ADR NEWS

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

EDITORIAL :

Despite the fact that the public sector construction industry in the US has beneficially embraced the Construction Dispute Review Board process, DRB's have with a few notable exceptions, such as the ***Channel Tunnel*** project, had little impact in the UK. This may well be about to change in light of the Government's decision to make DRBs an integral part of all contracts related to the 2012 Olympics to be held in London.

The UK ADR industry has been served 4 years notice by the Government that the Commercial Court is likely to provide stiff competition for commercial dispute resolution business in the future. Whilst the establishment of the new Supreme Court, to replace the House of Lords is the Government's first priority, nonetheless, progress is underway for the relocation of the Commercial Court to custom built premises with state of the art technological facilities. The objective is to ensure that each court room is fully equipped with the latest in audio-visual aids, enabling electronic sourcing of data, electronic case presentation and international video streamed conferencing. This would enable parties and witnesses to engage in civil trials without expensive relocation costs and should do much to expedite the scheduling of trials, reducing the costs and delay currently inherent in litigation. The infrastructural costs inherent in providing equivalent private ADR services to clients will favour the major providers who are able to match the investment.

Given that s.5.4 of the recently issued ***Pre-Action Protocol for Construction and Engineering Disputes*** goes far further than the general pre-action protocol and now provides that "*In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt*" the government has taken yet one more step to encourage even those already engaged in litigation to step back and re-evaluate the contribution that ADR might make to the timely settlement of the dispute in lieu of continuing with the action. This represents a real opportunity for the ADR industry, since unlike small claims where court advised mediation may be of questionable benefit to the parties, mediation has much to offer in the resolution of large and complex disputes, both in terms of cost and time issues.

The rapid rise in house prices in the US has been accompanied by an explosion in litigation against surveyors and housing agents by clients claiming wrongful inducement to enter into questionable real estate investments. Demand for ADR services in this field is growing. House prices in the UK have similarly risen remorselessly over the past decade. As house price rises slow down and even fall in some areas particularly where new buyers are priced out of the market, some investors are faced with the prospect of negative equity. Mortgage foreclosures are on the rise since, as investors find themselves over stretched, particularly where redundancy is involved and where equivalent wages are not available to finance outstanding mortgages.

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Whilst rising property values may have taken the sting out of questionable investments in the recent past, this might not be the case in future and the ***Yianni v Evans*** type of claim may prove an attractive option for a home owner saddled with an over priced piece of real estate. The proposal to remove the catchment area test for school entry is likely to have a negative impact upon the value of property near desirable school and conversely encourage a levelling off of property values elsewhere. Again, this could lead to negative equity for property in what were previously regarded as prime locations. The current US litigation fever against surveyors and estate agents could well cross the Atlantic in the not too distant future. Since the central issue would be one of complex localised factors and determinations of fact, this is the type of speculative issue that lends itself to mediation.

The Law Gazette Reports that Jeremy Tagg of HMCS envisages nine new court mediation centres along the lines of the Manchester Court Mediation Service. What role, one wonders, will there be for the Mediation Help Line in these areas?

G.R.Thomas : Editor

HOME BUILDER AND HOUSE RENOVATION DISPUTE RESOLUTION

Home building and renovation is treated simply as one sector of the construction industry in the United Kingdom. It has not been marked out for any special treatment by the legislature. The construction industry is subject to a complex web of regulations ranging from planning, design, environment, health and safety to local authority inspection and certification. The home building and renovation sector has come under much criticism. The problems associated with so called Cowboy Builders are legion. All this is despite the fact that the property market is a key sector in the economy and home building and particularly the home renovation industry plays a central role in the ever rising value of domestic property. Domestic home owner / contractor disputes feature strongly in all District Court listings.

From the perspective of alternative dispute resolution the home building and renovation sector is virtually a pariah within the ADR industry, since contracts made with residential occupiers are excluded from the scope of adjudication under the Housing Grants, Construction and Regeneration Act 1996, though as illustrated by the JCT Home Owner Contract, the parties may contract in to adjudication. How different then from the UK experience is that of Australia, where a plethora of legislation provides for a highly regulated home building industry, with compulsory inbuilt dispute resolution procedures. Whilst New South Wales seized the initiative and hence it is the New South Wales legislation analysed below, it should be noted that most of the other jurisdictions of Australia have since copied New South Wales' example. Is there anything that we in the UK can learn from their experience? After all, they were not slow to pick up on our adjudication revolution. Perhaps the UK could beneficially repay the compliment?

The primary home building legislation is the Home Building Act 1989 as amended by the Home Building Legislation Amendment Act 2001 and the Home Building Amendment Act 2004, complemented now by the Home Building Regulation 2004 The principal section headings to the Home Building Act 1989 give a flavour of the regulatory regime aimed at ensuring a responsible, accountable home building industry :

PART 2 - REGULATION OF RESIDENTIAL BUILDING WORK AND SPECIALIST WORK
- *Division 1 - Contracting for work*
- *Division 2 - Restrictions on who may do certain work*

PART 2A - REGULATION OF SUPPLY OF KIT HOMES

PART 2B - REPRESENTATIONS CONCERNING CONTRACTOR LICENCES OR CERTIFICATES

PART 2C - STATUTORY WARRANTIES

PART 2D - REGULATION OF BUILDING CONSULTANTS
- *Division 1 - Contracting for work*
- *Division 2 - Restrictions on who may do certain work*
- *Division 3 - Representations concerning building consultancy licences*

PART 3 - LICENCES, BUILDING CONSULTANCY LICENCES AND CERTIFICATES
- *Division 1 - Contractor licences*
- *Division 2 - Supervision and tradesperson certificates*
- *Division 3 - Owner-builder permits*
- *Division 3A - Building consultancy licences*
- *Division 4- Provisions relating to contractor licences, certificates, building consultancy licences and owner-builder permits*

PART 3A - RESOLVING BUILDING DISPUTES AND BUILDING CLAIMS
- *Division 1 - Definitions*
- *Division 2 - Dealing with a building dispute*
- *Division 3 - Making an application for determination of a building claim*
- *Division 4 - Jurisdiction in relation to building claims*
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PART 4 - DISCIPLINARY PROCEEDINGS
- *Division 1 - Interpretation*
- *Division 2 - Disciplinary action*

PART 4A - REVIEWS BY ADMINISTRATIVE DECISIONS TRIBUNAL

PART 5 - JURISDICTION OF TRIBUNAL REGARDING APPEALS AND UNJUST CONTRACTS
- *Division 3 - Unjust contracts*

PART 6 - HOME WARRANTY INSURANCE
- *Division 2 - Insurance*

PART 6A - INSOLVENT INSURERS
- *Division 1 - Preliminary*
- *Division 2 - Insurance claims indemnified by State*
- *Division 3 - Miscellaneous*

PART 7 - FAIR TRADING ADMINISTRATION CORPORATION AND ADDITIONAL POWERS OF DIRECTOR-GENERAL

PART 8 - GENERAL
- *Division 1 - Inspections and reports*

It can be seen that the Act provides a comprehensive licensing program for home building, coupled with warranties and compulsory insurance. Dispute Resolution plays a key role in this regulatory regime. The provisions of Part 3A warrant closer inspection and are set out in full below.

PART 3A - RESOLVING BUILDING DISPUTES AND BUILDING CLAIMS

Division 1 - Definitions

48A Definitions

(1) In this Part:

"building claim" *means a claim for:*

(a) the payment of a specified sum of money, or

(b) the supply of specified services, or

(c) relief from payment of a specified sum of money, or

(d) the delivery, return or replacement of specified goods or goods of a specified description, or

(e) a combination of two or more of the remedies referred to in paragraphs (a)–(d),

that arises from a supply of building goods or services whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of building goods or services, but does not include a claim that the regulations declare not to be a building claim.

"building dispute" *means a dispute that has been notified as referred to in section 48C.*

"building goods or services" *means goods or services supplied for or in connection with the carrying out of residential building work, specialist work or building consultancy work, being goods or services:*

(a) supplied by the person who contracts to do, or otherwise does, that work, or

(b) supplied in any circumstances prescribed by the regulations to the person who contracts to do that work.

(2) Without limiting the definition of "building claim", a building claim includes the following:

(a) an appeal against a decision of an insurer under a contract of insurance required to be entered into under this Act,

(b) a claim for compensation for loss arising from a breach of a statutory warranty implied under Part 2C.

(3) A word or expression:

(a) that is used in a definition in subsection (1), and

(b) that is defined in the Consumer Claims Act 1998 ,

has the same meaning as in that Act.

(4) For the purposes of subsection (3), a reference in section 3 of the Consumer Claims Act 1998 to a consumer is to be read as a reference to any person.

Division 2 - Dealing with a building dispute

48B Definitions *In this Division:*

"complainant" *means a person who has notified the Director-General of a building dispute under section 48C.*

"contractor" *means the holder of a contractor licence to whom a building dispute relates.*

"inspector" *means a person appointed to carry out an investigation into a building dispute, as referred to in section 48D.*

"rectification order" *means an order referred to in section 48E (1) or (2).*

48C Notification of building dispute

Any person may notify the Director-General, in such manner as the Director-General may approve, that the person has a dispute with the holder of a contractor licence with respect to residential building work or specialist work done by the contractor or the supply of a kit home by the contractor.

48D Investigation of dispute

(1) The Director-General may appoint a member of staff of the Department of Fair Trading to investigate any matter that has given rise to a building dispute.

(2) After completing an investigation, an inspector must cause a written report to be prepared on the results of the investigation and cause copies of the report to be given to the complainant and the contractor.

48E Inspector may make rectification order

(1) If, after completing an investigation under section 48D, an inspector is satisfied:

(a) that any residential building work or specialist work contracted to be done by the contractor is incomplete, or

(b) that any residential building work or specialist work done by the contractor is defective, or

(c) that the contractor, in the course of doing any residential building work or specialist work, has caused damage to any structure or work, or

(d) that, as a consequence of any defective residential building work or specialist work done by the contractor, a structure or work has been damaged,

the inspector may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure that the work is completed or the defect or damage rectified, as the case requires.

