Session 5- Overview of Dispute Resolution

Presenter

Hanna McNab

Partner

Most of Hanna’s work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is “on course for a very successful career”. Hopefully that career is in law.

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Liam Hendry

Senior Associate

Liam is a solicitor who helps construction clients to avoid and resolve disputes on their projects. Prior to qualifying as a solicitor he spent fifteen years working in commercial roles in the construction industry.

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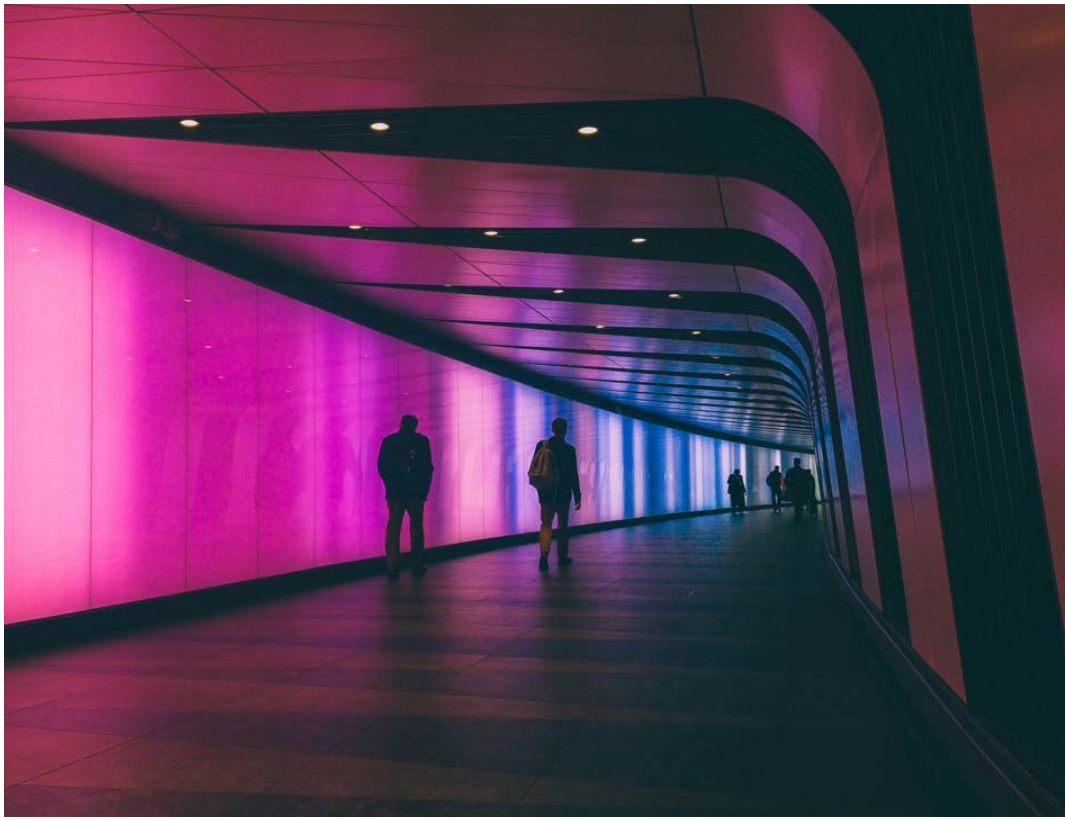
Summary

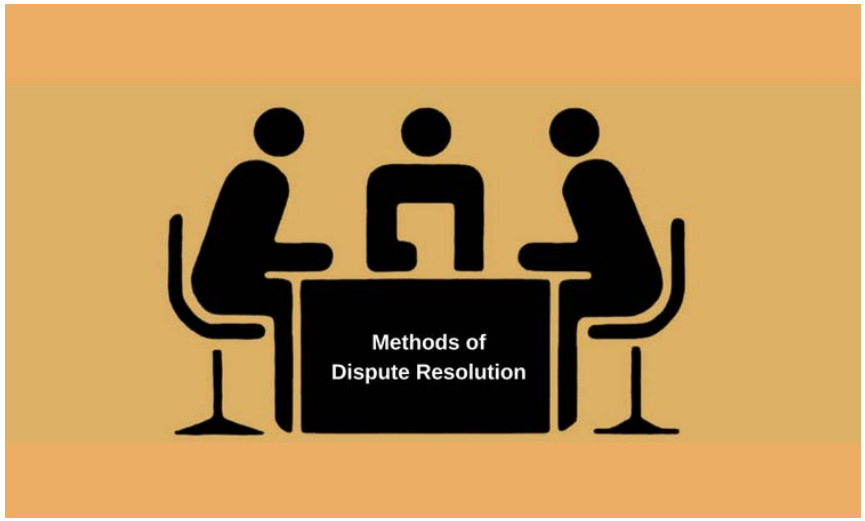
1. Part 1 – What are the options?
2. Part 2 – Adjudication



