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# Baptism by Fire?

By

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## 1. INTRODUCTION

I am a chartered quantity surveyor, on two adjudicator nominating bodies.[1] I qualified as a chartered arbitrator in December 2002. To become a chartered arbitrator I undertook the postgraduate diploma in arbitration at the College of Estate Management and pupillage with the CIArb, which took about two years.

This note describes my first two appointments as arbitrator in construction-related disputes. The first appointment, textbook procedure, was over in just over three months. My second appointment appeared to be relatively straightforward. However, the introduction of a counterclaim which quadrupled the amount in dispute, allegations of a whole raft of defects, repudiatory breach of contract, delay and disruption and loss of profit claims, all served to cause considerable delays in the arbitration. This, coupled with an illegal worker called as a witness to give evidence at the hearing, other witnesses who could not speak English, the losing claimant going into liquidation, and a winning respondent unwilling to settle the balance of my fees, forcing me to go off to the county court for payment ... I certainly got plenty of experience out of my second appointment. It was a good job my pupil-master trained me well.

## 2. MY FIRST APPOINTMENT

I was very keen to receive my first appointment. I had been told by senior individuals within the arbitration fraternity that arbitration appointments were few and far between, especially since the introduction of statutory adjudication under the Housing Grants, Construction and Regeneration Act 1996. However, I did receive a call from the CIArb in December 2003, about a year after qualifying as a chartered arbitrator. They asked if I was available for appointment as arbitrator in a construction-related dispute. After considering the type of dispute—non-payment of money by client to contractor—I accepted the appointment.

It was a low value dispute, a few thousand pounds. I immediately issued my terms and conditions of appointment together with my directions for the conduct of the arbitration. The claimant submitted his claim, the respondent submitted his defence, and then the claimant submitted his reply to the defence—simple! I issued my final award (save for the determination of the recoverable costs), just over three months from accepting the appointment. I was pleased: my first arbitration done and dusted.

That was straightforward: I could do with some more of these arbitrations to build up my experience. But when would I get my next appointment?

## 3. MY SECOND APPOINTMENT

Sooner than I had expected, in June 2004, I received a call. A quiet voice on the other end of the phone said "we have a dispute, a construction-related dispute, are you available to accept the appointment as arbitrator?"

There was one main issue in dispute: whether or not a settlement agreement had been entered into. The amount in dispute was about £28,000. I accepted the appointment on June 23, 2004, and issued my terms and conditions and my directions for the future conduct of the arbitration. I suggested to the parties that, having regard to the small amount in dispute,

[1] CIArb and CIC.

the parties adopt, by agreement, a "short form" procedure in accordance with the CIArb's Arbitration Rules, 2000 edition. The First Schedule sets out a documents-only procedure but allows the arbitrator to conduct a hearing if the arbitrator considers that a hearing is necessary.

## 4. THE PARTIES' SUBMISSIONS

I issued my directions for the conduct of the arbitration: claim, defence, reply, maybe a hearing, then off I would go and write my award. The claimant submitted his claim on August 20, 2004. He wanted me to decide whether a settlement agreement had been entered into and, if so, for how much. He alleged that he had entered into a settlement agreement with the respondent that the respondent would pay him £28,000 and that, in breach of that agreement, he had not paid up.

The respondent now had 28 days from August 20, 2004 to submit his defence. On September 3, he informed me that, due to counsel's unavailability, he would not be in a position to submit his defence by the due date. He wanted more time. I agreed that his request appeared reasonable. On September 13, 2004 he asked again for more time and then, on September 21, 2004 he informed me that he intended to introduce a counterclaim and that a further six weeks was required. He also informed me that, taking into consideration the need for expert evidence, oral testimony and cross-examination of witnesses, the short form documents-only procedure would not be appropriate. I gave him until October 29, 2004 to submit his defence and counterclaim; this was 70 days after the claimant's submission. I also told him that, if he did not make his submission by that date, I would issue a peremptory order to direct that pleadings would be deemed to be closed and that I would proceed to an award on the basis of the materials properly provided to me.

On October 27, 2004 the respondent requested more time. He cited as his reason a death in the family. Overseas travel was allegedly required to go to the funeral. "That is not correct, the respondent is lying, no more delays", cried the claimant, demanding proof that someone had died and copies of passports to prove travel. The claimant argued that it went to the credibility of the witness if the respondent was not telling the truth about the death in the family to get more time to prepare his submission. I decided not to require proof of death, a bit of a sensitive issue I thought, but I did require proof of travel by disclosure of a certified copy of the respondent's passport.

So the defence and counterclaim were still not submitted. Again, after considering the reasons given, I decided that the respondent's defence and counterclaim must be submitted on or before November 1, 2004. Guess what, he asked for more time.

I then issued that peremptory order. I directed that, unless the respondent submitted his defence and counterclaim on or before November 5, 2004, I would direct that pleadings would be deemed to be closed and that I would proceed to an award on the basis of the materials properly provided to me.

