

ADR NEWS



Volume 7 Issue No 4 January 2008

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

EDITORIAL :

The answer to the question posed in the previous editorial, namely whether the *Legal Services Act* and the *Tribunals, Courts and Enforcement Act* would make it onto the statute book, has now been answered in the affirmative. Not only that but recruitment to the new tribunal is well advanced, with our own HHJ Hickinbottom, latterly of the TCC in Wales, has been appointed to, in his own words, “assist Carnwath LJ with the implementation of the Tribunals Act – and particularly to set up the new court of record that will take over second tier appeals from the Social Security Commissioners, the Tax Commissioners and VAT Tribunal, the Land Tribunal, the Transport Tribunal, and the High Court (appeals from SENDIST, Welsh SENT, MHRT for England and Wales, Care Standard Tribunal amongst others!).” Congratulations are in order and heartfelt thanks for the support his honour extended to ADR provision in the Wales. In the meantime we all await with bated breath the outcome of all these deliberations and the realisation of the plans to reshape the UK tribunal landscape, together with clarification of the role that ADR will be expected to play in that arena.



Contents

- Editorial
- Mediation Case Corner
- Construction Case Corner
- Procedure Case Corner

Editorial Board.

General Editor : G.R.Thomas
Assistant Editor : C.H.Spurin
N.Turner
R.Faulkner

HIP HIPS horray. Gradually the HIPS project is spreading out to cover more and more properties in England and Wales. It is only a matter of time before a dispute involving a certificate arises. What will the role of ADR be, if any, in dealing with such disputes ? Is there an opportunity for incorporating ADR provisions into contracts for the compilation of HIPS? Further questions arise as to the potential nature of such disputes, particularly since word on the block is that purchasers do not rely upon them in any case, assuming that the purchaser actually has sight of the document, since surprisingly whilst the legislation mandates the commissioning of a HIPS, unfortunately the draftsmen omitted to ensure that the purchaser had a right to receive it. Ho hum.

Seasonal greetings to all our readers.

G.R.Thomas : Editor

MEDIATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin



Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002: Bailli

Failure to mediate : Failure by both parties to mediate deprecated. £1000 K plus legal expenses to recover £6K. Purpose of issuing draft judgments is to allow parties to proof read & broker costs arrangements : The practice of asking the judge to revise a decision is to be discouraged except in the most exceptional of circumstances. CA on appeal from Bristol County Court (HHJ Rutherford DL).

CA before Ward LJ; Arden LJ; Smith LJ. 18th October 2007

Holloway v Chancery Mead Ltd [2007] EWHC 2495 (TCC) : Bailli

ADR – a prerequisite to arbitration ? A building contract provided a range of options for dispute resolution ranging from an ADR settlement process through to arbitration. The home owner submitted the dispute to arbitration – the builder sought to stay the arbitration pending the outcome of an ADR settlement process. Held : The ADR was an option – not a prerequisite and in the circumstances there was an immediate right to pursue arbitration.

Mr Justice Ramsey. TCC. 30th July 2007

UPS Supply Chain Solutions v. Glasgow Airport Ltd [2007] ScotCS CSOH_202 : Bailli

Frustrated mediation – costs : Trial preparation and mediation well progressed when the claimant introduced a new claim for lost profits : once both parties had eventually fulfilled accountancy procedures in order to evaluate the claim – the claim was dropped as being unrealistic. Held : Costs from the date of the amended claim recoverable by the other party.
Lord Glennie. Outer House Court of Session. 19th December 2007.

**Amber Construction Services Ltd v London Interspace HG Ltd [2007] EWHC 3042 (TCC)** : Bailli

Whether only fixed costs should be payable if the defendant to an issued claim admits or pays the sum claimed within a few days of the issue on or before the Acknowledgement of Service. Court allowed substantial costs since the defendant had forced the claimant to prepare to deal with allegations of absence of jurisdiction of the adjudicator.

