ADR NEWS

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

EDITORIAL :

With the holiday season fast approaching it is a time to evaluate 2006 to date and contemplate what the rest of the year has in store. It has been an eventful time for dispute resolution. Recent developments are likely to have an impact on the market and implications for future practice.

The control and management of professional services is an area fraught with pitfalls and traps for the professional and user alike. Whilst true for any profession, some are more exposed than others to complaint and dissatisfaction from clients, particularly those who deal directly with the public. Claims management in the litigation market falls fairly and squarely into this category. In recent years the legal profession has been bedevilled by adverse publicity about claims management firms and their role in the market, which have had an adverse impact on the profession as a whole. It could be foreseen that this situation would not be allowed to continue and unsurprisingly the Government has set in motion plans to take direct control over the regulation of the claims market. The Department of Constitutional Affairs has initiated a tender competition amongst local authority trading standard departments to apply to run a monitoring and compliance unit, empowered to enforce the regulatory regime. Under measures announced in Parliament, the Lord Chancellor will act as regulator. Whether or not these are merely interim measures pending passage of the Legal Services Bill and the introduction of the Legal Services Board only time will tell. It is noteworthy not so much that the Government saw need for a regulatory body to control claims management companies, but that it has taken on the role itself, even if only as an interim measure. The development certainly raises points of debate and contention not only for the legal profession, but other professional bodies. Generally speaking professional bodies would rather operate their own self regulatory systems than to have the function under Government control.

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The development could have knock on implications for dispute resolution practitioners and mediators in particular because the absence of regulation in the mediation industry is a live issue at the present. The courts embraced the CPR, putting their stamp of approval on ADR, thereby helping to ensure that it became firmly established as a viable alternative to litigation. Could the Government, having actively encouraged the use of mediation through the auspices of Her Majesties Court Service step into the breach to regulate mediation services? Only time will tell.

Following on from the perceived successes of Mediation Week last year, HMCS has already sent out the invitations to engage in a second round of promotion of court annexed mediation in October 2006. Mediation Week 2006 is coming to a court near you. This year, rather than having mediators working with individual courts to organise promotional events, the 42 HMCS areas will work with a single, appointed representative of the mediation community to organise programmes of events across their area. It would appear that HMCS is starting to rationalise court based mediation services, but it not yet clear how extensive that rationalisation will be. Perhaps the various nominating organisations need to hold a conference to "***thrash out***" an acceptable regulatory regime to pre-empt one being imposed from on high.

This leads neatly into the latest twist in the relationship between the courts and mediation. The TCC has taken the concept of *"**judicially approved mediation***" one step further. For a one year trial period, 2006 to 2007, a TCC judge can act as a "third party neutral" to broker settlements between litigants. If the parties fail to reach an agreement then they can have their case heard in court, but before a different TCC judge. This is a scheme that will be watched with great interest and throws further light on the recent comments (June 2006) of His Honour Judge Jackson in ***Cleveland Bridge v Wembley*** when having found for one party in this interim application, he suggested that both enter into negotiations to settle the outstanding issues between them.

The construction industry over the years has led the way in ADR, initially as a major user of arbitration and most recently, albeit with a little push from Parliament, by embracing adjudication. In terms of dispute avoidance the industry has given partnering its best shot and has tentatively experimented with dispute review boards. The present innovation may yet prove to be another step forward in the quest to keep settlement costs to a minimum. It is an experiment we will watch with interest, if only to see whether or not anyone chooses to avail themselves of the service. Already the new service has attracted both supporters and detractors.

The first half of 2006 has to say the least been interesting for ADR. We wait with baited breath to see what the rest of the year might bring. In the meantime, enjoy a well earned half time break if you can.

G.R.Thomas

A New TCC Court Settlement Process for Technology Disputes [1]

Introduction

The specialist judges of the Technology and Construction Court have particular expertise in the evaluation of the disputes which are dealt with in that Court. It has been suggested that the judges might use this expertise to assist the parties to proceedings to achieve settlements as part of their role of case management under the Civil Procedure Rules. As a result, the following process has been produced for those situations where a case managing judge feels, either of his own volition or following a request from the parties, that the parties should be able to achieve an amicable settlement and that the judge is particularly able to assist in achieving that settlement.

In those circumstances, the judge would be at liberty, as part of the Court procedure, to offer a Court Settlement Process to the parties and, if accepted by all relevant parties to the case, the Judge would make a Court Settlement Order embodying the parties' agreement and fixing a date for a Court Settlement Conference proportionate in time to the issues in the case but not normally lasting more than one day. The judge, who would normally have been the case management judge, would then conduct the Court Settlement Process in accordance with that Court Settlement Order. If a settlement were not reached then the case would be taken over by another case management judge.

Implementation Scheme

If this proposed procedure is approved in principle, it is suggested that there should be consultation with Tecbar, TeCSA and Court Users followed by a pilot scheme by London TCC judges.[2] Subject to that consultation process and pilot scheme, the procedure would then be formally incorporated into the TCC Guide.

Court Settlement Order

Court Settlement

1. The Court Settlement Process under this Order is a confidential, voluntary and non-binding dispute resolution process in which the Settlement Judge assists the Parties in cases before the Court to reach an amicable settlement at a Court Settlement Conference.

2. This Order provides for the process by which the Court assists in the resolution of the disputes in the Proceedings. This Order is made by consent of the Parties with a view to achieving the amicable settlement of such disputes. It is agreed that the Settlement Judge may vary this Order at any time.

3. The following definitions shall apply:

(1) The Parties shall be [names]

(2) The Proceedings are [identify]

(3) The Settlement Judge is [name]

[1] This is a reprint of the HMCS announcement at www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf

[2] See A.Thornton, **You be the judge**. Building, 9th June 2006. p48. The pilot Scheme will run till 31st July 2007.

The Court Settlement Process

4. The Settlement Judge may conduct the Court Settlement Process in such manner, as the Judge considers appropriate, taking into account the circumstances of the case, the wishes of the Parties and the overriding objective in Part 1 of the Civil Procedure Rules.

5. Unless the Parties otherwise agree, during the Court Settlement Conference the Settlement Judge may communicate with the Parties together or with any Party separately, including private meetings at which the Settlement Judge may express views on the disputes. Each Party shall cooperate with the Settlement Judge. A Party may request a private meeting with the Settlement Judge at any time during the Court Settlement Conference. The Parties shall give full assistance to enable the Court Settlement Conference to proceed and be concluded within the time stipulated by the Settlement Judge.

6. In advance of the Court Settlement Conference, each Party shall notify the Settlement Judge and the other Party or Parties of the names and the role of all persons involved in the Court Settlement Conference. Each Party shall nominate a person having full authority to settle the disputes.

