees, only time will tell. Is there a place in the market for two distinct styles and if so, how will clients know which style they are buying into?

A final thought. As procurement gets underway for the 2012 London Olympics, will 2007 prove to be the year of that the Dispute Review Board process comes of age in the UK ?

G.R.Thomas : Editor

ADR is not limited to mediation

Yorkshire Electricity Distribution Plc v Telewest Ltd [2006] EWCA Civ 1418

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."

Lord Justices Buxton, Sedley and Dyson. 31.10.2006

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.

"REASONED DECISIONS AND JUDICIAL TRANSPARENCY"

Lymington Marina Ltd v Macnamara [1]

[The] ***Duty to give reasons*** *: The point raised in the proceedings is whether LML is obliged to give reasons for its decision. There is no express obligation to do so ….. But as Millett J observed in* ***Price v Bouch*** *"a failure to provide proper reasons …..…. may lead to the inference that no such reasons exist".*

Conclusion : *There is no duty as such to give reasons for refusing consent but the absence of good reasons which conform to the grounds for refusal ……. may be taken as indicating that no proper reasons exist.*

Patten J. Chancery Division. 4th April 2006.

Introduction.

People instinctively require those in positions of authority to explain and justify decisions that impact upon them. Understanding is a significant element of acceptance and compliance, the willingness to do both being reinforced by justification, the absence of which in ***Lymington v Macnamara*** was fatal to the refusal.

At a very early age infants learn the dreaded ***"WHY?"*** word. Most busy parents will at one stage or another have tried to resort to the time saving ***"BECAUSE I SAY SO?"*** response, the subtext of which is that authority provides its own justification. It rarely works and will in time lead to unwelcome challenges to that authority. Hard gained authority, carelessly squandered has then to be earned all over again. Parental declarations along the lines of "***I DON'T HAVE TO JUSTIFY MYSELF TO YOU', 'I HAVEN'T GOT TIME FOR THIS", "YOU MUST LEARN TO DO AS YOU ARE TOLD"*** and ***"YOU DON'T HAVE ANY RESPECT"***, as responses to the sulking ***"WON'T"*** and "***ITS NOT FAIR"*** achieve little apart from postponing the time when an explanation has to be provided in order to restore peace and harmony.

Even though the infant may have no right to that which he or she wants to have or do, or alternatively does not want to do, nonetheless the child holds the moral high ground in that a sense of injustice (*even if there is in fact no injustice*) is inherent in a failure to provide a rational justification. The parent is however caught between a cleft stick, for once given, the reason may itself provide ammunition for a challenge or objection. It needs therefore to be met with a good explanation, a self justifying reason that puts the demand, order or declaration beyond challenge, otherwise further detail will be called for.

The difficult legal questions here are ***"What situations call for a reasoned decision?"*** and then ***"What amounts to sufficient reasons?"*** The court in ***Lymington v Macnamara*** was able to require a reasoned decision because in the circumstances of the case there were contractual pre-requisites *(grounds)* to the exercise of the decision making power. This was however was a civil law action concerning a contractual dispute and hence not subject to public law and judicial review, the principal area under consideration here.

The provenance of the decision making power and the existence and extent of prerequisites to the exercise of that power are key to the existence of a duty to provide reasons. Whilst arbitrary power is anathema to the instinctive human desire for reasoned decisions this is not to say that arbitrary power cannot be and is never lawful. There are many examples of statute granting arbitrary powers of decision making on public and quasi-public bodies. At common law, the exercise of authority in a wide range of social relationships is recognised but largely unregulated. Thus there is no legal duty on a parent or guardian to justify everyday decisions to those under their charge. Furthermore, consent to authority within groups is common. Depending upon the nature of the social / commercial contract, such power may be arbitrary or subject to conditions, whether oral or written, express or implied.

The need or otherwise to provide reasons will accordingly depend upon circumstances, which are infinitely variable, making it difficult to set down intelligible rules and workable criteria suitable for all occasions. This dilemma is as true, if not more so, for judicial or quasi-judicial decision makers as it is for anyone else in a position of authority. Five categories of decision maker are examined here, namely :- 1) the judiciary, 2) tribunals (both statutory and professional), 3) arbitral tribunals, 4) construction adjudicators and 5) conciliators, dispute review boards and experts.

PART I : JUDGES AND REASONS

The judge will be called upon to determine whether or not a party to litigation was entitled to reasons as a prerequisite to the performance of reciprocal duties or submission to authority and if so whether or not the reasons provided were adequate. In addition a judge may also be called upon to provide adequate reasons for his decisions. On times the judge stands in the same position as the harassed parent, with a massive case load to get through. A reasoned decision takes a lot of time to construct and commit to paper, a luxury not always available to a judge delivering a series of ex tempore judgments in quick succession.

The pressures inherent in that task and the compromises that may arise are set out vividly by Lord Craighead in the 2005 Annual Lecture to the Judicial Studies Board, entitled "***Writing Decisions***", regarding his time on the bench of the Criminal Appeal Court in Scotland, where there were often in excess of 75 cases per week on the list. His Lordship then provides some sound advice on how to compose a judgment.[2] Central to this is the importance of thinking about and satisfying the needs of one's audience. In addition to the parties, he identified appellate bodies, judicial colleagues, the legal profession, academics and those in society that will look to the judgement for advice on how they should act in similar situations, as an extended audience who need also to be taken into consideration when drafting a judgement.

[1] ***Lymington Marina Ltd v Macnamara*** [2006] EWHC 704 (Ch), at paras 96 & 9

[2] www.jsboard.co.uk/downloads/annuallecture_2005_proof_220305.pdf

Whilst first impressions often turn out to be correct, this is not always the case, hence the danger implicit in arbitrary decision making. There is little doubt that the quality of decision making is improved where the decision and the reasons underpinning it are reduced to writing. So doing concentrates the mind of the decision maker. That said, it would be wrong to conclude that all judicial and quasi-judicial decision makers are under a legal duty to provide reasoned judgements at all times and in all circumstances. This is most certainly not the case, though with the advent of the Human Rights Act 1998 and in particular the requirements of a fair trial set out in Article VI, the exceptions to the duty to provide reasons have been greatly reduced. Nonetheless, exceptions do exist and the extent of the duty will vary between different courts, disciplinary bodies and public and private tribunals.

Where there is a duty to provide reasons, the next question to be addressed is "*What amounts to adequate reasons?*" An mere appearance of reasons will not do, as noted by Mr Justice Hedley in ***RE F (children),*** where he remarked that "…… *this judgment is so lacking in reasoning and substance that it presents at least an appearance not to have engaged fully with the important issues that were being ventilated before the learned judge and that it is wholly deficient in explanations as to how or why he has arrived at the conclusions that he has.*"[3] This is not to say however, that every case calls for the judge to deliver a judgment on par with Tolstoy's ***War and Peace***. Adequate and sufficient reasons may on times be quite short and concise. In ***Bessant v South Cone Inc*** the Court of Appeal observed that *"The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed. The duty to give reasons must not be turned into an intolerable burden:"* [4] The conclusion therefore is that what is required should be in some way proportionate to the circumstances.

At the very least a judgment should not be arbitrary, and constitute a figure plucked out of the air for no good reason. This is what appears, from the text of the ex tempore judgment of His Honour Judge Howarth, to have occurred in ***Fielden v Cunliffe.***[5] The case concerned a disputed will. Despite the fact that a couple had married late in life and had only been married for a year before the husband died and the fact that she was the successor in title to real estate valued in excess of £200K, the court awarded the widow £800K out of a £1.4M estate, the rest going to the deceased's extended family. The question here was how did the court arrive at that figure? Whilst the applicable law was referenced, there was no indication that it was taken into account. The Court of Appeal was not inspired by the reasoning of the court, as set out in the extract below

"65. … *I must find an appropriate sum of capital which should be awarded to Monica (Mrs Cunliffe), and doing the best that I can and how much is always one of the most difficult questions a Judge ever has to answer or a barrister to advise upon. Counsel will know that very often within a set of barristers chambers, people will go into each other's rooms and say* ***"We have a claim under the Inheritance Act. These are the facts. How much?"*** *and you will get from members of chambers differing answers over sometimes a quite broad spectrum. For better or worse the case has ended up before me and no doubt one party will say it is better for them and another party will say it is worse for them, and perhaps they might both say it is worse for them, and if that is so, that would be a very good indication that I have got it about right.* (emphasis added).

66. *The figure I have in mind is £800,000, and that is the amount of the order."*

Commenting upon this extract Lord Justice Wall stated " …. *it has to be said that the judgment, taken as a whole, is both discursive and unfocused. Moreover, from a forensic standpoint, its principal deficiency … is that it lacks any kind of judicial analysis. The consequence, in my judgment, is that the judge simply fails to explain how he reached his figure of £800,000. ….. In my judgment, the proper exercise of a judicial discretion requires the judge to explain how he has exercised it. This is the well-known* ***"balancing exercise"****. The judge has not only to identify the factors he has taken into account, but to explain why he has given more weight to some rather than to others. Either a failure to undertake this exercise, or for it to be impossible to discern from the terms of the judgment that it has been undertaken,* ***vitiates*** *the judicial conclusion, which remains unexplained."* (emphasis added).

The Court of Appeal reduced the sum to £600K. Given that the widow's litigation costs were paid out of the estate, one might pause to wonder whether at the end of the day the other testators ended up any better off than they were prior to the challenge, but that is a completely different matter.

Remedies

Assuming both a duty and a failure to provide adequate reasons, the next issue is "*What should be done about the omission?*" Three possibilities exist. The first is to do nothing. Thus in ***Marshall v Northamptonshire County Council,*** Mr Justice Sedley noted that insufficient reasons alone is not enough to challenge a decision. The applicant must also demonstrate that that the absence of reasons resulted in an error or law.[6] Thus some form of prejudice to the legal interests of the applicant must exist that requires remedial action.[7] The second is that the decision may be reversed, ending the matter or it may be quashed raising the possibility of a new trial before a new tribunal. Finally, the matter may be

[3] ***RE F (children), [2006] EWCA Civ 792*** at para 16

[4] ***Bessant & ors v South Cone Inc*** [2002] EWCA Civ 763: at para 29. See also the Overriding Principles of the Civil Procedure Rules.

[5] ***Fielden v Cunliffe [2005] EWCA Civ 1508*** *para 22 et seq*

[6] ***Marshall, R (on the application of) v Northamptonshire County Council [1998] EWHC Admin 400***

[7] ***McLoughlin v Jones [2006] EWCA Civ 1167*** at paras 72-74. per Arden LJ; *"There were four errors in the judge's detailed reasons; however, in my judgment, her overriding reason for rejecting the claim remains….. It is necessary, in my judgment, to look at the imperfections in the judgment as a whole, cumulatively. Even so, they are not in my judgment to shake the foundations on which the judgment was based. Namely, the absence of credibility and the absence of contemporaneous complaint. …. those findings of primary fact on credibility are matters with which this court cannot interfere."*

remitted to the prior tribunal with a request for further information and elucidation, which assumes that the judge had or may have had reasons.[8] The circumstances in which each of these options is appropriate requires further consideration.

The duty of a court to provide reasons

That it is common for the courts of England and Wales to provide reasoned judgments is not in doubt. Rather the question here is whether there is a duty to provide a reasoned decision and if so, the scope and extent of that duty. The Common Law is a construct of the doctrine of binding precedent. It would not exist but for the delivery and dissemination of reasoned decisions. However, the mere fact that courts do on occasions provide reasoned decisions does not establish a general rule that they should do so.[9] Where a decision of the court does not add to the body of the law, as in the majority of cases where the decision turns on the facts as determined by the court rather than on a novel point of law, there is no need from this perspective for a reasoned judgment. If a judge has nothing to say of great import to the wider world the incentive to deliver an extended judgment is greatly reduced. It is hardly surprising that the higher the court, the more likely it is that it will deliver a fully reasoned decision, though only a fraction of such decisions have in the past been published, since on occasions the higher court merely confirms the decision of the lower court and involves no new statement of legal principle.[10]

Whilst the expectation of a reasoned judgment is longstanding[11] it would appear that the duty of a professional judge in England & Wales (*by implication the duty does not extend to 'non-professionals' though beyond lay magistrates, what is deemed to be a non-professional is less clear*) to deliver one is of relatively recent standing.[12] Thus in ***Flannery v Halifax*** Lord Justice Henry declared *"That today's professional judge owes a general duty to give reasons is clear, although there are some exceptions. It does not always or even usually apply in the magistrates court, nor in some areas where the court's decision is more often than not a summary exercise of discretion - in particular orders for costs."* [13]

The issue was of importance to the Court of Appeal because it impacted upon the ability of the court to fulfil its appellate function. In the absence of a reasoned decision the court has no way of evaluating whether or not the lower court correctly determined the facts and then applied those facts to the law to reach its decision. In such a situation the court might either have to retry the case itself, ask the trial judge for further information or send the case back for a new trial, all of which are expensive and time consuming options.[14] It is thus in the interests of the Court of Appeal to encourage trial judges to provide reasoned judgments, particularly where the trial judge has to choose between conflicting evidence. The same principle would apply to both evidence of fact and expert evidence.

