ADR NEWS

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

EDITORIAL :

To date 2005 has been a year of changes, some of which were expected, other not, some planned and others not. We have seen the death of Pope John Paul II and the election of his successor. The United Kingdom has had a general election and whilst the government majority was reduced, the Prime Minister achieved an historic third election victory for the Labour Party. Referenda have taken place in Europe on the adoption of the European Constitution. In the UK we are approaching the time for the Lord Chief Justice, Lord Woolf to hand on the baton to his successor Lord Chief Justice Phillips. Lord Woolf's term of office has seen continued support for ADR as well as reform of the legal processes. It is to be hoped that Lord Phillip will maintain the judiciary's support for ADR.

On a topical note, there are important lesson that can be drawn from the British and Irish Lions' tour of New-Zealand for ADR practitioners. The mantra for success as an ADR practitioner is "***Preparation! Preparation! Preparation!"*** The 2005 Lions may have been the best prepared rugby team to leave these islands but the preparation was to play a game the All Blacks do not play and the Lions were left looking ill prepared and badly organised. It is a trap that is easy to fall into. The secret of good preparation is evaluation and planning. Practitioners need to assess not only their own strengths and weaknesses but also those of their opponents if they are not to be placed at a disadvantage. The message is ***Evaluate and plan thoroughly before acting.*** So doing can save tremendous embarrassment and loss of face.

A concerted effort is being made to increase the use of mediation as a means of settling disputes and to this end there will be a National Mediation Awareness Week under the auspices of Her Majesty's Courts Service (HMCS) in October, to spread the message to the unconverted, that mediation is out there and that it works!

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On a different note and of great interest to those in the dispute resolution field was and is the question of legal privilege. In the run up to the general election the difficulties associated with it became an election issue and whether the Government should have disclosed the full preliminary advice of the Attorney General over the legality of war with Iraq. Ultimately, after partial leaks to the press, the Government issued the full advice it received. This, however, did not end the arguments on the issue.

Once in the public arena, a separate issue arose as to whether or not the summary delivered to Parliament and to the Cabinet was in fact a summary or a distinct and separate document. Did the Attorney General change his mind? Further, was the decision to go to war a purely political matter or did it continue to be a legal matter? This issue clearly shows how tricky it is to differentiate between decisions of fact and decisions of law, a matter familiar to all adjudicators, arbitrators and everyone who has to make a "judicial decision". Whilst understandably the Government wished to move on from this issue, the distinction between law and fact is a live and contentious one. This question is considered below in the context of construction adjudication in the **William Verry Case**.

G.R.Thomas : Editor

ERROR OF LAW AND ADJUDICATION

Introduction

In **William Verry v NWLC Mikvah**[1] the High Court provided clarification on the HGCRA referral procedure. The court held that whilst a construction contract must establish a mechanism aimed at securing a referral within 7 days. Fulfilling that aim is not however mandatory. Thus an adjudicator can allow an extension.

On the facts of the case, the terms of reference of a dispute to an adjudicator were limited to release of retention. The adjudicator did not consider the validity of defects notified to him by the respondent. Since this went to the heart of the defence, the court advised NWLCM to commence adjudication on the defects and held that the previous retention award be stayed pending the outcome of adjudication No2. Paragraphs 40-60 of the judgment deals with matters of jurisdiction.

Exclusion of Referred Issues

NWLCM asserted that the adjudicator erred

(1) by deciding that he had not been asked to determine the existence or value of defects.
(2) by concluding that he could not reduce his prior valuation in the light of a subsequent valuation or apply an abatement.
(3) by concluding that any abatement should be made from sums becoming due after making the initial decision..
(4) by failing to follow the procedure he used in the first adjudication when he revisited a valuation contained within an even earlier adjudication when new information had come to light.

No Defects Referred to Adjudicator :

NWLCM requested that the adjudicator should value non-conforming works and submitted evidence to the effect that this amounted to £80,431.22 which NWLCM wanted deducted from the gross value of the work decided upon in the earlier adjudication. The adjudicator had declined to do so. NWLCM asserted that the issue of the existence and value of defects clearly fell within the range of issues encompassed by Verry's adjudication notice and further that the necessary details needed by the adjudicator to determine that issue were clearly referred to him by NWLCM. Accordingly the adjudicator's decision to the contrary was clearly erroneous.

The Previous Decision :

This related to a previous interim certificate. The court was now concerned with the next interim certificate, issued after practical completion. The adjudicator decided that he could not revalue the work to take account any defects or snagging items, even if these were present in the work, because he had previously determined the gross value of the work and no further work had been done since the previous decision had been issued. This was based on his understanding of the CA decision in ***Ferson v Levolux*** [2003] TCLR 5. However, unlike **Ferson**, in the instant case the prior decision had been fully complied with. It appears the adjudicator had concluded that like **Ferson**, revaluation would have resulted in displacing the statutory requirement enforcing adjudication decisions. This was clearly incorrect. Each dispute referred on subsequent valuations may well result in revaluations. The adjudicator was wrong in his legal conclusions.

Abatement :

The adjudicator's further error was in his holding that the only abatement open to NWLCM was against sums becoming due after his first decision, due again to his misunderstanding of ***Ferson.*** The principle he enunciated was wrongly applied by him since the abatement in question was being sought against the first half of retention which but for any proved value of defects, have become due in the sum of £67,055.97. He erred in not considering the claimed abatement since this would have been applied against the first half of retention as a further sum that became due after the earlier adjudication decision had been issued and paid.

Inconsistency :

The adjudicator's error in not considering afresh the value of those work items in the light of new evidence was not only an error of law but was also unfair since it constituted the opposite procedure to that he had adopted in the earlier adjudication..

Jurisdictional Error :

Were the errors of law errors made within jurisdiction or were they so fundamental that their effect was to transform the adjudicator's consideration of the referred question or dispute into a consideration and determination of a different question or dispute which left undecided the referred question?

Thornton J referred back to his decision in ***Joinery Plus v Laing*** [2003] TCLR 4 where stated that:

[1] **William Verry Ltd. v North West London Communal Mikvah** [2004] EWHC 1300

"The effect of the relevant decisions relating to errors by an adjudicator is as follows:
1. The precise question giving rise to the dispute that has been referred to the adjudicator must be identified.
2. If the adjudicator has answered that referred question, even if erroneously or in the wrong way, the resulting decision is both valid and enforceable. If, on the other hand, the adjudicator had answered the wrong question, the resulting decision is a nullity."

Thornton J noted that in this case the referred dispute was not clearly or fully identified in the adjudication notice. Verry sought to establish an "entitlement to the release and payment of the first half of retention." Whilst this involved, in reality, disputes as to the existence and valuation of defects and snagging items this would have involved opening up and revising Interim Certificate 34, in answering and deciding these disputes, the adjudicator had concluded that the gross value of the work could not be revised to take into account any defects.

Thornton J concluded that the errors of the adjudicator appeared to be ones made as part of his answering the right question wrongly rather than in answering the wrong question. These errors were crucial in that they had the effect of shutting out from consideration the crucial and core dispute. These errors were compounded by his procedural error in concluding that defects had not been referred to him. Nontehless, that error did not effect the overall result because, by his reasoning, he could not have considered them even if he had concluded that they had been referred to him.

Clearly from NWLCM's point of view all of this was highly unsatisfactory, leading them to the conclusion that the adjudicator had answered a different question to that referred to him.

The identification of jurisdictional error that has occurred when an error of law has been made during a consideration of the substance of a referred dispute is one of the most difficult tasks a court has to undertake. The identification of the threshold between reviewable and unreviewable error continues to trouble courts at all levels.

Within the confines of a two hour hearing on an application for summary enforcement the parties did not have the opportunity of going through all the relevant cases or in developing all the relevant arguments that would enable a clear cut conclusion to be drawn as to whether the errors in question were within or outside the adjudicator's jurisdiction. Thornton J's inclination was that the errors were just, but only just, ones within jurisdiction but that the exclusion of any consideration of the defects on the manifestly erroneous ground that this issue had not been referred to the adjudicator potentially vitiated the adjudicator's decision and prevented NWLCM's entitlement to a fair hearing because NWLCM's contentions on a core issue were not considered at all by the adjudicator.

Thornton J had to choose between 1) enforcing the decision, 2) giving leave to defend the application and directing a full hearing of the application or 3) dismissing the application and giving a defendant's summary judgment in favour of NWLCM.

He noted that NWLCM could start a fresh adjudication to resolve the dispute about defects, observing that if they failed to do so, that would suggest the claimed abatement has little merit. If such a course were adopted and a decision in NWLCM's favour followed, that adjudicator's decision could be set against the current decision.

He therefore concluded that the adjudicator's decision should be enforced since, on the basis of the arguments developed on the summary judgment application, the decision was both valid and enforceable. He directed that the resulting judgment not to be drawn up for six weeks from the date of handing down and gave permission to apply so that if a subsequent adjudication decision in favour of NWLCM followed or an agreement as to the defects and their value could be reached in that period, effect could be given to those developments, so that one decision could be set against the other and the balance be paid to the net winner, thereby giving effect to the overriding objective (s1 CPR 1999) to decide disputes in a way which most expeditiously, economically and fairly resolves all disputes between the parties.

IN SEARCH OF JUSTICE – PART I

Introduction. In the commercial context, both the courts and arbitral tribunals are tasked with resolving private disputes, by delivering a ruling on the respective rights and duties of the parties. The ruling will be based on the relevant legal principles that the tribunal finds apply to the disputed issue and in the light of the facts, as determined by the tribunal. The outcome will be a ruling that one party account to the other either for the consequences of the wrong as identified by the tribunal (including the costs of the process), or alternatively for the costs of the action, in the event that the tribunal finds that no wrong has taken place. In essence the tribunal determines the allocation, between the parties, of risk and responsibility for events that have resulted in loss.

In the minds of the parties they may be seeking a decision that gives them what they consider they are "***legally entitled to***", that is to say the enforcement of their respective rights or "***just deserts***". Alternatively they may assert that they are looking for "***justice to be done***" and anticipate that the outcome will be "***fair and just***".

To what extent will courts and tribunals fulfil these expectations, enforce legal entitlement and deliver justice as between the parties? Are they one and the same or are they different? If different, can both objectives be fulfilled or might they be mutually exclusive, some, if not all of the time?