7. No offers or promises or agreements shall have any legal effect unless and until they are included in a written agreement signed by representatives of all Parties (the "Settlement Agreement").

8. If the Court Settlement Conference does not lead to a Settlement Agreement, the Settlement Judge may send the Parties an Assessment setting out his views on the disputes, including, without limitation, his views on prospects of success on individual issues, the likely outcome of the case and what would be an appropriate settlement. Such Assessment shall be confidential to the parties and may not be used or referred to in any subsequent proceedings.

Termination of the Settlement Process

9. The Court Settlement Process shall come to end upon the signing of a Settlement Agreement by the Parties in respect of the disputes or when the Settlement Judge so directs or upon written notification by any Party at any time to the Settlement Judge and the other Party or Parties that the Court Settlement Process is terminated.

Confidentiality

10. The Court Settlement Process is private and confidential. Every document, communication or other form of information disclosed, made or produced by any Party specifically for the purpose of the Court Settlement Process shall be treated as being disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure.

11. Nothing said or done during the course of the Court Settlement Process is intended to or shall in any way affect the rights or prejudice the position of the Parties to the dispute in the Proceedings or any subsequent arbitration, adjudication or litigation. If the Settlement Judge is told by a Party that information is being provided to the Settlement Judge in confidence, the Settlement Judge will not disclose that information to any other Party.

Costs

12. Unless otherwise agreed, each Party shall bear its own costs and shall share equally the Court costs of the Court Settlement Process.

Settlement Judge's Role in Subsequent Proceedings

13. The Settlement Judge shall from the date of this Order not take any further part in the Proceedings nor in any subsequent proceedings arising out of the Court Settlement Process and no party shall be entitled to call the Settlement Judge as a witness in any subsequent adjudication, arbitration or judicial proceedings arising out of or connected with the Court Settlement Process.

Exclusion of Liability

14. For the avoidance of doubt, the Parties agree that the Settlement Judge shall have the same immunity from suit in relation to a Court Settlement Process as the Settlement Judge would have if acting otherwise as a Judge in the Proceedings.

Particular Directions

15. A Court Settlement Conference shall take place on [date] at [place] commencing at [time].

16. If by [date] the Parties have not concluded a settlement agreement, the matter shall be listed on the first available date before an appropriate judge who shall be allocated for the future management and trial of the Proceedings.

17. The Court Settlement Process shall proceed on the basis of the documents filed in the Proceedings, without further documents; provided that the Settlement Judge may direct that any Party should provide further documents.

HMCS MEDIATION WEEK : ROUND TWO
Court Annexed Mediation in the UK

The aim of this paper is to examine the ways that court annexed mediation has developed to date in the U.K. and to speculate on how court based mediation might develop over the next few years as Her Majesties Court Service (HMCS), which is tasked with rationalising the court service, takes an ever more active interest / role in court based mediation provision.

Introduction

From the early beginnings of court annexed mediation in the Central London Court, successive courts have established their own distinct mediation services, drawing on broad principles from what had gone before but without emulating prior practice, tailoring services to perceived local needs, shaped by the knowledge and experiences of local enthusiasts in the vanguard of the movement. Whilst the movement was very slow to spread out from London at the outset, gradually as more and more courts developed their own in house services, momentum started to gather pace.

When HMCS decided to take an active role in promoting and developing court based mediation its initial response was to gather together as many of those actively engaged in court based mediation, both practitioners and court officials alike, together with likeminded persons interested in establishing new court schemes, for a brain storming session in Birmingham in June 2005, to mount a mediation promotion campaign in the courts, entitled ***"Mediation Awareness Week".***

At that time HMCS expressed no preference for the model that should be operated through the courts, though they let it be known that HMCS would be providing central support from London via an online Mediation Help Desk that they were in the process of developing. Whilst HMCS needed to determine the shape of its own provision through the Help Line, it made sense for HMCS to build upon pre-existing services in the regions, particularly since the HMCS budget was very limited. It was not part of HMCS's stated agenda to displace and replace what was in existence, but rather, the objective was proclaimed to be to promote ADR as a mutually beneficial new service for court users. It was far from clear at that time how the Help Line would dovetail into local provision and to what extent it would be compatible with regional services.

The diversity of services in operation at that time became apparent at the Birmingham session as representatives from around the country extolled the virtues of their home grown schemes. The inevitable question is whether this flexible approach is desirable, or whether or not it would be better to adopt a universal model throughout the UK. It is a question that needs to be addressed since whilst it is not yet clear whether or not HMCS will ultimately seek to impose a uniform model, given its rationalisation role in court service provision, it would be logical if they were to do so. Whether or not such a development would be welcomed by the various providers is, of course, quite another matter. If HMCS were to go down that route, the next question is what form should that model take?

First, is such a development likely? HMCS set a target in 2005 to establish a mediation officer in each of the 220 courts that fall within its remit. Mediation Awareness Week went a long way towards achieving that target with court based mediation promotion programs taking place in over 86 courts around the UK last October. It is now clear that these courts will be represented on a regional, not an individual, basis for Mediation Week 2006. This is just one small step towards rationalisation and centralisation. The Civil Mediation Council (CMC), closely supported by HMCS is holding a conference at the National Motorcycle Museum in Birmingham on the 3rd October 2006. A central theme is the direction of mediation, standardisation of training, accreditation and service provision. The Academic Committee of the CMC has also devoted much attention to these matters. Whilst some committee members have expressed the view that CMC should become the standards gatekeeper for mediation in the UK, this does not appear to be something that CMC aspires to. HMCS might well decide to step into the breach, at least in respect of court based mediation services.

Variable factors in mediation services.

There are no set mediation procedures, practice standards or pricing scale. There are no uniform qualifications or training for the accreditation of mediators. There is no uniform guide to the appointment of mediators, with diverse mechanisms for appointment, ranging from court lists of mediators, to approved nominating bodies. HMCS also provides a central service. There is no set time scale for mediation. Sometimes court facilities will be provided for the mediation, at other times not.

Mediation procedures

Is there a right or a wrong way to mediate or is it a matter of "***different strokes for different folks***"? If the latter, how will clients know what they are getting themselves into?

