ADR NEWS

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

EDITORIAL :

I must apologise on behalf of NADR and the editorial staff for the late arrival of this quarter's Newsletter. The decision was made at editorial level to delay circulation of the Newsletter so that it would be possible to include recent developments concerning NADR that we as a Board consider will be of interest to members and readers.

There is little doubt that the use of alternative forms of dispute resolution is gathering momentum throughout the world. It has always been NADR's stated objective to be part of this global growth in the ADR market and to be a leading organisation in the field together with our training arm the NMA in the field of professional development and education. This objective is coming to fruition in various parts of the world and it is because of these ongoing developments that there has been a delay in production of this quarter's Newsletter.

When you read through the Newsletter we hope that you will appreciate that the delay has been justified both in terms of NADR development as well as ADR developments.

The modern business world is calling out for forms of dispute resolution that meet the needs of the electronic age. These needs are different to those of earlier ages as business is conducted in different ways compared to the time-honoured manner. Legal systems and processes whilst still of the utmost importance are being supplemented by ADR processes that can be trans-national as well as private in nature.

Contents

Developments in ADR are ongoing and no individual, body or organisation can afford to rest on its laurels if it is to provide a professional service to its customers. There is a tendency to forget that clients are customers and need value for money from a quality product. The aim of any individual or body providing ADR services should be to provide a professional service satisfying its clients as to the quality of the product and giving value for money.

ADR practitioners need to consider the implications of the fact that they are providing a service for fees to people who have other options as to how to proceed with their dispute. Developments in ADR procedures and methods need to be assimilated by all those who profess to be dispute resolution practitioners.

The current edition of the ADR Newsletter is concerned with developments that are ongoing. Do take advantage of the opportunities that are available to you to further develop your skills. These are skills and knowledge that will enhance your ability to provide a service to your clients and help you to build your practice. We hope that you will enjoy the commentary on recent developments and become part of the future.

Thanks to Tony Bingham and Nicholas Gould for their contributions. All submissions for the January edition will be gratefully received. Also please remember that with the peer reviewed journal, to be introduced in April 2004, there will be scope for members to contribute some pretty heavy weight material, so please, if you have an idea you wish to develop, get scribbling now. Happy reading!

G.R.Thomas : Editor

INVITE FROM NIGEL GRIFFITHS - MINISTER FOR CONSTRUCTION

An invitation was extended to The Society of Construction Law from Nigel Griffiths MP, Minister for Construction, to "...provide a concise briefing note on the issues which you and your members feel are vital to making Britain world leaders in construction. I also expect the note to raise with me your main concerns".

Mr C.H.Spurin of NADR responded to an invitation from the SCL to provide comments on the request of Nigel Griffiths and his response was set out in the following terms :-

”I am concerned with certain aspects of the HGCRA 1996

1 The failure of the Act to address contractual provisions that provide for the referring party to pay all costs of the adjudication including the nomination charge / adjudicator fees and the legal costs of the defence - irrespective of the outcome of the adjudication. New Zealand has banned such provisions and the UK should follow suit. My preferred option would be for costs to follow the event, but failing that, a measure that required each party to bear their own legal costs and perhaps to share the costs of the reference might be acceptable.

2 There should be a mechanism whereby the adjudicator can produce his decision within the statutory time frame, seal it in an envelope and release the decision after payment of the adjudicator's fees.

3 The jurisdictional requirement that the construction contract be in writing in order for the HGCRA to apply is unnecessary and causes complications for follow on contracts on similar terms to previous contracts. Whilst there is no good reason why the parties cannot play safe and ensure there is a written contract, I have already encountered five situations where this is not the case, and where the employer has taken advantage of this to fail to pay, knowing that the contractor cannot afford to go to court.

4 The way that the courts have developed the ability for payments due under an adjudication to be withheld, or paid into court, due to the poor financial position of the successful party are turning into a legally technical minefield and often strengthen the hand of the non-paying party - particularly since, if a court action or arbitration is filed the successful but short funded successful claimant cannot afford to continue, thereby losing by default.

This is particularly galling when the lack of funds is created by the defaulting payer in the first place. This is a form of return to payment into escroll by the back door - something the Act sought initially to avoid - having learnt lessons from the old DOM /1 1980 provisions.

5 It is quite common for contracts to provide that all orders and variations must be in writing. However, it is equally common for a contractor to be pressured into carrying out work on site, particularly when senior management is not available to insist on formalities being fulfilled, and for the employer's officials on site to find a million and one excuses for not having time etc to write out an order, merely promising to do so at a more appropriate time.

Often that appropriate time never arises. When the time for payment arrives, the employer falls back on the strict terms of the contract and refuses to pay. The courts apparently agree that a failure to record the order in writing justifies non-payment. Arguably, the employer may be estopped from subsequently refusing to pay, provided that some such orders have been paid. However, in other circumstances, oral provisions may not override the written terms of the contract.

This is bringing legal complications and technicalities into a situation where justice should require that the employer pay.

