ADR NEWS

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

ADR FORUM

UNIVERSITY OF GLAMORGAN

School of Law and School of Technology

Wales Branch | In association with the | Law & Technology

CHARTERED INSTITUTE OF ARBITRATORS

WELCOME

Good afternoon Ladies and Gentlemen, allow me to introduce myself. I am Professor Michael Stuckey, Head of Law here at the University of Glamorgan. It is my pleasure to welcome the Welsh Branch of the Chartered Institute of Arbitrators to the Business Centre at the University of Glamorgan, for the third annual ADR Day. Each year this collaborative event between the Law School, the School of Technology and the Chartered Institute of Arbitrators adopts a different theme.

Contents

- In 2003 the inaugural event concentrated on Construction Dispute Settlement.
- Last year was dedicated to Construction Adjudication Practice.
- This year the chosen theme is Landlord and Tenant Disputes.

The University values the opportunity events such as this provide to forge links with the professional community, particularly when, as today, it facilitates multi-disciplinary cooperation between academia, legal practitioners and those engaged in the built environment. Our students today, will be the practitioners of tomorrow. The wide range of expertise drawn from both professions sharing their expertise and knowledge with us today provides both delegates and students with the opportunity to gain insights into the latest issues affecting dispute settlement practice and procedure in the built environment.

This Forum's is a demonstration of the fact that learning is a process that we undertake throughout our working lives and is not limited to the time we spend at school and in university. It is appropriate therefore that the University plays a central role in both formal and informal continuing education for the professions.

The University's Professor of Arbitration, Geoffrey Beresford Hartwell, will set the tone for today's proceedings, with his third successive Key-Note speech to the Forum.

Unfortunately, Gregg Hunt is unable to be with us today. Dr Mair Coombes Davies will present Gregg's paper on the resolution of Tenant and Leaseholder disputes. Gregg is otherwise engaged today signing important agreements for the settlement of London Borough rent disputes – the very issue addressed by his paper..

Phillip Howell Richardson will talk to you about mediating rent disputes and then I will present Gerwyn Griffith's paper on the law related to renewable business leases.

We will have a short break at 3:00 for refreshments followed by Christopher Dancaster's presentation on avoiding disputes and what to do if things go wrong. Today's session will conclude with a Q&A session.

I thank all the speakers for their contributions and look forward to hearing from them shortly. I hope you all have a thoroughly enjoyable and informative afternoon. Now, allow me to pass you over to Corbett Spurin, Vice-Chairman of the Wales Branch of the Chartered Institute of Arbitrators and today's Event Chairman.

OPENING ADDRESS by Corbett Haselgrove Spurin

Thank you very much Professor Stuckey. Good Afternoon and welcome to the University of Glamorgan.

We have an interesting and important topic to consider this afternoon. The market in rented property, both commercial and residential, plays a central role in our society. The Landlord – Tenant relationship, as with any relationship, is one fraught with tensions, both commercial and social. Changes to the balance between home ownership and rented accommodation directly impact upon broader relationships and expectations of both parties to the landlord – tenant compact. Social pressure points arise out of the following:-

- Home-ownership has expanded rapidly over the past thirty or so years, partly through extensive home building programs but partly as a consequence of the "right to buy programme" which has considerably reduced the public stock of social housing.
- The inexorable rise in house prices has made it increasingly difficult for first time buyers to climb on to the property ladder. New build in key locations has failed to keep abreast of demand.
- Divorce rates have virtually doubled the demand for separate housing.
- The inward flow of people to the UK from overseas, (as demonstrated by Home Office Statistics) has put further pressure on the property market.
- Private landlords are the primary suppliers of rented residential property. The last twenty years has seen the advent of Housing Associations, filling the gap vacated by the local authority residential landlords.
- Affordable housing for key public sector employees, be they nurses, teachers or whatever is now high on the political agenda.
- Young graduates entering the labour market already shoulder a considerable burden of debt from their time in education and find it increasingly difficult to cope with the rising costs of accommodation.
- Concern has been raised that affordable accommodation is beyond the reach of "ordinary folk" in many communities, particularly those that have attracted the attention of "down-sizers" from the City, who have the financial muscle to outbid locals in the property market.

It is inevitable that from time to time rent disputes will arise. Clearly it would be unreasonable to expect all landlords and all tenants to at all times fulfil all their reciprocal rights and duties or that as and when problems arise they can always be resolved by purely amicable discussions. The respective duties of landlord and tenant for care and maintenance of the rented property and mechanisms for the adjustment of rent rates are fertile areas for dispute.

What is at stake for the tenant (namely a place to live, often surrounded by friends and relatives, in striking distance of work and school) if the landlord/tenant relationship irrevocably breaks down means that there is a very high premium attached to resolution.

Similarly for the landlord, particularly one who operates a multi-tenancy property or a number of neighbouring tenancies, the behaviour of a tenant has broader implications since relationships with other tenants can be adversely affected. Problems can range from issues arising out of the social conduct of tenants to disputes about who should contribute to communal property running costs / maintenance and how much should be contributed.

Today we are in search of the "holy grail" of landlord/tenant dispute-ology - impartial, cost effective and speedy dispute resolution mechanisms. It is a worthwhile quest.

Allow me briefly to introduce you to Dennis Baldwin, Chairman of the Wales Branch of the Chartered Institute of Arbitrators who put today's program together. Without Dennis's vision and a lot of hard work, today's event would not be possible. Dennis, if you could say a few words ……. Now allow me to introduce our keynote speaker, Professor Geoffrey Beresford Hartwell. Geoffrey …..

Keynote Introduction

Prof Geoffrey M. Beresford Hartwell

Good afternoon to you all. I suppose that there cannot be many people who arbitrate for fun, but I can claim to be one of them. Almost every year, for the past ten years, I have been one of the arbitrators at the Willem Vis International Arbitration Moot in Vienna. It's an excuse to be in that beautiful city in the week before Easter, but is also an exciting event. 135 law schools from 46 countries around the world, a list which sadly does not include Wales, although I am quite sure that the Welsh are as skilled in advocacy as any of the teams I have seen. The standard is very high.

This year, we decided to create a legal problem about the sale of a quantity of cocoa. For the final round, we invited the doyen of the cocoa market in London to join the tribunal. The chairman was a lady, the President of the Swiss Arbitration Association.

That final round took place before an audience of more that a thousand people in the modern exhibition centre in Vienna and was won by a team from the Law School of Stetson University in Florida.

That we chose a commodity like cocoa this year was important and I will argue that it is relevant to what we have to think about this afternoon.

Very few modern arbitration practitioners have ever seen a proper arbitration, an arbitration of the kind that the legislators had in mind in the nineteen thirties or even in 1950. An arbitration in which the parties in dispute go to someone in their trade for a quick and straightforward answer to the differences between them.

Commodities like cocoa, like coffee, sugar, grain and cattle feed, each have their own markets and their own schemes for arbitration. The cocoa arbitrator who came to us in Vienna is the leading arbitrator in his market. He hears and decides the biggest cases, often the most complex and difficult cases in a huge international market which is changing all the time. He isn't a retired chief justice or lord of appeal in ordinary. He isn't even a superannuated law teacher. He is a man who buys cocoa for a living. All the cocoa arbitrators are currently employed in the cocoa business, buying and selling cocoa, maybe selecting and blending cocoa, everyday.

And that is how real arbitration works. People know and trusted in the market make decisions for their peers. There are few lawyers in cocoa arbitration, none as arbitrator and usually none to represent the parties. It's a business process in which business decisions are made.

In building and construction that kind of arbitration is almost over. Some house owner's arbitration under the scheme for house building may still be of that style, but more and more, and in spite of the legislation, arbitration is becoming a poor simulacrum of the Court. And not even the modern Court; I know of one arbitration, which has been over ten years in the hearing, on and off, and still remains to be completed. Like the famous case of Jarndyce & Jarndyce which ran like a length or ribbon through the episodes of Bleak House by Charles Dickens, a fore runner of the modern soap opera.

Mercifully, however, our main subject this afternoon, Landlord and Tenant arbitration, is not like that. I would argue that Rent review arbitration remains, like the commodity arbitration which I have just discussed, as an island of common sense in a sea of legal complexity. Originally I wrote the words "legal nonsense" and perhaps I should have stayed with that.

In Rent Review, although, of course, landlord and tenant have to give their evidence, and although the arbitrator has to weigh the evidence: "comparables", perhaps retail surveys counting people past the door, he or she can, and indeed should use professional skill and knowledge in finding the right answer. In that way, Rent Review is important, not only within the property market, vital though that is, but in the broader context of arbitration study.