The traditional justifications for resorting to private processes in preference to commercial litigation centre on potential cost savings, informality, speed, privacy, international enforceability, industry expertise and the autonomy of the parties. Much attention has been paid by commentators to the ability of negotiated ADR processes to provide "***fairer***" outcomes not based on an allocation of fault and responsibility, but rather on wider mutual interests, predicated on continuing relationships between the parties, drawing on the experience of mediators in the field of social dispute resolution.[2] The rescheduling of debts, joint ventures and new contracts that seek to redress imbalances in previous arrangements are prime examples. Such discussions often involve a re-evaluation of what amounts to justice, though the rationale for ADR may be alternatively reduced to pragmatism, without recourse to jurisprudential discourse. Be that as it may, little attention has been paid to the impact of judicial policy making on justice within the litigation process and the alternate role of the private adjudicator. Should and do judges and private adjudicators seek to achieve justice? In what ways, if at all, do the objectives of the public and private processes differ?

The facility exists for third party determination of disputes without recourse to legal rules and norms:-

a) An expert may be engaged by the parties to settle disputed facts that involve no questions of law.[3] Whilst the expert should be impartial and a decision may be impeached on the grounds of bad faith, in other respects all that is required of the expert is the delivery of an honestly held opinion.

b) The Model Law[4] and the Arbitration Act 1996[5] provide that an arbitrator may be engaged to settle a dispute without recourse to law.

The following discussion however, targets the judicial and the quasi-judicial processes, where the decision is the outcome of the application of relevant law to the facts, as established by the tribunal. Furthermore, since it is anticipated that the outcome of both judicial and arbitral processes is likely to be broadly similar in simple, straightforward cases, attention will be directed towards the so called "***Hard Cases***" which run the risk of making of "***Bad Law***" since general principle often[6] does not satisfy the needs of specific cases.

Justice – what is it? The problem with searching for justice lies in defining what amounts to justice in the first place. Unhelpfully, justice means different things to different people, and even different things to the same person depending upon the circumstances. Whilst it is common for the individual to have a sense of injustice at a particular outcome, providing a uniform account of justice that applies both to that particular situation and to all others is somewhat like the search for the end of the proverbial rainbow. Justice is personal and related to where the evaluator is standing at the time. Are there then any objective criteria at all that could form the basis of a usable test? To whom must the law be fair and just?

[2] See for example ***Getting to Yes*** : R.Fisher & W.Ury

[3] This is the traditional role of the construction contract administrator. Expert valuation is widely used to establish independent objective pricing of realty, art and antiques.

[4] Article 28(3) UNCITRAL Model Law.

[5] S46(1)(b) Arbitration Act 1996

[6] Though the overriding principles established by the CPR 1999 suggest that this should no longer be the case.

The rule of law appears at first sight to provide the answer. It states that everyone is equal under the law and that everyone is subject to the law. So far so good! Furthermore, it mandates a regular system of law, an absence of arbitrary rules, a requirement that the law be known to all, not rules made up on the hoof to deal with situations as they arise at the whim of the tribunal. But, is the law fair and just? The law is what the law is. The rule of law is tempered by concepts of due process and natural justice, which it is deemed are inherent within it and reinforced by lofty ideals in human rights conventions, but whilst these constrain the way that the authorities treat the individual, outside the realms of procedure, they provide no guide as to what is or is not fair and just in respect of the substantive law.

Whilst principles play some part in litigation, the primary aim of commercial dispute resolution is accountability - the allocation of responsibility and liability for the adverse consequences of actions. The price for being held to account frequently impacts not only on the individual but also on unsuspecting third parties, drawn from the immediate or even the wider community and can have an impact of society in general, particularly where the judgement leads to bankruptcy, destroying jobs and the prospects of those that rely upon the industry. All this ensues despite the fact that judgments often involve close calls drawn upon fine distinctions, where there is no clearly evident case of right or wrong. Millions may turn on the interpretation of a word that no-one really had in mind when first they forged their legal relationship. What then for justice, when the winner takes all? But then, winning may well protect the interests of another equally needing community.

Often there are no winners and losers in the litigation game. The personal costs of litigation, both financial and emotional, may weigh heavily on both parties. The destruction of working relationships may well carry a heavy cost for both parties. For reasons such as these the parties may chose to abandon any quest for strict or legal justice and look rather for accommodations and compromise and a way forward that both can live with.

Assuming the law is fair and just, how then does one determine the law? Whilst statute may lay down much of the law, the meaning of statutory provisions and their application is for the judiciary to determine. In common law jurisdictions the judicial law discovering role provides further scope for judicial discretion.

Justice and the Judicial Process. The power of the judge is significant in that in him resides the authority of the state. In as much as the authority of the court is used to support the arbitral process, from one perspective there is little in the practical sense to distinguish between the processes, apart from convenience.[7] The major distinction rather lies in the extent to which a judge may apply policy to the legal decision making process. In common law jurisdictions, such policy is wont to establish binding precedent, which will have an impact far beyond the instant case, be it by establishing common law rules or by attributing specific meanings to statutory provisions and turning common terminology in standard form contracts into terms of art. The latter can equally be highly persuasive in civil law jurisdictions. Statutory interpretation is vital to the effective application of statutory codes and the ongoing development of the common law enables the law to evolve to address novel situations and to adapt to changes in society. Both introduce a level of uncertainty and unpredictability into the law since it would be naïve to imagine that such determinations are made on a purely objective basis relying on the mechanical application of logic, given that law owes as much to art as to science.

Great faith is vested in the judiciary to deliver justice. They are often viewed as veritable Solomons, who can fathom questions of fact, such as who is the true mother of a child.[8] They possess great guile *(a second Daniel no less*) as exhibited by Shakespeare's Portia in the Merchant of Venice, who whilst upholding the strict legal rights of Shylock to his pound of flesh, was able to prevent "***injustice***" by limiting the creditor's rights to flesh alone, by requiring that not one drop of blood be shed.[9] The issues at stake in commercial trials may not be so dramatic and lurid or the need for justice so clearly evident, but frequently the financial lifeblood of litigants is at stake and perceptions of justice are no less relevant to the parties.

The exercise of judicial policy may be critical to the outcome of a trial. Whilst statute today constitutes the principal source of law in the UK, the common law continues to develop apace. The modern tort landscape has been shaped almost entirely by the

7 S42-45 Arbitration Act 1996
8 ***The Holy Bible***, 1 Kings verses 16-28
9 ***The Merchant of Venice***, William Shakespear, Act IV Scene 1

common law.[10] Seizure and discovery, whilst now put on a statutory basis by the Civil Procedure Rules 1998, was brought about by the judiciary.[11] Lord Denning virtually single-handedly reinvigorated the role of equity in the guise of estoppel.[12] The 1966 practice declaration by the House of Lords reinforced judicial policy making, enabling the court, in exceptional circumstances, to further overturn outdated precedent. Precedent itself has developed by analogy and by distinguishing between cases on the basis of fact. Even the adoption of an analogy and the decision to create a distinction are governed by the prevalent judicial policies of the day or at the very least those of the presiding judge.

How the courts exercise policy depends very much on the leanings of the tribunal seized with the matter. In previous times the higher courts exhibited strongly conservative tendencies.[13] Today liberal tendencies are in the ascendancy[14] both in the UK and the USA where the composition of the Supreme Court is under the microscope. The composition of the courts is a consequence of political decisions made at the time of the appointment, of individuals who frequently outlive the appointing administration. With between 2-4 appointments to the US Supreme Court pending, the current administration may influence U.S. judicial policy making for the next 20 or more years.[15] The liberal regime[16] that has reigned since the 1960's, impervious to the Nixon, Regan and Bush administrations, it would appear is about to end.

[10] eg the Law of Tort, ranging from Lord Atkin's neighbour principle enunciated in **Donoughue v Stevenson** [1932] AC 502, public policy decisions on pure economic loss – **Spartan Stee**l **v Martin** [1973] 2 QB 27 - through to the tort of nuisance – **Cambridge Water** v ECCL [1994] 2 AC 264 and allied strict liability torts – **Rylands v Fletcher** (1868) LR 3 HL 330.

[11] **Anton Pillar** Orders [1976] Ch. 55 and the **Mareva** Injunction [1975] 2 Lloyd's Rep. 509.

[12] **High Trees House** [1947] KB 130 Equitable estoppel; **Williams v Williams** [1957] 1 WLR 148 Proprietary estoppel.

[13] See e.g. Atkins, Megary & Wilberforce. Denning could perhaps be put in a class of his own, being both a visionary yet highly conservative at the same time as demonstrated by **Gouriet v Post Office** [1978] AC 435 & his vacillations over the supremacy or otherwise of European Law.

[14] Lords Scarman, Woolfe, Irvine and Faulkner to name but a few are/were clearly liberal leaning judges.

[15] There are nine justices. However Chief Justice Rehnquist is 80 and in ill health. Sandra Day O'Connor is 74. Justice John Paul Stevens, is 84. Favourites to succeed include Justices Antonin Scalia and Clarence Thomas

[16] Without the support of the Supreme Court, bussing, the key weapon in the armoury of desegregation which brought about the end of segregation in the US education system, would not have been possible.

The prevalent tendencies do not necessarily lead to certainty. There are exceptions. Currently decisions of a broadly conservative leaning High Court bench are frequently overturned on appeal, by a predominantly liberal Court of Appeal.[17]

Policy motivated decisions are frequently dressed up as measures designed to deliver justice. Yet at the same time we are given to believe that the courts are ***courts of law***, not ***courts of justice***.[18] Conservative judgments that maintain the status quo are on times delivered with expressions of regret and wistful hopes that the matter might be addressed by Parliament. The court appeals to the notion that Parliament is the sovereign law maker and that it is not the place of the courts to resort to judicial legislation. Principled rules of law and the predictability of the law should not be sacrificed for a ***wagon-load of hay***, even though misfortune may be visited upon the hapless litigant who does not deserve to be so harshly treated.[19] Thus, it is not for the courts to reshape a bad bargain. Caveat emptor applies.[20] The parties should take care when forming relationships. That events have turned sour for a party is not the business of the courts.

Yet, on the other hand, the courts have not been slow to develop rules to protect the interests of the consumer and to right perceived imbalances in power between commerce and the general public.[21] Many a ***wagon-load of hay*** has resulted in the reckless overturning of prior legal understanding or in the drawing of fine distinctions which subsequently prove difficult[22] or even impractical[23] to apply thereafter.

What then are the rules that govern the judicial decision making process? S1 Civil Procedure Rules 1999 sets out over-riding principles to guide the judiciary in respect of practice and procedure.

[17] See the spate of cases on housing and social security rights for asylum seekers, illegal entrants and the High Court to House of Lords decisions on the legality of detention at Belmarsh Prison. **A v S.S. for the Home Office** [2004] UKHL 56

[18] "*The Common Law*" Oliver Wendell Holmes

[19] Compare **British Columbia v Loach** [1916] 1 AC 719

[20] Eg **Photo-productions v** Securicor [1980] 1 All.E.R 556

[21] **Donoughue v Stevenson** [1932] AC heralded the start of judicial consumer protectionisms.