(2) If, after completing an investigation under section 48D, an inspector is satisfied:

(a) that any kit home supplied by the contractor is incomplete, or

(b) that any kit home supplied by the contractor is defective, or

(c) that the contractor has failed to supply a kit home,

the inspector may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure that the kit home is supplied or completed or the defect rectified, as the case requires.

(3) A rectification order:

(a) may specify conditions (including conditions with respect to the payment of money) to be complied with by the complainant before the requirements of the order must be complied with, and

(b) must specify a date by which the requirements of the order must be complied with, subject to the complainant's compliance with any condition referred to in paragraph (a), and

(c) must indicate that the order will cease to have effect if the matter giving rise to the order becomes the subject of a building claim before the date specified in accordance with paragraph (b).

48F Effect of rectification order

(1) Except as provided by section 51, a rectification order does not give rise to any rights or obligations.

(2) Subject to section 48I, a rectification order ceases to have effect for the purposes of section 51 if the matter giving rise to the order becomes the subject of a building claim before the date specified in accordance with section 48E (3) (b).

Division 3 - Making an application for determination of a building claim

48I Application for determination of building claim

(1) Any person may apply to the Tribunal for the determination of a building claim.

(2) A building claim may be withdrawn by the claimant at any time.

(3) If, immediately before a building claim was made, the claimant was subject to the requirements of a rectification order under Division 2, the building claim may not be withdrawn except with the leave of the Tribunal.

(4) When granting leave to the withdrawal of a building claim referred to in subsection (3), the Tribunal may restore the rectification order referred to in that subsection.

48J Certain applications to be rejected

The Registrar of the Tribunal must reject any application to the Tribunal for the determination of a building claim unless:

(a) the Registrar is satisfied that the subject-matter of the building claim has been investigated under Division 2, or

(b) the Chairperson of the Tribunal directs that the building claim be accepted without such an investigation having been made.

Division 4 - Jurisdiction in relation to building claims

48K Jurisdiction of Tribunal in relation to building claims

(1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed $500,000 (or any other higher or lower figure prescribed by the regulations).

(2) The Tribunal has jurisdiction to hear and determine any building claim whether or not the matter to which the claim relates arose before or after the commencement of this Division, except as provided by this section.

(3) The Tribunal does not have jurisdiction in respect of a building claim relating to building goods or services that have been supplied to or for the claimant if the date on which the claim was lodged is more than 3 years after the date on which the supply was made (or, if made in instalments, the date on which the supply was last made).

(4) The Tribunal does not have jurisdiction in respect of a building claim relating to building goods or services that are required under a contract to be supplied to or for the claimant on or by a specified date or within a specified period but which have not been so supplied if the date on which the claim was lodged is more than 3 years after the date on or by which the supply was required under the contract to be made or, if required to be made in instalments, the last date on which the supply was required to be made.

(5) The fact that a building claim arises out of a contract that also involves the sale of land does not prevent the Tribunal from hearing that building claim.

(6) The Tribunal does not have jurisdiction in respect of a building claim arising out of a contract of insurance required to be entered into under this Act if the date on which the claim was lodged is more than 10 years after the date on which the residential building work the subject of the claim was completed.

(7) The Tribunal does not have jurisdiction in respect of a building claim arising from a breach of a statutory warranty implied under Part 2C if the date on which the claim was lodged is more than 7 years after:

(a) the date on which the residential building work the subject of the claim was completed, or

(b) if the work is not completed:

(i) the date for completion of the work specified or determined in accordance with the contract, or

(ii) if there is no such date, the date of the contract.

(8) The Tribunal does not have jurisdiction in respect of a building claim relating to:

(a) a contract for the supply of goods or services to which none of subsections (3), (4), (6) and (7) applies, or

(b) a collateral contract,

if the date on which the claim was lodged is more than 3 years after the date on which the contract was entered into.

(9) This section has effect despite section 22 of the Consumer, Trader and Tenancy Tribunal Act 2001 .

48L Tribunal to be chiefly responsible for resolving building claims

(1) This section applies if a person starts any proceedings in or before any court in respect of a building claim and the building claim is one that could be heard by the Tribunal under this Division.

(2) If a defendant in proceedings to which this section applies makes an application for the proceedings to be transferred, the proceedings must be transferred to the Tribunal in accordance with the regulations and are to continue before the Tribunal as if they had been instituted there.

(3) This section does not apply to matters arising under sections 15, 16 or 25 of the Building and Construction Industry Security of Payment Act 1999 .

(4) This section has effect despite section 23 of the Consumer, Trader and Tenancy Tribunal Act 2001 .

48M Jurisdiction in relation to actions against refusal of insurance claims

Despite section 48K, a building claim that relates to the refusal of an insurance claim that exceeds $500,000 (or any other higher or lower figure prescribed by the regulations) is to be heard by a court of competent jurisdiction.

Division 5 - Powers of Tribunal

48N Tribunal may have regard to certain building reports

(1) In determining a building claim, the Tribunal may have regard to, but is not bound by, any report prepared by an inspector by whom any matter giving rise to a building dispute has been investigated under Division 2 (before an application was made for determination of the building claim).

(2) The inspector may be called to give evidence in proceedings before the Tribunal only by the Tribunal (and not by either party to the building claim).

(2A) The Tribunal may appoint an independent expert, from a panel of experts approved by the Chairperson of the Tribunal, to advise the Tribunal as to any matter that the Tribunal refers to the expert for advice.

(2B) In any proceedings for which an independent expert has been appointed under subsection (2A), no party may call any other expert to give evidence in the proceedings, or tender any report prepared by any other expert, except by leave of the Tribunal.

(2C) Subject to any order of the Tribunal, the costs of an independent expert appointed under subsection (2A) are to be borne by the parties in equal proportions.

(2D) Anything done or omitted to be done by an independent expert under this Division does not, if the thing was done or omitted to be done in good faith for the purposes of this Division, subject the expert personally to any action, liability, claim or demand.

(3) Nothing in this section prevents a party from cross-examining an inspector or expert called under this section.

48O Powers of Tribunal

(1) In determining a building claim, the Tribunal is empowered to make one or more of the following orders as it considers appropriate:

(a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,

(b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,

(c) an order that a party to the proceedings:

(i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or

(ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.

(2) The Tribunal may make an order of a kind referred to in subsection (1) (a) or (b) even if the applicant asked for an order of a kind referred to in subsection (1) (c).

(3) The provisions of sections 9–13 of the Consumer Claims Act 1998 apply, with any necessary modifications, to and in respect of the determination of a building claim.

48P Power to adjourn proceedings where insurable event arises

(1) This section applies to proceedings in relation to a building claim that does not arise under a contract of insurance entered into under this Act.

(2) If, during the course of any proceedings before the Tribunal in relation to a building claim, it appears to the Tribunal that a party to the dispute has the right to make a claim under a contract of insurance entered into under this Act, the Tribunal may adjourn the proceedings to allow the claim to be made and determined.

(3) If proceedings are adjourned under this section and the claim in relation to the contract of insurance is settled, the proceedings are taken to have been finalised, unless the Tribunal otherwise orders.

48Q Power to join persons as parties to proceedings

If, at any time before or during proceedings before it in relation to a building claim, the Tribunal is of the opinion that a person should be joined as a party to the proceedings, the Tribunal may, by notice in writing given to the person or by oral direction given during proceedings, join the person as a party to the proceedings.

48R Order must include warning regarding non-compliance

An order made under this Part (other than an interim order or a direction) must include a warning, in the form prescribed by the regulations, that if the person against whom the order is made fails to comply with the order the failure to comply will be recorded with the other information kept about the person in the register kept under section 120.

48S Tribunal must inform Director-General of any order made

The Tribunal must inform the Director-General of any order made under this Part, and of the time limit for compliance with the order, as soon as practicable after making the order.

48T Director-General to be informed of compliance with order

(1) A person against whom an order has been made by the Tribunal under this Part may inform the Director-General when that order has been complied with.

(2) A person against whom an order has been made must not inform the Director-General that an order has been complied with if the person knows or ought reasonably to know that it has not been complied with. Maximum penalty: 200 penalty units.

(3) If the Director-General is satisfied that an order has been complied with, the Director-General must ensure that the register kept under section 120 does not record non-compliance with the order.

(4) Nothing in this section prevents the Director-General from recording non-compliance with an order if he or she had previously removed a reference to an order from the register.

48U Failure to inform of compliance

If the Director-General has not been informed that an order has been complied with by the end of the time limit for compliance with the order, the order is taken to have not been complied with and may be recorded as such on the register kept under section 120.

The **Homebuilding Act** is supplemented by the **Home Building Regulation 2004** which in outline provides further detailed provisions in respect of the following matters with specific reference to Part 6:-

PART 2 - PRESCRIPTIONS FOR THE PURPOSES OF DEFINITIONS IN THE ACT

PART 3 - REGULATION OF RESIDENTIAL BUILDING WORK, SPECIALIST WORK, BUILDING CONSULTANCY WORK AND THE SUPPLY OF KIT HOMES

Division 1 - Contracting for work
Division 2 - Restrictions on who may do certain work
Division 3 - Supply of kit homes

PART 4 - CONTRACTOR LICENCES, BUILDING CONSULTANCY LICENCES, CERTIFICATES AND OWNER-BUILDER PERMITS

Division 1 - Requirements to obtain contractor licences, building consultancy licences and certificates
Division 2 - Conditions of contractor licences, building consultancy licences and certificates
Division 3 - Cancellation
Division 5 - Fees
Division 6 - Miscellaneous

PART 5 - INSURANCE REQUIREMENTS

Division 1 - Preliminary
Division 2 - Insurance contracts generally
Division 3 - Miscellaneous

PART 6 - RESOLUTION OF BUILDING DISPUTES AND BUILDING CLAIMS

8 Transfer of proceedings from other courts

(1) For the purposes of section 48L of the Act:

(a) proceedings are to be transferred by order of the court hearing the proceedings, and

(b) notice of the transfer is to be given to the Registrar of the Tribunal by the registrar of the court hearing the proceedings, and

(c) all documents relating to the proceedings in the custody of the court hearing the building claim are to be transferred by the registrar of the court to the Registrar of the Tribunal.

