CHARTERED ARCHITECTS
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DISPUTE RESOLUTION
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SENSE STUDIO

ANGLES

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Welcome to the Sixth edition of "ANGLES" our triannual newsletter which we hope you will find a source of interesting information and news. We welcome feedback and contributions so please **let us know what you think**. We hope you will enjoy this and future editions. **Murray Armes**

The Expert Witness in Adjudication

When introduced in 1998, adjudication was intended to be a quick and cheap method of dispute resolution to help cash strapped contractors and subcontractors avoid insolvency. Since then, because domestic adjudication is the subject of a good deal of case law, the process has become increasingly legalistic and its popularity has led to more complex disputes being referred than was probably ever envisaged when the process was conceived by Latham. Adjudication is now used not only for straightforward disputes but for some that are technically complex and which often cannot be resolved within the prescribed twenty eight day period.

Despite critics asserting that adjudication is not a suitable forum for the resolution of complex disputes and in particular professional negligence cases, many such cases are being referred. Technical expert witnesses are used in order to demystify complex issues for both those instructing them and to explain those issues to the tribunal, be it a judge, arbitrator(s) or an adjudicator. Although such instructions have become almost universal in court and arbitration cases, the use of experts has not always been the norm in adjudication and the question arises as to whether experts are required at all and if they are, whether the role is different to that in arbitration and litigation.

Although not directly relevant to adjudication the Pre-Action protocol requirement of litigation for experts to be appointed to give opinion on the performance of a professional in negligence cases must surely apply to adjudication if the process is to have any credibility[1]. A question arises if no such expert evidence is provided whether an adjudicator should request that it is[2].

Although adjudication may never have been intended as a means to resolve complex technical or negligence cases the reality is that this is exactly how some parties are using it and therefore the use of experts in adjudication is here to stay and possibly set to increase.

If the experts' instructions originate from the Referring Party then the expert may be required to act initially in an advisory capacity, exactly as in litigation, and then to produce an expert report. The process allows the Referring Party's expert the time to fully carry out its instructions. If instructed by the Responding Party there is likely to be much less time[3] and therefore the role is usually one of reacting to the Referral and any expert reports produced in support of it. The expert instructed by a Responding Party may well have very little time to get to grips with the facts and issues and to produce an expert report. This could put the expert in the position of being unable to properly investigate all the facts of a case and therefore to be forced to rely heavily on the evidence produced by the party instructing the expert. Depending on the quality of that evidence the expert may face the prospect of working with evidence that does not provide a complete picture of the facts.

In most adjudications the only opportunity an expert has to explain its opinions is in the report produced for the adjudication. When writing the report the expert must remember that the adjudicator is also under pressure, so it should clearly and concisely tell the story, set out clear reasons for its opinions, ensure that any documents referred to are attached and clearly cross referenced in the text. If a clear and concise report is good practice in litigation it is essential in adjudication and written well it can assist the adjudicator to decide the dispute. Although the report is often produced under pressure the expert should guard against advocating its instructing party's case and straying into the territory of hired gun, which it can be easy to do when producing a report quickly and sometimes with limited access to evidence. In my view, despite there being a possible temptation to be overly bullish about a Party's case, a report that is objective and obviously neutral is more likely to be more persuasive.

Party appointed experts appointed in support of adjudication

proceeding are not subject to the Civil Procedure Rules or other protocols as they are when instructed in connection with litigation or arbitration. Adjudication is a much less formal procedure where there are no formal rules for experts, other than those imposed by professional bodies[4]. A recent survey conducted by the Society of Construction Law[5] suggested that in adjudication there is not always a clear boundary between independent expert evidence and that of an advocate. This is a difficulty that might arise out of lack of time, where the expert instructed on behalf of the Responding Party will be faced with a short timetable to produce a report and may have little option but to take the Referring Party's evidence at face value. There is also usually no time for the exchange of expert reports during adjudication proceedings. This may be a particular problem for the expert appointed by the Referring Party because the first time it will see the opposing Party's case and expert report is when the Referral is served.

