



North West
Branch

CI Arb

THE CHARTERED INSTITUTE OF ARBITRATORS

NEWSLETTER

Summer 2010

Chairman's Report

This Is Your Branch – USE IT!

This is the first Branch Newsletter since I took office in March this year. I would therefore like to take this opportunity to thank my predecessor Daniel Brawn for his excellent stewardship of the Branch for the past two years and to take the opportunity to thank all of my colleagues on the Branch Committee for their hard work and support. I will say more about committee activities later but I would first like to introduce myself:

My name is Ian Williams. I am a Fellow of the Institute and have been on the branch committee since 1998. During these last twelve years I have held the roles of Dinner Committee Chairman and Webmaster and until March this year, I was the Vice Chairman. I am the Managing Director of Advent Project Management Ltd and a Director of Advent Global Ltd. Enough about me.....



The North West Branch is as the title suggests, a regional Branch of the Chartered Institute of Arbitrators. Geographically, we cover the North West of England and encapsulate the conurbations of Greater Manchester, Merseyside and Chester and the boundaries of the Branch reach as far North as the southern boundary of the Cumbrian Branch, as far East and South as the North East and Midlands Branches, as far West as the border with the Wales Branch. Last but not least, the Branch also includes the Isle of Man and North Wales Chapter.

The Branch aims to represent members of the Chartered Institute of Arbitrators that reside within its boundaries and we aim to promote the aims and objectives of the Institute at a regional level.

One of the primary functions of the Branch is to arrange educational events for its members. These range from specific educational topics that are deemed to be of interest to those practising in the fields of law, expert witness, adjudication, mediation and arbitration and can be full or half day events or evening events sometimes held over Dinner. Some of the events while being educational are also classed as training events for example our popular Mediators, Arbitrators and Adjudicators Surgeries where delegates discuss real-life situations in manageable sized groups that heighten the experience and in some cases provided one-to-one assistance by our experienced tutors and course leaders.

Recently, we have been active in teaming up with other professional institutions to hold joint-events and more importantly alert you the member to other events that you may not be aware of but may be suitable for the dispute resolution and allied professions. My fellow committee members work tirelessly to organise a full events calendar and this Newsletter. I thank them all! For further information and events you can attend at competitive prices, please see our Events Calendar in this Newsletter.

Please note that in an attempt to reduce the Branch administration costs, future Newsletters will be distributed by email only. In order to ensure that you receive your copy, please ensure that you have updated your Member Profile on the main Institute website or by contacting the membership department at the CI Arb Office at Bloomsbury Square, London. It is particularly important to ensure that the Institute has your up-to-date email address because this allows us to ensure you receive all Branch mailings as well.

This is your Branch! As a member or affiliate of this Branch you have received this Newsletter and I would like to invite you to support the Branch and the work of the committee by attending our Education Events, Training Courses and Dinners. Perhaps you already do support Branch Events and if this is the case, I warmly thank you. However, out of some 450 Branch members, very few are

FROM THE EDITOR

In this Summer edition of the Newsletter:-

Ian Williams

Chairman's Report

Michael Pye

Mock Trial

Ken Salmon

1 Letter of Intent – Again

2 Mediator compelled to give Evidence

3 Local Democracy, Economic Development and Construction Act 2009 (The Act)

4 The Jackson Report Civil Litigation Costs Review 2010

Daniel Brawn

Without Prejudice Communications

Mark Mattison

Update from the Civil Mediation Council

Welcome to new members Plus details of the 2010/2011 programme and dinner events and contact details for all committee members.

Branch Website

www.arbitrators-nw.org

- **Current news** relating to the Branch and Chartered Institute affairs.
- **Articles**
- **Branch Committee –** who's who, mug-shots, contact details.
- **Check forthcoming branch events**

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If you would like to contribute to the next newsletter please contact:-

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Honorary Editor

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Chairman's Report cont'd

regular attendees. Attendance at some of our events has generally fallen recently and we have concluded that this is a consequence of the dire economic conditions that we have experienced over the last three years. There are mixed reports in the press. On the one hand there is talk of the "green shoots of recovery" and on the other, further "deep cuts" and greater austerity measures. The good news for you as a member of the North West Branch is that our Events are competitively priced, are delivered locally and offer a great choice of topics by excellent speakers. My plea to you therefore is to come along and support the Branch activities. I would also urge you to consider supporting the committee because without it the Branch will not function and the many events you currently enjoy locally may be unavailable in the future unless you travel even further afield. Use your Branch or lose it!

Regrettably, during the last year we have seen the demise of the Northumbrian Branch due mainly to the apathy of the members in that Region. Let us not go the same way!

