TECBAR Review

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From the Chairman

Since the last TECBAR Review Lord Justice May has retired from the Bench after a long and distinguished career. I am delighted that he will be continuing as President of TECBAR and that he agreed to give this year's Annual TECBAR Lecture on 28 September 2011 to mark his retirement. A further loss of judicial talent has come with the retirement of His Honour Judge Brian Knight QC who was the principal TCC judge in the Central London Civil Justice Centre.

One of the articles in this edition of the Review explains how members of TECBAR and SCL can now get access, free of charge, to four CPD Podcasts each year through our new relationship with Informa Law. We hope that this facilitates members in satisfying their CPD requirements. On this topic, the Bar Standards Board is currently consulting on the outcome of a review of the CPD requirements for barristers which was led by Derek Wood QC CBE. This review made a number of recommendations including increasing the number of required CPD hours from 12 to 24 per year and the recategorisation of CPD qualifying events to 'verifiable' and 'non-verifiable'. The deadline for responses to the BSB's consultation has been extended to 31 October 2011. The consultation can be found on the Bar Standards Board's website. I would encourage all members and members' chambers to respond to this consultation, even if briefly.

On Monday 26 September TECBAR together with the SCL, TecSA, CIArb and the ACCL jointly hosted a dinner at the Brewery to mark the opening of the new business court, the Rolls Building, which includes the TCC. Mr Justice Akenhead spoke at the dinner about the new building and the promotion of London as an international dispute resolution centre.

Finally, I would like to thank Charles Pimlott who steps down as Secretary of TECBAR. Without all his hard work my job would have been much harder over the last year. We will not be losing him as he will be staying on as a member of the Committee. I welcome Lynne McCafferty who after many years of organising the TECBAR CPD events has agreed to take on the role of Secretary.

Chantal-Aimée Doerries QC, Chairman

From the Editor

The new legal term brings with it not only the move of the TCC into the Rolls Building with the advent of the new Business Court, but also the long awaited coming into force of Part 8 of the Local Democracy, Economic Development and Construction Act 2009, amending Part 2 of the HGCRA 1996 on 1 October 2011. Jennie Gillies addresses the new provisions in her very helpful article.

As well as providing comment on the removal of experts' immunity from suit by the Supreme Court in *Jones v Kaney* (Philip Boulding QC) and the TCC's injunction of a call on a performance bond in *Simon Carves Ltd v Ensus UK Ltd* (Andrew Goddard QC), this issue of the Review marks the passing of HH Esyr Lewis QC, the last judge to hold the post of Senior Official Referee.

Finally, Tom Lazur describes his experience at, and suggests lessons to be learned from, a three-day conference in Washington DC titled 'Managing Complex Litigation: The View from Inside the Corporation'. Junior members of the Bar should take particular note: Tom traveled to Washington as the beneficiary of funds from the International Professional and Legal Development Grant Programme, open to all barristers under seven years' call.

As always, comments, contributions and correspondence are welcome for future publication. Enjoy this new issue, the new court and the new term.

Mark Chennells, Editor

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The new Construction Act

Part 8 of the Local Democracy, Economic Development and Construction Act 2009 ('LDEDCA') finally came into force on 1 October 2011 amending Part 2 of the HGCRA 1996[1]. The final period of delay — since Royal Assent was granted in November 2009 — was the result of consultation on the amendments required to the Scheme for Construction Contracts, the results of which were published in June 2011 and also took effect on 1 October 2011[2].

For now, two systems of statutory adjudication will co-exist. The amendments are not retrospective (LDEDCA s149(3) & (4)); the contracts affected are those 'entered into' on or after 1 October 2011.[3]

What does the new regime entail?

The changes introduced are essentially threefold.

(A) Construction Contracts do not need to be in writing

Section 107 of the HGCRA is repealed in full by the LDEDCA s139(1). The effect of the repeal is somewhat diluted by changes to s108 however, which require the incorporation of 'provision in writing' enabling parties to adjudicate disputes into all construction contracts (whether written, oral, or part-oral). In the absence of such provisions the revised Scheme applies.

A number of fertile battle grounds will emerge as a result of the repeal of s107.

1. **Conduct of an adjudication:** Adjudicators are likely to need to consider whether any contract has been concluded, the date that a contract was entered into, the relevant parties to a contract and the terms of construction contracts on a regular basis with necessary knock-on effects to the way in which adjudications are conducted:
   - Referring parties will need to ensure the factual basis to the existence of an oral contract is properly set out in referral notices;
   - Witness evidence relating to oral contracts (eg existence of, identity of parties and relevant terms) will need to accompany referral notices; and
   - Adjudicators will need to ensure that sufficient opportunity is afforded to the parties to test factual evidence.

2. **Jurisdictional challenges:** a fresh wave of jurisdictional challenges is likely. Possible grounds might be:
   - No contract
   - Wrong party
   - Oral contract concluded prior to 1 October 2011
   - Resurgence in natural justice arguments.

3. **Practical Issues for the TCC:** the existing fast track procedures (para 9.1.1 of the TCC Guide) will be put under strain. Disputes relating to whether a contract exists, the date a contract was concluded or the terms of that contract, will not lend themselves easily to the Part 8 procedures, and Part 7 procedures will need to be followed instead to enable substantial disputes of fact to be considered properly.

(B) Changes to Adjudication Procedure

The combined effect of the changes to procedure introduced through the LDEDCA and Part I of the revised Scheme are:

(1) **Adjudication timetables**

Confusion[4] regarding whether the 28-day timetable ran from the date on which the Referral Notice was sent or the date on which it is received has now been resolved. Whilst the LDEDCA remains silent:

- paragraph 7(3) of the revised Scheme requires an adjudicator to notify the parties of the date upon which the Referral Notice is received; and
- paragraph 19(1) now makes it clear that periods are to be calculated from the date that the referral notice is received.

1 By virtue of the Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (England) Order 2011 [SI 2011/1582] and the Local Democracy, Economic Development and Construction Act 2009 (Commencement No 2) (Wales) Order 2011 [SI 2011/1597].

2 The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 [SI 2011/2333] and The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011 [SI 2011/1715].

3 It is currently unclear how the courts may interpret this phrase and there is certainly scope for jurisdictional challenges to be mounted; letters of intent are commonplace in the industry and few construction projects proceed only once all contract terms have been agreed (and contracts are frequently executed after work has commenced).

4 Contrast *Aveat Heating v Jerram Falkus Construction* (2007) 113 ConLR 13 (where the date of receipt of the notice by the adjudicator was used) with *Ritchie Brothers v David Philip* [2003] ScotCS 103 (where the relevant date was the date the Referral Notice was sent).