It is fair enough that a contractor be prevented from going off on a jolly of his own and providing un-requested services - but where the work is done with the full knowledge of the employer and is exactly what the employer wanted done, it is wrong that the employer gets off Scott free.

This is particularly a problem where goods and service providers on sites, who lack the experience of the main players in the industry, are vulnerable to bully boy tactics.

I have been involved in a situation over the last year where a shop outfitter, bit off more than he could chew by trying to play with the big boys. Whilst he no doubt was the creator of some of his problems, it would appear that the main cause of his woes is attributable to the behaviour and incompetence of the main contractor. The outfitter under took a medium sized, by industry terms, partitioning job valued at a very tight £80,000

plus. With variations (not written) the final bill came to in excess of £120,000. The job was 6 weeks behind when the outfitter came on site, and finished about 12 weeks behind. A 10 week contract turned into a 22 week job for the outfitter mainly because the site was not water tight, preventing access and progress. Much of the work ended up being done in bits - with much remedial work to damp areas. When the outfitter presented his bill, he was greeted with a bill from the main contractor for £180,000 for delay etc. The outfitter's paperwork was very patchy. His financial situation was dire. His business is closed. He has sold his house to pay off his supplier creditors. He cannot afford to go to court and even if he were to prevail in part in a claim pursued at adjudication, he would be unlikely to get the payment since the main contractor would seek to go to arbitration as provided in the contract, and ask the court to hold the payment pending the arbitral award. And that is assuming the outfitter can overcome the lack of signed off orders and his ramshackle "time sheets and supply orders" hold water.

There is a case here for better training for such sub-contract suppliers - but in the meantime such examples are not one off exceptions. This sort of thing occurs all too often and small but successful businesses go to the wall with loss of jobs for their employees.

The HGCRA was intended to be a simple / non-technical and valuable protection for ordinary folk in the industry. If the Act is supplemented by too many legal technicalities it will be of no use to small jobbing firms and ordinary plasterers, plumbers and electricians etc. That would be a great shame and a missed opportunity."

NADR Jordan

NADR Jordan and Mr Hassam Tafish are to be congratulated on the recent developments in Jordan. NADR Jordan has moved into new offices in Amman and has already arranged training courses for interested nationals in December in both adjudication training and dispute review board training. The adjudication training is to be undertaken by personnel from NADR and NMA whilst the dispute review board training is in association with the DRBF. The DRBF team is to be led by Mr Larry Rogers. The courses have attracted a great deal of interest and plans are already being made to run more in the near future.

Arbitrator's Office in the ADR Centre

Amman, Jordan.

Adjudication Society

The Adjudication Society of the United Kingdom held its annual conference in London on the 20 November. All those members and readers who are practising adjudicators or interested in adjudication are recommended to visit their website and to register with the society.

NADR Website

Members and readers alike are encouraged to visit the NADR website. There is always something new and as a reference source and research tool, it cannot be faulted. Hopefully you will take advantage of the site and all feedback whether positive or negative will be welcome. Without feedback the people responsible for the website do not know whether the site is meeting user expectations or not. Please visit the site and give us your opinion of it.

Launch of NADR membership list

Members are reminded that the list will be posted on the NADR website in the near future and that it is your responsibility to prepare your resume for inclusion on the list as well as to supply a photograph of yourself in digital format, if you wish to have a picture of yourself posted on the website.

Many members have already done so but there are still a significant number of members who have not yet provided either a resume or a photograph or both.

NADR's list of Welsh Adjudicators

NADR is in the process of establishing regional lists of members to better serve the local community. The first list being developed is the Welsh list of adjudicators. If you are a member of NADR and wish to be included on the list please contact the NADR office with your details. If you are not a member of NADR then to be included on the list you need to join NADR as a member. NADR cannot nominate you if you do not give your details for inclusion on the lists.

NADR and the University of Glamorgan

NADR and the University of Glamorgan have entered into an agreement to provide joint training courses in dispute resolution. This is an arrangement that benefits both parties in that the experience of NADR personnel and worldwide connections dovetails with the academic expertise of the University of Glamorgan who are providers of a Master of Laws degree in Commercial Dispute Resolution. It is perceived that as a result of the joint venture NADR and the University of Glamorgan will become one of the main foci for dispute resolution training and research into the ADR field globally as well as nationally.

Dispute Resolution Board Foundation

The Dispute Resolution Board Foundation held its International Conference this year in Paris on the 26-27 September. The conference was well attended by European members of the Foundation with the Conference dinner held at the Altitude 95 Restaurant in the Eiffel Tower. The Conference itself being held in Les Salons de *Maison des Arts et Metiers*.

There was much discussion on the development of the Foundation prior to the Annual Conference in Washington DC in October. The discussions centred round Good Practice Guidelines and the conduct of a "hearing" as well as the potential for a rift between the North American concept and the European concept as to the future development of the Foundation. The conference itself was conducted in a spirit of co-operation and goodwill with forceful debate on the development of suitable mechanisms to further dispute resolution in the construction industry.

