ADR NEWS

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

EDITORIAL :

Over the years NADR has made steady progress, establishing itself as a premier provider of law reports and case commentary on the ever evolving field of ADR practice, with the objective of ensuring that our members can keep up to date, with minimum effort. I am please to be able to advise members that the NADR Adjudication Law Reports have for the first time been cited in the High Court, by His Honour Judge Peter Coulson QC, in the case of ***A.R.T. Consultancy Ltd v Navera Trading Ltd,*** 31st May 2007. Mr Corbett Spurin should be congratulated on the amount of unsung work that he has put into the development of the organisation and providing the Adjudication Law Reports which are at the forefront of legal knowledge. It is entirely up to members how they use the resources at their disposal, but if it is good enough for the High Court then it is good enough for you! So please, visit the website on a regular basis as you will always find something new which can be of benefit to you.

The buzz phrases in the construction industry today are *"sustainable development"* and *"zero carbon rating"* all in the name of saving the planet, satisfying the latest political preoccupations and reacting to a torrent of environmental legislation. Change, as ever, will ultimately lead to disputes and yet more grist for the ADR mill. The question that as yet remains unanswered pertains to *"Who will bear the legal responsibility for ensuring compliance with the new environmental regime and hence bear the risks inherent in non-compliance ?"* When the time comes for weighing such matters, it is to be hoped that someone will have actually worked out exactly what amounts to *"sustainable development"* and provided us all with a workable carbon rating test that takes into account the production process, durability and operational carbon costs. In the absence of workable criteria, adjudication will not be possible.

Mediation has received a timely boost from the insurance industry which is putting its weight behind proposals to use it more extensively for the settlement of personal injuries claims.

It would appear that the timetable for legislative changes to the Housing Grants Construction and Regeneration Act 1996 adjudication regime has suffered from slippage. However, on the 20th June the DTI published its second consultation on proposals to revise the HGCRA. Interestingly, whilst it had initially been anticipated that reform would be by way of statutory instrument, the current proposal is to introduce amending primary legislation, which is of course subject to the government finding sufficient time in its legislative program. The result is that it is unlikely that legislation will now be introduced before 2008, since undoubtedly the incoming Prime Minister will have many other priorities on his mind as he tries to stamp his own mark and re-brand the government. Readers are encouraged to participate in the consultation process, since this is likely to be the last opportunity for quite some time to influence the shape of construction dispute resolution for the foreseeable future.

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Finally, and on a different note, summer holidays are approaching fast. It is the time of year when plans can be made and brought to fruition. It is a period when training schedules, in-house development and newly qualified solicitors and barristers embark on their professional careers. This is where NADR services can be of benefit. There are a range of packages covering many aspects of legal practice as well as alternate dispute resolution which are available and can be tailored to your individual needs so take advantage of your organisation as we cannot grow without your support, but you can benefit from membership by taking advantage of what we have to offer you.

NADR will shortly be launching a new look for the web-site, which will include a book shop and a web site search engine. We are going into collaboration with the Construction Study Centre to provide mediation training to the construction industry. Details of programs and how to book a place on these programs will soon be available on the site.

Enjoy your summer holidays, but do remember we are here to help you develop your practice. We will still be here when the warm balmy days of summer are a past memory and as the wet grey days of autumn descend upon us. When you need training, practice development etc. do not forget your organisation is here to help you.

Bon voyage and safe return.

G.R.Thomas : Editor

Improving payment practices in the construction industry.

2nd Consultation on proposals to amend Part II of the Housing Grants Construction & Regeneration Act 1996

The executive summary states :-

"Proposals

We believe prompt and fair payment practice throughout construction supply chains will better enable the industry to adopt integrated working as the norm.

We are proposing to:

- *improve transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow;*
- *encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation; and*
- *improve the right to suspend performance under the contract.*

We are proposing to do this by:

On adjudication

- *improving access to the right to refer disputes for adjudication by:*
  - *applying the legislation to oral and partly oral contracts*
  - *preventing the use of agreements that interim payment decisions will be conclusive to avoid adjudication on interim payment disputes*
- *ensuring the costs involved in the process are fairly allocated*

On payment

- *preventing unnecessary duplication of payment notices*
  - *clarifying the requirement to serve a s110(2) payment notice*
  - *clarifying the content of payment and withholding notices*
  - *ensuring the payment framework creates a clear interim entitlement to payment*
- *prohibiting the use of pay-when-certified clauses*

On suspension

- *improving the statutory right to suspend performance by allowing the suspending party to claim the costs and delay that result.*

This is not wholesale reform. These proposals are intended to be proportionate amendments to the existing framework to address specific issues that have arisen during the nine years the Construction Act has been in operation. Guidance remains the preferred route to improve the operation of construction contracts and we have only considered further legislative intervention where we believe it is absolutely necessary.

We are now seeking the views of the construction industry and its clients, through this consultation process, on:

- *whether this package of proposals properly and adequately addresses the weaknesses in the existing framework; and*
- *how we might evaluate the costs and benefits of the package."*

Annex D contains response pro-forma.

Jurisdiction and written contracts.

It was always a mystery why HGCRA adjudication was restricted to written contracts. S107 resulted in a flurry of litigation as to what amounted to a written contract. It is proposed to open up adjudication to contracts that are oral or partly written.

Prohibiting the use of conclusive interim/stage payment decisions clauses.

This will open all certification to adjudication, removing contractual bars to the process. Parties will still be able to agree that a decision, once issued, is final and conclusive.

Bridgeways v Tolent Clauses.

The proposal is to bring adjudication in line with arbitration, in that contractual provisions allocating the cost of adjudication on one party or on a referrer, that act as a disincentive to adjudication will no longer work. Parties could however agree a cost regime after a dispute has crystallised.

Preventing duplication of payment notices

S110(2) will be amended to allow a notice or certificate from a third party to act as s110(2) payment notice.

Clarification of the requirement that a s110(2) payment notice should be served

The revision team concluded that the continuing obligation to issue a payment notice where no payment is due because of abatement or set-off under the contract in issue is not clearly expressed at the present time. The proposal therefore is that a payment notice will be required where a payment would have been due if:

- the party performing work under the contract had carried out his obligations under the contract;
- no set-off was permitted by reference to any sum claimed under the contract or one or more other contracts; and,
- no abatement was permitted in respect of the work.

Clarity of the content of payment & withholding notices

The proposal is that the payer will have to set out in the payment notice the amount (if any) that he has paid or proposes to pay. Where different from the amount that would have been paid had and:

- the payee carried out his obligations under the contract;
- no set-off was permitted by reference to any sum claimed under the contract or one or more other contracts; and,
- no abatement was permitted in respect of the work,

the payer will have to set out the grounds for paying less. All grounds will have to be set out and the amount attributable.

All withholding notices will be required to be in the same format as a s110(2). The withholding notice will become a revision of the payment notice. Once the *'prescribed period'* under s111(3) has passed, no further revision of the notice would be permitted. The withholding requirement will be in respect of any amount (including both abatement and set-off).

The figure specified in a notice will become the sum due, subject to any withholding.

Prohibition of pay-when-certified clauses

This will remove another potential contractual barrier to adjudication.

Public Law / Private Law Divide Revisited

The question that arises here is ***"In what circumstances is a decision amenable to judicial review?"*** In as much ADR practitioners are in the decision making business, it is a question pertinent not only to the judiciary, statutory tribunals and public officials, but also to all arbitrators, adjudicators, conciliators and expert decision makers.

The issue is one of both procedural and substantive significance. There is a unique and mutually exclusive procedure under the Civil Procedure Rules, complete with protocols and practice directions for the submission of applications for judicial review to the Administrative Court within the Queen's Bench Division of the High Court. The remedies available by way of judicial review are distinct and separate from those available in the civil courts.

Depending upon the circumstances of the case the remedies available, and grounds required to establish such availability, may lean towards the civil law or public law as being potentially more attractive to the litigant, which leads on times to a party pursuing the wrong cause of action which is then struck out as an abuse of process. [1]

One might have thought that it would be a straight forward matter to determine whether or not judicial review applies to any given case, but that has not always proved to be so, resulting in complex argumentation in a number of now famous cases, as to which was the appropriate forum and process.

How and why that might be the case stems from the way that the relevant legal principles of natural justice and due process have evolved over the centuries. Neither of these concepts is rooted in any concept of public law, though at least from the modern lawyers perspective this might appear to be the case since Constitutional and/or Administrative Law is/are the primary vehicle(s) used to address the topic in law schools. Natural justice occupies a central role in Public Law, but is not exclusive to it. Whilst process is central to all legal practice courses, by that time the nexus between Public Law and due process is firmly fixed in the minds of many students and the appropriateness of using such a pigeon hole or label is unlikely to be questioned thereafter.

The notion of Public Law is a relatively modern innovation in the UK, dating back just a short period of time to the landmark case of ***Ridge v Baldwin*** [1963],[2] which is coincidentally also the seminal authority with regard to natural justice, the significance of which has been enhanced by the fair trial requirements of The Human Rights Act 1998.

At the opposite ends of the spectrum there is little difficulty identifying what is a public body subject to public law principles and what is a private body subject to the ordinary civil law of the land. It is in the middle ground that difficulties arise, where a body is a quasi-public body, or a private body performing public functions, or conversely a public body engaging in private enterprise. The key distinguishing factor regarding which process applies, viz public or private law, is whether or not the power being exercised arises out of statute. In ***Davy v Spelthorne*** Lord Fraser stated *"Before the expression "public law" can be used to deny a subject a right of action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules."* Where that is the case, the question therefore to put to the Administrative Court will be whether or not the public authority has acted ***"Ultra Vires"*** that is to say that it has exceeded its statutory powers.

Caution however is recommended when applying this test. Powers and duties can be implied into private relationships including contracts, by the law. In some cases the distinction is obvious, as with the implied terms arising out of the Sale of Goods Act. The way that the adjudication process introduced by the Housing Grants Construction and Regeneration Act 1996 operates is perhaps less obvious.

The scope for judicial review under Scots Law was explored in and following the decision of Lord Reid in ***Ballast v Burell*** [2001][3] where he stated that *"Like Dyson J I have approached the issues raised by adjudication within a contractual framework, for the reasons I have explained. One difference between Scots and English law (in procedure at least), however, is (as I have already mentioned) that judicial review is not confined under Scots law to issues of public law, but extends to powers conferred by a contract upon a third party to determine the rights of the parties to the contract inter se. In particular, judicial review under Scots law extends to arbitration and is not uncommon in the context of arbitration under building and engineering contracts. This is a factor which appears to me to be potentially relevant, as those responsible for the Scottish Scheme [of adjudication] can be taken to have been aware both of the possibility, under Scots law, of a relatively rapid determination of questions as to the compatibility of a decision with what might be described as* ***Wednesbury*** *standards; and they can also be taken to have been aware of the role played by judicial review under existing Scots law and practice in relation to construction contracts."*

Whilst the Act gives every party to a relevant construction contract the right to refer a dispute arising out of that contract to adjudication, the mechanism adopted requires the parties to incorporate such terms into their contract. If they fail to do so, the statute then incorporates the Scheme into the contract. The key factor however is that the process is governed by the express or statutorily implied terms of the contract. It is not a statutory power and thus not amenable to judicial review, even though the source of that power was statutory.[4] This remains the case even when the private body exercising that power enjoys a monopoly, so that the concerned individual exercises no genuine degree of freedom of choice over the matter.[5]

1 ***O'Reilly v Mackman [1983] UKHL 1; Davy v Spelthorne BC [1983] UKHL 3.***

2 ***Ridge v Baldwin (No 1) [1963] UKHL 2***

3 ***Ballast Plc v The Burrell Company Ltd [2001] ScotCS 159,*** but see ***Gillies Ramsay*** below, where the scope of Scottish review under the HGCRA was limited by the court to jurisdictional issues alone.

4 ***Diamond (Gillies Ramsay) v. PJW Enterprises Ltd [2003] ScotCS 343.*** Compare and contrast the way that adjudication operates in New South Wales, Queensland and Victoria, Australia. NSW mirrors the UK, ***Brodyn P/L v Philip Davenport [2004] NSWCA 394.*** In Queensland however, Judicial Review applies because the provisions are enacted differently. ***State of Queensland v Epoca Constructions P/L & Phillip Davenport [2006] QSC 324***

5 ***Law v National Greyhound Racing Club [1983] EWCA Civ 6; R v Disciplinary Committee of the Jockey Club, ex p. The Aga Khan [1992] EWCA Civ 7 .***

This does not mean however that the process escapes judicial attention. It does not. However, the relevant court to be seized of the matter is the ordinary civil court, not the administrative court. The procedures that govern the decision making process depend upon the terms of the contract and the powers of the decision maker are those given to the decision maker by the parties, expressly or by implication of law, particularly statute. Thus the powers and duties of an arbitrator under English Law are prescribed by the Arbitration Act 1996, as are the powers and duties of the court with respect to the arbitral process, which effectively encompass all that might be available in a public law action by way of judicial review.[6]

Adjudication is different in that reasons are not required unless requested and errors of fact and law are not reviewable with the exception of jurisdiction. Provided the adjudicator answers the right question, even if he gets it wrong, that decision is immediately enforceable, pending final resolution of the dispute by litigation or arbitration.[7] Thus there is no review of errors of law whether on the face of the record or otherwise and no review of whether or not the adjudicator could have reasonably reached a decision by applying ***Wednesbury*** principles.[8]

Nonetheless, the principles of natural justice are alive and well under the common law and impact upon the common law decision making process. As Lord Dyson stated in ***Amec v Whitefriars*** [2004],[9] *"The common law rules of natural justice or procedural fairness are two-fold.* ***First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal.*** *These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the leading party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable ..."*

With regard to the adjudication process, the opportunity to raise a challenge on the basis of breach of the rules of natural justice arises during enforcement proceedings. A party can submit the decision making process to a review by a judge, though the process should not be termed "*judicial review*" since the procedures that apply are distinct. The terminology is different in that the decision of the adjudicator is set aside as opposed to being quashed (modern speak for certiorari). The outcome is similar, in that in the absence of a determination of the dispute, the parties are free to resubmit the dispute to a fresh adjudication, or to pursue alternative means to settle the dispute, either before the court or via arbitration where applicable.