Flannery v Halifax was a dispute involving conflicting expert evidence. The claimants bought a house relying on a valuation report produced by Mr Haining an employee of Halifax. They did work to the property then put it on the market. Another valuer of Halifax found that the property had structural damage. The claimants sought to recover their losses from the Halifax. At the trial the Halifax relied upon expert evidence by Haining that the property had no structural damage. The claimants relied upon expert evidence confirming what the Halifax's second surveyor had determined. The trial judge stated that he preferred Haining's evidence and found for the Halifax. The claimants appealed on the grounds that the judge provided no explanation as to why he preferred Haining's evidence. The Court of Appeal upheld the appeal, stating "…. *in our judgment* ***this*** *judge was under a duty to give reasons and did not do so. Without such reasons, his judgment is not transparent, and we cannot know whether the judge had adequate or inadequate reasons for the conclusion he reached."* Commenting generally on the duty to give reasons Lord Justice Henry said :-

> *"(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in* ***Ex parte Dave****) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*

[8] ***Saxena v Rushforth [2002] EWCA Civ 1129*** *"What I propose to do is to request Jacob J to give reasons for his decision. For me to refuse permission on the basis now available ….. would, in my judgment, be unsatisfactory, having regard to my difficulty in considering why Jacob J made the order he did and what follows from it. I accede to the applicant's request that reasons be sought."*

[9] ***Soulemezis v Dudley Holdings*** (1987) NSWLR 247 at 273: per Mahoney JA *"The court's order is a public act. The judgment given for it is a professional document, directed to the parties and to their professional advisers. It may, in a particular instance, delineate, develop or even decorate the law but that is peripheral and not essential to its nature."* Referenced in ***English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605*** *at para 15.*

[10] Whilst the internet and sites such as BAILEE have greatly increased the number of reported decisions, even now, many reports are not published.

[11] In "***Of Judges & Arbitrators*** (2001) 67 Arbitration, 2001. 254 et seq," Sir Anthony Evans observes that as early as the 17th century Francis Bacon in his "***Essays***" saw that a principal part of judicial office is the "*wise use and application of law.*" Hence the judge is required to "*get the answer right.*" The only way to know whether or not a judge did in fact so do is by reference to a reasoned decision.

[12] Compare ***Lewis v Wilson & Horner Ltd*** [2000] 3 NZLR 546 at 565, per Elias CJ. *"there is no invariable rule established by New Zealand case law that Courts must give reasons for their decisions".* Referred to in ***English v Emery Reimbold*** [2002] EWCA Civ 605 at para 15

[13] ***Flannery v Halifax Estate Agencies Ltd [1999] EWCA Civ 811,*** further citing ***R v Knightsbridge Crown Court ex parte International Sporting Club*** [1982] QB 304 and ***R v Harrow Crown Court ex p. Dave*** [1994] 1 AER 315.

[14] In ***Willett (Now Whitling) v Marks & Spencer [2002] EWCA Civ 1427,*** the CA having concluded that because the CA simply did not know how the judge arrived at a vital conclusion (*viz how an accident had occurred and injury sustained*) a retrial was necessary. However, given the expense involved and the fact that this litigation had already been running for 10 years the court urged the parties to explore ADR in lieu of a retrial.

(2) *The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.*

(3) *The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence, but it is not necessarily limited to such cases.*

(4) *This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same; the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case.* ***Transparency*** *should be the watchword."*

The Court of Appeal revisited the duty to give reasons in ***English v Emery Reimbold & Strick***.[15] Here, the court dealt with three separate cases (English, Withers and Verrechia) in a combined judgement. In ***English*** the critical issue was whether a disabling dislocation of a section of the claimant's spine was attributable to an injury for which the defendants were responsible or resulted from a congenital condition. On this issue, expert evidence was of critical importance. In ***Withers*** the central issue was also one of causation – whether a hydraulic system for milking cows supplied by the defendants had suffered from design defects which had been responsible for an outbreak of mastitis in the claimant's herd. Again expert evidence was of critical importance. In each case the Judge found for the defendants, findings that were open to the Judge on the evidence. In each case the claimant contended that, because the Judge had failed to explain why he had reached his decision, he had not received a fair trial and was entitled to a retrial. In ***Verrechia*** the claimant appealed a costs judgement on the ground that the judge was wrong in principle and failed to give any reasons.

Regarding the duty to give reasons the court concluded that *"There is a general recognition in the common law jurisdictions that it is* ***desirable*** *for Judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement … "* but then observed that *" …. justice will not be done if it is not apparent to the parties why one has won and the other has lost."*

[15] ***English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605***

Whilst the court in ***Flannery*** stated that "***the trial judge***" was under a common law duty to give reasons, this fell short of stating that all judges are under such a duty. It is not clear from ***English v Emery*** that the position is any clearer as to whether there is now a blanket duty to do so or whether the duty only applies in certain types of situation. If that is the case when does it apply and when is it not applicable? The court examines the impact that Article 6 of the Human Rights Act 1998 has had on the duty to provide reasons. Thus contrary to the view in ***Flannery*** magistrate are now subject to the duty. ***Flannery*** also considered that where a judgment is based on a summary exercise of discretion, as where a court awards costs, reasons are not required. However, contrary to the House of Lords emphatic ruling in ***The Antaios***,[16] the Court of Appeal noted that the Commercial Court is also now required to give at least limited reasons when refusing permission to appeal against an arbitration award under s69 Arbitration Act 1996.[17] Logic dictates that this should apply to all appeal consent or refusal determinations. Both parties are entitled to know why.

Adequacy and the scope of the duty.

English v Emery examines the scope and extent of the duty to provide reasons established by the Strasbourg litigation. The court's starting point was ***Ruiz Torija v. Spain***[18] where the court stated that "…. *Art 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfill the obligation to state reasons, deriving from Art 6 of the convention, can only be determined in the light of the circumstances of the case."*

The Court of Appeal concluded that Article 6 is concerned with the fairness of the procedures adopted by courts when determining substantive issues. Thus it does no extend to procedural matters and is not concerned with the merits of a case. It is concerned with whether or not a relevant matter has been taken into account[19] but is not concerned with whether or not the court then reached the right decision in the light of that matter. To the extent that a decision could not have been reached if a matter had been considered, a breach of the duty would be evident, but not otherwise. Thus it may be implicit in a decision that a matter has been taken into account, even if not expressly stated.[20] The overall

[16] ***The Antaios*** [1985] AC 191; see also ***Mousaka Inc v Golden Seagull Maritime In [2001]*** *1 All ER 726*

[17] ***North Range Shipping Ltd v Seatrans Shipping Corporation*** [2002] EWCA Civ 405.

[18] ***Ruiz Torija v. Spain*** (1994) 19 EHRR 553 at paragraph 29 confirmed by ***Garcia Ruiz v Spain*** (2001) 31 EHRR 589.

[19] ***Helle v Finland*** (1997) 26 EHRR 159 at para 60 "….*the notion of a fair procedure requires that a national court which has given sparse reasons for its decisions, whether by incorporating the reasons of a lower court or otherwise, did in fact address the essential issues which were submitted to its jurisdiction and did not merely endorse without further ado the findings reached by a lower court."*

[20] ***X v Federal Republic of Germany*** [1981] 25 DR 240; *Webb v UK* [1997] 24 EHRR CD 73

conclusion is that substantive decisions must in future be supported by reasons that demonstrate expressly or implicitly that all relevant matters have been considered. Since the pre-Civil Procedure Rules 1998 cost regime automatically followed the rule that ***"Costs follow the event"*** nothing more was required. This is no longer the case since s44 of the Civil Procedure Rules allows exceptions. Today a costs judgment should provide a clear, albeit succinct, reference to the relevant matters that have been taken into account when allocating costs.[21]

English v Emery[22] also considered the scope and extent of the duty under common law, by reference to the dicta of Griffiths L.J. *in* ***Egil Trust Co. Ltd. v Pigott-Brown,***[23] in which he stated that *"When dealing with an application in chambers to strike out for want of prosecution a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal, the basis on which he has acted. …* " Lord Phillips MR stated on behalf of the court that in their judgement the observations of Griffiths L.J. apply to judgments of all descriptions. Having noted that *"… the judgment must enable the appellate court to understand why the Judge reached his decision"* he explained however that *"This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision."*

Adequate Reasons, Convention Rights and Proportionality

It would appear that where Convention Rights are at stake, it is very important for a trial judge to provide a clear explanation of how he has exercised his discretion. *Thus in* ***Gallagher v Castle Vale Action Trust Ltd***[24] which involved an appeal against eviction for anti-social behaviour the C.A. determined that the trial judge had failed to set out why he had exercised his discretion in the way he did and had not taken a less drastic option. Whilst accepting that there was sufficient evidence to support the judge's decision the C.A. re-exercised the discretion and suspended the order for two years subject to good behaviour, because of the importance of demonstrating that Convention rights had been taken into account. The court had to demonstrate that it had acted proportionately. In this case it had failed to do so.

Lord Phillips, MR. also addressed the question of reasons when proportionality is in issue in ***Coates v South Bucks DC.***[25] He noted that *"Members of this court have expressed different views as to the manner in which a judge should explain in his reasons a decision that turns essentially on a test of proportionality. Sedley LJ has, on a number of occasions, emphasised the need not merely to identify the relevant factors that weigh in each direction but to explain clearly why it is or is not proportionate to interfere with a Convention right in order to address a pressing social need ….. He returned to this theme when giving permission to appeal in* ***Davis v Tonbridge & Malling BC.***[26] *On the substantive appeal Auld LJ suggested that Sedley LJ had been over-exacting. He said this of the judge's task at para 51:* ***"At the end of the day, having set out all the competing factors, he had to make his own judgment, which, though characterised by section 187B as an exercise of discretion, is as much a matter of feel as anything else. It is not an exercise that is susceptible to fine intellectual analysis or description at the point of decision. The problematic business of weighing competing interests of so different a character … is to be structured and articulated in the judgment as a whole. It is from that exercise … that … "the appropriate conclusion should emerge"."***

In my judgment there is one cardinal rule. The judge's reasons should make clear to the parties why he has reached his decision. Where he has had to balance competing factors it will usually be possible to explain why he has concluded that some have outweighed others. Even where the competition is so unequal that the factors speak for themselves it is desirable to say so. "

Later in the same judgment Lord Justice Neuberger stated *"I accept that it may have been better if he had then explained in a little more detail his thought processes as to why the balance ultimately fell in favour of the shorter period of suspension, but there is a limit as to how far a Judge can take an explanation of his thought processes in relation to such a balancing exercise. Sometimes, there is a decisive factor, in which case he can say so. Sometimes, there are exceptional factors which can be said to take the case out of the ordinary, and therefore to justify a particular course; in that case, he can also say so. However, on many occasions, having set out the various competing factors, there is little more that a Judge can say than that he is of the view that the factors pointing one way are stronger than the factors pointing the other."*

Reasons for choosing between conflicting evidence.

Moving from the general to the specifics of each case, the Court of Appeal makes it clear that when preferring one piece of evidence over another, the court is required not merely to state that fact but to in addition provide some indication of why that is the case, whether it be by reference to the standing or expertise of an expert witness, the scope of expertise demonstrated on the day or alternatively defects in the competing evidence. In

21 ***The Mayor and Burgess of the London Borough of Brent v Aniedobe*** (unreported) 23 November 1999, per Swinton Thomas LJ, *"…this Court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the County Court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event) it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."*

22 At para 17.

23 ***Eagil Trust Co. Ltd. v Pigott-Brown*** [1985] 3 All ER 119, at 122. see also Sachs L.J. in ***Knight v Clifton*** [1971] Ch 700, 721

24 ***Gallagher v Castle Vale Action Trust Ltd*** [2001] EWCA Civ 944

25 ***Coates v South Bucks DC [2004] EWCA Civ 1378*** at para 6

26 ***Davis v Tonbridge & Malling BC*** [2004] EWCA Civ 194.

each of the three cases in ***English v Emery*** the Court of Appeal was able to determine, by closer inspection of the evidence, why the judges reached their conclusions, but clearer first instance judgements would have rendered that task unnecessary.[27]

The appropriate judicial approach to conflicting expert evidence was set out by Lord Justice Bingham LJ in ***Eckersley v Binnie***[28] "*In resolving conflicts of expert evidence, the judge remains the judge: he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity….*" However, it is not then enough to reach a conclusion. How that conclusion is reached must be set out. A failure to do so was fatal to the judgment of His Honour Judge Steel when he concluded that a surgeon was negligent during the course of an operation when he entered via the abdominal wall to treat a suspected hernia from below. The claimant asserted that he should have made his incision of the outer layers of the stomach above the site of the suspected hernia, thereby weakening the abdominal wall rendering her more susceptible to further hernias by entering from below. In consequence she asserted that she suffered from a hernia two years later. The experts disagreed as to whether or not this assertion was correct, the defence asserting that she was susceptible to hernias because of other underlying conditions. It was not apparent why the court had upheld the claimant's version of what was an appropriate operational procedure and the consequences of deviating from it.[29] Even with the evidence in front of them the Court of Appeal could not determine the matter because both parties challenged the judgment, the claimant seeking greater compensation and the surgeon challenging liability, thereby necessitating a retrial.