This time, the respondent actually served his defence and counterclaim. The defence was good and the counterclaim amounted to over £100,000. The denials within the defence and counterclaim alleged a whole host of defects in the construction works and an expert report had been submitted in respect of alleged defects. The issues in dispute included valuation of the works, quality of work and materials, late completion, repudiatory breach of contract, loss of profit and mitigation. Hasn't this case mushroomed?

On December 3, 2004 the claimant served his reply and defence to the respondent's defence and counterclaim. He had now brought on board his own expert in response. It was the respondent's turn to make his reply to the defence and defence to counterclaim. Guess what? The respondent asked for more time. I gave him a few extra days, and he made his submission on December 20, 2004.

All submissions had now been made—a sigh of relief and a smile. It had taken six months so far, already twice the time of my first appointment.

## 5. PRE-HEARING REVIEW AND HEARING

A pre-hearing review to arrange hearing procedures was held on December 23, 2004, followed by a site visit on January 12, 2005. This was attended by me, the arbitrator, along with both parties' experts, respondent's counsel and the managing director of the claimant contractor. The respondent himself kept well away. We all walked around the respondent's premises looking at each alleged defect in turn. The place was a bit of a mess, I can tell you. I wouldn't let this contractor get close to my place. "Watch it, Robert," I told myself, "do not jump to conclusions—wait until you have seen all the evidence—from *both* parties." But the place was a mess—riddled with defects.

There was a three-day hearing in January at the CIArb, Bloomsbury Square. The first two days were for examination of witnesses of fact and the third day was for examination of experts. The hearings started at about 10am and went on until 6pm, on one day until 8pm.

On Day One all the procedural matters were dealt with—then, it was time to start examining the witnesses. This was exciting: I had never done this before and I really wanted to listen to what they had to say. First issue, a witness who did not speak English and required a translator; a good job we had had that pre-hearing review meeting. As you can imagine, both sides had to make sure that the translations were correct and not translated in a manner that favoured one of them—suddenly there was a shadow translator, and both parties were now happy. Each party had about six or seven witnesses to examine. To save time, I had directed that each of the witnesses' statements would stand as evidence in chief, opening submissions were to be in writing, sent to me one week before the hearing—then I could review them properly. One of the parties faxed their opening submissions to me late Sunday evening—the hearing was the next day. An early start tomorrow morning, I thought! What was required at the hearing was the cross-examination and re-examination of each witness—two long days ensued. After the first two days of the hearing it was time to reflect. I could not have imagined how many versions of one single event I was to hear—at times not just slightly different. One of the witnesses admitted to being an illegal worker. A few glances between the arbitrator and both parties' counsel followed that admission. And what about the allegations of violence, drinking? But had a settlement agreement been entered into? After listening to all the witnesses of fact being examined, under oath, I was none the wiser. Who was telling the truth? Shouldn't they all be telling the truth, after all the witnesses were under oath? Ah, just different recollections, memories fade over time: that was the reason—wasn't it?

One week later it was time for the experts. There were two, one on each side. One of them was experienced, but changed his opinion at times; the other, a younger chap, less experienced but a bit more objective. Both experts did their best. Both had a hard time of it. They got a grilling, in a polite and professional way of course, and, when one of them was not too sure of himself, I was glad to be the arbitrator and not one of those experts. It was difficult to decide between them at times. However, when I started to analyse the expert opinion evidence of the more experienced expert, I wondered why it took him two, or even three, attempts at giving his evidence on the same point—a slight lack of consistency. I then began to think that some of the evidence of the younger, less experienced, expert, who was a bit more objective, was more reliable. No offence to either expert; they were both very professional.

## 6. CLOSING SUBMISSIONS AND AWARD SAVE AS TO COSTS

Closing submissions were in on January 25 and 26, 2005 and a brief oral presentation of these was conducted on January 31, 2005 at the claimant's representative's offices.

I completed my award, save as to costs, on February 21, 2005. I notified the parties that it was ready to be picked up or dispatched to them upon payment of my fees. My award was in favour of the respondent and my fees amounted to approximately £16,000. Of course, the parties would not know who my award was in favour of until it had been picked up.

All I needed to do now was to decide the parties' costs and it would be all over. No chance! The claimant went into liquidation and my fees had not been paid. Off to the Central London County Court and then the Supreme Court Costs Office.

## 7. CLAIMANT GOES INTO CREDITORS' VOLUNTARY LIQUIDATION

On March 15, 2005 I received a letter from the claimant, who informed me that he was going into creditors' voluntary liquidation. A liquidator was appointed on March 30, 2005. I was at the creditor's meeting. Interestingly, the claimant had been here before, he had also been advised to stop trading before this arbitration hearing and he had recently lost in an adjudication brought against him. It goes on . . . My fees had not been paid. Both parties were liable for them under the Arbitration Act 1996 s.28, jointly and severally. "Not so", said the respondent. Obviously, I checked his argument with various legal experts, who advised me that the respondent was completely wrong.

I wrote to the parties on March 30, 2005, offering to complete the arbitration at no further cost if my fees were paid in full within the next week.