(2) On receipt of such a notice of transfer and accompanying documents, the Registrar must serve on all of the parties a notice fixing a date and time for the holding of the hearing or a directions hearing in relation to the proceedings.

9 Warning notice for Tribunal orders

For the purposes of section 48R of the Act, the following warning must be included in an order made under Part 3A of the Act:

You must notify the Office of Fair Trading's Home Building Service in writing when you have complied with this order (for example, when you have done the work or paid the money).

If you do not notify the Home Building Service, your public record will show that you have failed to comply with the order and you may be unable to renew your licence when it expires.

You can be fined up to $22,000 if you falsely claim you have complied with this order.

From the above it will be noted that dispute resolution takes two separate tracks, one for the resolution of claims before a Tribunal and the other for an investigation of complaints, which if upheld following inspection, which is an integral part of the service, will lead to orders for rectification. This is a client orientated service, ensuring both cash flow for the builder and not only quality assurance but also rectification for the home owner. The builder is held accountable both to the client and the State.

Allied to the above is the role of the **Consumer, Trader & Tenancy Tribunal Act 2001** which has a section that specialises in home building construction disputes and is the relevant tribunal within the Home Building Act. Note that the residential theme is continued in that the tribunal also has jurisdiction over Residential Tenancies. **The Consumer, Trader and Tenancy Tribunal Act 2001** provides in outline as follows, with specific reference to Part 5 on ADR :-

PART 2 - ESTABLISHMENT OF TRIBUNAL
Division 1 - Establishment and membership

5 Establishment of Consumer, Trader and Tenancy Tribunal

(1) A Consumer, Trader and Tenancy Tribunal of New South Wales is established by this Act.

(2) The Tribunal has and may exercise such functions as are conferred or imposed on it by or under any Act.

The following Acts confer jurisdiction on the Tribunal: ..... (only selected acts set out below)

Consumer Claims Act 1998 .....
Fair Trading Act 1987 .....
Home Building Act 1989 .....
Residential Tenancies Act 1987 ..... etc

Division 2 - Organisation and functions
Division 3 - Assessors
Division 4 - Registrar and staff

PART 3 - JURISDICTION OF TRIBUNAL
(This refers parties back to the jurisdiction in each of the Acts it services)

PART 4 - PROCEDURE OF TRIBUNAL

PART 5 - ALTERNATIVE DISPUTE RESOLUTION
Division 1 - Conciliation and preliminary measures

54 Tribunal to promote conciliation

(1) Before making an order to determine any matter that is the subject of proceedings, it is the duty of the Tribunal to use its best endeavours to bring the parties in the proceedings to a settlement that is acceptable to all the parties.

(2) If such a settlement is reached, the Tribunal must make orders that give effect to the settlement to the extent permitted by this Act.

(3) Any statement or admission made before the Tribunal or any person at a meeting or other proceeding held for the purposes of subsection (1) is not admissible at a hearing of the matter concerned or in any other legal proceedings.

55 Preliminary conferences

(1) In addition to or in the course of any action taken under section 54, the Tribunal may, before commencing to hear and determine an application, confer with, or arrange for a member or the Registrar to confer with, the parties in the proceedings and make any determination with respect to the proceedings that is agreed to by the parties.

(2) If proceedings are referred under this section to a member or the Registrar and the parties agree to the determination of the member or the Registrar, the determination has effect as a decision of the Tribunal.

(3) If the proceedings are not determined under this section and the matter proceeds to a hearing:

(a) evidence is not to be given, and statements are not to be made, concerning any words spoken or acts done at a conference held in accordance with this section unless the parties otherwise agree, and

(b) any member who presided over a preliminary conference in respect of the proceedings is not entitled to be a member of the Tribunal determining the proceedings if any party in the preliminary conference objects, in the manner and form prescribed by the regulations, to the member's participation in the proceedings.

(4) The Chairperson may direct that a preliminary conference is to be held under this section in the case of any applications made to the Tribunal of a kind specified in the direction.

Division 2 - Mediation and neutral evaluation

56 Definitions : In this Division:

"mediation session" means a meeting arranged for the mediation of a matter under this Division.

"mediator" means a person to whom the Tribunal refers a matter for mediation under this Division.

"neutral evaluation session" means a meeting arranged for the neutral evaluation of a matter under this Division.

"neutral evaluator" means a person to whom the Tribunal refers a matter for neutral evaluation under this Division.

57 Meaning of "mediation" and "neutral evaluation"

(1) In this Act, "mediation" means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

(2) In this Act, "neutral evaluation" means a process of evaluation of a dispute in which the neutral evaluator seeks to identify and reduce the issues of fact and law that are in dispute. The neutral evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings.

58 Appointment of mediators and neutral evaluators

(1) The Chairperson may appoint any person whose name is on the list compiled under Schedule 5 as a mediator or neutral evaluator for the purpose of particular proceedings in the Tribunal.

(2) Mediators and neutral evaluators have the functions conferred or imposed on them by or under this or any other Act.

(3) Schedule 5 has effect in respect of a mediator or neutral evaluator appointed under this section.

59 Referral by Tribunal

(1) The Tribunal may, by order, refer a matter arising in any proceedings for mediation or neutral evaluation if the Tribunal considers the circumstances appropriate.

(2) The mediator or neutral evaluator may, but need not be, a person whose name is on a list compiled under Schedule 5.

60 Costs of mediation and neutral evaluation

(1) The costs of mediation or neutral evaluation, including the costs payable to the mediator or neutral evaluator, are payable by the Tribunal, except to the extent that the regulations provide that the parties in the proceedings are to pay such costs.

(2) Regulations made for the purposes of this section may provide that the parties are to pay such costs:

(a) in such proportions as they may agree among themselves or, failing agreement, in such manner as may be ordered by the Tribunal, or

(b) in any other prescribed manner.

61 Agreements and arrangements arising from mediation or neutral evaluation sessions

(1) The Tribunal may make orders to give effect to any agreement or arrangement arising out of a mediation session or neutral evaluation session if the Tribunal is satisfied that it would have the power to make a decision in terms of the agreement or arrangement or in terms that are consistent with the agreement or arrangement.

(2) Nothing in this Division affects the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session or neutral evaluation session, in relation to the matters the subject of any such session.

62 Privilege

(1) In this section, "mediation session "or "neutral evaluation session" includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

(2) Subject to subsection (3), the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:

(a) a mediation session or neutral evaluation session, or

(b) a document or other material sent to or produced to a mediator or neutral evaluator, or sent to or produced at the Tribunal or the office of the Registrar, for the purpose of enabling a mediation session or neutral evaluation session to be arranged.

(3) The privilege conferred by subsection (2) only extends to a publication made:

(a) at a mediation session or neutral evaluation session, or

(b) as provided by subsection (2) (b), or

(c) as provided by section 63.

(4) Evidence of any thing said or of any admission made in a mediation session or neutral evaluation session is not admissible in any proceedings before any court, tribunal or body.

(5) A document prepared for the purposes of, or in the course of, or as a result of, a mediation session or neutral evaluation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.

(6) Subsections (4) and (5) do not apply with respect to any evidence or document:

(a) if the persons in attendance at, or identified during, the mediation session or neutral evaluation session and, in the case of a document, all persons identified in the document, consent to the admission of the evidence or document, or

(b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under section 63 (c).

63 Secrecy

A mediator or neutral evaluator may disclose information obtained in connection with the administration or execution of this Division only in any one or more of the following circumstances:

(a) with the consent of the person to whom the information relates,

(b) in connection with the administration or execution of this Division,

(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,

(d) if the disclosure is reasonably required for the purpose of referring any party or parties in a mediation session or neutral evaluation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties in the mediation session or neutral evaluation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,

(e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

64 Other measures not precluded

Nothing in this Division prevents:

(a) the parties in any proceedings from agreeing to and arranging for mediation or neutral evaluation of any matter otherwise than as referred to in this Division, or

(b) a matter arising in any proceedings from being dealt with under the provisions of the Community Justice Centres Act 1983 .

PART 6 - APPEALS AND REHEARINGS

65 Review by prerogative writ etc generally excluded

(1) Except as provided by this section, a court has no jurisdiction to grant relief or a remedy by way of:
(a) a judgment or order in the nature of prohibition, mandamus, certiorari or other relief, or
(b) a declaratory judgment or order, or
(c) an injunction,
in respect of any matter that has been heard and determined (or is to be heard or determined) by the Tribunal in accordance with this Act or in respect of any ruling, order or other proceeding relating to such a matter.

(2) A court is not prevented from granting relief or a remedy of a kind referred to in subsection (1) in relation to a matter in respect of which the jurisdiction of the Tribunal to determine the matter was disputed if the ground on which the relief or remedy is sought is that:
(a) the Tribunal gave an erroneous ruling as to its jurisdiction, or
(b) the Tribunal erred in refusing or failing to give a ruling as to its jurisdiction when its jurisdiction was disputed.

(3) A court is not prevented from granting relief or a remedy of a kind referred to in subsection (1) in relation to a matter in respect of which the Tribunal has made an order if the ground on which the relief or remedy is sought is that:
(a) the Tribunal had no jurisdiction to make the order, or
(b) in relation to the hearing or determination of the matter, a party had been denied procedural fairness.