(2) **The Slip Rule**

An adjudicator's power to correct an accidental error is well established[5]. This was formulated as an implied term entitling correction of an obvious mistake (or in some circumstances, clarification of an ambiguity) in *Bloor Construction v Bowmer* [2000] BLR 764.

HGCRA, s108(3A) (amended by the LDEDCA, s140) now requires a contract to include a written slip rule provision 'permitting the adjudicator to correct clerical or typographical errors arising by accident or omission'. This is broadly consistent with the decision in *Bloor Construction* (although the formulation there was broader than the language used in s108(3A)).

If not provided in the contract, the revised Scheme applies, which addresses the procedure to be used:

- an adjudicator may correct his decision 'on his own initiative or on the application of a party' (paragraph 22A(1));
- corrections are to be made 'within five days of the delivery of the decision to the party' (para 22A(2)); and
- any correction forms part of the original decision (ensuring that the timescales required for a statutory adjudication are not exceeded) (para 22A(4)).

(3) **Peremptory compliance**

The adjudicator's power to require peremptory compliance with a decision, and ancillary provisions enabling the court to enforce the exercise of this power (paras 23 and 24 of Part I to the Scheme), have now been abolished.

(4) **Costs in adjudication proceedings**

Part II of the HGCRA was silent on adjudication costs and resulted in some parties incorporating Tolent clauses into contracts (ensuring that adjudication costs and expenses would be borne by Referring Parties irrespective of the ultimate outcome of an adjudication) thereby fettering a party's right to adjudicate. To an extent, the court had begun to address the problem caused (eg *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCC) where an onerous Tolent clause was held to be inconsistent with the HGCRA s108).

Section 108A of the HGCRA (as amended) renders agreements as to adjudication costs unenforceable, subject to two narrow exceptions:

(1) Parties can agree a term which confers power on the adjudicator to allocate his *fees and expenses* as between the parties, provided the term is set out in writing and is contained in the construction contract; and

(2) Parties can agree terms which concern the allocation of the adjudicator's fees and expenses or the parties' costs relating to the adjudication provided that (i) the agreement is in writing; and (ii) is agreed after the notice of intention to refer the dispute has been given.

The terminology used is important; there is a distinction between allocation of an adjudicator's *fees and expenses* and the allocation *costs* incurred. It is clear from the explanation provided in the government's response to the Scheme Consultation that the courts are expected to take a dim view of attempts to circumvent these provisions.

Only ancillary amendments have been required to the Scheme to bring it in line with these provisions (see paras 9(4), 11(1) and 25).

Preservation of the status quo

A number of changes mooted in relation to Part I of the Scheme have not been implemented:

- There is no extension of the period for service of a referral notice (after notice of intention to refer has been given).
- Confidentiality provisions are not to be extended.
- Adjudicators continue to lack any power to require joinder of proceedings.
- An adjudicator is not to be afforded the power to open up a decision or certificate if the underlying contract provides that it is final and conclusive (para 20(a) of Part I to the Scheme).
- Adjudicators continue to lack any general discretion to award interest.
- No express requirement for an adjudicator to give reasons (absent a request) has been introduced (because it would be superfluous).
- No delayed period for compliance has been introduced; compliance is required when a decision has been delivered (para 21).

(C) Substantive changes to implied terms – payment provisions

Whether a contract was entered into before or after 1 October 2011 will become a significant battleground owing to the amendments introduced by ss142–145 of the LDEDCA (and ancillary amendments made to Part II of the Scheme) which affect the substantive payment obligations of counterparties.

The amendments fall into four categories:

(1) **Adequate mechanism for determining when payments fall due**

Section 110(1) of the HGCRA requires that every construction contract includes an 'adequate mechanism' for determining when and what payments become due under the contract. The LDEDCA, s142 now supplements this requirement by specifying two instances where provisions fall short:

(A) Where the date on which payment becomes due is determined solely by reference to when a payment notice is provided to the party to whom payment is due (s110(1D)).

5 See *Buildability Ltd v O'Donnell Developments Ltd* (2010) 128 ConLR 141, *CIB Properties v Birse Construction* [2004] All ER (D) 256 (Oct), *YCMS Ltd v Grabiner* [2009] All ER (D) 19 (Apr) and *Redwing Construction Ltd v Wishart* [2010] All ER (D) 305 (Dec).

(B) Where payment is said to be conditional upon performance of obligations (or the decision of any person regarding whether obligations have been performed) under another contract (s110(1A)).

- This is not simply a reiteration of s113 of the HGCRA (which provides that 'pay when paid' clauses are — for the most part – ineffective). As made clear by s110(1B) this is not intended to affect payment obligations and is focussed at conditions predicating payment on the performance of *substantive* obligations under a separate contract.
- The ambit of this provision is limited by:
  - s110(1C) providing that where a construction contract is an agreement between two parties to the effect that a third party is to carry out construction operations, it will be permissible for the parties to agree that payments are conditional upon the third party carrying out those obligations; and
  - the Construction Contracts (England) Exclusion Order 2011 and the Construction Contracts (Wales) Exclusion Order 2011, SI 2011/1713 providing that s110(1A) does not apply where a party to a PFI contract (as defined in the Construction Contracts (England and Wales) Exclusion Order 1998) has sub-contracted some or all of its obligations to a third party.

(2) **Payment notices**

Absent parties having negotiated terms, there is no provision within the HGCRA which gives the party to whom money is owed an entitlement to take the initiative by issuing payment notices. Section 143 of the LDEDCA changes this and introduces two new provisions:

1. By s110A(1) every construction contract must include a provision requiring either a payer or a payee to issue a payment notice no later than five days after payment falls due:
   - Where the contract does not meet this requirement the revised Scheme applies (para 9 of Part II to the existing Scheme having been replaced in its entirety by a new para 9 providing, by default, for payment notices to be issued by the payer, not later than five days after the payment due date).
   - The information to be included in the notice is set out in s110A(2) (for payer's notices) and s110A(3) (for payee notices).
   - The amount included in the notice (which might be zero — per s110A(4)) becomes the 'notified sum'.
   - A party intending to pay less than the full notified sum (because of set-offs or abatements) must set that out in the payment notice.
2. Section 110B introduces a statutory entitlement for the party to whom payment is to be made to issue a payment notice in the event that the payer fails to do so (if required under the contract).
   - The payee may issue a payment notice once the ime during which the payer should have issued a payment notice has expired (s110B(2)).
   - The payee does not gain a second bite of the cherry; if the contract already permits the payee to issue a payment notice (and it has done so) there is no entitlement to raise a further payment notice (s110B(4)).
   - The contents of the notice are set out in sub-s110A(3).
   - Where a payee notice is issued under these provisions, the final date for payment by the payer is postponed by the same number days as the period between the date on which the notice should have been given by the payer and the date on which it was actually given by the payee.