Joint sessions or caucus **: S**omewhat like the traditional model of conciliation, some mediators conduct all the proceedings in a single joint session. There are advantages to doing so. There are no issues about exchanges of information. Everything that occurs is open and perforce above board. The mediator is somewhat like the chairman of a meeting. Only one room is needed, so accommodation issues are minimised. The drawback is that it can be difficult to overcome an impasse / gridlock in a joint session. By contrast, other mediators will use a mixture of joint and private sessions. The advantage is that a mediator can brainstorm avenues and grounds for settlement in a free exchange with a party that could prejudice the proceedings if carried out in an open forum. The danger is first a risk of collusion. Since the mediator assumes the role of information corridor there is the potential for both misinformation and disinformation as the mediator priorities that which appears conducive to settlement

Evaluation or interests based mediation **:** The question here is the extent to which a mediator could and should take the initiative in developing/imposing avenues for the resolution of a dispute, of providing advice and even evaluating the case. For some mediators some or all of the above are absolutely no go areas, but for others they are standard procedure. Some users would welcome a mediator's evaluation, others would resent it as a threat to party autonomy.

Duration of mediation : The half hour, quick fire mediation is a feature of some low cost / low value mediations. Whilst this is seen as perfectly standard and appropriate to some, other mediators would not even start to know how to mediate under such tight time constraints, which would not leave them sufficient time to go through their standard opening, development and closure routines. Two to three hours is pretty standard in court mediation. Some court schemes have the facility to extend time, some do not, whilst others have a completely open attitude to time, according the process as much time as is needed or desired by the parties. Deadlines are very useful to concentrate the mind but can equally act as artificial constraints on the ability to give complex matters sufficient consideration.

Costs in mediation – fees and appointments : Mediator fees are highly variable. At the lowest possible end of the scale is the pro-bono / free mediation. There are a number of fixed price mediation services. A number of schemes operate a graduated fee structure linked to the value of the dispute, with little regard to the complexity of the dispute, legal or factual or the personalities involved. At the top of the range, the sky is the limit.

The appointment process is free in some schemes but involves appointment fees to the court or to a nominating body in others.

Training, accreditation & quality assurance : Training ranges in the private sector from a couple of days of presentations, to extended hands on role play training, with or without written examinations and skills testing. Completion of the course is sufficient for accreditation by some nomination bodies, whilst others mandate and provide apprenticeship, sometimes followed by a panel interview. Clients on the other hand will sometimes self select a mediator on the basis of reputation, which might not include any mediation training or experience whatsoever. Quality assurance is closely linked to the next item.

Appointment processes and administration : Some courts operate an appointment process. The court may maintain a list of mediators (and is thus able to set down criteria to be on the list and perhaps even to monitor performance and remove mediators from the list) or alternatively avails itself of the services of one or more nominating bodies, relying on the nominating bodies to establish their own listing criteria, and quality assurance mechanisms. The court maintains control over the nominating body and can stipulate some minimum requirements such as professional insurance cover. Some courts leave it to the parties to find their own mediator.

Mediation venue : Whilst much court annexed mediation takes place on court premises, not all courts have the spare rooming capacity to make such provision. A major drawback to using court facilities is that often there is limited space, unsuited to mediation and the buildings often close early.

Conclusion

How much, if any of the above it would be possible, financially or professionally, for anyone to regulate is hard to say. Any changes to mediation practice are likely to be stoutly resisted by those holding grandfather rights. Nonetheless, it seems that change is in the air! C.H.Spurin

Could I Just Say?

Case Note on ***Paul Boardwell t/a Boardwell Construction v k3D Property Partnership Ltd*** (unreported) – *adjudicator failing to consider defence and breach of natural justice*

On the 21st April 2006, HHJ Raynor QC, sitting in the Technology and Construction Court in Salford, gave judgment in ***Paul Boardwell t/a Boardwell Construction v k3D Property Partnership Ltd***[3] (unreported). It was one of the small number of cases where the Court refused to uphold an adjudicator's decision in the claimant's favour.

The defendant was a development company based in Carlisle. The claimant was a small local contractor. The defendant wanted to refurbish and carry out alterations to premises situated in the centre of Carlisle to create residential accommodation. In October 2004 the Defendant and the Claimant entered into a contract based on the JCT Agreement for Minor Building Works 1998 Edition (with Amendments 1 – 5 inclusive) in the sum of £276,223-20. The contract period was to be the 1st November 2004 – 29th July 2005. The Agreement was subject to adjudication with the RIBA the inserted nominating body to appoint an adjudicator.

The claimant came to conclude during the currency of the works that he had been subject to considerable variations, the works were more complex than he had anticipated, there were delays for which the defendant was responsible, the defendant had failed to pay as required and the claimant had generally incurred additional costs. Matters came to a head with the claimant purporting to determine his own employment under the Agreement on or about the 16th September 2005, following a prior notice of alleged default. The defendant in turn purported to determine the contractor's employment by letter dated the 3rd October 2005, following a default notice dated the 29th October 2005.

Matters remained in abeyance until the early part of 2006. On the 27th January 2006 the claimant issued an adjudication notice. The claimant sought various remedies, viz.

- An extension of time;
- A declaration that the claimant rightfully determined his employment;
- Money allegedly due under the Agreement (measured work, variations and loss and expense);
- Interest;
- Other appropriate relief; and
- The adjudicator's costs

A major bone of contention between the parties, once the adjudication started, was the adjudicator's remit. The defendant formed the view the referral was defective being made up of a number of discrete parts. He wrote to the adjudicator in these terms - "*Would you consider limiting the referring party purely to the issue of who determined the contract and why?*" Following representations from the parties, the adjudicator concluded – *"My view is that I have no authority to influence or limit Boardman's [the adjudicator's error of transcription] claim and that my jurisdiction encompasses all matters referred within the Notice of Adjudication."* Having accepted that he could not go behind the notice of adjudication the adjudicator recast the claimant's principal requests into four questions, set out in his letter of the 1st March 2006 - (a) Did the claimant have the right to an extension of time; (b) was the determination of the claimant's employment lawful; (c) what was the value of the variation orders and (d) what was the value of the loss and expense to which the claimant was potentially entitled. The adjudicator made some alterations in his letter to the parties of the 2nd March 2006 but the questions which he set himself to answer remained the same.

In response to the referral the defendant sought to raise a counterclaim for various items including loss and damage as a result of the employer's determination - *"The quantum of [which could not] be suitably addressed until the contracted works have been completed"* and sought the adjudicator's advice as to *"which of these heads he may award to the Respondent within this adjudication."* The defendant also relied upon his own alleged determination of the Agreement as a defence to the claim in the adjudication, relying upon the provisions of clause 7.2.3 of the Agreement – *"…the Employer shall not be bound to make any further payment to the Contractor that may be due under this Agreement until after completion of the Works and the making good of any defects therein*."