66 Referral of questions of law to Supreme Court

(1) A referral under this section is to be made in accordance with rules of the Supreme Court.

(2) If, in any proceedings, a question arises with respect to a matter of law, the Tribunal may decide the question or may refer it to the Supreme Court for decision.

(3) If a question with respect to a matter of law is referred to the Supreme Court by the Tribunal:
(a) the Tribunal is not to make an order or a decision to which the question is relevant until the Supreme Court has decided the question, and
(b) on deciding the question, the Supreme Court is to remit its decision to the Tribunal, and
(c) the Tribunal is not to proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the Supreme Court.

(4) Any costs to the parties in proceedings arising out of the referral of a question with respect to a matter of law to the Supreme Court are not payable by the parties but are to be paid as a cost of the administration of this Act.

(5) For the purposes of this section, a reference to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.

67 Appeal against decision of Tribunal with respect to matter of law

(1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the Supreme Court against the decision.

(2) An appeal is to be made in accordance with the rules of the Supreme Court. The rules of the Supreme Court may provide that an appeal (or such classes of appeal as may be specified in the rules) may be made only with the leave of the Court.

(3) After deciding the question the subject of such an appeal, the Supreme Court may, unless it affirms the decision of the Tribunal on the question:
(a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or
(b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal.

(4) If such a rehearing is held, the Tribunal is not to proceed in a manner, or make an order or a decision, that is inconsistent with the decision of the Supreme Court remitted to the Tribunal.

(5) If a party has appealed to the Supreme Court against a decision of the Tribunal on a question with respect to a matter of law, either the Tribunal or the Supreme Court may suspend, until the appeal is determined, the operation of any order or decision made in respect of the proceedings.

(6) If the Tribunal suspends the operation of an order or a decision, the Tribunal or the Supreme Court may terminate the suspension or, where the Supreme Court has suspended the operation of an order or a decision, the Supreme Court may terminate the suspension.

(7) If a rehearing is held, fresh evidence, or evidence in addition to or in substitution for the evidence on which the original decision was made, may be given on the rehearing.

(8) A reference in this section to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal.

(9) The regulations may exclude the making of an appeal under this section in such classes or description of cases as may be prescribed.

Note that the Tribunal fulfils a case management role somewhat like that within the Civil Procedure Rules 1999 in that there is a duty to encourage the parties to pursue settlement, complete with detailed provisions for conciliation and mediation, which are distinguished from each other. Furthermore a fast track preliminary decision making process is also

available from the registrar – somewhat like a mini-trial. Decisions of the tribunal are fully binding, subject to an appeal process. Decisions of the tribunal are published. The following have been reported :-

Precision Flooring P/L v Tricon Projects P/L (Home Building) [2005] NSWCTTT 250
This claim was related to the **Ziade v Tricon**[1] adjudication. The question arose as to whether this was the same issue and thus amounted to double jeopardy. The Tribunal held that it was a distinct and separate dispute and hence the Tribunal had jurisdiction. W J Tearle. Member. Consumer Trader and Tenancy Tribunal. 2nd April 2005

Hogan v Allan (Home Building) [2005] NSWCTTT 255
Tribunal had to determine whether the contractor held himself out as a building contractor; whether the contract was for a "fixed price" or on a "costs plus" basis; whether works completed to specifications; standard of workmanship; whether homeowner and/or contractor terminated or repudiated the contract; whether payment for work completed lawfully withheld; whether claim founded in contract or restitution & quantum meruit?
M. Noone : Member Consumer, Trader and Tenancy Tribunal. 6th April 2005

Meyer v Brian Burston Building Design Consultant (General) [2005] NSWCTTT 235
Tribunal considered the application of the BCISPA in Tribunal proceedings, holding that the procedure to assert a claim / defence had not been followed and accordingly the payment claim failed.
W J Tearle. Member Consumer, Trader & Tenancy Tribunal. 20th April 2005

Bell v Pearce (Home Building) [2005] NSWCTTT 433
An adjudication found that the contract had been determined, following which claims for oral variations and cross claims for non-completion were submitted to the tribunal which found the variations payable on a quantum meruit basis.
G J Durie. Senior Member. Consumer Trader & Tenancy Tribunal. 23rd June 2005

Williams v Star Structures P/L (Home Building) [2006] NSWCTTT 347
Where the claim for damages by owner and the counterclaim for unpaid progress payment were both successful the tribunal determined that each party should bear its own costs. G J Durie. 28th June 2006.

There is a further potential cross over between the role played by the CT&TA 2001 and that of the construction adjudication regime established by the **Building and Construction Industry Security of Payment Act 1999.** The inspiration for this Act was the HGCRA 1996, so it should be more familiar territory for readers. However, the jurisdiction of the adjudicator under the BCISPA is more restrictive than under the HGCRA in that it targets progress payments rather than "*any dispute arising under a relevant construction contract*". For the benefit of readers unfamiliar with the BCISPA, its provisions in outline are as follows:-

PART 1 - PRELIMINARY

3. Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

4. Definitions
5. Definition of "construction work"
6. Definition of "related goods and services"
7. Application of Act

PART 2 - RIGHTS TO PROGRESS PAYMENTS

8. Rights to progress payments
9. Amount of progress payment
10. Valuation of construction work and related goods and services

[1] ***Ziade v Tricon*** [2004] NSWSC 1070. Hearing of originating process seeking to set aside statutory demand, contested adjudication application, property developer, construction management agreement. Off-setting claim, whether this was an appropriate supplementation of the initial affidavit rectification - property sold. Is the offsetting claim genuine. Proceedings dismissed. Equity Division. Supreme Court New South Wales. Master Macready. 22nd November 2004

11. Due date for payment
12. Effect of "pay when paid" provisions
(1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract. …….. etc

PART 3 - PROCEDURE FOR RECOVERING PROGRESS PAYMENTS
Division 1 - Payment claims and payment schedules

13 Payment claims
(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
(2) A payment claim:
(a) must identify the construction work (or related goods and services) to which the progress payment relates, and
(b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and
(c) must state that it is made under this Act.
(3) The claimed amount may include any amount:
(a) that the respondent is liable to pay the claimant under section 27 (2A), or
(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
(4) A payment claim may be served only within:
(a) the period determined by or in accordance with the terms of the construction contract, or
(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
whichever is the later.
(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.
14. Payment schedules
*(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.*
(2) A payment schedule:
(a) must identify the payment claim to which it relates, and
*(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).*
(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
(4) If:
(a) a claimant serves a payment claim on a respondent, and
(b) the respondent does not provide a payment schedule to the claimant:
(i) within the time required by the relevant construction contract, or
(ii) within 10 business days after the payment claim is served,
whichever time expires earlier,
the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.
15. Consequences of not paying claimant where no payment schedule[2]
16. Consequences of not paying claimant in accordance with payment schedule

Division 2 - Adjudication of disputes

17. Adjudication applications
18. Eligibility criteria for adjudicators
19. Appointment of adjudicator
20. Adjudication responses
21. Adjudication procedures
22. Adjudicator's determination
23. Respondent required to pay adjudicated amount
24. Consequences of not paying claimant adjudicated amount
25. Filing of adjudication certificate as judgment debt
26. Claimant may make new application in certain circumstances

[2] ***Bitannia P/L v Parkline Construction P/L [2006] NSWCA 238*** : Contrary to s15, s52 Trade Practices Act 1974 (Federal Law) provides a remedy where the failure to provide a payment schedule arose out of the misleading and deceptive conduct of the contractor. Thus by virtue of the TPA a s52 cross-claim can be pleaded as a defence to an enforcement action.

Division 3 - Claimant's right to suspend construction work

27. Claimant may suspend work

Division 4 - General

28. Nominating authorities
29. Adjudicator's fees
30. Protection from liability for adjudicators and authorised nominating authorities
31. Service of notices
32. Effect of Part on civil proceedings

PART 4 - MISCELLANEOUS

33. Act binds Crown
34. No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void.

The interrelationship between litigation, construction adjudication and the tribunal is relevant to the following reported cases outlined below :-

Cooper v Home Productions P/L (General) [2004] NSWCTTT 597
Tribunal had to determined whether an adjudication under the BCISPA 1999 ousts the jurisdiction of the Tribunal under the Consumer Claims Act 1998. D.Sheehan. Member. CT&TT. New South Wales. 20th October 2004

Cooper v Anthony Veghelvi (1) Home Productions P/L (2) CT&TT (5) [2005] NSWSC 227
The issue here was whether in the light of a pending appeal sum ordered by adjudication by virtue of s 25(4) BCISP Act should be paid into court. Master Harrison : New South Wales Supreme Court : 23rd March 2005.

Cooper v Veghelyi, Home Productions P/L, Consumer Trader & Tenancy Tribunal [2005] NSWSC 602
The claimant applied for a declaration that the adjudication determination made by the First Defendant in favour of the Second Defendant under the BCISPA 1999 (NSW) (BCISP Act) was null and void and of no effect. Having considered the jurisdiction of the Trader and Tenancy Tribunal the declaration was granted.
Patten AJ : New South Wales Supreme Court : 28th June 2005

Presser v Ocean View Properties Pty Ltd [2006] VSC 143
This concerned a dispute over defective floors in an advance purchased apartment in a development program. Application for stay of action to the Home Building Tribunal approved. Habsersberger J. Melbourne. 10th March 2006

Plus 55 Village Management P/L v Parisi Homes P/L [2005] NSWSC 559
A dispute as to the basis for payment under an oral construction arose. Was the work in respect of a "dwelling" under H.B.Regs - HBA ss10, 91(1)(a), 92, 94 - BCISPA ss 32(2), (3) - CA s459G, s459H(1)(b) ? The Consumer Claims Tribunal declined to hear application due to lack of jurisdiction. An adjudicator found in favour of the defendant and the decision was filed as a District Court judgment. Here an application was made under s459G Corporations Act to set aside a statutory demand. The court held that there was a genuine dispute as to liability and the statutory demand was accordingly set aside. White J : New South Wales Supreme Court : 2nd June 2005

CONCLUSIONS

The Australians have devised a complex web of inter-related mechanisms for the regulation of home building work and for the resolution of disputes that works in a just yet speedy and cost effective manner. Decisions as to alleged regulatory defects feed seamlessly into the dispute resolution matrix, providing both for reparation works and compensation. The matrix does much to protect consumer rights and promotes responsible building. In return the home building and renovation industry has a robust mechanism that helps to ensure prompt payment and protection against spurious allegations by over-demanding and unreasonable clients. It is a model that the UK could learn much from. Granted the Consumer Tribunal is designed to deal with much more than building and would involve a major commitment for any government. However, elements of the program could be grafted on to current UK systems.