Professional skill and knowledge is one of the more important facets of arbitration, whether commercial or otherwise. Arbitrators have to be cautious about it. In the infamous case of **Fox v Wellfair** [1982] 2 Lloyd's Rep 514, the arbitrator took into account facts which contradicted unchallenged evidence. Even more importantly, he gave the parties no warning and no opportunity to deal with what was in his mind. For years that case was allowed to cloud the thinking of some practitioners, who became unwilling to use their own skill at all. That was not right. The Court had made its position very clear as long ago as 1968, when Donaldson J, as he then was, said: "*A trade arbitral tribunal is fully entitled to use its own knowledge of the trade. Indeed the fact that it has this knowledge is one of the reasons why it exists and performs a most useful purpose* " (Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd [1968] 1 Lloyd's Rep 16) I mention this because it has a direct bearing on many kinds of Landlord and Tenant dispute where the relevant knowledge may be very local, and understanding the circumstances of a dispute may be valuable for its resolution.

There is a tendency in arbitration, as in other areas of professional practice, for practitioners to coalesce into groups which are small and specialised. Often those groups tend to be somewhat inward-looking, so their experience and their developments are not always known to those in other fields. Closed, rather like the way the valleys used to be. Perhaps insular. Sessions like this, where practitioners can exchange views with others, are one way of communicating on a wider front.

Today, the Chartered Institute and the University have taken a useful step forward. There are many aspects of Landlord and Tenant disputes which are instructive. As I have said, it is a classic area in which professional skills matter. It is an area in which local knowledge matters. Above all, it is a sensitive area in which the parties need to be able to continue their relationship. Preserving or restoring good relations after a quarrel is difficult and requires tact as much as it does skill. And that is what Arbitrator, Adjudicator, Mediator and Expert must have in abundance.

We have some excellent speakers this afternoon, and I hope that there will be plenty of active participation from the floor.

"Resolving Tenant and Leaseholder disputes by ADR"

Presented by Dr. Mair Coombes-Davies

You will have been expecting Gregory Hunt, Head of Business Relationships at the Chartered Institute of Arbitrators, to be speaking to you today. However, Gregory has been forced to send his apologies as he is unable to make it here due to the fact that he is signing a contract with a major local authority at this very moment. This contract will secure a high volume ADR service expected to resolve upwards of 500 leaseholder disputes before the end of 2005, and many more as we move in to 2006.

This new service will be the fifth that DRS-CIArb, the Institute's dispute resolution service, has developed to resolve housing disrepair, tenant and leaseholder disputes. New services are expected with other local authorities throughout the Midlands, the North West of England and Scotland before the end of the year.

Furthermore, DRS-CIArb is in discussions with private landlord bodies, such as Age Concern England, and close to introducing ADR to resolve disputes between leaseholders and private landlords on a national UK basis.

Gregory hopes that further services will be added in Wales shortly thanks to the hard work of the Institute's Welsh Branch in organising days such as this, when the work of DRS-CIArb can be promoted to a wider audience.

The methods used to resolve disputes in these local authorities will be familiar to you all – conciliation and arbitration. In most cases both conciliation and arbitration are dealt with by documents-only procedures, although there is an option for a hearing within arbitration if the parties or the arbitrator feel it is necessary.

However, it is the new service that is the most interesting. This service will see the development and use of four ADR components resulting in a huge saving to the local authority and its residents. Indeed, based upon a recent press release by the London Borough of Hackney, there are savings of £1m+ per year to be made by using ADR.

The components of the new service are:

- 2 hour mediation
- 2 hour adjudication
- documents-only adjudication, and
- arbitration, default method being documents-only but with the option of a hearing built in

It is expected that the majority of disputes will fall in to the 2-hour mediation or adjudication sessions. For these sessions, DRS-CIArb will provide local mediators and adjudicators, trained and accredited to defined standards, who will sit in local authority offices throughout the day and mediate or adjudicate three cases per day for a set fee.

In terms of mediation, the process is well tested in county courts throughout the country, and a high success level is expected. The parties will provide the mediator with no more than two sides of A4 each as pre-reading material, and the mediator will attempt to assist the parties in the settlement of their own dispute within the two-hour session. If mediation fails or all of the issues are not resolved, then the parties will be free to escalate the remaining issues to adjudication or arbitration.

Adjudication in this form is less tested, but the adjudicator will listen to the evidence of the parties and then provide them with a written decision within two days of the session. This decision becomes binding on the local authority if it is accepted by the leaseholder. If the decision is not accepted by the leaseholder then they will be free to pursue arbitration, LVT or the courts as further options.

In terms of documents-only adjudication, the process is tested and is already used successfully by DRS-CIArb via its use in the Communications & Internet Services Adjudication Scheme – CISAS. CISAS was developed 18 months ago following cries from certain communications providers, such as Orange, T-Mobile and Telewest, for an alternative to the Telecommunications Ombudsman.

Since its development and approval by Ofcom, the regulator, CISAS has resolved almost 400 disputes between customers of over 90 communications providers in the UK, and over 80% of decisions made by the adjudicator in this documents-only format have been accepted by the consumer – a major success rate considering that only 66% of cases are found in favour of the consumer. Furthermore, in the 400 cases to-date, only once has a consumer rejected the decision made and sought further relief in the courts.

Documents-only arbitration is, of course, the mainstay of DRS-CIArb, and has been used in tens of thousands of cases in the past ten years.

In this particular procedure, the parties will use documents-only as a default although the power is there to allow the arbitrator to call an oral hearing. If an oral hearing is held there is a further option of using wingers as advisers to the arbitrator, and these will be drawn from one winger from the Local Authority's Housing Team and one from the local Leaseholders Association. If either or both do not turn up on the day the hearing will continue in the presence of the arbitrator only.

In terms of costs, all costs will be paid by the local authority. That is, the costs of DRS-CIArb and the mediator / adjudicator / arbitrator and any expert appointed to assist. In the London Borough of Hackney, they go one step further by actually funding the tenant by providing them with a grant of £500 to fund legal assistance.

These five services, and the latest addition in particular, are expected to provide greater access to justice to tenants and leaseholders and to reduce the sums of money spent by local authorities in legal fees incurred in disputes with their tenants and leaseholders. They are also expected to reduce the backlog of disputes, which in one particular local authority is in the region of 1,300 cases.

Finally, due to the Institute's national membership structure, DRS-CIArb will be able to draw on the resources of mediators, adjudicators and arbitrators throughout the UK to be able to provide local services to local authorities. Panellists will be required to receive extra training

and continue their professional development in order to remain on the panel, and we will look to local authorities themselves to provide access to the Institute to train members of their staff and tenants and leaseholders in their own areas via the Institute's one day awareness to ADR programmes.

For further information, including copies of the rules, guidance notes and application forms for the various schemes, please contact Gregory Hunt who's contact details are shown on the back page of the DRS-CIArb leaflet in your delegate packs.

"MEDIATING RENT DISPUTES"

Some Issues

Talk by Phillip Howell-Richardson[1]

Rent disputes can be the perfect examples of litigation undertaken which costs all parties involved too much, destroys relationships and achieves no effective satisfaction for any of the parties involved. In recent years, housing disrepair cases proceeding under conditional fee agreements, the increasing awareness of "rights" and "obligations" and the increasing strain created by raised expectations and issues surrounding anti-social behaviour orders or injunctions, have all been brought together in the field of housing law. At the same time the reforms that have been undertaken in the procedures and approach adopted by the Court, such that dispute resolution is at the forefront, has brought an opportunity to deal in more creative ways with the particular requirements of the private sector and the public sector when dealing with property issues.

The Court has made it quite clear that ADR, and mediation in particular, is to be used and, for example, Lord Woolf in the case of **Cowl v. Plymouth City Council**, with the public sector particularly in mind, did not mince his words when he said:-

> "*The parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do this without help then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible*".

The application of mediation, within the particular requirements of the property sector and public sector housing obligations, is what this talk is about, where a rent dispute is the presenting problem.

1. Is it really a rent dispute?

It is well known that before any rent action is taken before the Court, Housing Officers and personnel within Local Authorities or Housing Associations, Managing Agents or indeed the landlord, will make every effort to speak to the tenant concerned and try to ascertain the issues involved, so that they can be resolved without the need for proceedings. Quite frequently such persons now have mediation training so that they can use the skills that are often seen and used in mediation itself, at this preliminary stage. It is preferable, if possible, to agree and to reach a resolution such that the rent is paid.

