



Final, conclusive and binding? Not quite

Arbitration is a popular form of dispute resolution designed to oust the jurisdiction of the courts to deal with a contractual dispute. A number of arbitration clauses provide that the tribunal's award will be "final, conclusive and binding on the parties". One might think that where this wording is incorporated into the contract the party that has an arbitration award made against it could not appeal to the court.

Section 69 (1) of the Arbitration Act 1996 provides that: "Unless otherwise agreed by the parties, a party to arbitral proceedings may ... appeal to the court on a question of law arising out of an award made in the proceedings."

So surely if the parties had signed up to an arbitration agreement which provided for the tribunal's award to be final and binding they had "...otherwise agreed..." and so there was no right of appeal on a point of law against such award?

Not so according to Mrs Justice Gloster in, *Shell Egypt West Manzala GmbH and Another v Dana Gas Egypt Limited* [2009] EWHC 2097 (Comm).

In her judgment the words "final... and binding" added nothing to the agreement of the parties to arbitrate. She said that

notwithstanding Section 58(1) of the Act which provides that (unless otherwise agreed), tribunal awards are "final and binding" there is (unless otherwise agreed) a right to appeal.

However in the *Shell Egypt* case in addition to "final...and binding" the agreement also included the word "conclusive".

Surely that must show that the parties had "...otherwise agreed..." since the word "conclusive" must mean that the dispute is at an end?

Again Mrs Justice Gloster thought otherwise.

In her view the words overlapped and she had to decide what the phrase meant in its context.

- "Binding" meant that "each party promises to abide by the award and to perform it".

- "Final" meant that an award would be final in the sense that the successful claimant is "precluded by the award from bringing the same claim again in a fresh arbitration or set of proceedings".
- "Conclusive" operated so as to prevent a party in a subsequent arbitration or claim from disputing for a second time an issue of fact or law on which he has failed. It precludes the reopening in a later dispute individual issues of law or fact, which had already been determined.

The effect of such a clause or agreement is simply to preclude the same claim being brought again or disputing the same facts again in separate proceedings. It does not operate to preclude an appeal of a point of law against an arbitration award.

Parties to contracts that include arbitration clauses or agreements should therefore read those clauses carefully: either to be satisfied that a right of appeal exists or they wish to amend the clause so as to exclude it.

For further advice and assistance please contact Phil Burbidge on 0117 926 4121 or by email at pjb@meadeking.co.uk

A heavy price to pay

The proprietor of a former Costcutters store in the London Borough of Enfield has been fined £49,400 following a prosecution by Enfield Trading Standards Department. Mr Saleem pleaded guilty to 19 summonses under the Licensing Act 2003 at Enfield Magistrates Court, and was fined £2,600 for each offence together with costs.



The court heard that over the previous 12 months Enfield Trading Standards Department had made a series of test purchases, most recently with a 15 year old volunteer who was able to purchase alcohol at the store.

It is not unusual for regulatory prosecutions to involve many summonses, each of which may appear to be more or less well founded on the evidence. This case illustrates the importance for the defendant of scrutinising each individual summons on its merits, since a bundle of transgressions, some of which may be very minor, can easily add up to a swingeing fine and serious damage to reputation.

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Challenging the petition

In recent years the Companies Court has increasingly become the forum of choice for one party (“the petitioner”) alleging a debt against a company (“the company”) to apply pressure for payment by presenting or threatening a winding-up petition. It is not necessary to obtain judgment on the alleged debt to present a petition so many creditors choose this route without first seeking to obtain judgment.

Where the debt in question is undisputed and is for more than the £750 threshold the use of a winding up petition to exert pressure for payment has long been accepted as entirely proper and not an abuse of its process, with costs ordinarily awarded against the company if it pays the debt after presentation of the petition.

Different considerations apply where the debt in question is in dispute or where the company has a counterclaim against the petitioner.

Where the debt that is subject to a winding-up petition is shown to be genuinely disputed on “substantial” grounds the use of winding-up proceedings by the petitioner is an abuse of the court’s process and the court will normally dismiss the petition and award costs in favour of the company.

Matters are less clear-cut however where the company alleges a counterclaim which exceeds the amount of the petition debt or reduces it below £750.