Whereas under the CPR the expert's primary duty is to assist the tribunal, there is no such mandatory obligation in adjudication, although in my view there should be no difference and the experts should aim to assist the resolution of the dispute by assisting the adjudicator. Unlike reports produced under the CPR[6], expert reports produced for adjudication do not have to include a signed declaration, although in common with factual witness statements they often include a short statement of truth. My own experience suggests that even experienced and well established experts are more willing to take diametrically opposing views in a way they might not so obviously do in litigation because there is less time and opportunity to challenge them. The short timetable, at least for the Respondent is unlikely to help and the lack of formality and the private nature of adjudication means that a party appointed expert that has strayed into advocacy or worse still has obviously taken on the role of hired gun will be shielded from the possibility of the public criticism (and sanctions) a judge may deliver but which an adjudicator is not empowered (or advised) to do.

This could leave the adjudicator with a dilemma as to just how much reliance and weight should be attributed to a party appointed expert's report, which becomes much more crucial role when the adjudicator decides not to hold a meeting. Just like conflicting factual evidence, conflicting expert evidence might only be resolved by holding a meeting to test the evidence. This is something I have had experience of myself as an adjudicator on a number of occasions when trying to work out which of two diametrically opposing views to choose between and which Party's evidence to prefer.

Should an expert report prepared for adjudication include a declaration? In my view all reports should include at least a statement of truth, and established and reputable experts should have no difficulty in signing an abbreviated version of the declaration, along the lines of that suggested by the RICS[7] no matter which form of dispute resolution the expert is working under. If nothing else, inclusion of a Declaration might remind the expert of its ultimate duty to assist the tribunal. Unfortunately, even when such declarations are provided it does not always mean the party appointed experts will necessarily act in the same way they would in court proceedings and the more rough and ready nature of adjudication means this is not always possible, even if the experts have tried to do their best in the time available.

When faced with highly conflicting expert evidence in adjudication, the adjudicator has the power to order a meeting[8]. Provided the adjudicator has a good grasp of the opposing Party's submissions careful questioning of the experts can be very helpful in testing each of the opposing experts' opinions and conclusions. Although some adjudicators allow it, cross examination of experts in adjudication is rare and the procedure is much more akin to "hot tubbing" or witness conferencing as it is more formally known. As an adjudicator I often find it very helpful to engage in what is often a conversation with the opposing experts on the various technical matters. This process has been successfully used in court and arbitration hearings and although an adjudication meeting is different and not as formal the principles of expert evidence given under CPR 35 should still guide the behaviour of the experts and parties.

Normally adjudicators are selected for their expertise on the matter in dispute, but sometimes it is not always possible to nominate an adjudicator who has all the expertise necessary to understand all of the technical issues. Ordinarily, if party appointed experts are giving truly independent advice, there is then usually at least some common ground and even if the adjudicator is not directly experienced in all the technical matters it is possible to weigh the evidence and choose which is preferable. In adjudication, though, as we have seen above, the expert evidence is not always of the same quality that would be expected in arbitration or litigation and sometimes, however, the matters are so technical and the expert opinions far apart that it is not easy to decide which evidence the adjudicator should prefer, and in some cases the "truth" may comprise a hybrid of both experts' evidence, neither of them being entirely persuasive.

Complex delay disputes often result in widely diverging expert reports, the conclusions of which may be based on differing methods of delay analysis. The adjudicator is most likely not to be a delay expert and is then faced with a dilemma in choosing which evidence to prefer. Of course the adjudicator has the power to simply decide which of the experts' evidence it prefers[9] and continue to make a decision based on that. However, this "sudden death" scenario could result in real injustice and could mean the resistance to the enforcement of the decision by that aggrieved Party.