You may not care! You may not see the relevance! However, the danger is that if we, the membership do not support our Branch, then we will see more, if not all, future events becoming controlled from Bloomsbury Square. As a member of another professional institution, I have personally experienced the effect that the central control of events can have on a member as the choice, relevance and frequency of the events will lessen, ticket attendance costs will rise and events will only be held where the Institute may feel it will make money – this could well be London. On a local and sometimes regional level this can have a devastating effect on the ability of the member to obtain local and relevant CPD training or career development as the cost of attending events further afield than the Branch area may prove to be too expensive. Some may say that London events are expensive at the best of times. More importantly perhaps is the networking opportunity that our Branch events and committee meetings offer you especially if you are a sole practitioner or work in a small office where the opportunity to have a 'chin-wag' with fellow professionals operating in the ADR sector are limited. Branch events and even our committee meetings are a great way to learn what is happening in other practices and in the industry generally.

Although a new member did join the committee at the last AGM, regrettably, we have lost three committee members due to retirement. Again, I take the opportunity to personally thank those members for their years of service to the Branch and for their energy and enthusiasm. However, we must also look forward and with this in mind, I have an offer to make that you cannot refuse!

Come along and see what the Branch Committee gets up to. This is a **FREE no-obligation** "Taster" invitation to sit in on a future committee meeting of your choice (see dates below). You may think it is onerous? It really is not! Other than the AGM, the committee meets about 5 times a year and a meeting lasts for about 1-1½ hours. Is this really too much time to ensure that your local Branch remains active for you and your fellow members in the future? You also get more out of your membership by participating in local events.

Why not come along and give it a try? Be part of it or lose it!

If you would like to know more please do contact me personally on 01248 679 266 or 07889 082 182 and I will be delighted to see how I can assist you to get more from your membership.

Thank you for taking the time to read this note – **any questions? Email me at ian.williams@adventpm.co.uk**

Ian Williams FRICS, FCIArb, DipArb, FinstCPD, Accredited Mediator

We are currently working on upgrading the Branch website to become part of the overall Institute's main website and as such we apologise if some of our existing branch website information may be out of date while we concentrate on the new site. Once it is live we will provide further details.

www.arbitrators-nw.org

Mock Trial

(Michael Pye)

On 23 September 2010, in conjunction with the CIOB, the CI Arb North West Branch is staging a mock trial for a construction claim in the courtroom of The Old County Police Station in Bolton. This will be the first in a series of four events being held in the North West over the coming year in conjunction with other leading construction institutes such as the ICE and RIBA in which the same claim is subsequently staged through mock mediation, a mock arbitration and finally a mock adjudication.

The old courtroom in Bolton was first commissioned in 1870's and used as a magistrates court up until as recently as 1990. In fact, it still has several existing cells in the basement which no doubt could tell a grim tale or two of life in the old days. Nowadays it is used mainly by television and film production companies such as Coronation Street.

The judge presiding over the Mock Trial will be Edward Bootland of Linder Myers, Manchester and advocates from local chambers will be representing the parties. This is not an event to miss and will be of particular benefit from those attendees who wish to follow the series. For more information contact mpye@pyeassociates.com.

Letters of Intent – Again

By Ken Salmon

How often do we hear of, read, or see cases where following a letter of intent (LoI) the parties get into a dispute about whether or not a contract came into existence? This note concerns yet another example of the folly of proceeding on a LoI.

The parties were a factory owner and a contractor. They entered into a LoI in February 2005 valid for 4 weeks for the design manufacture and installation of equipment at the Owner's factory. It got extended once. By June 2005, the LoI had expired but the parties had agreed the amendments to MF/1 and most of the schedules. They had agreed the scope of the works for the agreed price.

Then they got into dispute about whether the works were governed by the MF/1 conditions. This dispute – what were the terms of the contract – was tried before a high court judge who gave judgment on 16 May 2008. He decided there was a contract based on the parties' agreements but it did not include MF/1. It went to appeal and at the hearing in the court of appeal in November 2008 the contractor raised a new argument: that there was no contract at all. The court of appeal gave judgment in February 2009. It allowed the contractor to take the new point because to decide the terms of a contract one had inevitably to decide first if any contract existed. Fair enough you may think. The decisive factor however was that the LoI referred to MF/1. The contract the parties hoped and expected to enter into was to be based on MF/1. Clause 48 of MF/1 provided that the contract covered not just the conditions but all the schedules as well. It also said that the contract "*...shall not become effective until each party had executed a counterpart and exchanged it with the other*". The court thought the meaning clear and that no contract came into existence because the schedules were not all agreed and the counterparts signed

and exchanged. RTS appealed to the Supreme Court who gave judgment in March 2010. They reversed the court of appeal and decided that the question of whether there was a contract was to be decided on an objective consideration of what was said and done and whether that lead objectively to an intention to create legal relations and whether the parties had agreed all the terms they thought, or the law required, as essential for a formal and binding contract. It was unrealistic to suppose the parties did not intend to create legal relations, once they agreed price, invoicing and payment and a variation to delivery times. Cl 48 of MF/1 prevented the agreement becoming binding until a formal contract was signed or exchanged but that condition could be and had been waived by conduct in reaching the various agreements. So there was a contract on the terms agreed and the previous requirement for signature and exchange had been overtaken by events.