Washington DC saw the Annual Conference of the DRBF this year. The Conference was held on the weekend of 18 and 19 October in the Radisson Hotel, Alexandria. This was followed by two one day training courses at the same venue for those who wished to become DRBF panellists and chairs. The Washington Conference followed the format of the Paris Conference where Good Practice Guidelines were discussed by the Conference as a whole as well as in individual workshop sessions. The differences between the European and North American experiences and expectations were also examined in some detail. The result was the establishment of a position that was satisfactory to all those who attended. Mr Peter Chapman from the United Kingdom was also formerly installed as the President of the Foundation for the current year. We all wish him and the Foundation every success in his year of office.

The South and West Wales Court Mediation Scheme.

Monday 3 November 2003 saw the launch of the Court sponsored mediation scheme for Wales in Cardiff. Initially the court sponsored mediation scheme will be confined to the Civil Justice Centre, Cardiff. However, the hope is that within the very near future similar schemes will be launched in both Swansea and Chester.

Judge Graham Jones, designated Civil Judge South and West Wales, has been the driving force behind the initiative and provided the momentum to establish a mediation steering committee to oversee the process. Out of this process has come the Court Based Mediation Scheme, Cardiff and the Welsh Association of mediators.

The launch itself was a dual loci launch at the Civil Justice Centre, Cardiff and County Hall, Cardiff Bay where the launch was accompanied by a half-day conference. The conference included a mock mediation where experienced practitioners played their natural roles and students from the University of Glamorgan represented the clients. The University of Glamorgan was one of the sponsors of the conference.

Mr C H Spurin of NADR was one of the speakers at the conference reflecting the role that NADR has within the Court Mediation Scheme. Four of the nominating bodies for the court scheme are NADR, the ADR Group, the CIArb and LawWorks Mediation Scheme.

Whilst the scheme was publicly inaugurated on the 3rd November this year, it will actually commence on the 28th November, when it is formally launched by the Lord Chancellor. The scheme has everybody's best wishes as to its future success. A follow up article on its success or otherwise will be carried in a future edition of the Newsletter.

The Welsh Association of Mediators

Following the successful launch of the Court Mediation Scheme, Cardiff, an Association of Welsh mediators has been established. The person to contact if you are interested in joining is Dr. Mair Coombes-Davies, Barrister Chambers, 30 Park Place, Cardiff. If you are eligible or believe that you may be eligible you are encouraged to join the Association.

The University of Arlington Texas (UAT) and NADR / NMA

Successful delegates to selected NADR / NMA training programs will in future be entitled to credit bearing certificates from the Civil Engineering Department of UAT and will be able to build a portfolio of credits leading to an MSc in Construction Dispute Resolution, a program of study and research led by leading members of NADR in the US and the UK.

PROJECT MEDIATION

By Nicholas Gould

The construction industry benefits from a wide range of dispute resolution techniques. The traditional processes of arbitration and litigation have in part made way for mediation and more recently adjudication under the Housing Grants, Construction and Regeneration Act 1996. Mediation has developed slowly since around the start of the 90's. Hybrid and multi-stage processes such as dispute review boards or dispute escalation clauses have become more widely used on some projects. At the other end of the scale management techniques such as partnering are attempts to avoid disputes arising.

'Contracted Mediation' or 'Project Mediation' attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. A contracted mediation or project mediation panel is appointed at the outset of the project. The impartial contracted mediation panel consists of one lawyer and one commercial expert who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project and may conduct one or more workshops at the outset of the project or during the course of the project as necessary.

The panel may also visit the project periodically during the life of the project. In this respect the panel therefore has a working knowledge of the project and more importantly the individuals working on that project. That knowledge allows the panel to resolve contractual differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. Experiences with contracted mediation in practice are limited. However, contracted mediation was used on Jersey Airport.

The only publicly reported project where contracted mediation has been used was Jersey Airport taxiway. The contract sum was approximately £15M, and the contracted mediation panel cost approximately £15,000. According to the article in Construction Manager a variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success has been attributed to the use of the contracted mediation process.

The parties to the construction contract have recognised that there is a risk that they might have disputes during the course of the building work but they have also recognised that a standing mediation panel can help to avoid those disputes during the course of the work. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will get to know the individuals working on the project. There is therefore the potential for the contracted mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation.

The experience at Jersey raises an important observation and that is the amount of the contract sum by comparison to the cost of the contracted mediation process. Most of the structured ADR procedures such as dispute review boards are only economically viable because they are used on substantial projects. This is because of the costs associated with establishing and running a 3 man dispute review board. A dispute review board is established at the start of the project, and then follows the project by making site visits. Disputes are then referred to that board, which will make recommendations only or binding decisions depending upon the drafting of the contract between the contractor and the employer.

However a contracted mediation panel is viable for projects with a much lower contract sum. Statistics indicate that around 80% of construction work carried out in this country has a contract sum in £10's of millions rather than £100's of millions. Therefore, the contracted mediation has the potential for use on around 80% of the construction projects carried out in this country.

