REFLECTIONS ON LIFE AS A JUDGE OF THE TECHNOLOGY AND CONSTRUCTION COURT

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Her Honour Frances Kirkham CBE

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Introduction

To begin at the beginning. Of course I had to learn to give reasons for every decision. This is a good discipline – if you can't say why you are making a decision there is a risk that you are not making the right decision. However, a drawback is that the habit spills over into one's private life. When asked by my husband whether I wanted a cup coffee or tea, I found myself replying that I'd like tea, because ...

In this paper I consider some of the ways in which judges of the Technology and Construction Court (TCC) have taken an innovative approach to dispute resolution. I conclude by offering some ideas for the future. And I touch on some issues in between.

I speak solely for myself. The views are my own and may not be shared by others. Not all TCC judges have adopted the same approach as I took. I shall mention matters where other judges have led and the rest of us have followed. In doing so, I am certainly not trying to take credit for any particular matters.

I recognise also that I have probably got it wrong sometimes. Advocates are usually immensely courteous, and some find it hard to tell a judge that she or he is going off track. It is not only helpful to be told at the time, but it should be done: anything which helps remind a judge that he or she should not get above themselves is, to my mind, a 'Good Thing'.

Adjudication

One of the most significant aspects of work in the TCC in recent years has of course been the development of the law relating to the enforcement of adjudication decisions. TCC judges gave immediate and positive support to the provisions of legislation which was generally welcomed by the industry.

I shall not deal in any detail with the fascinating development of this area of law. It was a privilege to have been part of such a great voyage. All the TCC judges have, in various ways, thrown in their two penny worth, and I claim no special mention. I do, however, recognise that I shall not live down my approach to ambushes over the Christmas period. As I said in *Orange EBS v ABB*:

> 'Holidays at any time of year are a practical problem which companies must deal with. It is not fair that a company stands out of substantial sums of money simply because some in the industry do not work over Christmas and the new year holiday.'[1]

I realise that some may not share that view. So, my apologies to all those who work flat out for demanding clients during the year and would rather like to have some free time over Christmas.

The approach to adjudication enforcement illustrates the way in which TCC judges across the country have sought to provide a service to the parties. I want to stress that ethos: the courts serve the community for which they work.

Early neutral evaluation (ENE)

This service has been available to parties for some time but I believe has not been greatly used. I saw this as a way in which parties could be helped at an early opportunity to clarify issues, to say how they felt they were likely to win on various points; it also gives an opportunity to air grievances. The parties have the benefit of an authoritative view – from a judge – of the merits, albeit based on limited information. It seemed to me that some parties find it easier to settle once someone has acknowledged that some or all of their argument is correct.

My approach to ENE was to offer parties wide freedom to decide how best to use the court. They could ask the court to look only at written submissions. Or they could ask for a short hearing at which they could present whatever they wanted in almost any way they wanted. That might have taken the form of evidence from a key witness, or an explanation by an expert witness, or maybe showing a video or even giving a Powerpoint presentation. (Happily none opted for the Powerpoint.)

However, the service was taken up in my court on only a handful of occasions. I was not clear whether there was insufficient understanding of the process and its potential benefits, or whether other factors made it an unattractive proposition.

Case management and in particular the use of experts

The TCC has a long tradition of active and firm case management. Indeed, given the complex disputes with which the court is concerned this is imperative. As so many cases settle, the case management stage is very important. Effective case management is a most difficult task, whether one is dealing with small or large cases. The greatest challenge lies in trying to help parties prepare a case for trial in a cost effective way. This is particularly so in cases of modest value.

There is a strong tradition of intervention by the court. Some parties would come to the first case management conference (CMC) asking for permission to

1 *Orange EBS Ltd v ABB Ltd* [2003] EWHC 1187 (TCC), para 43.

call half a dozen experts. I sometimes took the view that no experts were needed; or that experts would be needed in only one or maybe two fields. Especially in modest cases, parties had often not identified the issues in respect of which expert evidence was said to be needed; what the party really wanted was someone to make the claim or defence on the party's behalf. The judge should permit the use of expert evidence only where she or he considers it is needed, but it is difficult to refuse permission when the consequence is unfairness, for example where a small company will find it difficult to present its case without so-called expert assistance in preparing the case.