This case was unusual in that practically all the essential terms had been agreed and a different outcome would have ensued if there had been unagreed essential terms. The courts strive to find a contract when works have been substantially performed and eventually did so here. But the fact that the case went through three courts and each came up with a different view, shows only too well the dangers of starting work without an agreement in place

¹ RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH & Co [2010] UKSC 14

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Without Prejudice Communications

By Daniel Brawn

The “without prejudice” rule applies to written or oral communications made in negotiations for the purpose of compromising an existing dispute between the parties, where the communications were expressed or otherwise proved to have been made “without prejudice”.¹ The rule makes evidence of those communications inadmissible in any subsequent litigation unless both parties agree.² The public policy underlying the rule is that parties should be encouraged to settle their disputes without fear that statements made in negotiations may be used against them in subsequent proceedings.³ The main exception to the rule is that WOP communications must not act as a cloak for perjury, blackmail or other “unambiguous impropriety”.

The fact that negotiations are sensitive does not confer privilege (if that is what you want, use a confidentiality agreement), there must be an identifiable dispute.⁴ The privilege binds the parties and their solicitors,⁵ unless it is waived.⁶ It cannot be waived unilaterally,⁷ but if one party lifts the edge of the cloak without the other party’s consent, the other party may accept the repudiation and insist that all communications are admissible.⁸ A document need not be headed “without prejudice” for the privilege to attach,⁹ and using that heading is not definitive, the court will examine the true nature of the document.¹⁰ The privilege covers subsequent communications, even if not expressed to be WOP, unless a clear break is indicated, such that a reasonable recipient would realise that there was a change in the basis of negotiations.¹¹ A joint statement by experts following a WOP meeting is disclosable by virtue of CPR Part 35.12.¹¹

In *Shepherd Construction –v- Berners*,¹² Coulson J said that the privilege attaches to “all statements made by each party touching upon the strength or weakness of its own and its opponent’s case”. Berners did not pay the money it had been ordered to pay, and Shepherd asked when Berners would pay, but there were no “negotiations” and therefore it was not WOP. In *Bradford & Bingley –v- Rashid*,¹³ the bank sought repayment of a loan, Rashid wrote a letter asking for more time to pay, the bank then commenced proceedings on the basis that the debt was admitted. Rashid said his letter was WOP, but the House of Lords disagreed, because the debt itself was admitted and was not in dispute.

However, in *Ofulue –v- Bossert*,¹⁴ Ofulue alleged that Bossert was a trespasser, Bossert claimed she was a tenant but sent a WOP letter accepting that Ofulue owned the property and offering to buy it. That offer was not accepted. In due course the claim was struck out. Later, Ofulue commenced fresh proceedings for possession, but this time Bossert claimed good title due to adverse possession for 12 years pursuant to S.15(1) of the Limitation Act 1980. Ofulue sought to rely on the WOP letter from the first proceedings as evidence that Bossert had acknowledged Ofulue’s title to the property. The House of Lords found against Ofulue.

The moral is, formally dispute the matter first, then negotiate “without prejudice”.

EXCEPTIONS TO THE RULE

Exceptions to the WOP rule seek to uphold public policy and prevent abuse, lest the privilege should act as a cloak for perjury, blackmail or other unambiguous impropriety.¹⁵ However, the parties should speak frankly when negotiating a settlement and the exceptions apply only where there is clear abuse of privilege.¹⁶ The fact that during WOP negotiations a party says something that conflicts with its “open”

¹ *Woodward –v- Santander UK PLC* [2010] UKEAT/0250/09/ZT.

² *Rush & Tomkins –v- Greater London Council* [1989] AC 1280.

³ *Cutts –v- Head* [1984] Ch 290.

⁴ *Prudential Assurance Co Ltd –v- Prudential Assurance Company of America* [2003] EWCA Civ 1154.

⁵ *La Roche –v- Armstrong* [1922] 1 KB 485.

⁶ *Somatra Ltd –v- Sinclair Roche & Temperley* (2000) 1 Lloyd’s Rep 311.

⁷ *Reed Executive plc –v- Reed Business Information Ltd* [2004] 1 WLR 3026).