(3) **Payment of notified sums and withholding notices**

For contracts entered into on or after 1 October 2011, withholding notice provisions are changed because the old s111 is replaced with a new s111. The emphasis of this new section is on the requirement to pay 'the notified sum' (rather than the 'sum due' referred to previously). This is, however, made subject to two separate provisions:

(A) **Withholding Notices**

If a payer or a specified person wishes to give notice of an intention to pay less than the notified sum it may do so (new s111(3)). This notice must:

- specify the sum the payer considers due (new s111(4)(a));
- specify the basis on which that sum is calculated (even if zero) (new s111(4)(b));
- be provided no later than the 'prescribed period' before the final date for payment (which is either (i) the contractual period agreed; or (ii) not later than 7 days before the final date for payment (per new paragraph 10 of the revised Scheme which applies if the contract fails to specify a prescribed period).

(B) **Insolvency**

Statutory provisions are now included mirroring the effect of *Melville Dundas v George Wimpey UK* [2007] 3 All ER 889. If the contract provides that the payer need not pay if the payee has become insolvent[6], then the payer need not pay if the payee becomes insolvent after the time for a withholding notice has passed (s111(10)).

(4) **Suspension of performance for non payment**

LDEDCA s145 introduces two material additions to the existing provision (HGCRA s112) permitting suspension of work for non-payment. These:

(a) make clear that a contractor may choose to suspend work only in relation to a particular part of the works; and

(b) provide that the party in default is liable to pay a reasonable amount for the costs and expenses incurred stopping work.

Jennie Gillies

4 Pump Court

6 The definition of 'Insolvent' remains that set out in s113(2) to (5) of the HGCRA.

Jones v Kaney: The end of expert immunity

In the past it has simply been accepted that an immunity which protects witnesses of fact applies equally to prevent a client from suing in negligence the expert that he has retained. However, this 5/2 majority decision of the Supreme Court overturned the first instance ruling to remove protections afforded to expert witnesses that have been in place for more than 400 years.

The expert witness immunity rule has traditionally been justified by reference to the public interest in expert witnesses giving truthful and fair evidence in court, without fear of being sued by a party whose case is lost. On this basis it is important to understand why the Supreme Court decided that public policy no longer justifies conferring on an expert witness any immunity from liability in negligence in relation to the performance of his duties in that capacity.

Prior to this decision experts enjoyed a limited immunity from proceedings for professional negligence which extended to evidence given by the expert in court or arbitration and to work which was preliminary to giving such evidence. Thus, production or approval of his or her report would be protected, as would the content of the experts' joint agreement: *Stanton v Callaghan* [1999] 2 WLR 745. The immunity did not extend to work done for the principal purpose of advising the client as to the merits of their case, particularly, if proceedings had not been started, or to advice as to whether the expert was qualified to advise at all: *Palmer v Durnford Ford* [1992] QB 483. Nor did it extend to criminal charges such as perjury or to disciplinary proceedings or wasted costs orders.

As Lord Hobhouse stated in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615:

> 'A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation … Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity.'

The public policy arguments which have been relied upon to confer immunity upon experts include:

(1) Immunity should only be given to an expert where to deny it would mean that he would be inhibited from giving truthful and fair evidence in court (see *Palmer v Durnford* at p488, *Stanton v Callaghan* at pp774–776);
(2) The immunity must be necessary for the orderly management and conduct of the trial (see *Stanton v Callaghan* at p768, *per* Chadwick LJ and pp773-774, *per* Otton LJ); and
(3) It is necessary to avoid a multiplicity of actions (see *Stanton v Callaghan* at page 761, *per* Chadwick LJ).

In *Landall v Dennis Faulkner and Alsop* [1994] 5 Med LR 268, Holland J commented on the purpose of the immunity, in the context of experts' meetings, as follows:

> 'In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice.'

By way of a summary, the facts of the case were that Jones alleged that Kaney provided negligent opinion evidence when she acted as his psychiatry expert in a previous personal injury claim arising out of a road traffic accident. Kaney applied to have Jones' claim struck out on the grounds that, as an expert witness, she enjoyed immunity in respect of such matters. At first instance, Kaney's argument succeeded on the basis of *Stanton v Callaghan*. However, in his judgment Blake J also stated that he doubted whether *Stanton v Callaghan* would continue to remain good law and granted a 'leapfrog' appeal in order to have the matter decided by the Supreme Court.

Relevant background is that even prior to the decision of the Supreme Court, there was already a growing opinion that expert witness immunity should be abolished because *Stanton v Callaghan* was no longer good law. This was argued on the basis of three reasons:

(1) The immunity should no longer survive in light of the House of Lords' decision in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 (in which a barrister's immunity from suit was abolished);
(2) The analogy between expert witness immunity and general witness immunity was not valid; and
(3) The expert witness immunity was inconsistent with the right to a fair trial enshrined by art 6 of the European Convention on Human Rights.

It is necessary to say a little about each of these arguments in turn. The reasons given by the Court of Appeal in *Stanton v Callaghan* for applying the principle of absolute immunity to expert witnesses retained by a party in litigation was predicated substantially upon the advocate immunity principle. The principle had been articulated in the earlier cases of *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sidney Mitchell and Co* [1980] AC 198. In *Stanton v Callaghan*, Chadwick LJ quoted the headnote of *Rondel v Worsley* as follows:

> 'a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and

management of a case in court and the preliminary work connected therewith such as the drawing of pleadings. That immunity was not based on the absence of contract between barrister and client but on public policy and long usage in that (a) the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently; (b) actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest.'

The similarity in the arguments for advocate immunity and expert witness immunity is clear. However, the decisions in *Rondel v Worsley* and *Saif Ali v Sidney Mitchell* have been overturned by the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, with the effect that the advocate's immunity no longer exists. In such circumstances, it was difficult to see why the arguments should remain valid in the context of expert witness immunity. Further, there were already signs of a shift away from an unquestioning acceptance that expert witnesses should be immune from civil suit or other consequences arising from their evidence. In *Phillips v Symes* [2004] EWHC 2330 (Ch), Peter Smith J held that an expert could be liable for a party's costs of the proceedings pursuant to s51 of the Senior Courts Act 1981. At paras 93 to 98, he held:

'It seems to me that I should approach the matter along the principles (for example) set out in the *Stanton* case. Do expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice? Alternatively, is it against the administration of justice principles not to allow a costs application of the type envisaged by the Administrators to be brought against Dr Zamar?