Various ADR processes have been re-examined in the light of Article VI Human Rights Act 1998, in relation to natural justice and the concept of a fair trial. The central issue here relates to what, in the circumstances of the case, amounts to a fair or reasonable opportunity to put one's case and expose the assertions of the other party to scrutiny. As far as adjudication is concerned the critical factor appears to be that scrutiny is available during the enforcement process. [10] The scope and extent of a hearing may be limited by the needs for a quick decision and proportionate to the issues at stake. Thus the rough and ready nature of both the construction adjudication process[11] and the disciplinary procedures operated by the Football Association have respectively been approved by the courts.[12]

European Community Law prevents rough and ready fast track procedures being imposed upon consumers,[13] but it is possible for the consumer to waive the right to a judicial process after the event. The benefits of a rapid procedure are attractive to consumers particularly where this leads to a low cost resolution process and this explains why domestic occupiers outside the scope of the HGCRA often submit to adjudication.[14]

Insolvency law impacts upon the jurisdiction of both courts and adjudicators, ensuring that the statutory procedures are not bypassed by claimants and thus is not directly relevant here.[15] The court however have in addition been prepared to refuse enforcement in situations where a challenge to an adjudication decision has been mounted or is imminent and there is a real danger that funds paid out in compliance with the decision might be dissipated,[16] though where a party contracted in the knowledge that the other party was not financially secure, this will not be the case since the court deems that this was an accepted risk in the first place.[17]

The CA made it clear in ***Carillion v Devonport*** [2005],[18] that whilst it is open to the court to refuse enforcement in appropriate circumstances, the courts will not nit-pick or closely scrutinize the adjudication process for minor defects in procedure. The interests of the industry and Parliament was to establish a fast, cost effective process. It is submitted however that the conclusion of Moses LJ in ***Lead v CMS*** [2007],[19] that "*... an adjudicator* ***cannot act*** *where there is a real prospect based on cogent grounds of establishing that the adjudicator had acted without jurisdiction ...*" is not very helpful. It appears that where jurisdiction is uncertain, enforcement may be denied. What other exceptions exist that we do not yet know about?

6 See sections 66-69 Arbitration Act 1996 for the powers of the court to "**review**" the arbitral process.

7 ***Bouygues UK Ltd v Dahl-Jenson UK Ltd [1999] EWHC TCC 182; [2000] BLR 522 CA.***

8 ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1***

9 ***Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418 at para 14.***

10 ***Austin Hall Building Ltd v Buckland Securities Ltd [2001] EWHC TCC 434; Karl Construction Ltd v Palisade Properties Plc [2002] ScotCS 350***

11 ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358*** per Lord Chadwick at para 80 : "*The need to have the "right" answer has been subordinated to the need to have an answer quickly.*"

12 ***Stretford v Football Association Ltd [2007] EWCA Civ 238 :*** see also fn5 supra.

13 UTCCR 1999

14 ***Allen Wilson Shopfitters v Buckingham [2005] EWHC 1165 (TCC) : Westminster Building Co Ltd. v Beckingham [2004] EWHC 138 : Lovell Projects Ltd v Legg & Carver [2003]BLR 452: Bryen & Langley v Boston [2004] EWHC 2450.***

15 ***Rainford House (in Receivership) v Cadogan [2001] HT 01/014 :***

16 ***Herschel Engineering Ltd v Breen Properties Ltd [2000] BLR 272***

17 ***Wimbledon Construction Co 2000 Ltd. v Vago [2005] EWHC 1086***

18 see fn 10 supra.

19 ***Lead Technical Services Ltd v CMS Medical Ltd [2007] EWCA Civ 316***

PART II : TRIBUNALS AND THE REASONED DECISIONS[20]

The scope and exercise of public law "duties and powers" and Judicial Review.

Public authorities regulate a wide range of activities deemed to impact upon the interests of the public and provide public services and amenities. The power *("vires")* of public authorities derives from statute which will be accorded in order to achieve specific objectives, pursuing alternative objectives being beyond the authority's power. The statute may in addition establish criteria for the exercise of that power. The criteria may include the existence of factual situations or set out factors that the decision maker may or must take into account when making a decision. The non-existence of such facts or a failure to take factors into account may result in the action being deemed beyond the authority's power and thus unlawful. Accordingly the decisions of public authorities are amenable to review to ensure that the authority has acted within its ***"vires"***. Regulation embraces the establishment of and monitoring of compliance with conditions for the engagement in specified activities, which often involve placing limits on the scope and extent of activities, to create and maintain a balanced community. The courts have jurisdiction to ensure that the authority operates within its own regulations, but review does not extend to the formulation of the regulations.

The judicial overview of the exercise of discretion by public authorities is a thorny and complex area of Public Law. Discretionary powers are legion within the public service arena. Thus for example, licensing decisions are frequently discretionary. Discretion also attaches to most activities involving public expenditure. Public authorities have finite resources and often exercise a wide degree of discretion over the allocation of such resources. The key to the judicial overview of the exercise of discretion is the concept of ***reasonableness,*** epitomised by the ***Wednesbury Rules***. For the reviewer the question is not "*Would I have decided the same way?*" but rather "*Could a reasonable person with the duty to make that decision have reached that decision in the light of the known facts and the relevant criteria?*"

The Legal Framework for Judicial Review

Judicial Review procedures are now governed by Part 54 Civil Procedure Rules, accompanied by Practice Direction 54 (supported by Notes by the Administrative Court) and a Pre-Action Protocol.

Guidance as to the criteria for applying for judicial review are provided by the Pre-Action Protocol

1 Judicial review allows people with a sufficient interest in a decision or action by a public body to ask a judge to review the lawfulness of:

- *an enactment; or*
- *a decision, action or failure to act in relation to the exercise of a public function .(2)*

2 Judicial review may be used where there is no right of appeal or where all avenues of appeal have been exhausted.

3 Where alternative procedures have not been used the judge may refuse to hear the judicial review case. However, his or her decision will depend upon the circumstances of the case and the nature of the alternative remedy. Where an alternative remedy does exist a claimant should give careful consideration as to whether it is appropriate to his or her problem before making a claim for judicial review.

This guidance is not exhaustive or definitive. It should be noted that in addition the court will need to be satisfied that the applicant has an arguable / winnable case and that there is an overriding public interest in providing a review in the circumstances of the case. A number of pertinent provisions within Part 54 CPR are set out below :-

Permission required : Part 54 CPR 1998

54.4 The court's permission to proceed is required in a claim for judicial review whether started under this Part or transferred to the Administrative Court.

Note that judicial review of the actions of public authorities is not available as of right. Whilst therefore it is only available at the discretion of the court, that discretion is prescribed by the criteria briefly described in the pre-action protocol above.

Permission decision without a hearing : Part 54 CPR 1998

54.12(1) This rule applies where the court, without a hearing (see 54.18 – hearings are at the court's discretion)

(a) refuses permission to proceed; or

(b) gives permission to proceed() subject to conditions; or (ii) on certain grounds only.

(2) The court will serve its reasons for making the decision when it serves the order giving or refusing permission in accordance with rule 54.11.

(3) The claimant may not appeal but may request the decision to be reconsidered at a hearing.

Reasons for the granting or refusal of permission must be provided if there is no hearing. As discussed in Part I of this article, there is now an expectation that at the end of a hearing the court will provide a reasoned decision.

[20] Continued from ADR NEWS Volume 6 Issue No 4 January 2007.

Public officials and reasoned decisions.

Given the enormous range of activities that the modern public authority is engaged in, the number of decisions made by such bodies on a daily basis is incalculable. They will range from the minor, mundane, frequent but highly personal decision affecting a single individual to the one off major strategic decision that affects an entire community. The time taken for and the resources accorded to decisions is accordingly infinitely variable. The decisions may be made by individuals as a matter of routine or be the subject of in-depth analysis and debate by a committee or other body. The application that triggers a decision may be the result of a direct oral request or the submission of basic to complex documentation, with or without further evidence. It may even involve hearings.

Statute will prescribe the extent, if any at all, that reasons are required to be supplied to applicants for the decisions. To the extent that reasons are required, a failure to provide said reasons may render the decision unlawful and unenforceable. Even in the absence of a duty to provide reasons, the decision may yet be amenable to review to determine vires. It may well therefore be in the interests of the decision maker to provide reasons as a means of demonstrating fulfilment of the prescriptions of the enabling statute, though this may not be necessary particularly where compliance is apparent or self evident.

To the extent that a decision involves the exercise of discretion, assuming the existence of evidence that would justify a reasonable decision maker reaching a particular decision, the decision becomes unimpeachable. The supervisory role of the court in judicial review proceedings has up till now [21] precluded the substitution of alternative outcomes. The court does not exercise appeal jurisdiction. It sole function is to guarantee that specified procedures are adhered to and to ensure that the authority has acted within its powers. Whether or not certain facts existed, whilst key to the exercise of a power, is to a large extent an evaluation placed in the hands of the decision maker. The courts will be slow to interfere with that process. This is clearly established and demonstrated by the case of ***William v L.B. Wandsworth,***[22] which concerned an application for accommodation. The council had to determine whether or not the applicant had intentionally made himself homeless and thus disqualified himself from entitlement to accommodation. The following extracts from Lord Justice Chadwick's judgment are illuminating.

*16. ….. , the authority is required to give reasons for the decision …. The essential requirements, in a homelessness case, were summarised by Lord Justice Parker in **City of Gloucester v Miles** (1985).[23] The review decision "must state: (a) that the authority is satisfied that the applicant for accommodation **became** homeless intentionally; (b) when he or she is considered to have become homeless; (c) why he or she is said to have become homeless at that time, i.e. what is the deliberate act or omission in consequence of which it is concluded that **at that time** he or she ceased to occupy accommodation which was available for his or her occupation; and (d) that it would have been reasonable for him or her to continue to occupy it".*

*17. It is the third of those requirements which is likely to give rise to difficulty in practice: what is the deliberate act or omission in consequence of which the authority has concluded that the applicant ceased to occupy accommodation which was available for his accommodation? As Mr Justice Dyson pointed out in **R v Hackney LBC, ex parte Ajayi** (1997):[24] "Questions of causation are notoriously difficult and, in my judgment, the Court should be slow to intervene to strike down the decisions of administrative bodies on such questions and should only do so in clear cases. I cannot accept that the effective cause should always be regarded in these cases as the chronologically immediate or proximate cause. In some cases, the cause closest in point of time will be regarded as the effective cause. . . . In others, the closest in time will not be so regarded".*

18.** It is trite law, as Lord Justice Schiemann observed in **R v Brent LBC, ex parte Baruwa** (1997),[25] that, where an authority is required to give reasons for its decision, it is required to give reasons which are proper, adequate, and intelligible and enable the person affected to know why they have won or lost. But he went on to say this (ibid): **"That said, the law gives decision makers a certain latitude in how they express themselves and will recognise that not all those taking decisions find it easy in the time available to express themselves with judicial exactitude."

*There are observations to the same effect in the judgment of Sir Thomas Bingham, Master of the Rolls, in **R v LBC Croydon, ex parte Graham** (1994):[26] "[Counsel] . . . has reminded the court that these are questions for the housing authority and not the court. It is their judgment and not the court's that matters. He has further urged that one should not read a letter of this kind as a statute or even a planning inspector's decision letter and that one should not go through it with a tooth-comb in order to find fault. Nor, indeed, should one deny a reasonably liberal interpretation or elaboration of what lies behind it. I readily accept that these difficult decisions are decisions for the housing authority and certainly a pedantic exegesis of letters of this kind would be inappropriate. There is nonetheless, an obligation under the Act to give reasons and that must impose on the council a duty to give reasons which are intelligible and which convey to the applicant the reasons why the application has been rejected in such a way that if they disclose an error of reasoning the applicant may take such steps as may be indicated."*

*19. In **R v Hillingdon LBCl, ex parte Puhlhofer** [1986],[27] Lord Brightman expressed the hope that there would be a lessening in the number of challenges mounted against local authorities endeavouring, **"in extremely difficult circumstances",** to*

21 But see the proposals within the Tribunal's Bill 2007
22 ***William v London Borough of Wandsworth*** [2006] EWCA Civ 535
23 ***City of Gloucester v Miles*** *(1985) 17 HLR 292, 302.*
24 ***R v Hackney London Borough Council, ex parte Ajayi*** *(1997) 30 HLR 473, 479:*
25 *in* ***R v Brent London Borough Council, ex parte Baruwa*** *(1997) 29 HLR 915, 929,*
26 ***R v London Borough of Croydon, ex parte Graham*** *(1994) 26 HLR 286, 291-292:*
27 ***R v Hillingdon London Borough Council, ex parte Puhlhofer*** *[1986] 1 AC 484, 518F*

*perform their duties under the homelessness legislation "**with due regard for all their other housing problems**". He said this (ibid, 518B-E) ". . . I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the [Housing (Homeless Persons) Act 1977]. Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power – e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the **Wednesbury** sense – unreasonableness verging on absurdity: see the speech of Lord Scarman in **R v SS Environment, Ex parte Nottinghamshire CC** [1986].[28] Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."*

*The final sentence of that passage was adopted by this Court in **R v R.B. Kensington & Chelsea, ex parte Bayani** (1990),[29] and in the **Baruwa** case to which I have already referred.[30]*

20. *In **Nacion** [31] Lord Woolf, Master of the Rolls, indicated that he … had "**reservations . . . as to how far those comments . . . were of general application"**. He had in mind, I think, that all justiciable grounds of intervention are available on an appeal under section 204 of the Act - as Lord Bingham was to emphasise in **Runa Begum**.[32] Lord Brightman's comments in **Puhlhofer** must be read in the context in which they were made: that is to say, **"Where the existence or non-existence of a fact . . . involves a broad spectrum ranging from the obvious to the debatable to the just conceivable".** But there is, I think, nothing to suggest that, in distinguishing between the fact finding role which Parliament has entrusted to the local authority under Part VII of the 1996 Act and the role entrusted to the court under section 204 of that Act, those comments do not remain apposite. They were treated as authoritative in that context by this Court in **Cramp v Hastings BC** [2005].[33] Where what is alleged is a misconstruction of ascertained facts, **'obvious perversity'** is required before the court can properly interfere with the authority's findings of fact. The court must respect the role which has been entrusted to the authority by the provisions in Part VII of the Act."*

The above demonstrates the tensions that underpin the balance of convenience between the right of the applicant to receive reasons, what is proportionate in the circumstances of the case and the need to ensure that administrators have the power to make cost effective, decisive decisions which involve determinations of fact. The standards to be applied to the decision making process should not be set at a level which defeats the primary objectives of the legislation. Whether or not a decision is amenable to review depends upon the mechanisms provided by parliament. In many situations the primary recourse of a dissatisfied applicant will be to the next level of decision making, e.g. an appeal to a tribunal followed perhaps by a further appeal to a higher body. Only when these have been exhausted will it be appropriate, if at all, to have recourse to judicial review.