[22] **Re Polemis** [1921] All ER 40 **: The Wagonmound No1 [1961] AC 388**.

[23] **Midland Silicones v Scrutton** [1962] AC 446 : **Elder Dempster v Pattison Zarchonis** [1924] AC 522: **Pyrene v Scindia** [1954] 2 AB 402

1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

1.1(2) Dealing with a case justly includes, so far as practicable
(a) ensuring that the parties are on an equal footing
(b) saving expense
(c) dealing with the case in ways which are proportionate
(i) to the amount of money involved
(ii) to the importance of the case
(iii) to the complexities of the issues and
(iv) to the financial position of each party
(d) ensuring that it is dealt with expeditiously & fairly &
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 the court must seek to give effect to the overrriding objective when it
(a) exercises any power given to it by the Rules or
(b) interprets any rule.

These rules are about dealing with cases justly, not with just outcomes. The development of the common law is left entirely to the discretion of the judiciary. Regarding statutory interpretation, the guidelines are the contextual Literal, Golden and Mischief Rules, now supported by recent European imports, proportionality and the teleological approach. To what extent do these rules proscribe the interpretive process or alternatively afford a wide range of latitude to the judiciary in search of the intentions of Parliament?

Judicial Policy and European Law. The scope for judicial policy making has increased in recent times. The European Court of Justice at Luxembourg has, since 1964, firmly established its judicial policy making role in respect of the creation and consolidation of European Union principles under a court proclaiming a limited sovereign European Union power[24] and as harmonising interpreter of all European Union Law.[25] Rather than risk potential challenges before the ECJ the UK courts tend in their interpretations of UK statutes and rules of court, to err on the side of conformity with EU norms.[26]

The European Court of Human Rights, Strasbourg, has interpreted the text of the Convention to embrace issues that were clearly not in the minds of the founding draftsmen. Even before the Human Rights Act 1999 came into force, the U.K. courts had already started to take judgments of the ECHR into account. Since the Act came into force in 2000 they are obliged to do so. Clear language to the contrary in an Act of Parliament is needed for the U.K. court to deliver a statement of non-compatibility. Most Acts will be interpreted in conformity with the Convention, even if this requires the straining of the ordinary meaning of the text.

Whether or not the laws emanating out of Luxembourg and Strasbourg are closer to or further removed from one's concept of justice is another matter. All rights come at a price. One man's right is another's burden. There is no authoritative universal statement of rights and burdens. Local law tends to reflect local values. These can often find themselves in conflict with so called "shared" values between nations, or at least the representatives of nations.

Judicial Policy and Arbitration. The impact of judicial policy on arbitration has been considerable. Following the Arbitration Acts of 1970 and 1975 the UK courts adopted a policy of intervention in the arbitral process. By 1985,[27] the adverse effects of this intervention became apparent and London started to lose its previously unassailable hold on international arbitration. It took the passage of the Arbitration Act 1996 to reverse the trend. Today the courts deal at hands length with the arbitration process, primarily taking a supportive role where needed.[28] The new policy accords with government strategies to encourage arbitration in order to reduce court lists with consequent savings for the justice system. The courts[29] have also actively encouraged mediation ostensibly to promote a less confrontational attitude in commerce but equally with cost saving implications for the courts, encouraged and fortified by the Civil Procedure Rules 1998.[30]

Implementation of Part II of the Housing Grants Construction and Regeneration Act 1996 has relied heavily on policy developments by the courts to fill in the blanks left by this extremely succinct piece of legislation. In excess of 250 cases have refined and shaped the adjudication process. In the U.S., federal and state precedents have resulted in a continuous ebb and flow in the fortunes of arbitration and mediation, again fortified by a vast range of state and federal legislation.[31] C.H.Spurin

[24] **Costa v E.N.E.L** [1964] ECJ
[25] **Van Gend en Loos**.Case 26/22 [1963] E.C.R. 1, 13
[26] **McCarthys v Smith** : **Garland v BRB : Factortame**
[27] Times Article 1985 by Lord Mustil on the need for reform.
[28] S42-45 Arbitration Act 1996 Powers and Duties of the Court in support of arbitration.
[29] See **Cowl v Plymouth CC** [2001] EWCA 1935; **Dunnet v Railtrack** [2002] EWCA 303; **Hurst v Leeming** [2001] EWHC 1051; **Halsey Milton Keynes NHS Trust** [2004] EWCA 576.
[30] Sections 1, 28, 44 Civil Procedure Rules 1998.
[31] This article in concluded in the next edition of ADR News

LETTERS TO NADR

A number of questions have been received from students conducting empirical research on ADR. Their questions (in bold print) and NADR's answers (in blue italics) are set out below.

Sirs,

1) Do you think that evaluative mediation can cause friction between disputing parties, and therefore should be avoided during the early stages of a construction project, to avoid the risk of damaging relations?

Much here depends upon one's interpretation of the term "evaluative" mediation. The question assumes that facilitation and evaluation are mutually exclusive, whereas in reality that need not be the case. A mediator may drift backwards and forwards between approaches in response to feedback by the parties, as appropriate.

a) If by evaluative one means judgemental, providing the parties with a preferred, advised or mandated outcome as in conciliation then the parties can hardly complain if that is what they wanted and contracted for. It must be a matter of choice for them whether or not such a process would be valuable to them. On the other hand, it might be disconcerting for the parties to discover that this is what the mediator offers, without prior warning. Such mediation techniques have value in respect of social disputes and may be more useful for final account disputes than for the early stages of construction projects, since by taking the matter out of the hands of the parties, a dissatisfied party may find it difficult to subsequently maintain relationships with the other party. However, such an approach can be useful for those who sense that they are in the wrong to justify making concessions to their superiors.

b) If by evaluative one means inviting the parties to engage in a reality check, brainstorming potential liability and judicial outcomes and factoring those considerations into their negotiations there is no reason why this should risk damaging relations. The parties remain in control at all times of the terms of the settlement. However, it may equally be beneficial to explore what the perceived cause of the problem is and potential solutions. If the parties can arrive at an agreed solution and a negotiated share of costs / responsibilities there may be no need to go down the line of evaluating litigation risks.

c) Whether facilitative or evaluative mediation techniques are most appropriate depends very much on how and why the parties have arrived at mediation. In the Resolex format of on-going partnership negotiations cooperation must be the basic starting point. If relations are already strained a more robust approach may be needed.

2) Do you think that evaluative mediation has an advantage over the facilitative approach at the end of a construction project, where the resolution is usually limited to a monetary outcome?

To the extent that facilitative approaches, as propounded by Fisher et al, concentrate on wider on-going commercial interests and relationships, the validity of such an approach is dependent upon whether or not there is likely to be a future on-going relationship. This is closely linked to the concept of fairness in mediation and equality of bargaining power. The danger is that where one party needs the other but not vice-versa, the facilitative approach emphasises the need for one sided compromise. If the mediator highlights the fact that one party has the other over a barrel, this is likely to fuel antagonisms rather than calm them down. Whether the evaluative or facilitative approach is adopted, much of the skill of the mediator is in creating the correct climate for negotiation, taking the temperature out of dialogue and opening up minds to avenues of discussion that might lead to settlement.

Where neither party wants or needs an on-going relationship, personal interests will rise to the fore, leaving evaluative techniques as the primary tool available to the mediator. This is particularly so where one party is in or close to receivership or where much of the burden of settlement will be borne by a third party insurer or investor.

3) In your opinion, does the evaluative mediator need to be experienced in the area of the dispute?

The question as to whether or not a mediator needs to be an expert begs the question as to expertise in what? Firstly the mediator should be experienced and skilled at mediation. Further than that there may be expertise in the industry and or expertise in the settlement of and legal aspects of settlement in that industry. These are not one and the same. Which might be called for depends upon whether the disputed underlying issues are technical or legal/contractual or a bit of both. Often evaluative problem is reliant on the mediator having the necessary level of understanding to prompt discussion and evaluation in the first place. However, the big danger is of the so-called expert who thinks he knows the answer and is hell bent upon imposing it upon the parties and letting them know that he is the superior force in the equation.

4) If so, would a facilitative mediator, with little knowledge in the area, be less effective in resolving a construction disputes with their inherent technical issues?

The problem for a mediator who does not know much about the underlying industry and relevant legal issues is that he will be unable to direct the parties towards relevant factors they need to explore. Any efforts he makes to gaining an insight into issues will be reliant on the persuasive talents of the parties, which may not be equally effective, resulting in lopsided negotiations and will what ever else, use up valuable time that could better be used to develop a momentum towards settlement. Loss of momentum can be fatal to negotiations.

Sirs

1) I am looking at ADR and in particular, whether mediation should be made compulsory in construction disputes, using the Woolf style case management scenario introduced in civil justice cases whereby mediation is not optional and is in fact the only initial route open to both parties, thereby removing the tit for tat battles that seem to plague the Dispute Resolution cases and introducing at the early stages an independent mediator who can assess the dispute and suggest possible commercial remedies prior to the case going into the `pure` law arena.

With the exception of the London Mediation scheme there is no compulsory mediation in the UK. Even the London Scheme could be avoided by a refusing party providing reasons. In the UK the CPR cost penalty is closest we get to compulsion. Even that is a step too far for some people.

Mediation has much to commend it. There is no reason why mediation cannot assist the parties to a construction dispute to achieve a settlement. Commercial construction mediation is common in the US so theoretically it could benefit the UK industry. It should not however be thought that Mediation is provides a sure-fire panacea. Much depends upon the attitudes of the parties towards the process, potential outcomes and upon what they perceive is at stake. Third party interests can make compromise impossible.
Where mediation works it can save time, money and preserve on-going relations. Where it fails, it can result in unwanted delay and additional expense without any benefit. This may not always be the case since even a failed mediation may reduce the number of issues in dispute, lowering the cost of any subsequent trial.

The value of mediation varies with local circumstances and in particular the prevailing legal climate. Thus, apart from the question of whether or not mediation is a useful mechanism for the settlement of construction disputes, there is the separate question of whether it can make a valuable contribution in the UK, particularly because of the availability and indeed the semi-compulsion of HGCRA adjudication.

Would it be better to mediate than to adjudicate? To a great extent both are speedy and relatively inexpensive compared with litigation and mainstream arbitration. One relies on consensus and maximises party control over the settlement whereas the other provides a quick fix. Rather than mandate one over the other, perhaps it is better to allow the parties to jointly choose. At present legislation gives adjudication the edge, over-riding mediation provisions in the contract. However, party autonomy relies on joint-consent. In mediation one can take the horse to water but one cannot make it drink. In adjudication, the process can proceed even if the other party refuses to take part. From a pragmatic standpoint the UK stance at least works. It would be undesirable to have two compulsory and sequential forms of fast track settlement process, and since there is demonstrable support from a large sector of the construction community (albeit not total support) for the adjudication process, displacing adjudication with compulsory mediation is highly unlikely at the present time.

