ARBITRATION PRACTICE AND PROCEDURE

INTERLOCUTORY AND HEARING PROBLEMS

By

D. MARK CATO

FRICS, FCIArb

SECOND EDITION

FOREWORD BY

The RT. HON. LORD MUSTILL

President of the Chartered Institute of Arbitrators

ENDORSED BY THE ROYAL INSTITUTION
OF CHARTERED SURVEYORS
AND
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APPENDIX "A"—TYPICAL ORDER RE NOTICE TO ADMIT FACTS

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION UNDER THE JCT ARBITRATION RULES (18 JULY 1988)
BETWEEN

RELIABLE BUILDERS LTD **Claimant**

and

SANCTUARY HOUSE LTD **Respondent**

ORDER FOR DIRECTIONS NO 18

WHEREAS

1.00 The Respondent has requested the Claimant, by letter—to admit the facts set out in that letter and

WHEREAS

2.00 The Claimant has refused to admit the facts and the Respondent has requested me to allow him to serve a Notice to Admit Facts on the Claimant.

3.00 I HEREBY DIRECT that the respondent has consented to serve such Notice forthwith and that the Claimant shall Reply not later than 5.00 p.m. 20 December 1997.

4.00 The costs of proving any facts listed in the Respondent's letter which, for no good reason, are not admitted by the Claimant in his Reply, shall be paid by the Claimant.

5.00 The costs of the Respondent's application in connection with this Order and the costs of this Order to be paid by the Claimant.

Date: 21 November 1997
D Mark Cato MSc FRICS FCIArb
Registered Arbitrator

APPENDIX "B"—RE TYPICAL REQUEST FOR INTERROGATORIES (QUESTIONS FROM THE ARBITRATOR)

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION UNDER THE JCT ARBITRATION RULES (18 JULY 1988)
BETWEEN

RELIABLE BUILDERS LTD **Claimant**

and

SANCTUARY HOUSE LTD **Respondent**

ORDER FOR DIRECTIONS NO 18

Interrogatories on behalf of the above-named Claimant further to the Claimant's application dated 8 January 1998 and the arbitrator's consent being given by his letter 16 January 1998.

1. Do you accept that you received the letter of 22 April 1996 written by the Claimant to yourself?
2. If the answer to interrogatory 1 is yes, do you accept that you did not reply to it?
3. If the answer to interrogatory 2 is that you accept you did not reply to the letter, do you allege that you made any complaint or statement (written or oral) in response to receipt of the letter of 22 April to the effect that its content was inconsistent with the agreement you now allege of 8 April, and if so, what complaint or statement did you make, to whom and when?

William Bliss, a Director of the above-named Respondent company, is required to answer all the above interrogatories.

Served this 26 January 1998, etc.

(Note: If these were questions from the arbitrator then the Respondent would be DIRECTED to answer them—rather than required by the Claimant.)

26.7 PLEADINGS—RE-SERVICE OF

26.7.1 Party's newly appointed solicitor requests consent to re-serve defence and counterclaim previously inadequately served by lay representative.

THE FACTS

An arbitrator was appointed to a dispute following a unilateral application to the President of the RICS. The dispute concerned monies owed over a contract for the conversion of a residence into a health centre and was between the builder and the proprietor. The standard form of JCT Contract includes the usual clause making the reference subject to the JCT Arbitration Rules.

The arbitrator informed the parties of his appointment and invited them to attend a preliminary meeting within 21 days of the notification date as prescribed by the JCT Rules which he confirmed was the date of his letter to them.

In his letter the arbitrator requested the parties to inform him who would be attending this preliminary meeting. The respondent proprietor wrote to say that she would be abroad on the date that she had agreed for the meeting but she nominated her estranged solicitor husband to attend in her place.

The husband did not appear but a neighbour friend of the proprietor turned up instead saying that she had been asked to represent the respondent. The arbitrator was in a quandary. He had written confirmation that the respondent's nominated representative was to be her husband and without something further from the respondent he could not ignore this and conduct the preliminary meeting with this neighbour. He explained the situation to the neighbour who fortunately was able to put through a call to the respondent. The respondent was put on to the arbitrator and became abusive for doubting her friend's *bona fides*.

The arbitrator did his best to conduct this meeting with a lay representative who said that she could not agree to anything and was only there to observe and report back to her friend.