Part 1: Dispute Resolution Options

Forms of "formal" dispute resolution

- Expert Determination
- Arbitration
- Litigation (Court)

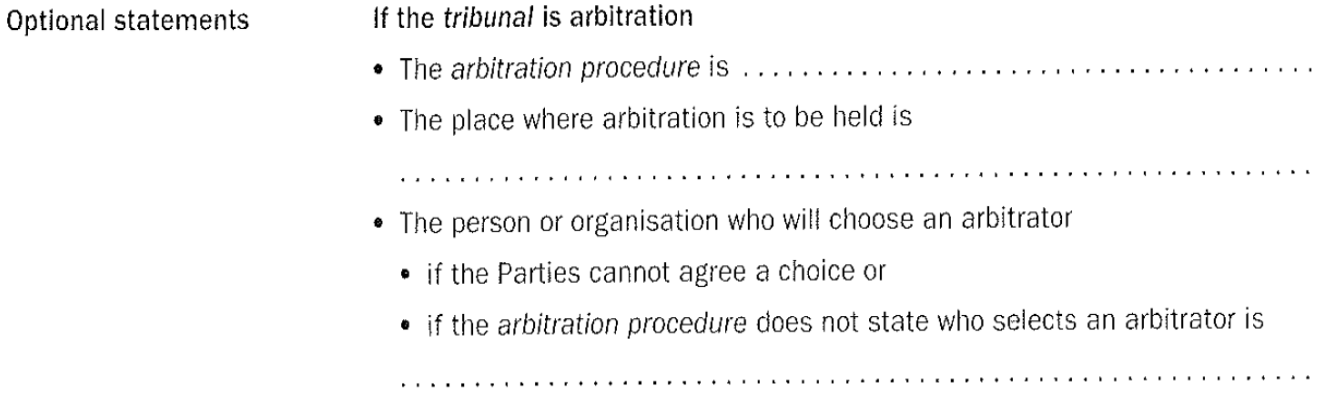


Expert Determination

- Be careful - Final and binding
- No standard process
- Most common property documents - development agreements
- Used in certain construction contracts:
- IchemE forms
- MF/1

Arbitration

- It is NOT adjudication!
- Alternative to Court
- Governed by Arbitration Act 1996 or pre-agreed rules:
  - CIMAR (JCT)
  - UNCITRAL / ICC / LCIA
  - NEC



Optional statements

If the *tribunal* is arbitration

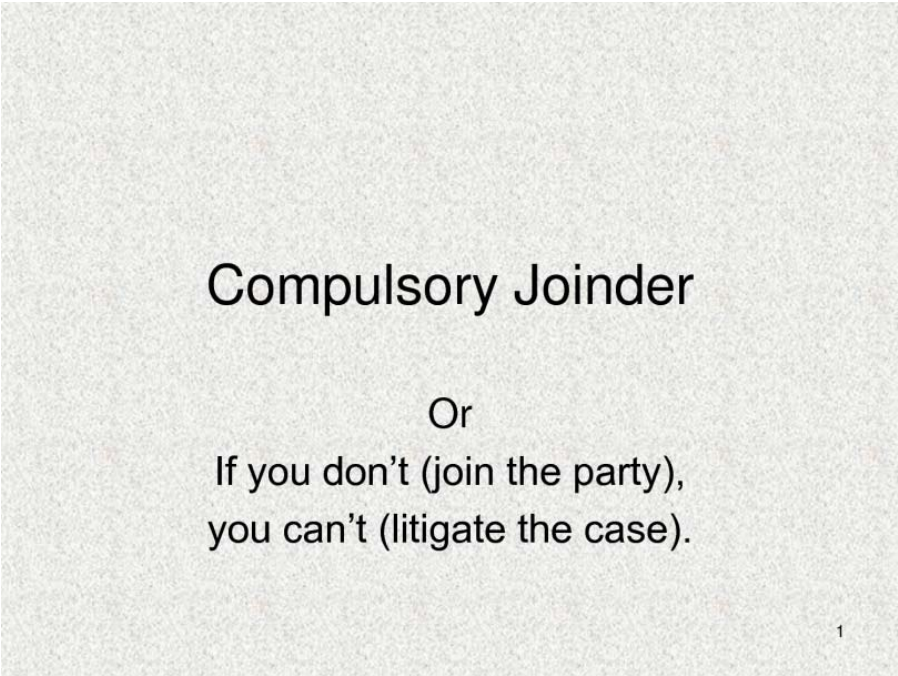
- The *arbitration procedure* is .....
- The place where arbitration is to be held is