After further written submissions from the parties the adjudicator issued a reasoned decision on the 16th March 2006 in the claimant's favour. The adjudicator noted that certain counterclaims had

[3] The author appeared as counsel for the defendant in the enforcement proceedings but played no part in the original adjudication

been made and concluded that, as the items had not been referred to in the notice of adjudication and as no agreement from the claimant had been given to these claims being adjudicated upon, he had *"no jurisdiction to consider these counterclaims within this Adjudication."* He ordered the defendant to pay the claimant the sum of £57,931-96 (subject to any VAT) by the 23rd March 2006 but also concluded that "*I do not consider that the determination of employment by Boardwell was rightfully made."* The adjudicator expressly stated at paragraph 41.0 of his decision that *"I have not recorded all of the parties' submissions within this document, but I have considered them all."*

The defendant resisted enforcement. In those proceedings the defendant argued –

Multiple Disputes
The notice of adjudication required consideration of a range of unconnected disputes.

Breach of Natural Justice
The adjudicator breached natural justice in that he disregarded a substantial and integral part of the defence; viz. the claimant had committed a repudiatory breach of the Agreement. The adjudicator had failed to realise that what he saw as the defendant's counterclaim could equally function as a defence.

Solvency
There must be doubts over the claimant's solvency.

HHJ Judge Raynor QC limited oral argument to '*breach of natural justice'*, having noted his reading of the skeleton arguments on the other two points.

On the 'multiple referral' point both counsel had referred to ***Chamberlain Carpentry and Joinery Ltd v Alfred McAlpine Construction Ltd*** [2002] EWHC 514 (TCC) (see paragraph 14) – "*In my judgment what, in any given case, constitutes a "dispute" fit to be referred to adjudication as a single dispute is a question of fact. It is possible to contemplate both a substantial dispute with a number of elements, which is nonetheless properly characterised as but one "dispute", and a situation in which parties are in difference simultaneously about a number of matters, but by no stretch of the imagination would any reasonable man say that there was only one "dispute". The correct analysis in any particular case depends upon the facts of that case. I do not consider that it was a correct understanding of the comments of H.H. Judge Thornton Q.C.* [***Fastrack Contractors Ltd –v- Morrison Construction Ltd*** *[2000] BLR 176] that he was contemplating that it was up to a referring party in his notice of adjudication to characterise as a single "dispute" whatever he chose. Obviously the referring party has the ability to describe as he wishes what he wants to refer to adjudication, but it would be wrong, in my judgment, to permit the referring party to be the sole judge of whether what is referred is in truth a single "dispute". It is only against the background of the matter or matters in issue between parties at the time a notice of adjudication is given that it is possible to address the questions what, if anything, has been referred to adjudication, and is it a single "dispute". Those questions, it seems to me, fall to be addressed objectively in any case in which they arise*."

There is also the recent telling judgment of HHJ Coulson QC in ***Michael John Construction Ltd v Richard Henry Golledge & Others*** [2006] EWHC 71 (see especially section C of his judgment – paragraphs 26 – 28) – "*Indeed, as far as I am aware, there is no reported case in which the decision of an Adjudicator has not been enforced because the Judge has been persuaded that the original notice to refer encompassed more than one dispute*." (para. 28)

Similarly counsel were in agreement that to resist enforcement on the ground of suspect solvency depended on the existence of the ***"special circumstances"*** necessary to justify a stay of enforcement (RSC 47.1) and that HHJ Coulson QC had in ***Wimbledon Construction Company 2000 Limited v. Vago*** (20 May 2005) (in particular paragraph 26) set out the applicable principles.

Breach of Natural Justice
Counsel agreed that the adjudicator was obliged to avoid any material breach of natural justice. Where they chose to differ was in their interpretation of the adjudicator's actions. The claimant relied on ***Discain Project Services Ltd v Opecprime Development Ltd*** [2001] BLR 285, where at paragraph 68 HHJ Bowsher QC said - *"I also repeat the words of Judge Humphrey Lloyd QC* ***"It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit."*** *The qualification in the latter part of that sentence is important."*

The claimant also relied upon the decision of HHJ Wilcox in ***Try Construction Ltd v Eton Town House Group Ltd*** 28 January 2003 at paragraphs 48 and 50. The defendant identified the decision in ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd*** [2005] EWCA Civ. 1358 see especially paragraphs 85 – 87, as being key. Chadwick LJ identified ***two***

possible methods to challenge an adjudicator's decision – see paragraph 85 of the judgment "[if] *it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair*." In oral argument the claimant refined his argument to encompass the ***Bouygues*** principle, i.e. the adjudicator is not answerable for an error of law and disregard of the counterclaim's role as a defence was non actionable as founded in the second proposition of Jackson J in ***Carillion Construction*** at first instance. The defendant argued that disregard of the defence was such a crucial part of the decision as to be a matter that had to be addressed as a potential breach of justice. The decision was distorted – if the defence had been properly considered there was a substantial possibility that no money would have flowed to the claimant because of the wording of the Agreement. The defendant relied upon paragraph 49 of ***Quietfield Ltd v Vascroft Contractors Ltd*** [2006] EWHC 174 (TCC) and more particularly paragraph 51 – "*…the adjudicator ought to have considered Vascroft's substantive defence, but he failed to do so. In those circumstances, as Quietfield have fairly conceded, the adjudicator's decision cannot be enforced because he failed to abide by the rules of natural justice*."

The defendant also relied upon ***Kier Regional Ltd t/a Wallis –v- City & General (Holborn) Ltd*** [2006] EWHC 848 (TCC) especially paragraphs 36, 37, 41 and 42.

HHJ Raynor QC was satisfied that the adjudicator had committed a breach of natural justice, which was on the critical path of the decision and to omit erroneously to consider the defence could not be disregarded. He did not accept the argument of counsel for the claimant that use of a general words' formula that the adjudicator had considered all the submissions could protect the adjudicator where in a reasoned decision it was not discernible that he had considered the counterclaim in its guise as a defence. Although not part of the claimant's original skeleton argument, during the hearing the claimant argued that the defendant was estopped from challenging jurisdiction because the defendant had, on the true interpretation of certain correspondence, acquiesced in the continuation of the adjudication once the adjudicator identified the issues. HHJ Raynor QC refused to accede to this argument.

OPEN AND CLOSED ADJUDICATION

The inspiration for this short paper was a presentation by Tony Bingham under the auspices of the SCL at Cardiff in May 2006 at the offices of Hugh James. With his usual enthusiasm for new found causes, Mr Bingham urged his audience (as erstwhile litigators) to case manage their disputes by closely prescribing in advance the remit of an arbitration or adjudication, to prevent the process from growing like ***Topsy*** into massive, uncontrollable proportions with consequent cost and time implications which could potentially deprive the parties of any realistic sense of proportionate justice. Beguiling as the concept might at first blush appear, are their any hidden dangers to such an approach and in what circumstances, if any might such an approach work?