Following this meeting the arbitrator issued a direction for the future conduct of the reference. A week or so later he received a letter from the respondent confirming that she had appointed a claims consultant to represent her and he would be dealing with her defence and counterclaim.

This claims consultant proved to be the first of three different representatives appointed by this respondent. Each one in turn on appointment sought and was granted some extension of time to acquaint himself with the background to the reference and to serve the defence.

The last of these representatives was an architect who proved to be totally unversed in any form of dispute resolution and despite as much guidance as the arbitrator felt he could give made a complete hash of the statement of the defence. The arbitrator felt that he had no choice in order to be fair to the claimant so he issued an unless order as required by JCT rule 6.4 giving the respondent seven days to serve a proper statement or he would proceed as if no statement was being served.

Twenty-four hours before the deadline was due to expire the arbitrator received a letter from a new firm of solicitors informing him that they had been instructed in this matter and having studied the defence which had been submitted previously they

admitted that it was so defective that they were bound seek consent to start again—i.e. to re-serve the defence and in this regard they requested a further extension of 28 days.

The claimant, not surprisingly vehemently objected to any further extensions of time being granted and formally requested the arbitrator to debar the respondent from entering a defence.

QUESTION

How should the arbitrator react to the claimant's request?

COURSE OF ACTION

I thought that this was a classic situation for my pupil Thomasina to consider and say how she would deal with it. She rightly pointed out that it appeared to her that this arbitrator seemed to have lost control of the reference somewhere along the line and certainly had not been entirely fair to the claimant in allowing so many extensions of time to the respondent. Surely, she said, the JCT Rules were clear enough and the arbitrator could and should have taken a firm line much earlier in the reference.

I could not disagree with her. Certainly he had failed in the duty imposed upon him under s.33 AA '96 to avoid unnecessary delay and expense. However, the arbitrator had allowed things to drift so how was he to rescue the situation as things now stood.?

After some discussion we agreed that the best course of action was to call a interlocutory meeting between the claimant and the respondent's new solicitor to ensure that he understand the severity of the situation before determining what directions to give.

The meeting was held and the arbitrator was satisfied that the solicitor was fully aware of what was required of him and accordingly made an order by consent, that the respondent be allowed to re-serve its defence and counterclaim as requested and that the respondent pay the "costs thrown away" as a result, which the new solicitor accepted was inevitable. (See Appendix "A" to this example for a copy of the order.)

Two days before the expiry of the time allowed to re-serve this defence the solicitor faxed the arbitrator to the effect that he had been involved in a case which had overrun and as a result he needed another three days. Again the claimant objected to any further extension being granted and renewed his earlier request to debar the respondent from entering a defence.

Mindful of the JCT rules, the arbitrator then issued a peremptory order (see Appendix "B" to this example).

One reason for the arbitrator's reluctance to debar the respondent was the judgment in a recent Court of Appeal decision which he had read concerning the late service of witness statements and experts' reports where the decision of the judge of the first instance, refusing to admit these late statements, had been overturned by their lordships who made the following comments in guidance in this case *The Mortgage Corporation Ltd* v. *Sandoes* [1996] 47 BLISS 5:

> *"1 The time limits specified in the rules and directions given by the court are rules to be observed not merely targets to be attempted;*
> *2 The overriding principle, however, is that justice must be done;*
> *3 Parties are entitled to expect that their case will be resolved at reasonable speed, and non-compliance with time limits can cause prejudice and disrupt the administration of justice;*

4 *The vacation or an adjournment of a date of the trial also causes prejudice and disruption, and therefore extensions which involve such extensions or adjournment should be granted only as a last resort;*

5 *Where parties have not complied with time limits, they should co-operate in reaching an agreement as to new time limits which will not necessitate the date of the trial be postponed. If agreement is reached the court will normally give effect to that agreement at the trial, and it is unnecessary to make a separate application solely for this purpose;*

6 *The court will look unfavourably upon a party's seeking to gain a tactical advantage from the opposing party's failure to comply with the time limits;*

7 *In the absence of agreement as to a new timetable, a prompt application should be made to the court for directions;*

8 *The court will take into account all the above considerations plus the circumstances of the case when coming to a conclusion whether to extend the time."*

I find this judgment confusing. On the one hand the court says that time limits are not mere targets, implying that they must be observed, but then goes on to say that the overriding principle is justice. Their Lordships reinforce the impression they give that some flexibility over time limits should be exercised when they say that a party should not seek to obtain tactical advantage from the opposing party's failure to meet the time limit set down.