Pre-contractual agreements to mediate however are enforceable in respect of arbitration and litigation, since a stay of action may be granted pending exhaustion of the mediation process. Thus the mediation provision can be respected for non HGCRA construction contracts. Indeed, mediation is often successfully used for domestic construction disputes.

2) What percentage of construction disputes go straight to litigation and what percentage go to ADR?

The statistics on known adjudications are readily available – see http://www.adjudication.gcal.ac.uk/. Current construction litigation statistics are available from the Court Service web site. The various Mediation service providers such as CEDR and Association of Northern Mediators provide a break down of construction based mediation references. It should therefore be a straightforward task to compile a table – though the mediation element cannot be that accurate. The nature of mediation is that it is private so accurate statistics are not easy to come by. Nonetheless, for present purposes it would appear that the lion's share of construction disputes in the UK at present go to adjudication.

3) Is the take up of mediation as a dispute resolution technique as high as it could be in construction disputes and if not what is holding it back?

As outlined above, in the UK competition from adjudication has severely limited the uptake on mediation. However, given that there are major sources of dissatisfaction with adjudication, particularly for final account disputes, there is a possibility that if the industry embraces mediation, parties might chose to mediate in lieu of adjudication. But do not hold your breath. Much of the industry is highly sceptical of mediation. Similarly, DRB processes have not taken off in the UK either despite the demonstrable benefits that they offer particularly to larger projects. The inclusion of mediation provisions in the JCT suggests that mediation might be taken more seriously in future, but a similar provision in PAM, the standard form of contract in Malaysia has not seen a rush to mediation.

Sirs,

1. "*There are extreme views about the benefits of using mediation usually based on the experience parties have had of the procedure*" (Laurance Cobb, 2003). It is widely felt that the perception of mediation, more often than not, determines the take-up of mediation as a dispute resolution process. If a party agrees to mediate then they are willing to compromise but at the same time this may also be perceived as a lack of confidence in the strength of the willing party's case.

(a) How true, from your experience and knowledge, do you find this to be?

There is no reason whatsoever why a rationally thinking person involved in a dispute should think that the mere fact of entering into negotiations is a sign of weakness. If that were the case no business negotiations would ever take place.

The willingness to compromise arises out of either a pragmatic decision that there is a benefit in settling for less than a person believes they are entitled to or quite often a realisation that their demands have been pitched somewhat on the high side and may not be entirely realistic.

Participation in mediation is often the consequence of a fear of cost repercussions of failing to do so or as a method of bridge building. It does not provide any indication of willingness to settle – indeed many enter the process without any expectation of success and it is not uncommon for a party to declare after the event that they are amazed at the fact that the process in fact worked.

The principal factor in the non-take up of mediation is the incorporation of some other form of dispute resolution in the contract. In the UK adjudication is a major barrier to construction mediation. Nonetheless mediation is currently benefiting from a degree of dissatisfaction with the adjudication process.

Domestic construction disputes are frequently referred to mediation by the courts

Resolex provides an ever expanding contracted mediation service.

International construction mediation is not uncommon and mediation is frequently used in the US for construction disputes.

(b) How much of an effect does this have on the mediation process?

The main barrier to closure during mediation is a perception by one party that they have a right to something which can be satisfied by litigation and therefore there is no benefit in settling or alternatively the debtor simply wants to either buy time or wear the other party down by attrition hoping the claimant will give up and go away.

2 In his article, 'Blow your rights', Tony Bingham pointed out a common error made by many people and in particular students. He pointed towards the presumption that mediation resolves disputes and makes the comment that mediation does not 'resolve issues', it only works well at getting rid of them. This therefore suggests that in order to 'resolve' a dispute parties have to resort to formal methods of dispute resolution such as litigation and arbitration.

(a) How true do you find this to be?

Tony Bingham is absolutely correct in asserting that mediation does not produce a legal outcome that determines the parties' respective rights and liabilities. As such it is of no value to predict what should be done in similar circumstances. It does not resolve the issues – but it can and does either resolve, dissolve or settle the dispute. He is correct in asserting that it makes the dispute go away.

Care should be taken in reading too much into Tony's article – he is after all an active and successful mediator – and would readily accept that there are situations where mediation provides a very valuable mechanism for bringing about closure.

(b) And what effects, if any, can this 'getting rid' of disputes have on the future of mediation in the construction industry?

- *Where a party requires a definitive answer to an issue which is likely to recur and thus requires a definitive guide for future action mediation will not be suitable, though if adjudication or arbitration is used the guidance will only work for the immediate parties – since the processes remain private most of the time.*
- *However, many disputes are one off events where this factor is of no consequence.*
- *Few parties will seek to establish (and foot the bill for) a precedent for the benefit of the rest of the world. The impact therefore of this is likely to be minimal. I know of no-one who has resisted mediation on this basis.*

3. Mediators tend to get portrayed as 'magicians', in the construction industry. *Mediators have a unique ability to identify and explore, through the caucusing process, the settlement routes and options, which the parties may not previously have believed to exist* (Martin Roberts, 2004). Philip Naughton QC has expressed the view that this image of mediators is a myth and has gone on to say that while mediators have a role to play and have a certain influence on the process, the important factor, in determining a result, is the enthusiasm of the parties that are participating in the process

(a) How much influence does a mediator have on an outcome, in your opinion?

Whilst I am aware of mediations that have produced a settlement in spite of rather than because of the mediator, bad mediators can assist in the framing of bad settlements. Inexperienced mediators may fail to establish an environment where settlement might be brokered. An effective and experienced mediator is essential to the success of the process. It is not magic – the process opens up opportunities for the parties to realistically re-evaluate their situation and to act accordingly - it is a highly skilled job.

(b) Should mediators be regulated by professional bodies and be subjected to training standards and codes of practice? Why?

- *It is highly desirable that mediators are well trained and that they operate in a professional manner. That said, informal mediation has occurred since time immemorial and to criminalise such conduct simply because a volunteer mediator is not professionally qualified and a member of some organisation would be undesirable.*
- *Who would the professional body be? Construction only or generic to all mediation? The concept sounds good but is difficult to put into practice. There are a wide range of mediation methodologies and a vast range of trainers of different techniques. Who should be IN and who should be OUT? The EC is looking into the matter and has a directive – weak without much detail – but to go further would be to open up a can of worms. There is sufficient common law control of deceit and undue influence / duress / mistake to deal with wrong-doing and the incompetent will quickly be isolated by the industry. Parties are usually legally represented which should provide sufficient safeguard.*
- *A complaint to most mediation provider organisations (who will have their own codes of conduct) will lead to an investigation and de-listing of rogue mediators.*

4. Mediation is an alternative to formal dispute resolution methods such as litigation and arbitration, where decisions are imposed on the parties, and allows disputing parties to make their own decisions. The Civil Procedure Rules encourage the courts to promote mediation and have given the courts the powers to impose mediation onto disputing parties. Some are of the opinion that by courts imposing mediation on parties and by introducing severe penalties to those parties who refuse to mediate, the courts are infringing Article 6 of the European Convention on Human Rights – 'a party's entitlement to a fair trial' and the Human Rights Act 1998.

(a) What is your view on this?

- *The courts refer dispute to mediation where they perceive that litigation is not ideal – and where a settlement would be better for the parties.*
- *They merely delay litigation – they do not remove a party's entitlement to their day in court. Article 6 arguments are not a real runner.*
- *There is little to be lost in attempting mediation – though the process in the London Central Court is frequently too short to be successful and could thus result in an additional waste of monies.*

5. Parties are often frogmarched, by the courts, to mediation. It is believed that the outcome from a mediation process is largely dependant on the parties and hence their attitudes towards mediation. Imposing mediation on parties may result in parties going into the process half-heartedly and therefore may influence the process and its outcome negatively. Mark Roe (2002) said, "*Parties used to mediate because they thought it was a good idea. Now they are obliged to mediate, the contract or the court tell them they have to…but, forcing people to mediate*

***raises its own problems. Mediation, by its very nature is a consensual process…there is a danger in forcing people…parties may go through the motions – making the process ineffective.*"**

(a) What do you think are the implications of this on mediation?

- *If the parties have contracted for mediation they can hardly complain if asked to participate. This is consensus – and does not cease to be so simply because a party changes its mind – the same is true of arbitration – one cannot undo the initial choice.*
- *As for court recommended mediation, judges do not advise it without good reason. It is only done where the circumstances lend themselves to the process. Frogmarching is somewhat too strong. Parties who genuinely feel the process cannot succeed can opt out. An outright winning litigant is unlikely to be penalised for costs today (the savage early cost decisions have now been overruled) but where a party only makes a marginal recovery that outcome confirms that mediation would have been appropriate and compromise would have been the better part of valour.*

6. Mediation is perceived by some as a more formal method of negotiation with the help of an independent mediator who guides the parties to an outcome but the implications of the Woolf report, introduced by the Civil Procedure Rules 1999, have given mediation a new importance and as a result disputing parties are spending more and more time and money preparing for mediations. "*In many cases, the costs of this exercise can be expensive…parties insist on deploying lawyers and experts. Professional expenses of £50,000 to £100,000 per party and mediator fees of £20,000 are not uncommon*" (Robert Akenhead, 2005).

(a) In your opinion, will mediation remain the cheap and quick process with few rules, if any, that it initially was?

- *Whilst the procedural rules adopted by the parties in private dispute settlement processes may set time and cost limits, in general the parties retain autonomy over the process and by mutual consent they can expend as much time and energy as they deem fit upon the process. It is not uncommon for the costs of arbitration to spiral out of control. The same can occur in mediation. This is not to say that it is wise but it is a recognised phenomena. Common sense dictates that such behaviour is not desirable and is counter-productive. Evidence and proof are of limited value in mediation. Most parties to mediation processes would prefer to hold back evidence as and until needed at a trial. Its only purpose in mediation is to convince the other party of the strength of one's case. There is no judge to rule upon it.*
- *In my experience the longer a mediation goes on, after the main issues have been set out and considered by the parties, the harder it is to achieve a resolution. A day to a day and a half usually suffices to pave the way for a settlement, if one is to be brokered. Often an apparently failed mediation at the end of the first day, reconvenes a short time later and the parties having slept on the issue are able to settle. Slogging it out day after day is likely to be counter-productive.*
- *Note however that often mediations are really a series of mediations, each of sizeable proportions, where a day may be needed for each sub-mediation. Sometimes settlement can be achieved for a number of sub-topics leaving others for litigation at considerably reduced expense. However, there are times where the sub-mediation settlements are subject to agreement on all issues – so that one stumbles all – resulting in large costs thrown away.*
- *In a complex mega-million pound dispute it may be perfectly reasonable and even cost effective to incur professional expenses of £50,000 to £100,000 per party and mediator fees of £20,000 in order to settle a dispute. However, a mediator can by keeping the opening joint session short and to the point, minimise the need for expensive disclosures or oral presentation of expert evidence. I would advise against cross-examination of experts in joint sessions, though if both parties asked for it, their confidence in the process would be lost if a mediator refused to permit it. If only one day is scheduled for a mediation the parties are unlikely to ask for it – since a continuance would have to be scheduled some time in the future and parties will normally seek to keep within the time limits of the process and order their priorities accordingly. There is no reason why expert reports cannot be exchanged in advance as can other supporting documentation. The problem here is likely to stem from lawyers and lawyer mediators who seek to emulate the trial scene.*
- *The scope for management of the process by a skilled mediator can eliminate most of the problems highlighted by Akenhead, so escalating costs is not an inevitable development. It has not proved to be a major problem in the US, but only time will tell how mediation practice evolves in the UK.*

(b) While an increasing number of people are becoming aware of mediation, to what extent do you think the take up of mediation is influenced by such changes and why?