The author is currently on a contract mediation panel of two members. The project concerns a large hospital development in the South East of the UK. Work commenced in the Summer of 2002, and will be on-going for at least another year. It is of course too early to say whether the process has been a complete success in respect of this project. However, the feedback has been positive and a variety of issues have been explored and resolved through the panel.

Rights and Interests in Mediation

By G.R.Thomas

Alternative dispute resolution processes and especially mediation have been trumpeted as the mechanisms that ensure that disputes are settled amicably and to the satisfaction of all parties. Mediation in particular is a dispute resolution process that aims to achieve a win-win result for the parties to a dispute. This is one of its major selling points. Successes and failures at mediation are classified not by the attitudes of the parties post mediation, but rather by whether or not the parties have settled at mediation.

However, for many ADR practitioners, "getting a result" takes precedence over every other consideration and accordingly the whole mediation process is orchestrated by the mediator to achieve this desired state of Nirvana. There is little thought given to the post settlement consequences as long as the dispute is settled at mediation and the mediator can "chalk up" another success. Settlement implies that the parties are happy with the end result. This however, may not be the actual position. Many parties post settlement on reflection believe that they could have achieved a "better result" through one of the judgemental processes than that achieved at mediation where they feel that they have been "ground down" by the mediator to settle the dispute on terms that are not favourable to them. This approach to mediation can and does bring the whole process into disrepute and works against parties repeating the process in future if they have another dispute.

If the ADR industry is going to make the great strides that have been anticipated for it, then practitioners need to appreciate that their responsibilities do not end at the termination of the mediation but still exist when the settlement is implemented.

There are various bodies and organisations that train mediators and other alternative dispute resolution practitioners as well as the fact that anyone can call himself an adjudicator, mediator or arbitrator, as these are not protected terms. The potential for growth is great for practitioners, but so is the potential for disillusionment amongst clients and potential users of ADR processes who rightly or wrongly believe that they will not have a "fair hearing" if they use one of the ADR processes.

There is the potential for major growth in mediation both in the United Kingdom and world wide, but the scope can be limited by people's confidence in the system, the practitioners and the training that practitioners have to do. There is disquiet with some of the approaches to mediation and mediation training with organisations "jumping on the bandwagon" and providing training and services, but there is no minimum standard or uniform approach to training. This vacuum is one that Europe is prepared to step in to rectify, but will rectification bring its own problems in that a standard approach may produce a system where the process is more important that the people who have to use the system? Time will tell! The debate on the future training of mediators needs to be expanded to take into consideration people's experiences of mediation training and using mediation and what they consider to be successes or failures not whether there has been completion of a training course or settlement of a dispute. It is only through learning from experience that mediation can be driven forward as a dispute settlement process and one the public will have confidence in using.

Parties need confidence that they will have justice if they submit themselves to mediation. The responsibility is on mediators to ensure that this is the case in practice. Mediators need to appreciate that this is an onerous task as they are the "guardians of the process" and should never forget this in their rush to "successfully settle the dispute" and keep their settlement figures high to prove that they are "masters of the process".

The mediator needs to appreciate that sometimes "getting a result"; that is, a settlement may not be as important as dealing with the parties' rights and failing to reach settlement if mediation is to become a recognised mainstream respected dispute resolution process in the United Kingdom.

Mediation can only work when the parties have confidence in the process and this confidence can only come from the mediators and how they conduct the process. Settlement of a dispute is not the ultimate seal of approval of the process or a guarantee that the parties are satisfied with the outcome. Parties have rights that need to be respected irrespective of the outcome and mediators must never forget this fact.

The importance of the concept of rights in the development of the ADR cannot be overstated. Parties need to have confidence in the process if they are going to agree to use the concept and genuinely take part if so ordered by a court. There are two recognised approaches to mediation, the interests based approach and the rights based concept of dispute settlement. These two approaches to the mediation process can and do merge into one in many cases, but in others the rights of the parties can be fundamental. Failure to explore rights and parties concepts of rights may at the time not appear important to the mediator, but the long term consequences of failing to identify the needs of the parties can and does bring the concept of mediation into disrepute. Parties not only want "justice, but they want justice to be seen to be done" in their particular case.

The differences in approach adopted by mediators and whether they adopt an interests based or a rights based approach to dispute settlement can have a profound effect on how disputes are settled. In one, the interests based approach settlement of the dispute become paramount. In the other, the rights based approach the rights of the parties are the most important consideration rather than "obtaining a result". These two approaches have fundamental differences for the mediation process and the results that may occur by mediators adopting the approaches.

The interests based approach has many proponents who argue strongly that they bring a new robust approach to settling the dispute by ensuring that the parties realise what their "best interests are" and getting them to settle along those lines. There are criticisms of this approach that are difficult to ignore when comparisons are drawn between the two types of approach to mediation. It is accepted that mediation is a facilitated negotiation process whether an interests based or rights based approach is adopted. The question must be asked, "Why do parties settle at mediation when experienced lawyers and negotiators have failed to reach settlement prior to the mediation?"

