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In issue 20 of the Trett Digest Tony Farrow invited readers to offer their own views on the 'thorny the issue of programme float' when project delays occur and extensions of time have to be addressed. He implied that programme float belongs to the 'project' and whoever got to the float first had an entitlement to use it. This debate originated in an article in issue 12 of the Trett Digest, when Roger Trett argued that the contractor may claim the float on the basis that he prepared the programme and therefore, created the float. Tony's suggestion was that, in the absence of any words in the contract to the contrary, the employer could also claim the float as his on the basis that he is, in effect, paying for the float and is an equal party to the contract.

We received several interesting responses to the article and these have addressed a variety of different aspects of the interpretation problems associated with programme float.

With regard to the ownership of float, **Robin Marlow** of AMEC BKW stated that "*Planning is an informed guess...[in which] the planner will allow a contingency against the durations allowed....It thus follows that the float must belong to the contractor, not to the employer. Any other interpretation would be less inequitable*". **Roy Aspden** also comments that "*The contractor tendered the programme and owns all the float. If the employer wants ownership of some float to allow for his potential defaults then he needs to instruct the contractor*". Finally, **Andre Zijderveld** of Bayards Aluminium Construction BV is of the opinion that "*The contractor submits the programme showing the float...If there are no objections of the employer [then the employer] agrees that the float belongs to the contractor and [the employer] is no longer entitled to the rights of using the float. The ownership of the float is mutually agreed to be that of the contractor*".

In response to Tony's statement that the employer got to the float first and hence obtained the benefit, **Roy Allen** of John Mowlem & Company PLC disagrees stating that "*There is no logic in the argument that the first delay to occur 'gets to the float'*". **Roy Aspden** also disagrees. "*The commercial benefits of 'first come first served' shared ownership of float favours the earliest delayer, so get your delays in first must be the maxim - but this would have the very effect of encouraging delays*". Agreeing with these views, **Malcolm Robinson** of MSR International Consultancy believes that "*it is contractually irrelevant who gets to any float first*". I still have a nagging doubt on this point because some contracts say that if the regular progress of the work is delayed (at any moment in time) and this affects the completion date, then the completion date should be adjusted. Hence if the delay is early and there is float, no overrun will occur and so no extension is warranted.

With reference to basic legal principles, **Malcolm Robinson** refers to "*the [idea] of damages [being to] put the contractor back in the contractual position he was in before the event arose*". **Roy Allen** contributes "*the general principle of law in relation to damages for breach [of contract] is to restore the injured party to the position it would have been in had the damage not occurred. Thus, had the employer not been in breach then the contractor would have finished by the due date even though he used his float*". Applying this principle to the example adopted **Alan Whitaker** of Alan E Whitaker & Associates observes that "*To put the contractor back into the position he was in before the delay occurred he needs a four week extension of time to reinstate the conditions upon which the contract was let i.e. twelve weeks in which to complete the work*"

On the subject of the entitlement to float, **Malcolm Robinson** is of the opinion that "*float is available to the contractor to accommodate unforeseen problems such as delays...thereby*

giving relief from damages. The contractor is entitled to the full stated contract period to complete his contracted work and obligations plus any further time arising out of variations and/or delays caused by the employer's representatives". **Roy Allen** also addresses the same issue, "It is not logical that the contractor should be deprived of the float period to cover for the risks which are his to bear under the contract....The obligation upon the contractor in the example given is to complete within three months. The employer cannot then, after submission of the programme, effectively impose a new term to complete within two months. In this sense the float shown on the contractor's programme is his own and cannot be taken over by the employer".

Another issue raised by readers' replies was the actual order of the delays. **Roy Allen** argued that "if the same example is worked with the delays reversed then presumably [the] logic [adopted for the example] would result in the conclusion that the contractor is entitled to an extension of time because the employer caused the overrun. I cannot see the logic in a different entitlement arising purely due to the order of the delays". On the same subject, **Roy Aspden** states "Suppose the magnitudes involved were put on a different scale, say hours instead of months. Does it really hold water to say that a morning default by the employer followed by an afternoon default by the contractor should be valued differently if the events were reversed on the same day". This is a very good point.