  .....
- The person or organisation who will choose an arbitrator
  - if the Parties cannot agree a choice or
  - if the *arbitration procedure* does not state who selects an arbitrator is

  .....

Arbitration – Yes or No?

- Must be an arbitration agreement
- Standard forms (JCT) changed
- Why – Privacy?
- Why Not:
  - Time
  - Cost
  - Arbitrator?
- JOINDER



Court System

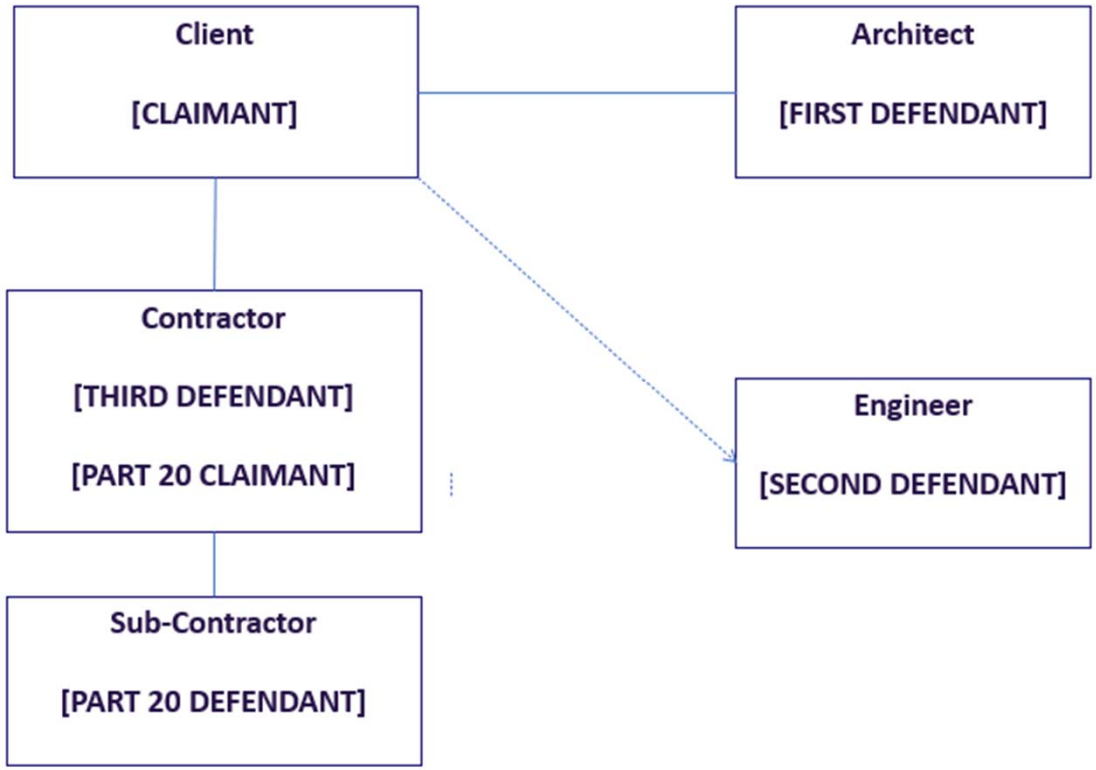
- County Court
- High Court
- Court of Appeal
- Supreme Court

- High Court – TCC > £250,000 or complex

High Court (TCC)

- Business and Property Court (TCC)
- Cost budgets
- Time and Cost
- E-filing

Parties to proceedings



Forms of "informal" dispute resolution

- Conciliation
- Mediation
- Early Neutral Evaluation
- Talking!