The usual answer is that the mediator has introduced a reality check and that the parties now better understand their dispute. Given the fact that the dispute may have been in existence for a good number of years and that the lawyers and the parties have been intimately involved for that length of time then this explanation may only be part of the answer not the whole answer. It is possible that the parties do become entrenched in their respective positions, but the "reality check" may introduce a new factor, the fear factor!

Once parties appreciate that they can lose the fear factor can take over. This is especially true when parties are not used to litigation and do not fully appreciate the nuances. The parties or one party may become afraid of the consequences of going to court and make concessions in a mediation that would not be contemplated in direct negotiations between the parties. The reality check has worked to produce a result because the concentration has been on the interests of the parties not the rights.

Once a settlement has been agreed and the parties have time to consider their position, they may well find that their rights have been subrogated. In many cases this may not be important, but in some situations it may well be the reason why the case was brought in the first place. Thus even though the case has been settled and the parties have agreed to the terms of the settlement, one of the parties has realised that it has made a "bad deal" and would have been better served by another method of dispute resolution.

The onus is on the mediator to guide and lead the mediation process. He is "guardian of the process" rather than "master of the process". This differentiation is important as it is incumbent on the mediator to perform his duties to the best of his abilities for the benefit of the parties rather than to maintain his high success rate.

Settlement of a dispute should not come at the expense of the rights of a party or parties. Initially their short-term interests may have been better served by settlement. However, their rights both long term and short term would have been better protected by not settling.

The ultimate goal of a mediation is not to settle, however desirable this may be, but to produce a win-win situation if at all possible for the parties. It needs to be recognised that it is not always possible to achieve this goal in a mediation. There is no shame in not settling at a mediation if the parties have honestly applied

themselves and an agreement cannot be reached. This is not a failure of mediation or the mediator, but namely that the parties are so far apart that it is not possible to reach a voluntary agreement that satisfies the parties and third party resolution of the dispute may be the best option. Coercion of the parties by the mediator is undesirable if the only goal is to reach a settlement so that the mediator can maintain his "strike rate".

We all have a duty to respect the clients and the processes and this duty should take precedence over the need to "achieve a result" so that we are a "successful ADR practitioner". There is no point in having a high success rate when nobody has confidence in the systems and do not wish to use them even if ordered to do so by the courts. This is a responsibility that all ADR practitioners need to take seriously!

THE BINGHAM SCHEDULE

First we had Scott Schedules – now let us introduce you to "The Bingham Schedule". It is not uncommon for the construction adjudicator to be presented with cases of vast proportions and complexity. How can the humble adjudicator cope within the time scale set by the statutory framework? There may be a case for arguing that the adjudicator can do little more than make a very hasty and potentially ill judged decision or that the adjudicator should indicate to the parties that it is impracticable to reach a fair and balanced decision and that he is resigning. At present however, unless both parties agree, the only extension of time available under the statutory scheme is that which can be granted unilaterally by the claimant. So the adjudicator has to get on with it and do the best he can.

The Bingham Schedule is a tool to implement the advice of the **Construction Umbrella Bodies Adjudication Task Group July 2002 "***Guidance for Adjudicators*" in adjudications conducted under Part II of the Housing Grants, Construction and Regeneration Act 1996.

It relates specifically to point 5 of Section 4, which invites adjudicators to "Consider requiring a party to provide a concise statement of its case, cross referenced to a bundle of back-up documentation, and a chronology (although an extension of time may also be needed)."

The Bingham Schedule goes one step further in that it provides a pro-forma document for both parties to list issues and sub-issues, indicating who in each party's opinion bears the burden of proof on each issue and a directory as to where the relevant information that the parties wish the adjudicator to take into account can be located within their bundles. A downloadable copy of The Bingham Schedule is available for use by all adjudicators on the NADR Web Site in the Adjudication Section under Publications.

Feel free to use it and let us know how useful you find it. Any recommendations for improvements welcomed.

Thanks to Tony Bingham for submitting the schedule and for giving permission for its general use by adjudicators.

MEDIATION CASE CORNER by C.H.Spurin

May & Butcher v R [1934] 2 KB 17

An agreement to negotiate the detailed terms of a contract or to renegotiate the terms of a contract, that is to say an agreement to agree, is unenforceable under English Law. In consequence, the original terms of a contract will prevail at law. Conversely, if there is no contract there will be nothing to enforce.

Negotiation agreements are damned by the rule against uncertainty. At first sight there is little positive in the judgement for the prospects of the mediation process. The application of common law principles to the mediated settlement process is a salutary reminder that other common law principles such as consideration also apply and the wisdom of reducing settlement agreements to a deed or a Tomlin Order where the existence or adequacy of consideration in a settlement may be questionable, simply to ensure the enforceability of the settlement and to put it beyond all doubt. See also **O&M D.C. v Mahdi Sajjad** below**.**

Walford v Miles [1992] 2 AC 128

The court reconfirmed **May & Butcher v R**. An agreement to negotiate cannot form the basis of an enforceable contract, even if related to a term to negotiate in good faith future disagreements arising under a contract.