This issue of float can also be viewed against the background of the various standard forms of contract. **Mike Hamilton** of Watson Steel Ltd contributes "in respect of ICE 6<sup>th</sup> Edition Clause 44 [extensions of time]...In the sample analysis there is no doubt that the contractor has suffered a delay....The argument is [whether this] fairly entitles the contractor to an extension of time." He continues that "it seems to be inequitable for the employer not to award the entitlement on the basis of the float [as it would only leave the contractor with two options] e.g. accelerate to ensure that he still has some float for possible risk of overrun or problems of his own; or carry on in the hope that everything goes well." His concluding argument is "why should the employer profit because of his own failure!".

A similar argument is put forward by **Roy Allen** whose conclusion is based upon the provisions of ICE 5<sup>th</sup> and 6<sup>th</sup> Editions. "Essentially the ICE contracts provide in Clause 44 the basis for awards of extensions of time. Nowhere in Clause 44 is mention of any programmes referred to in Clause 14. The programme is not a binding contract document, merely a statement of the contractors intentions. [Therefore], there is no linkage between the entitlements to extensions of time and programmes submitted in accordance with Clause 14."

One final argument raised relates to the actual inclusion of float within the programme. **Alan Whitaker** believes that "all programmes should include a period of time at the end where no planned work is to occur (call it float if you wish) because that demonstrates that the contractor has made some contingency, time-wise, for those matters of possible delay for which he has no redress under the contract." **Richard Gill** of Amec Design & Management Ltd points out that "Although part of the activity is indicated as float the whole activity belongs to the contractor. He is not asking for a new completion date, he is stating that he requires two months to be available to him." **Andre Zijderveld** says that "Today, I still build float in every programme but do not let it show. I am aware that I can use this float for negotiating purposes as well as for delays. I use it as time to play with depending on the situation" He continues, "If it is necessary to show a float to my employer, I will take care that contractually I am the owner of the float and reflect it in what circumstances I will use the float." **Richard Gill** feels that the float can only be shown to the employer to the advantage of the contractor in certain circumstances. "The only benefit of showing part of the bar as float is to tempt the client that an earlier finish may be possible."

Not a single response in support of Tony's case was received (where are all the defenders of the employers' position?), but I do not believe this reflects the strength of the contractors' case. I have therefore sought a final judgement from an eminent lawyer. ... his opinion will appear in the next Trett Digest.

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## PARALLEL LINES

### A re-appraisal of collateral contracts

by David Simons

From the late 1980's there has been a growth in the popularity and use of collateral warranty agreements in connection with building developments. In my work, as a Quantity Surveyor, I have spent many hours vetting such documents and also clarifying their implications. This article is my analysis of the practical implications for contractors and sub-contractors.

Warranties seek to give purchasers, or tenants who are not direct parties to a construction contract, actionable contractual rights against the builder or designer for defective work. Without these warranty agreements in place, the purchasers or tenants would only have limited remedies in the tort of negligence where building defects cause other physical damage. The existence of a *defect per se*, is not normally actionable in negligence in the absence of a special relationship of "reliance" between the parties, as it amounts to pure economic loss. This is a position which was clarified in the landmark case of **Murphy - v - Brentwood District Council (1990) All ER 908** and as a result, the use of collateral warranty agreements in parallel with main construction contracts, has become commonplace.

As a consequence of this trend, most of us now think in terms of formally executed documentation when collateral agreements are mentioned, but it is worth re-visiting a leading case on the subject and considering two more recent cases, which all confirm that in appropriate circumstances, such contracts may in fact be implied.

In **Shanklin Pier Limited - v - Detel Products Ltd (1951) 2KB854**, the pier company, relying upon representations made by the defendant paint manufacturer, specified a particular type of paint for the redecoration and protection of their pier.

The redecoration work was carried out by a painting contractor who purchased paint from Detel Products and when the product later proved to be defective and failed, the contractor could point to compliance with the pier company's specification, as a defence. Also, Detel argued that as they had not supplied paint to the plaintiff under a purchase agreement, there was no contract with Shanklin Pier, who could not therefore recover damages.

However, the court decided that collateral to the redecoration contract, there was an implied agreement between the plaintiff and the defendant, whereby the choice of the defendant's product was made in response to their (false) representations as to\* its suitability. Shanklin Pier Ltd therefore recovered damages for breach of this collateral undertaking on the part of the paint supplier.