APPENDIX "A"

APPENDIX "A"—TYPICAL DIRECTION GRANTING THE RESPONDENTS APPLICATION TO RE-SERVE ITS DEFENCE

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION UNDER THE JCT ARBITRATION RULES (18 JULY 1988)
BETWEEN

RELIABLE BUILDERS LTD **Claimant**

and

SANCTUARY HOUSE LTD **Respondent**

ORDER FOR DIRECTIONS NO 11

Upon receiving a Request, dated 14 July 1997, from Mr Crighton, to be permitted to re-serve the Respondent's Statement of Defence and Counterclaim and also considering the Claimant's objections to this Request in his letter dated 15 July 1997 and following hearing Mr Redman for the Claimant and Mr Crighton solicitor for the Respondent, at the Interlocutory Meeting on 4 August 1997

the following Directions are given BY CONSENT (unless otherwise directed) and it is HEREBY DIRECTED that:

due to the very recent change in the Respondent's representation, the dates shown in Order for Directions No 3, and subsequent Orders, are now superseded by this Order, where appropriate. (Bracketed references—unless otherwise noted—are to those items in Order for Directions No 3).

1.00 Timetable
(6.00) The Respondent will be permitted to Re-serve his Defence and Counterclaim. Service to be not later than 5.00 p.m. 18 August 1997.

In the serving of this Defence and Counterclaim the Respondent to take into account the Claimant's previous Request for Further and Better Particulars, dated 7 June 1997 and the Replies given by the Respondent's previous representative 2 July 1997.

As a result of the re-service of the Defence and Counterclaim the Claimant is HEREBY GRANTED CONSENT to serve an Amended Statement of Case not later than 14 days after the re-service of the Defence and Counterclaim.

The Claimant shall serve his Reply to the Defence and Defence to the Counterclaim not later than 28 days after the re-service of the Defence and Counterclaim.

The Respondent may, if he so wishes, serve a Reply to the Defence to the Counterclaim, not later than 14 days after the service of that Defence.

Items (6.02) and (5.03) remain unaltered but for the avoidance of doubt the Respondent will price up all the items on the Scott Schedule before passing it to the Claimant for his comments.

2.00 Hearing
The dates set aside for the Hearing—item (14.00) are hereby cancelled and new dates will be fixed

by me, by agreement, with the parties, following close of pleadings, but in any event not later than 5.00 p.m. 2 February 1998.

The parties to inform me of their joint view as to the number of days that I am to set aside for the hearing, preliminary reading and drafting of the award. Also the approximate number of witnesses of fact and expert witnesses they would like to call and whether they intend to use Counsel at the Hearing.

Following this I will let the parties know what dates I have available and we will, once more, make a firm fixture.

3.00 Costs Thrown Away

The Respondent is to pay to the Claimant FORTHWITH all of his reasonable costs incidental to and arising out of this Direction.

These costs include, but are not necessarily confined to, those incidental to and consequential on the following:

(i) Any abortive "Pleading" including further and better particulars.
(ii) Order for Directions No 7 21 May 1997.
(iii) Order for Directions No 8 8 June 1997.
(iv) Order for Directions No 11 (This Order).
(v) Late service to Defence and Counterclaim—see my letters dated ..... 1997.
(vi) Cancellation of Inspection Meeting 1997—see my letter dated ..... 1997.
(vii) Interlocutory Meeting prior to Inspection on ..... 1997.
(viii) Cancellation of the Hearing Dates my letter dated ..... 1997 refers.

These costs to be settled by me, on a commercial basis, if not agreed. The procedure for this settlement exercise will, if required, be the subject of a separate direction.

In addition, the Respondent is to pay FORTHWITH my costs thrown away by the same events as per the attached Fee Statement.

Should the Respondent fail to pay within 14 days of the request for payment the amounts ordered by me in this Direction then, on application of the Claimant, I will encapsulate this Direction into an Interim Award.