⁸ *Somatra Ltd –v- Sinclair Roche & Temperley* [2000] 1 WLR 2453.

⁹ *Chocoladefabriken Lindt –v- Nestle* (1978) RPC 287.

¹⁰ *Cheddar Valley Engineering Ltd –v- Chaddlewood Homes Ltd* [1991] 1 WLR 820.

¹¹ *Aird –v- Prime Meridian Ltd* [2006] EWC Civ 1866.

¹² *Shepherd Construction Ltd –v- Berners (BVI) Ltd and Another* [2010] EWHC 763 (TCC).

¹³ *Bradford & Bingley plc –v- Rashid* [2006] UKHL 37.

¹⁴ *Ofulue –v- Bossert* [2009] UKHL 16.

¹⁵ *Savings and Investment Bank Ltd –v- Fincken* [2003] EWHC 719 (Ch), following *Unilever Plc –v- The Procter and Gamble Co* [2000] 1 WLR 2436

¹⁶ *Williams –v- Hull* [2009] EWHC 2844.

case is not “unambiguous impropriety”, there must be some abuse of the process like threats or blackmail or perjury.¹⁷ “Serious and substantial risk of perjury” is not sufficient, there must be unambiguous impropriety.¹⁸ WOP communications are admissible to establish that an agreement was reached,¹⁹ but not to show the terms of that agreement.²⁰

If during negotiations one party makes a clear statement intending the other party to act on it, and the other party does so act, the statement may be admissible as giving rise to an estoppel.²¹ Evidence of WOP negotiations may be admissible for the purposes of rectification.²²

WOP communications are also admissible if marked “without prejudice except as to costs”. In *Calderbank –v- Calderbank*,²³ Mrs Calderbank offered her husband a house as part of their divorce settlement, he did not accept and at trial was awarded less than the value of the house. He was penalised in costs. The “Calderbank letter” is used to make offers of settlement in arbitration, and sometimes in adjudication. In court proceedings a payment into court of the amount of the offer is preferable and by CPR 36.19(1) is treated as “without prejudice except as to costs”. However, a Calderbank letter may be used where the offer is of a nature that cannot be paid into court – such as a house.

¹⁷ *Berry –v- Moussavi* [2003] EWCA Civ 715, *Savings and Investment Bank –v- Fincken* [2004] 1 WLR 667.

¹⁸ *Berry Trading and another –v- Moussavi* [2003] EWCA Civ 715.

¹⁹ *Tomlin –v- Standard Telephones and Cables Ltd* [1969] 1 WLR 1378, CA.

²⁰ *(Oceanbulk Shipping & Trading SA –v- TMT Asia Ltd* [2010] EWCA Civ 79).

²¹ *Hodgkinson & Corby Ltd –v- Wards Mobility Services Ltd* [1997] FSR 178.

²² *Unilever Plc –v- The Proctor & Gamble Company Ltd* [2000] 1 WLR 2436.

²³ *Calderbank –v- Calderbank* [1975] 3 All ER 333, CA.

Update from the Civil Mediation Council

Mark Mattison

There was a recent election for a vacancy for a mediator provider on the board of the CMC which was won by the Association of Northern Mediators. On behalf of the ANM I attended my first board meeting at the end of June.

Here is an outline of some of the work that the CMC is currently undertaking.

The CMC is responsible for the annual accreditation of mediation providers across England and Wales for the National Mediation Helpline scheme operated through the Courts. Some additional providers seek CMC accreditation even though they do not wish to undertake NMH work.

There are some ten or eleven organisations which provide civil and commercial mediation training, which is required for NMH mediators. The courses are all different in length and content. The CMC recently commissioned research to identify the course content and “pass” requirements of each of these courses and then organised a facilitated meeting of all the training providers with a view to agreement being reached as to the core components for all civil/commercial mediation training courses and minimum standards for the accreditation of individual mediators. Progress has been made but at least one further meeting will be necessary to finalise any agreement. Differences will remain between the various courses after this process has concluded but I expect that there will be a minimum standard with which all providers will be committed to comply if they wish to be recognised by the CMC for accreditation purposes.

Reference is made elsewhere in this newsletter to a change in the training provider for the CI Arb. Currently the CI Arb offers one of the most comprehensive mediator training courses available.

The CMC recognises the importance of workplace mediation. It held a forum in March of this year with some 35 organisations attending. It has since committed itself to reviewing workplace mediation standards. If this is an area of interest to you, you can find the results of a government survey at (<http://www.berr.gov.uk/policies/employment-matters/research/seta>)

Every year the CMC holds a one day conference. At this year’s conference on May 13 the keynote speech was given by Lord Neuberger the Master of the Rolls. If you would like to read the speech you can download it from the CMC website at www.civilmediation.org. You will find it in the “news” section on the website.