Mr Justice Akenhead. TCC. 18th December 2007

City Inn Ltd v Shepherd Construction Ltd [2007] ScotCS CSOH_190 : Bailli

Extension of time : *Percy Bilton v GLC* [1982] 1 WLR 794; *Peak Construction Ltd v McKinney Foundations Ltd*, [1970] BLR 111; *Balfour Beatty Building Ltd v Chestermount Properties Ltd*, 1993, 62 BLR 1; *Henry Boot v Malmaison* 1999, 70 Con LR 32; *Royal Brompton Hospital v Hammond (No 7)*, (2001) 76 Con LR 148, *Wells v Army & Navy Co-op*, 1903, 86 LT 764. *S.M.K. Cabinets v Hili Modern Electrics Pty Ltd*, [1984] VR 391, *Chas. I. Cunningham Co.*, IBCA 60, 57-2 BCA P1541 (1957), *John Doyle v Laing* 2004 SC 73. *Leyland Shipping v Norwich Union Fire Insurance* [1918] AC 350. *Neodox Ltd v Borough of Swinton and Pendlebury*, (1958) 5 BLR 38, *Armia Ltd v Daejan Developments Ltd*, 1979 SC(HL) 56, *E & J Glasgow Ltd v UGC Estates Ltd*, [2005] CSOH 63, *Toepfer v Warinco AG*, [1978] LI Rep 569, *Charles Rickards Ltd v Oppenheim*, [1950] 1 KB 616, *Evans v Argus Healthcare (Glenesk) Ltd*, 2001 SCLR 117, at paragraph [11]; *Oak Mall Greenock Ltd v McDonald's Restaurants Ltd*, 9 May 2003. *Gatty v Maclaine*, 1921 SC (HL) 1; *Grant & Sons Ltd v Glen Catrine Ltd*, 2001 SC 901; *Grundt v Great Boulder Pty Gold Mines Ltd*, (39) 59 CLR 641 referred to.

Lord Drummond Young. Outer House, Court of Session. 30th November 2007

Harris Calnan Construction Co. Ltd v Ridgewood (Kensington) Ltd [2007] EWHC 2738 (TCC) : Bailli

Written contract – letter of intent – validity of service : costs : Adjudicator found a written contract based on letter of intent. Service out of jurisdiction – in Jersey valid. Costs are recoverable even in an undefended action. *Project Consultancy v Gray Trust* [1999] BLR 377, *Nordot v Siemens*; *Whiteways v Impresa Castelli* [2000]; *Bennett Electrical v Inviron* [2007], *Mott McDonald v London & Regional Properties* [2007], *Trustor AB v Barclays Bank* [2000] T.L.T. 22nd Nov. considered.
HHJ Peter Coulson. TCC. 15th November 2007

Hadden Construction Ltd v. Midway Services Limited [2007] ScotSC 58 : Bailli

Insolvency – adjudicate or wind up petition : Applicants for adjudication deterred from continuing on being informed that the defendant was insolvent. Commenced winding up petition – which failed when accounts revealed the company was solvent. Court nonetheless ordered costs to the petitioner. Appellant / defendant unsuccessfully appealed the costs order.
Sheriff Principal Edward F Bowen QC. Edinburg. 17th October 2007

Leading Rule v Phoenix Interiors Ltd [2007] EWHC 2293 (TCC) : Bailli

Suspension – non payment of VAT on decision : Whether or not notice of suspension of works valid for non-payment of VAT on an adjudicator's decision. Application for preliminary issues. Case on-going.

Mr Justice Akenhead. TCC. 3rd October 2007

Ledwood Mechanical Engineering Ltd v Whessoe Oil and Gas Ltd [2007] EWHC 2743 (TCC) : Bailli

Pain & Gain – impact on payment of adjudication decision : (1) Is the risk/reward régime to be applied to all applications or only those after completion? The risk/reward régime, referred to as "pain and gain", limits Ledwood's entitlement to payment of costs by reference to target hours. (2) Should the Adjudicator's decision be given effect by applying his decision to Application 19 or Application 22? (3) If the risk/reward régime applies to applications for payment prior to completion, can the Joint Venture set off a sum in respect of an adjustment for risk/reward? *Balfour Beatty Construction v Serco* [2004] EWHC 3336 considered.
Mr Justice Ramsey. TCC. 20th November 2007

PC Harrington Contractors Ltd v Multiplex Constructions (UK) Ltd [2007] EWHC 2833 (TCC) : Bailli

Certificate : Valuation of works & EOT. A progress certificate for works done did not establish that a sum was due for the purposes of adjudication – since there is scope for deductions from that sum. The *Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis* [2003] EWCA Civ 1563 considered.

Mr Justice Christopher Clarke. TCC. 30th November 2007

Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd No1 [2007] EWHC 2421 (TCC) : Bailli

Meaning of dispute – Crystallisation : Following practical completion Ringway submitted interim application No11 which included claims arising out of an asserted EOT and variations. V prevaricated over an extended period of time and a number of attempts were made to engage in negotiations. Eventually R commenced adjudication asserting that under the contract terms payment under an application became due in the absence of withholding notices. The adjudicator awarded the application sum. Here, V resisted payment on the grounds that no dispute had crystallised or alternatively that the adjudicator's task was to determine the final account.

