What is a dispute ? [1]

Questions by Annie McCartney
Responses by Corbett H Spurin

Question 1 : What do you understand by the meaning of *"dispute"* and does this include a claim - if so what do you understand by the reference to the word *"claim"* when applied to construction contracts? Does it include claims made under and sanctioned by the contract or is it something more formal such as that recorded on a Statement of Claim/Claim Form?

I am of the opinion that a civil dispute arises when *"one party asserts a legal entitlement (founded in tort or contract etc) to something, be it a right to damages/compensation, goods, services or the commencement of a process such as valuation or certification and the other party either denies that assertion or fails to respond within the requested time scale (if any), the contractually specified time or within a reasonable period of time for a considered response to be delivered, thereby demonstrating that preliminary discussions are at an end and a dispute has consequently crystallised."* What is being asked for must be clear and specific or determinable by application of a formula.

Frequently the assertion is in the form of a demand for payment of a sum of money. The demand may be expressed as a claim for money but does not have to be headed "Statement of Claim/Claim Form" etc (*unless the contract specifies a particular form*) provided the request for payment is clear and unambiguous. An inquiry is not a claim. In order to amount to a demand there is no requirement that it be a claim in court.

All disputes have two elements, namely entitlement and quantum though it should be noted that there may be no dispute about a particular element, as in either *"provided there is entitlement, we accept £5,000 is due"* or *"we accept that there is entitlement but only admit to £1,000"*. It is also possible to ask for a ruling on entitlement, leaving it to the parties to settle quantum on an amicable basis, a practice common in the US.

Not all claims are valid. The mere fact that a claim ultimately proves to have been invalid does not prevent a dispute arising, rather the dispute becomes one of entitlement, i.e. whether or not the claim is valid becomes the crux of what falls to be determined. Frequently the entitlement dispute will centre on whether or not a certificate or evaluation was accurate or alternatively whether the claimant was entitled to receive a certificate or evaluation. Depending on the outcome of that element of the dispute, the second element, namely quantum will or will not then fall to be determined, though if the question is whether a certificate or evaluation is due under the contract, then the contract procedure may require the certificator or evaluator to do that job so that the adjudicator has no more to do at that stage. It is now clear that an adjudicator has jurisdiction to open up and re-determine certifications and evaluations, but the adjudicator must be asked to do so by the claimant.

The factors that determine whether or not a claim is valid are many and varied :

- Was there a contract? If not there may be no claim or at best an accounting for undeserved benefit
- Entitlement may be subject to the fulfilment of contract procedures such as
- the occurrence of some event – often by an outsider, time or date requirement, time bar,
- a variation order,
- certification and passage of specified time post certification,
- application for payment etc in the manner specified by the contract including passage of time post application,
- failure to issue a withholding notice, passage of time if any post failure to issue, reckoned from due date of payment etc and
- proof that the sum claimed has been earned in accordance with contract specifications. This may not in fact be a distinct and separate issue from the above since the absence of a certificate may well indicate that no service or benefit has been rendered, or alternatively has become due under the contract.

The scope of the dispute thus referred is another matter. Much may depend on whether the dispute concerns an interim payment, a final payment or occurs at an even later stage. Whilst an arbitrator may seek to ensure that all disputes arising out of a contract are dealt with by the arbitrator and are within his jurisdiction, the jurisdiction of the construction adjudicator is limited by the terms of reference set out in the referral notice, to all matters relevant to that notice and no further in the absence

[1] *This exercise formed part of the empirical research conducted by A.McCartney into the meaning of a dispute for the purposes of construction dispute settlement.*

of consent by both parties to broaden it out to include counter-claims on distinct and separate issues, though it is possible that a set off for outstanding prior sums owed by the claimant to the respondent may form part of the final accounting process in order to establish the sum due from one to another.

Question 2 : The wide definition of dispute espoused by Halki has been interpreted to mean *"there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable."* **How workable is such a wide definition in reality when applied to the construction contract?**

There can be no dispute until the respondent has had sufficient opportunity to respond and either responds rejecting the claim, fails to pay on the due date for payment (if any), fails to issue a withholding notice where applicable under the contract mechanism, or fails to respond in a timely manner. The above interpretation makes no allowance for these factors.