As to a conflict between expert evidence and evidence of fact Mr Justice Lightman stated in ***Cooper Payen Ltd v Southampton Container Terminal Ltd.***[30] that "*Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situation is somewhat different. If the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of two opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact. The judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept. The circumstances may be such as to require the judge to reach only one conclusion.*" The Court of Appeal here overturned the first instance judgement because the finding of fact did not accord with what was possible in the light of the evidence of the single joint expert.

In ***Armstrong v First York*** [31] the dilemma facing the trial judge was that he found the evidence of the claimants that they had suffered whip lash injuries convincing, but against this was an expert report stating that such injuries were not possible where the impact to a vehicle was insufficient to do any more than rock the car on its springs. Whilst the witnesses could not prove their injuries (*that being the nature of neck and back pain, which is not susceptible to absolute proof*) their complaints were evidenced by prompt documented visits to a hospital and later to their GP's. The judge concluded on a balance of probability that the claimant's version was correct, rejecting a counter allegation of fraud. The insurance company appealed asserting that the judge had to show that the expert report was wrong in order to reject it. The Court of Appeal disagreed. The judge's reason for rejecting the report, namely that he was convinced of the veracity of the witness of facts statements was sufficient. The CA reiterated the observation of Lord Justice Stuart Smith in ***Liddell v Middleton***[32] that "*We do not have trial by expert in this country; we have trial by judge.*"

The same problem can occur in relation to conclusions as to credibility. In ***Hartley v Hartley*** the court had to determine whether personal loans had been made by one brother to another, or whether the loans related to companies run by each of them.[33] Over 45 minutes the court heard evidence and promptly delivered an ex tempore judgement. The Court of Appeal stated that "*It is an understandable wish of any judge, who has formed a clear view of the outcome in a relatively straightforward dispute, to give judgment immediately in order to avoid the parties having to come back on another day. But this should not be at the expense of a proper examination of the issues, and of the central factors bearing on their resolution. The judgment in the present case was regrettably short on such examination, a matter which has both led to this appeal and made it difficult to resolve.*" The judge had concluded that he found the evidence of one brother more credible than that of the other, particularly since there was evidence that the other brother had on another occasion engaged in questionable accounting activities. Nonetheless there was evidence in support of his account, which the court discounted. The Court of Appeal was in the fortunate position of have transcripts of the evidence heard by the trial judge. Within this they found sufficient evidence to support the trial judge's conclusion. If he had pointed to that evidence in his judgment, there would have been no grounds for an appeal.

27 ***Eckersley v Binnie*** (1988) 18 Con L.R. 1 at 77-8 per Bingham LJ, '*a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal*'.

28 infra at 77-78: see also ***Penney, Palmer & Cannon-v East Kent Health Authority*** [2000] Lloyd's Rep Med 41

29 ***Glicksman v Redbridge NHS Trust [2001] EWCA Civ 1097***

30 ***Cooper Payen Ltd v Southampton Container Terminal Ltd*** [2003] EWCA.Civ 1223 at para 67

31 ***Armstrong v First York [2005] EWCA Civ 277***

32 ***Liddell v Middleton*** [1996] PIQR P36

33 ***Hartley v Hartley [2003] EWCA Civ 1688***

In ***London Borough of Merton v Williams***,[34] again the court at first instance had failed to provide reasons, but there was no dispute as to the evidence. The appellant had not even made an appearance in court. Whilst the failure was to be regretted, Lord Justice Mance noted that " … *a court may confirm a decision otherwise vitiated by procedural irregularity if it can properly be said that the decision would inevitably have been the same even if the matter had been dealt with properly*"[35] the view clearly being that nothing would be served by a re-trial.

In ***Baird v Thurrock Borough Council***[36] the Court of Appeal directly address the question as to whether or not the judgment of the trial judge met the test of adequacy. The court concluded that it did not. The claimant, an agency employee, was injured whilst loading a wheelie bin on to the defendant's rubbish cart. According to the claimant he was hit by the right hand bin as it automatically descended. The other employees gave testimony to the effect that after the incident the right hand bin remained in an upright position attached to the vehicle. Everyone agreed that the left hand bin lay on its side in the road. The judge accepted that the other employees had given honest accounts of the event, but concluded that the claimant's version was correct. Subsequent tests of the vehicle had demonstrated that whilst on most occasions where an operator manually operated the raising mechanism the bin would remain in the upward position after being emptied and would not return to the ground until the operator pressed the downward button, there were times when the bin would be automatically returned to the ground. The judge concluded that this is what had occurred, catching the claimant by surprise and causing his injury. The problem for the Court of Appeal was that this did not tally with the evidence of the other employees (*which the Judge had found credible*) that the bin remained in an upright position, the implication here being that the injury was caused by the left hand bin and was 100% the fault of the claimant who should not have stood underneath a raised bin. The defendant's complaint here was that they were at a loss to understand why they had lost the case.

Lord Justice Gage concluded that the judge had failed to provide any rational explanation as to why he preferred the evidence of the claimant over that of the other two employees and ordered a retrial. Lord Justice Ward highlighted the following exchange between Shapiro, council for the defendant, and the trial judge :-

Shapiro *"The grounds on which I ask that [permission to appeal] is that the judgment does not, I submit, address the issue of how the bin...*

HHJ Yelton*: "No. What I said was -- and I am always very careful in these judgments -- I followed the advice of the Court of Appeal, which is that a judgment should be as short as possible. I said that I preferred the Claimant's evidence on all material matters. That is a finding of fact. That is what County Court Judges are here for. I shall refuse permission to appeal. I think this is a wholly unappealable case."*

and then Lord Justice Gage observed that :-

"*Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments. Second, judges do not have to deal with each and every point in issue but where the dispute is as fundamental to the case as this one then it does deserve mention and an explanation being given for the apparent inconsistency between his appearing to believe the two ladies yet also finding that they could not have been correct in saying that the right-hand bin was still up in the air. If the judge had not so intemperately interrupted counsel, he would have heard Mr Shapiro's point, he would have had a chance to consider the suggested omission and expanded his reasoning to cover it if he thought fit. …. "*

Reasons and procedural determinations.

The prior rule that reasons were not required by a court when determining procedural matters has clearly been undermined by the advent of the Human Rights Act 1998, at least where the decision impacts upon a party's legal interests, as for instance where costs or consent to appeal are concerned. The absence of adverse effects could therefore explain the following Court of Appeal judgments, though the procedural versus substantive law divide is posited as another explanation for the exceptions to the duty to provide reasons embodied in the following judgments.

In ***Slot v Isaac***[37] the applicants unsuccessfully challenged an order of directions. Instead of requesting an oral hearing before the judge who refused their application they attempted to get a High Court judge to deal with the matter. It came before Judge Jack who refused the application on the simple grounds that he had no jurisdiction. They then challenged this decision for absence of reasons. The Court of Appeal concluded that since rejection is in essence an administrative act, in that the court had no jurisdiction, there was no necessity for any kind of reasoned judgment. Similarly in ***David Robert Persson v Matra Marconi Space UK Ltd***[38] the Court of appeal held that where a party is out of time to appeal there is no requirement for a court to provide a reasoned judgement when rejecting a late application to appeal.

Finally, in ***Sumners Ltd v L.B. Hammersmith & Fulham***[39] the Court of Appeal held that where a party did not object to a brief judgement on entitlement on the grounds of absence of reasons but instead went on to address quantum, it would be inferred that they had waived that objection and accordingly lost the right to appeal on those grounds.

[34] ***London Borough of Merton v Williams [2002] EWCA Civ 980*** : see further ***Barty-King v. Ministry of Defence*** [1979] 2 AER 80; ***Hussain Ali v. Somirun Ness v London Borough of Newham*** [2001] EWCA Civ 73.

[35] ***R v City of Westminster, ex p. Ermakov*** (1995) 28 HLR 819, at pp. 833-4. Hutchison LJ endorsed a previous statement by Schiemann LJ *"that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same".*

[36] ***Baird v Thurrock Borough Council [2005] EWCA Civ 1499***

[37] ***Slot v Isaac [2002] EWCA Civ 481*** ; but compare ***Jolly v Jay*** [2002] EWCA Civ 277 at [19].

[38] ***David Robert Persson v Matra Marconi Space UK Ltd [1996] EWCA Civ 921***

[39] ***Sumners Ltd v London Borough Of Hammersmith & Fulham [2002] EWCA Civ 703***

Two Caveats.

Firstly, it should not be assumed, without more, that no reasons existed, or that the judge's unspoken reasons were not good in law, simply because no reasons were provided. Quite the opposite, there is a presumption that the judge had good reasons and made the right decision, but merely failed to enunciate them clearly, believing that he had done so, or that the facts spoke for themselves and that the outcome was self evident. However, where the known facts point in the opposite direction to that adopted by the judge, it is possible for adverse assumptions to be drawn. If there is a way to test such assumptions by for instance re-examining transcripts, or inviting the judge to elucidate, this should be done. If that is not possible a retrial will be required. The presumption is a politically useful device that avoids any implication of bad faith on behalf of the trial judge and maintains public confidence in the judiciary.

Secondly, reasons do not have to be proportionate to the size or significance of a claim.[40] The issues surrounding a large but straightforward claim may be dealt with very briefly yet adequately. A small but complex dispute may be far more demanding. Paraphrasing Mozart, adequate reasons require "*as many words as required*" to clearly explain the judge's reasoning and to set out why the decision was reached, "*no more and no less.*" The size of a judgment alone provides no indication of the coverage given to the reasons. It is standard practice for a judge to set out the background to a dispute.[41] The facts may be extensive. By setting them out in a comprehensive manner, the judge helps to ensure that he has shown that he was aware of all the issues. The same applies where the judge sets out the relevant law and principles. The key area of the judgement for present purposes however remains that where the judge sets out his reasons for decisions of both fact and law. The reasons may be fragmentary, occurring incrementally during the course of a judgment, or alternatively they may be brought together in a single place. Awareness of the issues as demonstrated by setting out the facts will not be enough. The reasons need to show that the facts have been taken into account and the relevant law applied.

In conclusion, whilst the requirement for judges to provide reasoned judgements is not absolute, in recent times considerable progress has been made towards satisfying the general expectation that such reasons be provided. The losing litigant may or may not be persuaded by such reasons. Many outcomes are based on the drawing of fine distinctions; the capacity of the individual to convince himself of facts and of supposed entitlements is infinite. Independent, objective finality is the goal. A court cannot expect to satisfy all comers at all times but its decision making process can and should wherever possible be transparent.[42]

By Corbett Haselgrove-Spurin.

WHAT MAKES A GOOD JUDGE?

The Judicial Appointments Commission

Qualities and abilities

The Judicial Appointments Commission has identified the following five core qualities and abilities which are required for judicial office.

These qualities and abilities may be adapted slightly for different posts - for example a High Court judge would be expected to display a high level of legal knowledge, whereas a lay tribunal member would be expected to display expertise in their professional field.

1. Intellectual capacity

- High level of expertise in your chosen area or profession
- Ability quickly to absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

2. Personal qualities

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally.

3. An ability to understand and deal fairly

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy.

4. Authority and communication skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged.

5. Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously
- Ability to work constructively with others (including leadership and managerial skills where appropriate).

COMMENT : That's the criteria sorted. Sounds somewhat like the qualities that which one might look for in an adjudicator or arbitrator. **Next question** : *How does one test for compliance ?*

[40] See however fn 24 supra regarding proportionality and Convention Rights, which may be an exception to the general rule.
[41] See fn 2 supra, per Lord Craighead.
[42] This is part one of a four part article. Part II on reasoned decisions and tribunals will follow in the April edition of ADR News.

CHALLENGING AN ARBITRAL AWARD UNDER ENGLISH LAW

INTRODUCTION

Given the adversarial "*winner takes all*" nature of litigation, it is hardly surprising that there will be times when a disappointed litigant will seek to challenge and turn around the decision. This is likely in circumstances where the litigant feels strongly that the judge or arbitrator has got it wrong and the legal advisors indicate that there are potentially valid grounds for a challenge.

Whilst it is inevitable that neither judges nor arbitrators are infallible and that there will be occasions when a challenge will be successful, the decision to challenge an arbitral award is not one that should be taken lightly.[43] A frivolous challenge will simply result in additional costs and merely serve to delay the inevitable. Today, if not previously, in the light of the Arbitration Act 1996 the English courts take a robust approach to the enforcement of arbitral awards. They are very supportive of the arbitral process and are not amenable to petty challenges and nit-picking. Where the challenge is based on a mere technical breach the court will look for evidence of serious injustice or prejudice to the appellant's interests.