Stage One could take the form of a Scheme for Homebuilding / Remedial Construction Works establishing minimum standards within the industry, which would have to be incorporated into all contracts. Should a contract be non compliant the scheme would apply. To the extent that local authorities already certify such works, either local councils or Industry Organisations such as the National Home Builders could take on the task of policing the Scheme and delivering expert opinions. Registration and membership with the organization would be compulsory. If a home builder was not registered, then the regulation would state that he cannot enter into or enforce a home building construction contract. However, he would be entitled to recover a "quantum meruit" for work done. This would shift the burden to the home builder to prove value of work - rather than placing it on the consumer to prove defective work.

Stage Two might remodel the HGCRA to provide adjudication for the domestic construction sector, with prescribed systems for domestic billing. It would be very important for such adjudicators to be qualified evaluators of work done - and would put a large amount of the responsibility upon the professionals in the industry. It would drive cowboy builders to either upgrade - or ship out. Corbett Haselgrove-Spurin

"*The Status of ADR Training in Legal Education in the United Kingdom*"

Corbett Haselgrove Spurin♦

INTRODUCTION

This paper considers whether or not the concepts and practice of Alternative Dispute Resolution (ADR) should form an integral part of legal training in the United Kingdom (UK). This might seem like a surprising question to ask, particularly for colleagues from the US where ADR, particularly mediation, is firmly established as an integral part of training in many law schools, but as will be demonstrated below, this most certainly not the case in the UK at the present time.

Undergraduate legal education in the UK serves two distinct and separate though complementary functions. On the one hand the Law Degree forms a key stage on the road to legal practice, on the other, it is simply one more discipline (albeit an important and prestigious one) within the University portfolio. Both functions are important. As a platform for the first stage of qualification as a legal practitioner the focus is on substantive law with an emphasis on the assimilation, analysis and application of legal rules and principles. Less than 50% of law graduates enter into legal practice, with the majority of graduates using the status of the law degree as a mark of excellence in academic and intellectual achievement as a passport other careers. From this perspective the emphasis is less upon the acquisition of legal knowledge and rather on the development of critical analytical skills and transferable skills in general. Subsequent professional training courses (Legal Practice Course and Bar Finals) are self evidently practice courses, with the greater part of the syllabus dictated by the professional bodies which both monitor and sanction the programs.

Whilst any law school might chose to incorporate some element of ADR training into its program of study (competition between lecturers for the limited opportunities afforded for optional subjects is considerable), this would not occur across the board unless the legal profession were to mandate it as a core requirement of a qualifying law degree or professional course. Equally, the extent to which such training would be mandated would again be a matter for the professional bodies. For the professions to so determine they would have to reach the conclusion that ADR practice had become an essential and integral part of legal practice. Is there a case for reaching such a conclusion?

INTER-RELATIONSHIP BETWEEN LEGAL AND ADR PRACTICE

The right of audience before the courts in the UK is the sole preserve of the legal practitioner and the judiciary are drawn exclusively from the legal profession. The legal profession plays a major role in client representation in ADR. This is inevitable since the first port of call for a member of the public involved in a legal dispute is likely to be the profession. However, in the UK the exclusive right of audience accorded to the profession does not extend to ADR. Equally, the ranks of ADR practitioners are not the exclusive reserve of the legal practitioner in the UK. ADR forms an important area of legal practice for some specialist practitioners, but many others will have had little or no engagement in ADR at any level whatsoever. This may be in the process of changing, particularly with the advent of court based / promoted mediation which potentially could impact on every civil litigation practice. Already there are a number of specialist areas where some form of ADR is the norm.[3]

Whilst the courts remain the primary vehicle for the resolution of civil disputes a significant number of disputes are resolved by alternative means, ranging from arbitration, adjudication, conciliation and expert determination to mediation, supplemented by a few exotic variations such as mini-trial and dispute resolution boards. To the extent that it is true to say that supply expands to satisfy demand, recourse to ADR is increasing in the UK, as evidenced by the ever growing range of ADR service providing bodies who promote the benefits of their services to the public and private sector. Admittedly, the converse might apply, namely that there are increasing numbers of suppliers chasing a diminishing market, but for the fact that the market has broadened out from the traditional construction and maritime arbitration base to such an extent that today there are few areas of human endeavour which cannot be accommodated by an off the peg private dispute resolution service.[4]

In addition, the government has committed itself both to encouraging litigants to settle disputes[5] and to embracing ADR procedures for the settlement of disputes involving government agencies.[6] The Government has a vested interest in the growth of ADR since it relieves pressure on the limited resources of the state subsidised court system. Furthermore, ADR is seen by the Government as a vehicle to promote both commercial efficiency and social harmony. Potential benefits to the court's clients from the adoption of ADR highlighted by Her Majesties Court Service include the timely settlement of disputes and a higher degree of party autonomy. ADR offers a degree of procedural flexibility unobtainable before the courts and provides the court's clients with enhanced opportunities to play an active role in the process. Negotiated settlement processes provide clients with autonomy over settlement terms and the ability to fashion outcomes which are not available to the court. There is also a worry that the high costs involved in litigation may act as a barrier to justice which can to some extent be bridged by cost effective ADR services.

♦ This paper was delivered at the Chartered Institute of Abitrator's Conference on "***TRANSATLANTIC PERSPECTIVES ON ADR***" held at Queen Mary University of London at Charterhouse Square, on the 28th July 2006

3 Note that in specialist areas of practice such as Family Law, mediation is an everyday fact for the practitioner. Similarly, Patent Office mediation is likely to become the norm for those engaged in the field of Intellectual property dispute resolution. Construction adjudication under the aegis of the Housing Grants Construction and Regeneration Act 1996 is the norm in commercial construction dispute resolution practice. Etc. As specialist areas, from the legal training perspective their impact alone would not be sufficiently pervasive to justify a change in the general curriculum of the law school, as opposed to integration into specialist courses.

4 Eg. Community, family, consumer, commercial, sport, travel etc.

5 The overriding objective of the Civil Procedure Rules is the provision of cost effective dispute resolution procedures, proportionate to the issues at stake. S1 Civil Procedures Rules 1998.

6 Public Statement on ADR by Lord Irvine, March 2001.

Whilst the recent advances of ADR in the UK has been quite remarkable, it is submitted that progress is likely to stall in the foreseeable future, despite the sterling support of Her Majesties Court Service, if ADR is not embraced and promoted by the legal profession. At present support from the profession is patchy. Even as new court based mediation schemes are being established in some parts of the country, other established centres are struggling to survive, starved of support by the local legal community. Thus court mediation referrals and applications to the court to defer to mediation have risen dramatically in some areas and fallen away in others. This can partly be attributed to variable support for court based mediation by the judiciary and partly to variable support by the profession from region to region.

The role of the legal practitioner in the choice of dispute resolution process be it some form of ADR or litigation is significant. Firstly, contract drafting is often performed by legal practitioners. Outside the standard form contract which routinely provides for ADR the inclusion of an ADR provision in a contract is likely to be dependent on advice from the drafting lawyer. In the absence of knowledge by the lawyer of the benefits of ADR this is unlikely to occur. Ad hoc references to ADR require the consent of both parties which is difficult to achieve after the event. The support of ADR by the legal profession is thus central to the continued growth of commercial ADR. Secondly, as noted above, the courts are the primary vehicle for the resolution of civil disputes. The normal expectation when a client seeks advice from a legal practitioner is that the case will go to court. Whilst it is not uncommon in certain fields[7] for disputes to be settled through ADR processes without recourse to the services of a legal practitioner, because the levels of public knowledge and understanding about ADR are quite limited, unless a legal practitioner directs a client towards ADR where the practitioner is unable to broker a settlement any outstanding issues will inevitably be referred to the court. The exception is where the client knows of and requests ADR.

Clearly it is in the interests both of ADR practitioners and the government that legal practitioners direct clients towards ADR. Before that can occur, practitioners must firstly know about ADR[8] and secondly value it as a service to their clients which they can profitably engage in. Whilst it is not universally accepted that ADR is in all circumstances valuable to clients or to the profession, let us assume for present purposes that that is the case. The question then arises as to how legal practitioners should acquire ADR expertise, be it as an integral part of their legal education in the class room or as an optional part of continuing professional development.

LEGAL EDUCATION

The majority of legal practitioners in the UK will have undertaken a Bachelor's Degree in law (LLB)[9] accompanied by professional training to become a solicitor (The Legal Practice Course or LPC) or barrister (Bar Finals) followed by articles or pupilage.

- The traditional LLB degree course involves three years full time study or part time equivalent.
- The LPC and Bar Finals involve a year of full time study or two years part time study.
- Articles and pupilage will account for a further two years of on the job training.

Accordingly it usually takes a minimum of six years to become a qualified legal practitioner in the UK. At this stage formal education comes to an end and thereafter continuing professional development takes centre stage. Six years sounds like a long time but, during that period the trainee will be exposed to a great deal of information, much of which has to be assimilated and applied. The question therefore is whether or not there is a need to add to that work load by including ADR practice and procedure (be it a little or a lot). If so, would it be in addition to what is already covered, or would something have to be omitted to make room for it, and if so what would be omitted?