The duty of a public tribunal *(including Statutory Arbitral Tribunals)* to provide reasons

To the extent that it exists, the general requirement of a public tribunal to provide reasoned decisions is of longer standing than that of other judicial and quasi judicial decision makers, though it also is nonetheless a relatively recent development.[34] Where the statute that governs the procedures of a tribunal establishes a duty to provide reasons (or mandates that no reasons be given) that is the end of the matter, though recourse to the statute will be necessary to determine the scope of the duty and in particular to determine what amounts to adequate reasons. The problem here is that the range and diversity of tribunals in England and Wales is considerable and there is little evidence of procedural standardisation.[35] Where the governing statute is silent on the format of tribunal decisions, the question that arises is whether or not there is a common law duty to provide reasons.

The law in this area is highly complex and very subject specific. Relevant statutes and case law are legion, though some standardisation has arisen by virtue of the ***Tribunals and Inquiries Act 1971*** and its successor, the ***Tribunals and Inquiries Act 1992***. The Frank's Enquiry that paved the way for the 1971 Act addressed head on widespread concerns at that time about a general absence of reasons in the decisions of tribunals. Thus under the general heading of ***Judicial control of tribunals etc,*** s10 provides :

28 ***R v Secretary of State for the Environment, Ex parte Nottinghamshire County Council*** *[1986] AC 240 247-248.*
29 ***R v Royal Borough of Kensington and Chelsea, ex parte Bayani*** *(1990) 22 HLR 406, 409, para. (3)*
30 *(1997) 29 HLR 915, 920*
31 ***R v Brighton & Hove Council, ex parte Naçion*** [1999] EWCA Civ 688
32 ***Runa Begum v Tower Hamlets London Borough Council*** [2003] UKHL 5,
33 ***Cramp v Hastings Borough Council, Phillips v Camden London Borough Council*** *[2005] EWCA Civ 1005, [12], [2005] HLR 48*
34 For the history of this topic see "***The Role of Evidence in Public Law".*** C.H.Spurin. 1987.
35 It should be noted however that the number of tribunals in England and Wales is likely to shrink radically in light of the proposals within the ***Tribunals, Courts and Enforcement Bill 2007,*** whereby the business of tribunals may by Statutory Instrument be transferred at the behest of the relevant minister to the first tier of the proposed tribunal system. Furthermore, the second tier of the proposed system will fulfil appeal and review functions. In due course an evaluation of the duty of the new tribunals to provide considered judgements might be needed to supplement this article, but to attempt to do so now before the legislation is finalised would be premature.

***Reasons to be given for decisions of tribunals and Ministers.* T & I Act 1971**

10(1) Subject to the provisions of this section and of section 14, where—

(b) any tribunal specified in Schedule 1 gives any decision,[1] or

(b) any Minister notifies any decision taken by him—

(b) after a statutory inquiry has been held by him or on his behalf, or

(ii) in a case in which a person concerned could (whether by objecting or otherwise) have required a statutory inquiry to be so held,

it shall be the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons.

10(2) The statement referred to in subsection (1) may be refused, or the specification of the reasons restricted, on grounds of national security.

10(3) A tribunal or Minister may refuse to furnish a statement under subsection (1) to a person not primarily concerned with the decision if of the opinion that to furnish it would be contrary to the interests of any person primarily concerned.

10(4) Subsection (1) does not apply to any decision taken by a Minister after the holding by him or on his behalf of an inquiry or hearing which is a statutory inquiry by virtue only of an order made under section 16(2) unless the order contains a direction that this section is to apply in relation to any inquiry or hearing to which the order applies.

10(5) Subsection (1) does not apply—

(b) to decisions in respect of which any statutory provision has effect, apart from this section, as to the giving of reasons,

(b) to decisions of a Minister in connection with the preparation, making, approval, confirmation, or concurrence in regulations, rules or byelaws, or orders or schemes of a legislative and not executive character, or

(c) to decisions of the Occupational Pensions Board referred to in paragraph 35(d) of Schedule 1.

10(6) Any statement of the reasons for a decision referred to in paragraph (a) or (b) of subsection (1), whether given in pursuance of that subsection or of any other statutory provision, shall be taken to form part of the decision and accordingly to be incorporated in the record.

10(7) If, after consultation with the Council, it appears to the Lord Chancellor and the Lord Advocate that it is expedient that—

(b) decisions of any particular tribunal or any description of such decisions, or

(b) any description of decisions of a Minister,

should be excluded from the operation of subsection (1) on the ground that the subject-matter of such decisions, or the circumstances in which they are made, make the giving of reasons unnecessary or impracticable, the Lord Chancellor and the Lord Advocate may by order direct that subsection (1) shall not apply to such decisions.

10(8) Where an order relating to any decisions has been made under subsection (7), the Lord Chancellor and the Lord Advocate may, by a subsequent order made after consultation with the Council, revoke or vary the earlier order so that subsection (1) applies to any of those decisions.

Whilst the Tribunals and Inquiries Act impacts upon the conduct of most of the headline tribunals it does not affect the large bulk of specialist tribunals. Nor does the Act go far in harmonising the practices and procedures of any tribunals including those listed, which continue to be highly varied and present the public with a baffling array of diverse rules and regulations in respect of submissions procedures, conduct of the tribunal, rights of audience for representatives and costs. The resultant confusion hits the headlines from time to time, with adverse comments both in the press and from the judiciary. Currently the modus operandi of immigration tribunals has come under the spotlight, in particular because proceedings are held in camera. The prospect that such proceedings are not in accordance with Art VI Human Rights Act has been raised.

In addition to section 10, the scope for judicial review in respect of prior legislation is ensured by section 12. However, this does not prevent parliament from derogating from this requirement thereafter. However, the effectiveness of any review is still likely to be very limited in the absence of reasons.

Supervisory functions of superior courts not excluded by Acts passed before 1st August 1958.

12(1) As respects England and Wales—

(a) any provision in an Act passed before 1st August 1958 that any order or determination shall not be called into question in any court, or

(b) any provision in such an Act which by similar words excludes any of the powers of the High Court,

shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari [quashing order] or to prejudice the powers of the High Court to make orders of mandamus [enforcement order].

Even where the Tribunals and Inquiries Act establishes a duty to give reasons it remains silent as to what amounts to sufficient reasons. It would appear that what is required varies from tribunal to tribunal and the context within which the tribunal operates. What follows therefore is a review of selected decisions of the courts in respect of some of the key tribunals with regard to the scope of the duty as applied to each respectively.

Professional / Disciplinary Tribunals

The deliberations of such tribunals impact directly upon the ability of the professional to engage in that profession. The stakes therefore are often very high for the individual. Many of the relevant governing bodies are subject to statutory provisions or by the prescriptions of Royal Charter issued by the Privy Council, some but not all of which will requires reasons to be provided. There are two distinct themes here. On the one hand the requirements of justice and a fair trial lead to the conclusion that reasons are desirable from the implicated individual's perspective. However, there is also a trend towards demonstrating that professional bodies exist to protect the public and maintain standards rather, not to protect their members. The tensions are evident in the judgement of Mr Justice Hodge in ***Council for Regulation of Healthcare Professionals v GDC*** [2006] where he reviews some of the key authorities in this area.[36]

23 *In **Selvanathan v GMC** 2000,[37] Lord Hope said : "Their Lordships consider that in practice, reasons should now always be given by the Professional Conduct Committee for the determination under Rule 29(2) whether or not they find the practitioner to have been guilty of serious professional misconduct and their decision on the question of penalty. Fairness requires this to be done, so that the losing party can decide in an informed fashion whether or not to accept the decision or to appeal against it... It is plain that reasons were given in this case. The question is as to the adequacy of those reasons." And at p14: "In these circumstances it is not expected of the Committee that they should give detailed reasons for their findings of fact. A general explanation for the basis of their determination on the questions of serious professional misconduct and of penalty will be sufficient in most cases."*

24 *In **Stefan v GMC** [1999],[38] it was said by the Privy Council: "the provision of a right of appeal and the judicial character of the body point to an obligation to give reasons... There is nothing in the Act nor the Rules requiring reasons not to be given and no grounds of policy or public interest justifying such restraint. In the light of the character of the Committee and the framework in which they operate, it seems to their Lordships that there is an obligation on the Committee to give at least a short statement for the reasons of their decisions."*

25 *The PCC of the General Dental Council is in all respects in the same position as the General Medical Council. It is settled law that reasons must be given in these professional disciplinary cases. The issue here is both the adequacy of the reasons given in Mr Marshall's case and, importantly from the Council's perspective, whether those reasons adequately address the realisation of the need for the protection of the public when considering penalty in such a case as this. There are clearly issues as to **duty to give reasons** for decisions on factual matters such as credibility.[39] But that is not this case. Here, the inadequate reasons are said to relate to the decision as to penalty. The Council founds its reasons challenge on the basis that, when considering whether to take action, it must consider whether "it would be desirable for the protection of members of the public" (Section 29(4)(b) of the 2002 Act).*

26 *As **Garfoot v GMC** 200, shows, [40] decisions in this field do not have a punitive purpose. The purpose is to protect the public; to maintain public confidence in the profession; and to maintain proper standards of behaviour by healthcare professionals.*

27 *In **Ruscillo/Truscott**,[41] the Court of Appeal held: "The task of the Disciplinary Tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court in the cases referred is to consider whether the Disciplinary Tribunal has properly performed that task so as to reach a correct decision as to the imposition of a penalty".*

28 *Hence the protection of the public is at the core of the decision making process of the PCC in their deliberations in professional conduct cases and certainly as to the issue of any penalty that is to be imposed after adverse findings of fact have been made against a practitioner.*

29 *Mr Hockton submits in relation to the requirement to give reasons that "the essence of the requirements is that the practitioner should know the basis upon which his right to practice is being restricted and therefore provide an opportunity for challenge". He contends that the decided cases all turn on the rights of the appellant practitioner to be able to identify adequate reasons for the decision. In particular, he says it is a novel claim for which there is no statutory basis, that there is a free standing duty on a PCC owed to the Council for the Regulation of Healthcare Professionals to give reasons for their decision.*

30 *I reject those contentions. It is clear that the protection of the public is one of the factors which lead to the requirement to give reasons. If reasons for the imposition of a particular penalty are not adequately reasoned or are in other respects unclear, that duty is not fulfilled.*

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36 ***Council for Regulation of Healthcare Professionals v General Dental Council [2006] EWHC 1870 (Admin).*** See also ***Selvanathan v GMC*** *[2001] Lloyd's Rep Med 1;* ***Phipps v General Medical Council [2006] EWCA Civ 397***: ***Preiss v. General Dental Council (GDC) [2001] UKPC 36*** : ***Ghosh v. General Medical Council (Professional Conduct Committee of the GMC) [2001] UKPC 29***.

37 ***Selvanathan v GMC***, *PC Appeal No.21 of 2000, at p13:*

38 ***Stefan v GMC*** *[1999] 1WLR page 1293 at page 1303 letter H.*

39 ***Gupta v GMCl*** *[2001] UKPC 61*

40 ***Garfoot v GMC***, *PC Appeal No.81 of 2001*

41 ***Ruscillo/Truscott*** *at para 73,*

31 *In **Threlfall v General Optical Council** [2004], Stanley Burnton J in dealing with the need to give adequate reasons said: "Lastly I mention that there is a further practical reason why disciplinary committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Healthcare Professionals to consider whether to exercise its powers under Section 29 of the 2002 Act".* [42]

32 *I agree with that view. Disciplinary committees, as here for the PCC of the GDC, have in their decisions to have regard to the protection of the public. The Council has a similar duty to consider whether to take action for the protection of the public. It is no great leap to say that disciplinary committees should be aware that the **duty to give reasons** to ensure the protection of the public is also required to enable, among other matters, the Council for the Regulation of Healthcare Professionals to carry out its statutory functions.*

33 *Mr Hockton on behalf of Mr Marshall argues that in this case the reasons given by the PCC for the imposition of the penalty of suspension on Mr Marshall were in fact clear and adequate. The Council do not agree. I therefore next consider this issue.*

Adequacy of Reasons

52 *The reasons given by the PCC in Mr Marshall's case do not address these issues. It is unclear how the PCC thought the public would be protected by the penalty imposed and in my judgment the reasons given are inadequate.*

53 *I therefore regard the failure to give reasons dealing with the issues set out above as a serious procedural or other irregularity in the proceedings before the PCC and a failure of process. Without knowing if the conditions needed to ensure the protection of the public were or can be satisfied I am unable to decide whether the decision as to penalty was appropriate or not in this case. I accordingly allow the appeal, quash the penalty imposed by the PCC and remit the case to it. I direct them when further considering the penalty to be imposed on the basis of their findings (a) to have regard to such satisfactory evidence as there may be as to the past and future training or retraining undergone or to be undergone by Mr Marshall and (b) to consider such up to date evidence that may be available from dental practitioners with whom he has worked of his conduct and proficiency in practice in New Zealand.*

54 *If the Committee is satisfied in the light of the evidence received that the public will be protected by a period of suspension, then it will no doubt say so and give its reasons. If it is not, then it appears to me, given the seriousness of the findings made, that erasure may well be the proper penalty."*

By contrast in ***Watson v GMC*** [2006]. Collins J. stated that "*good practice does in my view require that reasons should normally be given for decisions. They need not be at all lengthy and where credibility is in issue it will usually not be necessary to do more than indicate that the evidence of particular witnesses is accepted. When evidence has been given on particular matters and especially where the appellant has been cross examined about them, it may be unnecessary for the panel to do more than indicate its conclusions if it is apparent from the transcript why the particular decision has been reached. A failure to give reasons is not necessarily fatal to a decision, but it may enable an argument that a particular matter has not been properly taken into account to prevail.*" In the circumstances he then concluded that "*In this case, the Panel did give a reasoned decision. It was brief, but that is not a criticism.*"[43]

Private disciplinary bodies continue to be free in some circumstances to limit the scope for reasons for their deliberations as demonstrated by ***Sankofa v FA*** [2007].[44] S had challenged the validity of a Red Card handed out by the referee for a professional foul. The commission doubled the penalty to a two match suspension having determined that the appeal was spurious. Here the rules of the FA stated that decision of the FA Disciplinary Commission were final, and this was upheld by the court. The rules did not require reasons. The court held that whilst ***Wednesbury*** unreasonableness applied as a ground for challenge, the decision in question was not self evidently unreasonable. On the balance of convenience, taking into consideration the need of sport to produce rapid, determinative decisions, the application for relief failed.