Single jointly instructed experts

It is plainly unacceptable for parties or their advisers to attempt to influence an expert in expressing his or her opinion. Having said that, I recognise that some experts need a little guidance. For example, an expert may have failed to deal with an issue or with some significant evidence. In such circumstances, the legal team can offer helpful guidance without impugning the integrity of the expert.

I soon realised that one of the difficulties faced by a single jointly-instructed expert (SJE), was that she or he could not ask the parties for help or be given guidance in that way. I used a framework of orders aimed at assisting SJEs. These included:

(a) requiring the parties to obtain in advance an estimate of the fees likely to be incurred by the SJE;

(b) requiring the parties each to put up their share of that money in advance (one of the solicitors to hold the money, either to the order of the court or as the parties and the expert might agree);

(c) noting that the expert was under no obligation to begin work until the money had been so secured;

(d) noting on the face of the order that the expert was welcome to approach the court directly for assistance; and

(e) requiring one party to send the SJE a copy of CPR Part 35.

I did indeed receive a number of requests for assistance directly from SJEs. This occurred, for example, where one party was not co-operating with the SJE. Often all that was needed was a letter from me asking for an explanation for the recalcitrant party quickly to take the necessary action.

In one case I had given permission for the parties to instruct an SJE. This they did. Time passed. Then one party came in asking for permission to call its own expert. The explanation was given: the SJE had called all parties and legal teams to a meeting at which all had been required to answer questions under oath; he had then delivered his verdict. It was not difficult to conclude that permission should be given to the party who then preferred to instruct his own expert. But this illustrates the pitfalls for an SJE who does not have access to benign guidance.

There were times when I wondered if I pushed my luck. In one case it became apparent that one party had not permitted his expert to deal properly with a without prejudice meeting with his counterpart. I asked both experts to attend court. They came. I told them that they were to spend the day producing their statement of matters agreed and disagreed; the parties were not to try to interfere; and that I expected the experts not to leave the court building until they had completed their joint statement. Both looked rather stunned but neither refused. I spent the rest of the morning working in my room and wondering whether they would actually stay. They asked to see me at the end of the morning. They reported that they had made good progress, politely offered assurances as to how and when they would deal with outstanding issues, and then, even more politely, asked if they might be permitted to leave the building. Of course I agreed. The outcome was a useful schedule of matters agreed and disagreed which enabled all to prepare for a full trial due to begin only days later.

Assessor

I was case managing a dispute concerning, in broad terms, ground conditions. Both parties were represented by excellent practitioners. Each side had instructed its own expert. At a CMC both parties asked for permission to appoint a further expert, whose task would be to mediate between their respective expert's views; they had a particular person in mind, someone who was eminent in this field. It was an unusual request. We discussed why they were suggesting that route. I suggested that I appoint that person as my assessor, pursuant to Part 35(15) Civil Procedure Rules. When we resumed the hearing, after a period of private consideration, the parties had embraced the idea enthusiastically and the lawyers had drafted directions suggesting an informal meeting with the assessor, the court and the parties to discuss practical arrangements, then a further meeting between the assessor and the experts, with the parties observing but not participating. Of course, the case settled quickly. I was disappointed that it did not come to trial.

Hot tubbing

I began hot tubbing some time ago (and well before the current pilot). I found it an excellent way to deal with experts, particularly in cases with only two parties and where comparatively modest sums were at stake.

It was not unusual to find, particularly in small cases, that experts had failed to meet, let alone to have prepared a usable schedule of matters agreed and disagreed. Sometimes this was because a party did not want to spend money on that exercise; sometimes a party had instructed its expert not to engage properly with his counterpart because it feared losing ground This usually became apparent only a short time before the trial was due to begin. In those circumstances a judge might opt to vacate a trial date so that the exercise could be undertaken and thus achieve a more orderly trial.

