

From the Chairman



Mediation?

There is more than one way to resolve disputes. We have seen Mediation coming to the fore and generally it is the process that most people think of when discussing ADR. I have just been involved in another method where two 'Third Party Professionals', one for each party, were appointed (I was appointed by the Contractor) with a time limit to try and reach a position where the parties could settle.

The dispute was in the Middle East and had been running for five years. The 'Third Party Professionals' were provided with an agreed core bundle of documents and had 10 days to read in and be briefed by their appointing party. The plan was to meet for 10 days with the object of producing a report for the parties consideration. We actually met for 11 days generally about ten hours per day. In separate ante rooms we both had the support of personnel who had been involved in the project and/or the claims who had additional documentation that could be referred to. This support allowed us to get to more detail in certain areas.

At the end of our meeting period we produced a joint report which was presented to both parties. The Joint report contained the areas of agreement and the



The Academy
2 South Square

reasons for reaching the agreement, also areas of disagreement and the reasons for disagreement. The rationale for giving reasons where we agreed was so that the parties could follow our logic. During the previous five years the parties had entrenched themselves on certain issues of principle and in a number of instances we felt that they were wrong. Following the presentation of the report the parties had a time limit of ten days to try and settle, the Third Party Professionals had to be available to help facilitate it.

In fact what happened was that the parties, between meetings, posed various questions to us and we prepared a joint response to the questions. I am happy to say that the parties did settle within the ten days. The exercise was non-binding and without prejudice. In essence the object was to bring new minds to an old problem without carrying the baggage of entrenched views. Whilst there were still substantial differences between the Third Party Professionals they amounted to monies related to issues of law, had the matter not settled any further action could well have been minimised to principles of law only.

This procedure is clearly an ADR procedure but not only that, the fact that we could narrow the issues is exactly the way that Expert Witnesses also work. The discussions between the Third

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August

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Diary Dates

August

Monday	12	The Expert & Dispute Resolver - Copy Deadline
Thursday	15	Executive Meeting

September

Tuesday	3	Evening Meeting - Scotland
Tuesday & Wednesday	3	Foundation Course - Scotland (2 Days)
Monday	4	Law for Experts & Dispute Resolvers
Tuesday & Wednesday	9	Commercial Mediation - Module 1 (2 Days)
Tuesday	11	The Expert's Report - Leeds
Wednesday	17	CPR for Experts
Wednesday	18	Joint Evening Meeting - CIARB London Branch
Friday	20	Day in Court (<i>provisional</i>)
Wednesday	25	Role & Responsibilities of the Expert
Saturday	28	Bar Conference 2002

October

Thursday	3	CPR for Experts - Taunton
Thursday	3	Evening Meeting - South West
Friday	4	Mediation Training - Taunton
Monday	7	Commercial Mediation - Module 2
Tuesday	8	Commercial Mediation - Module 3
Tuesday	8	Annual General Meeting
Tuesday	8	Evening Meeting
Monday	14	Commercial Mediation - Module 4
Tuesday	15	Commercial Mediation - Module 5 Assessment
Wednesday & Thursday	16	Foundation Course (2 Days)
Friday	17	Into Court - Scotland
Friday	18	EuroExpert Council
Wednesday	18	The Expert's Report - for Medics - NEW COURSE
Thursday	23	The Expert's Report
Thursday	24	The Expert's Report

November

Wednesday	6	Executive Meeting Council President's Dinner
Monday - Friday	14 - 30	Training Courses in Hong Kong (2 weeks)

Further dates are available from
www.academy-experts.org/members

Unless otherwise shown all courses/ meetings will be held in London

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An Expert's Tail

An Expert Asks...

Whose Expert are you and can it change?

1. The facts

- 1.1 The Expert was instructed by one of a number of defendants to examine a video made by the police.
- 1.2 A report was prepared and delivered. This was not favourable to the instructor's case.
- 1.3 The Expert was then released and told that it was confidential that he had been instructed and that this information could not be given to the police. He was also to 'lose' his report.
- 1.4 Subsequently the police have sought to instruct him with broadly the same instruction.