There are two distinct aspects to this concept. The one involves the extent to which an applicant is able to prescribe the scope of a dispute, which is inextricably linked to the question of "*What is a dispute*," the other, the role of the adjudicator/arbitrator/judge in case managing the proceedings.

The Submission Process

The drafting of the notice of intent to adjudicate and the referral rapidly developed into an art form almost immediately after the Housing Grants Construction and Regeneration Act 1996 came into force in 1998. It quickly became apparent that the referring party would pay a heavy price for getting the content of these documents wrong. Far from being an informal process to be operated by amateurs from within the industry, as initially envisaged by early proponents, it turned into a business for professionals. The lawyers and the courts made sure of this, quite correctly it might added in hindsight, since a great deal often rides on the outcome of adjudication.

Between them the notice of intention and the referral prescribe the scope of the dispute submitted to adjudication. To a greater or lesser extent, the same may be said of the referral document in arbitration

and the statement of claim in litigation. Unlike the latter two, however, where there is both time and the facility to further develop and broaden out the scope of the dispute, adjudication presented a serious challenge in that there was a danger that because of the tight timescales within which the procedure operates, there was a serious potential of ambush. There are two distinct aspects to ambush, namely novelty and constriction. Both have been addressed by the courts.

The novelty aspect relates to whether or not it is possible to land a claim on an unsuspecting party about something they had no idea about, forcing them to attempt to respond in a very short period of time, whereas the claimant has had all the time in the world to dot the I's and cross all the T's in the referral documentation. In 1998 this was a highly contested issue, with many proclaiming that the adjudication process was inherently unfair. The reality has proved to be somewhat different. Whilst the key to the scope of the dispute before an adjudicator lies in the notice of intention, which prescribes the content of the referral document, forcing it to remain within the limits of the issues mentioned in the notice, albeit with far more detail, what can be validly submitted to adjudication has been drawn back to crystallisation. The court have insisted that a matter cannot be referred to adjudication unless it had matured into a dispute, that is to say that the claimant had put the matter to the other party, leaving sufficient time for response and no satisfactory response had been received. Hence, wherever a matter is validly referred to adjudication the respondent will have had sufficient advance warning and should have been fully aware that a referral was imminent. Furthermore, the scope of the dispute is limited to the issues that had been previously canvassed and no novel issues can be slipped in on the back of the crystallised matters.

The constriction aspect relates to what matters the respondent can raise in his defence. In line with the above, the courts will not allow a respondent to introduce novel disputes into the process by way of counter-claim. The test for novelty lies in whether or not the grounds of defence are based on matters which are integral to the dispute at hand. The potential for ambush lies in the extent, if at all, that it is possible for the claimant to couch his reference in limited terms which exclude any scope for the respondent to assert contrary rights.

By treating anything which is integral to the dispute within the scope of the reference limits the ability of the claimant to secure an unfair advantage. However, the claimant who submits a sloppily drafted reference can broaden out the scope of the dispute unnecessarily and do himself a major disservice, enabling the respondent to pursue counterclaims that would not otherwise be necessary. The tightly drafted reference is not necessarily an unfair one. After all there is nothing preventing a respondent from initiating adjudication in respect of matters outside the scope of the current adjudication.

Thus, to a limited extent, what Mr Bingham proposes is practicable, but the scope to do so is limited. Let us consider some of the things not to do and some of the things that it would be wise to do.

1) Make sure you ask for what you want. The response to the question of breach will be ***YES*** or ***NO.*** If you want payment ask for it. If a specific sum is asked for the adjudicator must reach exactly the same valuation in order to accede. Therefore, pitch the referral in the alternative, to include *"such other sum as the adjudicator deems due*." Do submit a concise documentation and where evidence is submitted, cross reference it clearly.
2) To require a decision as to how much is due under a contract will provide the scope for the respondent to set off sums against the works. Thus it is best, wherever possible, to require a decision as to how much is due under a progress claim, directly linked to an application for payment and terms if any of withholding notices, all tied up to the contractual payment mechanism.
3) Progress disputes are limited in scope. Final disputes and valuations are open ended. The adjudication process was intended to be incremental with the parties if needs be pursuing a series of adjudications during the course of a project rather than one massive dispute at the end.
4) Whilst a bit previous, make sure the initial contract is ***"shipshape and Bristol fashion".*** Adjudication is not the best place to attempt to remedy defects in the contract.
5) Do keep your paperwork in order. Poor administration on both sides is a major cause of extended disputation.
6) Don't introduce novel matters into an adjudication, have another go later. Do not let the other side introduce novel matters either.

C.H.Spurin

ARBITRATOR / ADJUDICATOR IMMUNITY : THE DOWN UNDER EXPERIENCE

In the United Kingdom the arbitrator enjoys a wide degree of protection against undue pressure, including any attempt by a party to the arbitration to blackmail / cajole / coerce / influence or otherwise threaten the arbitrator, which might adversely impact upon the arbitrator's ability to reach an impartial decision. This protection is embodied in the Arbitration Act 1996 at section 29, which states as follows :-

Immunity of arbitrator.

*29(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator **unless the act or omission is shown to have been in bad faith**.*

29(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

29(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

Likewise, the construction adjudicator is also protected by virtue of 108(4) Housing Grants, Construction and Regeneration Act 1996, which requires a relevant construction contract to incorporate adjudicator immunity. S108(4) provides as follows :-

*108(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator **unless the act or omission is in bad faith**, and that any employee or agent of the adjudicator is similarly protected from liability*

If this were not the case, an arbitrator might consciously, or unconsciously, tip-toe around a belligerent litigant during the course of proceedings, be it during case management, during the hearing or in the body of an award, to ward off potential litigation. This would be contrary to the duty to act impartially at all times. It would impede the arbitrator's ability to act in a robust manner as and when required.

Bad faith is the only limitation to this immunity. What then amounts to bad faith? In what circumstances might the immunity be overridden and where that occurs, what is the consequence, first in terms of the enforceability of an award and secondly what are the consequences for the arbitrator? Does the arbitrator forfeit his entitlement to his fees and expenses? Could an arbitrator acting in bad faith be held accountable for any of the consequences of so acting, and if so how extensive would that liability be? Would it extend to the costs of the parties thrown away in the action or perhaps go even further to cover economic loss due to the failure to bring about closure? Apart from removal, what other consequences might flow from an arbitrator being removed on the grounds of bad faith? Recent judgements concerning construction adjudication, both in the UK and in Australia, throw some more light upon these questions.

Setting aside an award and removal of an arbitrator for serious irregularity

This is not the time or place for an extended discussion on the grounds for setting aside an award for serious irregularity or the grounds for the removal of an arbitrator, or to conduct a review of case law in that regard, but a brief reminder of the statutory regime sets the scene for consideration as to what additional recourse might be had against the arbitrator.