In my judgment, that question should be looked at in the light of modern developments of the law in relation to litigation. Thus, wasted costs applications against advocates have been decoupled from the immunity. The immunity has been destroyed as regards advocates. In neither of those cases did the Courts accept submissions that the immunity inhibited advocates fearlessly representing their clients. Indeed they rejected them. As regards experts in *Stanton* the Court of Appeal equally was dismissive of the belief that Experts would be deterred from giving proper reports because of a potential action against them.

It seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order in appropriate circumstances against an Expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the Court.

I do not regard the other available sanctions as being either effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of that evidence. This flows from the *Myers* case applied to Experts. I do not accept that Experts will, by reason of this potential exposure, be inhibited from fulfilling their duties. That is a crie de cour often made by professionals, but I cannot believe that an expert would be deterred, because a costs order might be made against him in the event that his evidence is given recklessly in flagrant disregard for his duties. The high level of proof required to establish the breach cannot be ignored. The floodgates argument failed as regards lawyers and is often the court of last resort...

I appreciate that in so concluding this is the first occasion the Court has been asked to consider this. I do not think that the authorities cited by Mr Fenwick QC bind me to come to a different conclusion. I do not accept the question of the separate jurisdiction of the Court to ensure duties owed to it are complied with was within the contemplation of the Courts when they were discussing witness immunity. The idea that the witness should be immune from the most significant sanction that the court could apply for that witness breaching his duties owed to the Court seems to me to be an affront to the sense of justice.'

In addition, in *Meadow v General Medical Council* [2007] QB 462 the Court of Appeal refused to extend the immunity so that it prevented an expert witness from being the subject of professional disciplinary proceedings in relation to statements made or evidence given by him in or for the purpose of legal proceedings. Sir Anthony Clarke MR considered that it would be:

'astonishing, if the way in which an expert gave evidence or the content of that evidence showed that he was not fit to practise in a particular discipline, but the [Fitness to Practise Panel] could not consider it because the expert was immune from disciplinary proceedings by some absolute common law immunity' (para 32).

Sir Anthony Clarke MR took the view that the public policy arguments justifying the immunity from civil suit did not and should not override the public interest in ensuring that expert witnesses were properly regulated by their professional bodies.

Obviously, it was difficult to explain and justify why an expert should be immune from proceedings for breach of duty (whether in contract or tort) when he was not immune from either liability for a wasted costs order, or disciplinary proceedings.

Turning to the general witness immunity analogy, the witness immunity rule confers an absolute immunity which

protects witnesses, lawyers and judges in respect of anything said in court. Witness immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court. The purpose behind such a rule is that the administration of justice requires that participants in court proceedings should be able to speak freely without being inhibited by the fear of being sued for what they say, and so that the court will have full information about the issues in the case. In the past, an analogy has been drawn between the immunities enjoyed by those who participate in court proceedings and the immunity granted towards paid expert witnesses. It has been said that a similar immunity against proceedings for negligence is necessary to enable experts to fulfill their duty to the court properly, particularly in relation to statements made out of court in the course of preparing evidence to be given in court.

Lastly, in recent times there has been greater appreciation of the importance which has to be attached in this context to the principles of human rights law. The decision in *Stanton v Callaghan* was decided prior to the coming into force of the Human Rights Act 1998 which now requires the court to act compatibly with art 6 of the European Convention on Human Rights, the right to a fair trial. This confers on an individual the right of access to the court for the determination of his or her civil rights. The right of access to the courts secured by art 6(1) is not absolute, but may be subject to limitations such as that resulting from expert witness immunity. However, in *Fayed v United Kingdom* (1994) 18 EHRR 393, 429–430 para 65, the European Court of Human Rights made it clear that a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. This reflected the process of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights. Further, in *Osman v UK* (no 87/1997/871/1083) the European Court of Human Rights stated that blanket immunities preventing claimants seeking damages in tort may be contrary to art 6 if they are disproportionate having particular regard to their scope and application to the case at issue. Whilst *Osman* had been criticised, it is clear that domestic rules on restrictions on liability, that were previously considered as a class of immunity, were going to have to be re-examined.

It was against this background that Jones' appeal came before the Supreme Court. It decided that public policy no longer justified conferring on an expert witness any immunity from liability in negligence in relation to the performance of his duties in that capacity and in doing so dealt with the reasons which were previously said to have justified the immunity in varying degrees of detail. It is clear that the majority of the Supreme Court were clearly influenced by the fact that advocates no longer enjoyed immunity. The decision does not affect the following matters: the absolute privilege of expert witnesses in respect of claims in defamation; the immunity of other witnesses in respect of litigation; an expert witness cannot be sued by the other side; there can be no suit against court appointed expert.

As to the public policy argument that with absent immunity an experts performance would be inhibited, Lord Phillips said in the context of the immunity previously enjoyed by barristers:

> 'it was always believed that it was necessary that barristers should be immune from suit in order to ensure that they were not inhibited from performing their duty to the court. Yet removal of their immunity has not in my experience resulted in any diminution of the advocates readiness to perform that duty.'

and

> 'it would be quite wrong to perpetuate the immunity of expert witnesses out of mere conjecture that they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty.'

Lord Collins also dealt with this particular matter and stated:

> 'A conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more (or less) credible that an expert will be deterred from giving evidence unfavourable to the client's interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future cases.'

Lord Collins also emphasised that the most likely effect of potential liability on the part of the expert would be greater care in preparing the initial report on the client's case, rather than to inhibit frankness at a later stage, which it is submitted is something to be encouraged:

> 'The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence ... It would tend to ensure a greater degree of care in the preparation of the initial report or joint report.'

The Supreme Court also referred to the fact that like the advocate, the expert witness owes a duty to exercise reasonable skill and care in providing services to the client, with the majority emphasising that this duty included and did not conflict with the expert's overriding duty to assist the court which may require the expert (or advocate) to act in a way which does not advance the client's case. In this context Lord Phillips rejected any suggestion that the expert's duties to his client and the court were different:

> '[the expert witness and advocate both] undertake a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to

act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with a witness of fact.'

Whilst the previous immunity has now gone, experts can take some comfort from the following statement from Lord Dyson:

'If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions. He will have discharged his duty both to the court and his client'.

It was very clear that the Supreme Court was not impressed at all by the general witness analogy, with Lord Phillips making the following statement:

'The object of the immunity is not to protect those whose conduct is open to criticism, but those who would be subject to unjustified and vexatious claims by disgruntled litigants'.