The Law Degree.[10]

The primary focus of the Law Degree is substantive law. Total face to face class room exposure will be somewhere between 12 – 15 hours per week. The core content of a qualifying law degree is set by the Law Society. Thus core subjects,[11] namely the substantive law of contract, tort, equity and trusts, property, crime together with Legal Systems, Constitutional law and European Community law account for approximately 60% of most qualifying law degrees.[12] The remainder of the program will be optional, with some facility for non-law subjects such as foreign languages.

Within a law school program ADR could be integrated into Legal Systems and / or Legal Skills. A law school could chose to offer a distinct ADR module, most likely as an option rather than as a core module. Alternatively, ADR could feature as part of extra-curricular activity.

It is quite likely that some reference is already made to ADR during the course of many Legal Systems programs, though how much emphasis and coverage is likely to be variable, ranging from a brief reference without any assessment to in

7 Eg community meditation; construction and maritime disputes where industry consultants play a major role representing clients in arbitration and adjudication particularly since ADR is a common feature of such standard form contracts.

8 The profession has been quick to take on board the cost risks of ignoring mediation by virtue of s44 CPR 1998 epitomised by ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** [2004] EWCA (Civ) 576 and fire fighting strategies to gain cost advantages by proposing mediation are now common. This demonstrates that the profession can and will take note of ADR when there is a perceived need and potential tactical benefit to be gained from proposing ADR, but many such offers do not demonstrate a genuine commitment to or understanding of ADR processes. The courts have not been fooled by spurious last minute offers of mediation and have robustly resisted applications for reductions of costs in such circumstances, see e.g. the recent judgment of Mr Justice Jacks in ***Patricia Mary Wright v HSBC Bank Plc*** **[2006] ADR.L.R. 06/23**

9 There are alternative routes including the Common Professional Examinations, a graduate conversion course in law, legal executive courses, HND and HNC law courses with fast track conversion to LLB. There is also provision for foreign lawyers to undertake practice conversion courses.

10 Given the diversity of provision in undergraduate law programs, the discussion below is pitched in general terms.

11 The subjects areas are described here in broad terms. The exact scope and title for such subjects will vary from institution to institution.

12 The number of modules in a law program can vary radically from one school to another. At the tightest level students might study a 4/4/4 program, moving upward to a 5/5/5 program or even a 6/6/6 program over three years. To further complicate matters some faculties will offer half modules.

depth evaluation of the systems coupled with a coursework or exam question. Some legal systems text books provide a respectable amount of coverage of ADR though others leave it out completely. If it is not in the chosen core text it is unlikely to be dealt with.

Legal skills may be offered as a distinct module or integrated into Legal Systems. With legal skills there is the scope for students to be ***briefly*** exposed to client interviewing, negotiation/mediation and advocacy skills in addition to study skills, essay writing, problem solving and research techniques. Emphasis is placed upon the word briefly because law school cohorts tend to be large and given the breadth of coverage within the syllabus time is at a premium.

Assessing interpersonal skills for large numbers places enormous strain on staff resources which few law schools are willing or able to accommodate. Furthermore, since legal skills underpin legal study such courses tend to take place at the beginning of a law course. It would be unrealistic to expect high degrees of sophisticated interpersonal skills from the average school leaver.

Legal Skills training has a chequered history in law schools. Such courses tend to be introduced by members of staff dedicated to its development, who have a passion for it and have the requisite skills to teach it well. They often expend enormous amounts of additional time and effort developing and delivering the program and do an extremely good job. However, when that staff member moves on to other things, it can prove difficult or indeed impossible to find another member of staff able to deliver the program and/or willing to commit themselves to so doing. The program eventually fades away or is diluted and merged into another program.

The provision of a distinct ADR module is perhaps the best that a law school could offer the undergraduate in the current context. However, as an option, it would not go far towards ensuring that all graduates had been exposed to ADR before graduating. Take up for such an option would be dependent upon reputation and student perceptions. Premium options such as commercial law, evidence, family and succession would no doubt continue to take precedence in most institutions. Also, given the breadth of specialist areas of practice embraced by ADR, the choice of subject matter and the breadth of coverage would inevitably be both limited and idiosyncratic.

A significant role in skills training has been fulfilled by extra-curricular activities. Many, but far from all law schools engage in debating, mooting, client counseling and negotiation competitions, both national and international. In some institutions this is supported by staff. In others the initiative is taken by the student law society, with or without help and assistance from staff. There are competitions for all these activities and at the final stages standards are extremely high. Some of these competitions are open to both undergraduates and post graduates whilst other competitions provide separate streams.

Less than 50% of the law schools take part in such programs. The level of investment, both in terms of library resources and staff commitment, required from a school to take part in international mooting for instance is considerable. In the absence of sponsorship most law schools are unlikely to make the additional investment required to take part such programs. The uptake in skills competitions of law schools with modular programs is very low since inter-sessional examinations coincide with the preliminary rounds for most of these competitions. Understandably, few students are prepared to juggle with extra-curricular skills commitments and examinations at the same time. This is particularly the case today when so many students also undertake part time work to help finance their studies.

The percentage of students from those institutions that take part in the first knock out stage of these competitions, let alone those who progress to the finals is both self selective and rapidly shrinks as the competitions progress through the stages. It is notable that a high percentage of the students that take an active part in extra-curricular activities are older students rather than those who have entered University directly from high school. For those who take part the quality and quantify of skills exposure, even at the earliest stages, is likely to far exceed anything that is delivered in formal classes, but the conclusion again must be that it is not a prospective vehicle for ensuring that all future graduates would have been exposed to ADR.

Professional Training.

The primary focus of both the Law Practice Course and the Bar Course is legal skills and practice. As such they would be an ideal vehicle for ADR training courses. The content of these courses is regulated by the professions and is very extensive and complete, leaving little scope for additional coverage. Whilst such courses involve eighteen hours of class contact per week, candidates are advised to treat the course like a full time job so that a full 40 hours a week need to be dedicated to the successful pursuit of the course.

The core texts for both courses contain several pages on ADR but, it is submitted, far from sufficient for present purposes. Clearly it is open to staff to develop this material further and no doubt some do so and provide ADR electives. However, it should be noted that whilst negotiation was previously a core skill, it was dropped from the curriculum five years ago, the view having been taken that whilst practitioners require drafting skills, negotiation skills are not central to what they do. It could take some doing to reverse this decision. That said, the legal practice course is currently in the process of radical change and the present program (The LPC which replaced the LSF) is due to be replaced by LPC 2 in 2008. This will apparently be a modular program with trainees being able to accumulate credits from a variety of training providers. It is far too early to be able to make any predictions as to whether or not ADR will be mandated under the new scheme, though there appears to be a current in favour of non-adversarial dispute resolution being projected by the regulating bodies at the present time.

Conclusion on ADR coverage at law schools.

Whilst there may well be law schools that provide more than adequate coverage of ADR at some stage during the four formal years of legal education in the UK, it is submitted that at the present time coverage is minimal. It would be possible for law schools to improve upon this state of affairs but it is most unlikely that coverage would ever be sufficient across the board to ensure full ADR awareness amongst all future graduates.

UNIVERSITY ADR PROVISION OUTSIDE THE LAW SCHOOL PROGRAM

None of the above is to suggest that the Universities in the UK have completely ignored ADR. This is far from the case, as the wide range of institutions in the UK which have Chartered Institute of Arbitrator accreditation for their post graduate ADR programs is testament. Even so, the number of Universities that offer post graduate ADR courses is modest. The majority do not.

The LLM, MSc, MBA etc is an ideal vehicle for ADR education, both academic and professional. The masters program dedicated to ADR has the ability to deliver a comprehensive training package, though many such programs such as construction concentrate on specific fields of ADR practice. The added maturity and experience of post graduate students means that they are often in a position to take the best advantage of and profit from ADR programs. The primary focus of many LLM ADR students is ADR practice. They are likely to be drawn from many disciplines, not just from law. The number of post graduates that are from or will go into legal practice is quite limited.

Law is taught on a great variety of undergraduate and post graduate programs. Where ADR is particularly relevant to a discipline it may well receive considerable coverage. A good example of this is the construction field. Thus, an undergraduate or post graduate construction program in the UK today would be incomplete without at least some reference to adjudication. Similarly, it is not surprising that negotiation skills feature alongside partnering and conflict management in many business and management study programs.

CONCLUSION.

It is important for ADR to engage the legal community. The continuing growth and uptake of ADR is at least in part dependant upon the support of the legal profession, in particular those members of the profession who are not as yet converts to ADR. This cannot be achieved by bland CPD courses that merely extol the virtues of ADR as given statements of fact without proof. That message has already been delivered to, but not necessarily been received by, the profession. Whilst most in the profession can reiterate the ADR mantra, often without conviction, far fewer have a real understanding of ADR or the ability to engage in it effectively. The legal profession will need to be convinced that ADR offers benefits both to clients and to the profession. How to convince the profession is another matter.

The efficacy of ADR is more a matter of belief and opinion than fact. In the absence of outside imperatives such as court ordered mediation or cost penalties, it is the perceptions of the profession that will carry the day. ADR has both its supporters and its detractors. There is no shortage of material demonstrating the benefits clients have reaped from engaging in ADR but then again neither is there a shortage of examples of clients who have had their fingers burnt by so doing. On the basis that "*good news is no news*" it is more likely that negative rather than positive experiences will be shared between members of the profession, which makes it even harder to project a positive ADR image.