Special Needs and Disabilities Tribunal etc (SENDIST)

This extract from ***W v Lewisham LBC*** [2006] highlights the central features regarding reasoned decisions and SENDIST.[45]

22 The respondent identifies a number of principles which are applicable when considering on appeal a SENDIST decision. They are as follows:

1. *"It may not always be possible to identify the precise reason for accepting the evidence of one witness as opposed to another, and in those cases there may have to be the simple assertion of the Tribunal's preference".*[46]
2. *"The one thing, as it seems to me, that should not happen in these cases is that a fine tooth comb should be used and a detailed dissection made of the reasons given in order to try and tease out an apparent error or inconsistency and to try to assert that full reasoning. has not been given".*[47]
3. *"When the decision is looked at in the round, it is apparent that what the Tribunal has done is to consider all of the evidence on the various aspects, which all interconnect with each other .. in such an exercise it is always possible to criticise a Tribunal for failing to mention some argument or some piece of evidence. [It is] the Tribunal's...**duty to give reasons** in summary form...that are adequate, intelligible and deal with the substantial points which have been raised so that the parties can understand why it has been reached.*[48]

42 ***Threlfall v General Optical Council** [2004] EWHC 2683 (Admin), at para 37*
43 ***Watson v General Medical Council** [2006] EWHC 18 (Admin)*
44 **Osei Sankofa & Chartlon Athletice Football Co Ltd v Football Association Ltd (2007) EWHC 78 (Comm) per** Mr Justice Simon.
45 ***W v Lewisham London Borough Council [2006] EWHC 1853 (Admin).** See also **BJ, R (on the application of) v Governing Body of a School [2005] EWHC 3392 (Admin) ; A v Birmingham City Council [2004] EWHC 156 (Admin).***
46 *per Latham J. in S v SENT 1995 1 WLR 1627 at 1636D to 1636F.*
47 *per Collins J. in **Staffordshire County Council v J and J** 1996 ELR 418 at 424C to 424H.*
48 *per Lawrence Collins J. **in M v Worcestershire CC and Evans** 2003 ELR 31.*

4. *"...the Court has been provided with numerous authorities in connection with the sufficiency or otherwise of reasons and the obligations upon Tribunals and fact finding bodies to give reasons... The principles...are well enough known. Two of the most important are that this appellant was entitled to know the reason why her case had been rejected. Secondly, the sufficiency of the reasons has always to be considered in accordance with the particular subject matter which is in issue and which was decided upon, and by reference to the illumination which can be gained from the evidence and range of issues canvassed at the hearing and the submissions which have been advanced...in my judgment, one has to remind oneself that this is a Tribunal which is comprised of experts. It is an expert Tribunal which is particularly charged with the responsibility of resolving conflicting evidence in these areas involving the special needs of children which, whilst not of a highly technical area, is of a specialised nature, and the areas of dispute which can arise are ones with which they are familiar with on almost a day to day basis. They have to listen to opinions from persons on each side as to what the needs of the child are" (per Newman J. in* ***R (on the application of Johnstone) v SENDIST and North Tyneside County Council*** *2005 EWHC 1483 (Admin) at paras 26 and 30).*

The impact on the decision making process of Disabilities Legislation is evident in ***T (a child) v IAP for Devon CC*** [2007],[49] where an education tribunal had to consider an appeal for expulsion from school of a child. The legislation required that the child's disability had to be taken into account. The Administrative Court held that the panel had failed to demonstrate in its decision that it had addressed the criteria set down by statute. The reasons for the decision were accordingly inadequate. The court further held that the panel could not subsequently provide additional reasons, as opposed to providing clarity regarding what its initial decision and could not contradict the original decision at a later stage. Thus the observation that "*insufficient evidence had been adduced to establish discrimination*" was not compatible with the initial finding that "*there was no evidence of discrimination.*"

Employment Tribunals

The obligation of a Chairman of Tribunals, expressing the tribunal's written reasons for their Judgment, is now formalised by r 30(6) of the ET Rules of Procedure. Rule 30(6) requires the tribunal to identify the issues relevant to the claim; make findings of fact relevant to those issues; give a concise statement of the applicable law and state how the relevant findings of fact and applicable law have been applied in order to determine the issues.

Bingham LJ said in ***Meek v City of Birmingham DC*** [1987]:[50] *"It has on a number of occasions been made plain that the decision of an [Employment] Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT … to see whether any question of law arises; and it is highly desirable that the decision of an [Employment] Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."*

Where the Court of Appeal concludes that the reasons provided are inadequate it may refer the matter back to the decision maker for further elucidation, before continuing with its own deliberations. The EAT is not functus officio for these purposes, which are now incorporated into the rules of the EAT. This procedure was reviewed in ***Tran v Greenwich Vietnam Community Project*** [2002].[51]

Immigration Tribunals

The standard set for reasons for refusal to enter appear to have been raised in recent times. In ***Swati (R) v S.S Home Department*** [1986], the CA held that *"I am not satisfied that you are genuinely seeking entry only for this limited period."* was sufficient reasoning for the purposes of the immigration rules.[52] Sir John Donaldson said:- *"The answer [to the question why did the person concerned take that decision or action] provides the reasons which have to be stated. No doubt those reasons, if rational, will be based upon a process of reasoning applied to evidence and, to this extent, may be described as a conclusion from that evidence. But this does not prevent that conclusion being the reason for the decision or action which is appealable and it is for this reason that the registrations call. In the instant appeal, the immigration officer, by specifying that she was not satisfied that the applicant was genuinely seeking entry for the limited period of one week, but only told the applicant why she was refusing him leave to enter, but also told him, by implication, that he had satisfied her on all other matters upon which he had to satisfy in accordance with [the Rules].* However, more recently, a number of determinations have been successfully challenged for an absence of reasons.[53]

The Court of Appeal, having confirmed that a reasoned decision is required however, warned that spurious challenges are all too common in ***R (Iran) v S.S Home Department*** **[2005].**[54] The Court stated that "*What we have said does not absolve an adjudicator of his/her duty of devoting the intense scrutiny to the appellant's case that is required of a decision of*

[49] ***T, R v Independent Appeal Panel for Devon County Council [2007] EWHC 763 (Admin)*** per Mr Justice Walker.

[50] *Meek v City of Birmingham District Council* [1987] 1RLR 250: As to successful challenges on these grounds see ***Anya v University Of Oxford [2001] EWCA Civ 405 : Bahl v The Law Society [2004] EWCA Civ 1070; Viggers, R) v Pensions Appeal Tribunal [2006] EWHC 1066 (Admin).***

[51] ***Tran v Greenwich Vietnam Community Project*** [2002] EWCA Civ 553. See also ***Barke v Seetec Business Technology Centre Ltd [2005] EWCA Civ 578 (16 May 2005); Burns v Royal Mail Group [2004] ICR 1103 : Burns v Consignia (No.2)*** **[2004] IRLR 425).**

[52] ***Swati (R) v S.S for the Home Department*** [1986] 1 All ER 717. Per Donaldson MR at 483d.

[53] ***RG (Ethiopia) v Secretary of State for the Home Department [2006] EWCA Civ 339 ; Hatungimana v Secretary of State for the Home Department [2006] EWCA Civ 231 (21 February 2006) ; Tofik, R (on the application of) v Immigration Appeal Tribunal [2003] EWCA Civ 1138; Januzi v Secretary of State for the Home Department [2003] EWCA Civ 1187.***

[54] ***R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982.***

such importance. What we wish to make clear, however, is that the practice of bringing appeals because the adjudicator or immigration judge has not made reasoned findings on matters of peripheral importance must now come to an end."

Town and Country Planning Tribunals.

Lord Bridge, in the House of Lords in ***Save Britain's Heritage v Number 1 Poultry Ltd*** **[1991]**, indicated that: *"The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the Applicant have been substantially prejudiced by the deficiency of the reasons given . . . a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development."*[55]

Clearly, the reasons must address the statutory criteria for planning consent,[56] but in common with judicial comment on other tribunals, trivial and peripheral matters do not have to be dealt with in depth.[57]

The duty of private bodies as decision makers of matters within the public interest and reasons.

A distinction must be drawn between the duty of statutory tribunals outlined above, which include private bodies exercising statutory powers such as the General Medical Council and private bodies exercising private powers which nonetheless impact upon the public interest such as the Jockey Club, University Examination Boards and Visitors.[58] Apart from the potential role of judicial review it should be remembered that such organisations are subject to general and specific areas of the law. Thus action will lie in respect of allegations of breach of employment laws, even where they involve questions regarding human rights, such as discrimination on the basis of sex, race, religion or age to the relevant employment tribunal.

Universities present an interesting case.[59] The University sector provides a contractual service to its clients. The University will exercise disciplinary jurisdiction over the conduct of its clients, will be called upon to adjudicate over relationship disputes between staff and clients and will assess and certify the academic performance of the clients, leading to the award of degrees and other qualifications. The University is hence a gate keeper in respect of the employment prospects of its clients. The public / private nature of this relationship has entered into sharp focus in recent times, given that students have increasingly become paying customers, rather than the beneficiaries of public funding.[60] University status is governed by Royal Charter. Universities are the beneficiaries of substantial public funding. Whilst they are increasingly self funding, they are in many respects public rather than private entities.

Disputes as to the payment of fees are clearly contractual matters. The same might be said of the quality of teaching provision. Efforts have been made to reduce behavioural issues into a contractual format through the introduction of charters for both staff and students. The issue that is less easy to categories is that of assessment. The assessor is akin to an expert. There is no quasi-judicial role here. The problem of challenging an assessment is that the professionalism and judgement of the assessor is called into question. Second marking provides a quality assurance mechanism. Even the examinations appeal board is merely a form of second marking expert determination. The question here is how much comment and feed back is a student entitled to receive for a piece of work, with a distinction being drawn traditionally between coursework and exam scripts. To what extent does feed back have to justify the mark, particularly when hundreds of scripts might be involved? Inevitably, given the resource implications here, there appears to be no answer to this question at the present time.

Should the student have the facility to challenge the mark? It is not uncommon for poor students to refuse to accept the accuracy of a mark, perhaps demonstrating an inability to understand what was required of them in the first place. A pragmatic solution appears to be that students can ask for re-marking, at a price, with the price being returned if the challenge is successful. At the end of the day the matter is one of expert opinion. Nonetheless, as demonstrated by ***Halifax v Equitable Life*** [2007] [61] where, due to an absence of reasons, an appeal court is unable to determine the matter it may require the expert to supply further and better reasons. The value of a fully considered decision is demonstrated by ***Van Mellaert v Oxford University*** [2006],[62] which concerned a Phd submission. It may well be that in the future it will become necessary for Universities examiners to provide marking criteria for every question at all levels including pre-grad, graduate and post-graduate, so that the examiner and subsequent re-examiners can identify in a precise manner why a script has received a particular grade. The danger inherent in this is that the marking process could become prescriptive limiting the scope for candidates to demonstrate lateral thinking. It might also encourage/facilitate teaching to the exam, which is not really what University education is supposed to be about. It would also be very costly.

When the issue concerns student malpractice, such as plagiarism or cheating in examinations, the examinations and appeals boards are presented with questions of both fact and law and one enters the quasi-judicial realm. Decisions will

[55] ***Save Britain's Heritage v Number 1 Poultry Ltd*** **[1991] 2 All ER 10,** see also **JS Bloor Ltd v S.S for Environment (2001)** per Collins J.

[56] ***South Bucks District Council v. Porter [2004] UKHL 33***

[57] See ***ADT Auctions Ltd v SS For Environment, Transport & Regions [2000] EWHC Admin 305 ; Arrowcroft Group Plc v First Secretary of State [2003] EWHC 1067 (Admin); Mobil Oil Company Ltd v SS For Environment [1996] EWHC Admin 23*** *; Dunster Properties Ltd v First Secretary of State [2006] EWHC 2079 (Admin).*

[58] Whilst construction adjudication falls within this general category, because of its specific statutory regime it is considered separately in Part IV below.

[59] Schools are subject to statutory mechanisms and so are quite distinct from the University sector.

[60] This relationship receives detailed analysis by the Oxford Centre for Higher Education Studies available at ***http://oxcheps.new.ox.ac.uk/casebook/index.htm,*** which maintains a Higher Education online casebook.

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

[62] ***Van Mellaert v Oxford University & Ors [2006] EWHC 1565 (QB)***

involve the exercise of discretion by the exam / appeals board and the application of regulations, the form of which may be also called into question. It is submitted that the test as to what amounts to sufficient reasons here would be to provide sufficient explanation to demonstrate that the discretion was exercised in a manner that complies with ***Wednesbury*** reasonableness in the light of the evidence before the board.

Private adjudication where there is no public interest.

A distinction should be drawn between decisions of private bodies that impact upon the public interest and those that do not. In the case of the latter, the only way to challenge such decisions will be on the grounds of breach of contract, as demonstrated by ***Lymington Marina Ltd v Macnamara***. It is not uncommon for contracts to contain dispute resolution procedures.[63]

CONCLUSIONS

Increasingly today, the duty to provide reasons is becoming the norm rather than the exception, but the existence or otherwise of that duty in the sphere of public service is not amenable to generalisations. It is a specialist area confounded by the questions as to what decisions within an area of public practice require reasons and then as to what amounts to sufficient and adequate reasons and the circumstances of the case. Whilst not everything in life is capable of rationale explanation, as demonstrated by the somewhat dark but haunting observation ***"And he can see no reason 'cause there are no reasons. What reasons do you want to be shown?"*** about the perpetrator's father faced with the sphinx like ***"I don't like Mondays"*** response of his daughter who had slaughtered pupils at a high school to the question ***"Tell me why?"***,[64] the decisions of public officials must, to be lawful, be founded in reason. However, whilst it is not unreasonable for the public to expect to be provided with said reasons, the duty to do so should not be placed so high that it places unreasonable burdens on the authorities and stifles their ability to act, particularly in respect of matters of day to day administration and routine service provision.[65] Thus adequate reasons may be very shortly stated on times, but the public should not be expected to be satisfied by the unrevealing "*Because I say so*."

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MANDATORY MEDIATION – A New TWIST

A Bill currently before the California State Legislators would, if successful, introduce a form of mandatory mediation for all civil disputes.[66] The proposition is that all claimants and cross-claimants would be required to offer to mediate the dispute within the time frame set down for commencement of the trial. The respondent by contrast would have the option of accepting or declining the invitation. Notably, the respondent does not have to provide good reason for rejecting the invitation.

The proposal differs from previous models of mandatory mediation in that it does not compel mediation in all circumstances, and in particular ensures that time and effort is not expended in situations where the defendant has no interest in settling the dispute. It thus appears to promote situations where mediation has a genuine prospect of success. The strict time frame is designed to ensure that the mediations provisions do not result in delay to the trial process.

The downside of the model however, is that it makes no concession to the claimant who has no interest in mediating, opening up the prospect of a mediation where one party is not committed to the process and where therefore there may be an absence of real prospect of success. It places the undeserving respondent, lacking in any genuine answer to a claim, in the driving seat, opening up the possibility of a claimant compromising a claim by engaging in a settlement process, detracting from pursuit of just rewards. The proposal introduces the possibility of cost penalties along the lines of those available in the UK courts for a failure to engage in the mediation process. The danger here is that what appeared to be a cut and dried case to the applicant, despite subsequent judicial confirmation, is nonetheless deemed by the court to have been sufficiently uncertain as to justify a serious engagement in a compromise process, leading to an unwarranted cost penalty after the event.