Question 3 : The middle / touchy feely definition of dispute is best described in the case of Beck Peppiatt where the judge held, *" for there to be a dispute for the purposes of exercising the statutory right of adjudication it must be clear that a point has emerged from the process of discussion or negotiation which has ended and that there is something which needs to be decided."* **How useful a definition is this in reality?**

The value of this lies in that it goes to the root of whether or not there is sufficient time, within the construction adjudication process for the parties and the adjudicator to give due consideration to matters. It helps to eliminate the danger, inherent within the process, of ambush. However, in a simple dispute, by the time the respondent has submitted all his documentation, both parties may well have had sufficient time and similarly the adjudicator, and to stop the adjudication process on a technicality may serve very little purpose and merely force the parties to resubmit and go through the entire process. A judge requested to enforce a decision in such a situation may well be advised to consider whether or not justice is served by striking down an otherwise sound decision.

It is too simplistic to state that negotiations must always have come to an end, since the respondent may have tried to employ delaying tactics and half-heartedly engage in negotiations to buy time or wear the other party down by attrition. A negotiation in good faith or mediation clause cannot prevent a party referring a dispute to construction adjudication though a mediation clause as opposed to a good faith clause can give rise to a stay of arbitration or litigation. The fact that negotiations are underway demonstrates the existence of a dispute. A party can cut to the chase, bypass / truncate negotiations and call for an umpire. But preliminaries about a claim and reasonable time for consideration/evaluation of a claim must have passed.

Question 4 : The narrow approach to the meaning of dispute is often considered to be found in Nuttall v Carter where His Honour Judge Seymour stated *"In my judgment a dispute is something different from a claim…While a dispute can be about a claim there is more to a dispute than simply a claim which has not been accepted….For there to be a dispute there must have been an opportunity for the protagonists each to consider the position of the other and to formulate arguments of a reasoned kind…"* **This definition somewhat removed from Halki could be considered too narrow for the Legislator's intentions in the 1996 Act - do you agree?**

This goes to the root of what is sufficient time to respond. It is a gloss – adding detail – useful where vast bundles of documentation are landed on an unsuspecting party or where no response can be delivered until an expert has had the opportunity to inspect works and do some valuation/accounting. On the other-hand, if the contract procedure lays down rules for response, such as issue of a withholding notice then it will not apply. Thus, the only "***opportunity***" will be that specified in the contract, not ***"such reasonable opportunity"*** as judged by a court.

Question 5 : For the construction contract and following the principle that contract is all about the manifestation of voluntary agreement Durtnell v Kaduna has a ring of sense to the meaning of dispute; the judge is quoted as saying *" …it is not easy to see how a dispute as to the entitlement to an extension of time could arise until …. The Architect had made his determination or the time permitted for so doing had expired….Until the Architect has made his assessment or failed to do so within the time permitted by the Standard Form, there is just nothing to argue about , no dispute"* **As practising lawyers do you consider that this judgment has much to offer?**

This spells out the fact that entitlement is subject to the terms and procedures of the contract, something very relevant for instance to construction contracts but not applicable to a wide range of trade/maritime disputes.

Question 6 : **In line with *Durtnell v Kaduna* I was very arrogantly minded to produce a fairly basic pro-forma advice that should be issued by one party to another to establish that a dispute has arisen*):**
"For the purposes of a construction arbitration and adjudication a statutory dispute or difference shall arise between us or crystallise as an adjudicable dispute once the contract machinery for the administration of construction claims as sanctioned by the contract itself has been fully complied with and no satisfactory outcome has been reached. If there is a failure to comply with the contractual machinery the responding party must be advised of this and be afforded [ ] days to remedy the situation and respond to the complaint before him. If no formal contract has been concluded a referring party must give the responding party a fair and reasonable opportunity to comment upon the potential dispute referred to him. The letter accompanying any potential complaint should be headed with simple words "Formal Complaint for immediate response within [ ] days to avoid a reference to adjudication or arbitration." **Your comments on this would be welcomed.**

As a proposed term to insert as part of a dispute resolution clause in a contract, this appears to be somewhat cumbersome, potentially repetitive since some of the detail may already be spelt out within the contract and introduces a restrictive formula. The more technicalities in a contract the worse it is particularly since sub-contractors in particular are often prone to failure to comply with technicalities and fall victim to the prescriptions. Main contractors tend to know the rules inside out and often exploit them.

On the other-hand, there is value in spelling out time requirements for responses and the consequence of failure to do so. However, it may be wise to temper such advice in a demand for payment, request for certification etc by "reserving the right to" rather than threatening, since this can force a matter away from cooperation and into formal dispute resolution mechanisms.