Alternatively the adjudicator could decide which parts of the opposing experts' evidence it prefers and make a decision

on that. That is a perfectly acceptable way to proceed but may not be easy or even possible to do, especially in our hypothetical delay case. Adjudicators are sometimes appointed on the basis of their own technical skills and if the adjudicator has the necessary skills and experience it could formulate its own analysis but has to be careful to put that analysis to the Parties for comment or face possible problems with enforcement of its decision[10].

Faced with the scenarios above the adjudicator, like most other tribunals, with the agreement of the Parties, normally has the power to appoint its own expert, or assessor[11]. The role of the expert assessor in this case is to review the evidence of both Parties and to assist the adjudicator in weighing the evidence to enable the decision to be made. The timetable of a typical adjudication does not permit the experts to meet to see if the issues in dispute can be agreed or narrowed. A question arises as to whether the adjudicator can hold meetings with the party appointed experts or whether perhaps the tribunal appointed expert might take on that role. If the adjudicator meets the experts this needs to be carefully arranged with the agreement of the parties and the difficulties that might arise should the meeting be perceived as mediation[12] need to be borne in mind[13]. It is possible, if the Parties agree, and time permits, for the expert assessor to meet the party appointed experts and in that way help to narrow the issues but that process needs to be carefully controlled and meetings carefully minute to avoid any allegations of breach of natural justice later in the process and importantly agreement to the process must be given by both Parties[14]. Of course any report produced by the assessor should be served on the Parties for their comments. This is likely to prompt a further round of submissions from the Parties and time will need to be allowed for this.

Adjudication is not without its critics, especially those that consider the increasing complexity of disputes being referred, the resultant increasing time it takes to get a decision and the increasing costs involved mean the procedure has become more akin to arbitration. However, it is still very popular with users and that trend is set to continue in the near future. The use of party appointed technical experts is also set to continue, although the task for the Referring Party's expert is always going to be a more difficult one. Experts are almost always certainly required to give opinion on negligence cases, even in adjudication and the uneven playing field that sometimes cause is good reason to be concerned about the suitability of adjudication for that type of dispute. Nonetheless without a change in the statute the process will continue to be used because it is quicker and cheaper than litigation.

Despite its less formal procedures, in order for expert evidence to have credibility in domestic adjudication, the principles set out in CPR 35 should always underpin the evidence given, whether written or oral. In the absence of party agreement the adjudicator may not have the powers to insist that such standards are adhered to, but ultimately, if expert evidence is to be of the high quality it requires to be, the matter lies with the experts themselves to ensure that their work is compliant with such standards and for adjudicators to give greater weight to evidence that does so. ●

1. Although not necessarily, see ACD (Landscape Architects) Ltd v Overall and another [2012] EWHC 100 (TCC)
2. Just as in litigation where the court expects expert evidence to be served, see Pantelli Associates Ltd v Corporate City Developments Number Two Ltd [2010] EWHC 3189
3. The process may allow as little as just a few days for the Respondent to serve a Response, although adjudicators may extend that time, particularly if the case is complex.
4. Such as the RICS practice note on surveyors acting as expert witnesses
5. Review of Experts Evidence, a consultation carried out by the Society of Constriction Law and headed by Her Honour Frances Kirkham CBE
6. CPR 35 Rules 3.2(9) and 3.3
7. Surveyors Acting As Expert Witnesses. 4th edition, 2014
8. The Scheme for Construction Contracts, Part 1, Clause 13(c)
9. The Scheme for Construction Contracts, Part 1, Clause 13
10. Balfour Beatty v Mayor & Burgess of L.B. of Lambeth [2002] BLR 288 : [2002] EWHC 597
11. The Scheme for Construction Contracts, Part 1, Clause 13(f)
12. Glencot v Ben Barrett Ltd [2001] EWHC Technology 15
13. Balfour Beatty v Mayor & Burgess of L.B. of Lambeth [2002] BLR 288 : [2002] EWHC 597
14. Try Construction Limited v Eton Town House Group Limited [2003] EWHC 60 (TCC)

Law of Penalties – Supreme Court Judgment

The Supreme Court on the 4th November 2015 gave Judgment considering the law of penalties, an issue although refined, has not been reviewed since the decision in Dunlop Pneumatic Tyre Company Ltd. v New Garage and Motor Company Ltd. [1915] AC 79 100 years ago.