2. The problem

- 2.1 Can the Expert accept instructions from the police?
- 2.2 If so, what is the effect of the instruction that the appointment by a defendant was 'confidential'?
- 2.3 Is there any conflict and if so should it be disclosed?
- 2.4 Should he accept and if so what action should he take to maintain his professional status?

3. The answer

- 3.1 In a 'nutshell' the answer is anything but clear or certain.
- 3.2 The basic rule is that there is no property in a witness. In other words nobody owns the witness. This means that the basic answer to 2.1 should be 'yes' **providing** that the witness has been told that he is no longer instructed. If this course of action is taken he cannot reveal any of the work undertaken for the other side.
- 3.4 The previous appointment would have to be disclosed prior to accepting a new appointment.
- 3.3 There has been a civil case where it was found that an agreement that prevented a non/dis-instructed expert from giving expert evidence was depriving the court of assistance it was

entitled to and was therefore contrary to public policy.

- 3.5 The desirability of 'switching' sides is more debateable. Some believe an expert is an expert and he should if those instructing him dis-instruct him, be free to accept an appointment from the other side. In practical terms the 'hassle' this is likely to bring causes most experts to decline to 'switch'.
- 3.6 In the present case the expert is the only (or one of a miniscule number of) experts undertaking this work. If he declines to 'switch' the court would be deprived of expertise to which they are entitled. This is therefore an ethical question for the expert.
- 3.7 If it is decided in principle to 'switch' the following should be undertaken:
 - i) Confirm in writing with the original instructors that he is dis-instructed and inform them that he has been approached by the other side and intends in the circumstances to accept the appointment and will not reveal the nature of the instructions or the work that was undertaken.
 - ii) Inform the police of the underlying facts i.e. that he had previously been instructed by one of the defendants; was no longer retained; that he could not reveal the nature of his instructions or the work or his conclusions.

From the Chairman...

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Party Professionals was amicable, we both had a job to do, but also I am sure that the basic Mediation training skills assisted in the manner in which it was tackled. The other fundamental ingredient, of course, was two parties who were willing to try another method and who obviously wanted the matter settled without recourse to formal procedures.

I found the whole exercise to be

Debt Collection

Members may recall from a previous edition of *'update'* (volume 7 issue no. 5) that the the Late Payment of Commercial Debts (Interest Act 1998) provides that suppliers may charge interest on outstanding debts. The remit of the Act has been brought in gradually through a series of Statutory Instruments. The fifth and final instrument (SI 2002/1673) will come into force on 7th August and covers any situations which are not covered by the preceding 4 Instruments.

Note that the parties (who must both be acting in the course of business) can chose to contract out of this obligation but only if the contractual remedy for late payment is "substantial".

This is good news for suppliers and bad news for late payers!

The relevant instruments are as follows:

1. Contracts between small businesses (as suppliers) and UK public authorities and large businesses (both as purchasers) 1st November 1998, SI 1998/2479
2. Contracts between small businesses (as suppliers) and further UK public authorities (as purchasers) 1st July 1999 SI 1999/1816
3. Contracts between small businesses (as suppliers) and certain further UK public authorities (as purchasers) 1st September 2000 SI 2000/2225
4. Contracts between small businesses (as suppliers) and small businesses (as purchasers) 1st November 2000 SI 2000/2740

Full details of the Act can be found on the HMSO website -

<http://www.hmso.gov.uk/>

intensive but the satisfaction comes when the parties settle. The same satisfaction that arises when as a Mediator you have been able to assist the parties in reaching agreement. As we know ADR often gives the freedom to explore different avenues and methods of settlement that are not available in Arbitration or Litigation but also ADR itself is not prescriptive in that different types of ADR are available to be pursued. It is this freedom from prescription that makes ADR such a powerful tool.