Power of court to remove arbitrator.

24.(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds-

- *(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*
- *(b) that he does not possess the qualifications required by the arbitration agreement;*
- *(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*
- *(d) that he has refused or failed-*
  - *(i) properly to conduct the proceedings, or*
  - *(ii) to use all reasonable despatch in conducting the proceedings or making an award,*

and that substantial injustice has been or will be caused to the applicant.

24(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

24(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

24(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

24(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

24(6) The leave of the court is required for any appeal from a decision of the court under this section.

Recoverable fees and expenses of arbitrators.

64(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

64(2) If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)-

(a) determine the matter, or

(b) order that it be determined by such means and upon such terms as the court may specify.

64(3) Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

64(4) Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

Challenging the award: serious irregularity.

68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

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

68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

68(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

68(4) The leave of the court is required for any appeal from a decision of the court under this section.

The case law to date.

Wicketts v Brine Builders & Siederer [2001] App.L.R. 06/08

This case concerned an application for an order under ***'Section 24(1) of the Arbitration Act 1996'***, for the removal of Mr. Siederer as arbitrator and the grounds set out in subsection (d) namely *'(d) That he has refused or failed (i) properly to conduct the proceedings, or (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.'*

The court took notice of the overriding principles set out under s1 Arbitration Act 1996, namely that *'The provisions of this Part [which is Part 1 of the 1996 Act] are founded on the following principles and shall be construed accordingly...'* with specific reference to subsection (a) namely *'The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal, without unnecessary delay be expense .. '* and of the arbitrator's duties set out in s33(1) Arbitration Act 1996, to the effect that *'The tribunal shall (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'*

The complaint related to an application to the tribunal for security of costs and peremptory orders. The applicants complained that they had suffered delay and incurred additional costs arising in connection with the failure of the arbitrator to adopt suitable procedures and asserted that the arbitrator failed to understand and apply properly his powers in relations to sections 38(3) and 40 of the Arbitration Act.

Wicketts had accused the arbitrator of spinning out the proceedings and allowing the respondent to conduct his case in such a way, such that costs were through the roof and rising and made it clear that he considered the arbitrator was negligent and incompetent, and that he might well take action against him or make complaint against him.

The arbitrator observed that Wicketts was not so clever having gone through three sets of solicitors.

Wicketts responded that that was because they had all advised him that the arbitrator was mis-conducting the proceedings.

The arbitrator took all this as a threat and advised the other party that this amounted to grounds to overturn any award he might produce on the grounds that it was procured by undue pressure / influence. The parties then unsuccessfully attempted a compromise settlement.

The following day Brine asked for an adjournment on health grounds. Wicketts objected.

The arbitrator initially ignored the application for adjournment and tried to get the parties to deal with the terms of an amended agreement. They refused and insisted on moving to the central issue once submission of evidence was complete.

The arbitrator wrote the next day and directed the parties that should they broker a settlement a draft should be sent to him for approval, instructions on any payment provisions that might go in the settlement including apportionment of the costs of the arbitration and detail arrangements for payment of the arbitrator and directed that no payment could be made until his (the arbitrator's) fees had first been paid. The arbitrator subsequently itemized his bill to date, plus VAT totaling in excess of £20K.

Following a renewed application for security of costs, the arbitrator wrote stating that because of the failure of the parties to fully comply with requests for interim payments of his fees on account, which could indicate that the parties were experiencing financial difficulties and stated that he was minded to direct that both parties provide reciprocal security for the costs of the other party, on the basis of joint and several liability. He subsequently wrote suggesting each party could deposit £13K as an indication of good faith. Brine indicated that they would send a cheque, post dated for 7 days and conditional on the Wicketts doing the same. Wicketts declined.

The arbitrator then informed the parties that he would issue peremptory orders for both parties to provide £30K security of legal costs and an additional £26K security to cover the arbitration fees.

Pending the hearing of an application for removal, pursuant to Section 24(3) the arbitrator decided to plough on, and attempted to set up a hearing. This led to an application for a restraining injunction. At the hearing the arbitrator agreed to an adjournment. After the application for removal, the arbitrator had ordered that a supplemental witness statement be received as evidence despite the absence of any opportunity for Wicketts to challenge the evidence. The arbitrator also permitted Brine to quantify a previously un-quantified counterclaim.

Having noted that the first order was not requested by either of the parties and thus none of the arbitrator's business, His honour Judge Seymour concluded that the second order had no legal foundation. The arbitrator had no perception of his proper functions and duties and was duly removed. This was all without considering events subsequent to issue of the orders. The court capped his fees at £10K.

One might think that in the circumstances the arbitrator was lucky to get what he did. The value of the claim was only £60K. The parties must have run up massive legal expenses. The entire affair had been extremely protracted and at the end of it all they still had no resolution. Nonetheless, the arbitrator received some remuneration (*albeit that the costs of the removal hearing would make a big dent in that sum*) but the parties were left with no recovery for the costs and consequences of the arbitrator's incompetence and inability to manage the arbitration. This is hardly surprising since compensation had not been asked for, no doubt because in the light of the "*section 29 Arbitration Act immunity*" provision, it was felt that such an application would not be appropriate. Furthermore, it is no doubt for this very reason that there is virtually no case law on the broader implications of breach of the "***good faith***" exception to immunity to date.

Rankilor (1) & Perco Engineering Service Ltd (2) v Igoe (M) Ltd [2006] Adj.L.R. 01/27

This case concerned two enforcement actions (1) for monies due pursuant to an adjudicator's decision and (2) payment by the losing applicant for an equal share of the adjudicator's fee. Perco had been retained to carry out boring works. The boring machine failed to bore out one area and took additional time to bore out another. The contract was terminated and traditional excavation methods adopted using an alternative contractor. Due to insufficient data on ground conditions, the contractor had undertaken to carry out the work within 10 days on the basis of normal ground conditions, excluding liability for delay or inability to bore if he encountered unexpected ground conditions.

The client's view was that he had tendered out for boring through clay. The ground was clay and thus there was nothing unexpected about the ground conditions. The problem was due either to worn out boring machinery or inexperienced operators. The contractor's case was that the ground conditions were not normal and prevented the machine functioning or functioning properly. Paperwork established that the boring machine was only 18 months old.

The adjudicator found that the ground conditions were unexpected. This decision was reinforced by his conclusion about why the boring equipment did not perform effectively, which he reached by relying on his own geological expertise. This view differed from that of the claimant and the defendant. The defendant asserted that he has been deprived of an opportunity to address this latter issue which was not canvassed in the adjudication.