If, however, the rent is not paid and there is insufficient responsibility demonstrated or insufficient reason for the proceedings not to be commenced, then proceedings will be commenced. Very often, depending on the policy involved, proceedings are issued for at least one week's arrears and more or, alternatively, 8 weeks if greater certainty is required, both accompanied by an application for a possession order.

Within the range of orders available to a landlord there now exists anti-social behaviour orders, anti-social behaviour injunctions, exclusion orders and demotion orders to use against tenants. These orders exist beside or instead of applications for judgment for rent in arrears and possession orders.

On the face of it this range of aggressive action is not a conducive environment in which mediation can be used to achieve settlement. But there are occasions when such powers are necessary and both the Courts, landlords and tenants recognise that these powers may indeed have to be used. However, as is widely known, the rent problem and rent proceedings may be just the beginning.

[1] Mediator, Solicitor, Chairman of the Association of Welsh Mediators. Chairman of ADR Net and Partner in Morgan Cole.

2. Common issues that are hidden.

If, for whatever reason, the underlying cause for a failure to pay rent does not emerge or become evident before the commencement of proceedings, it very often becomes evident after the commencement of proceedings. A relatively innocuous claim for rent can often be faced by a significant counterclaim founded on disrepair of the property or failure of promises or expectations, or a large variety of issues. Such actions, if proceeded with and contentious to any significant degree, can lead to large expense, a great deal of the landlord's attention and time in assessment of the counterclaim, and a breakdown in relationships. Not least, schedules of dilapidations are not agreed, the actual works to be undertaken are not agreed, and a landlord is often faced by a rising litigation bill and uncertainties as to the true extent of the repairs to be carried out.

There are many ways in which this situation can be resolved, not least through the Institute's own scheme here today, but mediation is a powerful tool to be used to reach a resolution where the parties literally face each other and decide upon the extent of the repairs to be undertaken, when they are to be undertaken and by whom, and can conclude the litigation, the counterclaim and the rent claim in one session.

The decision in **Bowen & Ors v. Bridgend County Council** has reined in the housing disrepair cases claim bubble, to a degree, in that claimants' solicitors must advise their clients to consider pursuing their claims through legal aid and, if that cannot occur then, even if a conditional fee agreement is concluded successfully, there should be no more than a 25% uplift. The incentive to keep the litigation running, notwithstanding what the Court tries to do to control it, has been reduced and the incentive to reach agreement increased. Mediation not only gives the tenant a greater degree of certainty of outcome, but also gives the landlord a greater degree of control over a situation where returns on the property are being eroded by potentially uncontrolled litigation.

3. Anti-Social Behaviour.

Another commonly met problem is that of anti-social behaviour either by the tenant concerned or by others within the same building. Clearly an anti-social behaviour injunction may have to be used to resolve the most serious cases, but quite often the tenants concerned are not in the category of people intended to be covered by that order, but are in the category of "low grade complaint" and disillusionment with the housing in which the tenant lives. Here, a mediation early in the process will present the opportunity for the tenant to vent, and to reveal exactly what the problems are.

Relatively small changes in operational procedures, or personalities, or undertakings for future action, can result in very significant improvements in relationships and a feeling that the tenant's views are being accepted and acted upon. These individual concerns may be quite outside any Tenants Associations or any previous correspondence that had occurred prior to the mediation. Here again, the controlling of the situation and the re-establishment of a working relationship through the mediation process can be achieved.

4. Shared ownership.

Quite often, also, the commencement of proceedings hits upon a particular issue that then becomes inflamed and is taken up by a group of tenants, or indeed the Tenants' Association, acting as a campaigning force. In the case of shared ownership, landlords may find that groups of people have a variety of concerns regarding, for example, a service charge. Here the group of tenants concerned may elect one or more of their number and may decide to mediate and may reach agreement upon a particular range of claims. In essence, a series of guidelines can be reached and those guidelines can then be applied to the whole group once the initial group has, as a result of its investigation and analysis reached settlement.

The situation can get more involved, however, if a tenants' action group spends some time over maybe months or years, pursuing issues. These issues may be diffuse or specific and may involve money, personalities, housing issues or policy. In these circumstances the commencement of rent proceedings are either part of a series of problems or the spark for such a group to come into existence. Whatever the reason for the existence of the action group, the fact is that mediation may be the only available means by which communication can take place. Mediation acts as a forum, or a "day in court" to enable the group to get over exactly what it wants to say, feel that it has achieved something and reach a common solution. Even if the mediation does not arrive at an agreed settlement, the fact that it has occurred will have created, or can

create, the atmosphere for settlement, and it is not unknown for an action group to recognise that its concerns have been met by the mediation meeting alone.

5. Commercial and Private Property.

In this sector, it is already well accepted that mediation will deal with, as part of a system of dispute resolution or, in its own right as part of proceedings or contractual arrangements, the whole range of problems that can arise out of landlord and tenant disagreements. Disagreements over dilapidations, breaches of covenant, breaches of user clauses, service charge disputes and disputes over contractual terms, are and do continue to be dealt with by mediation. Landlords and tenants recognise the need to obtain resolution quickly and to obtain certainty and control whilst minimising expense.

6. Summary.

The above are just some of the examples where mediation can be used as a powerful tool to achieve an investigation of, and a resolution of, the underlying problem that may exist in the landlord and tenant relationship.

It can be seen, therefore, that mediation has its place in mediating rent disputes. Not only can mediation get at some of the prime issues, it can also form the basis for a longer term, more constructive relationship between tenant and landlord.

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"The First 300 Days – a Look Back at the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003" Renewable business leases

by Professor Michael Stuckey* and Gerwyn Ll. H Griffiths*

INTRODUCTION

In marked contrast to those other major leasehold sectors which have a statutory framework or code to regulate them, (agriculture, residential and public sector) the area of the business tenancy [2] has, until recently, remained free of the rapid changes in the law which have characterised the others. Until as recently as ten months ago, the legal framework was, essentially, that put into place fifty years ago by Part II of the Landlord and Tenant Act 1954.

Indeed, Michael Haley, writing in 1999 commented that

> *"The controls established in 1954 have, remarkably, survived almost intact and, subject to some fine tuning, may continue to do so"*[3]

Equally surprisingly, when changes were finally introduced, a new piece of primary legislation was not felt to be necessary Changes were introduced under the Regulatory Reform Act 2001 by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096). The basic structure of Part II of the Landlord and Tenant Act 1954 has of course been retained, but its provisions have been amended. Thus, in dealing with disputes involving business leases the practitioner needs to be acquainted with: Part II of the 1954 Act in its amended form; subordinate provisions contained in the Order and new regulations made under the 1954 Act (including new statutory notices).

The changes came into force on 1 June 2004, but they are not retrospective. Now, some ten months later[4], the time seems opportune to revisit the actual changes made, evaluate their actual and possible effects and consider appropriate strategies. We take the view that the greatest source for potential problems is the ability given under the Order for contracting out, and for this reason we look in detail at this and make some suggestions in matters such as drafting, interpretation and procedure which may help both to prevent future problems and resolve them if they do arise

* Professor and Head of the School of Law and Reader in Equity and the Law of Property, respectively, of The University of Glamorgan. Gerwyn LL H Griffiths acknowledges the comments of Professor Peter Luxton on an earlier draft of this paper

2 The term' business tenancy' is used because the great majority of Government publications use this term. It is, however, the authors' contention that a better description is that of 'the renewable business lease' since it is only when the period of the original tenancy comes to an end that the distinctive features marking out such a lease from any other come into play

3 Haley, " The Statutory Regulation of Business Tenancies- Private Property, Public Interest and Political Compromise" [1999] *Legal Studies* 207

4 The "Three Hundred Days " of the title

THE KEY CHANGES- COMMENT AND EVALUATION

1 Agreements to exclude security of tenure

The system of having to obtain the court's approval to contract out of the security of tenure of Part II has been abolished. Instead, there has been substituted a prior "health warning" notice served by the landlord.

2 Surrenders

Agreements to surrender now need no special arrangements or court approval, but there are safeguards similar to agreements to exclude security of tenure (above).