In this context the fact that is was not easy to sue an expert also appears to have influenced Lord Phillips' mind:

'It is easy enough for the unsuccessful litigant to allege, if permitted, that a witness of fact who has given evidence against him was guilty of defamatory mendacity. It is far less easy for a lay client to mount a credible case that his expert witness has been negligent.'

As for the human rights angle, the matter was not dealt with expressly by the Supreme Court, although Lord Kerr may well have such considerations in mind when he expressed the view that save in exceptional circumstances every right should have a remedy:

'It has not been disputed that an expert witness owes a duty to the client by whom he has been retained. Breach of that duty should, in the normal course, give rise to a remedy. That is the unalterable back drop against which the claim to immunity must be made'.

It should be noted that whilst it will not affect the binding nature of the Supreme Court's decision in the English jurisdiction (although it may influence courts in other jurisdictions, such as Hong Kong, as to whether they should follow it), the dissenting speeches of Lord Hope and Baroness Hale were in strong and trenchant terms and openly critical of the majority. They both viewed the issue from opposite perspective and expressed the views that the immunity was a long established principle such that any exception to it, and not the rule itself, should be justified; there was no basis for removing immunity; the matter should be left to Parliament.

In terms of the effects and implications of the Supreme Court's decision, it is suggested that it will have the following consequences:

- There will be a need for actual/prospective expert witnesses to be aware of changes in the law;
- There will be a need for experts to understand and comply with duties of skill and care to the client and the overriding obligation to the court [or arbitrator];
- Conceivably, there could be fewer experts willing to undertake commissions and this could be a particular problem in small jurisdictions (like Hong Kong);
- Possibly, no more 'hired guns' or insufficiently adept experts;
- Less entrenched positions, with the possibility of less litigation/arbitration. Alternatively, will experts be more inclined to stick to their original positions? Only time will tell;
- Experts should be cautious of the views they express at the outset of the case lest they be embarrassed (or even worse, sued) at a later date;
- Less 'bullish' and more caveated opinions (and perhaps associated frustration for the client);
- Discouragement of underperforming experts and excessive delegation, which must surely be welcomed;
- More 'satellite' litigation.
- Perhaps a reluctance to act as a jointly instructed expert (with contractual duties to both parties and with one side bound to be disappointed);
- Need for insurance/more insurance and higher premiums.

In terms of protecting themselves as much as possible experts should consider the following:

- Inform insurers of exactly what is being undertaken;
- Consider obtaining 'bespoke', case sensitive insurance;
- Agree contractual limits/exclusions to exposure derived from expert assignments for significant projects (cf accountants/LLPs), whilst taking account of the effect of the Unfair Contract Terms Act 1977 and decisions given thereunder (or any equivalent legislation in other jurisdictions);
- Be comfortable with opinions and resist the temptation to change opinions under pressure from client/lawyers;
- Be cautious in meetings with opposing expert and when agreeing joint statements;
- Vital to explain to client the proposed departure from an earlier opinion before signing joint statement or making concessions on behalf of client.

Only time will tell what difference the decision makes in practice.

Philip Boulding QC
Keating Chambers

Note on Simon Carves Ltd v Ensus UK Ltd

It is widely acknowledged that on-demand performance bonds are open to abuse by unscrupulous beneficiaries, who may choose to make or threaten a call on the bond on the basis of an alleged breach of the underlying contract where it is in fact hotly disputed that any such breach has occurred. In such circumstances it is of no relevance to the issuing bank or bondsman that the validity of the alleged breach of the underlying contract is in doubt. The bondsman is concerned only with whether the call made on the bond is in accordance with the requirements of the bond itself, eg that it is accompanied by the requisite paperwork, which may often include an assertion that the underlying contract has been breached. It is in this sense that the bond is said to be 'autonomous'.

The opportunity for an aggrieved account party (that is the person obliged to procure the bond in favour of the beneficiary, and who will ultimately have to pay back the bondsman who has discharged the sum guaranteed to be paid to the beneficiary) to prevent, by way of injunction, a call being made on the bond or to prevent the bondsman from paying, has often been said to be limited to cases of fraud.

Where it is sought to injunct the bondsman, this means establishing at an interim stage clear and obvious fraud which is known to the bondsman at the time that the call is made. Similarly, where an interim injunction is sought against the beneficiary, it is necessary to show that the call amounts to such a fraud. Cases where such frauds have been successfully established are, unsurprisingly, few and far between.

However, the view that the only instance where a beneficiary could be restrained from making a call on a bond is in the case of fraud was shown to be too simplistic by the decision of the Court of Appeal in *Sirius International Insurance Co v FAI General Insurance Ltd & Ors* [2004] UK HL 54[1]. In that case there was a binding agreement contained in a side letter between the beneficiary and the account party that a call would not be made unless certain specific conditions were met. The account party disputed that the relevant conditions had been met and the parties agreed, by way of a Tomlin Order, that the letter of credit be drawn down and the proceeds held in an escrow account pending resolution of the issue of who was entitled to the proceeds.

On an appeal arising out of the first instance judge's decision that the proceeds should be paid out to the account party, and not to the beneficiary, the Court of Appeal held that as the terms of the side letter had not been satisfied, the beneficiary had never been entitled to draw the letter of credit and that this was enough to determine that the proceeds should be paid out to the account party. Although the issue did not arise for determination, May LJ, in the leading judgment, considered that an intended draw down, in breach of the side letter agreement, could be restrained by injunction; and that to do so did not offend against the principle of autonomy in respect of the letter of credit issued by the bank in favour of the beneficiary.

Akenhead J's decision in *Simon Carves Ltd v Ensus UK Ltd* (SCL) would appear to have extended the situations where court intervention may be successfully sought. Whether such extension will be seen to be controversial or not, time will tell.

In *SCL* Akenhead J applied the reasoning of May LJ in *Sirius*, but in the context of an interim application for injunctive relief to restrain a call on a bond, which call was alleged to be in breach of express Special Conditions agreed by parties to a contract incorporating the General Conditions of Contract for Lump Sum Contracts published by the Institution of Chemical Engineers in 2001.

Special Condition 3.7 provided, inter alia, that 'Upon the issue of the Acceptance Certificate the Performance Bond shall become null and void (save in respect of any pending or previously notified claims).'

An Acceptance Certificate had been issued to SCL which attached a schedule containing a list of 'defects' which had been the subject matter of Defect Notices. One of these related to 'Stack Odour', it being Ensus' case that the stack was constructed too low to dissipate smells created by the process plant.