The court found that the claimant in the adjudication (here the defendant) had failed to prove his case viz. normal conditions. Whilst the contractor's theory as to the cause of the loss differed from that of both the client's expert and also the adjudicator's alternative explanation (adduced from technical reports of both parties), the adjudicator was entitled to conclude that the conditions were unexpected.

The adjudicator did not have to share all provisional views with the parties. The parties between them had raised all the technical data relied upon by the adjudicator. The defendant had chosen to rely on a bold assertion that the ground conditions were normal, without adducing any proof. He had failed to prove that the machine was defective or adduce evidence of incompetence. He did not adduce any evidence as to why the machine was ineffective. That was his choice. He was not obliged to do so, but a failure to do so meant that the adjudicator was left to reach his own preliminary conclusions. These conclusions were not at odds with the evidence. Accordingly there was no breach of the rules of natural justice. Both of the adjudicator's decisions were accordingly enforced.

What is of interest to us here is the penultimate paragraph of His Honour Judge Gilliland's judgment :-.

33 *Perco is in my judgment entitled to enforce Dr. Rankilor's decision and it must also follow that Dr. Rankilor is entitled to recover the half share of his fee from Igoe. In the circumstances, I do not need to consider Dr. Rankilor's claim that even if his decision had been vitiated by a breach of the rules of natural justice, he would still have been entitled to recover his fee under the terms of the adjudication contract which had been entered into. It is,* ***I must say, a surprising submission that if an adjudicator's decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision*** *without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case.*

Whilst the problem under discussion is thus alluded to, no further enlightenment on what the answer might be is provided by the judgment. It is nonetheless a clear invitation for a future frustrated party to an ineffective arbitration or adjudication to seek to recover costs thrown away and to withhold fees.

Paul Boardwell v k3D Property Partnership Ltd [2006] Adj.C.S. 04/21[4]

The court found that the adjudicator had failed to consider a substantial part of the defence submission on the grounds that it concerned a counterclaim beyond his jurisdiction. The adjudicator should in fact have dealt with the information to the extent that it also amounted to a defence, whilst excluding the counterclaim element, which in any case was un-quantified at that time and incapable to resulting in an award. The adjudication decision included a statement to the effect that whilst only a limited number of matters were addressed by the decision all other matters had been considered. The court held that the catch all phrase *"all other matters had been considered"* was insufficient to establish that this was in fact the case.

His Honour Judge Raynor noted that the adjudicator intended to pursue an action for outstanding fees and remarked in an aside that the "***Rankilor"*** effect might come into play, with clear reference to paragraph 33 set out above, in that the adjudicator would be pursuing payment for a service that had in the event no value to the defaulting parties. It is not known where events went thereafter.

Timwin Construction P/L v Facade Innovations P/ L [2005] NSWSC 548. 1st June 2005.[5]

A contractor (Timwin) / subcontractor (Façade) construction variations payment dispute was submitted to adjudication. Timwin's response to a payment application was to assert that the variation payments were for works under the contract, that there had already been an overpayment due to duress and asserted a damages claim for delay. Façade's submission to the adjudication sought to demonstrate that clause 7 of the contract (which required written, valued instructions for all variations, in the absence of which the variation would be at the subcontractor's risk) had been waived in that there had been written instructions about many of the variations and promises to pay. Timwin sought to rebut these assertions.

The adjudicator went about the issue a different way. McDougall J found that he had ignored the submissions of both parties and instead found for Façade on the basis that any work done which the contractor had not demonstrated to be within the scope of the works was a variation for which payment was due. This was not an argument explored by the parties in their submissions or responses.

The issue before the court was "*whether the adjudicator, in the way that he dealt with the defence to the payment claim based on the assertion that the variations "****are amounts that should have been carried out pursuant to the contract****", attempted in good faith to exercise the powers given to him by the Act."*

4 Paul Newman's commentary on this case, where an application for summary enforcement was refused, is set out above.

5 Whilst an appeal appeared to be pending against McDougall J's judgement, there is no report of progress to date. However in the interim period, the ***Timwin*** test has been applied on a number of occasions. See ***Fifty Property Investments P/L v Barry J O'Mara*** *[2006] NSWSC 428;* ***Springs Golf Club P/L v Profile Golf P/L*** *[2006] NSWSC 344;* ***Pacific General Securities Ltd v Soliman & Sons P/L*** *[2006] NSWSC 13;* ***De Martin & Gasparini P/L v State Concrete P/L*** *[2006] NSWSC 31;* ***Tolfab v Tie*** *[2005] NSWSC 326;* ***Glen Eight v Home Building*** *[2005] NSWSC 907;* ***Reiby Street Apartments v Winterton Constructions*** *[2006] NSWSC 375;* ***Lanskey v Noxequin*** *[2005] NSWSC 963;* ***Shellbridge P/L v Rider Hunt Sydney P/L*** *[2005] NSWSC 1152;* ***Holmwood Holdings P/L v Halkat Electrical Contractors P/L*** *[2005] NSWSC 1129****; Energy Australia v Downer Construction (Australia) P.L*** *[2006] NSWSC 52.*
At an interlocutory appeal ***Facade Innovations P/L v Timwin Constructions P/L*** *[2005] NSWCA 197* the court of appeal ordered that Order 3 made by McDougall J on 1 June 2005 in proceedings 55035/05 for payment out to Timwin of money paid into court be stayed until the judgment entered in favour of Facade in 11729/05 had been set aside. Nothing in the interim judgment however detracts from the validity of the ***Timwin*** test.

In ***Brodyn v Davenport*** *[2004] Adj.L.R. 11/03* Hodgson JA having canvassed the concept of good faith within the context of ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147, concluded that the payment legislation mandated "*a bona fide attempt by the adjudicator to exercise the relevant power …* " accorded to him by that legislation. He concluded that where an adjudicator does not fulfill the statutory requirements the decision will be deemed invalid. Whilst ***Brodyn*** established that judicial review is not the appropriate mechanism for challenging payment adjudication procedures in New South Wales it nonetheless made it clear that there are mechanisms to set aside an invalid decision and render it unenforceable. The following extract from McDougall's judgment in ***Timwin*** develops the concept of good faith further :-

38 *There has not been any decision to my knowledge elaborating the requirement of good faith to which Hodgson JA pointed in* ***Brodyn.*** *Clearly, I think, his Honour was not referring to dishonesty or its opposite. I think he was suggesting that, as is well understood in the administrative law context, there must be an effort to understand and deal with the issues in the discharge of the statutory function: see, for example, the speech of Lord Sumner in* ***Roberts v Hopwood*** *[1925] AC 578, 603, where his Lordship said that a requirement to act in good faith must mean that the board "are putting their minds to the comprehension and their wills to the discharge of their duty to the public, whose money and locality which they administer."*