I generally took the view that my job was to do my best with what was available rather than send the parties away for more behind the scenes work. This was because a postponement of trial, with all the wasted cost which

ensues, might well result in the parties not being able to afford to bring the case back for trial at all. In those circumstances, dealing with expert evidence by hot tubbing was sometimes the best way for me to manage and assess the expert evidence, and probably the most cost effective approach.

I used hot tubbing to deal with two quantum experts in a case where the experts were wide apart. Experts' reports and schedules had been prepared only shortly before trial (in clear breach, of course, of orders made at case management hearings). There had been no attempt before trial to identify key items in the various schedules. At trial, there was no alternative but to take each item in turn. In approaching it this way I could immediately see what the differences were between each of the experts and could reach a decision on each point as we went through. The experts could, and did, debate points between themselves. That was illuminating, and resulted in some differences being immediately resolved.

In another case, hot tubbing resulted in the partiality of one expert being exposed pretty quickly. He then began to adopt a very different approach to items in the schedule from the approach he had hitherto taken. It seemed to me that, had the expert evidence been taken sequentially, with a gap of a day or two between them, it would have been less obvious to the partial expert that he would have to move to a more objective and realistic position. In that case, the immediacy of the hot-tubbing approach threw into much sharper focus the fact that one expert was trying to maintain an untenable position.

The alternative, of taking evidence from one expert on one day then from the other some days later, can feel clumsy and less satisfactory by comparison. The more traditional approach can make the judge's task longer and more difficult.

I appreciate that hot tubbing can be difficult for the advocates, who can feel excluded as the discussion can rapidly become three way, between experts and judge, with the advocates sitting on the side lines. I tried to deal with that by allowing each side to cross examine the other side's expert on general matters such as qualifications, competence, thoroughness of investigation and any matters going to integrity. I also allowed the advocates to ask questions on items as we went through schedules. In practice, there were few questions on detail.

It is possible that in hot tubbing an expert goes further in conceding points than he would if evidence were given sequentially, as the immediacy of the process makes it clear very quickly when one expert has hitherto taken an untenable position. From the point of view of the court, that is all to the good. From the point of view of justice and achieving the right result, that is all to the good. I imagine it is not so popular with clients and thus may not be readily recommended by the legal teams.

Location and timing

My firm view was that a TCC judge should adopt the attitude: have pen and specs, will travel. The judge should travel to the parties if it is difficult for the

parties to travel to the judge. That is an important part of the service. I found that parties were astonished when I offered to sit elsewhere, but it undoubtedly saved parties much cost and travelling time.

In one case we had nearly completed the evidence, but we needed a day or half a day to finish. We all consulted diaries. It was impossible to find a date convenient to all until some months ahead. That would not have been satisfactory. So, we agreed to sit on a Sunday. As the court building was closed, we used a room in the offices of one of the firms of solicitors in the case. Again – something which should be a feature of the service offered.

Costs

Probably every judge trying a civil case expresses concern about the cost of litigation. I can understand how this gives rise to accusations of hypocrisy as, after all, in our time as practitioners we did well enough. But it is such a profoundly important topic that I could not exclude it from this paper.

Many others have expressed far more eloquently than I can their concerns about the unacceptable cost of litigation. In brief, I share the view that it is not only profoundly unjust but it is also unsafe for society that so few people or organisations can afford to bring their disputes to the court for resolution and that inequality of arms can lead to injustice. A party should not have to abandon a good case by reason of attrition.

As a result of the Jackson proposals, a pilot costs project has been running in some TCC courts whereby judges monitor costs expended and forecast. I have some reservations whether judges are the best people to deal with this. In general, most judges have been out of practice for some years. Even now, most judges had previously been barristers. My own experience as a solicitor suggested that many barristers had little interest in costs and would happily leave such matters to solicitors. (Indeed, when undertaking summary assessment of costs as a judge, I often found that all were content to leave me to talk directly to solicitors, bypassing the barrister who had conducted the earlier parts of the hearing.) In practice it is difficult for a judge who is not a costs specialist to take a view on matters of detail, such as the length of time claimed to be necessary to deal with disclosure.

The costs forecasts which I considered did not, for example, give a clear understanding of the real cost implications of different courses of action, such as ordering full or limited disclosure, or of ordering trial of a preliminary issue.