In situations where there are genuine issues to addressed on both sides, mirroring the view that there are two sides to every story, the reality check provided by the mediation process has much to offer. However, it is not always the case that there are two relevant sides to every story. The other party's side may be an unjustifiable attempt to wriggle out of legal obligations in the short, medium or even long term. Not all respondents are honourable. Putting the additional cost burden of funding mediation on a claimant who is cash strapped because of the failure of a respondent to pay that which is due is not necessarily justifiable.

The proposals are clearly well intended and would enhance settlement rates. Whether the price to pay for these improvements is worth paying is another matter altogether. Gamesmanship is an integral part of dispute resolution. This proposal would alter the rules of the game. Whether or not it shifts the balance of power in the right direction in all circumstances is less clear.

63 Review of the procedural aspects of such dispute resolution processes will be discussed in Parts III and IV in subsequent issues of ADR News.

64 see ***"I don't like Mondays"*** by the Boom Town Rats

65 ***Mobil Oil Company Ltd v SS For Environment [1996] EWHC Admin 23*** per Mr Justice Hidden : "*What the S.S. must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden. ….. there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference will necessarily be limited to the main issues, and then only, as Lord Keith pointed out, when 'all other known facts and circumstances appear to point overwhelmingly' to a different decision.*"

66 ***Early Mediation Initiative***. *Steve Kesten*. Mediate.com. April 2007

CHALLENGING AN ARBITRAL AWARD UNDER ENGLISH LAW

PART II – SERIOUS IRREGULARITY [67]

Introduction.

The right to challenge an award on for misconduct on the part of the tribunal or other irregularity is set out in s68(1) Arbitration Act 1996. Note that the applicant must give notice to both the other parties and the tribunal, but does not require their consent to do so. Notice ensures that the other party and the arbitrator will then be in a position to play a part in that challenge, though the extent to which the arbitrator will wish to be involved is another matter, since whilst his standing may be called into question, pro-active participation will involve costs, both in terms of time and money.

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 s73) & the right to apply is subject to the restrictions in s70(2) & (3).

Scope of the Challenge – defining Serious Irregularity.

Whilst wide ranging, s68(2) provides a definitive list of the types of conduct which are deemed to amount to serious irregularity which give rise to a challenge, which by nature are those that one might otherwise expect to be embraced by the rules of natural justice. It is important to note that whichever ground is under consideration, the challenger must establish to the court's satisfaction that the irregularity was not only present but further that it ***"caused or will cause substantial injustice to the applicant."***[68] In ***Walsall Metropolitan BC v Beechdale CHA*** *[2005],*[69] it was asserted that an irregularity arose out of applying the wrong test for evaluation of rent. Even if upheld, the court considered that it would have made little difference if an alternative method had been applied and accordingly no injustice had occurred. A case where a serious irregularity occurred to the prejudice of the parties is ***Wicketts v Brine*** [2001],[70] where an arbitrator was so concerned with securing his not insubstantial fees, given the interests raised by the arbitration, that he took it on himself to issue orders at his own behest rather than at the instigation of either of the parties, including instructions that the parties should not settle the dispute without his consent. The court was scathing about the arbitrator's inability to manage the process in a proportionate manner. In the event the arbitrator was removed by the court which went on to severely cap his recoverable fees.

Section 68 does not provide a second opportunity to mount a jurisdictional challenge beyond that set out in s67. [71] It is not to be used as a means of launching a detailed enquiry into the manner in which the arbitrator considered the various issues,[72] and above all the issue is not whether or not the arbitrator reached the right conclusion.[73]

Challenging the award: serious irregularity. Definitions.

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 s67);*
- *(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.*

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67 Continued from ADR NEWS Volume 6 Issue No 4 January 2007.

68 per Colman J in **Vee Networks v. Econet Wireless International Limited** [2004] EWHC 2909 (COMM) at para 90: "….. *where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."*

69 ***Walsall Metropolitan Borough Council v Beechdale Community Housing Assoc Ltd. [2005] EWHC 2715 (TCC)*** per HHJ Peter Coulson.

70 ***Wicketts v Brine Builders & Siederer*** [2001] App.L.R. 06/08 TCC. HHJ Seymour QC.

71 ***Warborough Investments Limited v S Robinson and Sons Holdings Ltd*** [2003] EWCA Civ 751

72 ***Weldon Plant v The Commission for New Towns*** [2000] BLR 496 ; ***World Trade Corporation Ltd v C.Czarnikow Sugar Ltd*** [2004] 2 All ER Comm.

73 ***St George's Investment Company v Gemini Consulting Limited*** [2005] 1 EGLR 5.

Grounds for challenge for serious irregularity

Natural Justice. This heading, arising out of s33(1) & (2) Arbitration Act 1996 covers three separate concepts in relation to decisions on matters of procedure and evidence and during the exercise of its powers :-

Bias / impartiality

Parties often lose any sense of objectivity regarding their cause, becoming attached to their view point to such an extent that they cannot believe that an arbitrator could possibly disagree with them, leading to the conclusion that where an arbitrator disagrees, that arbitrator must have been biased and the more that is at stake, the more that is the case. However, the instances where the courts determine that an arbitral decision has been tainted by bias are relatively few and far between, once viewed objectively by the court. Grievance can centre around findings as to liability and equally regarding the assessment of quantum. In ***Claire v Thames Water*** [2005],[74] a claimant was aggrieved that the arbitrator fixed the rate for assessing loss of profit at 22% rather than at 32%. Whilst the court noted that the claimant's business had been destroyed by the activities of the utilities operator and acknowledged the distress this caused, there was no evidence that the arbitrator had failed to fulfil his duties under s33 Arbitration Act 1996. The arbitrator had taken into account all the evidence and reached a decision, which he was both entitled and indeed required to do.

Tensions between the parties to arbitration and the arbitrator are not unusual. An arbitration is a contest and is likely to be hard fought, often involving tactical manoeuvres by the parties such as delaying tactics and non-cooperation with disclosures, aimed at putting the other party on the back foot or at a disadvantage. The arbitrator will exercise his powers under s34 to minimise the impact of such tactics. The arbitrator may have adopt a firm and robust approach to managing the process, which can in turn lead to allegations of bias. However, something more is required to establish bias than intemperate exchanges. There is a fine line to be drawn here between legitimate pressure by the arbitrator and undue pressure. The question arose in ***Brian Andrews v Bradshaw*** [1999],[75] as to whether or not an impatient exchange between arbitrator and respondent raised a real possibility of bias? The Court of Appeal held that in the circumstances it did not, though the issue was finely balanced. The applicant, pursing a counterclaim where the main dispute was the subject of an arbitration by a separate arbitrator, adopted an obstructive stance and counsel was slow to advise his client to adopt proposals for moving the case forward developed by the arbitrator. In addition the applicant failed to pay interim fees due to the arbitrator, who declined to release an interim award until paid. The applicant then raised a point for clarification which had already been addresses. In exasperation, it would appear, the arbitrator declined to address any new points and this led to an application to remove the arbitrator which was acceded to by the court at first instance, but subsequently overturned here by the Court of Appeal on the grounds that whilst the letter was badly worded and misleading, there had in fact been no failure to act by the arbitrator. This was particularly so since the interim award was in fact in the applicant's favour.

Whilst bias or impartiality are the classic grounds for setting aside a judgement or award it is necessary to distinguish between actual bias or impartiality and perceived bias. The courts have long since stepped back from the stringent test that "*Justice must not only be done, but must be seen to be done*" established in ***Dimes v Grand Junction Canal***.[76] Nonetheless, the most potent challenges on the grounds of bias relate to connections between concerned lawyers and

[74] ***Claire & Co. Ltd. v Thames Water Utilities Ltd. [2005] EWHC 1022.*** TCC. per Mr Justice Jackson.

[75] ***Brian Andrews v Bradshaw [1999] EWCA Civ 2008.*** before Nourse LJ, Mantell LJ, Mance LJ.

[76] (1852) 3 HL Cas 759 at 793. Regarding bias and the courts see ***Taylor v Lawrence [2002] EWCA Civ 90*** : and ***Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117*** per Lord Justice Scott Baker

*26. ….. The test [for bias] is expressed by Lord Hope of Craighead in **Porter v Magill** [2002] 2 AC 357, 494 at para 103: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." This test, involving a slight adjustment to the test previously propounded in **R v Gough** [1993] AC 646, brings the law into harmony with the Strasbourg interpretation of the application of Article 6 of the European Convention on Human Rights, most Commonwealth Countries and Scotland.*

*27. The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased: see Lord Phillips of Worth Matravers MR in **Re Medicaments and Related Classes Goods (No. 2)** [2001] 1 WLR 700, 726 para 83. An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see **Locabail (UK) Limited v Bayfield Properties Limited** [2000] 2 QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing. Lord Phillips in **Medicaments** at paragraph 83 stated the principles as follows:*

"(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."

*28. Bias means a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue. In **R v Inner West London Coroner ex parte Dallaglio** [1994] 4 All ER 139, 151, Simon Brown LJ, as he then was, said: "Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue."*

*29. The proceedings under consideration by the court in the present case are tribunal proceedings and not judicial proceedings. The context is critical. In **Modahl** para 128, Mance LJ said: "The principles of natural justice or fairness must adapt to their context and can be approached with a measure of realism and good sense. Appendix B para (B7) of the defendant's rules makes clear that the disciplinary committee "will consist of members of the federation drug advisory committee, or its nominees". It was both natural and appropriate that the disciplinary committee should have among its members someone with experience of doping control and its procedures. Mr Guy was chosen for this reason, and because he spoke English and came from a different national athletic federation. There is no reason to think that he held or would hold any fixed or predetermined ideas on any of the issues being raised by the claimant in her challenge to the Portuguese results."*

decision makers and in particular where the decision maker has a proven or apparent interest in the outcome. It will be remembered that in ***Dimes*** the judge had portfolio shares in the Canal Company, albeit that he was unaware of that fact, but nonetheless the appearance of bias was sufficient to taint the decision. This principal was upheld in ***Lawal v Northern Spirit*** [2003],[77] by the House of Lords where it was held that a QC who acted as an EAT judge should not act as counsel for a party before the EAT.

In ***Smith v Kvaerner [2006],***[78] a close relationship between a recorder from the same chambers as counsel for one of the parties, who had acted for related firms gave rise to an appearance of bias which was datal to the decision of the court. Similarly, in the context of arbitration, the court was faced with a situation in ***ASM Shipping v TTMI [2005],***[79] where an arbitrator had previously acted as counsel in another case for a principal witness to the current arbitration. Whilst the tribunal been prepared to continue without an Umpire and to resort to an alternative Umpire if the circumstances demanded, the court held that the arbitrator should step down. Nonetheless, the UK courts take a far more relaxed attitude towards decisions makers who merely move in the same professional circles as others and are members of the same professional organisations than do the courts in the US, where bias is sometimes taken to extreme lengths taking into account mere passing relationships, to the extent that on times it is virtually impossible to find an eligible decision maker in specialist areas, so that only the judiciary are available to adjudicate.

Failure to provide a reasonable opportunity to put one's case

The opportunity to put one's case is a long standing key ingredient of natural justice.[80] The operative word here however is "*reasonable*" and most certainly not "*every opportunity*". What is reasonable in the circumstances of each case is a question of fact, involving a balance between the arbitrator's duty to manage the process and to ensure that costs are proportionate to the issues at hand. Where a party initially fails to engage in the process but subsequently tries to play catch up complaints by that party of deprivation of opportunity to put forward their case are likely to be repelled as in ***Sealand v Siemens [2002],***[81] where a party ignored arbitration initially then at last minute tried to introduce a counter claim and mounted a jurisdictional challenge. The arbitrators refused to entertain the new material. The CA dismissed a challenge to that refusal.

Arbitral proceedings do not have to mirror litigation. A party aggrieved that the procedure did not include a right to respond during closing speeches challenged for lost opportunity to put its case in ***Margulead v Exide [2004].***[82] The court held, dismissing the challenge, that it is quite usual in International Arbitration for there to be no reply.

A case where a decision was set aside on these grounds is ***Miller Construction v James Moore Earthmoving*** [2000]. [83] Here Seymour J concluded "…. *the Arbitrator has, in substance, dismissed without a hearing Mr. Moore's claim for a payment in respect of unforeseen adverse physical conditions and obstructions encountered in excavations calculated on a costs basis. That, it seems to me, is a serious matter amounting to misconduct. ….. I have come to the firm opinion that, objectively, a reasonable person would think that there is a real likelihood that the Arbitrator could not come to a fair and balanced conclusion if Issue 2 were remitted to him for reconsideration as to quantum, he having eliminated from consideration a possible basis of evaluation without being addressed on the matter. I have also formed the clear view that a reasonable person would think that the Arbitrator could not, indeed, come to a fair and balanced conclusion in relation to any of the remaining issues in the arbitration, he having already demonstrated that he is unable to recognise the vital need for parties to be afforded an opportunity to be heard before he reached any decision on any controversial issue.*"

Adoption of unfair procedures and exercise of case management powers

A perennial feature of arbitration concerns challenges to the admissibility of evidence, applications for discoveries and disclosure, particularly of expert reports not present before the court and the introduction of evidence from other arbitrations involving one or more of the parties. A refusal often leads to a challenge on the grounds of serious irregularity. It is however the duty under s34 Arbitration Act 1996 for the arbitrator to manage the arbitral process and in the absence of contrary agreement to make rulings on such matter. A case in point is ***Lincoln v Sun Life [2004],***[84] where the question was whether or not a prior award in an arbitration between other parties was relevant to the arbitration. The court determined that the prior award was not relevant or admissible and dismissed a subsidiary claim that the arbitrators could not rely on the assurances of a party's representatives. The court pointed out that, to the contrary, arbitrators have to rely on such assurances all the time.