The court agreed with the adjudicator that the dispute was about non-payment of an interim account and enforced the decision. Regarding the meaning of a dispute and crystallisation, *Macob v Morrison* [1999] BLR 93, *Bouygues v Dahl-Jensen* [2000] BLR 522). *Carillion v Devonport* [2005] BLR 310; *Thomas Frederic's v Keith Wilson* [2004] BLR 30 : *Amec v S.S for Transport* [2004] EWHC 2339 (TCC), *Collins v Baltic Quay* [2005] BLR 63. *F&G Sykes v Fine Fare* [1967] Lloyd's Rep 53; *Monmouthshire County Council v Costelloe & Kemple Ltd* (1965) 5 BLR 83: *Fastrack v Morrison* [2000] BLR 168: *AWG v Rockingham* [2004] EWHC 88 (TCC) considered. Mr Justice Akenhead. TCC. 23rd October 2007

Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd No 2 [2007] EWHC 2507 (TCC) : Bailli

Interest post enforcement : Interest, post enforcement runs from the date of the court judgement, not from the date when monies were due under the contract – which matter was one for the adjudicator, not the court.

Mr Justice Akenhead. TCC. 30th October 2007

Treasure & Son Ltd v Dawes [2007] EWHC 2420 (TCC) : Bailli

Written contract – variations – signature on decision : inability to repay : Enforcement application : whether variation of a contract impacted upon its status and jurisdiction of adjudicator – here a non HGCRA adjudication – held adjudicator had jurisdiction : whether a failure to sign a decision renders it unenforceable – held – signature not a requirement. No stay allowed on grounds of insolvency in the circumstances of the case. *RJT v DM Engineering* [2002] BLR 217. *Dean and Dyball v Kenneth Grubb* [2003] EWHC 2465 (TCC). *KNS v Sindal* [2000] EWHC 75 (TCC) *Grovedeck v Capital Demolition* [2000] EWHC 139 (TCC) *Pepper v Hart* [1993] AC 593 *Barnes & Elliott Ltd v Taylor Woodrow* [2004] BLR 111, *Bloor v Bowmer & Kirkland (London) Ltd* [2000] BLR 314 : *Wimbledon Construction v Derek Vago* [2005] BLR 374 considered. Mr Justice Akenhead. TCC. 25th October 2007

Williams (Mrs Sandra) t/a Sanclair Construction v Abdul Noor t/a India Kitchen [2007] All ER (D) 51 (Dec)

Legal personality : Technical defence to enforcement of adjudication decision (related to EOTs etc) mounted on the basis that the adjudication was pursued by Mr not Mrs Williams (t/a Sanclair) : Mr Williams carried out the work converting a takeaway into a restaurant. Defence rejected. *Macob v Morrison* [1999] BLR 93, *Pegram v Tally Weijl* [2003] EWCA 1750, [2004] 1 All ER 818 : *Carillion v Devonport* [2005] EWCA Civ 1358; *Three Rivers D.C v Bank of England (No 3)* [2001] 2 All ER 513; *Unisys International Services Ltd v Eastern Counties Newspapers Ltd* [1991] 1 Lloyd's Rep 538. *Prenn v Simmonds* [1971] 1 WLR 1381. *West Bromwich Building Society v Wilkinson* [2005] UKHL 44. *Total M & E v ABB* [2002] EWHC 248 (TCC). *Rok Build v Harris Wharf Dev. Co Ltd* [2006] EWHC 3573 (TCC), *Andrew Wallace v Artisan* [2006] EWHC 15 (TCC), *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712. *Aveat v Jerram Falkus* [2007] EWHC 131 (TCC) considered. HHJ Hickingbottom. TCC. Cardiff Registry. 29th November 2007

ADJUDICATION DOWN UNDER NEW SOUTH WALES

Bucklands Convalescent Hospital v Taylor Projects Group [2007] NSWSC 1514

Payment schedule : delivery : Question whether delivery or not of a payment schedule is for court or adjudicator to determine – Delivery challenged on basis that Superintendent under contract who delivered it had no authority to do so – Whether Superintendent can be so authorised – Question whether it was a matter for adjudicator

Hammerschlag J : Equity Division. Supreme Court of New South Wales. 13th December 2007.

Majeed v Mahmud & 4 Ors [2007] NSWSC 1413 .

Payment schedule : Security of Payment – where no payment schedule – disallowance of amounts apparently not in respect of construction work or related services

Brereton J. Equity Division. Supreme Court of New South Wales. 13th December 2007.

Berem Interiors Pty Limited v Shaya Constructions (NSW) Pty Limited [2007] NSWSC 1340.

Construction contract absent – invalidity : Whether determination issued by adjudicator void - Whether jurisdictional error due to absence of construction contract between plaintiff and first defendant. Decision: Determination void.