The Judgment was based on two appeal cases, Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent) and ParkingEye Limited (Respondent) v Beavis (Appellant) (2015] UKSC 67) and considers the law on penalty clauses in relation to a commercial contract in the first case, and the latter a consumer contract. The Supreme Court allowed the appeal in Cavendish v El Makdessi, where two clauses within a contract for the sale of a controlling stake within a large advertising and marketing communications group, were held to be primary obligations under the contract and not penalties. The appeal in ParkingEye v Beavis was however dismissed, and although the charge imposed on Mr Beavis for overstaying in the carpark was a secondary obligation, it was not a penalty the reason being "...although Parking Eye was not liable to suffer loss as a result of overstaying motorists, it had a legitimate interest in charging them, which extended beyond the recovery of a any loss."[1]

Describing the existing penalty rule within England as "... an ancient, haphazardly constructed edifice which has not weathered well..."[2] Lords Neuberger and Sumption state "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation."[3] Lord Mance agreed, and further stated that "...What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable..."[4]

Although not directly construction cases, the Supreme Court Judgment will potentially impact the future interpretation of liquidated damages clauses within construction contracts. Lord Mance considers "...In judging what is extravagant, exorbitant or unconscionable...the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."[5] Recognising that in some cases, parties to a contract will have justification of the legitimate business interest of the liquidated damages clause, and if proportionate and reasonable to the commercial interest of the innocent party, could now be more than a genuine pre-estimate of loss. ●

The full Judgment can be read at: http://www.bailii.org/uk/cases/UKSC/2015/67.html

Deborah Paterson

1. Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent) and ParkingEye Limited (Respondent) v Beavis (Appellant) [2015] UKSC 67 at [99]
2. n1 [3]
3. n1 [32]
4. n1 [152]
5. n1

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nec3 and Dispute Avoidance – A Snapshot

General Principles of the nec3 Family

The nec3 family of contracts has a number of characteristics and provisions which can in practice facilitate dispute avoidance. The potential under nec3 to avoid disputes falls firstly into the category of inherently reducing adversity and second into the category of dealing with nascent adversarial matters contemporaneously and removing the risk of escalation.

Most "old-style" standard form construction contracts can be distilled down to a detailed statement of the signatory Parties' respective legal rights and obligations. One of the "new" aspects of the New Engineering Contract was its incorporation of project management actions and whilst this is no longer new in nec3, it remains highly significant in terms of dispute avoidance. It is not that nec3 fails to state the signatory Parties' respective legal rights and obligations (contrary to the view of some early commentators); indeed, it arguably states them in more detail than many old-style contracts. However, most importantly, it states them in the context of clear communications and timescales for project management actions. This does in practice result in much greater awareness of what is happening at any point in a project, whether in the context of design or construction, as well as better understanding of the consequences of a given event and perhaps most notably, transparency of process.

The structure of nec3, with its generic contract conditions [Core Clauses], its project-specific contract conditions [Main Option Clause and chosen Secondary Option Clause(s)] and its project-specific contractual elements [Contract Data Parts I & II, Works Information and Site Information] necessitates a rigorous approach to contract documentation. Such documentation also has to reflect the reciprocal (as between the signatory Parties, or their representatives) approach, which is inherent in the contract drafting. The rigour of this contract structure combined with the flexibility of execution of the project-specific elements makes it quite difficult for an adversarial or combative attitude to prosper – every interested party has had the chance to influence the agreement and if they have chosen not to, or have done so ineffectually, they arguably only have themselves to blame if their interests are not safeguarded. Clearly the nec3 contract cannot of itself ban "unreconstructed" behaviour, or prevent someone intent on starting a "bunfight" from doing so; however, it can influence a different dynamic emerging and consequently reduce the risk of disputes arising.