3 Termination by the tenant

There is clarification of what the tenant must do to avoid its contractual obligations extending beyond the agreed date for the end of the lease (*i.e*. 3 months' notice, or quit by the end of the lease)

4 Notices requiring information

The parties are required to update information for six months (*i.e*. on transfer of interests) and there are more effective enforcement procedures

5 The Landlord's Termination Notice

Landlords not opposing renewal are required to set out their proposals for a new tenancy in the landlord's termination notice. Such proposals have to be accompanied by a "health warning"[5] informing the tenant that it is not obliged to accept the terms.

6 Procedures for Renewal and Termination

The old- and often criticised- regime of the tenant's counter-notice (in response to a landlord's termination notice) is abolished. The final deadline will be the date in the landlord's s 25 notice or the day before the date specified in the tenant's s 26 request. The parties can agree to extend the deadline for applications to the court (to enable further negotiations to take place) without having to go to court.

7 Applications to the Court by the landlord

Now, under the new provisions, the landlord is able to apply for renewal (so countering any delay by the tenant), or for termination and no renewal. In the latter case:

- if court agrees that the landlord has grounds of opposition to a new tenancy, then it will refuse the order for a new tenancy;
- if landlord fails to establish ground of opposition, court will order grant of new tenancy (and fix the terms) without the need of a separate application by the tenant

8. Ownership and control of business

A major feature of the Order was that the ownership and control provisions have been rationalised, so that Part II now applies to business entities separate from the landlord or tenant named in the lease, provided that they are under the same effective control. Tenants are thereby placed in the same position as landlords.

9. Interim rent

Tenants are now able to apply for an interim rent. Rules on timing of the interim rent have been changed to remove any incentive for delaying the renewal proceedings. The method of calculating the interim rent has been changed with a view to its being fairer to both parties.

10 Compensation

The tenant is now able to claim compensation from the landlord where the tenant was induced not to apply to the court or to withdraw an application for a new tenancy because of misrepresentation. (Previously, of course, the tenant could claim compensation from the landlord for misrepresentation only where the court had refused to grant a new tenancy by reason of the landlord's misrepresentation).

11 Other changes

- A tenant wishing to terminate a continuation tenancy does not now have to give more than three months' notice (*i.e*. it is no longer necessary for the continuation tenancy to end on a Quarter Day).

[5] Considered p 5, *infra*.

- The court is able to order the grant of a new lease for up to fifteen years (instead of 14 as previously), as this will fit more conveniently with three- and five-yearly rent reviews
- The procedure can be used where there is a single lease but several different landlords

A PARTICULAR ISSUE
PROBLEMS OF CONTRACTING OUT UNDER THE NEW REGIME

The old provision of the 1954 Act, (s 38(4)) which provided for contracting out of Part II with the approval of the court, was, of course, repealed (2003 Order, para 21(2)). Instead, the parties are able to contract out, without court approval, where the landlord serves a prior notice (a health warning[6]) on the tenant. The new contracting-out provisions do, we feel, give rise to a number of potential problems which will become more apparent and for this reason we consider it in some detail

1. Impact of the transitional provisions

(a) conditional agreement entered into before 1 June 2004

If the parties entered into an agreement before 1 June 2004 to contract out of Part II (*i.e.* an agreement subject to the approval of the court), the old regime for contracting out applies. The court's approval is therefore still required, even after 31 May 2004. This is clear from Article 29 of the 2003 Order, which states (words in square brackets are not part of the Order):

> **(4) If a person has, before the coming into force of this Order,** [*i.e.* before 1 June 2004] **entered into a agreement to take a tenancy, any provision in that agreement which requires an order under section 38(4) of the Act to be obtained in respect of the tenancy shall continue to be effective, notwithstanding the repeal of that provision by Article 21(2) of this Order, and the court shall retain jurisdiction to make such an order.**
>
> *Drafting point: Where the (conditional) agreement was entered into before 1 June 2004, but the lease is itself granted on or after that date, the lease should itself recite the date of the agreement pursuant to which it is made. This is particularly important where the court order approving the contracting out was itself also made on or after 1 June 2004. The recital is to ensure that there can be no argument at any future time about when the agreement was made and so whether the lease was validly contracted out or not*

(b) court approval obtained before 1 June 2004, but no agreement before that date.

Under the old regime, the application to the court could be made before the lease had been granted, or before any contract for a lease had been entered into. In these circumstances, the application to the court had to append a draft contract or lease. The agreement between the parties (a contract, or the grant of the lease) would then be entered into only after the court order had been obtained.

What is the position if the parties, not being contractually bound at that time, applied to the court, and the court made an order approving the contracting out before 1 June 2004, but the parties only become contractually bound (whether by entering into an agreement or by entering into the lease without any prior agreement) after 31 May 2004?

The answer turns upon the interpretation of the relevant part of Article 29(2) of the 2003 Order:

> **(2) Nothing in this Order has effect in relation –**
> **(a) to an agreement –**
> **(ii) which was authorised by the court under section 38(4) of the Act before this Order came into force** [*i.e.* before 1 June 2004]

There are two possible interpretations, which turn on whether the words "before this Order came into force", apply to the agreement or to the authorisation of the court:

[6] For an informative discussion of this concept, see Hewitson: "Reform of Business Tenancies Legislation" [2002] *Conveyancer and Property Lawyer* 261

(i) The words may refer to the agreement. If this is correct, then even if the parties have obtained a court order before 1 June 2004, the order is effective only if the parties contract (or enter into the lease without prior contract) before 1 June 2004. If they fail to meet this deadline, then the new regime will apply, so if contracting out is to be valid, the landlord will have to service the health warning notice.

(ii) The words may refer only to the authorisation of the court. If this is correct, then provided the court order was made before 1 June 2004, then any lease made pursuant to it is contracted out under the old regime, even if the parties only became contractually bound after 31 May 2004.

It is clear on either interpretation that the court would not be approving "an agreement" at the time, since this would then still be only a draft agreement or draft lease; but the Article evidently means that the court is approving what later becomes "an agreement", *i.e.* it is a figure of speech.

We would suggest that the first interpretation is the correct one, applying the principle that legislative changes are not presumed to have retrospective effect. If the second interpretation were correct, then the effect would be to nullify a court order obtained before 1 June 2004 where the parties had not proceeded to agreement by that date. However, we cannot be sure which is the correct interpretation until this is clarified by the court.

2. Only a tenancy for a term of years certain can be contracted out

The new contracting-out regime is contained in a new section, s 38A, to the LTA 1954, Part II (2003 Order, para 22(1)), the relevant parts of which are as follows:

Agreements to exclude provisions of Part 2

38A. –(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.

- As under the old law, it is possible to contract out of the security of tenure provisions under Part II only in respect of a tenancy for a term of years certain. A periodic tenancy is not for this purpose a tenancy for a term of years certain: *Nicholls v Kinsey* [1994] 1 EGLR 131 (CA).
- An attempt to use the 'new' procedure to contract out in relation to a periodic tenancy will result in the tenant's obtaining the protection of Part II.
- A tenancy is for a term of years certain even though it contains break clauses; so the parties can achieve a similar result to the forbidden contracted-out periodic tenancy by the grant of a fixed-term lease with break clauses on either side exercisable regularly, *e.g.* every year of the term.

3. The health-warning notice

Section 38A(3) provides:

(3) An agreement under subsection (1) above shall be void unless –
(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ("the 2003 Order"); and
(b) the requirements specified in Schedule 2 to that Order are met.

(a) the form of notice

The form of notice set in Schedule 1 to the 2003 Order is as follows:

"FORM OF NOTICE THAT SECTIONS 24 TO 28 0F THE LANDLORD AND TENANT ACT 1954 ARE NOT TO APPLY TO A BUSINESS TENANCY

To: ……..
[Name and address of tenant]
From: ……
[Name and address of landlord]"

So, we can see that the form is very simple:

– the names and addresses of the tenant and the landlord are the only pieces of information that need to be inserted;

(although these need to be correct – suppose a minor error in one of the names, *e.g*.

- the name of the tenant company?;
- change in identity of contracting parties after serving notice?
- compare ***Brighton and Hove City Council v Collinson*** [2004] 21 EG 150 (CS)

Brighton and Hove City Council v Collinson
Here the court had approved a contracted-out lease to a company under the old procedure. After the court's approval, the solicitor for the company's directors, on the advice of the company's accountant, suggested that they would prefer if the lease were granted, not to the company, but to directors (who were brothers). The prospective landlord agreed, and a lease reciting the fact that it was contracted out, was later granted to the brothers. When the lease expired, the tenants, the brothers, argued that the lease had not been contracted out, since the court had approved a contracted-out lease to the company, not to the brothers. This argument succeeded in the lower court, but failed in the Court of Appeal. The brothers had been parties to the application for contracting out as they had been intended to be guarantors, they were aware of the effect of contracting out of Part II, and the court would have had jurisdiction to approve a contracted out lease to them. (The court approved its earlier decision in ***Palacegate***, considered below).