In the grander scheme of things ADR in still in its early developmental stages in the UK. It continues to evolve and adapt to suit the needs of specific fields of practice. There are so many models of ADR in current use that generalisations, the bread and butter of what a law school can provide, are of limited value. It is likely that over time ADR will gradually undergo a process of rationalisation, trading off flexibility for certainty. Minimum standards of training, accreditation and enforceable codes of ethical practice are likely to be established in the not too distant future at least in specific fields of practice such as court based mediation. Some degree of accountability may be imposed upon appointing bodies with knock on effects for the way they regulate the activities of their members. The teaching of standardised rules, regulations, practices and procedures are more likely to be within the reach of the average law school.

Certainly if ADR were to be built into the law school's core curriculum prevailing gaps in the profession's knowledge and understanding of ADR could be plugged for future generations. Even so there remain limits to what law schools could achieve. It is most unlikely that the entire gamut of ADR and its specific applications could or would be catered for. The most obvious candidate for expanded coverage is mediation as Her Majesties Court Service raises it profile. Even so, such coverage is likely to be basic and rudimentary. Whether or not it would also imbue enthusiasm and commitment to mediation as well is yet another matter. At the very least, since some of the failures of ADR may be attributable to inappropriate choices of ADR process and or a failure of practitioners to engage effectively in that process, assuming sufficient ADR coverage is provided by the law schools such defects could be remedied for the future. Whatever the law schools do is unlikely to turn around disillusioned practitioners who have had "*bad*" ADR experiences and in such cases the new recruit might still encounter stiff resistance to ADR as they enter into practice.

Without wishing to detract from the important role played by the law schools, it should be remembered that formal legal education is limited. The legal practitioner builds upon the basics inculcated at law school and really learns his craft on the job, be it before the court, arbitral tribunal or mediation. The remaining vehicle for ADR training within the legal profession lies in continuing professional development, with a focus on representing clients within all aspects of ADR rather than in training to become an ADR practitioner. It is submitted that this is an area that the ADR community could and should actively engage in, but first the legal profession needs to be convinced that it is worthwhile investing in such training. The fact that many legal practitioners specialise in the ADR field is proof that some in the profession can benefit from engagement in it. This provides a starting point upon which we in the ADR community can build.

MEDIATION CASE CORNER

C.H.Spurin

Daniels v The Commissioner of Police for the Metropolis [2005] EWCA Civ 1312

Daniels, a mounted police officer suffered a work related injury. She unsuccessfully asserted that her employers knew that the horse was temperamental and thus was responsible for her injury. The court reconfirmed that there will be no cost penalty where the refusal to mediate is reasonable. The defendants, who successfully defended the claim had refused to negotiate to stem the flow of similar claims. The court held that this was a legitimate reason to refuse to compromise a highly defendable claim.

Ward LJ. Dyson LJ. CA. 20th October 2005.

COMMENT : It is difficult to assess the extent to which this provides a general ground for reasonably refusing to negotiate. It acknowledges that it may well be reasonable to rigorously defend even a minor claim to ensure that a precedent is not established. However, until now that the concept of precedent was not applicable to ADR. It is common practice for a party to compromise in private, without admission of liability, rather than take the risks or inconvenience of litigation. For this reason ADR coupled with cost penalties has acted as an encouragement to even weak claimants to commence a claim in the hope of a settlement offer. This decision will encourage defendants to take a more robust stand against worthless claims and may well at least initially reduce the number of pre-trial and mediation settlements. Ultimately however, it may reduce the number of spurious claims.

Patricia Mary Wright v HSBC Bank Plc [2006] ADR.L.R. 06/23

Costs application. The applicant, who had pursued a hopeless claim, having concluded a settlement, had no grounds for a reduction of costs for a failure to mediate by the successful defendant. Mr. Justice Jack. QBD. 23rd June 2006

Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058

Following a successful appeal the court ordered a retrial. However, the court considered that it would be better if the parties mediated the issue to avoid further unnecessary expense. Accordingly the court ordered that the retrial not to be listed until parties had demonstrated that appropriate measures had been taken to resolve the dispute.

CA. before Smith LJ; Moses LJ; Hallett LJ. 7th July 2006

COMMENT : Whilst this falls short of a general power for the court to mandate mediation, in the event such a scheduling order gets very close to mandating mediation. This further demonstrates the Court of Appeal's commitment to mediation.

Tonkin v UK Insurance (No 2) [2006] EWHC 1185 (TCC)

Whilst successful in the litigation, the claimants failed to beat a payment in. At a cost's assessment hearing the claimant's allegations of unreasonable behaviour by the defendants were rejected. The court provided a detailed re-evaluation of the rules on costs and determined that in this case costs should follow the event.

His Honour noted that "*It is difficult not to conclude that each time the Claimants had a decision to make, or a choice to make, they made the wrong one. That has led them to the position in which they now find themselves. It was an approach which led them to refuse a reasonable offer to settle before the action even began; to refuse two sensible ADR proposals; to refuse a payment into Court; to pursue a very weak claim all the way through to judgment; and to act, both before and after the commencement of proceedings, in a way that could only be described as unreasonable.*"

HHJ Peter Coulson : TCC. 18th May 2006

Merelie v Newcastle Primary Health Care Trust (No.3) [2006] EWHC 1433 (Admin)

A party agreed to mediation but demanded an apology at the outset. The court examined the role of the apology in mediation and observed that whilst an apology can be a useful aspect of mediation it is not appropriate to demand an apology as a prerequisite to mediation.

Mr Justice Underhill remarked that "*It is of course important to bring grievances out into the open; but if there is a genuine intention to resolve them constructively the way in which they are aired is equally important. Ms. Nelson described the Claimant's remarks as a "tirade"; and on the evidence of the Claimant's own script and notes that does not appear to be an exaggeration. To demand a public apology as the precondition for mediation was not constructive.*"

QBD. Administrative Division. Mr Justice Underhill. 20th June 2006

Bradford & Bingley Plc v Rashid [2006] UKHL 37

Overturning the decision of the Court of Appeal, the House of Lords provides an in-depth analysis of the scope of the without prejudice privilege, the admission of fact exception, what amounts to an admission of fact and re-examines what amounts to a negotiation to settle a dispute. Here an unequivocal admission of liability under a mortgage after time was exhausted under the Limitation Act defeated the time bar.

Lords Hoffmann, Hope, Walker, Brown, Mance 12th July 2006.

COMMENT : Whilst their Lordships were unanimous that there was no negotiation and thus the privilege rule did not apply, there was no unanimity about obiter as to the scope of privilege and the circumstances when the veil of privilege will be lifted. It would appear that a rift has opened up between the Scottish approach to admissions of fact in privileged negotiations and the English approach which is more restrictive. The dicta and authorities relied on by their Lordships will provide much ammunition for future battles.

CONSTRUCTION CASE CORNER

C.H.Spurin

Blair And Patterson Ltd v. McDermott [2006] ScotSC 43

Two is Company, Three is a Crowd. This is a classic case of the claimant seeking to recover certified payments for work on a cottage, met with a counter claim for defects and allegations that the building would have to be demolished. The claimant builder's case was that any defects were due to architectural design faults. The architect was retained by the owner. The question therefore was whether the case should go to proof between the parties or whether or not the architect should be brought in as a co-defendant. In the circumstances the case was set down to proof between the parties, leaving it for the loser to pursue the architect thereafter.

Sheriff Principal Edward F Bowen QC. Edinburgh, 1st May 2006

Midland Expressway v Carillion Construction Ltd [2006] Adj.L.R. 06/13

Can a party withdraw a claim from adjudication? Following a court ruling the defendants realised their unascertained claim in respect of costs of delay was unrecoverable at the adjudication and sought to withdraw it. The defendants had not asked the adjudicator to decide whether or not as a matter of principle costs of delay were recoverable but had rather claimed unascertained sums. The adjudicator decided that they could withdraw but further held that there was no dispute about delay costs. The court held the adjudicator was correct in his determinations. The HGCRA does not prevent a party withdrawing a claim from adjudication. Per Mr Justice Jackson :-

100. In litigation, the right of a party to discontinue its claim or certain heads of claim is enshrined in and regulated by the Civil Procedure Rules. Adjudication, however, is a very different process from litigation. Every construction contract contains, either expressly or by statutory implication, a series of adjudication provisions which comply with the requirements of Part 2 of the 1996 Act. The 1996 Act says nothing about the entitlement of a party to withdraw or not to withdraw a claim which has been advanced in adjudication.

101. Having considered the competing submissions of counsel, I have come to the conclusion that it is impossible to read into either the 1996 Act or the Scheme any restriction prohibiting a party from withdrawing a disputed claim which has been referred to adjudication. I reach this conclusion for four reasons:

(i) There is nothing in the Act or the Scheme which suggests that any such restriction is intended.

(ii) Adjudication is an informal process which arrives at an interim resolution of disputes pending final determination by litigation or arbitration. It would be contrary to the statutory purpose to prohibit a party from withdrawing from such a process any claim which it did not wish to pursue.

(iii) If there were such a restriction, it would have the bizarre consequence that parties would be forced to press on with bad claims in adjudication. This would lead to wastage of costs and resources on the part of all parties. In my view, this simple consideration outweighs all the policy arguments which have been urged in Mr Blackburn's skeleton argument.

*(iv) In **John Roberts Architects Ltd v Park Care Homes** [2006] BLR 106, the Court of Appeal stated obiter that a referring party could discontinue an adjudication. See the judgment of Lord Justice May at page 109.*

102. Let me now turn to the adjudication provisions in the D&C contract and the concession agreement. These provisions do not expressly prohibit a party from withdrawing a claim from adjudication. I see no basis for implying such a restriction. It therefore seems to me that CAMBBA were entitled, on 15th December 2005, to withdraw their claim, if any, relating to the indirect costs of DC11.

103. If, contrary to my view, the adjudicator's approval was required before CAMBBA could withdraw any claim for indirect costs, it is clear that the adjudicator gave such approval in his decision on 30th December.

104. In my view, the adjudicator was quite right to approve that course. I reach this conclusion for three reasons:

(i) In the circumstances of this case it would have been quite wrong to force CAMBBA to press on with a claim for the indirect costs of DC11 before that claim had been prepared.