Date: 7 August 1997
D Mark Cato MSc FRICS FCIArb
Registered Arbitrator
To Jayrich Associates

Representative for the Claimant
FAO Joel Redman
Solicitor for the Respondent
FAO James Crighton

Kalmsyde & Joyoff

APPENDIX "B"—TYPICAL DIRECTION SEVEN-DAY NOTICE TO RESPONDENT RE FAILURE TO SERVE DEFENCE

RECORDED DELIVERY

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION UNDER THE JCT ARBITRATION RULES (18 JULY 1988)
BETWEEN

RELIABLE BUILDERS LTD — **Claimant**

and

SANCTUARY HOUSE LTD — **Respondent**

ORDER FOR DIRECTIONS NO 12—PEREMPTORY ORDER

1.00 By my Order for Directions No 11 I gave consent to the Respondent to re-serve his Statement of Defence and Counterclaim not later than 5.00 p.m. 18 August 1997 in addition the Respondent was directed to pay the "costs thrown away" as set out in that Order.

2.00 To date the Respondent has neither re-served his Statement, paid the "costs thrown away" or made written application for an extension of time under Rule 6.7.1 before the expiry of the time for service.

3.00 ACCORDINGLY I HEREBY DIRECT THAT

UNLESS the Respondent, within seven days of the date of this Direction, re-serves his Statement of Defence and Counterclaim, I shall proceed on the basis that he will not be serving same.

4.00 Should the Respondent fail to re-serve his Statement within the seven-day period, and then he subsequently serves same, it shall be of no effect unless I am satisfied that there was good and proper reason why an application was not made within the time required by Rule 6.7.1 and why the Statement was not served within the seven-day period specified by this Order.

5.00 Costs of, incidental to and consequent on, this Order to be paid by the Respondent in any event.

Date: 20 August 1997
D Mark Cato MSc FRICS FCIArb
Registered Arbitrator
To: Jayrich Associates

Representatives for the Claimant
FAO Joel Redman

To: Kalmsyde & Joyoff

Solicitors for the Respondent
FAO James Crighton

26.8 PLEADINGS—WITHOUT PREJUDICE

26.8.1 Pleadings alleged to be "without prejudice".

THE FACTS

It was clear from a preliminary meeting that the respondent was very reluctant to co-operate in the arbitration. The timetable was set and pleadings directed. Points of claims were delivered on time, but the Points of Defence were late and when they arrived they were marked "without prejudice".

On the delivery of these pleadings, the claimant's representative immediately wrote to the arbitrator pointing out that this situation was untenable, since if the documents were marked "without prejudice" the claimant would be unable to refer to them during the hearing.

QUESTION

How would the arbitrator deal with this situation?

COURSE OF ACTION

First, he should write to the respondent and ask why the pleadings have been thus marked and exactly what privilege he considers attaches to them. He could further point out that the object of marking documents "without prejudice" is that they form part of a negotiation process aimed at settlement. As pleadings could hardly be viewed in this light, or construed as a *bona fide* intent to negotiate, the arbitrator could not consider that privilege attached to these documents.

He might further point out that it is untenable for pleadings to be privileged documents as their objective is to provide the machinery for the parties to state their case before the tribunal.

According to RSC Order 18, r.7(1):

> *"Every pleading must contain, and contain only, a statement in summary form of the material facts on which the party's pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved and the statement must be as brief as the nature of the case admits."*

The respondent clearly cannot rely on a pleading marked "without prejudice", and therefore pleadings thus marked are either not pleadings at all, or the "without prejudice" has no effect. This being so, the arbitrator could invite the respondent to amend his pleadings by removing the offending words.

If the respondent persisted and refused to amend the pleadings, then the arbitrator could issue a direction declaring that they were not privileged and leave the respondent to take action against the direction, as he saw fit. However, the most likely outcome would be that the respondent would see the error of his ways and amend his pleadings.

Alternatively, the arbitrator could write to both parties, saying that he assumed that the words "without prejudice" had been included inadvertently and he intended to ignore them.

It may be, of course, that the reason why the respondent marked his defence "without prejudice" is that he does not recognise the arbitrator's jurisdiction or challenges that jurisdiction. If this was so the arbitrator should have got to grips with this problem much earlier in the reference either by ruling on his own jurisdiction under s.30 AA '96

provided the parties had not agreed otherwise or provided the respondent is not out of time (s.31 AA '96) and the parties so agree (s.31(5) AA '96). He could stay proceedings whilst the respondent applies to the court under s.32 for a determination on this jurisdictional point (see 3.7 above).