It was a close run affair in ***ABB v Hochtief [2006].***[85] The nub of the dispute concerned whether or not ABB had brokered an oral agreement not to trade its shares in Athens Airport without consultation and agreement with Hochtief. If there was no agreement then it was clear that Hocktief had acted in bad faith in not dealing with the purported purchaser of ABB's shares. The tribunal held there had been an agreement, so bad faith did not arise. During the course of the hearing the tribunal had declined to order that Hochtiel disclose its records on meetings with ABB. Ultimately Mr Justice Tomlinson upheld the award but concluded his decision as follows "*Whilst the court will never dictate to arbitrators how their*

77 ***Lawal v. Northern Spirit Ltd [2003] UKHL 35*** before Lords Bingham ; Nicholls ; Steyn ; Millett ; Rodger.
78 ***Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242*** before Phillips LCJ, Clarke MR: Sir Anthony May LJ.
79 ***ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)*** per Mr Justice Morison, and upheld on appeal, ***ASM Shipping Ltd of India v TTMI Ltd of England [2006] EWCA Civ 1341*** by Clarke MR, Rix LJ, Longmore LJ.
80 ***Ridge v Baldwin (No 1) [1963] UKHL 2.***
81 ***Sealand Housing Corporation v Siemens AG [2002] EWCA Civ 1145*** per Sir Andrew Morritt VC; Rix LJ.
82 ***Margulead Ltd. v Exide Technologies [2004] EWHC 1019 (Comm).*** per Mr Justice Colman.
83 ***Miller Construction Ltd v. James Moore Earthmoving [2000] EWHC Technology 52*** per HHJ Richard Seymour Q.C.
84 ***Lincoln National Life Insurance Company v Sun Life Assurance Company of Canada [2004] EWHC 343.*** per Mr Justice Toulson.
85 ***ABB Ag v Hochtief Airport GmbH [2006] EWHC 388 (Comm).*** Per Mr Justice Toulson.

conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges as this ultimately has proved to be. It will be of little comfort to ABB but it may be instructive to know that at the end of my pre-reading in this case I was fairly certain that I would have no alternative but to remit or to set aside the award, notwithstanding the court's general approach to strive to uphold arbitration awards. I have had to strive a little harder than I might reasonably have expected. Reasons which were a little less compressed at the essential points might have been more transparent as to their meaning and might even have dissuaded the unsuccessful party from challenging the award or, at any rate, from mounting so wide-ranging a challenge."

The method used to evaluate a claim is frequently called into question on the grounds of serious irregularity, especially when both parties urge a different method to be applied. ***Marklands v Virgin*** **[2003],**[86] concerned a rent-review arbitration between landlord (Markland) and tenant (Virgin). The transactional framework for the evaluation of a lease was predicated on an overall basis. Markland sought to challenge the decision of the arbitrator who had been appointed pursuant to the terms of the lease. Markland had proposed that the valuation be determined by applying a zonal test. The arbitrator declined and went with the overall test, which was less favourable than the zonal test to Markland. The court rejected Marklands' contention that this amounted to a serious irregularity pursuant to s68 Arbitration Act 1996. Whilst a legitimate tactic to propose alternative valuations in negotiations, he was limited to the contractual mechanism for the purposes of arbitration. Accordingly there was no irregularity and the challenge failed.

Failure to deal with all the issues

It is axiomatic that a tribunal should deal with and settle all issues before it in order to discharge its functions. That said, it is not uncommon for a tribunal to be faced, apart from the central issues, with a host of minor issues often as part of a scatter gun approach, in the hope that one of them might stick, though without any real commitment being demonstrated. In addition, many things might be referred to, which have at best a tangential connection with the issues before the tribunal. Scant attention is often paid to such matters by the tribunal, which concentrates its big guns on the central issues. Nonetheless, this frequently leads to a challenge based on a failure to deal with an issue or take a relevant matter into account.[87] When dealing with such a challenge Mr Justice Colman observed in ***Margulead v Exide*** **[2004]** that a deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68(2)(d) of 1996 Act unless it amounts to a *"failure by the tribunal to deal with all the issues that were put to it."* Similarly in ***Benaim v Middleton*** **[2005],**[88] the court held that whilst an award was terse and to the point, particularly when contrasted with the extended submissions of the parties, nonetheless the arbitrator had done enough to demonstrate that he was entitled to reach the conclusions he did, all of which was part and parcel of choosing arbitration as opposed litigation in the first place.

There is a distinction between attaching a different weighting to evidence to that considered appropriate by the applicant and failing to take evidence into account as demonstrated by ***World Trade Corp. v Czarnikow Sugar*** **[2004].**[89] A central part of a tribunal's work is to determine how much weight it attaches to evidence. As such, it is not a matter that can be remitted under s*57* for correction of an award and is not a ground for challenging the award.

In ***Fidelity v Myriad [2005],***[90] an arbitral award was challenged on the grounds that the tribunal had failed to deal with an issue. In the event the court held that whilst a side issue peripheral to the case had not been determined, nonetheless *"…. The issue before the tribunal was directed to one crucial question: did the derogation satisfy the condition precedent? The construction of the contract was in order to answer that question; there was no need to say that the clause means this and therefore the derogation fell outside it. The tribunal asked the right question; the question they asked was the question which, through their QC the Claimants themselves had invited the Tribunal to ask and answer. The suggestion that the tribunal failed to carry out this task seems to me to be obviously wrong. The issues put to the Tribunal were set out and answered by it. Any criticism made of the Award goes to the reasoning of the Tribunal rather than their failure to address an issue put to it. ….."*

By contrast, in ***Newfield v Tomlinson [2004],***[91] the court concluded that *"the Arbitrator construed* ***'the event'*** *not by reference to all the pleadings, but by reference to two other, irrelevant documents which, to put it at the very lowest, all the pleadings expressly contradicted. That was not what the parties wanted him to do: the whole point of the pleadings was to define and, as actually happened here, to narrow the disputes between the parties; the parties wanted the Arbitrator to construe the 'event' by reference to their pleadings and were entitled to have it so construed; his complete failure to do so therefore amounted to a serious irregularity. Whilst such an irregularity probably triggers each of Sections 68(2)(a) (b) or (c) it is in my judgment closest to 68(2)(c); a failure by the Arbitrator to deal with the question of costs in accordance with the procedure - the tabling of extensive pleadings settling out both parties cases – agreed by the parties' themselves and ordered by the Arbitrator. It also seems to me that … a failure by the Arbitrator to understand the material used as the basis of the award may amount to a serious irregularity, is also relevant here. …"* By the arbitrator's own admission, but for his finding he would have determined costs differently, demonstrating clearly that an injustice followed the event.

86 ***Marklands Limited v Virgin Retail Limited [2003] ALL ER (D) 438 (Nov)*** per HHJ Lewison.
87 For an example of a failed challenge on these grounds see ***Torch Offshore Llc v Cable Shipping Inc. [2004] EWHC 787 (Comm).***
88 **Benaim (UK) Ltd. v Davies Middleton & Davies Ltd [2005] EWHC 1370 (TCC),** per HHJ Peter Coulson.
89 ***World Trade Corporation Ltd. v C Czarnikow Sugar Ltd. [2004] EWHC 2332 (Comm)*** per Mr Justice Colman.
90 ***Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm) per*** Mr Justice Morison.
91 ***Newfield Construction Ltd. v Tomlinson [2004] EWHC 3051 (TCC)*** per HHJ Peter Coulson.

Award induced by fraud or breach of public policy

It is not surprising that a party convinced of their version of events might consider the other party's version of events false and deceitful. There is however a very thin line between this ground of appeal and an appeal on a question of fact, the only distinction being that the facts, as determined by the tribunal were allegedly the consequence of fraud. It is equally unsurprising that the court, which views the matter from an objective and impartial position, may not agree with the appellant as demonstrated by ***Thyssen v Mariana*** **[2005]** which concerned an insurance claim for cargo damage by fire and a s80(5) extension of time in respect of the s70(3) 28 day time limit to appeal. The tribunal had found no evidence of unseaworthiness. During the arbitration the claimants had alleged either unseaworthiness or deliberate fire in support of a claim for constructive total loss. They now sought to establish that the loss was due to sparks from hot works and alleged that the owners had lied about their speculated reasons for the fire, viz a discarded cigarette by a stevedore. Mr Justice Cooke held that whether or not hot works caused the fire was no longer relevant. This is a matter that should have been adduced before the tribunal. The appellants had not established that the owners had lied or deceived the tribunal. The challenge held to be an abuse of process. An application for an extension of time was refused.[92]

A challenge to an award on the basis that the other party had not disclosed that the action was funded by a CFA was rejected in ***Protech v Al-Kharafi*** **[2005].**[93] This was not a serious irregularity.

Form of award rendering it unenforceable : Uncertain / ambiguous award

If an award is uncertain the court may remit to the tribunal for further elucidation, before finally determining what the court should do. Otherwise, an award which does not comply with the basic requirements of the Arbitration Act 1996 as to signature etc will be unenforceable. Such breaches cannot be cured after the event. However, mere slips can often be addressed after the event using the s57 procedure. However, s57 may not apply if the arbitrator has become ***functus officio***, particularly if he is out of time for the delivery of the award.

It is often the case that whilst a party expects the arbitrator to be concise, precise and accurate, they do not present their own case with any degree of clarity. Thus in ***Sinclair v Woods*** **[2005],**[94] an interim award was challenged on the grounds of serious irregularity and the applicant sought to have the arbitrator removed. The assertion was that the arbitrator had failed in his award to address all the issues put to him or deal with the issues clearly and unambiguously. However, in the circumstances the court found no reason to criticise the arbitrator. Rather, the problem lay with the applicant who had caused considerable delay, failed to prepare his case properly and failed to bring all the evidence needed to the table. The court urged the applicant to get his act in order before the next stage of the arbitration.

In litigation there are winners and losers. Predictability can be in short supply. A salutary warning is delivered by Ward LJ in **Checkpoint v Strathclyde [2003],**[95] where he concludes as follows "*I understand the tenant's surprise that in an arbitration of kind not only was the rent doubled but the landlord's expert's figure was accepted without a penny reduction. The result is a very substantial increase in the rent. But surprise, even sympathy, for the tenant's predicament, does not justify a finding that there was any serious procedural irregularity in the conduct of this arbitration, still less that a substantial injustice has been caused thereby. I would therefore dismiss the appeal.*"

Finally, the commercial court held in ***The Pamphilos*** **[2002],**[96] that a sequence of events, none of which separately amounts to an irregularity, can be added together and their impact aggregated to constitute an irregularity. Both parties had behaved in an obstructive manner in the arbitration. The tribunal had been forced to determine the facts on very scant material and could not be criticised for drawing conclusions in the absence of proof by either party.

Challenging the award: serious irregularity. Available Remedies

> *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.*

In the event of a successful challenge the options available to the court are to remit the award back to the tribunal to amend or reconsider in the light of the court's determinations, to set the award aside entirely or in part or to declare that the award is of no effect, again in whole or in part. Note the rider which states that remitting the award is the default remedy wherever appropriate, which accords with respecting the autonomy of the parties in initially choosing to determine the dispute by arbitration.

92 ***Thyssen Canada Ltd. v Mariana Maritime SA [2005] EWHC 219 (Comm)*** per Mr Justice Cooke.
93 ***Protech Projects Construction (Pty) Ltd. v Moh'd Abdulmohsin Al-Kharafi [2005] EWHC 2165 (Comm).*** per Mr Justice Langley.
94 ***Sinclair v Woods of Winchester Ltd. [2005] EWHC 1631 (QB),*** per HHJ Peter Coulson.
95 ***Checkpoint Ltd. v Strathclyde Pension Fund [2003] EWCA Civ 84.***
96 ***Bulfracht (Cyprus) Ltd. v Boneset Shipping Company Ltd. "MV Pamphilos" [2002] EWHC 2292 (Comm).***

MEDIATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

Charles Church Developments Ltd v Stent Foundations Ltd [2007] EWHC 855 (TCC)

A proposed mediation was due to be pursued late and out of sync with the pre-action protocol. That said, the judgment here would clear the way and simplify matters for the mediation. ***Daejan Investments v Park West Club Ltd*** [2004] BLR 223, approach in which HHJ Wilcox came to the conclusion that it was appropriate to make it a condition of permission to amend in a case where the pre-action protocol had not been complied with, that the amending party should pay the other parties' costs up to that stage applied. Mr Justice Ramsey. 23rd March 2007.

Crystal Decisions (UK) Ltd v Vedatech Corporation [2007] EWHC 1062 (Ch)

Crystal negotiated a mediated settlement to a dispute. The defendant sought to set aside the settlement on the grounds of fraud - having learnt about bank statements which it asserts if known about at the time, would have significantly altered the terms of the settlement. An anti-suit injunction was granted previously to prevent a fraud action being pursued in California. Here the court held that fraud had not been established - at best it was a case of innocent misrepresentation. ***Wallersteiner v Moir*** [1974] 1 WLR 991; ***Williams v. Powell*** *[1894] W.N. 141,* ***Patten v Burke Publishing Co. Ltd*** [1991] 1 WLR 541. considered.

Regarding estoppel ***Watford Electronics Ltd v Sanderson CFL Ltd*** [2001] EWCA Civ 317 considered. By repeatedly failing to meet deadlines for filing defences and claims and discharge of court costs, the defendant had already lost the right to pursue his actions. There were no grounds to set aside the settlement which was accordingly enforceable. The anti-suit injunction would remain in place. ***Bottin (International) Investments Ltd v Venson Group plc*** [2005] EWHC 90005 and ***E.G. Morris v Bank of America*** [2000] 1 AER 954 considered.

In cases of misrepresentation it is the act of the party entitled to rescind disavowing the contract which brings it to an end and not the subsequent determination of the Court that the agreement was validly rescinded: see ***TSB Bank plc v Camfield*** [1995] 1 WLR 430 at p.438 per Roch LJ. But where (as in this case) the existence of the grounds of rescission is disputed only the Court can resolve that.

The Court made an order for the settlement sum paid into court by Crystal to be paid out to Vedatech, subject to set off to take account of the costs of these proceedings and the wasted costs of defending the action in California. The amount payable was to be assessed not merely on a time basis, but rather on a time and success basis as in the case of ***Way v Latilla*** [1937] 3 AER 759. ***National Westminster Bank plc v Utrecht-America Finance Company*** [2001] EWCA Civ 658 applied. Mr Justice Patten. Chancery Division. 9th May 2007

COMMENT : This case provides an object lesson on the hurdles to be surmounted in order to set aside a mediation settlement on the grounds of misrepresentation.

Equitas Ltd v Horace Holman & Company Ltd. [2007] EWHC 903 (Comm)

Protracted action by assignee of Lloyd's Syndicate arising out of a settlement agreement against a Broker for inaccurate record keeping. Regarding accounting disclosure duties ***Yasuda Ltd v Orion Underwriting Ltd,*** [1995] QB at 174; ***Chandrey Martin v Martin,*** [1953] 2 QB 286 considered. As to whether accounting duties had been fulfilled ***Anglo-American Asphalt Co Ltd v Crowley Russell & Co Ltd,*** [1945] 2 AER 324; ***v Mellersh,*** (1850) 2 Mac & G 309, 314 and ***Lambert v Still,*** [1894] 1 Ch 73, 84 referred to.

