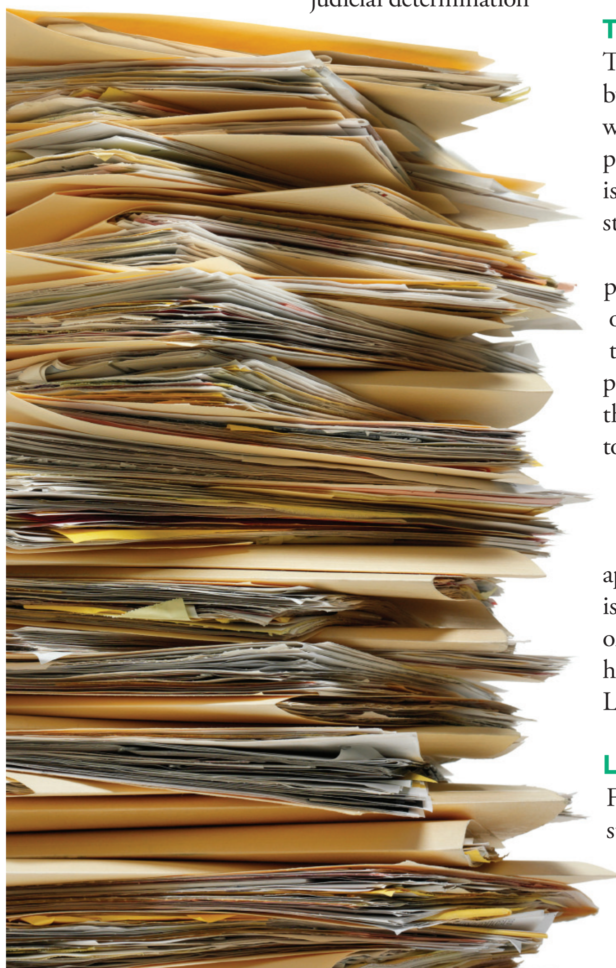
Constructive criticism

Michael Regan charts the demise of construction litigation

Any construction lawyer surveying the litigation landscape over the last 30 years or so would agree that it has changed considerably during that period. A cursory examination of recent volumes of the *Building Law Reports* indicates the scope of the changes which have taken place, revealing a mixed bag of cases drawn together under a general "construction law" theme. There are cases that involve adjudication, arbitration, procedural issues and several decisions from other jurisdictions, but comparatively few which a construction lawyer would readily equate with the heart and soul of this area of law.

However, it would be wrong to conclude that previous years' reported cases (or those that the editors have chosen to include) are anything other than an imprecise snapshot of the types of dispute which now arise. It is the fact that certain types of cases are no longer finding their way through to final judicial determination which is more revealing, and it is only those that involve adjudication that give a clue to the true present status of dispute resolution in the construction industry.



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Of course, in any analysis of the changes that have taken place, it is necessary to consider the effect that the Woolf reforms—and the introduction of the Civil Procedure Rules (CPR)—have had.

Impact

Undoubtedly these have had an impact, but one of the principal planks—active case management—was not unusual to practitioners in the Official Referees' Court (the forerunner of the Technology and Construction Court (TCC)). We had been used to the judge setting out a path leading to a date for trial which was fixed at an early stage, and the official referees had developed a reputation for innovations which subsequently were adopted in other parts of the High Court.

The real revolution

The most significant change brought about by the Woolf reforms has nothing to do with case management or the litigation process at all. For construction lawyers, it is the introduction of a pre-action protocol stage which represents the real revolution.

The theoretical purpose of the pre-action protocol is to encourage the early exchange of information about a dispute in the hope that the issues will be narrowed and, if the parties' differences cannot be resolved, that this will enable any subsequent proceedings to be conducted more efficiently. There is also encouragement for the parties to consider whether some form of alternative dispute resolution process might be appropriate. These are laudable aims and it is impossible to criticise the principle, but one wonders if the way in which the theory has been brought into practice is really what Lord Woolf had in mind.

Letters of claim

Far from setting out a clear and coherent statement of a claimant's position, many letters of claim are devoid of analysis and, at worst, are simply a series of assertions without any attempt to explain the legal basis of the claim, or how the alleged losses have been caused by failures on the part of the defendant. After a series of exchanges in correspondence, further information may emerge and sometimes the claim may undergo a metamorphosis where the allegations bear little resemblance to those set out in the original letter of claim. Any attempt to object to dealing with a claim on this basis is often met with the assertion that the defendant is ignoring the "spirit" of the protocol, as if precision in pleading a claim was one of the ills which Lord Woolf was trying to cure. In practice, it is hard to escape the conclusion that, in many cases, a defendant will know much less about the case it has to meet than would have been the position had a properly particularised pleading been served in the first place.

Strategic option

Faced with such a claim, a defendant could choose to disengage from the pre-action process, but that is a dangerous strategy, particularly if an invitation is extended to mediate the dispute. To do so exposes the defendant to incurring a costs penalty, even if it is ultimately successful in subsequent litigation. A cynical view might be that some claimants deliberately avoid any proper analysis of their claims, and see the pre-action process as necessary foreplay to achieving their goal of simply securing a deal at a mediation.