CHAPTER 27

PROCEEDINGS

27.1 ABANDONMENT OF—REFERENCE

27.1.1 Absentee respondent, working and resident overseas, refuses to appoint representative. Claimant elects to start arbitration proceedings and subsequently claims abandonment.

THE FACTS

Upon appointment the arbitrator wrote to both parties whose addresses in the UK were provided in the appointment documentation suggesting dates and a venue for the preliminary meeting.

A letter was received from the address of the respondent but issued by the occupier who was not the respondent stating that the respondent had now been resident overseas for at least a year and that the occupier was charged with forwarding correspondence to him.

The arbitrator copied that letter to the claimant and sent a further notice to the respondent's last known UK address advising when the preliminary meeting would be held several weeks thereafter. He also suggested that the respondent appoint an appropriate representative to act for him in his absence if he could not attend himself.

With that letter a separate letter was issued to the occupier of the respondent's address asking for the notice to be forwarded to the respondent. These documents were sent *via* courier to ensure registration of delivery.

In the absence of any response at all from the respondent and the occupier at the respondent's address two further reminders were sent the second of which gave formal notice to the respondent that in the absence of any response the preliminary meeting would proceed *ex parte*.

On the morning of the preliminary meeting and before the time for attendance by the parties a fax message was received from the respondent from America. The message contained a rebuttal of the matters of claim by the claimant and stated also that the respondent was not able to attend the hearing nor was he prepared to appoint a representative to act in his absence.

The preliminary meeting proceeded, with only the claimant in attendance. The agenda items for this preliminary meeting were all dealt with on the basis of the respondent's clear statement of intent—not to attend any hearing or to be represented.

QUESTION

(a) What action should the arbitrator take in the absence of the respondent having received his formal refusal to attend and refusal to appoint a representative?

(b) What response should he give to the claimant's subsequent application for abandonment of the case?

COURSE OF ACTION

Immediately following this preliminary meeting the arbitrator drafted his order for directions covering a timetable up to a hearing date agreed with the claimant. He recorded the respondent's decision communicated to him by fax but made provision for the respondent to enter a defence if he changed his mind.

He also stated in this order for directions that in the event the respondent maintained the stance as faxed then he would have no choice but to proceed as if no further statement of defence was being submitted and in effect with no respondent or no respondent's representative present he would have no choice but to conduct an "*ex parte*" hearing.

The arbitrator said no "*further*" statement of defence as he could see no good reason why the respondent's rebuttal of the claim should not be dealt with by the claimant in attempting to discharge the burden of proof for his claim.

This order for directions was sent to the claimant and copied again to the respondent this time to the American address on the fax received by the arbitrator.

On receipt of the order for directions the claimant requested time to consider whether or not he wished to continue with the arbitration in view of the respondent's refusal to be involved.

Counsel for the claimant was of the opinion that as the amount involved in the arbitration was relatively small and as it was probable that upon award should the claimant be successful legal proceedings would then have to be instigated to recover any amount awarded the direct route of litigation might be more expeditious.

A month went by with no further communication from the claimant. The arbitrator then wrote to the claimant (copied to the respondent) giving him seven days in which to reply, following which, if no abandonment was sought then he would assume that proceedings would continue.

The arbitrator received a formal application from the claimant for abandonment of the arbitration restating the grounds why abandonment was considered to be appropriate.

Having carefully considered the matter the arbitrator decided that adequate grounds existed for abandonment and issued a formal notice of abandonment pursuant to the claimant's application. This was also published to the respondent's UK and American addresses.

Although such a formal notice was not strictly necessary it had the advantage of tidying matters up both for the parties and the arbitrator. If then, for example, the respondent returned sometime later to the UK and the claimant decided to start another arbitration against him provided it was not statute barred under the Limitation Act 1980 there would appear to be no impediment to him for so doing.

It is interesting to note that the only exception to the requirement for writing concerns an agreement to terminate an arbitration (as to which see s.23(4)). The exception is permitted because of the impracticality of imposing a requirement for

writing in certain of the circumstances in which an arbitration may be mutually allowed to determine for example where both parties simply abandon proceedings or allow them to lapse.