Roger Trett
July 2002

Notice of Annual General Meeting

NOTICE OF ANNUAL GENERAL MEETING

8th October 2002

5.30pm

To be held at

The Academy of Experts,
2 South Square,
Gray's Inn,
London WC1R 5HT

Draft Agenda

- 1 Apologies for absence
- 2 To approve the minutes of the AGM held on 11th October 2001 – published in 'update' November 2001 (Volume 9 Issue No 6)
- 3 Matters Arising
- 4 Chairman's Report
- 5 Treasurer's Report including adoption of accounts for the year ending February 2002
- 6 To appoint the Auditors for the year 2002-2003
- 7 Election of Officers
- 8 Election of Council Members (7 vacancies)
- 9 To approve 2003-04 subscription levels
- 10 Any other Business

Proxy Voting

Any Member wishing to have a proxy vote (for this AGM only) must ensure that it is registered in writing with by the Secretary (at the office of the Academy) at least 5 working days before the date of the AGM. (See clause 7.7 of the constitution)

Nominations

Members wishing to stand for office (Council or Officer) should note the following:

To be eligible to be nominated as an Officer a Member must have served at least 11 months on Council and have attended at least 2 meetings of Council. This is set out in section 8 of the Constitution.

Members eligible for nomination for council are set out in section 9 of the constitution (see below). Valid Nominations must be received by the Secretary General by 12 noon at

2 South Square on 28th August.

Nomination forms are available from the Member's Area web-site or from the office.

Extract from the Constitution....

- 9.2 The following are eligible to stand as candidates for election as Elected Members, and to propose or second any candidate:
- (a) Fellows
 - (b) Full Members
 - (c) Qualified Dispute Resolvers
 - (d) Legal Members
 - (e) Associate members, who have satisfied Clause 5.3(b)
 - (f) Companions
 - (g) The nominated representatives of a Corporate Member.

9.3 Elected Members shall be elected by postal ballot of all members. Members entitled to vote at General meetings in accordance with Clause 7.5 shall be entitled to vote in the ballot for Council Members.

9.4 All nominations for Elected Member must be in writing and must be signed by the proposer and seconded and counter-signed by the candidate expressing his willingness to stand for election. The completed nomination must be submitted to the Secretary at least 42 days before the date of the Annual General Meeting. Council may from time to time impose voting restrictions in order to implement the requirement of Clause 9.1.

ANNOUNCEMENTS

More Mediation?



Professor Hazel Genn of University College, London has undertaken research about the increasing uptake of ADR in cases in the commercial court and court of appeal.

The findings of Professor Genn's work have been published earlier this year. There is a summary and a copy of the report at:

www.lcd.gov.uk/research/2002/1-02es.htm

Congratulations to...



Owen Luder CBE MAE who has been elected as Chairman of the Architects Registration Board. He is supported by His Honour Judge Humphrey Lloyd QC as Vice-Chair.



Patrick O'Reilly MAE who has recently become the President-elect of the British Association of Urological Surgeons.

Criminal Justice Review - the Auld Report



The Government's response to the recommendations made by Lord Justice Auld in his report *Review of the Criminal Courts of England and Wales (2001)* has now been published as *Justice for All*. Whilst there are currently no specific proposals relating to Expert Witnesses there are apparently some issues which were not completed in time for publication of the paper and these may include items more relevant to us.

The white paper is available for download from www.cjsonline.org.uk (the Criminal Justice System website) or from the stationary office - www.tso.co.uk/bookshop (priced £20.75).

President's Dinner - 6th November



This year the President's Dinner is being held at a new location - The National Liberal Club in Whitehall Place. This sumptuous setting will provide a beautiful venue for the most prestigious event in The Academy's calendar.

This year we have been able to freeze the price at the same rate as last year. Tickets cost £57.50 (plus vat).

This event is a perfect opportunity for entertaining. The chance to meet other Academy members, solicitors, members of the bar and the judiciary should not be missed.

A booking form is included with this mailing.



The National Liberal Club
Whitehall Place

Chambers & Partners Guide to the Legal Profession

The Academy has again been able to secure a supply of 'Chambers Guide to the Legal Profession'. This excellent book is a comprehensive resource giving detailed information regarding firms of Solicitors and the members of the Bar and chambers alphabetically, by region and by area of specialisation.

Normally retailing at £65 this book is available free to members who wish to collect in person from the office or for £10p&p if you would like us to send it to you.

There are now only a few copies of the book left. Call 020 7637 0333 now to reserve yours.

Academy enclosures in this mailing

- Course Registration Form
- President's Dinner Form
- Sundries Order Form

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