Bergin J. Equity Division. Supreme Court of New South Wales. 21st November 2007.

Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 1298.

Costs of declaration of invalidity of adjudication : Declaration that adjudication determination under BCISPA 1999 (NSW) void – Moneys paid into Court pending proceedings – Whether declaration should be made conditional upon part of the moneys in Court being paid out to unsuccessful defendant : Decision: Declaration that the adjudication determination dated 28 May 2007 of the second defendant void; first defendant to pay plaintiff's costs; amount in Court together with any interest accrued thereon to be paid to the plaintiff.

Hammerschlag J. Equity Division. Supreme Court of New South Wales. 13th November 2007.

ACN 001 891 103 Pty Ltd v Reiby Street Apartments Pty Ltd [2007] NSWSC 1345.

Set aside application : Statutory demand – Portion of debt owed a judgment debt – Appeal from judgment pending – Application to set aside under s 459J(1)(b) for “some other reason” – Where Court of Appeal granted stay of execution of judgment on terms that plaintiff provide security within 21 days and plaintiff did not comply with terms – Held no sufficient “other reason” within meaning of s 459J(1)(b) – Application dismissed.

White J. Equity Division. Supreme Court of New South Wales. 13th November 2007.

Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 941.

Natural justice – failure to consider all submissions : Building and construction adjudication pursuant to s 22 BCISPA 1999 – Whether adjudicator breached basic and essential requirements of the Act to consider all submissions duly made – Whether adjudicator failed to make a bona fide attempt to exercise his powers under the Act – Whether plaintiff denied measure of natural justice required under the Act – Nature, gravity and effect of adjudicator’s error relevant : Decision: Adjudicator’s determination set aside

Hammerschlag J. Equity Division. Supreme Court of New South Wales. 1st November 2007.

Firedam Civil Engineering v KJP Construction [2007] NSWSC 1162.

Payment schedule – service : Progress payments - BCISPA - service of payment schedule - service under Corporations Act - relevance of evidence of non-receipt by director of claimant - adjudicator disregards adjudication response on ground that payment schedule was not provided because not received by claimant’s director - errors of law - denial of natural justice - whether relief should be by declarations and injunctions or orders in nature of certiorari

Austin J. Equity Division. Supreme Court of New South Wales. 25th October 2007.

Reed Constructions Australia Ltd v DM Fabrications Pty Ltd [2007] NSWSC 1190.

Priority of enforcement judgement : Voluntary administration - deed of company arrangement - where deed refers to obviously incorrect date - whether correct date may be substituted as a matter of construction - statutory force and effect of deed indicate rectification by order under s.447A - CORPORATIONS - deed of company arrangement - substantive application for order terminating or avoiding deed - application for interlocutory injunction restraining enforcement of judgment against subject company - where company had judgment created by BCISPA - where judgment debtor asserted greater claim provable under deed of company arrangement - operation of s.553C

Barrett J. Equity Division. Supreme Court of New South Wales. 23rd October 2007.

QUEENSLAND**Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors [2007] QSC 333**

Payment schedule – validity : Where the first respondent sent the applicant an invoice for building work completed – where the applicant sent an email to the first respondent refusing to accept the invoice and suggesting the parties meet to discuss the claim and amount payable – where in response the first respondent applied under s21 BCISPA 2004 for an adjudication of the dispute – where the second respondent was appointed as adjudicator – where the applicant argued that the appointment was precluded on the grounds that the applicant had issued a payment schedule to the first respondent as defined under the Act – whether the applicant’s email constituted a payment schedule under s18 of the Act – whether the second respondent should have granted the applicant an opportunity to make submissions regarding the nature of the email.

Where the court’s jurisdiction to hear the appeal was founded under Part 3 of the Judicial Review Act 1991 (Qld) – where under ss13 and 48 the court could dismiss an application for review if the applicant was afforded an opportunity for review by another court, tribunal, authority or person, or if the interests of justice made it appropriate to do so – whether the mechanisms available to the applicant under s100 BCISPA 2004 enlivened the power granted under ss13 and 48.

Chesterman J. Supreme Court of Queensland. 14th November 2007.

Greg Beer T/A G & L Beer Covercreting v JM Kelly (Project Builders) Pty Ltd [2007] QDC 242 DCJ

Licence – construction : BCISPA 2004 : Construction of “licence of the appropriate class” in s 42 of the Queensland Building Services Authority Act 1991 – whether read subject to restrictive conditions

Martin SC. District Court of Queensland. 22nd October 2007.