Periodically the CMC issues guidance notes. It has recently issued a note on the obligations of mediators under the Proceeds of Crime Act. It has previously issued a note on the subject of mediation confidentiality. You can obtain copies of these guidance notes from the CMC website.

Mark Mattison (markmattison@talktalk.net)

Mediator CI Arb NW branch member and CMC board member

NEW MEMBERS

The North West branch is pleased to welcome the following new members.

Francis Okanigbuan
Isaac Okeya
Christopher Heath
Christopher McCormick
Stephen Moore
David Hugill
Mark Andrew Littler
Graham Benson
John Riley
Stephen Findlay

THE CHARTERED INSTITUTE OF ARBITRATORS

Membership Benefits

A prestigious secondary qualification

CIArb is the world's leading professional body that offers ADR professionals credibility through qualifications and recognition

- members are able to progress to Chartered or Accredited status – the ultimate accolade for practitioners
- recognisable post-nominal letters ACIArb, MCIArb, FCIArb

Training and development

CIArb – setting the global benchmark in dispute resolution

- continuing professional development (CPD)
- education and training opportunities
- conferences, seminars and other events
- professional networking and social events
- panel membership for Presidential appointments

Access to information and knowledge

CIArb offers members a range of professional advice and guidance

- dispute resolution advice service
- free subscription to The Journal
- global website www.ciarb.org
- newsletters including The Resolver and NewsWatch
- books for purchase at discounted rates for members
- free weekly Linex Legal alerter service (worth £100)
- access to the CIArb's library, now situated at the Maughan Library, Kings College London

Networking opportunities, locally and internationally

CIArb membership offers a global dispute resolution community

- a worldwide network of members, Branches and Chapters
- online networking and discussion fora
- Special Interest Groups (SIGs)
- opportunities for active involvement

Additional benefits

CIArb member products and services – most with discounted rates

- hearing and meeting facilities at 12 Bloomsbury Square, London
- education and training and other events
- books and other member affinity schemes
- advertising

For UK tax payers who pay their own professional fees: remember you are eligible to claim tax relief against the full annual subscription fee, via the annual tax return or by completing the claim form P358 available from local tax offices.

If you have any questions or for further details about membership services, please contact the membership team: E : membership@arbitrators.org T : +44 (0)20 7421 7490

EVENTS PROGRAMME 2010

| DATE | EVENT | SPEAKERS | HOSTS/VENUE |
|----------|---|---------------|----------------------------|
| 16.09.10 | Branch Committee Meeting | | Knowles Offices, Daresbury |
| 23.09.10 | Mock Trial Joint Event with the CIOB | | The Old Courtroom, Bolton |
| 4.11.10 | Branch Committee Meeting prior to Annual Dinner | Tony Bingham | De Vere, Daresbury |
| 18.11.10 | Law Relating to Defects | Kevin Barrett | |

EVENTS PROGRAMME 2011

| DATE | EVENT | SPEAKERS | HOSTS/VENUE |
|--------------------|--|------------------------|----------------------------|
| 13.01.11 | Branch Committee Meeting | | Knowles Offices, Daresbury |
| 19.01.11 | Adjudication/Arbitration Surgery | Chaired by Paul Jensen | |
| Feb 2011 | Mock Mediation Joint Event with the RIBA | | Provisional |
| 3 or 10 March 2011 | AGM Dinner | | De Vere, Daresbury |
| 28.04.11 | NEC 3 Review | Charles Tomlinson | |
| May 2011 | Joint Dinner | | Huddersfield |
| November 2011 | Annual Dinner | | De Vere, Daresbury |

MEDIATOR COMPELLED TO GIVE EVIDENCE

By Ken Salmon

In **Farm Assist Ltd v DEFRA (no 2) [2009] EWHC 1102 (TCC)** 19 May 2009, Ramsey J refused to set aside a witness summons issued against the mediator (Jane Andrewarthur of Clyde & Co). Jane had mediated a dispute between FAL and DEFRA in June 2003. The dispute was settled at the mediation, since which time Jane had conducted some 50 mediations per year. FAL now alleged they had only settled as a result of DEFRA applying economic duress during the mediation and that Jane was a necessary witness to what occurred.

Jane argued that

1. The mediation was covered by confidentiality, privilege and was without prejudice, so her evidence was inadmissible
2. The parties had agreed not to call her as a witness and in any event she should not be called as it would undermine the mediation process
3. She had no recollection of the events as the mediation was so long ago.

There was a written mediation agreement and it was expressly agreed (1) that the mediation was confidential, privileged and without prejudice and (2) that the parties would not call the mediator to give evidence "in relation to the Dispute" (as defined).