So the court there was unwilling to allow the technicalities of the application to defeat the contracting out. But will this same relaxation apply under the new regime? No, since the landlord's notice must be served on the person who is to be the tenant. Had the circumstances in the ***Collinson*** case occurred under the new regime, a landlord's notice served on the company would not have been a valid notice in respect of a lease later granted to the brothers.

- There is no requirement that a draft lease or draft agreement for a lease are attached - indeed, the form itself does not even seem to require that the parties have agreed (subject to contract) all the terms of the lease;
- But it is important for the landlord that there is evidence at the time of service of a draft lease or draft contract that the parties have already agreed (subject to contract in each case) at the time the notice is served. Why?: because s 38A(1) requires the notice to be served in relation to a tenancy "to be granted", and that seems to require that the parties have already agreed the terms of the tenancy (subject to contract) at the time the notice is served.

  Is agreement (subject to contract) of "heads of terms" (*i.e*. material terms) sufficient?
- It *might* be argued that it is sufficient if the parties have agreed the main terms to be included in the lease at this time, without having agreed all the exact wording of the lease. It depends whether the principle under the old law established in ***Receiver for the Metropolitan Police District v Palacegate Properties Ltd*** [2001] Ch 131 still applies.
- In the ***Palacegate*** case, the district judge had approved the contracting out of a draft lease for a term of five years at a specified rent; but the draft lease left gaps to be filled in: the date of the lease, the date for commencement of the term, the date of the proposed exclusion order, and also the time for the payment of the rent. This last omission meant that, by implication of law, the rent was payable in arrears. After the court's approval, the lease granted took the form of the draft with the gaps filled in,

and provided for the payment of the rent quarterly in advance. Towards the end of the term, the landlord received a section 26 request for a new lease from the tenant, which argued that the lease had not been contracted out, since (the tenant argued) it did not conform to the draft lease approved by the district judge. This argument succeeded at first instance, but failed in the Court of Appeal. The Court of Appeal took the view that section 38(4) was intended to enable the court to satisfy itself that the prospective tenant understood that it would be forgoing the protection of ss 24-28 of the 1954 Act. It pointed out that s 38(4) used the words "in relation to that tenancy", and this did require that that terms of the actual lease should bear a substantial similarity to that previously approved by the court. It drew a distinction between material and non-material changes – only the former would nullify the approval obtained. On the facts of the case itself, the solicitors for both parties agreed that there had in fact been an agreement for rent to be payable in advance, so that the draft lease, by omitting this, did not represent the agreement of the parties; the Court of Appeal was clearly unwilling to allow the tenant to acquire security of tenure through a mistake, and treated the term for payment or rent as immaterial.

- Note that the new s 38A(1) also uses the expression "in relation to a tenancy". This suggests that the ***Palacegat****e* principle might well survive, so that agreement (subject to contract) of the material terms is sufficient. What would be the material terms? From ***Palacegate***, these appear to be terms that might well affect a tenant's decision to enter into a contracted-out lease – so the length of the term is material, since a tenant is less likely to wish to incur large capital expenditure on premises under a short lease where there is no prospect of renewal under the Act. For the same reason, the presence of a break clause would be material, as would be the identity of the premises to be leased, and the rent to be paid. The precise date of commencement of the term, however, would not be material; and a change in the tenant's address between the draft agreement and the grant of the lease would also be immaterial (as was admitted by the tenant in ***Palacegate*** itself).
- Reliance on the ***Palacegate*** principle under the new contracting-out regime is rather dangerous from the landlord's point of view, as we cannot be sure that the courts will apply it to the new regime. The risk for the landlord is that that the tenant (or a successor in title) may later argue that, unless it had notice of the precise wording of the draft lease at the time the notice was served, it could not be said that it had the requisite notice. The landlord therefore needs evidence that the notice relates to the lease that is actually granted later. So to preserve such evidence, it might be best to attach the (subject to contract) draft lease or agreement to the notice sent to the tenant. Furthermore, the lease itself should contain a declaration that the notice served related to the lease itself.

  Procedural tips:
  - *unless and until the Palacegate principle is held to apply to the new contracting-out regime, the landlord should ensure that the exact terms of the lease have been agreed (subject to contract) at the time the notice is served;*
  - *such agreement must be "subject to contract", as the notice must precede the tenant's becoming contractually bound;*
  - *in order to preserve evidence of such (subject to contract) draft lease or agreement, it might be best to attach such document to the notice sent to the tenant; and*
  - *if the parties agree any changes to the (subject to contract) draft lease or after the notice has been served, the landlord should serve a fresh notice on the tenant (even though such notice will be identical to the first).*
  - *if the parties agree any change to the identity of the prospective tenant after the notice has been served, a fresh notice should be served on the new prospective tenant.*

  Drafting point: the lease when granted should contain a declaration that the notice served related to the lease itself.

  This drafting point is belt-and-braces if the draft lease or agreement (subject to contract) was annexed to the notice, but even then it is useful in case the notice and accompanying draft has been lost.

(b) the period of the notice

According to Schedule 2,

- if the notice is served on the tenant no less than 14 days before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so, then the tenant must make a declaration in the form (or substantially in the form) set out in paragraph 7.
- if the notice is served on the tenant less than 14 days before that time, then, the tenant or a person duly authorised by him to do so, must before that time make a statutory declaration in the form, or substantially in the form, set out in paragraph 8.

So the basic difference is that an *ordinary* declaration suffices for the longer period, whereas a *statutory* declaration is required for the shorter period.

The Order clearly envisages that normally the parties will use the longer period, but it is understood that in practice most contracting out since 1 June 2004 has occurred less than 14 days before the agreement or lease is entered into, so that the statutory declaration route is becoming the norm. From the landlord's point of view, unless it can rely on the ***Palacegate*** principle, it is vital that the draft lease has been drawn up (subject to contract) by the time the notice is served, and the tenant will usually be anxious to move in and start trading, and may not wish to have to wait a further 14 days.

What is the 14-day period?

The notice for the 14-day period must be served no less than 14 days before the tenant becomes contractually bound. So it is necessary to count forward 14 days from the date of service to ascertain the earliest date the contract or lease can be made.

So if the notice is served on Monday, 6 September 2004, the earliest date that the parties can become contractually bound (or enter into the lease) will be Monday, 20 September.

(c) method of service

Recorded delivery is evidentially desirable; and since s 23 LTA 1927 applies to notices served under the 1954 Act, the notice will be deemed to be served at the date the letter is handed to the Post Office (discussed further under Service of Notices in Business Tenancies below).

4. The tenant's declaration

(a) The forms of declaration

The form of declaration where the 14-period of notice is given is as follows (para 7):

I ……..…….

(*name of declarant*) of

……..……

(*address*) declare that –

1. I/

……..……..……..……

(*name of tenant*) propose(s) to enter into a tenancy of premises at

……..……..……..……

(*address of premises*) for a term commencing on

……..……

2. I/The tenant propose(s) to enter into an agreement with

……..……..…….

(*name of landlord*) that the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.

3. The landlord has, not less than 14 days before I/the tenant enter(s) into the tenancy, or (if earlier) become(s) contractually bound to do so served on me/the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.

4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.

5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

DECLARED this

……

day of

……

To:

……

[*Name and address of tenant*]

From:

……

[*name and address of landlord*]

The form of statutory declaration (where the declaration is made less than 14 days after the service of the notice) is as follows (para 8):

I ……

(*name of declarant*) of

……

(*address*) do solemnly and sincerely declare that –

1. I/ ……

(*name of tenant*) propose(s) to enter into a tenancy of premises at

……

(*address of premises*) for a term commencing on

……

2. I/The tenant propose(s) to enter into an agreement with (name of landlord) that the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.

3. The landlord has served on me/the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.

4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.

5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

To:

……

[*Name and address of tenant*]

From:

……

[*name and address of landlord*]

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declaration Act 1835.

DECLARED at

……

this

……

day of

……

Before me

(*signature of person before whom declaration is made*)

A commissioner for oaths or A solicitor empowered to administer oaths or (*as appropriate*)

(b) Timing of the declaration

There is no express requirement for the tenant to wait the 14 days before making an ordinary declaration (in the form in para 7); so it might be possible for the tenant to make the declaration the day it receives the notice, and the lease will still be validly contracted out provided the parties do not enter into the lease until the end of the 14-day period. Nevertheless, it seems to be *implicit* in clause 3 of the declaration that at least 14 days have past since the notice was served (since how else could the tenant declare that the notice was served not less than 14 days before the tenant becomes contractually bound?).