VICTORIA**Danidale Pty Ltd (t/as Bernie Cornfoot Sons Earthmoving) v Abigroup Contractors Pty Ltd [2007] VSC 552**

Costs : Whether plaintiff entitled to any costs of claim when it recovered judgment for less than it had been offered by defendant before proceeding commenced – Extent of power to “otherwise order” under r.26.08(3) – Whether defendant entitled to indemnity costs from date of any of three offers of compromise which exceeded amount recovered by plaintiff – Whether the rejections of the three offers of compromise were reasonable – Whether plaintiff entitled to costs on a higher basis in respect of that part of the counterclaim which the defendant withdrew prior to the hearing – Whether Court could determine argument that that part of the counterclaim could never have succeeded without a hearing on the merits – Whether defendant entitled to costs of the remainder of its counterclaim when it eventually only sought and recovered nominal damages – Whether there should be an order setting off the order for costs payable to the defendant against the judgment sum in favour of the plaintiff – Whether there should be a stay of execution on the judgment pending taxation of the costs orders.

Habersberger J. Supreme Court of Victoria. Melbourne. 21st December 2007.

Dellam P/L v. Poposki [2007] VCC 1679

Progress payment cheques bounced : Bills of exchange - Claim in respect of four dishonoured cheques – Cheques provided as progress payments pursuant to a domestic building project – Whether action should be stayed so that claim proceeds in the Victorian Civil & Administrative Tribunal – Section 57(2) Domestic Building Contracts Act 1995.

Anderson J. County Court of Victoria at Melbourne. 21st December 2007.

Sopov v Kane Constructions Pty Ltd [2007] VSCA 257

Repudiation of contract : Repudiation – Building contract – Whether principal's conduct evinced intention not to perform contract – Principal's insistence upon untenable contractual position and commission of unjustifiable breaches – Message conveyed to contractor – Contract repudiated by principal – Whether contractor's conduct disentitled it to accept repudiation.

Maxwell P, Kellam JA Whelan AJA. Court of Appeal Supreme Court of Victoria : Melbourne. 22nd November 2007

Danidale Pty Ltd v Abigroup Contractors Pty Ltd [2007] VSC 391

Lump sum contract – valuation of works : Lump sum contract entered into after parties negotiated on rates basis – Whether cost of excavation of rock included in the lump sum – Assessment of value of work if no agreement on rate – Two conflicting results of survey of volume of soil stripped – Whether parties bound by results of principal's surveyor – Other factual issues.

Habersberger J. Supreme Court of Victoria. Melbourne. 12th October 2007.

WESTERN AUSTRALIA**O'Donnell Griffin P/L v Davis [2007] WASC 215 .**

Stay of adjudication : Practice and procedure - Application for interlocutory injunction to prevent adjudication under the Construction Contracts Act 2004 (WA) - No cause of action disclosed - Failure to comply with O 59 r 9 - Damages an adequate remedy - Balance of convenience favours defendant - Indemnity costs.

Templeman J. Supreme Court Western Australia. 7th September 2007.

NEW ZEALAND**Bunting & Gardner v Auckland City Council [2007] HC AK CIV 2007-404-2317**

Strike out application : limitation : Watertight Claim struck out – 10 years since registration – action time barred.

J.P. Doogue Associate Judge. High Court New Zealand Auckland Registry. 21st December 2007.

Laywood & Rees v Holmes Construction Wellington Ltd [2007] HC AK CIV 2006-404-4152

Decision as judgment of court : Failed appeal against entry of an adjudication decision as a judgement of the court. Whether sum claimed exceeded jurisdiction of court : whether a hearing should have taken place : whether error in finding judgment had not been paid.

Asher J. High Court New Zealand Auckland Registry. 13th December 2007.

Auckland Waterproofing v TPS Consulting [2007] HC AK CIV-2007-404-005890

Costs appeal : Appeal against an order that the defendant (now the respondent in this Court) pay the plaintiff (now the appellant in this Court) costs in respect of District Court proceedings in the sum of \$1,862, including disbursements and GST. The appellant contends that it is entitled to a higher award of costs than that amount. It seeks an award of \$6,608 plus disbursements of \$465; these amounts being the actual costs it has incurred in pursuing the summary judgment.

Duffy J. High Court New Zealand Auckland Registry. 11th December 2007.

R T Phillips v Petrou [2007] HC AK CIV 2007-404-001771

Transfer of proceedings : Application to transfer proceedings to the Weatheright Homes Tribunal.

Abbott Associate Judge. High Court New Zealand Auckland Registry. 5th October 2007.

PRACTICE & PROCEDURE CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

**Albon (t/a NA Carriage Co) v Naza Motor Trading SDN BHD [2007] EWCA Civ 1124: Bailli**

Oppressive and vexatious : Court has jurisdiction to determine whether documents that would terminate arbitral proceedings were fraudulent.