As matters currently stand, it seems to me that the most effective method of trying to control costs is for a judge to impose a costs cap at a very early stage, as many arbitrators do routinely. While on the face of it, that conflicts with the view I expressed earlier about judges' ability to deal with costs, in practice I consider that judges could be assisted effectively to calculate an appropriate overall costs cap when the case enters the list. A costs cap is the only way in which a party can have some certainty about its total exposure to costs. It is

unacceptable that it is generally not possible for a client to know the likely maximum liability it will have to the other side if it loses its case.

I found it difficult to deal with cases where I was asked to deprive a party of costs by reason of alleged unreasonable refusal to mediate. I felt uncomfortable with the idea of depriving a party of costs without having a full picture. And of course the judge cannot have a full picture. A judge is not told the detail of negotiations between parties. I was always aware that there was likely to be activity going on behind the scenes, but of course I could not know what might be happening and it would be unacceptable to try to guess. But I know that it is all too easy for a party to agree to mediate then to make no effort at all to engage in sensible settlement discussions. When that happens, that is just a waste of everyone's time and money.

I understand fully that mediation can be a most effective process and am an enthusiastic supporter. But I was also reluctant to proceed in a way which actively discouraged parties from using the courts. It seemed to me to be rather odd to welcome parties to a first CMC and then immediately suggest to them that they might like to go elsewhere for resolution of their dispute.[2]

A short digression which is cost related. I found it irritating to be asked to read a whole lever arch file full of ya-boo correspondence in which the issues went round and round. If a request had been made by one party and denied by the other, then I did not want to see the parties waste money on lengthy letters on each side rehearsing and repeating arguments until they were stale. It would have been better for an application to have been made to court after only maybe a couple of exchanges. The court can promptly make a decision on the papers so that the matter is dealt with quickly and cheaply. But I appreciate that this is an area where you have to know your judge: a different judge in similar circumstances might take the view that an application to court was premature, and disallow costs or even penalise an applicant in costs. This underlines the need for consistency between judges.

Unrepresented parties

Many small or medium sized companies are conducting their own cases, and that is likely to increase. It certainly makes it harder for the judge, but there are some benefits: I found that unrepresented parties, though usually very courteous, were entirely without sycophancy, and that is very good for judges.

The most refreshing aspect of working with unrepresented parties was that most of them considered that, if the court made an order, it was to be obeyed. Unrepresented parties would, for example, serve a list of documents by the date specified in the order. Legal representatives, on the other hand, would often treat a date for compliance as a target vaguely to be aimed at but with no real concern that they might not comply. This is a greater problem than might be apparent at first sight: when an unrepresented party quite rightly

2 Those who are interested to read more around this topic should read Professor Dame Hazel Genn's 2008 Hamlyn lectures, *Judging Civil Justice* (Cambridge University Press, 2009).

complained about non compliance by a legally represented opponent and yet there were only limited sanctions available to the court, it made it difficult to appear to be even handed.

The future

I would welcome the introduction of appraisal of judges, or at least of feedback from court users, whether parties, legal advisers or witnesses. After all, many highly-respected arbitrators and mediators seek feedback.

The lively TCC User Groups have provided a most useful forum for practitioners and judges to discuss ideas. I found the contributions from the Birmingham Users' Group most helpful. I hope that these continue to flourish and feel confident to express any concerns as well as to provide constructive help and ideas.

The TCC has a great record of reform and innovation. It continues to be the forum which offers the best opportunity to introduce reform. I hope that practitioners and TCC judges will be able to devise ways to enable parties, of any size, to bring their claims to court for quick and cost-effective resolution. The TCC has led the way in the past. It can, and should, continue to take the lead.

HH Frances Kirkham CBE, BA, AKC, FCIArb, Chartered Arbitrator

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'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

MEMBERSHIP/ADMINISTRATION ENQUIRIES

Jill Ward
The Cottage, Bullfurlong Lane
Burbage, Leics LE10 2HQ
tel: 07730 474074
e-mail: admin@scl.org.uk

website: www.scl.org.uk