- *Court ordered mediation does not rely on awareness – though no solicitor should be unaware of the process given the duties imposed on the profession by the CPR to advise clients of mediation.*
- *It is obvious that knowledge of a process is a necessary part of voluntary adoption outside the court schemes. However, more important is appreciation of and perceptions of benefit. (Mediation was mentioned during my English Legal Systems course more than 20 years ago – but it was never explained). Whilst lawyers should know about mediation, there is still a very low level of knowledge and understanding of the process within commerce and industry in the UK. It is well known and used in the US, Canada and China. It is well known but little used in Malaysia.*

7. There have been many mixed reviews as to whether or not mediation as a form of ADR had fulfilled the requirements of proposals made by Lord Woolf in his 'Access to Justice' report published in 1996.

(a) Do you think mediation has been effective in fulfilling the requirements of the Civil Procedure Rules and has helped to improve the civil justice systems management of construction disputes?

- *Only 8 of the civil court centres is currently offering mediation – results are mixed – there is no uniform provision – some centres outperform others. The London Central Court statistics are not that encouraging. The South Wales Court mediation scheme is performing quite well – but is dragged down by one mediator who has had 8 appointments and failed to settle any of them. The administration of the scheme is basic but getting better. By 2006 there should be 40 centres. Once they have bedded in we will be in a better position to answer your question. It is currently too early to tell.*
- *However, I doubt that court ordered mediation will have much impact upon commercial construction disputes. Litigation and arbitration rates have been decimated by adjudication. There is little scope for mediation. Furthermore, complex construction disputes do not lend themselves to court ordered mediation. On the other hand, it is an ideal process for home-owner disputes. I have been involved in three in the last year – each of which was resolved in a timely and cost effective manner.*

(b) What do you think is the future of mediation as an ADR process in the construction industry?

- *Internationally, I believe commercial construction mediation will grow apace, but in the UK its future is limited. For me it is too early to call on the prospects of Contracted Mediation. Resolex might say otherwise.*
- *There is a growing practice of Dispute Mediation Boards in the US to complement Dispute Resolution Boards and if successful they may spread. Certainly the DRB process has been adopted by the World Bank, FIDIC and the ICC in the mutated form of Dispute Adjudication and Arbitration Boards but in the Middle East a number of Dispute Mediation Boards have already been instituted in favour of the DAB.*
- *Note that the US Dispute Resolution Board is a form of advisory mediation – in that the board makes a recommendation – which the parties can accept or reject. This is not pure facilitative mediation – but is close to the Californian style of judicial mediation. As ever with mediation, the devil lies in defining what one understands by the mediation process. It means many different things to many people.*

……

Sirs,

1. What do you understand by the term 'ethics' within construction mediation?

I am of the opinion that the ethical constraints that apply to the conduct of a mediator are in no way dictated by the subject matter or discipline concerned in a dispute. The applicable ethic will be that of the dispute resolution process at hand. As such, it is important to identify precisely what one understands by the term "mediation" since that will determine what is expected of the process and draw the parameters within which the mediator must operate.

The roles of the social and commercial mediator are quite distinct. Social mediators play a far more active role in shaping outcomes and perceptions and act far more as a role model than commercial mediators. Likewise mediation is often used to embrace conciliation, where the conciliator may formulate and recommend or even impose outcomes.

However, where the mediator acts as a facilitator, the ethical constraints will be the same whether the dispute is centred on the construction industry or any other commercial activity. To act ethically in this context is

a) to conduct oneself in an even handed manner
b) which respects the confidentiality of the process.
c) Parties enter into mediation because they are have lost the ability to canvass all the options available to them without assistance. The competence of the mediator concerns the ability to enable each of the parties to give due consideration to all relevant options and to reorder their priorities and to align them with the expectations of the other party
d) without endorsing any particular course of action or applying undue pressure or influence over the free choices of the parties.
e) It is important to separate the ethics of the mediator from the ethics of the parties. Whilst a mediator should not be complicit in the proposed wrong doing of a party, it is not for the mediator to induce a party to act in an ethical manner - so the reasons underpinning the offers of a party are not the mediator's direct concerns. Termination of the process by the mediator should be based on exhaustion of the value of the process alone.

2. The author considers the following five ethical terms are central to achieving and demonstrating an ethical and fair mediation. Please indicate alongside each of the terms what you consider to be their relative importance, 1 – 5 (1 being the most important and 5 being the least important**)**

* **Competency.** *3*
* **Impartiality / Neutrality**. *2*
* **Self Determination of the parties to settle.** *1*
* **Confidentiality**. *4*
* **Identification, by the mediator of when the process should be halted.** *5*

3. Do you consider that an ethical code of conduct should be a compulsory requisite for UK construction mediation? If not, why not?

No. It is essential that mediators are well trained and competent but thereafter the industry must trust the mediator to act in a professional manner. Since confidentiality is key to the process, the introduction of a code of conduct would be pointless without policing which could only be instituted by penetrating the veil of confidentiality. Mediators who act in an unprofessional manner will quickly be recognised by the industry and isolated. The common law rules against bias, coercion and undue influence are all that are needed without producing some arcane and complex set of rules. Most mediation service provider organisations subscribe to a basic set of rules for the process. It is possible that the European Union may produce a uniform code for the provision of mediation services, though this is likely to be a difficult task given the wide range of methodologies involved in mediation.

Sirs, in the context of the mediated settlement of construction disputes,

a) What do you understand by the term natural justice?

Natural Justice has two distinct meanings :

i) A legal concept and principles commonly known as "Due Process" comprising
  A) The right to a fair hearing – as per the Human Rights Act in the UK, etc
  B) Absence of bias (whether actual/real, perceived or imaginary). And

  In addition a third element that is particularly relevant to construction is
  C) Compliance with any lawful constraints in respect of jurisdiction established by statute, contract provisions and the terms of reference.

ii) Vague ill defined concepts about achieving a fair / just / equitable / natural outcome.

Note that concepts of natural justice are common to all dispute settlement situations irrespective of subject matter and hence should have no special connotation in respect of construction disputes.

b) How do you see natural justice fitting into the process of mediation?

Regarding i), since the mediator (as opposed to the binding conciliator) does not have any jurisdiction in the first place C) does not apply beyond the limitation of what disputes the parties have contractually agreed to refer to mediation and those that are consequently free to go to litigation.

In mediation A and B tend to merge. A mediation session is not a hearing, it is a third party facilitated negotiation. The mediator should deal in an even handed manner with both parties – affording them adequate (though not necessarily equal in terms of time) opportunities to air their views on difference and relevant aspects of the dispute and avenues of settlements. The mediator should not favour one party over another or put undue pressure or exercise undue influence or duress on either party to settle by abusing his position of authority and respect.

Regarding ii) mediation is often viewed as a mechanism to achieve fair, more just, equitable and or natural outcomes. The problem is defining these in any meaningful manner.

The key to mediation is that no settlement is likely to occur unless it is acceptable to both parties, though the motives for settlement of the parties can be many and varies and are not likely to coincide.
A party that accepts the terms is likely to feel that the outcome is fair, or as fair as can be achieved in the circumstances.

Whenever compromise occurs a party gives way on initial aspirations or expectations. If the party clings to a perception that they represented achieving their just deserts then "legal justice" may not to their mind be achieved, but the bargain may nonetheless appear justified for other reasons – or represent a degree of pragmatism.

Equitable solutions are closely linked to notions of fair outcomes and should not be confused with the equitable principles developed by English Law. However, it is not the job of the mediator to correct any imbalances of power between the parties, since that in itself amounts to a failure to act in an even handed manner.

To strive as a mediator to achieve a natural outcome would first require the mediator to form a view as to what amounts to the natural or normal solution that would arise between ordinary or reasonable persons. No such thing probably exists in most situations, since different people will view a situation from different perspectives. Since Mother Nature is ex-directory it is impossible to procure an answer.

There are difficult questions that can arise during mediations, regarding conflicts of interest, problematic disclosures of bad character, bad intentions perhaps including admissions of criminality or criminal intent, absence of frankness, openness and honesty, There are an abundance of codes of ethical practice that can provide some guidance to mediators. In addition the law sets out rules on privilege, confidence and disclosure which need to be adhered to by mediators.

…….

Sirs, I would appreciate your views firstly on what amounts to expert determination and secondly as to the challenge-ability of such a determination.

Definition of Expert Determination

- *Expert Determination is a process for settling disputes about facts (value of works done - satisfactory works and issue of certificates - including extensions of time - variations etc)*
- *Expert Determination may be contracted into before the event by the parties as a contractual mechanism for settling disputes about facts between the parties to a contract. Alternatively, the parties to a dispute about facts may refer that dispute to an expert for determination.*
- *The crucial distinction between expert and judicial / quasi-judicial determination lies in the fact that the scope of the dispute is limited to questions of fact and does not extend to questions of law or involve mixed questions of law and fact.*

  Thus once the question of fact is determined the expert determinator becomes functus officio - his role ends immediately: whereas the judicial / quasi-judicial decision maker goes on first to determine questions of law - applies the determined facts to the determined law and reaches a further decision or award.
- *What happens after an expert has made a determination depends upon the procedure set out in the contract.*
- *Thus a construction contract may specify that the figure determined by the contract administrator become due etc.*

Challenging the determination of an expert.