It is always useful to use a bold capitalised header e.g. **CLAIM – APPLICATION FOR PAYMENT** etc

A clarification of contract terms may be considered worthwhile e.g. *Pursuant to clause 30 XYZ contract, the sum claimed will become due 7 days from submission of this claim in the absence of a reasoned withholding notice. If payment is not then received on the due date, ABC Co reserves the right to submit the matter to adjudication* etc.

Rather than a pro-forma for all occasions, I would recommend a range of languages appropriate to differing circumstances, but following a standardised form, that could be usefully incorporated into claims, applications etc.

Question 7 : The 7 propositions set out by Mr Justice Jackson in *Amec Civil Engineering v Secretary of State for Transport* and commented upon in *Collins Contractors v Baltic Quay* does serve to provide some useful guidance on the meaning of dispute. How if at all could this guidance be improved?

For ease of reference, selected extracts from Collins are set out below: -

Collins (Contractors Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA Civ 1757

53. The remaining question which arises is whether there is a dispute which the parties have agreed to refer to arbitration. The clause is in wide terms. There is no doubt that if there is a dispute between the parties it is within the scope of the clause. In this regard we were referred to a considerable number of decisions on the existence or otherwise of a dispute in the course of oral argument yesterday. A number of different, and not entirely consistent, strands of thought can be discerned in them. There are, I think, a number of such strands.

*54. In particular they include these: (1) A dispute requires both a claim and a rejection **Monmouthshire C.C v Costelloe & Kemple** [1977] 5 BLR 83.*

*55. (2) Such rejection is not necessary. As it was put by Templeman LJ in **Ellerine Brothers (Pty) Ltd v Klinger** at page 1381: "... it seems to me that ... if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say 'I don't agree'. If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation."*

That approach received support from the reasoning of the majority in ***The Halki.***

56. (3) In ***Fastrack Contractors Ltd v Morrison Construction Ltd & Anr*** *[2000] 1 BLR 168, HHJ Thornton QC sought to reconcile the above cases by deriving this principle at paragraph 27:*

"A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

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57. (4) In two cases, namely ***Ken Griffin v John Tomlinson T/a K & D Contractors v Midas Homes Ltd*** *(unreported) 21st July 2000, and* ***Sindall Ltd v Solland & Ors*** *(unreported) 15th June 2001, HHJ Humphrey Lloyd QC introduced the notion that adjudication was intended to resolve what has not been settled by the normal process of discussion and agreement. In that regard he said in the* ***Ken Griffin*** *case that a dispute was not likely to be inferred. That approach was, at least to some extent, reflected in the decision of HHJ Seymour QC in* ***Edmund Nuttall Ltd v RG Carter Ltd*** *[2002] 1 BLR 312 and by Forbes J in* ***Beck Peppiatt v Norwest Holst*** *[2003] 1 BLR 316.*

58. (5) There are cases in which a dispute has been held not to exist where one party has simply sought further information and not made a claim, or where the party has not given enough information to enable the other party to decide whether or not to admit the claim. Examples are ***Cruden Construction Ltd v Commission for the New Towns*** *[1995] 2 Lloyd's Rep 387 per HHJ Gilliland QC and* ***Carillion Construction Ltd v Devonport Royal Dockyard*** *[2003] 1 BLR 79 per HHJ Peter Bowsher QC.*

59. *(6) In two cases, namely* ***Cowlin Construction Ltd v CFW Architects (A firm)*** *[2003] 1 BLR 241 and* ***Orange EBS Ltd v ABB Ltd*** *[2003] 1 BLR 323, HHJ Frances Kirkham, in careful judgments in which, as I read them, she referred to many if not at all the cases, recognised that they are not all entirely consistent and preferred the test in* ***The Halki*** *following the approach of Templeman LJ in* ***Ellerine v Klinger.***

60. (7) After the conclusion of the argument, as promised by Miss Houghton, we were sent a copy of the decision of HHJ Moseley QC in ***Lovell Projects Ltd v Legg and Carver*** *[2003] 1 BLR 452 which essentially followed* ***The Halki*** *in much the same way as HHJ Kirkham had done.*

61. *More importantly, we learned of a judgment of Jackson J delivered on 11th October 2004 in* ***AMEC Civil Engineering Ltd v The Secretary of State for Transport.*** *In the course of that judgment he considered many of the cases to which we have been referred, namely* ***Monmouthshire County Council v Costelloe, Tradax International v Cerrahogullari, Ellerine v Klinger, Cruden Construction Ltd v Commission for the New Towns, Halki, Fastrack Contractors Ltd v Morrison Construction Ltd, Sindall Ltd v Solland*** *and* ***Beck Peppiatt Ltd v Norwest Holst Construction Ltd.***