Ramsay J decided

1. Mediation proceedings are covered by "without prejudice" privilege as to both documents and information used at the mediation, but this belonged to the parties not the mediator and could be (and here was by agreement) waived by the parties so that it was all admissible.
2. The proceedings were confidential as between the parties and the mediator. Such a term would be implied even if not expressed. Even if the parties agreed to waive the confidentiality, the mediator could still enforce the provision. The court would generally uphold that confidentiality but where it was in "the interests of justice" for evidence to be given of confidential matters, the court could order or permit that evidence to be given or produced.
3. If other privilege attaches to documents (e.g. legal professional privilege) which are produced and shown to the mediator, the party retains that privilege and it is not waived by that disclosure.
4. It was in the interests of justice that the mediator give evidence and the witness summons should not be set aside because:

(a) The issue in the case was whether the settlement should be set aside for economic duress. The parties had waived without prejudice privilege and the mediator had provided the parties with the limited documentation she still held. FAL had pleaded and relied on what occurred in the mediation and in witness statements what was said in private sessions with the mediator. That evidence formed a central part of FAL's case and the mediator's evidence was necessary for the court to properly determine what was said and done.

(b) Whilst the mediator had said she had no recollection of the mediation that did not prevent her giving evidence. Her memory might be jogged when documents were shown or events mentioned.

(c) Giving evidence was not contrary to the mediation agreement it having been held that such agreement was limited to the (original) Dispute not the current proceedings which were not "in relation to the Dispute".

(d) The parties had waived privilege as they were entitled to do.

(e) Whilst the mediator was entitled to rely on the confidentiality provision, in this case as an exception, the interests of justice strongly lay in favour of her evidence being heard.

Comment

This case is a worrying development in the law relating to mediation. Although from a much respected judge, it is a decision that mediators will regret.

MEDIATOR COMPELLED TO GIVE EVIDENCE CONT'D

The exposition on the law of confidentiality and privilege is welcome especially that there is a species of mediation privilege that exists even if the mediation agreement does not say so; and that there is an implied promise not to call the mediator to give evidence.

Previous case law allowed the court to lift the veil of confidentiality to determine whether or not an agreement has been concluded, as an exception to the confidentiality of the mediation process (Patel). But there was no suggestion, in that case that the mediator might be compelled to give evidence.

What can be done? Mediation agreements should continue to provide expressly that the proceedings are confidential privileged and without prejudice and the parties will not call the mediator to give evidence on any matter or thing arising out of, connected with or relating to the original dispute or the mediation proceedings. Mediators and parties' advisers should make the parties aware of these narrow exceptions to the confidentiality rule.

The allegations made in this case, should also serve as a warning to parties and their advisers not to attempt to apply duress or engage in other unfair practices in the mediation, lest any settlement or advantage gained, should later be lost.

**Mace & Jones
Mediation Unit**

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009 (the Act)

By Ken Salmon

Amendments to the Housing Grants Construction and Regeneration Act 1996 (1996 Act)

Where are we now?

During its passage through the committee stages and third reading in the House of Lords, the proposed amendments to the 1996 Act were substantially reduced. What is left, is now enshrined in Part 8 of the Act which received the Royal Assent on 12 November, 2009. However Part 8 is not yet in force. The idea is to agree a new Statutory Scheme for Construction Contracts after consultation and then bring the Act into force. Following the General Election it remains to be seen if and when Part 8 will be brought into force.

Application

The Act will apply to England, Wales and Scotland.

The changes

Adjudication

- Construction contracts need no longer be wholly in writing or evidenced in writing. Contracts which are made orally or party orally will be subject to the Act. Section 139(1) of the Act repeals section 107 of the 1996 Act so that Part II of the 1996 Act applies to all construction contracts.
- Adjudication provisions must still be in writing to have contractual effect (section 139(2)). The provisions that must be in writing are those found in sub-sections 108(2) and (3) of the 1996 Act. If those provisions are not in writing or non-compliant, the (new) Scheme will apply (as at present)
- A statutory slip rule (section 140 introduces section 3A to the 1996 Act). Adjudicators will have power to correct clerical or typographical errors in their decisions. The English courts had already decided that such power exists and the original proposal was to introduce the new power in Scotland only. Now it will apply throughout the three countries. The extent of the new power is uncertain and is sure to be tested in the courts. The parties will be free to agree a contractual slip rule failing which the (new) Scheme will apply.
- New provision (section 141) allows the parties to agree in writing how to allocate the costs, fees and expenses of adjudication provided that the agreement confers power on the adjudicator to allocate his fees and expenses. Contractual provisions dealing with the allocation of the parties' costs and expenses will be unenforceable unless entered into in writing *after* the notice of adjudication is given.