(c) Who can make the declaration?

Whether an ordinary or a statutory declaration is made, who else can make the declaration? Somebody authorised by the tenant to do so (Schedule 2, paras 3 and 4). If the declaration is made by somebody other than the tenant, the landlord should ensure that there such person is duly authorised to make the declaration, and that evidence is preserved of such authorisation.

Procedural tips: where somebody other than the tenant makes the declaration, the landlord should:
- ask for a copy of the tenant's authorization, and
- ensure that such copy is kept with the relevant documents

Drafting point: where somebody other than the tenant makes the declaration, the landlord should ensure that the lease should include a statement that the person who made the declaration was duly authorized by the tenant to make it.

(d) Note or endorsement in the lease

A reference to the notice, and the declaration (whether ordinary or statutory) must be contained in or endorsed "on the instrument creating the tenancy" (Schedule 2, para 5).

(The declaration cannot itself be in the lease, or the agreement for a lease, since the declaration is that the tenant *proposes* to enter into a contracted-out lease: the declaration must therefore precede the agreement or lease).

Nice point here whether this means the agreement for the lease, if the parties enter into a contract for a lease after the declaration is made, or whether it means the lease itself. Probably not practically significant, since in most instances the parties will proceed directly to the lease without a prior contract; but, an agreement for a lease is also protected under Part II of the 1954 Act (s 69(1)) ("tenancy" includes an agreement for a lease), and the contracting-procedure must apply to an agreement for a lease, whether or not a legal lease is executed later. Therefore, if there is a prior contract, then it is prudent to make the reference in both the contract and the later lease.

5. Later variations of the lease

If the lease has been effectively contracted out of the protection of Part II, what is the effect of any subsequent variation of the lease between the parties?

- If the purported variation involves a change in the estate (the identity of the demised premises, or the length of the term), then it is new lease (on the principle in the Court of Appeal in ***Friends' Provident Life Office* v *British Railways Board*** [1996] 1 All ER 336).

  If therefore the landlord wishes the new lease also to be contracted out, the landlord needs to serve a fresh notice and obtain the tenant's appropriate declaration before the variation is binding on the parties.

- If the variation does not involve a change in the estate, *e.g.* a change in the manner of calculating the rent at review, the contracted-out lease simply continues as varied, so no fresh notice procedure is required.

6. Contracted-out sub leases.

Guarantors

The new provisions appear to raise potentially insoluble problems for landlords in respect of guarantors.

A common form of guarantee requires the guarantor to enter into a new lease in his own name when requested to do so by the landlord in the event of a disclaimer or surrender of the lease by the tenant's liquidator or trustee in bankruptcy. The new lease is typically on the same terms for the unexpired reside of the existing lease. Such obligation of a guarantor has been variously described as:

- a *conditional obligation*, the contingency being a timeous demand made by the lessor (***Coronation Street Industrial Properties Ltd* v *Ingall Industries Ltd*** [1989] 1 WLR 304 (HL) (Lord Jauncey); and

- a *conditional contract*, which becomes unconditional, binding and specifically enforceable upon the landlord's request (***Re a Company (No 00792 of 1992) ex p Tredegar Enterprises Ltd*** [1992] 2 EGLR 39, 40 (Mummery J))

A lease entered into since 1 January 1996 is a new lease for the purposes of the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995). Under a post-1995 lease, a tenant's liability under the lease ends on a lawful assignment, but the landlord may be able to require the tenant, on assignment, to enter into an AGA, under which the tenant guarantees the liability of its immediate assignee only. An AGA may require the tenant to enter into a new tenancy in the event of the tenancy's being disclaimed after assignment, but only if the term of such tenancy expires no later than the term of the tenancy assigned, and if the tenant covenants which it contains are no more onerous than those of that tenancy: LT(C)A 1995, s 16(5)(c).

When a post-1995 lease is granted, there are therefore likely to be two sorts of guarantors:
- guarantors of the original tenant (*e.g.* where the company is the tenant, its directors); and
- the original tenant as potential future guarantor of its immediate assignee under an authorised guarantee agreement (AGA)

Unfortunately, the new contracting-out provisions do not indicate how they apply to a guarantor who can be required to enter into a lease in its own name. Since a health-warning notice must be served before the tenant becomes contractually bound, it is crucial to determine the moment at which the guarantor's obligation to enter into the lease arises.

Can the obligation of a guarantor to take up a lease at some time in the future in the event of the disclaimer of the lease by the existing tenant's trustee in bankruptcy or liquidator be characterised as an agreement to take such a lease?

There is as yet no answer, but we would suggest that:

(i) an original tenant who enters into a post-1995 lease under which it can be required to provide an AGA on assignment should not be treated as being bound to take a lease under such possible future AGA *from the moment it enters into the original lease*. The obligation to enter into an AGA does not depend solely on a request by the landlord, but on the tenant's proposing to assign. The obligation does not arise until that future time, and it is within the tenant's power to ensure that any obligation to provide an AGA never arises.

(ii) a stronger argument can be put that the obligation of a guarantor to take a new lease arises only *from the moment it enters into the guarantee*; but even this is debatable, since it is subject to the default of the tenant under the lease as well as to the demand of the landlord.
The words of s LTA 1954, 38A(1), "to be granted" seem simply to point to the future, so this sub-section does not seem to give any guidance; but the tenant's declaration forms refer to the tenant's "proposing" to enter into an agreement to exclude security of tenure in relation to the tenancy –the word "proposing" might seem inappropriate when the tenant's obligation is not immediate

(iii) the third possibility is that the obligation of the guarantor to take a new lease arises only *from the moment that the landlord actually demands that it do so*.

From the landlord's point of view, (iii) is the best view, since it considerably reduces the number of notices that need to be served, and declarations that need to be obtained. But remember that, if (ii) turns out to be correct, then, even if the landlord serves a notice before it enforces the guarantee, and the guarantor makes the declaration, the guarantor could later argue that the lease it has taken is not contracted out, since it was already bound to enter into the lease before it was served with the notice and made the declaration.

Drafting point: If (ii) is correct, then the clause restricting assignment need to be amended appropriately. It should provide either:
- *that it is reasonable for the landlord to refuse consent to assign unless and until the guarantor has been served with a contracting-out notice and has made the appropriate declaration; or*
- *that the making of the appropriate declaration by the guarantor (following service of the notice upon it) is made a condition precedent to the tenant's acquiring a fully qualified right to assign.*

AVOIDING DISPUES AND WHAT TO DO IF THINGS GO WRONG

by Christopher Dancaster FRICS DipICArb FCIArb

My remit today is to contribute that part of this seminar concerning "private sector construction disputes". I propose to concentrate on "avoiding disputes" in the context of "getting the contract/agreement right" and, if a dispute does arise, how to "keep ownership of the dispute". I will then have a look at fast track arbitration, particularly the 100 day Arbitration Procedure that has been published by the Society of Construction Arbitrators and the Chartered Institute of Arbitrators' Short Form Procedure..

I am a Quantity Surveyor, and until I became fully and exclusively enmeshed in dispute resolution ten or so years ago, my main purpose in life, at least as far as the professional aspects of that life were concerned, was to be a part of a team involved in the successful procurement of construction projects.

By successful procurement of construction projects, I mean ending up on time and on budget.

My career as arbitrator and, more latterly, as adjudicator has provided me with the opportunity to confirm the view that disputes generally arise as a result of someone not getting their sums right. That often results from a pressure to see something happening on site or an unrealistic design programme.

A typical scenario is one where the design is not finished and someone has to take a stab at something that for a few more weeks design time would be properly designed and available for costing properly. All too often there is evidence that no-one stood back and took stock before into starting work on site. Drawings are released too early for the Quantity Surveyor or builder to cost. The Quantity Surveyor, if involved, does not fully allow for what the Architect has not designed. The builder's estimator does not include in his price for the things that the Architect and QS have not allowed for or, on a design and build project, allow only the minimum that they think the specification requires. The project costs too much and savings are made on the basis of incomplete information. The design is finished after the work starts on site, things turn out to cost more than anticipated, when the design is produced it reflects the designer's original thoughts and does not take into account the savings made to reach a contract sum that is acceptable to the Client.