Discussions and offers of settlement

- Open discussions
- Without prejudice
- Without prejudice save as to costs
- What's the difference?

Open discussions

- Open (unless otherwise stated)
- Would you like a judge, arbitrator or adjudicator to read the correspondence?
- If not – without prejudice
- Why?

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Without prejudice

- Lord Hoffman in Bradford v Bingford Plc v Rashid [2006] UKHL 37 (at para 62) said:

> *"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] Ch 290 , 306: 'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings."*

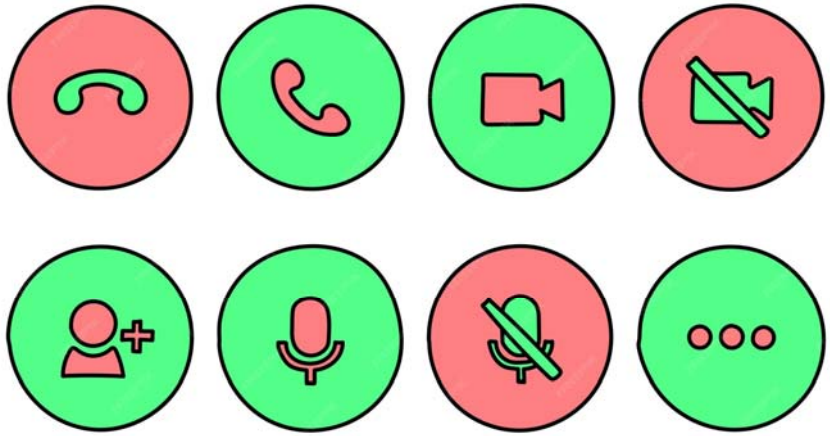
Without prejudice

- Lord Bridge in Rush Tompkins v Greater London Council [1989] AC 1280 (para 1 & 2) said:

> *"(1) that in general the "without prejudice" rule made inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement; and that admissions made to reach settlement with a different party within the same litigation were also inadmissible whether or not settlement was reached with that party*
>
> *(2) That the general public policy that applied to protect genuine negotiations from being admissible in evidence also applied to protect those negotiations from being disclosed to third parties"*

Without prejudice

- Not your position in proceedings – mark it as without prejudice
- Meetings?
- E-mails?
- Phone calls?
- Joint privilege and cannot be waived unilaterally

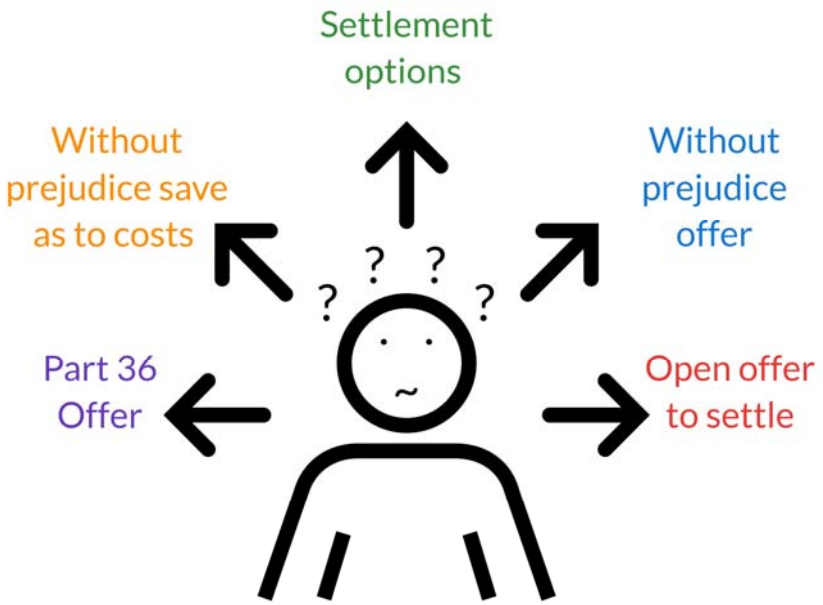


Without prejudice save as to costs

- Different to “without prejudice”
- Existence and contents of material remain confidential
- Judge or arbitrator has no knowledge when making his/her decision/judgment on the dispute
- **However** can be used when to decide liability for costs of the dispute

Part 36 offers

- Part 36 Civil Procedure Rules
- WPSATC offers
- Court
- When? Before proceedings?
- Principal sum only (not costs)
- Costs assessed if not agreed



Part 2 – Adjudication

Adjudication

- What is it?
- Why is it required?
- Process of adjudication
- What happens if we win and the other side don’t pay?