A distinction may however be drawn between good faith negotiation agreements as in **Walford v Miles**, which have no formal mechanism and mediation agreements which involve a distinct third party assisted process. Whilst the court cannot enforce the agreement there is scope for the court to support the process, as demonstrated by the next case.

Torith Ltd v Stewart Duncan Robertson [1999] LTL C8200316

In an appeal by an employer against a decision of an employment tribunal regarding a collective agreement, the Employment Appeals Tribunal considered the inter-relationship between applications to the Employment Tribunal for hearings and ADR agreements. Lord Johnstone held that where a collective agreement provided for a conciliation and dispute resolution procedure, an employer was entitled, as a matter of contract, to hold its employees to that procedure for determination of their complaint until such times as the route was exhausted, thus excluding the jurisdiction of the employment tribunal to that extent.

Torith Ltd had entered into a Working Rule Agreement with the trade union in 1997. A dispute developed regarding whether skill rate 1 or 3 applied to workers with LGVC licences. The Working Rule Agreement provided a comprehensive conciliation and dispute resolution procedure under the auspices of the Construction Industry Joint Council (CIJC). The process stalled when the Union could not agree on who would represent the parties on the Council. An Employment Tribunal held that rate 1 applied. The question on appeal was whether the Employment Tribunal had jurisdiction. The Appeal Tribunal declared that the original agreement was unsatisfactory, if not ambiguous, but since there was a detailed disputes resolution procedure by analogy with an arbitration clause in a contract, the jurisdiction of the general courts was excluded by such an agreement, at least to the extent of the merits of the dispute until such time as it was resolved. The tribunal should not have embarked on the task of settling the matter in the circumstances. The decision of the tribunal was sisted (*stayed*) pending further deliberations by the CIJC. If the CIJC process became frustrated by an inability to agree on composition then the sist could upon the application of either party be removed. By analogy, a stay of action could lie against a court action in deference to a mediation clause. That mediation is now on the same footing as arbitration is confirmed by **C&W v IBM.** See below.

Oil & Mineral Development Corporation Ltd -v- Mahdi Sajjad, Oasis International LLC (1999)

At the conclusion of a protracted series of mediations, the mediator drafted proposals which were broadly acceptable to the parties. The mediator suggested the parties reduce the agreement to writing. However, when one of the parties indicated to the other via the mediator that as far as they were concerned the matter was concluded the other made no further efforts to chase up the written agreement. On default of the agreement, the matter proceeded to court where it was held that there had been no settlement. It would appear that oral settlements are insufficient in mediation. A written settlement agreement is essential.

Dyson and Field (Executors of Lawrence Twohey deceased) v Leeds City Council 22.11.1999,

The Court of Appeal felt compelled to order a retrial where the trial judge had not provided reasons for preferring one expert's evidence over another's, rendering the decision unsound, because the trial judge had since died and could not therefore furnish reasons. The Court however felt that this case was appropriate for mediation and indicated that a costs penalty would be applied against any party that did not cooperate in the mediation process prior to the retrial.

This provides an example of when the courts may feel that mediation could be of value. It also highlights the fact that where a quasi-judicial decision maker such as an arbitrator or adjudicator fails to provide sufficient reasons for a decision, enforcement may be withheld pending the provision of sufficient reasons, but that in the ordinary course of things the decision will not without more be struck down. Of course, if sufficient reasons cannot be produced that would be another matter.

Glencot v Barrett [2001] WLR 239 771

At the request of the parties, a construction adjudicator adopted the role of a mediator, holding a joint session. The mediation failed to produce a settlement and the adjudicator assumed his original role and produced a decision. Enforcement of the decision was subsequently resisted on the grounds of irregularity and potential bias because of the information the adjudicator was exposed to during the mediation.

Whilst Mediation / Arbitration and Mediation / Adjudication clauses in contracts for the settlement of future disputes and similar ad hoc agreements for the settlement of existing disputes are quite common, great care must be taken to ensure that the parties fully understand the implications for natural justice of an adjudicator becoming aware of information during the mediation process that might not be available during a trial.

Even though members of the ADR profession are divided upon the desirability of such processes because some feel that once learnt the decision maker cannot distance himself from the information and thus his judgement will be coloured by it, the court did not outlaw med/arb processes. This perhaps recognises that many others in the profession feel that the experienced adjudicator is capable of putting such information out of mind. After all, juries are required to do this all the time when instructed by the judge to ignore information that he orders to be struck from the record following an objection by opposing counsel.

In the circumstances the court held that insufficient had been done by the adjudicator to bring the inherent risks of disclosure of information that had not been pleaded by the parties to the attention of the adjudicator and so that part of the adjudicator's decision was held to be unsound.