Regarding burden of proof ***Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corp Ltd.,*** [1942] AC 154 considered. Ultimately it was established that a small sum due to Equitas due to faulty records. Bulk of claim had fallen away once certain records disclosed. Court considered that this could and should have been dealt with by mediation where the problem of records could have been solved. Mediation mooted by Equitas but not actively pursued and not taken into account in costs order. Mr Justice Andrew Smith. 27th April 2007.

Framlington Group Ltd v Barnetson [2007] EWCA Civ 502

This is an important case regarding the extent to which the Without Prejudice rules apply to settlement negotiations before legal action has been commenced. ***Prudential Assurance Co. v Prudential Insurance Co*** [2002] EWHC 2809 and ***Paribas v Mezzotero*** [2004] IRLR 508 considered. The question considered here was "How proximate must unsuccessful negotiations in a dispute leading to litigation be to the start of litigation, to attract the without prejudice rule?" The court held that the critical feature of proximity for this purpose is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations i.e. whether the parties contemplated or might reasonably have contemplated litigation if they could not agree.

The court reviewed ***Rush v Tompkins Ltd v Greater London Council*** [1989] AC, 1280; ***Cutts v Head*** [1984] CH 290; ***Bradford & Bingley plc v Rashid*** [2006] 1 WLR 2066; ***Unilever PLC v The Proctor & Gamble Co*** [2000] WLR 2336. ***South Shropshire District Council v Amos*** [1986] 1 WLR 1271; ***Petrograde Inc v Texaco Ltd*** [2002] 1 WLR 947; ***Hinton v University of North East London*** [2005] IRLR 552. CA before Auld LJ; Longmore LJ; Toulson LJ. 24th May 2007

Raglan Housing Association v Southhampton City Council [2006] EWCA Civ 1567

This case involves an application to appeal the classification of a waterway by the court at first instance. Three possibilities existed. It was either a stream and maintenance was the responsibility of the land owner, a private sewer under the care of the local authority or a public sewer under the care of the Water Authorities. The significance lies in the fact that the waterway had flooded three times in the last few years. The application to appeal an arguable point of law was granted subject to an undertaking to mediate. The court concluded as follows : -

16. *My concern however - as was Lord Justice Jonathan Parker's and His Honour Judge Hughes' concern - is that public money should not be spent unnecessarily in the conduct of further litigation. I understand from counsel for Southern Water Services that his client would be perfectly content that the matter should be referred to the Court of Appeal Mediation Scheme. That will require the consent of the other two parties. For my part, it seems to me that this matter should not be argued in court unless and until an attempt at mediation has been shown to be unsuccessful.*

17. *I give permission to appeal therefore on the footing that the applicant will refer the matter to the Court of Appeal Mediation Scheme and will actively seek the consent of the other two parties to that reference so it can be mediated before it has to be further litigated.* Sir Andrew Morritt. 24th October 2006

Comment : one wonders what a District Auditor might make of a mediated agreement to accept a classification not necessarily legally justifiable and the expense that might arise from such a voluntary classification. Furthermore, would a CA judgement provide valuable guidance to the classification of such waterways for the future and if so would a mediated settlement amount to a lost opportunity?

CONSTRUCTION CASE CORNER

Case commentary by

Corbett Haselgrove Spurin

A.R.T. Consultancy Ltd v Navera Trading Ltd [2007] EWHC 1375

The parties concluded a JCT Minor Works Contract and a separate oral contract for design works. Disputes arose under both contracts that were submitted to adjudication. The adjudication declined jurisdiction regarding the design disputes and made an award for payment in respect of the works contract. Enforcement was resisted on the grounds that the contract was not sufficiently in writing for HGCRA purposes. The court found that the JCT contract was entirely in writing and there was no evidence of additional written terms. ***RJT v DM Engineering*** [2002]; ***Trustees of Stratfield Saye v AHL Construction*** [2004], ***Bennett v Inviron*** [2007] considered. Application for stay on basis of financil vulnerability declined. ***Hershel v Breen*** [2000] ; ***Ashley House v Galliers*** [2002] considered. HHJ Peter Coulson. 31st May 2007

AC Yule & Son Ltd v Speedwell Roofing & Cladding Ltd [2007] EWHC 1360

The court was called upon here to determine whether or not an adjudicator's decision was reached within the HGRCA timeframe and extensions of time granted by the applicant and or agreed by the parties. There was a statutory extension – together with a request for 2 additional days in response to late submissions by both parties of additional considerations. One party asked – the other acquiesced by conduct and continuing participation and submission. This amounted to implied / express consent to the final extention of time. The decision was delivered in time and was enforceable. ***Macob v Morrison*** [1999] ; ***Bouygues v Dahl Jensen*** [2000]; ***C&B Scene v Isobars*** [2002]; ***Discain v Opecprime (No 2)*** [2001] ; ***Balfour Beatty v LB Lambeth*** [2002]; ***AMEC v Whitefriars*** [2004]; ***Carillion v Devonport*** [2006]; ***Barnes & Elliot v Taylor Woodrow*** [2004]; ***Ritchie v David Philp*** [2005]; ***Simons v Aardvark*** [2004]; ***Hart v Fidler*** [2006] ; ***Cubitt v Fleetglade*** [2006]; ***Epping v Briggs & Forrester*** [2007] ; ***Aveat v Jerram Falkus*** [2007] considered. In addition, the respondent was estopped by conduct from denying the extension. ***The Stolt Loyalty*** [1993] 2 LLR 281 considered. As to whether the statutory period is mandatory or merely advisory ***Cowlin v CFW Architects*** [2003]; ***R v. Soneji*** [2006] 1 AC 340, ***Brodyn v Davenport*** (2004) 61 NSWLR 421 considered. HHJ Peter Coulson. 31st May 2007

Autolink Concessionaires (M6) Plc v Amey Construction Ltd [2007] ScotCS CSOH_81

This concerned a Motorway construction contract followed by a 30 year maintenance agreement. A dispute arose over the contractual definition of defect in the main contract and whether a subsequent defect was subject to defects provisions under the main contract or a defect under the terms of the maintenance contract. The court stated that in the absence of cross referencing the construction contract must be construed on its own terms. Remarkably the definition required perfection. There were no provisions limiting it to defects arising out of the fault of the contractor. Accordingly the contractor had to repair the works at his own cost. Outer House, Court of Session. Lord Clarke. 4th May 2007.

Claymore Services Ltd v Nautilus Properties Ltd [2007] EWHC 805 (TCC)

A dispute regarding the final account of a hotel refurbishment was submitted to adjudication. The adjudicator held that there was no written contract, the work having been carried out in furtherance of a letter of intent that required the formal signing off of a JCT contract, which never occurred. However the adjudicator found that he had jurisdiction to determine the final account and did so. It was held, not surprisingly that the decision was unenforceable since in the absence of a written contract the adjudicator lacked jurisdiction.

A subsequent quantum meruit claim was settled, with the question of interest alone proceeding to trial. The court held that interest at bank rate + 2%. ***Pinnock v Wilkins*** TLR 1990: ***Watts v Morrow*** [1991] 1 WLR 1421. ***Tate & Lyle v GLCI*** [1982] 1 WLR 149; ***Shearson Lehman Hutton v MacClaine Watson Co. Ltd.*** [1990] 3 All ER 723 : ***Way v Latilla*** [1937] 3 All ER 759 considered regarding the appropriate interest rate. The court imposed a 50% downward adjustment in respect of 1 years interest due to failure to prosecute promptly by pursuing enforcement of an obviously unenforceable decision. However, the initial submission to adjudication was deemed to be reasonable and thus not to be taken into account.

The court also held that the claim was founded in restitution - not unjust enrichment – and accordingly interest was to run from the date of final account + reasonable time (3 months) to consider account. ***BP Exploration v Hunt (No.2)*** [1979] 1 WLR 783: ***Birkett v Hayes*** [1982] 1WLR 816: ***Metal Box Co Ltd v Currys Ltd*** [1988] 1 WLR 175: ***Allen v McAlpine*** *[1968] 2 QB 229* : ***Wright v BRB*** *[1983] 2 AC 773;* ***La Pintada v President of India*** *[1983] 1 Lloyds Rep 37;* ***Athenian Harmony (No. 2)*** [1998] 2 LL.R 425, ***Kuwait Airways v Kuwait Insurance*** (2000): ***Quorum v Shramm*** (2001) 19 CLJ 224, ***Adcock v Co-operative*** *[2000] LIRLR 657* considered re restitution & quantum meruit. Mr Justice Jackson. TCC. 20th March 2007

Domsalla (t/a Domsalla Building Services) v Dyason [2007] EWHC 1174 (TCC)

Following destruction by fire of the assured's property, an insurance company contracted with Domsalla for the demolition and restatement of Dyason's home, subject to JCT Minor Works. Dyason signed as agent of the underwriters. Delays followed and the quality of work was disputed by Dyason. Domsalla terminated the contract for non-payment of stage payments. The underwriters purported to avoid the policy at about the same time but ultimately brokered a settlement with Dyason, who was left to sort out outstanding construction matters. Domsalla submitted the payment dispute to adjudication. Dyason took part subject to two reservations regarding jurisdiction, with specific reference to the compliance with the UCCTA of withholding notice provisions within the JCT contract. The adjudicator held that the provisions did not offend the UCCTA and determined that in the absence of withholding notices payment became due on the certified stage payments. Domsalla here sought summary enforcement of that decision.

Thornton J held that the adjudication provisions complied with the UCCTA and there had been a valid reference of the dispute to adjudication. He further held that as a non-HGCRA adjudication, the adjudicator's decision was amendable to review for errors. In the circumstances, at the relevant times contract administration was exclusively in the hands of the underwriter. Dyason had had no say in the terms of the contract. He was unaware of the withholding provisions and had no power to issue withholding notices at the relevant time. These factors were contrary to the requirements of the UCCTA and thus the withholding notice provisions were not enforceable. Whilst under the HGCRA errors of law will not prevent an adjudicator's decision from being enforceable, this is not the case in non-HGCRA adjudication. The adjudicator could not by error override the statutory rights of a consumer under the UCCTA. Accordingly summary enforcement was refused and the case would proceed to trial.

D.G. Fair Trading v First National Bank [2002] 1 AC 481*;* ***Bryen & Langley v Boston*** [2005] EWCA Civ 973 considered. Other cases cited included ***Picardi v Cuniberti*** [2003] BLR 487 (Toulmin); ***Lovell Projects Ltd v Legg & Carver*** [2003] BLR 452, (Moseley); ***Westminster Building Company Ltd v Beckingham*** [2004] BLR 163, (Thornton); ***Allen Wilson Shopfitters v Buckingham*** [2005] EWHC 1165 (TCC), (Coulson). ***Rupert Morgan Building Services Ltd v Jervis*** [2004] 1 BLR 18 ; ***Gilbert-Ash v Modern Engineering*** [1974] AC 689 considered. HHJ Thornton. Q.C. TCC. 4th May 2007

Hands v Morrison Construction Services Ltd [2006] EWHC 2018 (Ch)

Hands, the applicant, was the principal shareholder / investor in a speedway development venture. The first event was a disaster due to water on the surface of the track. The venture failed. Hands sold his £7.5M shares for a mere £1. In this on-going negligence action, Hands asserts that Morrison, the contractor, knew that the track was not fit for purpose and was negligent / fraudulent in giving three assurances that it would be fit for purpose, which resulted in the financial loss since remedial action would otherwise have been taken to ensure the event was a success.

Here, Hands sought disclosure of an array of electronic documents as part of the pre-action protocol. The court rejected much of the application but acceded regarding a class of documents arising out of a prior litigation which were both compact, accessible and in the possession of Morrison's solicitors since they would assist in taking the case forward. The documents related to an adjudication between Morrison and architects/contractors (***AWG v Rockingham Speedway*** [2004]) about defective design and construction of the track. Hands wished to use this material to demonstrate that Morrison had been fully aware that the race track would not be fit for purpose (in the event the adjudication decision had not been enforceable) at the time that the assurances were made. The court ordered disclosure.

Bermuda Int. Securities Ltd v KPMG (2001) 1 Lloyd's Rep 392; ***Black v Sumitomo*** [2001] EWCA Civ 1819, ***Steamship Mutual v Baring Asset Man. Ltd*** 2004 EWHC 202 (Comm); ***XL London Market Ltd v Zenith*** [2004] EWHC 1182 (Comm); **Birse v Engenharia,** considered. M Briggs QC. Chancery. 16th June 2006.

Hart Investments Ltd v T.M.C. Fidler (t/a Terence Fidler Partnership) [2007] EWHC 1058 (TCC)

This concerned an engineer's liability for failure to advise on a contractor's non-compliance with design specifications for temporary works and resultant collapse of facia and side wall during basement excavation activities. The court held that there was joint liability in contract & tort and that a special relationship extending liability to pure economic loss existed. As to implied contractual duties, ***Corfield v. Grant*** (1992) 29 Con. L.R. ***Old School v Gleeson*** 4 B.L.R. 103. ***Credit Lyonnaise v Russell Jones & Walker*** [2003] PNLR 17. ***White v Jones*** *[1995] 2 A.C. 207 considered. As to liability in tort* ***Henderson v Merrett; Murphy v Brentwood D.C.; Merrett v. Babb*** [2001] QB 1174 considered.

Mr Recorder Roger Stewart QC. TCC. 30th March 2007

Hewden Tower Cranes Ltd v Wolffkran GmbH [2007] EWHC 857 (TCC) : Bailli

A hire crane collapsed. Hewden having paid out compensation to various parties sought to recover against the German manufacturer / hirer of the equipment on the grounds of negligence, defective welds in crane. Civil Liability Contribution Act 1978. Question "Whether under EC Reg 44/2002 Arts 2(1); 5(3) & 23 the UK or German court had jurisdiction?" Held : UK Court had jurisdiction. ***Kalfelis v Bankhaus Schröder, Munchmeyer, Hengst & Co*** [1988] ECR 5565 ; ***Santa Fe (UK) Ltd v Gates Europe NV*** [1991]; ***Davenport v Corinthian Motor Policies at Lloyds*** [1991] S.L.T. 774 ; ***Molnlycke AB v Procter & Gamble Ltd*** [1992] 1 WLR 1112 ; ***Kleinwort Benson Ltd v Glasgow CC*** [1999] 1 AC 153 ; ***Casio Computer Co Ltd v Sayo*** [2001] EWCA Civ 661 ; ***Verein fur Konsumenteninformation v Karl Heinz Henkel*** [2002] ECR 1-08111, In ***Sallotti RUWA v Polstereimaschinen GmbH*** [1976] ECR 1831; ***Konkola Copper Mines plc v Coromin Ltd*** [2006] EWCA Civ 5; ***Bols Distilleries BV v Superior Yacht Services Ltd*** [2007] 1 WLR 12 referred to. Mr Justice Jackson. TCC. 3rd April 2007

Humes Building Contracts v Charlotte Homes (Surrey) [2007] LAWTEL AC0113534

The employer purported to terminate a design & build contract. The contractor issued valuation 14 to recover outstanding measured works, subject to off setting defective works after the termination. The works had not been certified as required under the contract. Whilst no withholding notice issued, none was required under the contract in the circumstances, since the contract provided payment for completed works. The adjudicator concluded the defective works counter-claims were not relevant in the absence of a withholding notice, a point not pursued by the contractor and ordered payment. The court accepted that whilst the conclusions with regard to the requirements of a withholding notice, and the consequences that followed from that were legally incorrect, that was nonetheless a determination that the adjudicator had jurisdiction to make which would, even though in error, be enforceable.