THE JURISPRUDENTIAL BASIS FOR CHALLENGES TO ARBITRAL AWARDS.

It is quite common for challenges to arbitral awards and construction adjudication decisions to be assimilated with Judicial Review actions in Public Law. This is understandable in that natural justice is a key feature of the supervisory powers of the court in respect of the judicial process and the arbitral process has been likened to private justice. However, it is the very fact that the arbitral process is private that places it outside the remit of Judicial Review, which is exclusively reserved to disputes between private legal personalities and state organs in respect of the exercise of state powers. It is an abuse of process to submit civil litigation to Judicial Review.[44] Nonetheless, there are striking similarities between the private challenge and judicial review which is hardly surprising since they arise out of the same conceptual base.

Ultra vires is the principal ground for challenging alleged abuses of public powers. The assertion quite simply is that a public official has strayed outside the statutory framework that prescribes the exercise of a power or failed to fulfil statutory duties and hence the resultant action or decision is unlawful. Similarly, the arbitration process (including its existence and the way it is conducted) is prescribed by the terms of the contractual agreement (both express and implied including by statutory implication as set out for example in the Arbitration Act 1996) upon which it is based. Whilst an easy trap to fall into, a breach of the contractual rules governing the arbitral process should not be referred to as being ultra vires the contract. It is quite simply a breach of contract. This issue, in relation to construction adjudication, has recently been examined extensively and confirmed by the English,[45] Scottish[46] and the Australian Courts.[47]

The judicial process is subject to the rules of natural justice. The two central rules here are 1) the right of a party to hear and to be heard (***Audi alterem partem***) and 2) the right to a hearing before an impartial arbiter (***Nemo iudex in causa sua***). These are implicit in the requirements of due process established by the Bill of Rights 1688 and reaffirmed by Article VI of the European Convention on Human Rights, now part of English Law by virtue of the Human Rights Act 1998. It is now clear, though that has not always been the case, that these basic concepts are respected and fully observed in private dispute resolution, but by other means than through judicial review. Thus, as far as arbitration and construction adjudication are concerned, the Arbitration Act 1996 and the Housing Grants Construction and Regeneration Act 1996[48] respectively provide rules to ensure that the key elements of natural justice are a feature of both processes.

What amounts to a fair hearing in public law and when a party is entitled to one, and if so, the extent of the hearing called for, has always been a moveable feast which depends upon the distinction between rights, mere expectations and administrative proportionality. The same is likewise true of arbitration and construction adjudication, the distinction being between the temporary and final natures of the outcomes of arbitration and adjudication.[49] Similarly, the application of these principles is modified in respect of expert determination and conciliation, but has no application to mediation since no outcome is imposed upon the parties.

43 Note that leave to appeal is required in respect of litigation but this is not required to challenge an arbitral award. However, leave is required to challenge the court's decision in respect of the challenge under sections 67(4), 68(4) and 69(2), criteria for such appeal in respect of the latter being set out in s69(3).

44 ***O'Reilly v Mackman*** [1983] 2 AC 237 ; ***Law v National Greyhound Racing Club*** [1983] 1 WLR 1302.

45 ***Macob Civil Engineering Limited v Morrison Construction Limited*** *[1999] BLR 93 :* ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** *[2000] BLR 522 :* ***Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377 : Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607*** :

46 **Homer Burgess Ltd v Chirex (Annan) Ltd [1999] ScotCS 264 :** ***Naylor (t/a Powerfloated Concrete Floors) v Greenacres Curling Ltd [2001] ScotCS 163.***

47 ***Brodyn P/L v Philip Davenport [2004] NSWCA 394.***

48 ***Fab-Tek Engineering Ltd v Carillion Construction Ltd [2002] ScotCS a873-01 : Karl Construction Ltd v Palisade Properties Plc [2002] ScotCS 350 : Austin Hall Building Ltd v Buckland Securities Ltd [2001] EWHC TCC 434.***

49 ***Brodyn P/L v Philip Davenport [2004] NSWCA 394.*** at para 57 Hodgeson JA observed that *"there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example* ***Ridge v Baldwin*** *[1964] AC 40,* ***Durayappah v Fernando*** *[1967] 2 AC 337,* ***Banks v Transport Regulation Board (Vic)*** *(1968) 119 CLR 222 at 233,* ***Calvin v Carr*** *[1980] AC 574 at 589-90,* ***Minister for Immigration v Bhardwaj*** *(2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."*

SL Timber Systems Ltd v Carillon Construction Ltd [2001] ScotCS 167 at para 22. *"Error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make (****Watson Building Services Limited*** *per Lady Paton at paragraphs [21] to [24];* ***Homer Burgess Limited v Chirex (Annan) Limited*** *2000 SLT 277 at 284J to 285D;* ***Macob Civil Engineering Limited v Morrison Construction Limited*** *[1999] BLR 93 per Dyson J at Paragraph [19];* ***Northern Developments (Cumbria) Limited*** *per His Honour Judge Bowsher QC at paragraph 24)."*

THE GROUNDS FOR CHALLENGE OF AN ARBITRAL AWARD.

There are three grounds for challenging a domestic award under the Arbitration Act 1996, namely ***Jurisdiction*** under s67; ***Serious Irregularity*** under s68 and ***Appeal on a Point of Law*** under s69. In addition there are specific rules based on the New York Conventions on the Enforcement of Arbitral Awards 1958, set out in sections 100-103 of the Act in respect of International Awards. Each of these will be considered in turn below. Any challenge must be based on these provisions and the procedures prescribed by related provisions within the Act such as sections 70-73. There is no common law supplement to these rules,[50] though judicial considerations of the provisions since the Act came into force have been extensive. Frequently a multi-pronged attack on an award is mounted involving two or more grounds, e.g. a) the tribunal had no jurisdiction but even if it did either b) there was a serious irregularity in the way the tribunal conducted itself and/or c) the tribunal erred in law. In consequence some cases are authority for the application of all three provisions.[51]

GROUNDS

S67 Jurisdiction
S68 Serious Irregularity
S69 Appeal : point of law

International Awards

S103 NYCEAA 1958 : Incapacity: invalidity: jurisdiction; empanelment; set-aside; public policy

It should be noted that the grounds set out in sections 68 and 69 exclude an appeal against a finding of fact on any basis apart from it being a consequence of a serious irregularity. [52] Whilst a simple point, this appears to elude many parties and counsel. [53] It should further be noted that the courts will take a robust view of spurious challenges which seek to dress up a point of fact as a point of law. The court can and will impose cost sanctions in such instances, as demonstrated by ***Vrinera v Eastern Rich Operations [2004].***[54] Vrinera sued ERO (the charterer) under a safe port clause and ERO in turn sued BAO on the safe port clause in a sub-charter, both by arbitration. In the event the actions were held to be spurious. The tribunal and the court found that the vessel was unseaworthy, which was ERO's defence against Vrinera. The question here for the court was "*Whether ERO's costs against BAO were caused by Vrinera?*" Mr Justice Langley held that they were not. The loss was actually the consequence of pursuing a hopeless case.

The facility to mount a challenge should not and cannot be used as an opportunity to retry the factual evidence. In the context of the Arbitration Act 1996 this was affirmed in ***Orchard v Hutchings [1997].***[55] During the course of an arbitration the claimant produced a plan and asserted defects in a conservatory. The applicant appealed on the basis that there was an irregularity, in that he asserted that he had never seen the plan, and that the arbitrator ignored this absence of knowledge. The court held that by implication the arbitrator believed he had actually fact seen the plan. The issue was thus one of fact and the appeal failed.

From this perspective little has changed since there was no appeal on a point of fact under the Arbitration Act 1950 either as demonstrated by ***Sembawang v Pacific Ocean [2004].***[56] The complaint was that the arbitrators finding that an owner who had lawfully terminated a ship conversion contract had not mitigated his losses by choosing a British and not a Singapore yard to complete the work. The court held that this was a question of fact, namely "*was there legally adequate mitigation*", not law as in "*what is the lawful definition of mitigation*". Accordingly the challenge failed.

In relation particularly to s68, rather than wait for a tribunal to deliver an award there is the facility to apply to the court under s24 Arbitration Act 1996 to remove an arbitrator where there are doubts about the arbitrator's impartiality, qualifications, physical and mental capacity and where an arbitrator has refused or failed to properly conduct proceedings or proceed with reasonable dispatch, resulting in substantial injustice.[57] In addition, by virtue of s23 parties can jointly agree to revoke the authority of an arbitrator. Furthermore, in relation particularly to s69, rather than wait for a tribunal to deliver an award that might potentially be challenged on a point of law, there is the facility to apply to the court under s45 to determine that point of law.

[50] S81(1) *Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to :-*
(a) matters which are not capable of settlement by arbitration,
(b) the effect of an oral arbitration agreement; or
(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.
S81(2) *Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground or errors of fact or law on the face of the award.*

[51] e.g. ***Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm).***

[52] ***Demco Investments SA v SE Banken Forsakring Holding Aktiebolag [2005] EWHC 1398 (Comm)*** There can be no appeal of facts under s69 - only an appeal of law. Mr Justice Cooke.

[53] e.g. ***Compania Sud American Vapores v Hamburg [2006] EWHC 483 (Comm).*** Bunkers overheated, damaging cargo. Arbitrators found as a fact that loss was due to negligence in operation of the vessel and accordingly the charterer was not liable by virtue of Art IV HVR. The appellants sought to establish that overheating of bunkers next to a cargo is negligence in care and handling of cargo and that in consequence a breach of Art III had arisen. Mr Justice Morison held that this was a challenge to fact not law. The Arbitrators had applied the correct test scrupulously. ***Gosse Millard*** [1929] applied.
See also ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC)*** Appeal against the construction of the contract regarding variations. Mr Justice Jackson conducted an extensive consideration of the role of the court under s69 and subsequently found that that arbitrator had applied the correct construction. Accordingly the appeal failed.
And see also ***Maridive VII v Key Singapore, Owners and Demise Charterers of the oil rig [2004] EWHC 2227 (Comm)*** The arbitrator changed the base value upon which the award was compounded and further altered the contributions of the parties in respect of a salvage and tow claim. The consequent reduction in the award was challenged. Mr Justice David Steel held that the second arbitrator made no errors of law or principle.

[54] ***Vrinera Marine Company Ltd. v Eastern Rich Operations Inc [2004] EWHC 1752 (Comm).***

[55] ***Orchard v Hutchings [1997] EWCA Civ 2269.*** Hutchinson LJ.

[56] ***Sembawang Corp Ltd v Pacific Ocean Shipping Corp [2004] EWHC 2743 (Comm)*** *per* Mr Justice Gross.

[57] e.g. ***Norbrook Laboratories Ltd v Tank [2006] EWHC 1055 (Comm).*** Mr Justice Colman removed an arbitrator under s24 for engaging in undisclosed contact with witnesses in order to gather evidence.

Supplementary Provisions related to both challenges and appeals.

Section 70 Arbitration Act 1996 contains a number of very important supplemental provisions that as stated in s70(1) concern the right to mount s67 and s68 challenges and / or an appeal under s69.

Exhausting available appeal and review facilities.

> 70(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-
> (a) any available arbitral process of appeal or review, and
> (b) any available recourse under section 57 (correction of award or additional award).

This provision is particularly important where institutional arbitration is involved and again where standard contract forms such as the GAFTA charter-party terms apply since it is common for such contracts to provide the facility of institutional appeal or an appeal to a trade board.

Time bar for application for challenge or review

> 70(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

This is a very tight timescale. Compare this with the 3 months allowed for an application for judicial review in public law.

Adequate reasons for the decision of a tribunal – remission to tribunal – and costs of remission

> 70(4) If on an application or appeal it appears to the court that the award-
> (a) does not contain the tribunal's reasons, or
> (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,
> the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.
>
> 70(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

In the absence of adequate reasons it may not be possible for the court to deal with a jurisdiction challenge or to determine whether or not there has been a serious irregularity or error of law. This provision enables the court to remit the award for further clarification. It does not preclude a subsequent s67 / s68 challenges or a s69 appeal in the light of that clarification, though once given a challenge may not then survive the threshold requirements for a challenge.

Security of costs for a challenge or appeal

> 70(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
> The power to order security for costs shall not be exercised on the ground that the applicant or appellant is-
> (a) an individual ordinarily resident outside the United Kingdom, or
> (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

Interim Orders. Securing monies due under an award pending outcome of application.

> 70(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

Conditions regarding security of costs and securing monies under an award as part of leave to appeal.

> 70(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).
> This does not affect the general discretion of the court to grant leave subject to conditions.

PART I – JURISDICTION

AUTONOMY AND JURISDICTION

The autonomy of the parties is a fundamental feature of arbitration. In the absence of consent, express or implied, to the jurisdiction of a tribunal over the disposition of a dispute[58] or an aspect of a dispute,[59] enforcement of the award by the courts may be successfully resisted. An arbitrator's jurisdiction may be challenged at an early stage by virtue of a s24 application to the court for removal of an arbitrator. However, once an award has been delivered any challenge to the award on the basis of an absence of jurisdiction will fall under the remit of s67 Arbitration Act 1996.