Subsequently there are information delays when the builder identifies aspects of the construction that have not been detailed properly. There is standing time, disruption and delay claims are made. These claims are often subject to no more than token payments throughout the course of the works. The general thinking appears to be that it is better to get the building finished in order to allow the employer into occupation, than to resolve things as they go along.

This does often seem to work out quite well with the employer paying rather more than he originally anticipated and the builder reducing the amount of his claim substantially.

It seems to be an acknowledged fact that the number of disputes referred to a third party appears to increase when there is less work about and attitudes harden in an attempt to make more money out of past projects.

So my first point is, if you are involved in a construction project of any kind, get your contract arrangements right. Get the design resolved properly before the contract sum is finalised. Make sure that what the contractor prices is what the client is expecting to receive at the end of construction. Don't change things after the price has been submitted and agreed. A contingency sum should not be there to pay for things that the Architect, Engineer or QS has not included in the tender documents but to allow for unforeseen occurrences such as bad ground or difficulties in working in an existing building.

My next point relates to the form of contract to use. The form of contract that is chosen is all about the allocation of risk. At one end of the spectrum there is the Prime Cost Contract the Management Contract where the entire risk as regards cost lies with the employer. At the other end of the spectrum, provided that the Employer's Requirements document is watertight and the contractor's tender includes for the specification that the employer expects, the whole of the risk lies with the contractor. Provided that each party really does know the level of risk that is being undertaken, and allows the other party to operate in accordance with that contract, there should be no problem. All too often however, it seems to me, from my perspective of picking up the pieces at the end that the assumptions made by the parties are like ships that

pass in the night. The principal problem being that one party, generally the contractor, has priced the job on a basis that is different from the employer's expectations.

If something goes wrong, what then?

Things generally seem to sort themselves out by negotiation between the parties. In most cases a settlement is reached where the employer pays more than he originally expected and the contractor receives less than he claims.

In this way the parties remain in control of their dispute and of the outcome. Unless there is some other agenda, no one wants the loss of control that will result from the dispute ending up in the hands of a third party such as an arbitrator or a judge.

There is however another way. A way in which the parties can have the benefit of the views of a third party without totally losing control of the dispute. There are two particular methods. The most commonly used method results from the introduction of the Housing Grants, Construction and Regeneration Act 1996 which has provided the statutory right to adjudication. A similar voluntary method is early neutral evaluation.

An early neutral evaluation provides the parties to a dispute with a non-binding assessment, by a neutral, of their respective chances of success should the dispute proceed further in the Courts or in arbitration. This procedure involves the agreement of a neutral who may be a technical man or a Commercial Judge. The neutral receives presentations comprising the nature of the dispute and the parties' respective contentions. The neutral then gives to the parties an evaluation of the issues indicating his view of the strengths and weaknesses of the claim and defence.

This procedure is set out in the Second report of the Working Party on ADR set up by the Courts Service. You will find this on the Courts Service website at
www.hmcourts-service.gov.uk/publications/misc/admiralcomm/working_party.htm
together with a considerable amount of information relating to ADR Orders made by the Courts. This is clearly a procedure where the parties to a dispute, having received the evaluation, can step back and seek to negotiate further before proceeding before a judge or arbitrator.

A brief resume of the statutory right to adjudication under the Housing Grants, Construction and Regeneration Act 1996 (HGC&R Act)

In 1996 the Government decided, having received some serious lobbying from the construction industry and sub-contractors in particular, that payment procedures in the industry could be improved. The basic premise is that a party to a construction contract as defined in the HGC&R Act is entitled to refer any dispute arising under the contract to adjudication at any time. There is no requirement for agreement, it is a unilateral right. The parties cannot contract out of the statutory right. If the contract does not provide for adjudication on the terms required by the Act, the provisions of an accompanying secondary piece of legislation, the Scheme for Construction Contracts (England and Wales) regulations 1998, are implied into the contract and provide the set of rules under which the adjudication is conducted.

When a party wishes to refer a dispute to adjudication he issues a Notice of Adjudication. The adjudicator must be appointed and the dispute referred to the adjudicator within 7 days of the notice of adjudication. The parties can agree the adjudicator or a nomination is made on application by an Adjudicator Nominating Body. These organisations operate on a commercial basis. Each has a list of adjudicators and generally has no problem in nominating within the 7 day period. Once the dispute is referred the adjudicator is required to make his decision within 28 days. There are provisions for extension of time, up to 14 days by the Referring Party and for a longer period by agreement of the parties.

The decision of the adjudicator is enforceable in the Courts. It is thus binding on the parties. The parties are however only bound until the same dispute has been referred to an arbitrator or the Courts and has been finally determined. The phrase "temporarily binding" was coined in respect of an adjudicator's decision and this caused a substantial amount of comment. Fortunately the Courts understood precisely what it is all about and have supported the process fully and as a result it has proved to be very successful. There have

been 15,000 or so adjudications in the six years since the HGC&R Act came into force and no more than 300 of these have been the subject of an action to enforce the decision.

As far as the continuation of disputes beyond the adjudication process is concerned, it would appear to be minimal. The work of the Technology and Construction Court has reduced dramatically in the area of construction disputes and construction arbitration appointments are pretty thin on the ground for construction arbitrators. .

You may be surprised when I say that adjudication is a process where the parties retain ownership of their dispute. I say that because of the temporarily binding nature of the adjudication decision. What has become evident is that adjudication is acting as a catalyst for the settlement of disputes. There are those disputes that will never settle without an Arbitrator's Award or a Court Judgment but the construction dispute business of the TCC and arbitration appointments are way down and an adjudication thus almost invariably leads to a settlement of a dispute.

The events in a typical dispute that goes to adjudication seem to be as follows: The Adjudicator's decision is enforceable in the Court unless the adjudicator has not complied with the rules of natural justice – been fair - or has acted in excess of jurisdiction. (The 300 odd cases that have been to the court are mainly in those 2 categories but as a proportion of the whole they are next to nothing.) In the eyes of the parties the adjudicator has got his decision right or about right. The parties may not be totally happy but it is an answer that they can live with. The parties accept the decision, and, knowing that the Court will in all probability enforce, the monies awarded change hands.

It may not however be the exact amount awarded that changes hands. Adjudicators' decisions are often used as the basis for negotiation. The threat of an arbitration or an action in the Courts may result in further negotiation and a settlement at a different figure from that awarded. Part of these further negotiations may be the commencement of an arbitration or a court action and when faced with many more months of dispute resolution, settlements generally seem to result fairly shortly thereafter.

If all the above comes to naught, there is arbitration or the Courts. Arbitration has the benefit of privacy whereas a dispute that goes to court is in the public domain. The arbitrator should be a person who has the ability to understand the dispute and cost benefits should result from that but in construction matters there is probably little to choose between an arbitrator and the Judges of the Technology and Construction Court given the familiarity of the latter with construction matters. Unless expedited procedures are instigated however they both generally take too long and are too expensive.

Without expedited procedures, the stately dance of formal pleadings and disclosure followed by a hearing where a large number of witnesses are cross examined by learned Counsel which is then followed by the Arbitrator or Judge pondering for a length of time before he produces his Award or Judgment is an immensely large hammer when the nut that is to be cracked is relatively small. Of course there are cases both in court or arbitration where the issues are such that only the formal adversarial process will do but in these days of the CPR, proportionality and the requirements of ss 1, 33 and 40, of the Arbitration Act 1996, such procedures tend to be rather more truncated than before.

It is not part of my remit to talk about Court procedures.

There are two expedited arbitration procedures that I have appended to my paper.

These are:

The Short Form Procedure of the Chartered Institute of Arbitrators produced as an appendix to their 2000 Rules,

This replaces the procedural section of the main rules and is thus not stand alone. The whole document is available at www.arbitrators.org/DRS/

and

The Society of Construction Arbitrators' 100 day Arbitration Procedure available at www.arbitrators-society.org/news .

In the context of my premise that it is better for the parties to retain control of their dispute arbitration comes way down the list. It is however a fact that the majority of arbitrations settle before they get to a hearing. The parties do remain in control if they continue to negotiate during the course of the arbitration.

One great benefit of arbitration is that rules and procedures similar to those in the Court apply particularly in the areas of preparing statements of the Parties cases and disclosure.

It is often the case that in adjudication that the time pressures or the nature of the representation, the Parties often represent themselves, mean that the way in which a case is presented is not conducive to clarity. There is often a paucity of information that may not assist in achieving an acceptable result. The question of whether a procedure based upon a decision made in 28 days can ever be fair also raises its head.