On the hearing of a winding-up petition (or on application by the company to strike out the petition) the court is concerned only to establish whether the counterclaim is “genuine and serious” and is likely to exceed the petition debt (or reduce it below £750) and therefore such that the claim and counterclaim should be tried in the ordinary civil courts with the accompanying dismissal or stay of the winding up petition. The only relevant consideration is whether the counterclaim is

advanced in good faith, is of substance and likely to exceed the petition debt.

What then must a company show at the winding-up hearing or strike out an application to establish that it has a “genuine and serious” counterclaim? In particular, is the company barred from establishing this if it has failed ahead of the hearing to issue proceedings against the petitioner in respect of its counterclaim? These were the questions that recently concerned the Court of Appeal in *Dennis Rye Limited v Bolsover District Council* [2009] EWCA Civ 372.

In *Bolsover*, the local authority petitioned for winding-up of the company for council tax arrears over a number of its properties. It had previously obtained liability orders in the civil courts. Following presentation of the petition, the company made payment to the council in respect of a proportion of the alleged council tax liability, disputing that it was liable for the full amount. After it had done so it alleged that it had made certain payments under a mistake in relation to the applicable class of council tax exemption. At the winding-up hearing, the company asserted a counterclaim against the council for a sum in excess of the council’s petition debt.

The company had previously taken no steps to assert its counterclaim, such as appealing the liability orders, claiming the relevant exemption from council tax when originally served with council tax bills or communicating its claim to the council.

The Court of Appeal was clear in confirming the authorities. A company will not be prevented from arguing a counterclaim in winding-up proceedings simply for failure to raise or litigate the counterclaim prior to those proceedings. It refused however to dismiss the winding-up petition as the company had failed to produce sufficient evidence to establish a “genuine and serious” counterclaim. In addressing this question, the court was entitled to take into account the fact that the company had not attempted to litigate the counterclaim nor, without good reason, had it taken any steps prior to the hearing to assert its counterclaim against the council. The court also placed reliance on the company’s failure at the winding up hearing to establish the extent of its counterclaim, including its failure to identify the date from which the relevant council tax exemptions were said to operate.

The winding up petition was allowed to proceed with costs awarded against the company.

Although it is not known what bearing it would have had on the court’s decision had the company particularised the extent of its counterclaim at the winding-up hearing, what is clear from *Bolsover* is that a company faced with a winding-up petition from a party against whom it alleges a counterclaim proceeds at its own risk if it fails, without good reason, to take any steps to assert its counterclaim prior to the winding-up hearing. Such failure may lead the court to conclude that its claim is not, in the words of Mummery LJ, “genuine and serious”. The very least that the company should do is communicate its counterclaim to the petitioner prior to the winding up proceedings if it is to seek dismissal of the petition.

For further advice and assistance please contact Keith Mahoney on 0117 926 4121 or by email at kwm@meadeking.co.uk

Employment tribunal awards of damages

Lesbian soldier former Lance Bombardier Kerry Fletcher, who had served at the RAF's Royal Artillery stables during 2004, was awarded £186,896 when the Employment Tribunal (ET) accepted her complaints concerning a campaign of harassment by a male Sergeant, who had repeatedly made sexual advances and bragged that he could "turn her straight."

The award included a punitive award of £50,000 in exemplary damages, £20,000 in aggravated damages and £30,000 for hurt feelings, which is the maximum amount. A further £65,558 was awarded to lost earnings and pension entitlement, with the remainder being made up of costs and interest payments.

The MoD challenged the first three elements of the award, the punitive awards totalling £100,000. The Employment Appeals Tribunal (EAT) found that the ET had "erred" in its remedy judgements and allowed the MoD's challenge.

...exemplary damages should be reserved for the "most serious abuses of Governmental power"

The EAT ultimately reduced Ms Fletcher's award by approximately one third, labelling the aggravated damages as "perversely high" and the exemplary damages as "unsustainable." The EAT also reduced the award for injury to feelings on

the basis this would also be covered by the remaining aggravated damages award.

Legal authorities have established that exemplary damages should be reserved for "the most serious abuses of governmental power" though in this case the EAT added that "the conduct of the Army which led to the proceedings being successfully pursued by Ms Fletcher was rightly condemned by the Employment Tribunal."

The EAT's decision to reduce the compensation would be welcome by veteran groups who publically protested to the award, pointing out that to date the highest award that has been made to soldiers for injury in combat currently stands at £161,000, i.e. less than Ms Fletcher's award, and in this a Marine lost an arm and a leg during combat in Afghanistan.