Challenging the award: substantive jurisdiction.

67(1) *A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-*

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

67(2) *The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.*

Rules governing the jurisdiction of the tribunal.

Section 67 Arbitration Act 1996 provides the facility to challenge an award on jurisdictional grounds but does not seek to define or regulate that jurisdiction. This is left to sections 30-32 of the Act which provide the mechanisms for determining the jurisdiction of the tribunal both by the tribunal and by the courts. A party who takes no part in arbitral proceedings may question the validity of an arbitration agreement, the constitution of a tribunal or the scope of the jurisdiction of the tribunal under the agreement by virtue of s72 coupled and can avail themselves of the rights to challenge under s67 and s68, without having recourse to the s70(2) duty to exhaust arbitral procedures. However s73 provides that where a party participates in proceedings without objection the right to object may be lost.[60] Note also that by virtue of s66(3) leave to enforce an award will not be granted where it has been shown to the court that the tribunal lacked jurisdiction. Together these provisions seriously prescribe the right to challenge an award on the s67 grounds of an absence of jurisdiction.

By virtue of the s30 Arbitration Act 1996[61] "*Kompetenze-Kompetenze rule*", an arbitrator has jurisdiction to rule on his own jurisdiction, which reduces the role of the courts in establishing jurisdiction at the outset, but such a decision is subject to challenge before the courts.[62]

Contrast the rules governing arbitration with those governing construction adjudication under the Housing Grants Construction and Regeneration Act 1996, where the adjudicator is not given jurisdiction over jurisdiction by the statute or by the accompanying scheme,[63] though it is possible for the contract to expressly grant jurisdiction[64] or for the parties to subsequently expressly or impliedly accord jurisdiction.[65] In the absence of jurisdiction the adjudicator merely considers whether or not he has jurisdiction and thus whether in his opinion continuing with the adjudication is justified. It is possible

[58] ***X Ltd v Y Ltd [2005] EWHC 769.*** Here Mr Justice Jackson was called to determine whether the subject matter of a dispute was within the scope of the arbitration jurisdiction clause.

[59] e.g. ***Ecuador v Occidental Exploration & Production Co [2006] EWHC 345 (Comm).*** Under the contract jurisdiction to deal with taxation was excluded. Did this exclusion extend to application for return of VAT. Mr Justice Aikens held that it did not. See also ***Econet Satellite Services Ltd. v Vee Networks Ltd [2006] EWHC 1664 (Comm)*** Mr Justice Field held that there was no jurisdiction to deal with set off under the contract. The applicants had confused the scope clause under UNCITRAL, regarding procedure, with the substantive law of the contract.

[60] ***Peoples' Insurance Company of China v Vysanthi Shipping Co Ltd [2003] EWHC 1655 (Comm).*** This concerned a general average claim following the grounding of a vessel. The owners successfully arbitrated the dispute and obtained an enforcement judgment. Subsequent to the award an action was commenced in the PRC followed by a late application to challenge the arbitrator's jurisdiction coupled with an application for an extension of time. The extension was refused. The challenge failed. Mr Justice Thomas found that the arbitrator was seized with jurisdiction. See also ***Oceanografia SA DE CV v DSND Subsea AS [2006] EWHC 1360 (Comm).*** Mr Justice Aikens found that the applicant had waived the right to challenge jurisdiction by submitting to proceedings.

[61] **s30(1)Arbitration Act 1996** *`Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

[62] **s30(2)Arbitration Act 1996.** *Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*

Birse Construction Ltd v St David Ltd [1999] EWHC TCC 253. This involved proving the existence of the contract containing the arbitration agreement which in turn gave rise to jurisdiction and accordingly the right to a stay to arbitration. Sections 5 & 9 Arbitration Act 1996 also considered by His Honour Judge Humphrey Lloyd. In ***Birse Construction Ltd v St David Ltd [2000] Lawtel AC0100051*** Recorder Colin Reese held that no contract had been concluded. The arbitration agreement was not alive. Accordingly he declined to order a stay to arbitration.

[63] ***Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377: Tim Butler Contractors Ltd v Merewood Homes Ltd [2000] TCC 10/00;: Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607***

[64] ***Deko Scotland v. Edinburgh Royal Joint Venture & Anor [2003] ScotCS 113*** : example of extension of jurisdiction contained in the contract, in this case over costs.

[65] ***Whiteways Contractors v Impresa Castelli [2001] 75 Con LRHT 00/199; Watson Builders Service v Millers [2001] Outer Ct of Session*** Scot.Courts.Gov.UK; ***Nolan Davis Ltd v Steven P Catton (No1) [2000] EWHC 590; Bryen & Langley v Boston [2004] EWHC 2450***

for one of the parties to seek a declaration in advance from the court to determine jurisdiction or to stay the adjudication with consent of the parties pending the outcome of an application for a declaration.[66] Otherwise the question of jurisdiction will be settled by the court during any subsequent enforcement action.

The statutory recognition of the *Kompetenze-Kompetenze* Rule brings English Arbitration Law in line with the Model Law. The previous ability to refer all questions of jurisdiction to the court tended to encourage judicial interference in the arbitral process, slowed the decision making process down, often quite unnecessarily and increased the costs of proceedings. Now a party will raise the question of jurisdiction directly with the tribunal. The tribunal will make a determination on the question (either as an interim award or subsequently as an integral part of the final award) unless the parties have decided that some other body will have jurisdiction over jurisdiction. [67]

Whether or not the arbitrator is the best person to decide upon jurisdiction is a debatable question. There are those who do not believe he is because the arbitrator has a vested financial interest in the continuation of the process. Against this however is the fact that an arbitrator has a professional reputation to maintain, which could be damaged if his judgment is subsequently called into question by the court, particularly since abortive proceedings will have involved the parties in considerable expense both in terms of money, time and personal commitment. Where both parties agree to the question of jurisdiction being determined by the court, or the arbitrator wants, with god reason, the courts assistance an application can be made to the court under s31.[68]

The grounds used to challenge the jurisdiction of an arbitrator.

Capacity : A number of such challenges centre on the contractual capacity or otherwise of one of the parties, with the assertion that the action should have been against a company, perhaps that it was against the wrong company,[69] or alternatively against an individual not a company, or that the wrong person has been cited.[70] This is closely related to the question as to whether or not there was a legal relationship between the parties that could give rise to a dispute discussed below.

Sovereign Immunity : A frequent basis for challenge is on the grounds of sovereign immunity. This is common particularly in respect of arbitrations which involve government trading partners in Latin America and most notably trading partners in Europe which are government entities or maintain close relationships with the government where the government was

[66] ***Adonis Construction Ltd v Mitchells & Butler [2003] Adjudication SocDec 2003; William Verry Ltd v Furlong Homes Ltd [2005] EWHC 138***

[67] **S31 Arbitration Act 1996. Objection to substantive jurisdiction of tribunal.**

31(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must, be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.
A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

31(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

31(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

31(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-
(a) rule on the matter in an award as to jurisdiction, or
(b) deal with the objection in its award on the merits.
If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

31(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

[68] **S32 Arbitration Act 1996. Determination of preliminary point of jurisdiction.**

32(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.
A party may lose the right to object (see section 73).

32(2) An application under this section shall not be considered unless-
(a) it is made with the agreement in writing of all the other parties to the proceedings, or
(b) it is made with the permission of the tribunal and the court is satisfied-
(i) that the determination of the question is likely to produce substantial savings in costs,
(ii) that the application was made without delay, and
(iii) that there is good reason why the matter should be decided by the court.

32(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

32(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

32(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

32(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.
But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

[69] ***Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121 (Comm).*** The ICC arbitration award challenged here concerned claims arising out of the supply of diseased poultry. The issue was whether the tribunal had jurisdiction to address claims by related companies in the C&M group or whether claims were limited to C&M. This in turn turned on whether Arkansas Law applied. Mr Justice Langley held that in the circumstances C&M was the only party to the reference. Accordingly the related awards were struck out.
See also ***Stansell Ltd v Co-Operative Group (CWS) Ltd [2005] EWHC 1601 (Ch).*** CRS business was transferred to CWS. Successful appeal against an interim award on jurisdiction based on the existence of a contract. His Honour Judge Blackburne upheld a contractual prohibition against assignment.

[70] ***Hussmann (Europe) Ltd. v Pharaon [2003] EWCA Civ 266.*** The first award against a company was held by the CA. (Phillips MR, Lord; Rix LJ; Scott Baker LJ.) to be invalid. However, a subsequent award, this time against the individual was valid. The applicant unsuccessfully sought to establish that the arbitrator was by that time functus officio.

previously part of the Communist Trading block.[71] These often involve complex legal issues since the relevant domestic rules governing privatisation are often not well developed, coherent, fixed or transparent.

Illegality : From time to time jurisdiction is challenged on the basis of the illegality of the underlying contract, either on policy grounds in England and Wales, or in some other relevant and concerned jurisdiction.[72]

No contract : Whilst the doctrine of separability, embodied in s7 Arbitration Act 1996,[73] has reduced the scope for challenging jurisdiction of an arbitrator on the grounds of the invalidity of a contract, none the less where a party has not entered into a contract there is no contract from which to separate the arbitration agreement.[74] Thus a classic ground for challenging the jurisdiction of an arbitrator is an assertion that no contract had been concluded between the parties.[75]

No arbitration clause : Alternatively, a challenge may involve the assertion that the contract did not incorporate an arbitration clause and hence no agreement to arbitrate.[76] The definition of an arbitral agreement is set out in s6 subsections (1) & (2) Arbitration Act 1996.[77]

Written arbitration clause : There is no requirement that the underlying agreement that gives rise to arbitration proceedings be in writing,[78] but in order for an arbitrator to have jurisdiction by virtue of and subject to the Arbitration Act 1996, the arbitration agreement must be in writing according to s5. If this is not the case this does not mean that the arbitrator has no jurisdiction, but rather that any question as to jurisdiction will be governed by the common law and thus the courts will exercise jurisdiction over questions of jurisdiction. The arbitrator will not be competent to do so.

GROUNDS FOR JURISDICTIONAL CHALLENGE

- Capacity
- Sovereign Immunity
- Illegality of main contract
- Existence of contract and collateral arbitration clause
- No effective arbitration clause
- Oral agreement.
- Scope of jurisdiction
- Defects in appointment

Outside Scope of arbitration agreement : Whilst the complainant may accept the appointment of an arbitrator and his jurisdiction over certain issues, the assertion here is that that jurisdiction is restricted in scope by the terms of the arbitration agreement and that the arbitrator has considered matters beyond his jurisdiction.[79]

Defective appointment : Here the complaint is that the mechanism for appointing an arbitrator contained in the contract expressly or by reference to institutional rules has not been complied with, often with regard to consent mechanisms, or alternatively that the wrong arbitrator has been appointed.

[71] See for instance ***Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm).*** Here a s67 jurisdiction challenge was mounted on the basis of foreign state immunity plea by the defendant and an assertion that the award was a treaty. Mr Justice Aikens held that the tribunal had jurisdiction. The sovereign state had submitted to the jurisdiction of the arbitrator.

[72] ***Vee Networks Ltd. v Econet Wireless International Ltd. [2004] EWHC 2909 (Comm).*** This action involved challenges on the grounds of s67 jurisdiction and s68 serious irregularity. V, a Nigerian mobile telecoms company concluded a Technical Support Agreement with EWI to provide V with engineering advice etc to set up its business. V subsequently purported to cancel the agreement asserting at an arbitration for damages etc that the TSA was ultra vires EWI's Articles & Memorandum of Association and thus unlawful and unenforceable.
The tribunal found that engineering services were at the core of the TSA and thus lawful objects. V here challenged the award on the grounds 1) that the TSA was unlawful and thus the tribunal had no jurisdiction under and by virtue of the TSA and 2) further asserted a serious irregularity.
Mr Justice Colman rejected the jurisdictional challenge because there had been no jurisdictional award. A s7 determination is not subject to a s67 challenge. He then went on to hold that whilst the decision may or may not have been correct, there was no evidence of serious irregularity. Accordingly the challenge failed on both heads.
See also ***JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd [2004] EWHC 245 (Comm).*** Here Mr Justice Colman heard a combined 67 jurisdiction challenge and a s69 challenge on a point of law. **First issue :** *Did the parties have the right to conclude an agreement to arbitration without consent of other parties ?* Held : YES. **Second issue** : *Did they actually conclude an ad hoc agreement to refer ?* Held : YES. **Third issue :** *Was the reference unlawful under Georgian law which required approval of the ministry ?* Held : NOT APPLICABLE. The contract was subject to English Law not Georgian law and hence the question was not relevant. The decision of the court of first instance to accede to an application for a s9 stay against continuing an action before a foreign court was obviously correct.