39 *That construction of the requirement of good faith is supported by the provisions of s 22(2), requiring an adjudicator to "consider" certain matters. A requirement to consider, or take into consideration, is equivalent to a requirement to have regard to something: see* ***Zhang v Canterbury City Council*** *(2001) 51 NSWLR 589 at 602 (Spigelman CJ, with whom Meagher and Beazley JJA agreed).*

40 *As his Honour emphasised, the requirement to "have regard to" something requires the giving of weight to the specified considerations as a fundamental element in the determination, or to take them into account as the focal points by reference to which the relevant decision is to be made. His Honour relied on the tests expounded in* ***The Queen v Hunt; ex parte Sean Investments Proprietary Limited*** *(1979) 180 CLR 322 (Mason J) and in* ***Evans v Marmont*** *(1997) 42 NSWLR 70, 79-80 (Gleeson CJ and McLelland CJ in Eq).*

41 *In the present case, I think that an available, and better, inference is that the adjudicator did not consider, in the sense that I have just explained, the submissions for the parties in which the ambit of the dispute that was intended to be raised in relation to variations was explained. Had he turned his mind to those submissions, he would have known what it was the parties understood the dispute to be; what it was that they were arguing. Because he did not, as it appears, turn his mind to those submissions, he did not deal with the real dispute.*

42 *It is of course apparent that the adjudicator turned his mind to the submissions for Timwin. However, did he so in the context of dismissing them (on this issue) because of s 20(2B). Had he read, and given consideration to, the submissions for Façade, he could not reasonably have done this. That, to my mind, supports rather than denies the drawing of the inference that the adjudicator did not have regard to, or consider, the relevant submissions.*

43 *I therefore conclude that the adjudicator did not attempt in good faith to exercise the power given to him by the Act because he did not attempt in good faith to consider the submissions put by the parties to understand what, in relation to variations, the real dispute was.*

His Honour continued

49 *I am conscious that the question of (in effect) attempting in good faith to exercise the power given by the Act has not been the subject of prior judicial exposition. However, the relevant question is one that was argued for the direct benefit of Façade and not merely as a service to the industry. In those circumstances, I see no reason why the usual order for costs should not be made.*

50 *Façade also asked that I make an order referring the matter back to the adjudicator to be dealt with according to law. I do not propose to do so, in circumstances where the time for the making of a determination has long since expired and where Façade's rights are preserved under s 26 of the Act. In that context, and unless it is not crystal clear, I should say that the view to which I have come has nothing to do with the merits of the case, and does not prevent the present or any other adjudicator from determining a further adjudication application, based on the same payment claim, according to law.*

Whilst it is to be noted that ***Timwin*** does not and could not have dealt with the liability of the adjudicator for costs thrown away, what it does do is to throw some light upon what "***good faith***" involves. The implication is that it is not restricted to "***bad faith***" but embraces a failure to fulfill or comply with the statutory duties that one has voluntarily undertaken by accepting a public or private appointment. Australia has taken the lead on

the development of jurisprudence in relation to good faith generally. Thus ***Zhang v Canterbury City Council***, noted in ***Brodyn*** above, concerned the duties of a planning tribunal which pursued its own policy agenda against prostitution, un-related to the criteria for planning permission. Where as "***misconduct***" by an arbitrator provides grounds for setting an award aside and for the removal of an arbitrator, the court both at first instance and on appeal in ***Sea Containers v ICT*** *[2002] NSWSC 77; NSWCA 84* went one step further and adopted a robust view to the misconduct of arbitrators who were more concerned with securing their fees than the business at hand and deprived them of the very fees they had been so anxious to ring-fence. Even so the arbitrators escaped any further liability for the legal costs incurred by the parties.

Traditionally the status of good faith agreements has been considered to be extra-legal, equating such commitments as promises to do something ***in good faith,*** the absence of which has no legal repercussions, since there is no intention to be legally bound by the promise. There is however a leap of logic in such a conclusion. Whilst it would be contradiction in terms to force parties to agree and thus comply with an agreement to agree, as per ***May v Butcher*** [*1929] ADR.L.R. 02/22* and ***Walford v Miles*** *[1992] 2 AC 128,* it does not follow that the parties intended the undertaking to be optional. After all, it is possible to measure the extent to which the parties have or have complied with the undertaking. This has been acknowledged already to the limited extent that the courts are prepared to stay court action pending participation in settlement negotiations, whether the parties have contractually committed themselves to do so, or indeed where the court considers that it would be beneficial for the parties to do so. It is not uncommon in US jurisdictions for the court to require a mediator to submit a report to the court, detailing the extent of participation in the mediation process of both parties, recording both attendance and the level of co-operation, noting any refusal to put forward a case or to otherwise actively engage in the process. Such conduct, it is submitted, amounts to a failure to do that which one has undertaken to do and would fit within the ***Timwin*** definition of an absence of "***good faith***".

Immunity is important to guard against behaviour that might prejudice the ability of an adjudicator to act impartially. Nonetheless, Parliament has made it clear by inclusion of the absence of "***good faith***" exceptions that there is no intention to extend the blanket immunity enjoyed by the judiciary to arbitration or construction adjudication. Despite stout resistance from the professions, long standing immunities based on public policy are gradually being stripped away. The mere objection that it is difficult to strike the right balance between competing public and private interests is no longer sufficient justification for not providing a remedy for the consequences of professional incompetence, as demonstrated by ***Arthur J.S Hall and Co. v Simons*** *[2000] UKHL 38,* so that today even lawyers can be held liable for incompetence in the presentation of a case.

The accountability (if any) of an arbitrator to a professional governing body for misconduct is small comfort to those who have costs thrown away by incompetence. To place the risk of professional incompetence on the parties to carefully choose who they appoint is not realistic, since they have little scope to assess the risk beyond relying on the reputation of the professional body, which also enjoys immunity. Clearly, it would be unsatisfactory to expose an arbitrator to legal suit at the whim of any and every unsuccessful party. If such litigation were to amount to a retrial, that would be tantamount to by-passing the appeal process and afford the litigant another bite of the cherry. That cannot be the way forward. The Supreme Court, Ontario, Canada held in ***Ryman v Ontario Association of Architects*** *[1998]* that professional indemnity cover extended to liability for losses arising from the incompetence of an arbitrator. It is only through an action for professional incompetence that the parties can avail themselves of the protection provided by professional indemnity cover. It is almost inevitable that the courts will in due course have to develop a jurisprudence of accountability for arbitrators, adjudicators and mediators. Perhaps ***Timwin*** points the way.

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