The claimant wrote back to me and said that they had no funds (that was no surprise), and suggested that I look to the respondent for payment. They would favour any arrangement that I could make with the respondent.

I telephoned the respondent's representatives to try and arrange a meeting with the parties to discuss the issue, but no one would to speak to me. Ultimately I was looking to the respondent to pay me as the claimant had gone into liquidation. But could we do a deal if they would not speak to me? I was not going to start writing letters; what would the legal ramifications be? I'm not a lawyer, I'm a quantity surveyor and arbitrator—so I took legal advice. On this advice, I wrote to the parties on April 18, 2005 to say that I was ready to proceed with the final part of the arbitration and that I would commence an action in the county court that day for the recovery of my fees.

I released my award without payment and then issued directions for the parties to make submissions in respect of liability for the costs of the arbitration. The respondent made his submissions; the claimant did not. I completed the arbitration. This time I decided to hold on to my award in respect of liability for the costs of the arbitration. I decided to exercise a statutory lien.

## 8. THE COUNTY COURT AND SUPREME COURT—MY FEES

I went to the county court and picked up a claim form, which I filled in and submitted. Between April and August, 2005 submissions to the county court were made—yes, claim, defence and reply to defence, followed by county court questionnaires. My argument was that the parties were jointly and severally liable for my fees. The respondent did not agree; he said that only the claimant was.

On August 5, 2005 I wrote and told the parties that it was not appropriate for me to continue to exercise a lien on the award on costs and that I was now going to release it. Again, my award was in favour of the respondent. The respondent could now lodge the award with the liquidators as a debt owing from the claimant to the respondent.

The main issue was therefore of joint and several liability for my fees. Under the Arbitration Act 1996, they were. Straightforward? Not according to the respondent. Even though the judge agreed with me, it took months to conclude. There was submission of my claim, the respondent's defence and my reply. It all culminated in a hearing at the county court on Friday, November 18, 2005. The judge found in my favour and awarded me my costs on an indemnity basis. He said that he had not awarded costs on an indemnity basis for years: now that was good news—for me, anyway. He made a point that it was one of the most straightforward cases he had ever had to deal with, stating:

> "... arbitration proceedings, unlike court proceedings, do involve the parties in paying for the privilege of having their dispute decided privately. Those fees, apart from his own legal advisers, will include the fees of the arbitrator. The provision of s.28(1) is a clear expression that the parties to arbitration are jointly and severally liable for the fees of the arbitrator ... It is therefore a risk that, if one of those parties to the arbitration goes into liquidation or becomes insolvent, liability for those fees generally will fall upon the other party. That is the clear position in law. I would have hoped that that would have been understood by [the respondent]..."

Asked by the judge if he had anything to say, the respondent said that he would like to appeal the judge's decision. The judge said that he would not give permission and said that it was clear that the respondent would lose an appeal, that the Arbitration Act is clear and it is a straightforward matter. The hearing closed.

I will get all my costs back soon, I thought—well, not that simple! If the parties cannot agree costs then the court will "assess" the costs. Guess what? Costs not agreed. I asked the county court to assess the costs. In the Central London County Court, costs disputes are dealt with in the Supreme Court Costs Office. On May 17, 2006 the Supreme Court awarded me 95 per cent of my costs including interest.

## 9. REFLECTION

Let's look back at the whole episode. I wonder whether it would have been better to have agreed something with the respondent. I had tried to call his representatives but they would not speak to me. Maybe I should have tried harder. I don't know what advice the respondent received on payment of my fees, but he could have paid £16,000 and that would have been that. Maybe I would have accepted less. In hindsight I certainly would have.

What about the respondent himself? What is that poor bloke thinking now? I am certainly not going to contact him to find out, but let's just think of it, shall we? He could have just paid £16,000—he did not. What has he incurred to date? My claim form, which included the additional costs for the award on costs plus interest plus VAT, amounted to about £20,000. I got judgment for the whole amount. The respondent therefore has a liability of £20,000 for my fees plus interest, and my legal costs amounting to about £17,000. How much were his legal costs in defending him against my claim for fees: £15,000, more? My costs are low at £17,000 because I had plenty of free help, which has not been charged to the respondent. In a way, he is getting away lightly (although I bet he doesn't see it like that). His bill must amount to at least £50,000, and it could actually be a lot more than that. Certainly substantially more than the £16,000 (or less) that I was willing to accept at the outset. There is not enough space to write about the offers to settle that I made to him.

What about the respondent's legal bill for the arbitration itself? Had the claimant not gone into liquidation, the respondent would have recovered a good proportion of his costs, but not now. What about all the rectification work to his property that was required due to the defective workmanship by the claimant contractor now in liquidation? That must have cost a bob or two. Furthermore, even though the respondent's counterclaim amounted to over £100,000, I did award him £41,000. Is he likely to see any of that? All in all, a very expensive loft conversion and extension for the respondent!

With the benefit of hindsight, what could the arbitrator, the claimant and respondent have done differently?