Cowl v Plymouth City Council [2002] 1 WLR 803: 2001/2067 [2001] EWCA Civ 1935, 14.12.2002
Before The Lord Chief Justice ; Lord Justice Mummery and Lord Justice Buxton, Lord Woolf CJ**:** In a public law dispute concerning the closure of an Old People's Home and the dislocation of the residents to other homes, the Court of Appeal criticised Plymouth Council for failing to take up an opportunity to negotiate a settlement and for pursuing unnecessary litigation.

Cowl is important in that it provides clear judicial support for the declared intention of the Lord Chancellor's Office that mediation will be used increasingly for the settlement of Public Law disputes. This is further reinforced by **Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence** below. Clearly future applications for judicial review of decisions of public bodies may be deferred to mediation.

Smith Group plc v Weiss (2002) Ch.D
The Smith Group bought PneuPac Inc. Subsequently Smiths commenced proceedings for damages for breach of warranties and misrepresentation. The parties attempted mediation. Experts interviewed present and former employees on a without prejudice basis, which made the interview records privileged. Weiss referred to the interview documents in a list provided to the court. Smith then sought to use the interview material disclosed during mediation at a subsequent trail, arguing that Weiss had waived the privilege.

Mr Kaye QC held, on the authority of **Somatra v Sinclair -Roche & Temperley** (2000) 1 WLR 2453, that the correct test for admissibility of such material was "whether in all the circumstances it was fair and just to allow a party to rely on it". The court, should be slow, both because of the mediation agreement and public policy, to hold that the without prejudice status of material was lost, except in clear and unequivocal circumstances. The fact that informal assurances of privilege were given to the interviewees underlined the confidential and without prejudice nature of the interviews. Merely including such documents in a list did not in itself breach the mediation agreement. On the other hand the court would, upon receipt of an objection, rule such material to be inadmissible.

Thakrar v Ciro Citterio Menswear [2002] EWHC 1975
The court upheld and enforced a mediation settlement agreement, related to the buy out price for shares in a company following a family disagreement, which saw the claimant expelled from the board. The settlement agreement has subsequently been reduced to a Tomlin Order. The company went into liquidation and the liquidators went to court without declaring the settlement. Thakrar raised the matter of the settlement which was resisted by the Company on the grounds that it was not enforceable. The CEDR mediation was conducted on the basis of consent to the subsequent settlement agreement by creditors, which was duly granted. The settlement was in all respects legal and compliant with Company Liquidation provisions. The judge stated "I have no hesitation in concluding that the compromise arising from the mediation is one which the court can and should uphold. There can be no question but that the mediation was genuine and the resulting agreement arrived at on a proper commercial basis. Each side was represented by experienced solicitors and had the assistance of skilled accountants."

Cable & Wireless PLC v IBM UK LTD [2002] EWHC 2059 (Comm)
A contract for the global supply of IT between the parties contained a good faith negotiation / ADR clause. C&W sought to litigate on the grounds of uncertainty citing ***Paul Smith Ltd v H&S International Holding Inc*** [1991] 2 Lloyd's Rep127 and ***Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*** [1975] 1 WLR 297. In an application for stay of the hearing pending ADR Colman J held that the ADR clause contained an enforceable obligation to take part in Centre for Dispute Resolution (CEDR) mediation.

He went on to state that even if the mediation provider was not stated the requirement to mediate would not founder if the obligation to mediate was expressed in unqualified and mandatory terms. Colman J stated that "For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic

uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in ***Dunnett v Railtrack.***" Rather than stay the action, Colman J adjourned the proceedings to enable the parties to engage in ADR

Dunnett v Railtrack [2002] 2 All ER 850

Three of the claimant's horses escaped from her field onto an adjoining railway line through a railway gate left open by unknown third parties. The claimant had repeatedly asked Railtrack to ensure that the gate would self-lock or alternatively for them to padlock it. Railtrack representatives had asserted that they had a legal duty to provide access to its workers, which would be denied if the gate was padlocked, though they subsequently replaced the gate with a fence. The claim failed in the High Court on the basis that the claimant should not have relied upon Railtrack's legal assertions. The claimant appealed, but pending the hearing requested mediation. The appeal failed because the grounds relied upon, namely that Railtrack owed a duty of care to guard against a known danger of trespassers leaving the gate open, whilst arguable had not been pursued at first instance. The court stated that the claimant had been let down by her original legal advisors. In the event the appeal failed but the CA refused to order costs against the claimant because Railtrack had unreasonably refused to mediate.

Hurst v Leeming [2002] EWHC 1051. (CH) 9.5.2002

Mr. Justice Lightman in the High Court heard an application for damages for negligence against a Barrister, pursuant to ***Arthur J.S. Hall & Co. v Simons*** [2000] 3 WLR 543 related to the conduct of a action by Hurst against his former partners in a solicitors firm. The action failed but Hurst attempted to resist an order of costs on the basis that Mr Leeming had refused to mediate. Leeming had refused to mediate on the grounds of previously incurred legal costs, the seriousness of the allegations of professional negligence; the total lack of substance of the claims made; the lack of any real prospect of a successful outcome to the mediation proceedings, given Mr Hurst's objective to obtain a financial payment from Mr Leeming when there was no merit in his claim; and the character of Mr Hurst as revealed by his actions – that he would not be able or willing to adopt the attitude required if a mediation was to have any prospect of success.