CA before Waller LJ; Longmore LJ; Sir Peter Gibson : 6th November 2007

Bandwidth Shipping Corporation v Intaari [2007] EWCA Civ 998 : Bailli

S68 AA 1996 : remitting award to tribunal : Charterparty payment of hire dispute. Failed appeal against refusal of 1st instance judge to remit an award under s68 AA 1996.

CA before Waller LJ, Gage LJ; Lawrence Collins LJ. 17th October 2007

Banco Nacional De Comercio Exterior v Empresa De Telecomunicaciones [2007] EWHC 2322 (Comm) : Bailli

Freezing order : Failed application for variations to a freezing order.

Mr Justice Tomlinson : 11th October 2007

C v D [2007] EWCA Civ 1282: Bailli

Anti-suit injunction ; Injunction against attempt through subsequent litigation to circumvent the protections provided by Bermuda Form in relation to dispute settlement of insurance issues.

CA before MR; Longmore LJ; Jacob LJ : 5th December 2007

Cereal Investments Company (CIC) SA v Ed&f Man Sugar Ltd [2007] EWHC 2843 (Comm) : Bailli

S069 AA 1996 challenge ; FOB contract : what terms are required in a letter of credit to comply with the sales contract?

Mr Justice Walker : 7th December 2007

Czech Republic v European Media Ventures SA [2007] EWHC 2851 (Comm) : Bailli

S67 AA 1996 challenge ; Failed challenge to the jurisdictional award of the tribunal.

Mr Justice Simon : 5th December 2007

ED & F Man Sugar Ltd v Lendoudis [2007] EWHC 2268 (Comm) : Bailli

S26 AA 1950 : Limitation Acts : Successful appeal against order enforcing foreign award. Action more than 6 years after the award issued.

Mr Justice Christopher Clarke : 10th October 2007

El-Farargy v El Farargy [2007] EWCA Civ 1149: Bailli

Bias – apparent ; A judge made disparaging remarks in that attempts at injecting humour into the proceedings went beyond the pale of acceptability. Judgment set aside.

CA before Ward LJ; Mummery LJ; Wilson LJ. 15th November 2007

El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm) : Bailli

S9 AA 1996 ; Application for a declaration that an agreement for sale of shares in Egyptian Distribution Group SAE was entered into as a result of duress and has been avoided. In his Points of Claim he additionally claims damages of at least US\$104,000,000. The agreement contained an arbitration clause, pursuant to which Sainsbury make this application. Stay granted.

Mr Justice Tomlinson : 13th November 2007

Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWCA Civ 988: Bailli

S103 AA 1996 Challenge to enforcement of award : security : Court has jurisdiction to deal with security of costs in respect of enforcement or defence of a New York award.

CA before Buxton LJ; Rix LJ; Moses LJ. : 17th October 2007

Heifer International Inc v Helge Christiansen [2007] EWHC 3015 (TCC) : Bailli

S9 AA 1996 : Application for stay to the Danish Building & Construction Arbitration Board of a dispute about a UK building project. Impact of the UCTA & Brussels Convention. Stay granted.

HHJ Toulmin : 18th December 2007

Kazakhstan v Istil Group Inc No2 [2007] EWHC 2729 (Comm) : Bailli

Injunction against arbitration ; Previous arbitration set aside for lack of jurisdiction. Further attempts to arbitration enjoined as oppressive actions.

Mr Justice Tomlinson : 21st November 2007

Kohn v Wagschal [2007] EWCA Civ 1022 : Bailli

S66 AA 1996 : enforcement & challenge : Unsuccessful appeal against enforcement of a Beth Din award on grounds of illegality – i.e. attempts to avoid paying tax. Held : Award enforced but papers to be passed to the Revenue.

CA before Waller LJ; Laws LJ; Gage LJ. : 24th October 2007

Korea National Insurance Corporation v Allianz Global Corporate & Speciality AG [2007] EWCA Civ 1066: Bailli
Strike out : Unsuccessful appeal against strike out of elements of defence and counterclaim

CA before Buxton LJ; Jacob LJ; Moore-Bick LJ. : 30th October 2007

Pacific Maritime (Asia) Ltd. v Holystone Overseas Ltd. [2007] EWHC 2319 (Comm) : Bailli

S44(3) AA 1996 : freezing order : Failed attempt to remit questions as to a freezing order to the tribunal.

Mr Justice Christopher Clarke : 11th October 2007

Premium Nafta Products Ltd (20th Defendant) v Fili Shipping Co Ltd [2007] UKHL 40: Bailli

S7 AA 1996 : Separability : bribery : Whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause.