AMEC Civil Engineering Ltd v The Secretary Of State For Transport *[2004] EWHC 2339 per Jackson J*

"From this review of the authorities I derive the following seven propositions:

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.*
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."*

63. For my part I would accept those propositions as broadly correct. I entirely accept that all depends on the circumstances of the particular case. I would, in particular, endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J does not endorse the suggestion in some of the cases, either that a dispute may not arise until negotiation or discussion have been concluded, or that a dispute should not be likely inferred. In my opinion he was right not to do so.

64. *It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute, than with an absence of a dispute. It also appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication. I make these observations in the hope that they may be of some assistance and not because I detect any disagreement between them and the propositions advanced by Jackson J.*

It seems to me that **Amec Civil Engineering Ltd v The Secretary Of State For Transport** and **Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd** do little more than rehearse some of the central issues that have already been canvassed by previous cases in respect of what is a dispute. I agree (***Collins** 63 above*) that the 7 points of **Amec** are broadly correct. The devil as always lies in the detail. However, if am wary of the use of the word discussion (*Collins 64*) in that ***"to discuss"*** is not ***"to dispute"*** though note that it is used merely as indicative viz. ***"likely to be more consistent with."*** A heated discussion may possibly be synonymous with a dispute but a preliminary discussion certainly is not. "***Crystallisation***" has become a useful term of art to indicate the stage when ***"discussions with dispute potential"*** break down and is to be preferred to the bland expression ***"absence of dispute"*** which could convey the impression that there is nothing to dispute.

There is little specific or concrete enough about the meaning of a dispute in either dictum to usefully employ in an action, so that litigants are more likely to resort to the detail of the plethora of dictum from which the reflections were drawn. Still it is all extra padding for the commentators.

The significance of **Collins** lies more in the question of forum than in respect of the existence of a dispute. The crucial distinction between **Collins** and **Rupert Morgan v Jervis** lies in the fact that the latter did not involve an arbitration clause. Even though in both cases there was no obvious defence to the claim, the claim was disputed in **Collins**. In **Rupert Morgan** the contract permitted construction adjudication, in accordance with the HGCRA but the court had default jurisdiction since neither party had commenced adjudication and the employer did not dispute that the Interim Certificate had been issued by the Architect, thereby giving rise to a sum due under the contract. Hence, the court had jurisdiction to deliver a summary judgement on a ***"pay now, argue latter"*** basis.

In **Collins**, a construction dispute should have been referred to arbitration pursuant to an arbitration agreement. The CA heard an appeal in respect of an application for stay of action. Neither party invoked construction adjudication. Collins asserted that there was no dispute. The court disagreed holding that the effect of **Rupert Morgan** was not to convert the claim into one for an undisputed sum of money due which would only be amenable to enforcement through the courts. A dispute existed which could only be settled, under the terms of the contract, by arbitration. Any other conclusion would result in rendering arbitral awards unenforceable, the exact opposite of the objective of the Arbitration Act 1996. The dispute was thus deferred to arbitration, albeit that the only obvious defence was a questionable reliance on a mere technicality, in that a claim had the "wrong" heading and was submitted outside a

specified 14 day period. The court considered that it was not an insuperable task to overcome these defences and felt that this was a matter that could be quickly dealt with by an arbitrator, perhaps by issuing an interim award. Hence, there was no real danger of the claimant being kept out of funds for any undue period of time. The granting of a stay of action would not impede justice.

No doubt there will be further attempts to produce a definitive judicial definition of what is a dispute that might serve for all purposes, but I doubt that that it is possible to do so. Each case will fall on its special facts and since new situations will always arise, so further glosses on the general rules can be anticipated.

Furthermore, we can rely, I am confident, on the good offices of novel contract draftsmen, to provide the opportunity and need for further judicial elucidation. With a revised version of the HGCRA Adjudication process waiting in the wings, the scope for judicial activity extends even further over the horizon.

For the present, it is rather the academics and literary minded legal practitioners who are likely to produce all encompassing guidance lists of greater or lesser value, liberally peppered with references to decided cases. Now is not the time for the gospel according to Saint Corbett, but much of what it might contain is set out against and in response to the various questions and propositions explored above.