Those of us who have been involved in the preparation of tender documents or in tendering, will be familiar with the usual disclaimer '...the Employer is not bound to accept the lowest or any tender...' which accompanies tender invitations with monotonous regularity. After all, an invitation to tender is only an invitation to submit an offer and an offer may or may not be taken up. Or is there more to it than this suggests?

In **Blackpool and Fylde Aero Club Ltd -v- Blackpool Borough Council (1990) 3 All ER 25**, the Council had previously granted the plaintiffs a concession to operate pleasure flights

from Blackpool airport. However, when the time for renewal came, the Council invited tenders for the concession which were to be received by 12 noon on 17th March 1983. The defendant's letter box was supposed to be emptied by 12 pm each day, but was not emptied on the final day and the Club's tender was rejected as being late. The Club maintained the Council had warranted that if a tender was returned by the deadline, it would be considered. They sought damages in contract for breach of that warranty, and in the common law of negligence for breach of the duty they claimed was owed to them.

It was held by the court that the form of the invitation to tender was such that, provided an invitee submitted his tender by the deadline, he was entitled, under an implied collateral contract, to be sure that his tender would be considered with any others, notwithstanding the usual disclaimer as to acceptance.

The plaintiffs were awarded damages equal to their tendering costs and the award of damages did not take into account potential success or failure of the tender. It is clear that the court applied similar reasoning to the Shanklin Pier case, albeit in circumstances where the "parallel" main contract did not materialise and no third party was involved.

Recently, similar principles were applied again in the case of **George Fischer Holding Limited - v - Multi Design Consultants & Others (1998) CILL 1362**, which concerned a building development local to our Coventry office.

The dispute arose from the defective design of a warehouse roof which leaked causing substantial damage, due to the insufficiency of end lap joints in the sheet coverings. The warehouse was built in 1989/90 under a JCT'81 design and build contract by an organisation called Multi Group, and Multi Design Consultants (MDC) were a member of the Multi Group responsible for the design.

However, MDC left the Multi Group by way of a management buy out in 1991 and Multi Group became insolvent and was dissolved in 1996. At the time Fischer Holding discovered the defect in their roof, the original design and build contractor had therefore disappeared and only MDC, with whom they (apparently) had no contractual relationship, were available to blame for the problem.

Undaunted, the plaintiff commenced litigation against MDC, arguing that a collateral contract existed with MDC who, as the contractor's designeer, warranted the sufficiency and operational performance of the project works. For good measure, Fischer Holding also sued their own consultants, Davis Langdon and Everest, for breach of Employer's Agent duties under a separate written agreement.

In finding Multi Design Consultants liable for breach of a collateral contract, His Honour Judge Hicks QC took into account the following facts and circumstances:

The design and build main contract had come into existence with direct input from MDC, who had originally advised, and carried out certain preliminary design tasks for, Fischer Holding.

Fischers had at first requested MDC to be their contractor, but had subsequently followed MDUs advice that the undertaking should involve Multi Group as main contractor. MDC's design fees were then to be met by Multi Group, as part of an overall "Guaranteed Maximum Price" arrangement for the project.

Fischers, relying upon their pre-existing relationship with MDC, had sought further clarification of Multi Group's role as contractor and there was evidence of Fischer's continuing wish to deal with MDC on design matters, notwithstanding their direct contractual relationship with the Multi Group.

The judge confirmed that the collateral contract involved MDC in exercising due skill and care and warranting the operational performance of their design. However, there was no obligation to inspect or supervise the works as this was the responsibility of Davis Langdon and Everest as Employer's Agent. DLE were also held to be in breach of their consultancy agreement in this respect. There are important lessons which we can learn from these cases. Clearly, where there is evidence of an exchange of promises, or a reliance upon advice in exchange for some benefit, then a collateral relationship can arise in connection with a construction contract involving separate issues of liability. This 'parallel' contract can involve parties who are not in a direct relationship under the main contract and its existence can often be inferred from surrounding facts and circumstances. Thus not all collateral contracts require formal, written agreements but broken promises will often nevertheless, return to bite the unwary!

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Author : M Hopkins  
Title : Turning The Clock Back to 1984 - Crouch Revisited

***Michael Hopkins of Masons Solicitors examines the recent House of Lords decision in Beaufort Developments Limited -v- Gilbert Ash (Northern Ireland) Limited and Others (1998) handed down by the House of Lords on 20 May 1998.***

## **Introduction**

Ever since the Court of Appeal reached its decision in Northern Regional Health Authority -v- Derek Crouch Construction Co Ltd [1984] Q.B. 644 construction law commentators had debated whether or not the decision was rightly decided. No less than 14 years after Crouch was originally decided the House of Lords has now held that it was wrong after all. However, other things have moved on. The reversal of Crouch comes at a time when both the Arbitration Act 1996 and the Housing Grants, Construction and Regeneration Act 1996 are both in force. Further, JCT has recently published amendment 18 to JCT'80. The purpose of this article is to consider not only the material aspects of the judgement but to focus on its possible effects.

## **The Decision**

Not surprisingly the principal issue in the Beaufort decision concerned whether the Court had power to "open up, review and revise" a certificate issued, in this case by an Architect under JCT'80.

Of their lordships judgements the leading and most notable is that of Lord Hoffmann. Lord Hoffmann considered that what the Court of Appeal in Crouch were considering was a two-tier arrangement of Architects' certification followed by the dispute resolution arbitral procedure. He defined the main issue in the case as follows:

*"The Court [of Appeal in Crouch] appears to have considered that in the absence of a second tier power of the Arbitrator to open up, review and revise the Architect's certificate, they would (if given in good faith and within the ambit of the relevant contractual revisions) be binding on the parties. So the critical question is whether, upon the true construction of the contract, such certificates are binding."*

Before reaching the ratio of the case he had this to say on the role and position of the Architect under the contract:

*"The Architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not really assume that the contractor would submit himself and be bound by its decisions, subject only to a challenge on the grounds of bad faith or excessive power... At all events, I think that today one should require very clear words before construing the contract as giving an Architect such power."*

Strident judicial words indeed putting paid to the taboo that Architects in this day and age do not at least at times succumb to the dictates of their paymasters.

In reaching his decision that the Courts have an inherent jurisdiction to open up, review and revise the certificates of Architects unless there are "very clear words" to the contrary Lord Hoffmann referred and relied upon the 1905 High Court decision of Robbins -v- Goddard [1905] K.G. 294 in terms that the Court in Robbins -v- Goddard:

*"...clearly took the view that the draftsman had seen no need to confer express power on the Court in the same terms as the arbitration clause. The Court's jurisdiction was unlimited. It was the Arbitrator's powers which needed to be spelled out."*

Finally, Lord Hoffmann went on to consider the Court of Appeal's decision in Balfour Beatty Civil Engineering -v- Docklands Light Railway. The contract concerned substituted the Employer's Representative for the Engineer as having the certifying role. The arbitration clause was deleted. The Employer's Representative's certificates were not expressed to be binding or conclusive. The Court of Appeal held, following the decision in Crouch, that the Court did not have a power to open up review and revise Architect's certificates and that in absence of any express provision the Court could not readily imply a term to this effect. The House of Lords has expressly overruled the Balfour Beatty decision.

So there we are. Back to the starting blocks. What are the effects.

### **To arbitrate or litigate**

Following the Crouch decision the legislature permitted under Section 43A of the Supreme Court Act 1981, inserted by Section 100 of the Courts and Legal Services Act 1990, the option, subject to the agreement of all parties concerned, for the High Court to be able to exercise any specific powers which the particular contract conferred upon an Arbitrator. In light of this enactment there sprung up various clauses, some more sophisticated than others, which arguably would have permitted the Court to open up review and revise Architect's certificates. In light of the Beaufort decision the utility of Section 43A of the Supreme Court Act 1981 is no more. If the parties so chose it now appears that so long as the arbitration clause is deleted (and assuming there are no clear words expressly stipulating that the Architect's decisions are final and binding) that a party dissatisfied with a certificate of the Architect can issue a Writ of Summons in the Official Referees Court in time honoured tradition.

The position is however entirely different where the arbitration clause remains. Under Section 9 (4) of the Arbitration Act 1996 the Court is obliged to stay legal proceedings to arbitration where a binding arbitration agreement exists between the parties. It has no discretion in the matter. The recently decided Court of Appeal decision in Halki Shipping Corporation -v- Sopex Oils Limited [1997] illustrates that the Court is obliged to grant a compulsory stay to arbitration even where the claim, on an objective basis, is indisputable.

### **Recent amendments to standard form of contract**

By a remarkable coincidence at the same time as the Beaufort case was winding its way through the judicial system the JCT was drafting amendment 18 to the JCT'80 form of Main Contract which is concerned predominantly with compliance with the Housing Grants Construction and Regeneration ACT 1996. The JCT took this opportunity to provide, for the first time, an option to arbitrate or litigate which the parties can agree between themselves by whether or not they choose to delete the words "clause 41B applies" from the Appendix. Although the option to litigate under JCT amendment 18 can still function notwithstanding the Beaufort decision it is ironic to say the least that a large part of its cumbersome drafting has immediately been rendered unnecessary.

### **Impact on adjudication**

Lastly, as is no doubt well known by now throughout the construction industry, Section 108 of the Housing Grants Construction and Regeneration Act 1996 provides a statutory framework for adjudication in construction contracts defined under the Act. However the Act in question does not provide the adjudicator with an express power to open up, review and revise Architect's certificates. It would seem that unless the parties have expressly provided that the adjudicator has powers to open up, review and revise certificates or unless they have

incorporated adjudication rules which so provide this power will not be available to an adjudicator. Beaufort is concerned only with the express powers of Arbitrators and with the inherent powers of the Court. Where a contract does not provide for adjudication the statutory scheme will apply. The interesting point here is that the statutory scheme constitutes a piece of secondary or delegated legislation in this case under Section 114 of the Act. Since no mention is made of any express power for Adjudicators to open up, review and revise Architect's Certificate in the Act itself it is highly arguable that the scheme is ultra vires the Act. Hence it is highly arguable that Adjudicators who are appointed under the Scheme for construction contracts do not, despite the express wording of the scheme, have any power to open up, review and revise the Certificates of Architects.

## **Conclusion**

The inescapable moral of this judicial volte-fa'ce is that if one waits long enough significant principles of construction law will revert back to the same position prior to a particular watershed decision such as that of Crouch. However, things have moved on. It is therefore necessary to take stock, consider those developments and take proper account of them in order to ensure that the contract being entered into will enable any disputes that might come along to be resolved by the forum that the parties intended.

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Title : Is Arbitration all It's Cracked Up To Be?

Although the supporters of arbitration proudly sing its praises, claiming it knocks spots off litigation, there are many circumstances in which a potential claimant is probably better served by litigation than he is by arbitration. One such situation may be where the claimant wants money quickly and would be advised by his lawyers to make an application to the High Court for summary judgement (Order 14) or for an interim payment (Order 29). In the past, an arbitration clause in the contract did not cause problems, even if the defendant to an application for summary judgement issued an application under section 4 of the Arbitration Act 1950 to stay (transfer) the court proceedings to arbitration. In ***Ellis Mechanical Services Ltd-v-Wates Construction Ltd*** (1976) 2 BLR 57, the Court of Appeal decided the claimant's application for money should be dealt with first. If the plaintiff could show there was no arguable defence to his claim there was clearly no case to refer to arbitration. On occasions, the contractor might succeed on part of his claim with his right to disputed balances transferred to arbitration: ***RM Douglas Construction Ltd. - v- Bass Leisure Ltd*** (1990) 53 BLR 124. Everyone was reasonably happy.

The Arbitration Act 1996 is supposed to have simplified arbitration law and practice and to be a model of clarity. Time will tell if this correct when and if the amount of case law decided under the new Act begins to mount. One part of the Act which may adversely affect a claimant is section 9. This deals with transferring proceedings from litigation to arbitration. Many features of the old law established under the Arbitration Act 1950 and earlier legislation remain valid. A party seeking to rely upon the arbitration clause must not take a step in the proceedings (section 9(3)) and thereby show an intention to waive the arbitration clause. Therefore a defendant under a contract containing an arbitration clause would only enter a defence if he was happy that the case remain in litigation rather than go to arbitration. Clearly to avoid judgement in default being entered against him it is necessary to acknowledge service of any writ but then immediately seek a transfer of the proceedings to arbitration on summons and affidavit. A major change in the Arbitration Act 1996 from earlier legislation is that the obligation to acknowledge service of the writ is expressly referred to in section 9(3) of the Act.

Under section 9(4) of the 1996 Act if a claimant starts proceedings under a contract containing an arbitration clause the defendant can say as in the past "Hang on a minute: We've agreed that we will resolve our disputes by arbitration." In the old days, the court could, as previously stated, under the 1950 Act, look at the pros and cons, including assessing whether or not an on account payment should be made. All that has now changed. Under section 9(4) of the 1996 Act the court shall transfer the proceedings to arbitration unless the arbitration clause is null and void, inoperative, or incapable of being performed. Section 9(4) states:

"On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed." How to interpret section 9 arose in a OBD decision, ***Halki Shipping Corporation-v-Sopex Oils Ltd*** [1997] 3 AER 833, a decision of Clark J. The shipowners chartered the vessel to the charterers on a tanker voyage charter party with an arbitration clause. After discharge of the cargo, the owners claimed demurrage as a result of the charterer's failure to load and discharge the vessel within the laytime. The charterers did not admit the claim and the owners brought a claim in demurrage. The charterers sought a stay of those proceedings to arbitration under section 9 of 1996 Act while the owners applied for a summary judgement payment under Order 14 on the grounds there was no arguable defence to the claim. The judge held that except in very limited circumstances, as prescribed by the 1996 Act, he had very little discretion. The disputes fell within the arbitration clause and had to be so referred even if there was no arguable defence. He was not permitted to carry out any sort of investigation into the merits of defence and claim. This important decision meant that claims

to which there was no obvious defence in either fact or law could no longer be litigated if the defendant decided to assert the presence of the arbitration clause in the contract. The decision was upheld with some reluctance by the Court of Appeal, dividing 2:1, in January 1998 and is reported at [1998] 2AER 23.

These legal developments appear bad news for contractors chasing money for whom cashflow is their lifeblood. There are summary remedies under the Arbitration Act 1996, such as interim payments under section 39 of the Arbitration Act 1996. The quality of such remedies will depend on the robustness of arbitrators and here the jury remains presently out. A future edition of *Trett Digest* will consider the 1996 Act remedies. Further, arbitration may play a less significant role in the resolution of construction industry disputes. The latest JCT amendments, Amendment 18 to JCT80 and Amendment 12 to JCT81 and Amendment 12 to IFC 84, recognise the status of litigation as an option to resolve disputes if the parties so choose. Until recently arbitration has enjoyed a protected status in the construction industry following the decision in **Northern Regional Health authority-v-Derek Crouch Construction Company Ltd** [1984] 2 WLR 676. In that case the Court of appeal held that in general the courts had, unlike arbitrators, no powers 'to open up' review and revise any certificate, opinion, decision, requirement or notice' of the architect. On occasions the courts did side-step **Derek Crouch** but there were often problems when the arbitration clause was deleted. In **J.F.Finnegan Ltd-v-Sheffield City Council** (1988) 43 BLR 124 the Official Referee decided contractual mechanisms had so broken down as to give him jurisdiction. **University of Reading-v-Miller Construction Ltd and David Sharp** (1994) 75 BLR 1 established courts could find works had been delayed in circumstances where the contractor was not entitled to extensions of time. In **John Barker Construction Ltd-v-London Portman Hotel Ltd** (1996) 12 Const. L.J. 277, the judge intervened where it was alleged the architect had dealt with extension of time requests and related matters inadequately. It became the employer's own breach if the architect's performance was inadequate. The Derek Crouch argument was recently laid to rest by the House of Lords in an appeal from Northern Ireland, **Beaufort Developments (NI) Ltd.-v-Gilbert-Ash NI Ltd** [1998] 2 WLR 860. According to the House of Lords an arbitrator's powers were derived from the contract and as such had to be set out in detail. Those of the courts were unlimited. In the words of Lord Lloyd of Berwick at page 863:

"Then can it be said that the jurisdiction of the courts to open and revise interim certificates is impliedly excluded by the terms of the arbitration clause? I do not pause to consider whether such an ouster of the court's powers would be effective in law; on any view it would require the clearest of language..."

In the death of **Derick Crouch** we wave goodbye to what was a familiar seminar topic.

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Title : Giving Evidence at 'A Day in Court'

*Tony Farrow describes his experience of giving evidence at The Academy of Experts training day in the High Courts of Justice*

I attended my first 'A Day in Court' session in 1996. I was due to give evidence in a construction arbitration and a colleague wisely suggested it would be useful preparation. It most definitely was! Although I was only a spectator on this occasion, the opportunity to experience a variety of styles of both Counsel and Expert was invaluable. A particular benefit to me (whether as an Expert or Witness of fact) was appreciating the importance of directing your oral evidence to the Judge, and not to debate matters with Counsel; it made me aware of the need to listen to Counsel's questions and respond directly to the Judge, acknowledging that in order to make the Judge fully aware of the point being raised by Counsel and my opinion on it, I perhaps needed to expand my answers on occasions.

Having attended the first course as a 'spectator', I decided that I would offer my services as an 'Expert' for the following year's course.

The day started somewhat excitedly. In order to enter the High Courts of Justice in The Strand, delegates had to pass TV cameras, media correspondents and newspaper reporters, all ensconced outside waiting for some celebrity to arrive who was involved in a high profile case (it was not mine!).

The seriousness of the High Court immediately takes over though as you enter the Court building; briefcases are x-rayed and bodies scanned and ushers direct you through the building.

The Academy has use of two court rooms and during the day expert evidence will be heard on 4 cases in each. The atmosphere is extremely sober and professional and Court etiquette maintained throughout.

For 'my case' I had selected a report completed in the previous 6 months. The case had settled prior to the hearing, so I did not have the prior experience of giving oral evidence upon it.

I reported in to the course organisers and was told by them that the Rt. Hon Sir Brian Niell would hear my case. They were very keen to tell me that Sir Brian was, until his recent retirement, a most senior and respected Judge of the Court of Appeal! I initially thought they were joking, to put me on edge (I was!), but it turned out to be entirely true - that I was to be heard before one of the most senior Judges in the land. This really does indicate the quality of the 'trainers' the Academy is able to field on these occasions, and also how serious the Courts treat the work of the Academy.

I was then told that not only was I to give evidence to one of the country's leading Judges but I was to be cross-examined by Mr Augustus Ullstein QC. I am still not sure if it was the grandness of the name or the initials that unnerved me the most!

I sought my 'own' Counsel, Philip Newman, to look for some words of comfort and advice, which was "***I've read your report Mr Farrow. I think an accountant would have been better placed to give opinion, not a quantity surveyor .... and there is no way you'll succeed with that overheads' argument. Opposing Counsel will have a field day.....***".

What time is the next train back to Manchester?

However, Counsel did give me a few hints, particularly relating to report writing generally and how he might cross-examine me on this particular report. I therefore spent the next hour or so thinking of every conceivable question that could be raised and how I might answer them. (Not many of these questions were asked, but the process of thinking about the cross-examination got my brain into gear).

My case was called and I took the witness stand. Heart beating rapidly now, but I was taking deep breaths and trying to look calm and at ease (some hope!).

The court is a much more formal setting than most arbitration rooms and the witness box quite a daunting place. It is positioned close to the judge's bench, but set down a little, but the general feeling is as if you are placed on a pedestal with Counsel and the spectators looking up at you.

On the Academy's day, the spectators consists of 40 or so of your contemporaries, each wanting to see how their contemporaries give evidence, their personal mannerisms etc, and to discover how others deal with difficult questions, how not to waffle, how not to argue with Counsel, how to speak up, how to remain dispassionate and impartial, ... essentially, how to think on your feet under quite stressful conditions.

Both Counsel took me through the stages of examination-in-chief and cross-examination, with the majority of time spent on the latter. The Judge interceded from time to time and my Counsel made several objections to the nature of the cross-examination. Mr Ullstein became aggressive on occasions, interrupted my long answers, bullied me and insisted I directly answer certain questions and not try to provide answers to different questions! I am sure everyone of the spectating experts felt they were watching 'the real thing'.

At the conclusion of the examination, the Judge summed up various points on the witnesses performance and Counsel made their own remarks. The spectators then had the opportunity to ask questions on what they had seen and heard.

The experience of giving evidence at a 'day in court' is well worth the effort and expense (and stress!). The following factors, namely:-

- the witness giving evidence on *actual* cases;
- the Judge and Counsel having read the pleadings and the expert's report;
- that the setting is the High Courts of Justice; and
- formal Court proceedings being maintained throughout

make the Academy's day an unrivalled opportunity for participants to witness 3 or 4 real-to-life cases of experts giving evidence to a variety of Counsel, each using differing approaches to test the knowledge and impartiality of each expert witness-of-fact.

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