Adjudication – What is it?

- Fast Track Dispute Resolution Process
- Decision is binding but not final
- Pay now – argue later
- No challenge based on law / fact (only process) but …
- Only applies to contracts of construction operations?

Background / Why it exists?

- Construction Industry – A basket case
- Sir Michael Latham – “Constructing the Team” - 1994
- Housing Grants Construction and Regeneration Act 1996 (the “Old Construction Act”)
- Local Democracy Economic Development and Construction Act 2009 (the “New Construction Act”)
- The Scheme for Construction Contracts (as amended)

Supplement to the East Anglian Daily Times

Proposals set to create new climate of trust

Constructive response to building law report

BY MICHAEL HUGHES

THE construction industry's addiction to litigation could be broken at last, if new recommendations become effective law.

Builders across the region have "welcomed in principal" a Government and industry sponsored report by Sir Michael Latham.

Legal experts claim that the measures outlined in a report will restore trust once more between client and contractor.

Building trade associations agree that the recommendations could correct many of the shortcomings of their industry, brutally exposed by the recession.

However, small building firms traditionally last in the pecking order, appear less certain.

"I will only believe there is a willingness to change when they see it," said one sub-contractor, who asked not to be named.

"In the meantime we will go on being abused by the main contractors in the way we always have."

The four major concerns of the Latham report are:

- UK construction costs are overloaded with off-site costs, including consultancy and legal fees.
- Employers, main contractors and sub-contractors now approach each other from the outset as adversaries – there being no trust remaining within the industry.
- Standard contract conditions are outdated. Contracts are rewritten on an ad hoc basis to suit particular jobs, often to include "pay when paid" clauses which are a recipe for distrust and litigation.

Dan Leno: "Latham report not loaded in favour of one side or the other"

These clauses mean that sub-contractors see no money for their work until the main contractor has been paid – if then, in many cases.

- The setting up of an independent adjudication service to deal with problems as they arise on site and not at the end of a contract or, subsequently, through arbitration with lawyers.

Dan Leno, a construction litigation specialist, explained that previous reviewers of the construction industry, some of which date back to 1944, had been ignored because they tended to favour one section of the industry or another.

"The Latham report is not particularly loaded in favour of employers, main contractors or sub-contractors," he said.

The problems of the UK industry have been exacerbated in recent years as output plunged by about 40 per cent and a quarter of a million jobs disappeared.

As the recession began to bite and workloads fell, desperate contractors began submitting absurdly low tenders, then tried to push up their margins by extra claims and by delaying payments to sub-contractors.

Mr Leno, a lawyer with the Ipswich branch of Birkett Westhorp & Long, said that millions of pounds were spent each year rectifying construction problems and yet more was spent with lawyers sorting out those problems after the event.

"Latham suggests there should be a trust fund set up into which a client would pay the amount of the next interim payment," he said.

"Everybody would know that the money is there and safe and that they were going to be paid – be they main contractor or sub-contractor."

The big concern is that if the UK industry doesn't sort itself out and reduce construction costs, the door will be open to EC competitors to step in and steal a march on the market, he added.

Tony Howe-Smith, eastern region president of the Building Employers Confederation, said that his members accepted the recommendations. Although there was some reservations about how they might be achieved.

"There will always be problems because we are only human and that is the nature of the industry.

"But we need a way forward to deal with those difficulties in a sensible and realistic fashion, without constantly having to resort to litigation."

While the report had come out against pay-when-paid clauses in contracts, it had done nothing to help solve the problems of late payment, which were a major cause of contention with sub-contractors.

"There should be legislation which will at least allow sub-contractors to claim interest on late payments," said Mr Howe-Smith.

Plans are moving ahead for a long period of consultation within the industry which, it is hoped, will eventually lead to the Government preparing new legislation.

However, the sub-contractor who spoke to the EADT was not convinced.

The man said he was sceptical when he first heard that the report was going ahead and nothing had happened since to change his mind. "Contractors will always find an excuse not to pay us or will knock off ten or 20 per cent over some claim of other they have dreamed up.