Of course, an effective outcome of a mediation can be to convince a party that it has no hope of success, but experience suggests that this rarely happens as parties are often encouraged to find some middle ground, whether that is just or otherwise. And it is not only claimants which are culpable; defendants can use the process to avoid engaging on the issues and see mediation as the endgame which provides the best opportunity of denying a claimant the right to recover the full extent of its actual losses.

Lack of clarity

Lack of clarity is often a feature of construction claims during the pre-action protocol stage. This is because there are rarely simple issues at the centre of a

dispute. Usually, the facts are complicated and there are often technical issues which demand expert input and detailed analysis. However, the protocol expressly states that the parties are not required to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation. Clearly, it makes sense to avoid imposing an obligation on the parties to incur unnecessary costs, but it has to be recognised that it is impossible to avoid significant costs in complicated cases. It is unfortunate if the signals in the protocol that proportionality is to be observed may be interpreted as encouraging a claimant to dispense with undertaking a proper analysis when it presents its claim. It could not have been the intended result that a defendant should, as a consequence, be left to work out for itself how the claim might ultimately be presented and established, or to try to piece together the allegations which seemingly are being made so that it can carry out a risk assessment.

Uncertainty

The introduction of the pre-action protocol certainly has had the effect of reducing the amount of litigation in the TCC. However, has it reduced the amount of claims, or claims which, if subjected to the forensic rigours of the litigation process, would either never have seen the light of day or been settled at an early stage? The answer is probably not. Instead, parties have found themselves caught up in a world where the rules of engagement are uncertain, albeit that they will almost inevitably end up in a mediation and under huge pressure to settle.

Statutory adjudication

A year prior to the introduction of the CPR, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996) came into force. This includes provisions which allow any party to a construction contract to refer a dispute to adjudication for determination within a very short period. Although an adjudicator's award is usually only binding on a temporary basis and the dispute can then be referred to a court or arbitrator, in practice the vast majority of parties are prepared to accept the award and take the dispute no further.

Clearly, many construction disputes which were traditionally the subject matter of litigation are now referred to adjudication, and the amount of reported cases which concern the adjudication process bears testament to its impact. Without a doubt, the introduction of statutory adjudication has had as much influence on the way in which construction disputes are determined as any of the Woolf reforms, and some may say that it has been even more influential. Both have resulted in fewer claims finding their way into the courts, but adjudication is a radically different model to the consensual formula adopted in a pre-action protocol process leading to mediation.

Adjudication is adversarial and, in the vast majority of cases, the "judge" is not a lawyer, but an industry professional. It is ironic that in an era where the avoidance of conflict is generally regarded as the way forward, a new form of dispute resolution has been introduced specifically for the construction industry which generates so many hard-fought battles.

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Adjudication serves a purpose as it is relatively inexpensive and provides access to justice of sorts in circumstances where previously a party may have been deterred by the costs of pursing its claim and the time which that would take. However, as a process, adjudication is relatively crude and there is an inevitable sacrifice of quality in favour of speed. Although any type of construction dispute can be referred to adjudication, claimants have tended not to use this method of dispute resolution for professional negligence claims.

This unofficial self-regulation has probably arisen because, within the construction industry, it is generally felt that claims of this nature are not suitable for the rough and ready justice of the adjudication process. The types of dispute which therefore form the subject matter of adjudications are frequently those which concern payment or delay-related claims.

Of course, there is nothing wrong with crude justice if it is possible sensibly to shoehorn the adjudication of a dispute into the short period contemplated by HGCRA 1996, particularly if the alternative would be to deny a claimant a remedy simply because it is deterred from pursuing its claim on grounds of cost.

However, it is questionable whether complicated claims which depend upon a detailed inquiry into numerous facts and require expert input are really suitable for adjudication. A claimant can take its time, prepare its case and marshal its evidence well in advance, leaving a defendant with little time to respond. Looked at in this way, adjudication does seem a process which again is balanced in favour of claimants.

Twin attack

The twin attack of the pre-action protocol and statutory adjudication has meant that there are fewer claim forms being issued in the TCC and consequently fewer reported cases of real interest to construction lawyers. The dearth of such reported cases has meant that the law reports have ceased to be the rich vein of precedent they once were, and there is now much greater reliance placed on decisions from other jurisdictions. If these other jurisdictions adopt similar far-reaching anti-litigation features, there does seem to be the real prospect of some stagnation in the development of the law.

Life in construction

The life of a construction lawyer is therefore very different in 2009. A visit to the TCC is a relatively rare experience and the CPR, no doubt providing for the much more effective dispensation of justice, are generally only of academic interest to the practitioner. It is impossible to avoid the feeling that this is a pity, bearing in mind that the TCC now has some of the most talented judges in living memory.

However, it seems that construction litigation has had its time in the sun and its position at the centre stage has been taken by less refined dispute resolution processes which are the preserve of the private sector. Does it matter? The answer really depends upon what the parties want out of a civil justice system. NLJ

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