One of the principal tenets of arbitration is set out in section 33 of the Arbitration Act 1996. The tribunal shall give each party a reasonable opportunity of putting his case and dealing with that of his opponent.

Section 33 also provides that procedures shall be adopted so as to provide a fair means for the resolution of the matters falling to be determined.

The parties in an arbitration must each have a reasonable opportunity of putting his case and dealing with that of his opponent. This overcomes two of the major problems of adjudication. The time factor and the knowledge factor. The parties in an arbitration can be reasonably assured that they have had the time to prepare their case, and to answer that of the other party, properly. They can also be reasonably assured that they will understand the other party's case and that their own case will be understood by the other party.

This understanding can be assisted by the importation into the arbitration process of disclosure obligations (s34(2)(d) of the Arbitration Act 1996) which means that a fuller understanding of the other party's situation may well be possible than where information is provided on a selective basis only as it is in adjudication.

I am not suggesting complete disclosure, merely the requirement to disclose all documents relative to the issues between the parties.

As far as my sub-agenda of maintaining control of the dispute is concerned, I think that the fuller the understanding of the parties regarding all the factors relating to their dispute, the more likely it is that successful negotiations will ensue. Arbitration can in appropriate cases provide the platform for this.

I do not intend to examine the two arbitration procedures that I have mentioned in any detail.

Both procedures place restrictions on the time scale. The CIArb Procedure is principally identified as applying to documents only arbitrations and concentrates on limiting the time for the statements of case and defence in respect of both the claim and the counterclaim and leaves the procedure subsequent to the reply to the defence to the counterclaim in the hands of the arbitrator. The SCA Procedure on the other hand does not start until the defence or the defence to the counterclaim has been served and the period of 100 days which includes the production of the Award runs from then (or the giving of directions by the Arbitrator if later).

I would suggest therefore that the CIArb Procedure, with its limited time scale for producing statements of case and its emphasis on documents only proceedings is more suited to the smaller dispute. The SCA Procedure however allows the proper development of the parties' cases. It is interesting to note that the main objection to the initial proposals for the 100 day procedure, which started from the issue of the notice of arbitration, was that a respondent might well have difficulty in making a counterclaim within the prescribed period, or might even be precluded from bringing a counterclaim in the same arbitration and end up with an adverse award in a time scale that had prevented him from having his counterclaim heard.

There are a few novel points in the SCA Procedure. The Arbitrator's lien on his award which could otherwise result in the 100 days being exceeded is overcome by including a trustee stakeholder provision for the arbitrator's fees. In addition any decision on the liability for costs is excluded from the 100 day period and a further period, limited to 28 days, is allowed for this. This again was perceived as a problem with a procedure limited to 100 days as the difficulties of dealing with costs where offers had been made were seen as insuperable if they were to be dealt with within the 100 day period.

There is an adoption clause included in the SCA Procedure paragraph 2 of which is an agreement not to refer the dispute to adjudication whilst the 100 day procedure in going on. This is of course in conflict with the statutory right that any party to a dispute has under the HGC&R Act to refer that dispute to adjudication at any time. This has caused some comment but the advantages of having this provision in giving those accepting this Procedure pause for thought (even though it may be breached with impunity) are seen to outweigh remaining silent.

At the end of the day the arbitrator will make his award, if the parties do not settle first, and the parties will have then lost control of their dispute and be subject to the findings of that award. I suggest, if they have not managed to settle their dispute in course of all the earlier opportunities that they have had, that this is the best outturn in that it produces finality.

In summary. Get the contract arrangements right, if disputes arise, maintain control, use the various processes that are available as a means of maintaining control and if, in the final analysis, no settlement results, for the sake of finality get the dispute to a final award by an arbitrator, if possible using an expedited procedure.

CHARTERED INSTITUTE OF ARBITRATORS ARBITRATION RULES 2000

FIRST SCHEDULE

SHORT FORM PROCEDURE

Paragraph 1 Adoption of the Short Form Procedure

1.1 The parties may agree at any time prior to or during the course of the arbitration to adopt this Short Form Procedure, and in that event the Rules set out above shall be modified as hereafter provided;

1.2 Article 8 of the above Rules shall be deleted, and the alternative Article 8 set out in Paragraph 2 of this Schedule substituted.

Paragraph 2 Alternative Article 8

2.1 The arbitration will be conducted on a documents-only basis subject to the discretion of the Arbitrator to order an oral hearing in respect of any part (or the whole) of the arbitration, but in exercising that discretion the Arbitrator shall bear in mind his duties under section 33;

2.2 Unless the Arbitrator otherwise directs the arbitration will proceed on the basis of exchange of Statements of Case as hereafter set out;

2.3 All Statements of Case shall contain the following:-

(i) a full statement of the party's arguments of fact and law;

(ii) signed and dated statements of the evidence of any witness upon whose evidence the party relies;

(iii) copies of all documents the contents of which the party relies on;

(iv) a full statement of all relief or remedies claimed;

(v) detailed calculations of any sums claimed;

2.4 Unless the Arbitrator otherwise directs the parties will exchange Statements of Case as follows:-

(a) Within 28 days of the receipt by the Claimant of the Arbitrator's acceptance of the appointment the Claimant shall send to the Arbitrator and to the other party his Statement of Case;

(b) Within 28 days of the receipt of the Claimant's Statement of Case the Respondent will send to the Arbitrator and to the other party the Respondent's Statement of Case but if no Respondent's Statement of Case is served within that time limit or such extended time limit as the arbitrator may allow then the Respondent will be debarred from serving a Statement of Case and pleadings are deemed to be closed;

(c) If the Respondent wishes to make any counterclaim then his Statement of Case shall include that counterclaim;

(d) Within 28 days of the receipt of the Respondent's Statement of Case and Counterclaim (if any) the Claimant may send to the arbitrator and to the other party a further Statement of Case by

way of Reply (and Defence to Counterclaim if any) but if no Reply is served within that time limit or such extended time limit as the arbitrator may allow the pleadings are deemed to be closed and if no Defence to Counterclaim is served then the Claimant will be debarred from serving a Defence to Counterclaim;

(e) Within 14 days of the receipt of a Statement of Case by way of Defence to Counterclaim (if any) the Respondent may send to the arbitrator and to the other party a further Statement of Case by way of Reply to Defence to Counterclaim and on the expiry of that time limit or such extended time limit as the arbitrator may allow or on the service of a Reply to Defence to Counterclaim if sooner pleadings are closed;

(f) When a Respondent or Claimant has been debarred from serving a Defence or Defence to Counterclaim under Article 2.4(b) or (d) above the other party or parties will still be required to prove any allegations made in his or their respective Statements of Case.

2.5 Before or after close of exchanges of Statements of Case the Arbitrator may give detailed directions with any appropriate timetable for all further procedural steps in the arbitration, including (but not limited to) the following:-

(a) Any amendment to, expansion of, summary of, or reproduction in some other format of, any Statement of Case or any extension to or alteration of time limits for service of Statements of Case;

(b) disclosure and production of documents as between the parties;

(c) the exchange of statements of evidence of witnesses of fact;

(d) the number and types of experts and exchange of their reports;

(e) meetings between experts;

(f) arrangements for any oral hearing if, in the exercise of his discretion he concludes that any oral hearing is necessary including any time limits to be imposed on the length of oral submissions or the examination or cross examination of witnesses.

2.6 The Arbitrator may at any time order any of the following to be delivered to him in writing:-

(a) submissions to be advanced by or on behalf of any party;

(b) questions intended to be put to any witness;

(c) answers by any witness to identified questions.

Paragraph 3 Rules of Evidence

3.1 In any arbitration under the Short Form Procedure the parties are deemed to have waived all rules and requirements in respect of the law relating to admissibility of evidence unless at any stage before publication of any award (whether or not the final or last award) any party notifies the Arbitrator in writing of that party's wish to withdraw such waiver.

3.2 In any event withdrawal of such waiver shall not take effect unless the Arbitrator in his absolute discretion consents thereto.

3.3 Before consenting to withdrawal of such waiver the Arbitrator shall permit the other party or parties to make such representations, whether orally or in writing, as he considers appropriate.

3.4 In the event of such withdrawal taking effect the Arbitrator shall give such directions, either in writing or by way of holding a preliminary meeting for the further conduct of the arbitration as he considers appropriate and may take into account the fact of the withdrawal of such waiver in considering the exercise of his discretion to award costs.

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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