There are two potential ways of challenging the determination of an expert

a) *By following the mechanism (if any) provided in the contract - this may specifically provide for an appeal process to court or adjudication or some other higher decision maker etc - and in particular it is made clear that the construction adjudicator under the HGCRA Process may open up any certificate or other determination of a construction administrator [Clause 20(a)] unless the contract otherwise requires. By contrast, FIDIC specifically states that the adjudicator / DAB may open up any determination of the contract administrator. Such opening up can go to the merits of the determination - or to the figures - values determined by the expert.*
b) *By way of judicial review - this is merely a challenge on the grounds of due process for bias or a failure to exercise discretion or take into account relevant factors - this is expressly not a challenge to the merits.*

Under UK Law and the HGCRA Construction Scheme, the determination of the expert will only be absolute, final and conclusive if the underlying contract says so, but this cannot preclude judicial review. Similarly, it is possible to make a decision final and binding at the international level - but similarly this cannot preclude judicial review.

Challenging the determination of an expert may be difficult if the power to determine is expressed to be entirely arbitrary - based on the whim or absolute discretion of the expert - particularly if the determination is not accompanied by any explanation. Some contracts requires reasoning - others do not. It is safer to require views to reserve the scope for a challenge - but where the parties want a quick and final decision, free from outside prying eyes then a requirement not to deliver reasons may be adopted.

However, at all times, where the determination requires the expert to formulate an opinion - it is essential that the

expert forms a view and does not merely adopt the view of another without canvassing all other views first. Where the expert does not have to consult it is important to ensure that he is not approached by one party - but not the other so that the only way that he can form a view is by doing so himself.

……

Sirs, what do you understand by the term partnering within the ADR process.

ADR is a range of processes, not a single process, each of which provides a mechanism to assist in the resolution of a dispute (mediation) or the determination of a dispute (adjudication and arbitration).

Partnering is a collaborative management process engaged in by the contracting parties or partners to a project. One of the objectives of partnering is to anticipate problems, devise strategies to identify problems in advance and then devise solutions. If a problem surfaces, partnering will seek to minimise its impact by producing rapid responses that prevent escalation and rising adverse consequences. Under the partnering ethos the partners share ownership of the project and to a certain extent share the risk and problems, so that theoretically the costs of solving problems may be shared between the parties.

The partnering management structure is usually layered into a hierarchy of decision makers. If an issue proves too big or contentious for the daily management team, it can be levered up by steps to higher management. The same stepped process applies equally to the early stages of the life cycle of a dispute which will be referred upwards to the appropriate level of financial authority, decision making and bargaining power, so that settlement of even major disputes is more likely than it would be in a situation where the erstwhile negotiator's loyalty is divided between his employer's interest (and his career prospects) and the project as a whole.

If a dispute arises under the partnering projects which cannot be resolved by the whole gamut of stepped negotiation then the partnering process proper may be deemed to have failed.

It is questionable whether further negotiations, albeit in the form of third party facilitated negotiation (mediation), will add any more to an already sophisticated negotiation mechanism.

The underlying concepts of partnering negotiation and mediated negotiation are not the same.

- Partnering is underpinned by joint ownership of the project and actions are taken in the best interests of driving the project forward on the assumption that the reward for both parties lies in the successful delivery of the project, on time and within budget. Hence, the focus of negotiations is cooperation in the best interests of the project.
- Mediation is underpinned by cooperation in the process, the assumption being that barriers to settlement can be broken down enabling the parties to achieve a compromise between the competing expectations of the parties that both parties can live with. Hence, the focus of negotiations is cooperation in the process in the best interests of the individual. The assumption is that the cost of failure to settle is that a party risks even worse consequences. Settlement is achieved where both parties deem that risk is unacceptable.

Once a dispute progresses to adjudication or arbitration the most partnering can do is, as with any other contract, to mandate the appointment and referral mechanisms and ancillary rules. The outcome is outside the control of either party. Their sole role is as advocates of their cause.

Lathom recommended both partnering and adjudication. He sought first to prevent disputes in the industry and secondly to promote the rapid resolution of disputes, in the event that a dispute should arise. The problem lies in the inter-relationship between the two distinct and separate processes. At what stage could and should problem management end and dispute resolution begin? Clearly once a stalemate has been reached, the sooner the dispute is referred onwards to a fast track adjudicatory process the better. On a case by case basis, it is not always easy to recognise when a point has been reached where management can no longer provide a solution. Even more so, it is difficult to devise a scheme which will automatically refer a dispute onwards to adjudication at the appropriate stage.

The stepped negotiation process has values but the draw back is that where it ultimately fails the solution will have been delayed. In the US disillusionment with the partnering process is growing. There is a

perception that the stepped negotiation process prevents other resolution processes such as DRB's from working effectively. The benefits of the DRB arise out of early problem identification, informed inter-party discussion / negotiation and board determination. A partial solution has been to allow the DRB to observe monthly partnering meetings and to immediately take over any potential dispute at the end of the meeting. Some employers have dropped the partnering process altogether and rely exclusively on the DRB.

The Resolex approach to partnering is to provide an independent mediator at the coal-face – to assist negotiations at partnering meetings. Thus the partnering and ADR processes are merged together in an apparently effective manner.

The measure of whether or not the partnering negotiation mechanisms mesh in well with ADR provisions therefore turns on the contractual demarcation between the two processes. Stepped negotiations need to be conducted and brought to an end as quickly as possible to enable adjudication to do its work. The longer and more protracted the stepped process the worse the relationship.

1. Do the ADR clauses contained within the 3 partnering contracts perform effectively?

a.	**PPC 2000**	**Yes/No**	**YES**
b.	**BE Collaborative**	**Yes/No**	**YES**
c.	**NEC 1991**	**Yes/No**	**NOT IN THE UK**
d.	**NEC /ECC**	**Yes/No**	**YES**

2. Please briefly explain why you have answered Yes or No to the above

Yes, on the basis that there is a hand over which does not then prevent the ADR mechanism working. So-so on the basis that stepped negotiations delay/detract from their fast track value.

The 1991 NEC, whilst it continues to be used outside the UK, had to be revised to comply with the HCGRA which requires that the parties can refer a dispute to adjudication at any time. Neither artificial barriers to defining a dispute or delaying negotiation/mediation previsions are permitted by the HGCRA. The new NEC . ECC contract is now HGCRA compatible.

3. Do the clauses relating to ADR in the contracts listed enhance collaboration which partnering demands?

a.	**PPC 2000**	**Yes/No**	**NEITHER**
b.	**BE Collaborative**	**Yes/No**	**NEITHER**
c.	**NEC**	**Yes/No**	**NEITHER**
d.	**NEC /ECC**	**Yes/No**	**NEITHER**

4. If possible please briefly explain why you have answered Yes or No to the above.

ADR provisions neither enhance nor diminish the partnering ethos and collaborative working. It is a fall back provision that comes into play in the event that collaboration has failed to produce the desired results. Whilst the existence of a fall back provides the partners with an alternative to cooperation, that does not mean that it encourages non-cooperation. If there were no fall back ADR provision the dispute would go to litigation instead.

Conclusions

Does partnering effectively manage problems and prevent disputes arising? Yes, if the parties adopt a positive attitude towards partnering and absorb and implement the ethos. No, if they do not.

Does partnering resolve disputes effectively? Not usually. With the exception of the Resolex process, dispute resolution is a separate follow on process that takes over in the event that partnering management has failed to prevent a dispute arising. The crucial factor is whether or not a specific partnering agreement clearly distinguished between problem management and dispute resolution and hands over responsibility for resolution a problem once it transforms into a dispute to an effective fast track process.

It is inevitable that intractable problems may arise from time to time. These may well be the consequence of circumstance which the team are unable to control. Thus, the fact that a dispute does arise is not necessarily and indictment on the ability and commitment of the team.

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The Role of the TCC in Construction Cases.

The Honourable Mr Justice Jackson, in **Machenair Ltd v Gill & Wilkinson Ltd** [2005] EWHC 445 made the following observations about the conduct of litigation in the Technology and Construction Court.

56. *"The case which I am currently dealing with is typical of many which come before the Technology and Construction Court ("the TCC"). Two perfectly reputable companies have been unable to reach agreement on the final account between them and on certain contra charges at the end of a construction project. There are of course many forms of dispute resolution available to contractors and sub-contractors in that situation. The options include mediation, arbitration, adjudication and litigation. Each of these procedures has its place, and each has its own particular advantages. In the case of litigation the advantages are that the decision is binding rather than persuasive, and the avenues of appeal are limited. In short, litigation has the advantage of finality. A further advantage of litigation is that there is a specialist court, namely the TCC, which is available to manage and try all actions concerning the construction industry. The chief disadvantage of litigation is the level of costs which will be run up if the parties and their lawyers do not exercise the utmost vigilance.*

57. *With this in mind I wish to make three observations arising from the present case:*
    - *(1) Costs would have been reduced if at an early stage the device of a Scott Schedule had been used to set out the parties' contentions in respect of variations. This should either have been proposed by the parties or, alternatively, ordered by the court as a matter of case management. Furthermore, the existence of a Scott Schedule would have made my task easier at trial.*
    - *(2) Much relevant evidence was omitted from the witness statements - in particular, that of Mr. Friend. The consequence was prolonged oral examination-in-chief. If I had not imposed a guillotine on the length of evidence-in-chief, this trial would have overrun its estimate, thus generating substantial further costs.*
    - *(3) The purpose of cross-examining witnesses is not to elicit their opinions about points of law or about the nature of the legal obligations imposed on the parties, nor is it the purpose of cross-examination to obtain a witness's general comments on the merits of the case. The purpose of cross-examination is to elicit factual or expert evidence which is within the witness's personal knowledge or expertise, and which is relevant to the issues before the court. In a case like the present, where the volume of fact is almost infinite, both restraint by counsel and occasional intervention by the court are necessary in order to confine the trial to its proper length.*

58. *I hope that none of my observations in this case are taken as personal criticism. They are certainly not intended as such. Both counsel responded constructively and with good humour to my efforts to confine this trial to its proper length. What I say in this part of the judgment is intended to give guidance for future cases.*

59. *There is one other point which I should make about cases like this. Once the trial starts, the parties have already incurred substantial costs. It is to be presumed that sensible attempts to settle have been made and have failed. What the parties want at this stage, and what the parties are entitled to, is the decision of the court. It is not generally a wise use of time or resources during the trial to send the parties out into the corridor to negotiate on the basis of some judicial indication of view.*

60. *Next may I say something about the TCC in Leeds. The Court Centre in Leeds designates three fortnights in the year for shorter TCC cases. During these fortnights TCC cases are listed back to back. Indeed, I shall be starting the next TCC trial later this morning. It not only saves costs, but also assists other litigants, if TCC trials can be confined to their estimated lengths. Furthermore, both the parties, the witnesses and counsel plan their diaries on the basis of the trial dates and estimates of length which have been given. The longer TCC cases in Leeds may be heard at other times of the year. These cases are assigned special fixtures.*

61. *The construction sector is a major contributor to this country's economy. It produces about 10 per cent of the gross domestic product. The TCC is the specialist court of the construction industry. The TCC provides an essential service to the industry in resolving its disputes. Very many of those disputes are like the present case. The sums in issue are modest in comparison with the potential costs. Both the court and the profession must be constantly examining the procedures which we use, in order to achieve justice in construction litigation at a proportionate cost. This is in accordance with the overriding objective contained in Part 1 of the Civil Procedure Rules. These observations are just as true in Leeds as they are in London. Leeds is a major financial and commercial centre, with a flourishing construction industry."*

The underlying factors in both this case and **Burchell v Bullard**, discussed below, concern the disproportionate costs involved in dispute resolution and the attitude of the parties. However, the approach of Mr Justice Jackson could not be more different from that of Ward LJ and Rix LJ.