House of Lords before Lords Hoffmann; Hope; Scott; Walker : 17th October 2007

Sabah Shipyard (Pakistan) Ltd v Pakistan [2007] EWHC 2602 (Comm) : Bailli

Fraud : enforcement of award : Application for summary judgment pursuant to a guarantee contract related to plant construction. Whether there was a reasonable prospect of defending the action on grounds that guarantee procured by fraud. Held : reasonable prospect.

Mr Justice Christopher Clarke : 9th November 2007

Sanhe Hope Full Grain Oil Foods Prod. Co Ltd v Toepfer Internat. Asia Pte Ltd [2007] EWHC 2784 (Comm) : Bailli
S69 AA 1996 challenge ; Construction of clause 27 of the standard FOSFA Form 22. Purchase of futures in SOYA repudiated. Whether a loss suffered.

Mr Justice David Steel : 28th November 2007

Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 1148 : Bailli

S67 AA 1996 challenge ; President of tribunal not correctly appointed & safety procedures to protect the interests of claimant's overridden (CS *solely responsible for appointments*) – it was not possible at the time for this to be discovered by the applicant. Award unenforceable. CA before Sir Anthony Clarke ; Waller LJ; Sedley LJ. 15th November 2007

FORMATION OF CONTRACT REVISITED

Felton Construction Ltd v Liverpool City Council [2007] EWHC 3049 (TCC)

Here the court had to determine whether there was a construction contract in place, and thus whether payment was governed by that contract including arbitration as the appropriate mechanism for determining what monies were due under the contract, or alternatively whether there was no contract, opening the way for a quantum meruit claim. The court provides a text book analysis of the formation of a contract under English Law, in the following terms : -

12. In essence there are three basic essentials to the creation of a contract: agreement, contractual intention and consideration. The normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other. Even where an apparent agreement has been reached it may fail to give rise to a binding contract because the agreement is incomplete or insufficiently certain.
13. As set out in Chapter 2 on Chitty on Contracts : *"In deciding whether the parties have reached agreement, the courts normally apply the objective test. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract."*
14. In relation to the claim that there was an incomplete agreement it is right to note that parties may reach agreement on matters of principle but leave important points unsettled so that their agreement is incomplete. On the other hand an agreement may be complete and enforceable although it is not worked out in meticulous detail. Even failure to agree the price is not necessarily fatal.
15. The principles to be applied to construction of documents were set out by Lord Hoffmann in *ISC Ltd v West Bromwich BS* [1998] 1 WLR 896 and are as follows:
 - i) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would be available to the parties in the situation in which they were at the time of the contract.*
 - ii) *The background may include anything which would have affected the way in which the language of the document would have been understood by a reasonable man or woman.*
 - iii) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*
 - iv) *The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.*
 - v) *Words should be given their "natural and ordinary meaning". However this does not require Judges to attribute to the parties an intention that they plainly could not have had.*

To these propositions must be added the following when considering whether the parties have concluded an enforceable contract.

- vi) The fact that a clause in a contract may be difficult to interpret does not mean that it is meaningless. The court must do its best to select among contending interpretations the one that best matches the language of the parties as expressed in the language they adopted – see Steyn LJ in *"The Star Texas"* [1993] 2 Lloyds Rep 445 at page 452.
- vii) The Judge is entitled to look behind the apparent or literal meaning of the words of a letter in order to determine the true intent of the parties, see Latham LJ in *Harvey Shop Fitters v Adi* [2003] EWCA Civ 1757.
- viii) Where there are contemporary exchanges and the carrying out of what was agreed in those exchanges, the course of dealing may create on one side a right to performance and on the other a right to be paid on an agreed basis – see Steyn LJ in *Trentham Ltd v Archital Luxfer* [1993] 1 Lloyds Rep 25 at 29.
- ix) In principle it is for the parties to decide whether they wish to be bound and if so by what terms – see Lloyd LJ in *Pagnan v Feed Products* [1987] 2 Lloyds Rep 601 at 619.
- x) Although the more important the term is the less likely it is to have been left by the parties for future decision, there is no legal obstacle to the parties agreeing to be bound now while deferring important matters to be agreed later – see *Pagnan* at page 619 (see above).
- xi) In *Trollope v NW Met Hospital Board* [1973] 1 WLR 601 at 609 Lord Pearson emphasised that "the court's function is to interpret and apply the contract that the parties made for themselves ... an unexpressed term can be implied only if the court finds that the parties must have intended the term to form part of the contract."
- xii) In each case the courts must consider whether or not the terms of a contract have been agreed. In *British Steel Corporation v Cleveland Bridge* [1983] 24 BLR 94 Robert Goff J held that there was no binding executory contract since the claimants were asked to and did proceed with the work pending the preparation and issuing of a form of sub-contract being a sub-contract which was plainly in a state of negotiations not least on the issues of price, delivery dates and the applicable terms and conditions. It was impossible to say what the material terms of the contract would be.
- xiii) In commercial contracts the court, whilst applying established legal principles, will strive to uphold a commercial bargain:
 - a) In *Sykes v Fine Fare* [1967] 1 Lloyds Rep 53 Lord Denning MR said that in a commercial agreement the further the parties have gone on with their contract, the more ready are the courts to imply any reasonable term so as to give effect to their intentions. "When much has been done the courts will do their best not to destroy the bargain."
 - b) In *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 at 460 the court said that it will even provide a substitute machinery to fill a gap in the contract when it is appropriate to do so.
 - c) In *Mamidoil v Okta* [2001] Lloyds Rep 76 at 89 Rix LJ said at paragraph 66 of his judgment: *"In a commercial contract which when dealing with the future and sometimes the long-term future, of necessity leaves out certain matters to be worked out over time - an arbitration clause assists the court to find certainty by means of the implication of what is*