Consequences

- *A greater number of disputes will be capable of being referred to adjudication*
- *There are likely to be more disputes over the terms of the contract (or even if there is a contract at all and possibly whether it came into being before or after the Act)*
- *More disputes will be governed by the Scheme*
- *The potential for more jurisdictional challenges and more applications to the courts*
- *If the contract draftsmen or parties wish to give the adjudicator a power to decide who shall pay the costs and expenses of the reference, they must be careful not to impose a requirement on him to do so – else the clause will be ineffective.*

Payment

The main changes to the payment provisions are summarised below. Note there are no changes to requirement for and intervals at which interim payments are to be made – the proposed changes to section 109 of the 1996 Act have been dropped.

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION ACT 2009 (the Act) CONT'D

Payment

- Section 142 includes new subsections 110(1A) – (1D) to the 1996 Act. 'Pay when certified' and other types of clause making payment dependent on the performance of obligations under *other* contracts, or upon the giving of notice by the paying party, are outlawed.
- 'Pay when paid' clauses are already banned and remain banned save for the 'upstream' insolvency exception under section 113 of the 1996 Act. Section 142 extends the range of prohibited conditional payments. The amendments to section 110 and failure to amend section 113, give rise to interpretational difficulties. The amended sections have been described as 'inaccessible' (by some commentators).
- The new provisions do not outlaw or prevent the normal payment arrangements under management contracting. New subsection 110(1C) creates an exception for contracts where works are to be carried out by a third party under a sub-contract or similar arrangement. But there is no like protection for the management contractor himself. Thus the management contract may provide for payment of the sub-contractor based on the certificate of a contract administrator and his view of the value of the work carried out by the third party. That would be lawful and binding as between the Employer and the Management Contractor. But the Management Contractor cannot impose a similar arrangement on his subcontractors because the subcontractor is carrying out the work under the subcontract not arranging for it to be done by a third party. Be clear that these provisions are not entirely limited to management contracts and will apply to other arrangement where one party (C) agrees with his employer (E) that he will arrange for another Party (S) to carry out work.
- New subsection 110 (1D) provides that any payment mechanism where the payer or any third party decides when payment is *due*, is unlawful. But the contract may still require the payee to give a notice to trigger the due date for payment.
- The *big* change. New payment notices and the replacement of the current withholding notices. Section 110(2) is repealed and replaced by sections 110(1A and B) and there is a new section 111. Construction contracts will require either the payer or the payee to issue a new form of payment notice specifying:
 - The sum
 - The payer or payee consider due; or
 - The payer or payee considers was due at the payment due date
 - The basis on which that sum was calculated

The contract may require an engineer, architect, or other "specified person" to give the payment notice. Existing standard forms are likely to be amended so that interim certification mechanisms comply. Even notices for nil have to give and *repeated* as often as necessary.

If the payer or specified person is liable to but fails to give a payment notice, the payee may give a "default" payment notice. There is no sanction for failing to give a default notice but in practice it may be the only way to get paid. The payee does not have to give a second notice if it has given its own payment notice any time before the payee's notice was required. This is apparently to prevent the payee claiming a greater sum than first notified. The date for payment is postponed by the number of days after the due date that the default notice is given.

Withholding

- Section 144 replaces section 111 of the 1996 Act. Withholding is no more. Rather the payer is required to identify any different sum it says is due at the date of the new section 111 notice, and the basis on which the sum is calculated. The sum stated in the section 111 notice is the sum payable unless the payer gives a section 111(3) counter-notice not later than 7 days (or other agreed period) before the final date for payment. If a valid counter notice is given the sum due is limited to that stated in the counter notice. If an adjudicator later determines the sum due is more than that in the counter notice, the final date for payment is the later of:

7 days after the decision; or
The contractual final date for payment

The payment notice and counter notice can be combined into one. The information to be given in the counter notice is the same as that required under the current sections 110 and 111.

Insolvency

- The new exception providing for insolvency reflects the law laid down in *Melville Dundas and George Wimpy [2007] UKHL 18* and is limited to cases of insolvency only. So the new section 111(10) applies if insolvency occurs between the date when a counter notice would have to be given and the final date for payment. To get the benefit of the provision the payee would have to serve the counter notice even if the onset of insolvency occurs before the date for giving the notice.

Suspension

- Enhanced rights of suspension. Three changes. The new provisions allow a payee to suspend all or *part* of its obligations under the construction contract. A valid suspension carries the right to an extension of time for the period of suspension *plus any delay* suffered as a consequence. The defaulting party must also pay the payee a *reasonable amount* for reasonable costs and expenses due to the suspension.