On an undefended Friday afternoon application, Akenhead J had granted an interim injunction restraining a call on the bond by Ensus, subject to SCL extending the bond for two months. However, it emerged over the following weekend that a call had already been made, but not yet paid by the bank. The parties thus appeared before the judge on the Monday, when he continued the injunction subject to an order that the demand be recalled, given that the Bank had not yet paid.

The matter returned to court for full argument two weeks later. Akenhead J decided that there was no legal authority which permitted a beneficiary to make a call on a bond when it is expressly disentitled from doing so; and that, in principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained from making that demand.

Thus far the judge's analysis appears to be uncontroversial and in accordance with the decision in *Sirius*. However,

1 [2003] 1 WLR 221. Reversed by the HL on a different point: [2005] 1 All ER 191.

the situation before Akenhead J was one being considered at the *interim* stage, not at a final determination. It was in dispute between the parties whether there were 'pending or previously notified claims' within the meaning of Special Condition 3.7, the existence of which would have prevented the bond becoming null and void. This is distinct from the situation in *Sirius*, where it was *positively established* that the party was not entitled to draw down the letter of credit.

Akenhead J approached the question of whether interim injunctive relief should be granted by applying *Cyanamid* principles, having rejected Ensus' argument that *Cyanamid* did not apply to bond or letter of credit cases. He concluded that, in accordance with *Cyanamid* it had to be shown that there was a serious issue to be tried; but additionally, in cases of the type before him, that the applicant's case was 'strong'. In approaching the matter in this way, Akenhead J was arguably adopting a different and less strict approach to that of Ramsey J in *Permasteelisa Japan KK v Bouyguesstroi and Banca Intesa SpA*[2]. Ramsey J had distinguished cases like *Sirius*, where it is positively established that the party was not entitled to draw down, and cases where there is only a serious, arguable issue to that effect (the *Cyanamid* test), the latter being insufficient to warrant the court's intervention. Akenhead J thus appears to have added a new category of case where the court may be willing to intervene to restrain a call at an interim stage, namely where there is a strong case that, pursuant to the express terms of an agreement between the account party and the beneficiary, a call cannot properly be made. This notwithstanding, the judge refused leave to appeal.

Akenhead J's judgment will be welcomed in some quarters, whilst others may be concerned that such intervention risks eroding the commercial effectiveness of instruments such as bonds and letters of credit.

Andrew Goddard QC
Atkin Chambers

2 [2007] EWHC 3508 (TCC).

HH ESYR LEWIS QC
1926 – 2011

Esyr ap Gwilym Lewis was, as his name suggests, a Welshman. He was appointed an Official Referee in 1984 and, from 1994 until his retirement in 1998 he was the Senior Official Referee. He was the last person to be the Senior Official Referee. Within months of his retirement, in October 1998, Official Referees Business was relaunched as The Technology and Construction Court with a High Court Judge (Mr Justice Dyson, as he then was) being appointed as its presiding Judge.

Esyr was born in South Wales. He believed his father, who was a Congregationalist Minister, invented the first name which he was given. It was his proud boast that, until 1972, when a godchild was named after him, the Christian name which he had been given was unique.

When he was 10 Esyr's family moved to Salford, where he attended a local school before going on to Mill Hill. Whilst at school, he must have had a good academic record but, when he looked back, in the forefront of his mind were his sporting achievements – rugby, cricket and athletics.

Esyr left school in 1944 and for the next three years he served in the Army. He enlisted in the Intelligence Corps and spent some time at Bletchley Park before being sent on a tour of duty in Malaya. Once his military service was complete, Esyr went up to Cambridge (Trinity Hall) to read law. At that time, ex-servicemen could take a first degree in two years, which Esyr did, obtaining a first in each year. One of the disarming tales which Esyr told of himself was of one of his professors informing him he had been awarded a first class degree with the words 'not a very good one Lewis, but at least it is a first'. Esyr stayed on for a third year at Cambridge, reading for an LLB (as a Cambridge LLM was then known). He obtained another first class degree.

Esyr joined Gray's Inn and was called to the Bar in 1954. After pupillage, he joined the Wales and Chester Circuit Chambers at Farrar's Building in the Temple. He became established as a broadly based common law practitioner, on circuit and in London, with a preponderance of personal injuries work. He was appointed a QC in 1971 and soon became involved in lengthy criminal trials in Wales. In 1977, he was appointed as a Member of the Criminal Injuries Compensation Board and, from 1978 to 1981, he was the Leader of the Wales and Chester Circuit.

In 1984, he was appointed a Circuit Judge and was immediately assigned to deal with Official Referees Business, then still being heard in the utilitarian courtrooms on the Official Referees Corridor on the top floor of the Royal Courts Building on the Strand. His legal background was a typical one for appointment to the 'OR's Corridor' as it was then known; he was a sound common lawyer who had had a wide general civil and criminal practice, but little

previous experience of construction industry disputes. He was a courteous and patient Judge who came to have a considerable knowledge of the ways of contractors and professionals involved in the building and engineering industries. No litigant in Judge Esyr Lewis QC's court ever felt that the trial was being rushed; he ensured he understood the evidence of each witness and the submission of each party in the litigation and he gave careful and thorough judgments. He was rarely overturned on appeal, save where, as in *Murphy v Brentwood DC* [1991] 1 AC 398, the House of Lords decided to depart from one of its previous decisions (in that case *Anns v Merton LBC* [1978] 2 AC 728) which, as a Judge sitting at first instance, he had been bound to follow.

One of the rare examples of Judge Esyr Lewis QC being overturned on appeal was the forerunner of *Murphy v Brentwood DC* (supra), *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177. This was a case which he tried in 1985, very early in his judicial career. At that time the courts were hearing many cases concerning tortious liabilities of builders and/or local authorities for defects in buildings, following the decisions in *Dutton v Bognor Regis UDC* [1972] 1 QB 373 and *Anns v Merton LBC* (supra). The facts were simple; when a dwelling was constructed, the plastering sub-contractors had failed to follow the manufacturer's instructions for application. In due course, the plaster lost its key and become loose. Was the main contractor liable to the plaintiffs in tort for failing to provide proper and adequate supervision of the plastering work? Judge Esyr Lewis QC was persuaded that the main contractor's supervisory staff ought to have known that the sub-contractors were not following the manufacturer's instructions and he held the main contractor liable. The Court of Appeal disagreed. It reversed his judgment on the basis that, having employed competent sub-contractors to carry out the plastering work, the main contractor owed no further (tortious) duty of care to the plaintiffs in relation to the execution of the work by the sub-contractors. The case was appealed to the House of Lords where a more fundamental issue (*viz* was the cost of repairing defective plaster recoverable in tort or was it irrecoverable in tort as representing pure economic loss) was fully considered. Whilst agreeing that the Court of Appeal had been right to reverse Judge Esyr Lewis's judgment on the supervision point, the House of Lords decided that the cost of repairing/renewing defective plaster was not recoverable in tort — a decision which pointed toward the overruling of *Anns v Merton LBC* (supra) which was to come in *Murphy v Brentwood DC* (supra).