27.2 PROCEEDINGS—CONDUCT OF

27.2.1 How the Arbitration Act 1996 has changed the approach of the parties and the arbitrator.

THE FACTS

On St Valentine's Day 1997 an arbitrator received a letter from the President of the RICS enquiring about his willingness to act if the President was minded to appoint him, subject to satisfactory answers to the "usual list" of questions—the subject-matter of the dispute was within his field of expertise; no relationship with either party which would affect his impartiality; the ability to act expeditiously; etc.

For the first time since that arbitrator had been receiving appointments from the RICS there were some additional questions concerning the AA '96 designed to ascertain that the prospective appointees were at least familiar with its provisions.

QUESTION

What are the Act's main provisions and how would they affect the arbitrator's approach to conducting a reference?

COURSE OF ACTION

When I came to consider this question with Thomasina I said that I was prepared to do no more than sketch the principal provisions. Half-a-dozen or so books have been written on the subject and each follows the Act through section by section to a lesser or greater degree, giving the arbitrator guidance on how to use his new powers or react to agreements on the non-mandatory clauses.

Some commentators talk of the Act being a revolution which will bring about fundamental changes in approach. The arbitrator has considerably increased powers coupled with new obligations to adopt suitable procedures and to avoid unnecessary delay and expense.

The best starting point is s.1 of the Act—General Principles—which provides, *inter alia*:

> *"(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
> *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."*

This means that the arbitrator must act fairly and impartially between the parties, giving them each a reasonable opportunity of putting their case and answering that of the other party or parties whilst at the same time avoiding unnecessary delay and expense.

It cannot be said too often that arbitration's most obvious advantage over litigation is *flexibility*—the ability to tailor the procedure of the reference to the size, complexity and nature of the dispute. The new Act strengthens that advantage by giving the parties the freedom to agree (in writing) on any or all matters of procedure and evidence, failing

which the default powers kick in and the decision rests with the arbitrator subject to the overriding duty to act fairly.

In broad terms the Act allows for or provides for the following:

Specific powers given to arbitrators in default of agreement:

- to rule on their jurisdiction;
- to order security for costs;
- to appoint experts or legal advisers;
- to require evidence on oath;
- to make interim orders for payment.

The issues which the arbitrator will wish to address would include, *inter alia*:

- cutting out some of the expensive processes. For example, a limitation
  - — on discovery
  - — on the number of witnesses
  - — on orality
  - — on hearing time (total duration), the time allowed for examination and cross examination of witnesses (*Note*: there is no longer an automatic right to a hearing unless provided for by contract)
- *where* and *when* any part of the proceedings is to be held (in itself an enormous potential cost saving over litigation)
- the ability to resolve disputes by "documents" only in appropriate cases
- the ability to decide what is fair i.e. or equitable as opposed to determining the dispute strictly according to a recognised system of law
- the ability to make a provisional award of money without being tied to the rigid legal constraints of say an Order 14/Order 29
- the ability to include compound interest on any amount awarded—where the courts can only award simple interest (unless a party is successful in a claim for special damages)
- the possibility of excluding rights of appeal to ensure absolute finality.

Probably the most important power under this Act is the arbitrator's power to cap costs provided the parties do not agree otherwise. "Otherwise" can also include an agreement between the parties to limit reasonable costs (see 9.8.1).

My practice even prior to AA '96 was to explore with the parties or their representatives the possibility of resolving their dispute at say no more than 25 per cent of the sum involved—of seeing what can be done for that sum; how much hearing time they can afford (if this is what they want); how many witnesses can, or need, to be called etc. Arbitrators now have real teeth to impose such sensible proposals.

I am obliged to my colleague and friend Professor Michael O'Reilly for developing three different scenarios based on my practice of attempting cost-effective resolution. (These scenarios are set out in full in 9.2.1 above which deals with the arbitrator's power to limit the costs of the proceedings.)

Those who support the robust arbitrator's approach would no doubt be in favour of scenario one. It seems to me that scenario two strikes the right sort of balance except that it is not always possible to determine the real amount in dispute—claims are frequently exaggerated and it would be unfair to impose a higher cost limit on an action because of this. Having said that, the arbitrator can reserve the right to take such an exaggerated claim into account (if that is what it turns out to be) when dealing with costs.