"And I can't believe the Government, which is already overloaded with a programme of new legislation, is going to do anything about it. "Until we hold the whip handle, nothing will change."

Mr Leno agreed that, if the Latham report recommendations eventually become effective law, the real losers could be the lawyers who have long enjoyed rich pickings from the industry's penchant for going to court.

"There will always be a role for us in the construction industry.

"We are like racing greyhounds – win or lose we always get fed."

Adjudication under the Construction Act(s)

- The Act(s) came into force in 1998
- The Act(s) introduced Adjudication
- Incorporated the Scheme for Construction Contracts
- Alternatives are:
  - TeCSA rules
  - CIC rules
  - ICE Adjudication Procedure
  - Bespoke Procedure

The Construction Act

- The Construction Act provides:

  "A statutory right for any party to a construction contract to refer a dispute to Adjudication at any time"

- Covers all construction contracts
- Must be a dispute
- Can go to Adjudication at any time

What is a construction contract?

(1) A "construction contract" means an agreement with a person for any of the following—

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement—

(a) to do architectural, design, or surveying work, or

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

What are construction operations?

"construction operations" means, subject as follows, operations of any of the following descriptions—

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) painting or decorating the internal or external surfaces of any building or structure

What is a construction contract? Recap

- Oral as well as written
- Professional services contracts
- Not domestic works but …..
- Oil and gas exceptions but limited

- Right to adjudicate under each of these contracts

Must be a dispute

- Does not require the exchange of solicitor letters to create a dispute;
- As simple as applying for some money or an extension of time and there being silence or it being rejected.
- Dispute must have crystallised at the point the adjudication is commenced

Court's approach to 'dispute'

Leading case is Amec Civil Engineering Ltd v The Secretary of State for Transport. Considered all of the previous court judgments and set out 7 propositions to address whether a matter gives rise to a dispute:

1. *The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*
2. *Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.*
3. *The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the* claim is not admitted.

Court's approach to 'dispute'

4. *The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.*
5. *The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.*
6. *If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.*
7. *If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.*

Dispute crystallised? Expert evidence?

- Does an expert report which lands a few weeks before the 12-week period to consider an EOT claim start the clock running again? NO!

- MW High Tech Projects UK Limited v Balfour Beatty Kilpatrick Limited
  - BB served 5 notices of delay on MW
  - *"MW's silence gave rise to an inference that the delay claim set out in the notices was not admitted."*
  - *An expert report served "did not amount to a fresh notification, whether under clause 2.17.1, clause 2.17.2 or clause 2.17.3. It contained a detailed critical path analysis and the total extension of time claimed was marginally longer than the previous cumulative extension claimed but it was not materially different to the delay claim advanced in the earlier notices."*

Core Requirements of Adjudication Procedure

- Core requirements under the Construction Act:
    - Appointment of Adjudicator within 7 days
    - Referral within 7 days
    - Require decision to be reached within 28 days of referral
    - Allow the Adjudicator to extend by 14 days with consent of referring party
    - Adjudicator must act impartially
    - Adjudicator can take initiative
    - Allow a period for dealing with ‘slips’
- Act compliant procedures contained in standard forms?
- If contract defective - fall back on the Scheme for Construction Contracts

(Standard) Timetable

	Day
Issue Adjudication Notice	0
Apply to nominating body	0 / 1
Issue Referral Notice	7
Issue Response	14
[Issue Reply]	21
[Issue Rejoinder]	24
[Issue Surrejoinder]	26
Decision	35-49
Enforcement	

Notice of Adjudication

- The notice of adjudication:
    - Informs the other party that a dispute is being referred to adjudication.
    - Defines the scope of the dispute the adjudicator has jurisdiction to decide.
    - Starts the adjudication process
- Must be issued and served on the Responding Party before apply to Nominating Body.
- Failure to do so means that the Adjudicator has no jurisdiction to decide the dispute.

Notice of Adjudication

- *IDE Contracting Ltd v RG Carter Cambridge Ltd* [2004] EWHC 36 (TCC)
    - Steps were taken in relation to the appointment of an adjudicator before the notice of adjudication had been served.
    - Judge Harvey concluded that, as a result, the provisions of the Scheme relating to the appointment of the adjudicator had not been complied with and that such non-compliance deprived the adjudicator of jurisdiction.