For further information please contact Nicola W Hughes on 0117 926 4121 or by email at nwh@meadeking.co.uk

Keeping it in the family

In April 2009 Betty Figg was removed by social workers against the wishes of her daughter, her former carer. Social workers arrived with police and a battering ram to remove the 86-year-old woman suffering from dementia from her daughter's house. The media quickly spread pictures and video footage of Betty being taken from the house in her wheelchair with a towel thrown over her head.

Social services did not agree with the daughter that it was in Betty's best interests to be cared for in a specially converted room in the daughter's home.

Could this happen to you and your family? You can avoid this by creating what is known as a Health & Welfare Lasting Power of Attorney.

This allows you to choose one or more attorneys to make decisions on your behalf regarding your healthcare. Your attorneys can only make these decisions when you lack the capacity to make them for yourself e.g. if you were unconscious or mentally incapable.

Without a Health & Welfare Lasting Power of Attorney, Social Services can make decisions on behalf of a vulnerable person if they think it is in his or her interests and if that person lacks the mental capacity.

The examples of the decisions that your attorneys can make under an unrestricted Welfare document are:

- Where the donor should live and who they should live with



Creating a Health and Welfare Lasting Power of Attorney allows you to choose one or more attorneys to make decisions on your behalf about healthcare.

- The donor's day to day care including diet and dress
- Consenting to or refusing medical examinations and treatment on the donor's behalf
- Arrangements for the donor to be given medical, dental or optical treatment
- Assessments for and provision of community care services
- Whether the donor should take part in social activities, leisure activities, education or training
- The donor's personal correspondence and papers
- Rights of access to personal information such as health and social care records about the donor
- Complaints about the donor's care or treatment or refusing consent to particular types of healthcare (including medical treatment decisions).

You can also give your attorneys power to make decisions about life sustaining treatment although this will need to be explained/ provided for within the document itself.

The Health & Welfare Lasting Power of Attorney does not allow your attorneys to make decisions about your financial property and affairs and if you wish to allow someone to deal with this on your behalf you will need to discuss the need for a Property & Financial Affairs Lasting Power of Attorney.

For further advice and assistance please contact Samantha Piper on 0117 926 4121 or by email at sjp@meadeking.co.uk

Dragon Boats

As the major event for Meade King's charity of the year, a team of 20 eager rowers, and two drummers, gathered at Baltic Wharf on a warm, bright Sunday in late September, to take part in a dragon boat racing event which saw some 16 teams competing to raise money for a variety of charities.



As the only team competing on behalf of CLIC Sargent, the pressure was on Meade King to repeat previous years' successes for the Bristol-based children's cancer charity.

Due to the efforts of partners and staff at the firm, and the generosity of their friends, family and clients, the event raised over £2,300 for CLIC Sargent.

Once kitted up with lifejackets and paddles, the intrepid rowers waited nervously by the dockside for the first race, before settling into the dragon boats, each with a drummer

for rhythm and helmsman to steer. Each race was a sprint across the water against another team, and after each team had raced three times the teams with the fastest times went through to the semi finals. The Meade King team won all of its first three races and stormed into the semi finals as the third-fastest time, and then went on to win its semi-final race for a place in the four-boat final.

By this time the exertions of the day were clearly beginning to take their toll on the rowers and in the final the team came fourth, but were still elated at a great achievement - a first for the firm. Due to the efforts of partners and staff at the firm, and the generosity of their friends, family and clients, the event raised over £2,300 for CLIC Sargent. If anyone still wishes to sponsor us, you can do so by visiting our justgiving page at www.justgiving.com/meadeking/



Half marathon

Simon East, an associate in the Commercial Property department, and a confirmed non-runner, decided to take the plunge this year and take part in the Bristol Half Marathon in order to raise money for CLIC Sargent.



Having spent months pounding the streets in training, Simon joined more than 16,000 runners to run the race in a time of 2:19:43, having beaten half of those taking part. Simon commented, "It was a brilliant experience, and the enthusiasm and cheering of the crowds made for a great atmosphere and really helped to keep me going along the 13 mile course".

Simon raised over £300 in sponsorship for the run.

Last issue's competition

The winner of the bottle of champagne in the quiz in the last edition of The Detail was Rhona Gauld of Handelsbanken.

Rhona has duly been presented with her prize by partner Keith Mahoney.