The dispute concerned a mainly labour only sub-sub-contract with a small portion of supply and fix at the Macaulay Hall refit for Leeds Metropolitan University. In dispute were whose terms applied, whether an extension of time was due or alternatively there was late completions, the valuation of variations and items of counterclaim for alleged defects/damage. The claimant substantially prevailed in his claims and one of four heads of counterclaim was granted. There is nothing remarkable in all of that.

The significance of the case thus lies in the comments of the judge on the conduct of the litigation by the parties. He observed at the outset that the parties had attempted but failed to negotiate a compromise. The court assumes that all reasonable steps were taken, yet whilst mentioning the existence of mediation, there is little reflection on the fact that the defendant was really pushing out the boat on the bulk of the counterclaims, which failed on the basis of absence of causation yet absorbed most of the trial time. The nub of the main issue lay in whether or not A or B's terms applied, a short sharp issue to determine.

Rather the judge concentrated on the absence of a Scott Schedule, missing evidence and experts straying into the territory of legal opinion – typical trial problems as his central remit whilst commending the court as the most appropriate forum for the determination of construction disputes. It is not clear why this is preferable to ADR or indeed to adjudication or arbitration, unless one accepts that judges are of a higher calibre than adjudicators and arbitrators.

Whilst there is some level of dissatisfaction with the quality of adjudicators, it would be wrong to assume that judges are always superior. Most adjudication enforcement actions successfully survive resistance on the grounds of judicial review and breach of due process. A number of first instance judgements have been recently overturned by the Court of Appeal. Clearly, it is desirable that everything possible is done to ensure the highest standards amongst arbitrators and adjudicators, particularly to avoid judicial criticism However, the suggestion that they do not have a valuable contribution to make to the settlement of construction disputes is one that should be stoutly resisted.

MEDIATION CASE CORNER

C.H.Spurin

Burchell v Bullard [2005] EWCA Civ 358

The claimant contracted to build an extension to the defendant's home. The homeowner defaulted on the third stage payment alleging defects to the roof. The claimant asserted roof defects were the responsibility of a sub-contractor. After reaching a stalemate the claimant left the site either in breach of contract or due to dismissal. Mediation having been rejected by the householder, the claimant sued to recover the stage payment and lost profit for the outstanding works. The defendant was forced to bring the roofer in as a part 3 defendant. The claimant succeeded in the claim subject to a discount for defective roof works. A minor award was made against the roofer, since the main defects were the claimant's responsibility and formed part of the counterclaim award. The court of first instance found on costs for the claimant, despite the fact that a portion of the counterclaim was successful. The homeowner appealed the award of costs.

The Court of Appeal (Ward LJ & Rix LJ) held that because the first instance case pre-dated Halsey, the homeowner would not be penalised for not going to mediation, but stated that Halsey would apply in future. The appeal was partially successful in that the court reduced the defendant's liability of costs to 60% to take account of the part success of the counterclaim and because that had formed a significant part of argumentation and was resisted by the claimant. The court made it clear that under the CPR cost rules, any party that inflates their demands unrealistically will suffer cost penalties where costs are percentaged out by reference to the extent that their demands have been met by the action. This applies both to claims and to counterclaims. The joint legal costs exceeded £185K where the amount recovered by the claimant was a mere £5K and were hence grossly disproportionate.

Cable & Wireless v CR Valentine [2005] EWHC 409 - LAWTEL

An employee of the respondents had been involved in a complicated breach of trust. The respondents agreed both in writing and by email and telephone that they would accept a fair and reasonable degree of responsibility for the losses of C&W that flowed from their employee's actions. The limitation to fair and reasonable was expressed by email and by phone but was not clear on the face of the signed document. The parties had previously canvassed using mediation or arbitration to determine what would amount to fair and reasonable. Based on this agreement C&W did not seek a joinder against the respondents.

The respondents sought to establish that there had been no agreement because what amounted to fair and reasonable had not been established, asserting that the agreement was subject to a condition precedent that that be established.

The claimants sought to establish that the signed letter and the email together amounted to a contract – namely and agreement to pay a fair and reasonable share, even though there was no agreed mechanism for doing so. Mr Justice Cooke agreed. The respondent's had accepted legal liability for a share which stood to be quantified. That could be determined with agreement by the parties by mediation or arbitration, or failing that by the court by application of the Civil Liability Contribution Act 1978. **Didymi** [1988] 2 Lloyd's Rep 108; **Mamidoil v Okta** [2001] 2 Lloyd's Rep 76 applied.

Chaudry v Yap (2004) LAWTEL

Leslie Kosmin QC considered an application for costs under CPR 36. The petitioner had accepted an increased payment in offer made 28 days before the trial date October 2004, 7 days after it was made. The petitioner had rejected initial offers in 2002 and invitations to mediate. The court stated that its task was to reach a determination which was fair and just in all the circumstances of the case. The petitioner has clearly prevailed. The party proposing mediation's attitude to mediation was inconsistent. There had been no serious engagement in mediation. Thus, there was no basis upon which to deprive the petitioner of costs.

R (A&B – X&Y) v East Sussex County Council [2005] EWHC 585 (Admin)

This concerned a paper only challenge before Mr Justice Munby (QBD Admin Div) to a prior ruling on costs in respect of judicial review hearing of care orders made by ESCC. These hearing related to "user independent trust issues", "manual handling" and "best interest proceedings." Following negotiations and mediation the best interest proceedings were vacated and dealt with by consent orders, leaving only the question of costs to be determined by the court.

The claimants' costs exceeded £750,000 and combined with the respondent's costs, the final bill exceeded £1M. The claimants were successful in respect of legal aspects of the trust and manual handling claims but vast sums were spent on aspects of handling that were never adjudicated. Both parties produced large quantities or argumentation, evidence and expert reports on matters which could not and should not have been dealt with by the court. All of this occurred despite the fact that the parties had been requested to limit submissions to matters over which the court had jurisdiction. The court refused to adjudicate on the public law exercise of discretion placed by statute upon the County Council, though it should be noted that because of the litigation the council substantially revised its manual handling policy, something that but for the litigation might not have occurred.

The respondents asserted that the claimants should be denied costs because of a refusal to mediate. The court disagreed because it was not unreasonable in the circumstances for the applicants to take the view that the terms of reference proposed by the local authority were inappropriate and to conclude that mediation was likely to be futile. The court noted that aspects of the case were stoutly litigated with enthusiasm by both parties, further indicating that mediation could not have succeeded. **Cowl v Plymouth County Council** distinguished on the facts. Munby J however speculated that perhaps he should have taken a more robust attitude towards mediation at an earlier stage and by applying Cowl, have mandated mediation.

The court also rejected attempts to apply the rules on costs adopted by the Family Court to public law care order cases.The court ultimately took a broad brush stroke to costs, rather than dealing with them on an issue by issue and success basis – since neither party prevailed on many aspects of the litigation. A fair outcome was that ESCC were ordered to pay 50% of the claimant's costs.

CONSTRUCTION CASE CORNER

C.H.Spurin

A&S Enterprises v Kema [2004] QBD HT 04 199

This concerned an action for the enforcement of an adjudicator's decision ordering payment of the 6th interim certificate which would have taken payments above the initial contract price. The nub of the case turned on whether under a JCT contract payments became due on certification by the architect (there was an underlying assertion that the architect was serving the contractor's rather than the developer's interests) or whether payment depended upon applications to the developer. The adjudicator decided that the latter both applied and took place, rendering payment due.

Payment was resisted on the basis that the adjudicator demonstrated bias. The adjudicator set up a hearing between the parties. The defendant's requested a change of date because of problems attending on the selected dates. Ultimately the meeting went ahead, with arrangements being made for some of the defendant's team to engage via tele-conference facilities, but one of the team failed to take part. The adjudicator made it clear in his judgement that he drew an adverse inference from this failure to participate particularly because he deemed that this person's participate was key to the proceedings. The defendants claimed that it had not been made clear that that individual's non-participation would play a critical part in the outcome.

His Honour Judge Seymour concluded that the adjudicator took a dim view the defendant's submissions because of the non-attendance of someone whom it was not initially made clear was crucial to the meeting which was to explore the submissions of the architect. Accordingly the decision was not enforceable.

COMMENT : If the adjudicator had simply recorded that he had not heard any evidence from that individual and had gone on to reach his decision without reference to that non-attendance no doubt the decision would have been enforceable. A degree of unnecessary verbosity disclosed a bias which might not otherwise have been apparent. Whilst it is trite law that justice must be seen to be done, whether or not justice is actually done may be less easy to discern. In the circumstances Seymour J was able to do just that, though of course, not being a decision on the merits, it remains open for a subsequent adjudicator to reach the same decision again, which in the absence of breach of due process, would then be enforceable.

Amec v Secretary of State for Transport [2005] EWCA 291 CA

Lord Justices May and Rix dismissed an appeal from the decision of Mr Justice Jackson, providing a clear account of the role of the certifier under Clause 66 of the ICE contract. Rix LJ considers that even if an engineer's decision is flawed (in this case potentially because the defendant may have been denied an opportunity to express views about responsibility for the defects), since the decision is subsequently opened up and re-examined in adjudication, such flaws have no impact upon the outcome of the dispute. In such circumstances it is a valid decision for the purposes of referring the dispute onwards to adjudication.

BAL (1996) Ltd. v Taylor Woodrow Construction Ltd [2004] 1 BLISS 7

This concerned a dispute as to how much was due for sub-contract glazing works. The sub-contractor billed for sums in excess of an asserted contract capping provision. The adjudicator, in compliance with the adjudication terms requested and received the consent of the parties to seek legal advice on whether or not the cap was enforceable. The parties neither asked nor received any information on the advice provided to the adjudicator. The adjudicator found that the cap did not apply and made a decision in the sub-contractor's favour. TWC resisted enforcement on the grounds of breach of natural justice, in that they had not been afforded an opportunity to address the legal advice.