Notice of Adjudication

- *Vision Homes Ltd v Lancsville Construction Ltd* [2009] EWHC 2042

    - First notice of adjudication, followed by the request to the nominating body, but the notice was then amended.
    - The parties were in agreement that it was the second amended notice that was the effective notice and so the request to the nominating body preceded the effective notice.
    - The Judge found that the adjudicator had no jurisdiction on the basis that paragraph 2(1) of the Scheme referred to a request in writing to the nominating body that accompanied, rather than preceded, the relevant notice of adjudication.

- Must raise this specifically at the earliest opportunity however, benefit in waiting for receipt of the Referral.

Notice of Adjudication

- **The notice of adjudication must be drafted carefully. Coulson says**

"It is impossible to over-emphasise the importance of the notice of adjudication. It is the cornerstone of both the adjudicator's jurisdiction and the scope and limit of the referring party's claim in the adjudication... the notice must identify carefully the dispute and the nature of the redress sought. Numerous problems in adjudication and adjudication enforcement have arisen out of the referring party's failure to provide an adequate notice of adjudication, and his subsequent attempts to make good that omission in the referral notice (Part 1, paragraph 7) and other documents served in the adjudication. The courts have made it plain that this is not a legitimate approach."

Notice of Adjudication

- What can you request?
  - A declaration;
  - A value of work;
  - Value and payment to you?

- No requirement to adjudicate all of dispute in one adjudication.
- Request payment of money in Notice of Adjudication- entitled to defend that seeking payment of sums- Pilon v Breyer

Notice of Adjudication

- Think about wording of redress. Do not make it too narrow:-
  - “or such other sum as the Adjudicator shall decide”
  - “or for such other period or at such other rate as the Adjudicator shall decide”
  - “or such other extension of time as the Adjudicator shall decide”

- Can have multiple adjudications running under the same contract at the same time BUT cannot have the same adjudicator appointed unless the parties consent- breach of Para 8 (1) of Part I of the Scheme – *see Deluxe Art & Theme Ltd v Beck Interiors [2016] EWHC 238.*

Notice of Adjudication

- Must only refer one dispute- see *David and Teresa Bothma t/a DAB Builders v Mayhaven Healthcare Limited* [2007] EWCA Civ 527:
  - Notice of Adjudication identified 4 disputes- date for completion, scope and validity of architect's instructions, the non-withdrawal of the notice of non-completion, and the sum of valuation no. 9.
  - Court of Appeal found that the extension/completion issue was entirely unconnected to the financial claim.
  - Therefore two disputes so the adjudicator did not have jurisdiction to decide it.
  - Case turned on the completion issue having no monetary consequence to valuation no. 9.

- Court takes a wide approach to 'one dispute' but the above was clearly two distinct disputes.

Nominating Body

- Check your contract!
- Named Adjudicator?
- Nominating Body?
  - RICS
  - RIBA
  - TECSA
- No adjudicator shopping!

Eurocom v Siemens

- **Application to RICS for an adjudicator in answer to the question about whether there were any adjudicators who were conflicted it said:**

"We would advise that the following should not be appointed:

Mr Leslie Dight and Mr. Nigel Dight of Dight and partners; Mr. Siamak Soudagar of Soudagar associates; Rob Tate regarding his fees - giving rise to apparent bias; Peter Barns for dispute of a minimum fees charge and apparent bias; Additionally Keith Rawson, Mark Pontin, J R Smalley, Jamie Williams, Colin Little, Christopher Ennis and Richard Silver, Mathew Molloy who has acted previously or anyone connected with Fenwick Elliott solicitors who have advised the Referring Party."

Eurocom v Siemens

The Court found:

"the evidence gives rise to a very strong prima facie case that Mr Giles deliberately or recklessly answered the question as to whether there were conflicts of interest so as to exclude adjudicators who he did not want to be appointed. Indeed he says in paragraph 9 of his first witness statement that that was the reason he mentioned those people in that box. It is very difficult to understand how Mr Giles, as a non-practicing barrister, could otherwise complete that box in that way.