In the circumstances Lightman J concluded that Mr Leeming was justified in refusing to proceed to mediation since objectively mediation had no realistic prospect of success as indicated by Mr Hurst previous unrealistic actions against his solicitor representatives. Also, as a bankrupt Hurst had nothing to lose in the proceedings. Mr Leeming was therefore awarded his costs. Neither the belief in a water tight case, heavy prior costs nor the seriousness of the allegations however, would not have been grounds for refusing to mediate. Whilst it may be a risky business to refuse to mediate under the current CPR regime, there are nonetheless occasions when a refusal to do so will be justified.

Leicester Circuits Ltd v Coates Bros Plc [2003] EWCA Civ 290

Coates successfully appealed against a finding of breach of contract by the supply of defective ink for the manufacture of PCBs. The CA found, overturning the finding of the lower court, that Leicester Circuits had not established that the ink in question was not fit for the purpose. Leicester's losses were therefore due to other factors. In a separate hearing on costs, Leicester Circuits raised the fact that prior to the High Court Action Coates, having agreed to an ad hoc mediation pulled out, at the 11th hour on the instructions of their insurers. The CA viewed the continued High Court litigation as being a consequence of the failure to mediate and without drawing conclusions on the possible outcome of such a mediation, awarded costs from the date of withdrawal through to the end of the High Court Case. However, the costs of the successful appeal followed the event and were thus payable by Leicester, as were the High Court costs prior to the withdrawal from mediation.

In hindsight, it would have been better for Coates to have attended and attempted a settlement. It also shows the importance of getting consent to mediate from an insurance carrier before making an agreement to mediate. If not and the carrier refuses to cooperate a party is in Catch 22.

Corenso (UK) Ltd v The Burnden Group plc [2003]

ADR for the purposes of the CPR embraces all methods of negotiation not just mediation. Burnden offered to mediate, but when this failed they upped their payment into court under Part 36. The payment in was accepted. Subsequently Burnden substantially succeeded in their counterclaim and sought costs up to the date of the payment into court on the basis that the other party had rejected the offer to mediate. Reid J held that Corenso had made considerable efforts to negotiate which fulfilled their CPR duty to attempt to avoid litigation, Burnden on the other hand only upped their payment in 21 days before the trial. Costs hence followed the event and despite winning the counterclaim costs were awarded against Burnden.

Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence [2003] EWHC 1479 (Ch.D)
The case turned on the legal interpretation of contractual break clauses in a lease, namely whether or not the Secretary of State for Defence had the right to issue notices to terminate early. RBC sought to mediate but the S.S. for Defence declined to do so, justifying the refusal on the grounds that a question of law not fact was at issue, and the public interest. In the event RBC lost on the question of law. The notice was validly issued. Despite this, the court refused to order costs to follow the event because the continuing litigation was the direct result of a failure to mediate. Under the CPR even public bodies have a duty to take steps to minimise litigation and the S.S. for Defence had failed to do so.

It is now clear that there is little distinction between way the CPR ADR rules apply to public and private bodies. It is also evident that a party that seeks to litigate to establish or re-establish a legal principle may have to pay even more than previously for that privilege.

WEBSITE UPDATE

NEW FEATURES

WELSH SECTION : This section features a list of NADR members based in Wales and an introduction to the new South and West Wales Court Based Mediation Service, featuring an electronic version of the Court Service Mediation Booklet and a power point demonstration of the booklet.

POWERPOINT DEMONSTRATIONS : Over the next few months NADR will be posting a range of power point demonstrations on a various aspects of ADR services and training. Members are invited to use the power point slides for ADR demonstrations to clients and for CPD within their organisations.

NEW ARTICLES

- **ADR : What's in it for lawyers ?**
- **Mediation : What can it offer Malaysia?** by R.Faulkner
- **Preparing to write an arbitral award** by Prof. G.M.Beresford Hartwell
- **Q&A on the Arbitration Act 1996** by Prof. G.M.Beresford Hartwell
- **The Reasoned Award** by Prof. G.M.Beresford Hartwell
- **The Arbitral Award** by Prof. G.M.Beresford Hartwell
- **Relevance of Expertise in Commercial Arbitration** by Prof G.M.Beresford Hartwell
- **Over-view of FIDIC Contracts** by Prof G.M.Beresford Hartwell
- **The BINGHAM SCHEDULE for Adjudicators** by Tony Bingham
- **Why Choose NADR ?**

RESOURCES

Text of the UK Arbitration Act 1996
Text of the Model Law and Arbitration Rules, UNCITRAL
Text of the UK European Communities Act 1972, Public Law Section
Text of the New South Wales Construction Legislation as amended March 2003, Construction
Text of the New Zealand Construction Legislation 2002. Construction.

Readers are invited to submit articles, case studies and comments for publication in the News Letter.

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