It is difficult to select a representative sample of the cases tried by Judge Esyr Lewis QC which gives a feel for the breadth of his judicial experience. I mention just three.

Gable House Estates Ltd v The Halpern Partnership [1995] 48 Con LR 1 was a marathon professional negligence action which occupied almost the whole of the 1993–1994 legal year. Gable House complained that Halpern had negligently over-estimated the net lettable areas of a proposed re-development in the City of London. Judge Esyr Lewis QC concluded (1) that Gable House had relied on information provided by Halpern when deciding to go ahead with the re-development; and (2) that if Gable House had been given the warnings that should have been given concerning the 'known uncertainties' about that information, it was improbable it would have gone ahead with the re-development.

Mitsui Babcock Energy Ltd v John Brown Engineering Ltd (1996) 51 Con LR 129 was a contract/no contract action which was tried in the spring of 1996. John Brown (JB) was constructing a power station in Nottinghamshire. It engaged Mitsui Babcock (MB) to manufacture and install generators. No agreement was reached as to the performance tests which needed to be passed to demonstrate that the sub-contract had been duly completed. When the sub-contract was signed the relevant clause had been struck out and the words 'to be discussed and agreed' were written in. The generators were manufactured and installed. MB claimed to be entitled to additional payment pursuant to the contract. JB asserted that no contract had been concluded. Judge Esyr Lewis QC disagreed. He held that, in the circumstances, the failure to agree on the performance tests did not prevent there being a contract.

Tesco Stores Ltd v The Norman Hitchcock Partnership Ltd [1997] 56 Con LR 42 was one of the last lengthy cases that Judge Esyr Lewis QC tried. He had to consider design and supervision liabilities in regard to a shopping development in Maidstone which had been badly damaged by a fire which had been started deliberately by vandals. A number of actions were ordered to be tried together, but most were settled. The action by Tesco against Norman Hitchcock (the architect designers of the shopping centre) was fought out. Tesco's case, that Norman Hitchcock had failed adequately to design the building for fire retardation and/or that they had failed adequately to supervise the construction works, did not succeed.

After retirement in 1998, Esyr and his wife, Elizabeth, enjoyed many happy years. They remained living in one of the residential flats in Gray's Inn. Esyr was proud to have been the Treasurer of Gray's Inn in 1987 and he remained actively involved in Inn life. Unfortunately, in the last few years of his life, Esyr's health deteriorated and he progressively lost his mental capacity. Those of us who were privileged to know him in his prime will remember a successful practitioner who went on to become a capable, conscientious and fair Judge, whilst remaining the engaging, kind and considerate man he had always been.

Colin Reese QC

Lessons for the Bar from In-House Counsel, Washington DC

TECBAR, together with the Bar Council and other associations, offer the International Professional and Legal Development Grant Programme, a scheme where barristers under seven years call can obtain up to two thirds funding to participate in international legal events and conferences. The goal is to encourage the junior-junior bar to 'develop an international perspective on legal issues and help them to thrive in an increasingly globalised legal market'.

At 5 years call I had always considered these international conferences to be the preserve of senior silks with fully developed practices and a bit of time to spend drinking champagne in exotic locations between arbitrations. While discounts are often offered for lawyers under 30, the registration fees are invariably high enough to discourage barristers who have to self-fund these events.

That said, the generous terms of the scheme were enough to tempt me into applying. I found out about a three day conference in Washington DC titled 'Managing Complex Litigation: The View from Inside the Corporation' and submitted my application. For some reason, despite regular emails from TECBAR telling us about the scheme, I think I was the only barrister applicant. Thankfully, I overcame the competition, and within a couple of weeks had booked my flights, hotel and place at the conference.

The conference started with a cocktail reception on the terrace of the Newseum overlooking the National Mall. The youngest at the event by some margin, my preconceptions appeared to be confirmed. However, over the following three days I completely changed my view.

Most significantly, I realised that the Bar is not doing enough to market itself at these events. Far from being dominated by senior members of the Bar, I was the only barrister. Most of the delegates were senior in-house counsel and lawyers working for some of the largest international firms. If the bar is serious about growing its international work, these are the people we need to be targeting.

Unfortunately, I was surprised at how many delegates were openly dismissive of the Bar, which they perceived as an arrogant, outdated and inefficient profession with a limited shelf-life.

Having been asked about his view on the Bar while chairing a session on the perspectives of in-house counsel on external counsel, Thomas Boardman (Deputy General Counsel at 3M) described his single experience of a barrister whose clerks failed to explain or justify the fee that was proposed, and throughout was made to feel like he was not worthy of this silk's time and effort, notwithstanding the princely sums that were being handing over. His view was clear: he would never use the Bar again.

The problem was not so much the views being expressed, but that I was the only one putting the case for the Bar. Our low attendance at these events was seen as symptomatic of the Bar's arrogance. This was all to the advantage of the many solicitors attending, funded by their firms, who confided that it was not in their interests to defend the Bar, who they privately valued, as this meant they could present themselves as the only option for in-house counsel looking for assistance in the UK.

That said, the theme for the conference was in-house counsel talking about their experiences of external counsel, so the Bar was not the only target for criticism.

Over the course of the conference we heard the views of some of the highest profile in-house counsel in companies like GE, Shell, 3M, Marriott, CBS and others giving advice on all aspects of managing complex disputes, but in particular how they select external counsel, how they react to marketing, and the gap that often arises between their expectations and our performance.