His Honour Judge Wilcox refused enforcement, applying **RSL v Stansell**, **Costain v Strathclyde** and **Try v Eaton**. There could not be an implied waiver of the duty to provide the information, though the parties could have expressly waived the need for disclosure and the opportunity to address the legal advice. The court also rejected an application to enforce part of the award, distinguishing **Glencot v Barrat** on the facts. The whole decision either stood or fell. In the circumstances everything was tainted by the breach of due process.

Carillion Construction Ltd v Devonport Royal Dockyard Ltd. [2005] EWHC 778

An application for enforcement of an adjudicator's decision was considered by Mr Justice Jackson. Enforcement was resisted on the grounds of no-jurisdiction in respect of target costs and interest and breach of the rules of natural justice. The court held that whilst not a central issue, it was necessary to determine the target cost (albeit that that determination might be rough and ready and might alter in the event of subsequent arbitration or litigation) before the central task could be performed and thus that decision was within jurisdiction.

Jackson J held following **Macob** and **Bouyges** that : An adjudicator has the right to decide whether or not evidence is relevant (he is allowed to get that decision wrong without impugning the enforceability of his decision) and therefore whether or not to expend further time and energy on that evidence. The adjudicator should following **Discain** demonstrate, by reference, that all evidence has been noted and brief reasons provided, but given the large amounts of information (26 arch lever files in the instant case) that an adjudicator often has to deal with. The reasons should be intelligible. Inadequate reasons are not grounds to refuse enforcement, unless it can be demonstrated that a party would suffer substantial prejudice.

A challenge to an award on defects based on ***Wednesbury Unreasonableness*** and a failure to consider the evidence was rejected on the facts. The value of retaining an ***expert civil-engineer*** as adjudicator was noted.

Subject to any express terms in the contract relating to interest, Clause 20(c) of the Scheme empowers an adjudicator to "decide the circumstances in which, and the rates at which, and the periods for which simple or compounds rates of interest shall be paid."

IDE v R.J.Carter [2004] HT 03 454

His Honour Havery J considered an application for enforcement of an adjudication decision. Wishing to submit a dispute to adjudication, a party approached the named adjudicator in the contract, only to find that he was not available and promptly approached an ANB for a nomination. The nominated adjudicator went ahead and delivered a decision in due course. The other party sought, successfully to resist enforcement on the basis of no jurisdiction. The court held that where the contract names an adjudicator, all parties must be informed of his unavailability before an ANB can be approached to make a nomination.

Melville Dundas v Wimpey [2004] Outer Court of Session 22nd October

The claimants contracted under the Scottish Building Contractor's Contract with Design 2000 to build a housing development. Whilst by virtue of Clause 30 an interim payment would in the ordinary course of things have become due in the absence of the issue of a valid withholding notice, payment was resisted because clause 27(5) stated that *"from the date ….. when the employer gives notice to determine [*on grounds of liquidation etc clause 27(1)-(4)] *… the employer shall not be bound by any provisions of this contract to make any further payment …."*

Since the clause 27(5) notice cancelled out all sums due under the contract, the interim payment application became unenforceable. The claimants argued that there was no withholding notice and the contract did not comply with s109/110 HGCRA and ensure a mechanism that guaranteed stage payments. Lord Clark disagreed. Whilst the HGCRA deals with ongoing interim payments, it was not intended to interfere with liquidation provisions. The operation of clause 27(5) of the contract lawfully stopped the sum from becoming due. There was thus no due payment that fell to be enforced through the HGCRA mechanism.

Palmac Contracting Ltd. v Park Lane Estates Ltd. [2005] 1 Bliss 15

An initial appointment of an adjudicator was frustrated when the adjudicator resigned upon learning that no notice of intention had been received by the defendant (even though the claimant asserted that a notice had been sent in advance to the defendant). A second appointment then took place. The defendant resisted payment of the sum due under the decision on the grounds that whilst the request for and appointment of the mediator took place the same day that a notice of intention was allegedly delivered to their property the defendant had not read the notice of intention until the following day. The defendant contested jurisdiction from the outset but the adjudicator decided to go ahead notwithstanding that objection.

Ground 1 : The defendant asserted that email applications for payment did not comply with the contract requirement of fax or letter. The adjudicator held that the email application was valid. Her Honour Judge Frances Kirham held that the court could not and would not disturb that finding, since it was in the adjudicator's jurisdiction to so decide. However, whilst the contract permitted "any effective means of communication" for applications the parties had discussed and anticipated email communications, but the defendants had raised concerns about using email, so in the absence of a decision by the adjudicator it may have been arguable that there was no valid notice. (***It should not therefore be assumed that it will always be alright to email applications for payment)***.

Ground 2 : Notice of intention contrary to Clause 39 was communicated after the application for appointment, not before and thus was invalid. Kirkham J was unable to establish one way or the other whether the notice of intention was delivered before or after the application but nonetheless held that neither s108 nor clause 39 prescribed a sequence of events. The main aim was to adopt a procedure that aimed to ensure appointment within 7 days. That had been achieved. Besides which, because of the prior attempt at instigating an appointment, there was no case to argue that an ambush had occurred.

Ground 3 : The adjudicator ignored the parties' agreed position that all communication be actually communicated. The court agreed with the adjudicator that this only referred to communication of notice of appointment of adjudicator. Accordingly the application for payment was validly issued by email.

Ritchie Brothers Ltd v. David Philp Ltd [2005] ScotCS CSIH_32

The first issue related to when time started to count for the purpose of the 28 day rule under the HGCRA. By a majority the court went for the earlier of the two dates, namely when the referral was issued, rather than the date when it was received by the adjudicator. Consequently, his decision was delivered late if time started to run from the day the Post Office first attempted to deliver the documents. Reversing the court at first instance, the majority held on appeal that, in the absence of an extension of time, the adjudicator's jurisdiction expired after 28 days. The court (Clerk LJ, Lord Abernethy & Lord Nimmo Smith) noted that the problem was avoidable since the adjudicator could and should have requested an extension before time ran out. Once the period expired it was too late to seek an extension. The decision was not therefore enforceable.

Roscco Civil Engineering Ltd v Dwr Cymru Cyfyngedic (Welsh Water Ltd) [2004] TCC HT-03-190

This concerned an application for enforcement of an adjudicator's decision, before Recorder Dermod O'Brien. During the course of a construction contract the contractors went from a partnership to an incorporated company and from then on added Ltd to their letterhead. A dispute arose as to the value of materials used which was referred to adjudication by WW against the Ltd Company. The adjudicator queried the discrepancy between the initial and subsequent identify of the contractor but received no reply. WW lost and resisted enforcement on the grounds that the contracting party was the partnership and hence, since the Company was not a party to the contract the adjudicator lacked jurisdiction. WW asserted that the Company was liable to carry out all works submitted to it but that WW owed no responsibilities to the company. The court held that having conceded the current trading name of the other party at adjudication it was not open to the defendant to resist payment because that was not the name used in the original contract. There was a mutual estoppel that meant neither party could resist the decision on those grounds.

The court also considered what amounts to a "written" construction contract for the purposes of the HGCRA and determined that there was an oral contract on written terms which could be validly referred to adjudication.

Scrabster Harbour Trust v Mowlem plc T/A Mowlem Marine [2005] CSOH 44

Lord Clark of the Outer Court of Session considered a dispute concerning a contract to build a breakwater on ICE 5th ed terms as amended 2001. Clause 66, in compliance with the HGCRA, provided for adjudication, but further stated that if the decision was not given effect a party could issue a notice of referral to arbitration, such notice to be issued within three months of the decision, otherwise the decision would become final and binding. Mowlem referred a dispute to an adjudicator. The decision was delivered on the 25th June. Mowlem were dissatisfied with the decision and accordingly gave a disputed ***"notice"*** of reference to arbitration on the 15th / 16th September.

Scrabster sought a declaration that the notice was ineffective because it failed to comply with the requirements of the applicable arbitration rules in that it lacked the details stipulated by those rules.

Lord Clark held that compliance with the requirements of Clause 66(6) ICE was required in order to submit the dispute onwards to arbitration but concluded that in the circumstances of the case the requirements were fulfilled, albeit that some of the detail set out in the Scottish Arbitration Rules were absent. The rules however were more relevant to the procedure of the arbitration than the reference. The required substance for a valid notice was present and Scabster suffered no impediment from the minor omissions.

PRACTICE & PROCEDURE CASE CORNER

C.H.Spurin

Eastbourne Borough Council v. Hafez [2003] UKEAT 0188

The respondent civil engineer had been certified as permanently disabled due to stress. The Tribunal had found that he suffered stress because of the way his employers treated him including overlooking him for promotion in favour of a less experienced junior that he had trained. The tribunal held that he had been unlawfully discriminated against on the grounds of his disability and also had been unfairly dismissed

The applicants appealed on the grounds of bias arising out of the delivery of a preliminary view, because the tribunal had failed to provide adequate reasons for their decision and alleged biased cross-examination. Finally the respondent alleged that discrimination on the grounds of disability was not pleaded issue and that the trial should be limited to fair dismissal.

The tribunal gave a preliminary indication as to merits and the possible level of compensation concluding with the statement that *"Both sides should note that this is a provisional indication from which they can take stock and see whether this matter can be resolved amicably. We will keep and open mind. We hope this is helpful."* The tribunal indicated that the employer had not taken proper steps to deal with the claimant's situation and had pushed him into a corner and suggested compensation would be in the regions of £3-5K. A member of the tribunal also "vigorously" cross examined one of the respondent's witnesses on what steps the employer had taken to address the employee's condition.

The chairman gave evidence that the parties had indicated they wanted time to negotiate – so it was assumed that a preliminary view would assist. If negotiations failed, a full trial would then resume. The panel's examination was aimed at clarification of written evidence received and already considered by the panel. It took a long time because the witness refused to answer the questions and was evasive.

His Honour Judge Ansell, applying **Jiminez v London Borough of Southwark** [2003] IRLR 477 held that the issuing of preliminary views did not demonstrate that the tribunal had already made up its mind even before hearing all the facts. The court was concerned about the level of examination from the lay member of the tribunal but in the circumstances felt it just stayed within acceptable boundaries and did not demonstrate bias against the employer. The court agreed that disability discrimination under s5(1) Disability Discrimination Act 1995 was implicit in the s5(2) action.

However, the court agreed that insufficient reasons for the s5(1) breach were provided by the tribunal. Accordingly, the case was remitted back to the tribunal to provide a clear exposition of their reasons. The following session should be a paper only session, not a fresh hearing. No problems were anticipated in the tribunal delivering adequate reasons, indicating that the court did not feel that any injustice had been done.

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