[73] **S7 Arbitration Act 1996. Separability of arbitration agreement.**
Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

[74] ***Continental Enterprises Ltd. v Shandong Zhucheng Foreign Trade Group Co [2005] EWHC 92 (Comm).*** Whilst an arbitration agreement can survive the invalidity of the main agreement, an arbitration agreement tainted by incapacity would be invalid. Mr Justice David Steel found that the GAFTA panel had correctly concluded that the tribunal had in the circumstances of the case no jurisdiction.

[75] ***Primetrade AG v Ythan Ltd [2005] EWHC 2399 (Comm).*** The appellant challenged the existence of contract in a dispute concerning the liability of a holder of bill of lading for damage to a vessel due to the shipment of dangerous cargo. Mr Justice Aikens.

[76] ***Welex A.G. v Rosa Maritime Ltd. [2003] EWCA Civ 938.*** Here the court heard an application for an anti-suit injunction against Polish proceedings and a s67 jurisdictional challenge against a 1st instance decision that a bill of lading contained an arbitration clause and that accordingly the New York Convention on Enforcement of Arbitral Awards 1957 applied. The CA. (Brooke LJ; May LJ; Tuckey LJ.) rejected the appeal.

[77] **S6 Arbitration Act 1996. Definition of arbitration agreement.**
6(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
6(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

[78] Contrast the requirement under s107 Housing Grants Construction and Regeneration Act 1996 that a construction contract be in writing if it is to fall within the remit of Part II of the Act, otherwise the adjudicator will have no jurisdiction.

[79] ***Westland Helicopters Ltd v Al-Hejailan [2004] EWHC 1625 (Comm).*** The question here was whether or not the tribunal had the jurisdiction to award interest. The dispute concerned the United Arab Emirates (UAE). Mr Justice Colman found that there was jurisdiction and further rejected a challenge on the grounds of serious irregularity.

Reasons for jurisdictional challenge

The motivation for a s67 jurisdictional challenge may be completely genuine, in that a party has not submitted to and never intended to submit the dispute to arbitration or to a particular arbitrator. However, it is just as likely that in hindsight the imminence of an arbitral hearing and the rapid resolution of a dispute may be unwelcome news to a party; the balance between forum and choice of law may in the circumstances prove to be less advantageous to a party than had been anticipated when the contract containing the arbitration clause was formed; or the party has not been successful in the arbitration. In each of these situations a challenge to jurisdiction may provide a way of overcoming those difficulties, even if all it actually achieves is to postpone the final decision, which may well have cash flow benefits or could lead, through attrition to the other side giving up, or alternatively force that party to compromise the action.

Timing of challenge.

A s67 jurisdictional challenge to an award is often mounted at an early stage of proceedings where an arbitrator has delivered an interim jurisdictional award rather than a reference being made to the court under s32 to determine the jurisdiction.[80] Note that in both situations (viz s67 or s32) the tribunal may continue proceedings pending the outcome of the court proceedings. This will require the arbitrator making a considered case management decision as to likelihood of the challenge being successful or otherwise and determining that any continued expenditure in the interim period is justified. This may well be the case where time is of the essence for the other party.

Nature of appeal proceedings and questions of fact

Unlike s68 and 69 where it is not possible to challenge findings of fact, jurisdiction involves mixed questions of law and fact, so it is not possible to conduct an effective review of jurisdiction without revisiting the factual basis surrounding the question whether or not the parties had agreed to give the tribunal jurisdiction of part or all of a dispute. If the court were limited to questions of law and constrained by the factual findings of the tribunal virtually all challenges would fail. The Court of Appeal stated in ***Azov v Baltic [1999]*** that the court should not be placed in a worse position than an arbitrator when determining the challenge.[81] A challenge under s.67 Arbitration Act 1996 to an arbitrator's ruling as to his own jurisdiction should involve a re-hearing rather than simply a review according to Mr Justice Gross in ***Electrosteel v Scan-Trans Shipping [2002].***[82] The court is not therefore limited to evidence available to the tribunal and may consider fresh evidence. However, in ***Ranko v Antartic [1998]*** Judge Toulson declined to accede to a s79 application for an extension of time [*limited to 28 days under s70(3)*] to challenge an award on the grounds of jurisdiction partly because new evidence not available to the tribunal was adduced, which militated against the need to ensure the just, expeditious and economic disposal of cases pursuant to Practice Direction 49G of the Civil Procedure Rules 1998.[83]

Remedies available to the court

The principal remedy is for the court to set aside the award if a jurisdictional challenge to an award is successful. It is however open to the court to salami slice an award and find that a challenge is only partially successful,[84] thus the provision allowing the court to 67(3)(b) vary the award.

Challenging the award: substantive jurisdiction. Remedies

67(3) *On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-*

- *(a) confirm the award,*
- *(b) vary the award, or*
- *(c) set aside the award in whole or in part.*

67(4) *The leave of the court is required for any appeal from a decision of the court under this section.*

Whilst an appeal against the determination of the award by the court may be possible it should be noted that by virtue of sections 67(4), 68(4) and 69(6) in each case leave of the court making that determination is required. Furthermore, it is not possible to appeal any refusal of leave according to the Court of Appeal in ***Athletic Union of Constantinople v National Basketball Association*** **[2002].**[85] The Court of Appeal has no jurisdiction to grant permission or to review the decision. Presumably this does not rule out judicial review by QBD, however unlikely that might be.[86]

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[80] ***Amec v S.S. for Transport [2004] EWHC 2339; [2005] EWCA 291 CA***. Failed challenge to an arbitrator's interim award on jurisdiction before Hooper LJ ; May LJ; Rix LJ. See also ***Metal Distributors (UK) Ltd. v ZCCM Investment Holdings Plc [2005] EWHC 156 (Comm)*** which concerned a challenge to the preliminary determination of the tribunal that it did not have jurisdiction over a counter-claim. Mr Justice Cresswell held that whilst the scope of the clause extended to counterclaims regarding quality of goods under the contract it did not extend to counterclaims arising out of alleged breaches of other contracts. Accordingly the tribunal's determination was upheld, demonstrating that the challenge can operate both for determinations asserting and for those declining jurisdiction.

[81] ***Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyds's Rep 68.***

[82] ***Electrosteel Castings Ltd. v Scan-Trans Shipping & Chartering SDN BHD [2002] EWHC 1993.***

[83] ***Ranko Group v Antartic Maritime SA [1998] ADRLJ 35.***

[84] ***Westland Helicopters Ltd v Al-Hejailan [2004] EWHC 1625 (Comm).*** This involved s67 and s68 challenges and an application for partial set aside of award on jurisdictional grounds and / or serious irregularity. Major aspects of the challenge were timed out. A minor part of the jurisdictional challenge, regarding interest, succeeded.

[85] ***Athletic Union of Constantinople ("AEK") v National Basketball Association [2002] EWCA Civ 830*** : See also ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** *[2001] 1 QB 308.*

[86] Part II, Challenges on the Grounds of Serious Irregularity continues in the next issue of ADR News.

MEDIATION CASE CORNER

Case Commentary by

Corbett Haselgrove Spurin

Aird v Prime Meridian Ltd [2006] EWHC 2338 (TCC)

The court ruled on the privileged status or otherwise of joint statements by experts of agreed and disputed matters. Having agreed at case management to instruct their experts to produce a joint statement for the purposes of a proposed mediation the agreements were reduced to a court order. The mediation failed and the question subsequently arose as to whether or not the joint statement was privileged? The court held that ordinarily such statements produced under the CPR 36 are not privileged. However, here the statement was produced very quickly for mediation only and was privileged. Hence it was non-admissible. The claimant could broaden out the scope of claims to embrace matters which were according to the statement not in dispute. His Honour Judge Peter Coulson. 19th September 2006.

Bailey (N.G.) & Co Ltd. v Amec Design & Management Ltd. [2003] EWHC 9012 (Costs)

The court examined the scope of privilege and disclosure during costing. The decision of District Judge Harrison in **Donald McCreery v Massey Plastic Fabrications Ltd** 23 January 2003 regarding extent of disclosure where CFA's are involved was disapproved by the court in that it went too far. Master Rogers, Costs Judge. 6th October 2003.

Balmoral Group Ltd. v Borealis (UK) Ltd [2006] EWHC 2531 (Comm)

Mediation : Privilege : Application for costs on indemnity for failure to take reasonable steps to settle.

Mr Justice Christopher Clarke : 17th October 2006.

Bradford & Bingley Plc v Rashid [2006] UKHL 37

Overturning the Court of Appeal's decision above, the House of Lords provides an in-depth analysis of the scope of the without prejudice privilege, the admission of fact exception, what amounts to an admission of fact and re-examines what amounts to a negotiation to settle a dispute. Here an unequivocal admission of liability under a mortgage after time was exhausted under the Limitation Act defeated the time bar.

Lord Hoffmann, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Brown, Lord Mance 12th July 2006.

COMMENT : Whilst their Lordships were unanimous that there was no negotiation and thus the privilege rule did not apply, there was no unanimity about obiter as to the scope of privilege and the circumstances when the veil of privilege will be lifted. It would appear that a rift has opened up between the Scottish approach to admissions of fact in privileged negotiations and the English approach which is more restrictive. The dicta and authorities relied on by their Lordships will provide much ammunition for future battles.

CMC Group Plc v Zhang [2006] EWCA Civ 408

Settlement agreement : Penalty Clause - term to repay settlement sum and pay damages for any continued allegations against the claimant a penalty clause. CA. Before Mummery LJ, Dyson LJ, Sir Charles Mantell. 14th March 2006.

Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] EWHC 58 (Comm)

Settlement agreement - insurance : Enterprise settled a dispute and attempted unsuccessfully to recover under a policy. Held : Enterprise had to prove that they were legally liable and had failed to do so. R-emphasised the importance of involving underwriters in settlement agreements. Commercial Court. Mr Justice Aikens. 26th January 2006.

EQ Projects v Alavi [2006] EWHC 29 (TCC)

Costs : Payment in : Indemnity : Construction dispute. Claimant, whilst successful did not beat payment in : Claim reduced by counterclaim : Indemnity costs awarded to defendant in respect of the trial. Conduct of trial severely criticised.

His Honour Judge Peter Coulson QC. TCC. 6th January 2006

Hickman v Lapthorn [2006] EWHC 12 (QB)

The claimant was advised by his solicitors and counsel to settle a road accident claim. Subsequently the claimant sued the solicitors (1st defendants) and counsel (2nd defendants) for negligent advice. The claim succeeded and was apportioned 1/3 & 2/3 between the defendants. Costs however was also a very significant issue. The court found that after the claimant had offered to settle for £150,000 it was highly likely that a mediation would have led to a settlement very close to the subsequent judgment figure of £130,000. The problem was that whilst the 1st defendants were prepared to mediate the 2nd defendant (guided by underwriters) refused to do so. The court was asked to award all costs of the claimant in the litigation against the 2nd defendant for a refusal to mediate and the 1st defendant likewise sought to recover its costs after that event. The court held that whilst the 2nd defendants position had been optimistic it was not unrealistic. Accordingly it was not liable for all the costs of claimant and 1st defendant. ***Halsey, Cowl, Dunnett*** and ***Hurst v Lemming*** considered.

The court concluded that the general principles in ***Halsey*** are :-

(a) A party cannot be ordered to submit to mediation as that would be contrary to Article 6 of the European Convention on Human Rights – paragraph 9.

(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation – paragraph 13. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.
(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of cost sanctions may be used to extract unmerited settlements – paragraph 18.
(d) Where a case is evenly balanced – which is how I understand the judgment's reference to border-line cases, a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must be unreasonable – paragraph 19.
(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal – paragraph 21.
(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative – paragraph 25.
(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful – paragraph 28.
(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable – paragraph 29.
(i) Public bodies are not in a special position – paragraph 34.

The court noted that the 1st defendant could have protected its position by making a payment in but had failed to do so.

The Hon. Mr Justice Jack. QBD. 17th January 2006

IDA Ltd v The University of Southampton [2006] EWCA Civ 145

Med/Arb : Patent Dispute. At the end of the judgment the court proposed that Med/Arb would be a suitable method of producing an early determination to such disputes.

CA. before Ward LJ; Jacob LJ; Wilson LJ. 2nd March 2006

Jackson v Ministry of Defence [2006] EWCA Civ 46

Without prejudice privilege : Defendant only just beat a payment in and had costs reduced. The MOD sought to introduce evidence from a settlement conference to further reduce the claimant's costs award.
Held : Settlement not subject to without prejudice to costs provision - so privileged and non-admissible.

CA before Tuckey LJ; Keene LJ; Wilson LJ. 12th January 2006.

Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058

Following a successful appeal the court ordered a retrial. However, the court considered that it would be better if the parties mediated the issue to avoid further unnecessary expense. Accordingly the court ordered that the retrial not to be listed until parties had demonstrated that appropriate measures had been taken to resolve the dispute.

CA. before Smith LJ; Moses LJ; Hallett LJ. 7th July 2006

COMMENT : Whilst this falls short of a general power for the court to mandate mediation, in the event such a scheduling order gets very close to mandating mediation. This further demonstrates the Court of Appeal's commitment to mediation.