As far as marketing is concerned, we would do well to learn from the mistakes that law firms have made in the past. Alex Dimitrief (Senior Counsel, General Electric) gave a list of do's and don'ts which I paraphrase as follows:

- The best marketing is the quality of work you produce.
- Good people are too busy to market (perhaps explaining the number of barristers in attendance).
- The more a firm is engaged in generic marketing campaigns, the more the impression is given that a firm does not have a strong client base and that money is being wasted.
- If you are going to market yourself, do it in a way that demonstrates your ability — give talks on complicated or emerging areas of law that are relevant to the firm you are targeting.
- The quality of a firm is often associated with the quality of its junior lawyers. The degree to which a senior lawyer is willing to assign credit says a lot about the quality of both the senior lawyer and the depth of talent in the firm (I liked that one).
- A firm should actively introduce younger lawyers to potential clients to develop long term relationships. To do this it is best to arrange small, team-based presentations, followed by a meal or time to talk and build relationships at all levels.
- Do not try to buy business by invitations to sporting or other events.
- Social events that are offered should be tasteful but are generally to be avoided unless there is a personal relationship that justifies it.
- If you are going to produce an email update to clients, make sure that your information is up to date. There is

nothing more embarrassing than getting an email talking about developments in the law that other firms have given presentations on six months earlier.
- The best email updates are ones that are personally tailored to specific issues facing a client. Scanned copies of a recent case with sections highlighted and any insights added in manuscript are particularly impressive.

Moving on to client care, most in-house counsel were shocked by how few external lawyers solicit information on client satisfaction both during the currency of a project and at its conclusion. It gives the impression that the firm doesn't care about improving its performance.

When the conference moved on to fee structures, it was interesting to hear that in-house counsel considered fixed fees to be the most effective as they enabled them to budget and effectively manage expectations internally.

Volume discounts, discounted rates and other modified billable hour structures had surprisingly poor reviews. Some felt that discounts tended to have an undermining effect on the perception of the quality of a firm, in particular that they were desperate for work. Others suspected discounts placed pressure on the partners to maximise the hours billed leaving a risk of overbilling. Alternatively it was suspected that work at a lower rate was given a lower priority and that the work product might ultimately suffer.

As to the management of hours billed, it was suggested that any write-offs should be clearly stated on time-sheets. In-house counsel want to see evidence that a firm is thinking about value for money. There is no shame in not billing for work done, so why not advertise it?

Bradley Lerman (Senior Vice-President, Litigation, Pfizer) described the Pfizer Legal Alliance: an all-in flat fee paid to a firm for a year's advice covering a defined portfolio of work. The contracts are long-term commitments and encourage collaboration between the organisations. The terms are intended to be reviewed continually to ensure that both parties are satisfied with the arrangement.

I found all of these observations extremely interesting and relevant to the future of the Bar. While we might currently be the subject of criticism in some circles, it seemed that there was a great opportunity for us. Rather than copying law firms with their global marketing campaigns and discounted rates, we can take comfort that what we traditionally offer is exactly what is wanted: work of the highest quality, the ability to offer insights into relevant areas of law through personal presentations, and even fixed fees.

The conference went on to discuss the role of external counsel in complex litigation. Time and time again, the focus came back to a single individual responsible for the management and strategy of the litigation. A repeated complaint was that a partner would be very hands-off except at times of peak activity, while there might be no-one to ensure that the day-to-day activities of the team were focused on the agreed strategy. The criticism was that very little thought seemed to be given in the planning stage as to how this role would be filled.

Again, it seemed that this observation revealed a further opportunity for the junior bar to become more engaged with the day-to-day management of complex cases, perhaps as managers of litigation. In my brief career I have noticed a tendency towards secondments with solicitors, or using junior-junior counsel as a cost-effective add-on to the solicitor team. As an alternative, we could be positively offering ourselves at an early stage in large scale litigation as the independent resource employed to ensure that all work on correspondence, documents, witness statements and experts is focused on the strategy agreed.

Finally, it seems that few external counsel offer their views on how the lay client can learn from the experience of complex litigation, not only in order to avoid litigation in the future, but to ensure that the process of litigation can be better managed if it happens again. Offering this service, and accepting the criticism that might come with it, goes a long way towards demonstrating a commitment to your client's long term needs and is more likely to result in repeat work.

Altogether this was an incredible experience that I am extremely grateful to TECBAR and the Bar Council for. I would encourage all barristers under seven years call to apply for the grant in the future. While I have come away with the realisation that the Bar might not have the image that it thinks it has internationally, it is equally clear that there are incredible opportunities for us individually and collectively to grow our international work. I will certainly be attending events of this sort in the future, and hope to see more members of the Bar there as the international grant programme produces more converts.

Tom Lazur
Keating Chambers

CDPcast: Courtesy of Informa

CPDcast is proud to announce that we have recorded four legal podcasts in conjunction with TECBAR and are making them available for free for readers of this publication.

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CPDcast was founded in 2007 by two barristers and a website development expert. They felt that the legal world could be better served by a training provider that could exploit modern methods of content creation and delivery to provide a flexible and comprehensive service. The company tripled in size each year and in early 2010, CPDcast was acquired by Informa plc, the FTSE-listed global leader in specialist information and services for the academic and scientific, professional and commercial business communities. Legal products from Informa that you may already use include IBC Legal Conferences, Building Law Reports, Lloyd's Law Reports and i-law.com.

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We use three sources of inspiration for our editorial schedule: the news — our podcasts have a swift turnaround time, and therefore address current issues as well as established practices; our contributors and focus groups — why not have the leaders in the field suggest where they think new developments are taking place, and which ones matter?; and finally, you – we often get suggestions from our subscribers (you can even let us know what you'd like to hear at www.cpdcast.com/contactus), and endeavour to cover them.

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Forthcoming Events

Joint TECBAR/PNBA Lecture on Tuesday, 8 November 2011

Venue: Parliament Chamber, Inner Temple
Time: 5.30pm followed by a drinks reception at 7pm
Chair: Mr Justice Edwards-Stuart
Speakers: David Sears QC and James Cross QC
Topic: Duties of Care in Construction Projects after *Linklaters v Sir Robert McAlpine*
Attendance is free to members of TECBAR and PNBA and their pupils.
CPD accreditation: 1.5 points
There is no need to register for this event.

The Joint TECBAR/SCL Seminar on 6 December 2011

Venue: National Liberal Club, Whitehall at 6.15pm
Topic: Decision making in the TCC: a personal perspective
Speaker: Her Honour Frances Kirkham CBE
CPD accreditation: 1.5 points
Attendance is free for members of TECBAR and SCL and their pupils.
This event will be followed by a drinks reception.
There is no need to register for this event.

TECBAR's Annual Construction Law Conference on Saturday, 4 February 2012

Venue: The Caledonian Club, 9 Halkin Street, London SW1X 7DR
Time: 9am to 4pm
Programme to be confirmed
CPD accreditation: 6 points
Details of cost and registration will be announced in Autumn 2011.

Readers are invited to submit material by email to be considered for possible publication. This may consist of correspondence, short articles or case notes, news of forthcoming cases or events, book reviews, or other matters of interest to members of TECBAR or SCL.

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