(ii) There were numerous contractual issues between the parties. These were being, and had to be, dealt with sequentially and in an orderly manner. It was perfectly logical to deal with the indirect costs of DC11 separately from the direct costs. These were two severable and very substantial topics upon which a great deal of work was required.

(iii) All parties to this litigation have been making their way through a minefield. All parties have made tactical errors from which they subsequently sought to escape. MEL included the indirect costs of DC11 in the Bingham adjudication before resiling from that position on 8th December 2005, when the implications became clear. The Secretary of State objected to the inclusion of indirect costs in the Dennys adjudication, but resiled from that position five days later, when the implications became clear. CAMBBA included indirect costs in their notice of joinder, but resiled from that position when the implications became clear. In my view, it would be unduly harsh to hold CAMBBA to the consequences of their mistake.

105. More generally, in my view, both adjudicators and the courts should approach procedural issues in adjudication in a manner which accords with fairness and common sense (as the adjudicator did in this case). Adjudication should not become a game of chess in which the tactical skill of the players determines the outcome.

106. For all of the above reasons I have come to the conclusion that the answer to the question posed in part 7 of this judgment is "yes".

His Honour Mr Justice Jackson. TCC. 13th June 2006.

COMMENT : There are two separate related issues that are of interest here.

The first is, "*What impact, if any does the withdrawal of a claim from adjudication have upon costs?*" The answer is straight-forward in arbitration and litigation in that both judges and arbitrators have mechanisms within s44 CPR 1998 and s61 Arbitration Act 1996. However, unless that parties otherwise agree there is no facility to award costs in adjudication, the norm being that each party covers their own costs. The costs mechanism, where it applies acts as a deterrent to the pursuit of unjustifiable claims, which might otherwise be marshalled as part of a war of attrition, only to be dropped subsequently if the other party is not frightened off from asserting their legal rights. Whilst legitimate tactics in negotiation to bid high, leaving scope to appear to "compromise" it is not to be encouraged in litigation.

The second aspect, which was explored by the parties here, was "*To what extent positing and then withdrawing a claim falls foul of subsequent assertions of issue estoppel and double jeopardy?*" Jackson J made it clear that once withdrawn, a claim can be subsequently reasserted in a fresh action since withdrawal is not tantamount to conceding the issue. Thus not settled, it remains on the table as the potential subject matter of a dispute. In the circumstances of this case, this is appropriate in that the problem was that the claim had not yet been quantified – but it would be less satisfactory if a party were to seek to salami slice different aspects of a crystallised dispute and separate but closely related aspects of a "claim" in successive actions.

Redworth Construction Ltd v Brookdale Healthcare Ltd [2006] EWHC 1994 (TCC)

In this case the court held that an adjudication decision was non-enforceable because there was no written contract for the purposes of s107 HGCRA, at least on the terms argued by the applicant for enforcement at the adjudication. The applicant could not change the pleadings in respect of what contract applied at enforcement. The adjudicator found that there was the contract was on JCT standard form, whereas the court held that this was not the case. There had been much discussion about using the JCT but this had never been formalised and there were a wide range of discussions, both written and oral about the terms of the contract, but much of what occurred developed on an ad hoc basis. There was a dispute that falls for determination - presumably at an alternative forum. ***RJT v D.M.Engineering*** considered.

His Honour Judge Havery. TCC. 31st July 2006

Harlow & Milner Ltd v Teasdale No3 [2006] EWHC 1708 (TCC)

This case concerns an application for an order for sale pursuant to CPR 73.10 as the final stage of proceedings to enforce an adjudicator's decision. The court held that the CPR prevails over any contradiction in the Practice directions which seemed to indicate that an action for sale should proceed through Chancery. Here the original order for payment pursuant to the adjudication was made by the TCC and it was appropriate and in line with the CPR for the same court to deal with the application in order in support of the original order. The basic grounds for sale were the same as those for enforcement. The court noted that the defendant's problems stemmed from the fact that their cash flow problems arose out of a failure of the Local Council to pay amounts alleged to be due pursuant to council grants – but none of that was made part of the contract relationship between the claimant and defendant. The fact that an arbitration of the dispute was pending was no basis not to order the sale. His Honour Judge Peter Coulson. TCC. 7th July 2006.

Hillview Industrial Developments (UK) Ltd v Botes Building Ltd [2006] EWHC 1365 (TCC)

In this action the claimant sought to enforce an adjudication decision in its favour for liquidated damages for delay. The due date for payment of the adjudication decision was the 4th April. The defendant had also pursued subsequent proceedings for the enforcement of sums allegedly due on the final account, under the JCT Standard Form 1998 ed. This hearing was scheduled for the 23rd June also before HHJ Toulmin. Initially His Honour had been prepared to consider hearing both enforcement actions together but this fell away when Hillview filed a defence, disputing the due date for payment under the final account.

Botes wanted both enforcement actions to be heard together because this would have enabled them to set off the £190,780.46 + vat against the £292,650 inclusive claimed by Hillview. Botes conceded there were no grounds to oppose the current enforcement action. There was no likelihood of Hillview not being able to repay.

His Honour reviewed the grounds set out by Jackson J in ***Interserve v Cleveland*** *[2006] EWHC 741*. He noted that whilst the HGCRA and the Scheme aimed to ensure prompt payment and preserve cash flow, there was the facility available to the court to grant a stay if there was a risk of manifest injustice, but this had not been established by Botes. Accordingly application for stay was denied and judgement was given to Hillview with statutory interest.

His Honour Judge John Toulmin QC. 7th June 2006.

Taylor Woodrow Holdings Ltd v George Wimpey Southern Counties Ltd Rev 1 [2006] EWHC 1693 (TCC)

This involved an application pursuant to s45 Arbitration Act. The court, in support of arbitral proceedings, determined that the employer had not undertaken the risk of previously unknown, pre-existing structural problems in a bridge. The problems were identified by a subsequent architectural survey. Mr Justice Jackson. 3rd July 2006.

PRACTICE & PROCEDURE CASE CORNER C.H.Spurin

London Borough of Southwark v Kofi-Adu [2006] EWCA Civ 281

This involved a challenge to the first instance court's determination, on the grounds of breach of the rules of Natural Justice. The Court of Appeal acceded, noting that it is the job of counsel not the trial judge to conduct examination in chief. CA before Laws LJ; Jonathan Parker LJ : Sir Martin Nourse. 23rd March 2006.

Econet Satellite Services Ltd. v Vee Networks Ltd [2006] EWHC 1664 (Comm)

In this s67 Arbitration Act 1996 challenge to the jurisdiction of the arbitral tribunal the court held, confirming the decision of the tribunal, that the tribunal had no jurisdiction to deal with set off under the contract. The applicants had confused the scope clause under UNCITRAL regarding procedure, with the applicable substantive law rules governing the contract.

Mr Justice Field. 13th July 2006.07

Goshawk Dedicated Ltd v ROP Inc [2006] EWHC 1730 (Comm)

Here an injunction was successfully applied for to prevent party pursuing an action to strike out arbitration proceedings before the Georgia Court. Mr Justice Morison. 12th July 2006.

Park Lane Ventures Ltd v Locke [2006] EWHC 1578 (Ch)

A party withdrew a s9 Arbitration Act 1996 application for a stay to arbitration. Certain documents were submitted in support of the application. The court held that the application provided admissible evidence for the purposes of this litigation, which indicated that both parties intended the documents to have legal force.

Randall QC. Mr John. Deputy Judge. 29th June 2006.

Econet Wireless Ltd v Vee Networks Ltd [2006] EWHC 1568 (Comm)

In this case a s44 Arbitration Act 1996 ex-parte injunction in support of overseas arbitration lifted. The other party had no notice. The court had been provided with insufficient information at first instance. It is only in extra-ordinary situations that a court will injunct in respect of overseas arbitral proceedings. Here the court determined that Nigeria was the appropriate forum of the arbitration. Mr Justice Morison. 27th June 2006.

Legal Services Commission v Aaronson [2006] EWHC 1231 (QB)

Following a successful application for a stay the LSC argued that costs should not follow the event because their attempts to settle outside arbitration were frustrated because the applicants had refused to disclose documents outside the arbitration. The court held that whilst this course of action was obstructive (viz unhelpful), this was not a reason to deprive the applicants of costs of the application. They had the right to refuse. Mr Justice Jack. 26th June 2006.

Harper Versicherungs AG v Indemnity Marine Assurance Company Ltd [2006] EWHC 1500 (Comm)

Due to Part VII FSA 2000 mergers the names of parties to an arbitration were not accurately stated. The parties had issued a deed acknowledging submission to an arbitration to settle what was due under reinsurance contracts. The court held that in these circumstances there was no need to institute fresh arbitrations for every name change. Accordingly the arbitrator had jurisdiction to determine accounts between the parties. Mr Justice Tomlinson. 23rd June 2006.

Jones v. Ministry of Interior for the Kingdom of Saudi Arabia [2006] UKHL 26

The issue here was whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state. Lords Bingham; Hoffmann; Rodger; Walker; Carswell. 14th June 2006

Oceanografia SA DE CV v DSND Subsea AS [2006] EWHC 1360 (Comm)

This concerned an unsuccessful s67 Arbitration Act 1996 challenge to the jurisdiction of an arbitral tribunal. There had been a waiver and submission to proceedings by the objecting party. It was now too late to object.

Mr Justice Aikens. 12 June 2006.

Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340 (Comm)

An arbitration clause withheld jurisdiction from the arbitrators to grant injunctive relief. The question here was whether or not the court could grant it in any case? In the circumstances a mandatory injunction forcing parties to work together was found by the court not to be workable and accordingly relief was denied. The court was also concerned about any potential of conflict between determinations of the court and the tribunal which might undermine the value of an award.

Mr Justice Tomlinson. 9th June 2006.

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