Merelie v Newcastle Primary Health Care Trust (No.3) [2006] EWHC 1433 (Admin)

A party agreed to mediation but demanded an apology at the outset. The court examined the role of the apology in mediation and observed that whilst an apology can be a useful aspect of mediation it is not appropriate to demand an apology as a prerequisite to mediation.

Mr Justice Underhill remarked that *"It is of course important to bring grievances out into the open; but if there is a genuine intention to resolve them constructively the way in which they are aired is equally important. Ms. Nelson described the Claimant's remarks as a "tirade"; and on the evidence of the Claimant's own script and notes that does not appear to be an exaggeration. To demand a public apology as the precondition for mediation was not constructive."*

QBD. Administrative Division. Mr Justice Underhill. 20th June 2006

Munt v Beasley [2006] EWCA Civ 370

Privilege : Notes of mediation proceedings used as evidence to establish that a landlord had contrary to the express terms of a lease included the use of a loft as part of the tenance. There is no explanation as to why the note was admissible. CA. before Mummery LJ; Scott Baker LJ; Sir Charles Mantell. 4th April 2006.

P4 Ltd. v Unite Integrated Solutions Plc [2006] EWHC 2924 (TCC)

Costs - failure to mediate : Failure to beat payment in : failure by successful defendant to make disclosure during case management. Application of CPR Rule 36.20(2). Mr Justice Ramsey. TCC. 17th November 2006

Robinson v Hammersmith and Fulham [2006] EWCA Civ 1122

This case concerns the implications of mediation in respect of time bars in public law. A 17 year old homeless child applied to be housed by the local authority. The authority had a statutory duty to provide such housing. The authorities initiated mediation to resolve the problems that underpinned the application. The problem for the applicant was that time was running against him for priority social housing since once he became 18 he would lose the right to entitlement. The court held that mediation, whilst useful, should not detract from an authority's duty to house an under aged homeless person. In the circumstances the mediation and the application processes should have proceeded at the same time. If the mediation succeeded before the application hearing, all well and good. The hearing could then be terminated. If not, then the council would be in a position to mount a timely hearing and the interests of the child would not be jeopardised by participating in mediation. CA before Waller LJ; Jonathan Parker LJ; Jacob LJ. 28th July 2006

Tonkin v UK Insurance (No 2) [2006] EWHC 1185 (TCC)

Whilst successful in the litigation, the claimants failed to beat a payment in. At a cost's assessment hearing the claimant's allegations of unreasonable behaviour by the defendants were rejected. The court provided a detailed re-evaluation of the rules on costs and determined that in this case costs should follow the event.

His Honour noted that *"It is difficult not to conclude that each time the Claimants had a decision to make, or a choice to make, they made the wrong one. That has led them to the position in which they now find themselves. It was an approach which led them to refuse a reasonable offer to settle before the action even began; to refuse two sensible ADR proposals; to refuse a payment into Court; to pursue a very weak claim all the way through to judgment; and to act, both before and after the commencement of proceedings, in a way that could only be described as unreasonable."*

His Honour Judge Peter Coulson QC : TCC. 18th May 2006

Wright v HSBC Bank Plc No1 [2006] EWHC 930 (QB)

There has been a settlement agreement of bank loans via sale of property by the claimant following the death of her husband and the collapse of his business interests. This case involved an unsuccessful attempt to rescind the settlement agreement on the grounds of misrepresentation, undue influence and duress together with claims for damages in respect of the original claims and in respect of what was said to her entitlement prior to the settlement. The court held that the bank was entitled to insist on settlement of debts - not economic duress.

Mr. Justice Jack : QBD. 5th May 2006.

Wright v HSBC Bank Plc No2 [2006] ADR.L.R. 06/23

This concerned a costs assessment following on from the May judgement. The successful defendant had only been prepared to meet to negotiate any potential outstanding exposure to the bank without accepting any further liability. The court held that the bank was entitled to take that position and should not be penalised in costs for refusing to renegotiate the terms of a pre-existing settlement. Mr Justice Jack : QBD. 23rd June 2006.

CONSTRUCTION CASE CORNER

Corbett Haselgrove Spurin

&

Nick Turner

Gray & Sons Builders (Bedford) Ltd. v Essential Box Company Ltd. [2006] EWHC 2520 (TCC)

An adjudicator found that a construction contract had been wrongfully repudiated and subsequently determined that £101K plus interest was due to the claimant. Here, the claimant successful sought enforcement. The day before the proceedings the defence withdrew opposition to the application but indicated that they had issues with regard to costs.

The court held that costs will be awarded on an indemnity basis if enforcement resisted and defence dropped pre-trial or at the trial. ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358. ***Reid Minty v Taylor*** [2002] 1WLR 2800. ***Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd*** [2005] EWHC 2174 (TCC) and ***Herschel Engineering Ltd v Breen Property Ltd*** [2000] BLR 272 considered.

The costs of the present hearing were resisted because the applicant had not accepted a "reasonable offer". The court held that there is no requirement to accept "reasonable offers" to settle an award – since legal entitlement to entire amount. Finally the court heard argument on some aspects of the cost claim and accepted some minor deductions because it had been unnecessary for a law firm's partner to be accompanied by an assistant.

His Honour Judge Peter Coulson QC. 11th October 2006

Hart Investments Ltd v Fidler [2006] EWHC 2857 (TCC)

Action to set aside main default judgement in respect of the collapse of a wall related to a construction contract and application for summary enforcement of adjudication.

1) The court exercised its discretion under CPR 13 and default judgment set aside : Service of documents took place on the 17th July by mail but was pre-empted by a fax on the 14th. If the fax amounted to service the applicant was entitled to the default judgment – but not if the 17th was the due date since the respondents served a statement of defence within the requisite 14 days. ***Harris v. Bolt Burden*** [2000] L.T.L. February 2nd 2000; ***Partco Group Ltd. v. Wragg & Anor***. [2002] 2 Ll.Rep, 343 (Court of Appeal). ***Molins Plc v. G.D. SpA*** [2000] 1 WLR, 1741, ***Hannigan v. Hannigan*** [2000] 2 FCR 650, and the decision of Christopher Clarke J. in ***Asia Pacific UK Ltd. & Ors. v. Hanjin Shipping Co. Ltd. & Ors***. [2005] EWHC 2443 (Comm) ***Godwin v. Swindon Borough Council*** [2001] EWCA Civ 1478. ***Anderton v. Clwyd*** [2002] EWCA Civ 933, ***Lazard Brothers & Co. v. Bank Industrielle de Moscow*** [1932] 1 KB 617 (CA), ***Regency Rolls v. Carnell*** (2000) EWCA 379 considered.

2) Summary enforcement refused

a) This did not concern a construction contract under HGCRA- since whilst the work was preceded by letters of intent (*which failed to identify clearly the scope of the works and key requirements for a valid contract*), no written contract was concluded. ***RJT Consulting Engineers Ltd. v. DM Engineering (Northern Ireland) Ltd.*** [2002] 1 WLR 2344 applied. Adjudicator had no jurisdiction. ***Macob v. Morrison*** [1999] BLR 93, ***Bouygues UK Ltd. v. Dahl-Jensen UK Ltd.*** [2000] BLR 522 (Court of Appeal), and ***C & B Scene Concept Design Ltd. v. Isobars*** [2002] BLR 93 (Court of Appeal). ***Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd.*** [2006] 1 BLR 15. ***Trustees of the Stratfield Saye Estate v. AHL Construction*** [2004] All ER (D) 77. considered.

b) Referral document submitted 8 days after notice – 1 day late - so invalid notice : Hence no jurisdiction : ***Barnes & Elliott Ltd. v. Taylor Woodrow Holdings*** [2004] BLR 111, ***Simons Construction Ltd. v. Aardvark Developments Ltd.*** [2004] BLR 117, ***Ritchie Brothers Plc v. David Phillip Commercials Ltd.*** [2005] BLR 384 considered. Ritchie extended to referral documents and applied. ***C & B Scene*** and subsequent cases not applicable to this case.

c) Contractor insolvent - so enforcement also declined. ***Bouygues, BCCI v. Prince Fahd Abdul Asis Al-Soud,*** 23rd July 1996, ***Stein v. Black*** [1996] 1 AC 243, ***Wimbledon Construction v. Vago*** [2005] BLR 374, considered.

His Honour Judge Peter Coulson QC : TCC. 3rd November 2006.

COMMENT : Note the emphasis place by His Honour Judge Peter Coulson on the importance of ensuring the referral arrives within the 7 day period. Whilst we all initially thought the period was sacrosanct, gradually a degree of latitude has slipped in with adjudicators simply starting the clock a bit later if time slipped. If Hart v Fidler is not challenged then it looks as if everyone will have to be much more careful about this in future - the likelihood is that applicants who are late will have to recommence the submission process - get the adjudicator reappointed via a second request and notice followed by the referral document. It sounds a bit messy and over technical - and perhaps not very pragmatic. The assimilation with the failure to achieve 28 days for the decision is somewhat disengenious. After all the speed element is primarily for the benefit of the claimant not the respondent. But if needs be, as they appear, it is clear what must be done not to fall foul of the rules.

Knapman R J Ltd. v Richards [2006] EWHC 2518 (TCC)

The defendants contracted with the claimant builders to build a pair of semi-detached houses. A dispute arose as to who was responsible for the supply of windows and in respect or entitlement to an extension of time. The claimant submitted the dispute to adjudication. He lost on the window claim, but prevailed in part on a claim for an extension of time. The adjudicator also found that there had been no practical completion and that there was outstanding work to be completed.

The defendant had made significant deduction (£41K). The adjudicator found that £18.2K had been incorrectly deducted and awarded this sum plus interest to the claimant. In this action the claimant sought to enforce that decision.

The respondent concluded the failed portion of the EOT claim gave rise to LADs and sought to set off LAD's against the adjudicator's decision, resulting in a negative balance due to the respondent of £3K. Initially the respondent further asserted that the claimant had unreasonably suspended the works and requested that the claimants arrange to complete the works but concluded that the claimant was not going to complete the works and terminated the contract. The court concluded that there was an ongoing dispute about other issues that might go to adjudication or litigation, but noted that it was only concerned with the adjudication enforcement application. The court noted ***Macob Civil Engineering Ltd v. Morrison Construction Ltd*** [1999] B.L.R. 93 and ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ 1358.

Enforcement of the adjudicator's decision was resisted on the grounds that by refusing to pay the £3K the claimant was cherry picking the favourable elements of the adjudication decision whilst ignoring those that were unfavourable. In essence the claimant should abide by the whole of the decision and could not be selective about the parts that it wished to enforce.

Regarding set off, the court referred to ***VHE Construction plc v RBSTB Trust Co Ltd*** [2000] B.L.R. 187; ***David McLean Housing (Contractors) Limited v Swansea Housing Association Limited*** [2002] B.L.R. 125; ***Ferson Contractors -v- Levolux AT Limited*** [2003] B.L.R. 118, ***Balfour Beatty Construction -v Serco Limited*** [2004] EWHC 3336 (TCC), ***Bovis Lend Lease v Triangle Developments*** *[2003] BLR 31 and* ***William Verry Limited v The Mayor and Burgesses of the London Borough of Camden*** [2006] EWHC 761 (TCC).

As to cherry-picking the court noted ***Shimuzu Europe Ltd. v Automajor Limited*** [2002] B.L.R. 113 and ***R Durtnell & Sons Limited v Kaduna Limited*** [2003] B.L.R. 225 but declined to conclude that by enforcing payment of the sum awarded that the court was not enforcing the other aspects of the adjudicator's decision, namely the declaration that practical completion had not been achieved. Whilst there may well be grounds to establish LADs the adjudicator had not finally determined all questions of EOTs for subsequent periods. Accordingly it was not possible to demonstrate that the LADs had been ascertained and were thus due and capable of being set off against the adjudicator's award. Thus enforcement was granted. His Honour Judge Peter Coulson. 12th October 2006

Management Solutions & Professional Consultants Ltd v Bennett (Electrical) Services Ltd [2006] EWHC 1720 (TCC)

Construction Contract : Oral variations to an otherwise written contract do not take the contract outside the scope of the HGCRA. Where a written contract replaces an oral contract, the oral contract ceases to have effect and the contract is within the scope of the HGCRA. Where two adjudication decisions have been issued one may be set off against the other during enforcement proceedings. No winner - no costs. Thornton J. TCC. 10th July 2006

Management Solutions & Professional Consultants Ltd v Bennett (Electrical) Services Ltd [2006] EWHC 1720_2 (TCC)
Costs : Challenge to costs order. Should costs be awarded on the basis of who writes the cheque pays the costs? ***Day v Day (***2006) EWCA Civ 415, ***Johnsey Estates v Secretary of State for the Environment*** [2001] EWCA Civ 535, considered. Held : Both parties wrote a cheque - that one was bigger than the other does not require the court to decide whether a "draw" is a score or no score draw. HHJ Thornton. TCC. 23rd August 2006

McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc [2006] All ER (D) 27 (Oct)
The parties to a pipeline construction contract entered into a new contract which provided for a later completion date. A dispute subsequently arose in respect of application for additional payments. There were referred to adjudication. The respondent asserted that the new contract was not a construction contract and hence HCGRA adjudication provisions did not apply. The adjudicator however considered that he had jurisdiction and found for the referring party. Following non payment the claimant brought this action for enforcement. The respondent's defence was that the new contract was not a construction contract and extinguished all prior debts.

The court disagreed. It was merely an extension / variation of the original contract and as such an impartial onlooker would have concluded at the time that the prior adjudication provisions were carried over to the new contract. Accordingly the adjudicator had jurisdiction and thus enforcement was granted. The new contract did not purport to extinguish or settle all prior claims and was not therefore a settlement agreement.

Westminster v Beckingham [2004] & ***Brown v Crosby*** [2005] considered. ***Shepherd v Mecright*** [2000] distinguished.
Mr Justice Jackson. TCC. 3rd October 2006.

Medlock Products Ltd v SCC Construction Ltd. (DR (Bristol)) District Registry (Bristol). 13 July 2006
Cross claims; Debts; Invoices; Striking out; Winding up petitions; Withholding payments. Where there was no substance in the submission that the wrong company was the subject matter of the winding-up petition, and where neither the dispute as to the petition debt nor cross-claims in relation to poor work had any genuine prospect of success, the claimant's application for either restraint of advertisement or the striking out of the winding-up petition would be refused.

SCC, a subcontractor, raised a series of invoices against the contractor, Medlock. No withholding notices had been served. These were not paid and SCC proceeded to present a petition to wind Medlock up. The sum in dispute was approximately £52k.The solicitors acting for Medlock indicated that the quantified losses of Medlock greatly outweighed those sums claimed by SCC. In other words, the debts were bone fide disputed on substantial ground or there were cross claims which Medlock had not yet been able to litigate which exceeded the amount of the petition debt. Consequently, they issued an application to restrain the advertisement of the winding up petition saying that the winding up petition was inappropriate.

The Judge noted that the contracts were written contracts within the meaning of the HGCRA because they incorporated the written terms of Medlock which are standard terms of contract. The Judge considered the possibility that the absence of a withholding notice might be a special circumstance following the leading insolvency case of ***Bayoil*** for refusing an order restraining advertisement. However he decided that he could rely on the absence of any withholding notice to support his conclusion that the cross claims were not substantial or serious claims which Medlock would have had in mind irrespective of the winding up proceedings.

The cross claims were described as being thought of as a last resort and would not have been advanced until the threat of winding up proceedings was already very much to the fore. This was therefore a situation where the main contractor was trying to take every possible point and *"throw up a lot of dust to conceal"* that he had failed to pay an agreed sum. The Judge did not think that the dispute was a genuine one on substantial grounds and the restraining application was thrown out. His Honour Judge Weeks QC. District Registry (Bristol). 13th July 2006.

Nageh v Giddings [2006] EWHC 3240 (TCC)
Application to set aside a default enforcement judgement of a default adjudication decision. Assertion that notice of adjudication and subsequent enforcement action sent to wrong address. In both situations adjudicator and solicitors sent notices to two addresses in compliance with CPR rules. Enforcement judgement upheld. ***Rhode Construction v Markhan-David*** considered. Coulson J. TCC. 8th December 2006

Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1737
Unsuccessful appeal against the decision of Jackson J refusing summary enforcement of adjudication where adjudicator had declined to consider a dispute regarding an application for an EOT which was brought on different grounds to a prior application : adjudicator erred in assuming double jeopardy. This was a distinct and separate dispute - not a replica of the first dispute. May LJ; Dyson LJ; Smith LJ. 20th December 2006

Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529
Personality : Was the State of Lithuania a party to a commercial contract and an arbitration agreement : appeal against an enforcement of award action. In the circumstances State was a party. Award enforceable.
CA before Clarke MR – Sir Anthony Scott Baker LJ Moore-Bick LJ 2006.11.13

South West Contractors Ltd v Birakos Enterprises Ltd [2006] EWHC 2794 (TCC)
The claimants entered into two contracts with the respondents viz 1) a Fee Contract for *3% of the total of all the work and the prelim content of a 65 week program of works to cover the* Claimant's profit element and 2) a Management Contract on JCT Standard Form of Domestic Sub-Contract 2002 edition terms, related to the Claimant's costs involved in managing the works.

The respondents terminated the project. The claimants submitted disputes in respect of unlawful termination to adjudication, claiming £152K + VAT for the terminated management cost contract and 3% of £4.2M less sums paid to date, in respect of the Fee Contract. The same adjudicator was appointed to both disputes. This action concerned an enforcement action in respect of the Fee Contract – the adjudicator having awarded and the respondent having failed to pay the sums of £72K and a further £21K on practical completion. The court firmly resisted assertions that there was no dispute. ***All In One Building and Refurbishments Limited and Makers UK Ltd.*** 2005 EWHC 2493 (TCC) applied.

The respondent asserted that the adjudicator had failed to address whether or not the claimant had taken sufficient steps to mitigated his losses between termination and practical completion, whereas the issue was fully aired in the Management Contract adjudication. The court rejected this assertion. The two awards were closely related and could be read together. It is clear that the mitigation issue was fully canvassed and taken into account by the adjudicator – but he had no replicated the discussion in the second decision.

It was clear from ***Carillion Construction Ltd v Devonport Royal Dockyard*** (2005) 1 BLR 324 that an award should not be minutely examined to identify minor / technical blemishes. A complaint that the adjudicator had not considered a potential set off was dismissed. There were no grounds for a set-off. Summary enforcement ordered.

His Honour Judge David Wilcox : TCC.. 7th November 2006

PRACTICE & PROCEDURE CASE CORNER

Case Commentary by
Corbett Haselgrove Spurin

Abu Dhabi Investment Co v H Clarkson & Company Ltd. [2006] EWHC 1252 (Comm)

S9 Application for stay to arbitration in the UAE. Court held that since arbitration as opposed to litigation in the UAE, of a dispute not related to the execution of a contract, is permissive, not compulsory, this amounted to an application for a stay to litigation in the UAE. Accordingly the application was refused. Mr Justice Morison. 26th May 2006

Andromeda Marine SA v OW Bunker & Trading A/S [2006] EWHC 777 (Comm)

Negative Injunction : Claimant's - third parties ship owners to a charterer's contract for bunkers from the defendant sought a declaration / injunction that no action lay against them as third parties. Main action was before the Danish Court. Held : Court had no jurisdiction. If at all, this action should be pursued before the Danish Court.

Mr Justice Morison. 11th April 2006

Compania Sud American Vapores v Hamburg [2006] EWHC 483 (Comm)

S69. Arbitrators found as a fact that loss was due to negligence in operation of the vessel : bunkers overheated, damaging cargo and hence charterer not liable under Art IV HVR. Appellants sought to establish that overheating of bunkers next to a cargo is negligence in care and handling of cargo and a breach of Art III had arisen. Court held this was a challenge to fact not law. Arbitrators had applied the correct test scrupulously. ***Gosse Millard*** [1929] applied.

Mr Justice Morison. 14th March 2006

Dadourian Group Int Inc v Simms [2006] EWCA Civ 399

Worldwide Freezing Order. CA laid down Guidelines to be known as the Dadourian Guidelines for the granting of a WWF or Worldwide Mareva Injunction. CA before Ward LJ Arden LJ Moore-Bick LJ. 11th April 2006

DWR Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd [2006] EWHC 1183 (Ch)

Under a water supply contract, rates for option to renew to be negotiated or settled by arbitration. Otherwise rates to be determined by Director General of Water. At renewal time the DGW set the new rate and DWR sought summary judgment for sums due. Public law challenge to jurisdiction of DGW upheld. This was a private law dispute, not an abuse of process to challenge jurisdiction in favour of arbitration. Mr Justice Hart. 26th May 2006

Galaxy Special Maritime Enterprise v Prima Ceylon Ltd MV "Olympic Galaxy" [2006] EWCA Civ 528

General average claim : By a letter of undertaking parties agreed to settle disputes either by arbitration or before the High Court Sri Lanka. It is clear the applicable substantive law is English Law. Parties submitted to but then abandoned an arbitration. CA held that in the circumstances there is no overriding reason for an English Court to deal with events that took place in Sri Lankan waters, particularly since the Sri Lankan court was already dealing with the matter.

CA before Mummery LJ; Buxton LJ. Longmore LJ.. 3rd May 2006

Gold Coast Ltd. v Naval Gijon SA [2006] EWHC 1044 (Comm)

Tribunal admitted an award contained an error but held that since the 21 day period under s57 had passed it was an issue for the court to deal with. Successful application under s79 to apply retrospectively for extension of time, thereby enabling the tribunal to correct the error. Mrs Justice Gloster. 15th May 2006

Gorne v Scales [2006] EWCA Civ 311

Court held that the method of valuing a directory proposed by an expert witness and adopted by the court was not a viable valuation mechanism. CA before Ward LJ; Arden LJ; Moore-Bick LJ. 29th March 2006

Halpern v Halpern [2006] EWHC 603 (Comm)

Succession dispute submitted to a Beth Din Arbitration. Parties agreed a compromise that was confirmed by the tribunal. Allegations that the compromise was procured by fraud: mistake; duress. Court ordered disclosure of documents, transcribed into English to enable a trial of the duress issue to proceed. Mr Justice Christopher Clarke. 24th March 2006

Knight v Beyond Properties Pty Ltd [2006] EWHC 1242 (Ch)

Application to court to make a capping order analogous to that under s65 Arbitration Act. Order refused – but costing judge could take issues into account if costs spiralled. Such an order might be possible in other circumstances.

Mr Justice Mann. 26th May 2006

Legal Services Commission v Aaronson [2006] EWHC 1162 (QB)

LSC applied for disclosure of all public files of Law Firm to establish sums due to the Commission. Account disputes subject to arbitration. The firm were only prepared to disclose files within the arbitral process, not outside or independent of it. The LSC wanted disclosure to enable it to negotiate a settlement. Disclosure refused. The LSC would get all it was entitled to within the arbitration. Mr Justice Jack. 24th May 2006

National Grid Gas Plc v Lafarge Aggregates Ltd [2006] EWHC 2559 (Ch)

Challenge : question of law Appeal : whether lost profit recoverable under the deed.

Mr Justice Cooke. 18th October 2006

Persimmon Homes (North West) Ltd v First Secretary of State [2006] EWHC 2643 (Admin)

Reasons : Planning application : Sufficient and adequate reasons provided for the planning decision.

Mr Justice Bean. 25th October 2006

Ravennavi Spa v New Century Shipbuilding Company Ltd [2006] EWHC 733 (Comm)

"An Entire agreement" contract which contained an arbitration clause replaced a prior agreement that contained a litigation clause. Application to serve out of jurisdiction withdrawn. Mrs Justice Gloster. 4th April 2006

Secretary of State for Transport v Pell Frischmann Consultants Ltd [2006] EWHC 2756 (TCC)

Application for disclosure against a non-party in support of litigation post arbitration. In the circumstances whilst early disclosure might be beneficial to the applicant, disclosure would be made in due course but there was no compelling reason why the applicant should benefit from early disclosure given the cost that would be involved in double disclosure.

Mr Justice Jackson. 23rd October 2006

Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242

Recorder was from the same chambers as counsel for one of the parties and had acted for related firms : CA allowed an appeal - setting aside the recorder's decision because of an appearance of bias. Also deals with appeal out of time.

CA. before Phillips LCJ, Clarke MR: Sir Anthony May LJ. 21st March 2006

Tavoulareas v Tsavliris [2006] EWHC 414 (Comm)

Question as to whether English or Greek court was seized of action, and status of the determination of the Greek Court, the CA having previously declared that the English Court had jurisdiction. Mr Justice Tomlimson. 9th March 2006

3C Waste Ltd v Mersey Waste Holdings Ltd [2006] EWHC 2598 (Comm)

Applications for declarations in respect of recovery of certain costs – in support of arbitration.

Mr Justice David Steel. 24th October 2006

Warfield Park Homes Ltd v Warfield Park Residents Association [2006] EWCA Civ 283

Court recorder fulfilled the role of arbitrator, by statute, in respect of ground rent for trailers on a caravan park. There were no guidelines, simply a requirement to determine an appropriate rate. The recorder fell to determine rent rises arising from changes to water, gas and electricity rates. The tenants challenged the rate. CA held that the court would only re-examine determination if clear evidence of injustice. Here parties had agreed a list of matters so CA accepted jurisdiction. Minor adjustments made to the determination. CA before Carnwath LJ; Gage LJ. 27th March 2006

Winterthur Swiss Insurance Co v AG (Manchester) Ltd [2006] EWHC 839 (Comm)

Here the court held that although the applicants were in possession of documents, the legal privilege in them vested in the other side who sought to introduce them as evidence. Accordingly an application of non-admissibility was denied.

Mr Justice Aikens. 12th April 2006.

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