If and when the new Scheme is agreed and the Act is scheduled to come into force, will be time to revisit contract terms and conditions and for the redrafting to begin.

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THE JACKSON REPORT – CIVIL LITIGATION COSTS REVIEW 2010

By Ken Salmon

Sir Rupert Jackson's one year long review of costs in civil cases culminated in the publication of a 584 page Report on 14 January. The main aim is to promote a package of measures designed to facilitate access to civil justice at proportionate cost. It also undertook a review of case management procedures and has regard to different costs regimes. The main findings and radical recommendations that may be of interest to members, are summarised below.

Alternative dispute resolution (especially mediation)

- Mediation / and Joint Settlement Meetings are efficacious for all kinds of claims including personal injury claims (in the latter case with specialist mediators versed in PI law and practice)
- Small businesses and the public as well as some lawyers and judges do not know of or accept the benefits of ADR and a serious education programme is needed
- Mediation has a significantly greater role to play than is currently recognised
- It is important that mediation is undertaken at the right time (i.e. too few mediations take place before proceedings)
- Mediation should not be compulsory BUT must be encouraged, directed and parties penalised for unreasonably refusing to participate
- The message is that there will be a greater role for mediation and a need for specialist mediators

Conclusion

Since what is needed is a culture change not a rule change, perhaps we can expect developments in this area sooner rather than later.

Costs

The Report recommends –

- An end to the recoverability of success fees and insurance premiums under conditional fee agreements – these should be paid by the party who incurs them; private individuals and SMEs would be encouraged to take out Before The Event Insurance
- Qualified one way costs shifting for certain types of claim for example personal injury, clinical negligence, IP and defamation, with other types of claim to be considered. Thus a claimant would be able to recover costs from the defendant if successful as at present, but would not be liable for the defendant's costs if unsuccessful in the claim (unless he behaved unreasonably or unjustifiably)
- Fixed costs of £12,000 pre trial in fast track cases and extending the fast track to more cases
- Streamlined procedures and a sued guide for the Mercantile Court; an extended small claims track for SME business v business claims
- The abolition of the indemnity principle – meaning a party entitled to costs need not show a liability to its own representatives for the costs or amount of costs claimed; this would facilitate contingency fee as well as conditional fee agreements
- Making contingency fee arrangements available for contentious work thereby adding another method of funding provided that the unsuccessful party ordered to pay costs will only be liable for conventional costs and the agreement are regulated to safeguard clients
- IP claims will be dealt with by a Patents Court with extended jurisdiction and capped costs
- Abolishing referral fees

- Repealing large parts of the Practice Direction on pre-action conduct to save complexity and cost
- Replacing standard disclosure (of documents) with a 'menu' of disclosure options in some types of cases and training for all lawyers and judges in e-document management and disclosure
- Stronger use of case management powers including costs management – which may reduce costs or simply limit recoverable costs e.g. reducing the length and prolixity of witness statements
- Increasing damages by 10% to compensate for inability to recover success fees and or insurance premiums in CFA cases
- Increasing damages by 10% when a defendant fails to beat a claimant's part 36 offer
- Creating a costs council to decided guideline hourly rates
- Improved costs management, training for all lawyers and judges in costs budgeting and management and a simplified bill of costs and IT-streamlined procedures for detailed assessment
- Extending electronic working as in the TCC and Commercial court to all other high courts county court and district registries
- The T&C and commercial courts are left largely untouched as they work satisfactorily

Preliminary thoughts

Some of these measure will doubtless improve the procedures and help to reduce costs particularly the front end costs which have increased dramatically and at least in part as a result of pre-action protocols and practice directions; and in further part by reason more extensive and sophisticated disclosure including electronic disclosure.

At the same time any shift away from conventional costs awards is unlikely to be welcomed by businesses who expect to recover their costs if successful. Whilst initial proposals for limited costs shifting will be confined to cases involving individuals or small businesses, and specific types of claim (see above), it may be an indication of things to come. Also many will fear a system of contingency fees. Not least because it requires significant funding and careful risk management that smaller law firms may find a problem, could lead to a denial of justice to those whose claims are not very strong, and might result in conflict between lawyer and client.

There is however no doubt that the proposed reforms give the Institute and its dispute resolving members the hope and opportunity of an increased share of the dispute resolution market. Arbitration, if not mediation, may prove to be a more attractive option to public authorities, commerce and industry. The time for users to start thinking about the future is now before they enter into contracts which provide for litigation in an uncertain future. A well crafted dispute resolution provision could take some of that uncertainty away by adopting the best and rejecting the rest of the CPR.

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**NW BRANCH COMMITTEE DETAILS (ALL COMMITTEE MEMBERS TO UPDATE DETAILS TO JOHN
PRICE AS APPROPRIATE)**

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