reasonable. Which is not to say that the Court will not itself provide the dispute resolution machinery even in the absence of an arbitration clause."

- d) At paragraph 69: "However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms where that is possible that enable the contract to be carried out ... For these purposes an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language the courts are prepared to imply an obligation in terms of what is reasonable."

16. I emphasise that none of these principles derogate from the overriding requirement that, judged objectively, there was an offer from the offeror and acceptance by the offeree in order to form a contract. The court must consider whether there was any agreement and, if necessary, define the extent of the agreement.

The court concluded from an evaluation of documents and correspondence before the court that there was indeed a contract, which incorporated an arbitration clause. HHJ Toulmin : 21st December 2007

The Law School



University of Glamorgan

LLM/Postgraduate Diploma/Postgraduate Certificate in "Dispute Resolution"

About the Course : The primary objective of the course is to provide a stimulating and challenging intellectual environment for the development of knowledge and understanding of the philosophy of disputation and the guiding principles of conflict avoidance, management and resolution in the context of the law, practice and procedure of dispute resolution beyond the confines of national courts.

The course aims to prepare students for alternative dispute resolution (ADR) practice, combining academic rigour with practical hands on training in case management, quasi-judicial decision making and the third party facilitated settlement process. The course provides a through grounding in the practices and procedures involved in arbitration, conciliation and mediation and the procedural law governing ADR processes, reinforced by the study of specialist areas of law.

Course content (Credits in Brackets – to total 180)

Core Modules:

- Arbitration Law (20)
- Dispute Resolution (20)
- ADR Practice and Ethics (20)
- Private International Law (20)
- Research Methods (10)
- Obligations (20) (ICE 1)*
- Dissertation (60)

Optional Modules:

- Public International Law (20)
- Litigation Strategies (10)
- Carriage of Goods (10)
- Commercial Law and Practice (10)
- Construction Contract Procedure (10) (ICE 2/3)*
- Construction Law (10) (ICE 2/3)*
- Trade Law (10)

* ICE 1,2 and 3 can be studied alone or as part of the LLM

How will you study : The scheme will be taught via a combination of lectures and small group activities with the emphasis on the latter. Students will be expected to have prepared thoroughly and to participate fully in all teaching and learning activities. Much of the assessment during the scheme is continuous, practical and skills based. 60 credits are required for the certificate, 120 for the diploma, and 180 for LLM.

What will I get for completing the course : An LLM in Dispute Resolution. Note in addition that :-
The LLM is fully validated by the Chartered Institute of Arbitrators, enabling successful graduates to apply for membership status of the CI Arb, to fast track to interview for fellowship and to then undertake the CI Arb programs to become respectively a listed mediator, a listed adjudicator and / or a chartered arbitrator.

Whilst the course covers the Institution of Civil Engineers (ICE) syllabus and the University of Glamorgan is an examination centre for ICE, the external ICE examinations must be successfully completed in addition to the LLM in order to satisfy the requirements of the ICE.

The course may be studied full time over one year, or part time over two years.

For further information or to receive an application form telephone ++44 (0)1443 483006.

THIS NEWS LETTER IS AVAILABLE AS A FREE DOWNLOAD AT
<http://www.nadr.co.uk>
PLEASE FEEL FREE TO PASS THE URL ON TO INTERESTED FRIENDS AND COLLEAGUES

NADR UK Ltd Company Number 4734831
 Published by NADR UK Ltd. and NMA UK Ltd. Registered Office, Stockland Cottage, 11 James St, Treforest, Pontypridd, CF37 1BU
 Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk