

Issue No : 8  
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Author : Roger Trett  
Title : Introduction - The Key To Europe

## **The Key To Europe**

The door to Europe has eventually been unlocked. As citizens of Europe we are entitled to free movement, throughout the community, for ourselves, our products and our services. There is more to this freedom than the chance to load the car with French wine on our summer vacation in the knowledge that controls no longer exist to restrict the personal consumption of our favourite tippie. We have entered a new era of opportunity and so we must be ready to rise to the challenges ahead. Occasionally in the past we have been reluctant to take advantage of the possibilities an open market in the EC offers. We see barriers, such as language, culture, standards and duties, which are more imaginary than real. If we want to be successful in Europe I am certain that we can be.

I recall a story told some time ago by an old circus impresario. As a child he had watched his father training elephants. When an elephant first arrived and was relatively small, the trainer would tie a rope to its leg and attach the other end to a stake in the ground. The young elephant would pull and pull for weeks in an effort to get free. Of course the stake proved too sturdy for the baby elephant. Eventually the elephant would give up and accept the restriction of its movement. In later years when the elephant was fully grown the trainer would tie the animal to the same stake. Now the elephant was fully grown it would easily be able to pull out the stake but surprisingly it never did. The elephant obviously remembered trying and failing as an infant. So eventually the real barrier to freedom was no longer the stake in the ground but the elephant's belief that it was securely fettered.

Perhaps the barriers that prevent us from moving into Europe are equally imaginary. We work with many UK clients whose experience and expertise is unmatched across the channel. Enterprising UK companies who have already expanded into mainland Europe have found that they are at least equal to their overseas counterparts in the area of construction. In many cases British companies are well ahead of their French and German competitors commercially and contractually as well as in the use of technology. Few mainland European construction corporations can match our contractors for speed and quality of construction. Furthermore, our best specialist subcontractors perform significantly better than those from the continent, hence the use of so many British specialists on EuroDisney.

Britain has come a long way in the twenty years since we were referred to as the sick man of Europe. We have taken a leading role in European politics over the last few years, so perhaps the time has come for us to take a leading role in European construction too.

We at Trett believe that 1993 is the year to move into Europe in a positive way, not just as a way of hedging our bets against future UK recessions. I am sure we will enjoy working with you just as much in mainland Europe as we have enjoyed working with you in the UK.

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Author : FIDUS  
Title : In The Lighter Side - A Word of Warning

## **A Word of Warning**

Our columnist FIDUS examines a long lost survey sent to an Old Testament Character

Dear Joshua,

Re: Purchase of Jericho

Sorry about the familiarity but we had an awful time trying to locate your surname in our database.

We are advised that Herodius, Chief Sadducee and governor of Jericho, disputes your title to the city, claiming to hold the deeds jointly with the Jerusalem and Walthamstow Building Society.

Herodius is offering the property, an attractively positioned city with open aspects to all sides, for 13 million Shekels, or close offer. We have calculated that the area on sale amounts to 39 million square cubits. In today's economic climate, where a camel isn't worth what it used to be, 3 Shekels per square cubits seem pricey.

The city itself is more sought after than its' erstwhile neighbours Sodom and Gomorrah where house prices plummeted on rumours of plagues, destruction and the building of a new Trett office.

The Palace is largely of flat roof construction, which may need refelting shortly, and offers comfortable 65 bedroom family accommodation. The property has the benefit of Hittite fired heating and a single storey harem extension to the rear.

The Temple is a more spartan dwelling uncomfortably close to the wailing wall, where the contractors congregate. However, it could be sold as an attractive place of worship with a few ceiling paintings, purple drapes and new wooden pews, but only if the economy picks up. I know that doesn't seem likely at present, but remember Moses and the Red Sea business.

The remainder of the dwellings are in reasonable condition, as far as wattle and straw buildings go, but we do have one concern, the walls.

The walls are defective as follows:

1. The mortar is crumbling -poor water/cement ratio.
2. Sporadic use of wall ties, where used at all these are the less effective old fish-bone type.
3. Repairs are needed, particularly around the kiosk which sells rocks for stoning.

In my opinion the walls are in a dangerous condition, and it would only take some radical Jewish Fundamentalist group to come around blowing horns and banging trays to bring the whole lot down.

Yours sincerely

Knight, Frank and Rabinowicz

PS Then again the rebuilding would give a vital boost to the construction industry.

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Article No : 3  
Author : Alastair Farr  
Title : Restricted By Stays

## **RESTRICTED BY STAYS**

Under Section 4(1) a stay of legal proceedings may be obtained if an Applicant is able to satisfy a court or judge firstly that there are no sufficient reasons" why the matter should not be referred in accordance with the Arbitration Agreement, and secondly that the Applicant was, ~at the time of the proceedings ready and willing to do all things necessary for the proper conduct of the Arbitration".

Whilst it is impossible to define these two grounds concisely, a wealth of case law is used by Mustill & Boyd in "Commercial Arbitration" (Butterworths 1982) to illustrate how the courts have used their discretion under Section 4 to refuse or grant a stay in proceedings. The purpose of this article is to review several recent cases decided since Mustill & Boyd which further illustrate the courts' use of this discretion.

In the case of *Croudace -V- The London Borough of Lambeth (1986) 33 BLR 1* the Court of Appeal refused to grant a stay of action as they were satisfied that since the sums claimed by Croudace were indisputably due, this was sufficient reason not to refer the matter to Arbitration and summary judgement could be made. Furthermore, the Court of Appeal accepted that in the circumstances a payment on account of the damages claimed would be appropriate under RSC Order 29, rule 11, and this again constituted sufficient reason.

It is firmly established that where it can be proven that there is no arguable defence to the claim, the court will not order a stay under Section 4.

Furthermore, Lambeth's failure to take steps to ascertain Croudace's claim amounted to conduct which 'merited the strongest condemnation" and the Court of Appeal were entitled to infer from this that Lambeth's intention had been to postpone payment which had already been acknowledged as being due. It could also reasonably be inferred that the motive behind the application to stay proceedings was to delay the matter still further.

A case reported in Building on 25th October 1991 raised the question as to whether poverty could be sufficient reason for a stay not to be granted. The case concerned a dispute between Chrisphine Othieno, engaged in his first building contract, and Messrs G & M Cooper as defendants. Othieno claimed that he was owed a large sum of money by the defendants and that as a result was in severe financial difficulties. Othieno started proceedings and the Coopers applied for a stay under Section 4 for the matter to be referred to Arbitration under the JCT Minor Works Form.

The Court relied on the earlier decision of *Fakes -v- Taylor Woodrow Construction (1973) 1 QB 436* in which Lord Denning had decided that a person who was able to show that the cause of his poverty was the defendant's breach and consequently that he would be denied justice, would have sufficient reason by which the courts would allow proceedings to continue.

The main benefit that commencing legal proceedings brings is that a person may qualify for Legal Aid. In tribunals or Arbitrations, Legal Aid is not available. Notwithstanding this, legal proceedings can often be more convenient and less costly.

An applicant must also satisfy the court that he was ready and willing at the commencement of proceedings to do all things necessary for the conduct of the Arbitration. In the case of *Mellows -V- J A Elliott Ltd (1989) 6 CLD 02 19* a stay requested by Elliotts was refused on the basis that, at the time of the proceedings, Elliotts had not been ready and willing to do all

things necessary for the proper conduct of the Arbitration. Stephen Desch QC, sitting as recorder on Official Referee's business, stated that he thought "all they (Elliotts) were ready and willing to do was to make life as difficult as possible for the Plaintiffs". Elliotts had originally contended that a contract under the terms of DOM/2 had not existed with Mellows and that an adjudication order made under these terms in favour of Mellows was therefore invalid. Elliotts only conceded at the point at trial that a contract existed under the terms of DOM/2, whereupon they requested that the proceedings be stayed to Arbitration in accordance with the contract terms.

Finally, it would appear that the courts will not use their discretion where there is an indication that the Applicant has already taken a step in the action. The Court of Appeal in the case of *Turner & Goudy -VMcConnell (1985) 2 CLD 03 28* held that the defendants should be deprived of the opportunity of obtaining a stay because they had taken a step in the action by filing an affidavit to show cause why judgement should not be entered against them.

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Author : A Smith  
Title : Resolving Disputes Amicably

## **RESOLVING DISPUTES AMICABLY**

Alastair Smith discusses the advantages of using Alternative Dispute Resolution

### **1. WHAT IS ADR?**

ADR (Alternative Dispute Resolution) is a voluntary, non-binding, private dispute resolution process in which the parties reach a settlement with the assistance of a neutral person.

It differs from litigation and arbitration inasmuch as these are adversarial processes with binding decisions imposed by an adjudicator, whereas ADR is consensual, ie the parties agree to seek a commercial solution assisted by advisors and the neutral. In litigation and arbitration, the adjudicator is bound to decide the case in accordance with the conditions of contract and the law, whereas in ADR a mediator will seek a solution which is acceptable to both parties, producing a win-win solution.

For example, a Housing Association were battling with a Supermarket chain for a prime site in a town centre. An appeal to the planning authority would automatically give a win/lose situation and so they decided to mediate. It was subsequently agreed that the superstore would be built with social housing above, subsidised by the supermarket chain a win/win situation.

### **2. USE OF ADR**

ADR has been used for some years in the United States and Canada and is sufficiently well known in the US for it to have been suggested that lawyers be sued for failing to recommend ADR and putting clients through the unnecessary "surgery" of litigation!

In the UK, ADR is offered by the Centre for Dispute Resolution (CEDR) which is an independent, non-profit making organisation launched with the support of the Confederation of British Industry to promote ADR techniques and services. The Chartered Institute of Arbitrators also offer ADR under their Supervised Settlement Procedure (Mini-Trial).

Although ADR is relatively new in the UK, its use is fast gaining ground owing to its ability to cut dispute/litigation costs and secure prompt settlements. Impressively, CEDR claim a 95% success rate. The four main techniques used in commercial disputes are examined below.

**Mediation** is the most widely used ADR technique. The typical stages in mediation are:

1. A brief written summary of the case is presented in advance to the mediator.
2. The mediator has private meetings (caucuses) with each party in turn, shuttling back and forth to clarify issues and search for settlement possibilities.
3. Further joint meetings are called either to continue negotiations directly, to conclude agreement or to conclude the mediation.

The mediators role is to act as:

- - facilitator (there purely to assist communications);
- - deal-maker (helping the parties find overlap in their bargaining positions or encouraging compromise);

- - adjudicator-assessor (providing parties with a commonsense or legal/technical appraisal of the merits of their case).

If the parties agree, a mediator may issue a written report recommending terms of settlement or giving an opinion on the case.

**The Executive Tribunal** (the so called "mini-trial") is a more formal type of mediation hearing. Its major feature is to allow senior executives to assess the case between the companies. A formal presentation is made by company representatives and/or Experts to a panel consisting of a senior executive from each party (usually someone with no previous direct involvement in the dispute) and a neutral chairman. After hearing the presentations and a period of questioning, the executives attempt in private to negotiate a settlement with the assistance of the neutral chairman (who can perform any of the mediation roles outline above).

**Expert Appraisal** offers the parties a technical experts assessment of their case to assist negotiations. In some cases, parties may wish to seek such appraisal individually rather than jointly.

In **Adjudication**, a neutral third party gives a non-binding finding on the case or an aspect of the case (eg technical merits). This can be used as the basis for further negotiation between the parties, or as a temporary binding decision until a certain time has passed (eg completion of contract performance) when parties are free to seek a legal or arbitral award ( a legally binding adjudication) to revoke the earlier decision.

### **3. THE MAIN POINTS ABOUT ADR**

- It is conducted on a "without prejudice" basis. Prior to the process, the parties sign an agreement preventing them from disclosing information obtained during ADR to any subsequent tribunal.
- It is flexible. Although rules/guidelines are available ADR need not be governed by rigid precepts. Of course, to avoid possible misunderstanding confusion and waste of time, a sensible procedure should be agreed before the mediation takes place. But provided the parties mutually consent, they can devise the procedure to suit themselves.
- It is non-binding. The parties can "walk away" at any time, but if a settlement is reached, the parties would be wise to draft a formal binding agreement with the assistance of the mediator.
- It can be carried out simultaneously with litigation/arbitration.
- Unless otherwise agreed, the mediator's fee and the expenses of the procedure are shared. The parties pay their own legal costs.
- It is quick. There need be no long, drawn out interlocutory procedures (ie pleadings, exchange of documents etc) before the mediation, and in most cases settlement is achieved in a day.
- It is relatively inexpensive. Compared with litigation or arbitration, fewer people are involved for a shorter period.

### **4. WHEN TO USE ADR**

- When conventional negotiation has become deadlocked or the issues are too complex to manage in such a manner.
- When there is concern about the cost/risk/stress of litigation/arbitration.
- When it is desirable to obtain an independent appraisal of the merits of the case at an earlier stage than in the courtroom.

### **5. WHEN NOT TO USE ADR**

- When the other side has no genuine interest in settlement.

- When an injunction is needed quickly to preserve rights/property.
- When direct negotiation is likely to succeed.

## **6. HOW SPECIALISTS CAN ASSIST IN THE ADR PROCESS**

Specialist consultants who are trained and experienced in the formulation and negotiation of construction contract claims and defences are often best able to assist in ADR by:

- preparing an Expert's report to be relied on during the mediation, or;
- preparing the case in a written submission to the mediator prior to mediation, or;
- preparing the case for succinct oral presentation at the start of the mediation;
- presenting the case during the mediation and if required advising during negotiations.

**Notes: "The ADR Route Map" is available from CEDR at £7.00 (Non-members) or £5.00 (Members). Tel: 071-430 1852**

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Author : S Whitfield  
Title : Record Keeping 1 - A Picture Paints a Thousand Words

**An article by a guest contributor that gives us an insight into how best to keep good photographic records.**

When dealing with anyone in the construction or offshore industries the first question I ask is do you want **progress** or **record** photographs, the two are quite different.

**Progress Photography**

By involving the photographer very early the construction client can obtain a progressive record of events which include the existing site, any demolition, groundworks and the erection process.

I like to see the site plans so that I can establish my viewpoints early. I will generally use these viewpoints throughout the contract to give continuity. Having marked my vantage points I will return at least every month to record the progress as seen from those positions. Generally I take the photographs on the day of the "evaluation" as I understand that this is the day when the client pays for the work done to date. The photographs are dated and logged. Occasionally I am asked to supply an extra set of prints to my customer's client as well. On fast moving sites I often attend more frequently and when photographing steelwork I can be on site daily until the frame is up. Of course contractors and their clients do take their own progress photographs but it can be an advantage to have an independent photographer who can truly verify the date the photographs were taken.

**Record Photography**

Photographers are often called in to record the appearance of the completed project, often for marketing purposes, but increasingly I am asked to photograph parts of the work where a problem is anticipated. An example of this is where I am asked to photograph wind or vandal damage, or a very deep excavation for record purposes. In recent months I have captured on film, pipework bending round obstacles that should not have been there, overhead wires pulled down by a crane, brickwork that changes colour as it gets higher etc. etc.

Trett tell me that record keeping in your industry is as important as in mine, with the increased use of photographic evidence in injury cases it can only be a matter of time before you will be at a disadvantage if you do not keep good photographic records.

**Taking Photographs yourself**

Format: Use a large format camera where possible (120 roll film). The negative area is 6 times that of 35mm film and can be enlarged with much greater rendition of detail. Whilst 35mm is perfectly acceptable Polaroids are not recommended for archive photographs.

Composition: This is the area where most people fail to obtain a good result. The simple way to overcome this is to take the picture from a variety of positions, from wide angle to close up. This way some of the shots will be useable. Do not try to save film -it is cheaper than time.

Lighting: Use natural light if possible. Flash photography is often unsuitable for construction because of the limited spread and the harsh shadow. More often than not when I see flash photographs of construction work the foreground is bleached out and the background is too dark, making the negative almost unprintable.

## **Using a Photographer**

Most of the good photographers I know are constantly busy, so do not try a competitive tender as you will end up with a poor service. Remember, a person with a camera is no more a photographer than a person with a scale rule is a QS.

Use your photographer as another resource. Listen to their advice ask for their ideas. A good photographer can be hired for £100-£150 per day, so a job can be fully recorded for a relatively small portion of the cost of a dispute.

## **Storage**

Finally, when you get your photographs, store them in some form of album in chronological order, having given each a unique reference number. This helps if you need further prints or if you need the prints as evidence. Always file the negatives separately in dust free sleeves, do not leave them in the processors flimsy envelopes.

With modern technology, I am now able to transfer the photographs directly onto video tape without the print. I can also transfer photographs onto CD. Look for the best retrieval method to suit you and use it whether it is the old fashioned hardcopy or electronic storage.

Unfortunately there are no books on successful constructional photography - (perhaps I should write one) - but there are a wide range of technique books which will help you produce good evidential photographic records. Use the tips above when you can and a professional when you can't.

Sue Whitfield is proprietor of Phi Photographic (0325) 722 968.

Specialising in Constructional Photography, she is based in Darlington

Issue No : 8  
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Author : Misc  
Title : Letters

*Sirs,*

*Our company use a management planning system that provides us and our clients with a precedence diagram type programme for our works. The software calculates and displays the float once we have inputted durations etc. On our most recent contract for a local authority on JCT80 the client used much of our float causing us disruption and delay to our completion date. However, the client is refusing to grant an extension of time on the most serious of the delays.*

*On the electrical second fix the client delayed a decision which ate up 9 of our 11 days float. With only 2 days' float left we discovered a number of defects which took 5 days to remedy these were not unexpected and were the reason we allowed the float initially Whilst we accept our delays we should surely be reimbursed for the clients use of our float*

*If no extension of time is granted we stand to suffer liquidated damages of one week or £9,500.*

*We accept that the client's delay did not affect the end date at the time but we must be entitled to an extension now we have overrun due to the client using up our float.*

**ANDREW GREEN**

*(address supplied)*

Perhaps the answer to this question lies in Mr Green's assumption in the last paragraph that the float is his float. The general rule under most forms is that the float is there to be used by the first person to need it.

JCT80 in common with other forms allow the Architect to grant an extension of time for certain relevant events that will cause the completion date of the contract to be moved back in time to a later date. Clearly the late production of information is such an event. In the situation cited above, however, it is conceded by the contractor that the late information would not have necessitated the completion date to be deferred. The client did use up some float but completion was still going to be achieved by the original contracted date. The event which caused the delay to contract completion was an event for which the contractor alone bore responsibility. Therefore, according to the wording of JCT80, and most other contract forms, an extension was not due to the contractor.

It may seem unfair but this is how the agreed standard form is worded. Perhaps it would be advisable to ensure that the activity durations are extended to adequately cover any misfortune the contractor may foresee. This would reduce the float and may discourage the client from delaying vital information. This query and others like it are addressed in seminars run by Trett Consulting.

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Author : Unknown  
Title : Great Scott

## LEGAL

### GREAT SCOTT

Scott Schedules have become a regular part of construction claims in recent years, probably as a result of being championed by the Official Referees, but are we getting them right, what do the Official Referees expect? We now have some sound advice from Judge Fox Andrews. He began:

*"In an appropriate case and before Official Referees - such cases are in my experience suprisingly few - a Scott Schedule is an admirable tool for the efficient resolution of factual issues."*

Two things struck me on reading this quotation, firstly that Scott schedules are useful to Official Referees less frequently than we may have thought, and secondly that the content should be restricted to purely FACTUAL matters. In explaining further he noted:

*"Pleadings properly will be limited to dealing with the legal issues, they will deal with the terms of the contract express or implied, those terms which were allegedly breached..."*

How many times have these issues crept into the Scott Schedule? He went on:

*"The factual matters relative to the alleged brief will be contained in the Scott Schedule."*

So we now know the scope of the Scott Schedule but what happens when further and better particulars are to be supplied. Judge Fox Andrews is quite specific in this regard too, talking about the effectiveness of a Scott Schedule he said:

*"However, its benefit is at once reduced if a party fails properly to particularise his case. Again, if because of lack of particularisation further and better particulars are sought and given, but in a separate documentation the Scott Schedule, trial duration is at once increased because of the necessity to look at not one document, but at two or more."*

The Official Referee went on to conclude that when he orders more particulars he, almost invariably, requires them to be incorporated into a freshly dated substituted document, not as an ammendment on the original.

When preparing a Scott Schedule for trial before an Official Referee perhaps we should follow Judge Fox Andrews directions, ie.

- Include FULL particulars of the factual case.
- Exclude legal or contractual issues, these are to be in the pleadings.
- Produce clean, freshly dated and updated Scott Schedules without necessarily noting or identifying ammendments from previous issues.

Direct advice on how to present cases from Official Referees is rare so when it happens take note.

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Author : M Thomas  
Title : Sub-Contracting

## **SUB CONTRACTING**

Mike Thomas highlights points arising from DOM/1.

### **DOM/1 - PART 8 OF THE APPENDIX**

Sub Contractors should be wary of accepting a DOM/1 (NOT incorporating Amendment 3 - issued August 1987) where the adjudicator is "**To be agreed if necessary**" or other such wording. The reason being that by the time such agreement is necessary, the parties may be in dispute. At that stage the Main Contractor could refuse to agree on a name and would prevent the Sub Contractor going to adjudication. As a result there would be no effective discipline upon the Main Contractor when exercising his set-off entitlement. If Amendment 3 is incorporated, the Sub Contractor can appoint an adjudicator post-contract from a list maintained by the Building Employers Confederation.

### **DOM/1 - CLAUSE 4.4**

Under Clause 4.4 of the Dom/1 Conditions, oral instructions can be confirmed by the Main Contractor or the Sub Contractor. Occasionally there is a Clause in a covering Order which says: "**All instructions must be given by the Main Contractor in writing**". This Clause can supersede Clause 4.4. Thus if the Sub Contractor confirms an oral instruction and the Main Contractor does not comment within seven days, the Sub Contractor may believe it is a valid instruction. However, if the Order specifies that all instructions must be confirmed in writing by the Main Contractor, and he has not responded to the confirmation in writing, **THE SUB CONTRACTOR WILL NOT HAVE A VALID INSTRUCTION**. This may lead to non payment.