Implied Dispute Avoidance Characteristics

The two key characteristics implicit in any properly executed, unamended nec3 contract are:

- Partnering ethos of the contract and the necessary collaborative working methods
- Real-time project management (carpe diem) and the avoidance of "doing nothing"

Express Dispute Avoidance Characteristics

A number of the Core Clauses contribute particularly to dispute avoidance:

Clause 10.1:
The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation.
This clause was perhaps not taken entirely seriously in the early years of NEC; however, there is a significant consensus in the nec3 era that this clause creates a legal obligation, which should inherently avoid disputes.

Early Warning
Clause 16.1:
The Contractor and the Project Manager give an early warning by notifying the other as soon as either becomes aware of any matter which could
- increase the total of the Prices
- delay Completion
- delay meeting a Key Date or
- impair the performance of the works in use.

Compliance with this clause ensures adequate risk management and removes uncertainty in terms of controlling time/cost/quality throughout the currency of the contract. As lack of control of one or more of these parameters is arguably the root cause of virtually all disputes, the use of early warning procedures

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makes a significant contribution to dispute avoidance. (This has also been the experience of users of other forms of contract which have subsequently incorporated an early warning procedure, e.g. PPC2000.)

It is important to note that the notification of an early warning matter does not automatically trigger an early warning meeting and that there is no necessary connection between either an early warning matter or an early warning meeting and a compensation event.

Design
Clause 21.1:
The Contractor designs the parts of the works which the Works Information states he is to design.

This apparently childishly simple clause is in practice a useful tool with which to help avoid disputes, in that it gives complete control to the project team over giving design responsibility to those best able to carry it. In view of the potentially live nature of the Works Information (i.e. the Employer may change it, as a compensation event), this clause also means that the procurement strategy can not only be decided at various pre-contract stages, but can be modified post-contract.

Programme
Core Clause section 3
The programming obligations under nec3 are equivalent to a critical path analysis and require that to be kept up to date. This is both onerous and a powerful aid to avoiding time and money related disputes.

Payment Options
Choice of Main Option
The range of payment mechanisms is helpful in avoiding disputes, provided the choice of the most appropriate main option is made with cognisance of the risk profile of each particular project.

Compensation events
Core Clause section 6
The key aspect of compensation events is their inextricable linking and contemporaneous resolution of both time and money issues – both of which can be fertile ground for disputes if left to be dealt with another day.

Secondary Options
The nec3 contract family is predicated on the principle of making the contract fit the project, not shoehorning the project into the contract. Tailoring with secondary options and therefore avoidance of extraneous clauses is part of that philosophy and should reduce the potential for disputes to arise.

The Z clause warning!
The potential to add Z clauses is intended to allow very bespoke project-specific requirements to be catered for. Any Z clause should augment the rest of the contract, not amend it and should be written in compatible language. Where Z clauses introduce heavy amendments and are used to turn an nec3 contract back towards an "old style" conventional contract, disputes are likely to escalate, not be avoided!

Adjudication
NEC contracts originally had adjudication long before its statutory introduction and before it became regarded as a largely adversarial process. The positive intent to limit dispute escalation was effectively hijacked by the 1998 legislation and consequently, the W1 and W2 dispute resolution options are a necessary compromise in nec3.

Conclusion
In summary, nec3 has a number of relatively sophisticated and interlinked dispute avoidance characteristics, which in practice do seem to reduce the occurrence of disputes.

Frances Forward

Frances is the author of "NEC3 Compared and Contrasted" 2nd edition and "An Architect's Guide to NEC3", published by RIBA Publishing