Enforcement however was successfully resisted on the grounds that the issue regarding whether or not a withholding notice was required, was not canvassed in adjudication. This amounted to a breach of natural justice in that no opportunity had been afforded to the parties to address the issue. ***Carillion v Devonport*** [2005] EWCA Civ 1358, ***Ardmore v Taylor Woodrow*** (2006); ***Balfour Beatty v L.B. Lambeth*** [2002] BLR 288. ***Discain*** [2000] BLR 402 considered.

Whilst not necessary in the circumstances, given that enforcement was refused, an application to stay enforcement on the grounds of financial instability was rejected. ***Wimbledon v Vago*** [2005] EWHC 1086 considered. The contractor's financial situation was well known at a prior stage and at the time of the adjudication there was no indication of insolvency. However, given that insolvency proceedings had commenced, any sum due would have to be paid into court.

Gilliland J. TCC. 3rd January 2007.

Melville Dundas Ltd v George Wimpey UK Ltd (Scotland) [2007] UKHL 18

This case concerned unpaid stage payments post filing of letters of Administration. By a 3/2 majority the House of Lords restored the first instance decision of Lord Clarke. Clause 27 JCT, which suspends outstanding payments of all payments that accrue from a date 28 days prior to a contractor entering into administration pending the making up of a final account, does not offend the HGCRA. Thus payment of a sum due in the absence of a withholding notice, 14 days before administration, is not enforceable under the HGCRA. ***Bouygues v Dahl-Jensen*** [2000] BLR 522, : ***Highland Engineering Ltd v Thomson,*** 1972 SC 87, ***Modern Engineering Ltd v Gilbert-Ash*** [1974] AC 689. ***Stein v Blake*** [1996] AC 243; in ***C & B Scene v Isobars*** [2002] BLR 93) considered.

House of Lords before Lords Hoffmann, Hope & Walker. Lords Mance & Neuberger dissenting. 25th April 2007

Mott MacDonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC)

A contract arose out of a letter of intent, followed over several years by extensions, written variations and oral variations reinforced by subsequent practice. A payment dispute was submitted to adjudication on the basis of the terms of the letter of intent which it was submitted had coalesced into a written contract. The applicant asserted during enforcement proceedings that jurisdiction had been conceded during the course of submissions and response. The responding party on the other hand objected to jurisdiction from the outset and adhered to terms under a subsequent variation, not the initial letter of intent. The court held that there was no jurisdiction. The contract was not in writing. Also the adjudicator had no jurisdiction to determine his jurisdiction. The decision was out with his jurisdiction and could not be categorised as non-reviewable.

On a separate matter the validity of the decision was disputed. Delivery of the decision had been withheld pending payment of the adjudicator's fees by the referring party in furtherance of a lien imposed by the adjudicator as a term of acceptance of the appointment. The court held that requiring the referring party to pay all the fees amounted to impartiality contrary to s12(a) of the Scheme. There is an appearance of partiality arising out of the fact that the adjudicator is financially beholden to the referring party.

In addition, there is no right to assert a lien over an adjudication decision, since to do so will, and in this case did, lead to a breach of s19(3) of the Scheme in that the decision had not been delivered promptly, since it had withheld for 5 days pending payment. Promptly requires delivery by email or fax. Finally, whilst the decision was signed and posted on the final date for delivery it was posted but not faxed and arrived a day late, rendering it unenforceable. Faxed delivery was a term imposed by the adjudicator which he had breached. For all of these reasons the decision was not enforceable.

RJT v DM Engineering considered regarding what is a written contract; ***Bloor v Bowmer & Kirland***, *St* ***Andrew's Bay v HBG***, ***Barnes & Elliot v Taylor Woodrow***, ***Ritchie v David Philip, Hart v Fidler, Cubitt v Fleetglade*** considered regarding late delivery of decision. His Honour Judge Anthony Thornton. QC. 23rd May 2007.

COMMENT : Why would a lien amount to an appearance of bias in adjudication but not in arbitration? What is the difference between the parties agreeing a lien and an adjudicator imposing one? Does this decision push the prompt delivery requirements too far and open up an additional can of worms for the future?

Sydenhams (Timber Engineering) Ltd. v CHG Holdings Ltd. [2007] EWHC 1129 (TCC)

Insolvency of main contractor : Liability of employer to sub-contractor. Whether or not a contract with the sub-contractor and liability to pay sub-contractor for work done that may already have been paid out to the main contractor. In the run up to the contractor entering into administration an agreement was reached for the sub-contractor to be paid directly by the employer. This agreement was enforceable. ***Edwards v Skyways*** [1964] 1 WLR 349; ***Kleinwort Benson v Malaysian Mining*** [1989] 1 WLR 379; ***Percy Trentham v Archital Luxfer*** [1993] 1 Ll.R. 27; **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896; **Absolom v TCRU Ltd** [2006] 2 Ll.R. [2005] EWCA Civ 1586; ***Antaios Co Naviera SA v Salan Rederierna AB*** *[1985] AC 191;* ***(James) & Partners v Whitworth Street Estates (Manchester) Ltd*** [1970] AC 573.; ***Maggs v Marsh*** *[2006] EWCA Civ 1058;* **British Steel v Cleveland Bridge** [1984] 1 All ER 504; **Mullan v Ross & London** [1998] 86 BNR 1. ***Homburg Houtimport BV v Agrosin Private Ltd*** [2003] 2 WLR 711 considered.

Peter Coulson QC. TCC. 3rd May 2007.

ARBITRATION & LITIGATION PRACTICE & PROCEDURE CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

AIC Ltd v Marine Pilot Ltd [2007] EWHC 1182 (Comm)

s69 Arbitration Act 1996 challenge : Point of law - preliminary determination regarding interpretation of safe port clause - and quantity to be loaded. The dissenting judgment of Dixon CJ in ***Reardon Smith Line v Australian Wheat Board ("The Houston City")*** [1954] 2 Lloyds Rep 148 considered. The passage in that dissenting judgment was subsequently approved by the Privy Council in the same case at [1956] AC 266 at 282 and also, prior to ***The Houston City*** reaching the Privy Council, by the English Court of Appeal in ***Compania Naviera Maropan S/A v Bowaters Lloyd Pulp & Paper Mills Ltd*** [1955] 2 QB 68. ***Transoceanic Petroleum Carriers v Cook Industries Inc (The "Mary Lou")*** [1981] 2 Lloyds Rep 272 considered. ***Atkins International H.A. v Islamic Republic of Iran Shipping Lines (The "A.P.J. Priti")*** [1987] 2 Lloyd's Law Reports 37, ***Aegean Sea Traders Corporation v Repsol Petroleo SA (The "Aegean Sea")*** [1998] 2 Lloyd's Law Reports 39 applied.

Mrs Justice Gloster, DBE: Commercial Court. 17th May 2007

Bunney v Burns Anderson Plc [2007] EWHC 1240 (Ch)

Application for summary enforcement of two awards by the Financial Services Ombudsman in excess of £200K. The Ombudsman had jurisdiction to award up to £100K and the right to recommend additional sums. Held : The court exercised discretionary power to award enforcement by mandatory injunction. Even in the absence of statutory power akin to s66 Arbitration Act 1996, the discretion would not be exercised to enforce an ultra vires award. ***O'Reilly v Mackman*** [1983] 2 AC 237. ***Wandsworth LBC v Winder*** [1985] 1 AC 461; ***Roy v Kensington, Chelsea & Westminster Family Practitioner Committee*** [1992] 1 AC 624; ***R v Wicks*** [1998] AC 92; ***Miller-Mead v Minister of Housing & LG*** *[1963] 2 Q.B. 196,* ***Bugg v DPP*** [1993] QB 473; ***Quietlynn Ltd v Portsmouth C.C.*** [1988] QB 114; ***Boddington v British Transport Police*** [1999] 2 AC 143. ***Clark v University of Lincolnshire & Humberside*** [2000]1 WLR 1988; ***Rhondda Cynon Taff CBC v Watkins*** [2003] 1 WLR 1864. ***Dwr Cymru Cyfyngedig v Corus UK Ltd*** [2006] EWHC 1183 (Ch). ***FSA v Matthews*** [2005] Pens LR 241; ***Davies Walters & Associates Ltd v PIA Ombudsman Bureau*** [2001] EWHC (Admin) 1159 considered.

Summary

47.I would summarise my conclusions on the basis of this review of the authorities as follows:

i) The original procedural reasons which led to the formulation of the principle in ***O'Reilly v Mackman*** *have lost much of their force since the introduction of the CPR;*

ii) They never applied to defendants who wished to challenge public law decisions upon which a private cause of action against them was asserted in proceedings which they wished to defend;

iii) There is no longer any difference in principle between a challenge based on substantive validity and one based on procedural invalidity;

iv) Where a defendant to a claim wishes to challenge a public law decision as part of his defence, the court does not have any discretion to refuse to allow him to do so, unless either the raising of the defence is an abuse of process or it has no reasonable prospect of success;

v) It will have no reasonable prospect of success if, as a matter of construction of the statute under which the impugned act was done, the legislation forbids any challenge (or the particular type of challenge that the defendant wishes to make) to be made otherwise than by judicial review;

vi) In construing statutory schemes which enable decisions to be made under them there is a strong presumption, based on the importance of the rule of law, against concluding that the only permissible means of challenge is by judicial review.

Mr Justice Lewison. 25 May 2007

Fiona Trust Holding Corp v Privalov [2007] EWHC 1217 (Comm)

This case involved a successful application for the extension of a previously granted Worldwide Freezing order. ***The Niedersachsen [1983] 1 W.L.R. 141. American Cyanamid v Ethicon Ltd [1975] A.C. 396, Eng Mee Yong v Letchumanan [1980] A.C. 331, Canada Trust v Stolzenberg (No. 2) [1998] 1 W.L.R. 547, Lewis v Freighthire Ltd (Unreported CA 1st Feb 1999), Laemthong International v ARTIS [2005] 1 Lloyds Rep. 100*** considered. ***Fyffes v Templeman [2000] 2 Lloyds Rep. 643*** ; ***Ultraframe v Fielding [2006] F.S.R. 17*** ; ***Murad v. Al-Saraj [2005] EWCA Civ 959***. referred to.

Mr Justice David Steel. 21st May 2007

J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd [2007] EWHC 1262 (TCC)

Application for an injunction to prevent continuance of arbitration s37 SCA 1981 / challenge to interim award s69 Arbitration Act 1996. Whether continuance of arbitration oppressive or vexatious. Application made at a very late stage when arbitration imminent. Potential concurrent actions in court and tribunal held not in itself to be oppressive. The risk of double liability was minimal. An arbitrator has a duty to manage the process, which is not per se vexatious. A real claim was at stake.

The 'Oranie' and The 'Tunisie' [1966] 1 Lloyd's List LR 477, ***The University of Reading v Miller Construction Limited*** [1994] 75 BLR 91, ***Lesotho Highlands Development Authority v Impregilo SpA*** [2005] UKHL 43; ***Elektrim SA v Vivendi Universal SA*** [2007] EWHC 571 considered. His honour stated as follows :-"

40. From this review of authority I derive four propositions:
    (i) The Court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to grant an injunction to restrain an arbitration from proceeding.
    (ii) That power may be exercised if two conditions are satisfied, namely: (a) the injunction does not cause injustice to the claimant in the arbitration, and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.
    (iii) The Court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.
    (iv) Delay by the party applying for an injunction is material to the Court's exercise of discretion and may in some cases be fatal to the application."

Alfred McAlpine Construction v Panatown Limited [2001] 1 AC 518. considered. Mr Justice Jackson. 14th May 2007

Orton v Collins [2007] EWHC 803 (Ch)

How do you accept a Part 36 offer to settle a case if it involves a disposition of an interest in land? settlement of a partnership dissolution dispute. Can it be accomplished via an enforceable Part 36 offer which is accepted? Answer - YES - though old CPR forms do not work that smoothly. New 44th revision will work more smoothly.

Mr Peter Prescott QC. 23rd April 2007

Stern Settlement v Levy [2007] EWHC 1187 (TCC)

Challenge s68 / s69 Arbitration Act 1996 : Challenged failed on both grounds : Where a term of a contract led to two potential, though equally imperfect interpretations, the arbitrator is legally entitled to chose one over the other. In addition, the consequence did not affect the outcome. The arbitrator afforded every opportunity to the party to address the disputed issue. His Honour Judge Peter Coulson. 11th May 2007

Wetherspoon JD Plc v Jay Mar Estates [2007] EWHC 856 (TCC)

Challenge s68 : Expertise : Rent review : Had arbitrator erred in not giving an opportunity to the parties to address what arbitrator had discovered by viewing the property? By adopting a valuation process not put by either party was there an irregularity? Held : No - had to use his expertise - parties had opportunity to put forward their cases.

Regarding scope of s68 ***Warborough Investments Limited v S Robinson and Sons Holdings Ltd*** [2003] EWCA Civ 751); ***Weldon Plant v Commission for New Towns*** [2000] BLR 496; ***World Trade Corporation Ltd v C.Czarnikow Sugar Ltd*** [2004] 2 All ER Comm). ***St George's Investment Co v Gemini Consulting Ltd*** [2005] 1 EGLR 5 considered.

Regarding the arbitrator's own experience, ***Checkpoint Limited v Strathclyde Pension Fund*** [2003] EWCA Civ 84); ***Eastcheap Dried Fruit & Co v NV Gerbroedus Catz Handelsvereeniging)*** [1962] 1 Lloyds Rep 283; ***Zermalt Holdings SA v Nu-Life Upholstery Repairs Limited*** [1985] 2 EGLR, 14; ***Fox v Welfair*** [1981] 2 Lloyd's Law Reports 514 considered.

Regarding substantial injustice ***Egmatra AG v Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862; ***Lesotho Highlands Development Authority v Impreglio SpA and Others*** [2005] UKHL 43, reviewed. HHJ Peter Coulson QC. 4th April 2007

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