

Do we have a dispute?

Keith Elliot
Trett Consulting
March 2006

Disputes. It is unfortunate that we all become involved in them at different times and for varying reasons but, if asked, are we able to identify when they arise?

Keith Elliott argues that it is important to be able to define a 'dispute' because under many contracts, it is not until this point has been reached that certain entitlements accrue to the parties.

Over the years, the English Courts have been asked to decide when a dispute has arisen. In *Monmouthshire County Council v Costelloe & Kemple Ltd (1965)*, Lord Denning MR expressed the opinion that there must be both a claim and a rejection of it in order to constitute a dispute or difference. It would seem that Lord Denning MR was of the belief that, for a dispute to arise, there must have been an express rejection of a claim.

However, in *Tradax International v Cerrahogullaritas (1981)*, the defendants to a claim did not admit liability; in fact, it would appear that they did nothing because they ignored all communications relating to it. It was held that these facts gave rise to a dispute. The absence of a response, within a reasonable time, may be taken as a non-admission of the claim, and hence the creation of a dispute. In *Ellerine Brothers (Pty) Ltd v Klinger (1982)*, Templeman LJ was of the opinion that the absence of a reply may give rise to a dispute.

The judgements in *Tradax* and *Ellerine* found favour with the Courts in the case of *Cruden Construction Ltd v Commission for the New Towns (1995)*, His Honour Judge Gilliland deciding that a dispute can exist when a claim is ignored or met with by prevarication.

More recently, the UK's Housing Grants, Construction and Regeneration Act 1996 has led to judicial opinions being expressed on the meaning of the word dispute. In *Sindall v Solland (2001)*, it was held that for the purposes of exercising the statutory right to an adjudication a point must have arisen from the discussions which needs to be decided.

These cases were reviewed by the Court in the recent case of *Amec Civil Engineering v Secretary of State for Transport*; Seven propositions concerning the meaning of the word 'dispute' were identified, each wholly endorsed by the Court of Appeal in *Collins (Contractors) v Baltic Quay Management (1994) Ltd (December 2004)*. The propositions can be summarised as:

The word 'dispute' which occurs in many arbitration clauses (and also in section 108 of the Housing Grants Act) should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

The mere fact that one party notifies the other party of a claim does not automatically and immediately

give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

The circumstances from which it may emerge that a claim is not admitted are variable. For example, there may be an express rejection of the claim. There may be discussions between the parties from which, objectively, it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the defendant who has a legal duty to consider the claim independently and then given a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the Court comes to consider what is a reasonable time for responding.

If the claim as presented by the claimant is so nebulous and illdefined that the respondent cannot sensibly respond to it, neither silence by the defendant nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

These seven propositions are helpful guidance in deciding if we have reached the point of having a valid dispute on our hands. However, many contracts use the expression 'dispute or difference'. What's the distinction?