I consider that the authorities make it clear that the principle applies in any case where a party is seeking an advantage by making the fraudulent representation. Where a party applies to an adjudicator nominating body and makes a fraudulent representation then the fraud cancels the advantage which would otherwise have been obtained from the transaction by voiding the transaction altogether. In my judgment, applying the principles set out in Rous v Mitchell, where there has been a material fraudulent misrepresentation in the process of applying to the adjudication nominating body, the application for a nomination of an adjudicator is invalid and it is as if no application had been made. The state of mind of the RICS on receiving the application is irrelevant and it does not matter whether RICS was deceived or not."

Referral

- The document that contains the Referring Party's case with all documents in support. Must be comprehensive and supported with evidence, including witness evidence where required.
- Burden of proving the claim rests with the Referring Party.
- Unless in exceptional circumstances, must have drafted this before the Notice of Adjudication is issued (or at least 90% complete).
- Only have 7 days from Notice of Adjudication otherwise not properly referred. A mandatory requirement under paragraph 7 (1) of the Scheme for Construction Contracts.

Referral

- **Hart Investments Ltd v Fidler [2006] EWHC 2857**

  "My initial reaction to this point was to consider that, in the overall scheme of things, it might be difficult to say that the delay of one day in the provision of the referral notice should be accorded great significance, and that it would be harsh to rule that the whole adjudication was a nullity because of that one day's delay. But, on a more detailed analysis, I do not consider this reaction to be so easy to justify. Indeed, all kinds of difficult questions arise if the failure to comply with the time period is ignored: What if the delay was not one day, but one month? What if important events occurred during the period of any delay in the provision of a referral notice which put the responding party in a much worse positon as against the referring party than it would have been if there had been so delay? If the words "not later than seven days" are to be qualified in some way, then how is such a qualification to be formulated, let alone assessed?

  …even then, the Act requires the appointment and the referral notice to be "secured" within seven days. Moreover, the Scheme is, I think entirely clear on this point. The referral notice must be provided by a date which is not later than seven days after the notification of the notice of intention to refer. If it is not, it cannot be a referral notice in accordance with the Scheme."

Response

- Normally have between 7 to 14 days for a Response.
- Quick turnaround
- All hands to the pump in that period.
- Need to provide all evidence rely upon in defence including expert evidence and witness evidence

Reply

- No automatic right to provide a Reply
- Likely to be restricted to new points raised in Response.
- Often does not stop the Referring Party having another go to fill in the gaps!

Post Reply

- No automatic right to submissions after Reply stage.
- See *Barry M Cosmetics Ltd v. Merit Holdings Ltd* [2019] EWHC 136 (TCC) where at paragraph 27 the court commented:

  "The need to afford each party an opportunity to meet the case made against him is not an unlimited right. Taken literally it might be understood to afford a right to endless rounds of pleadings. Such a literal interpretation is clearly misplaced as is clear from Amec. Properly understood, the rule simply ensures that the adjudicator has both sides of the argument."
- It is a 28-day process- avoid round and rounds of submissions regurgitating the same points
- Adjudication meeting- Only 1 in 5 have a meeting. Likely to be less than that now post Covid. Often seen as a way for Adjudicator to not read the papers or rack up fees.

Decision

Decision given in 28/42 days or longer

Will usually include reasons – some better than others!

Any decision given outside of above periods not enforceable or effective

Slip rule – 5 days to correct slips

Adjudication costs

- Not legal costs of representation
- Adjudicator discretion
- Costs follow the event?
- Both parties jointly and severally liable for the Adjudicator's fees
- Referring Party pay first for reimbursement by Responding Party

Adjudication – pros and cons

Pros	Cons
No limit to value of dispute	No limit to value of dispute
The Adjudicator	The Adjudicator
Time limits	Time limits
No limit on paperwork	No limit on paperwork
Straightforward enforcement	
Fully adopted by industry	

Enforcement of Decision

- Standard procedure
  - Issue Claim Form, witness statement
  - Applications for:
    - Abridgement of Time
    - Summary Judgment
  - Standard Order
- Hearing c6 – 8 weeks after issuing claim form
- Issue Claim Form in TCC
- Obtain a Court Judgment to enforce the usual way:
  - Third party debt order
  - Charging order
  - Winding up order
  - Bailiffs

Grounds to resist enforcement of Decision?

- Very limited
- Not about getting the decision wrong legally but about procedure
- Grounds are:
  - Breach of Natural Justice
  - Frolic of his own
  - Error in law
  - Fraud

Questions

Thank you

Our Locations

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