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disputes & lawyers in the construction industry  
Sinclair, S.**

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# **designing + (dis)assembling disputes**

*an ethnography of disputes & lawyers in the construction industry*

**STACY SINCLAIR**

**MAY 2016**

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A thesis submitted in partial fulfilment of the requirements  
of the University of Westminster for the degree of Doctor of Philosophy

## ABSTRACT

The UK construction industry is notorious for the sheer amount of disputes which are likely to arise on each building and engineering project. Despite numerous creative attempts at “dispute avoidance” and “dispute resolution”, this industry is still plagued with these costly disputes. Whilst both academic literature and professional practices have investigated the causes of disputes and the mechanisms for avoidance/resolution of these disputes, neither has studied in any detail the nature of the construction disputes and why they develop as they do once a construction lawyer is engaged. Accordingly, this research explores the question of *what influences the outcome of a construction dispute and to what extent do construction lawyers control or direct this outcome?*

The research approach was ethnographic. Fieldwork took place at a leading construction law firm in London over 18 months. The primary focus was participant observation in all of the firm’s activities. In addition, a database was compiled from the firm’s files and archives, thus providing information for quantitative analysis.

The basis of the theoretical framework, and indeed the research method, was the Actor-Network Theory (ANT). As such, this research viewed a dispute as a set of associations – an entity which takes form and acquires its attributes as a result of its relations with other entities. This viewpoint is aligned with relational contract theories, which in turn provides a unified platform for exploring the disputes. The research investigated the entities and events which appeared to influence the dispute’s identity, shape and outcome. With regard to a dispute’s trajectory, the research took as its starting point that a dispute follows the transformation of *“naming, blaming, claiming...”*, as identified by Felstiner, Abel and Sarat in 1980.

The research found that construction disputes generally materialise and develop prior to any one of the parties approaching a lawyer. Once the lawyer is engaged, we see the reverse of the trajectory *“naming, blaming, claiming...”* this being: *“claiming, blaming, naming...”* The lawyers’ role is to identify or name (or rename) the dispute in the best possible light for their client in order to achieve the desired outcome – the development of which is akin to the design process. The transformation of a dispute and the reverse trajectory is by no means linear, but rather, iterative and spatial as it requires alliances, dependencies and contingencies to assemble and take the shape it does.

The research concludes that construction disputes are rarely ever completely *“resolved”* as such. Whilst an independent third party may hand down a judgment, or the parties may reach a settlement agreement, this state is only temporal. Some construction disputes dissipate whilst others reach a state of hibernation for a period of time only to pick up momentum and energy some years later. Accordingly, this research suggests that the concept of *“dispute resolution”* does not exist in the UK construction industry. The ultimate goal should be for parties to reach this ultimate and perpetual state of equilibrium as quickly and as cost effectively as possible: *“dispute dissolution”*, the slowing down of the dispute’s momentum. Rather than focusing on the design and assemblage of the dispute, the lawyers’ role therein is, or should be, to assist with the *“disassembling”* of the dispute.

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## **LIST OF ABBREVIATIONS**

ACE	Association for Consultancy & Engineering
ADR	Alternative Dispute Resolution
ANB	Adjudicator Nominating Body
ANT	Actor-Network Theory
CDB	Combined Dispute Board
CECA	Civil Engineering Contractors Association
CEDR	Centre for Effective Dispute Resolution
CMC	Case Management Conference
CPR	Civil Procedure Rules
DAB	Dispute Adjudication Board
DRB	Dispute Review Board
DSD	Dispute System Design
FIDIC	International Federation of Consulting Engineers
HGCRA	Housing Grants, Construction and Regeneration Act 1996
ICC	International Chamber of Commerce
	Infrastructure Conditions of Contract
ICE	Institution of Civil Engineers
ICHEME	Institution of Chemical Engineers
IET	Institution of Engineering and Technology
IMechE	Institution of Mechanical Engineers
JCT	Joint Contracts Tribunal
LADs	Liquidated damages
LDEDCA	Local Democracy, Economic Development and Construction Act 2009
NEC	New Engineering Contract
ONS	Office for National Statistics
PAP	Pre-Action Protocol for Construction and Engineering Disputes
PFI	Private Finance Initiative
QC	Queen's Counsel
QS	Quantity Surveyor
RIBA	Royal Institute of British Architects
TCC	Technology & Construction Court
WP	Without prejudice

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## **DECLARATION**

All material contained in this thesis is my own work.

S. Sinclair.

# CHAPTER 1

## INTRODUCTION

### *Columns & Beams Ltd v Structures Ltd*

*The lawyer, Mr Jack Hunter, swoops into the conference room through the glass door, immediately extending his hand to his new client, Mr Ross Cahill, the Managing Director of Columns & Beams Ltd, who quickly rises from his seat:*

**The Lawyer:** Good morning Ross, good to finally meet you in person.

**The Client:** Jack, thank you for meeting me on such short notice.

**The Lawyer:** No problem. So, how can I help?

**The Client:** You've seen the bundle of papers I sent over yesterday?

**The Lawyer:** Yes, thank you.

**The Client:** Well, I am a small construction company and I simply cannot take the risk of spending any more money on this dispute. I had hoped to carry on without the use of lawyers, but this is now out of my depth. I need this over and done with as quickly as possible.

**The Lawyer:** I completely understand. If this runs the course, you quickly could run up huge costs. We need to find a balance. At the end of the day, you might be better off walking away frustrated, than continuing with this. But let's see - it is too early to say.

Now, I have read the documents you sent me, but it would be helpful if you could take me through this, in detail, starting from the beginning.

*The client then describes to his lawyer the dispute and the events to date.*

*Structures Ltd had engaged Columns & Beams Ltd to carry out specialist design and construction services on a number of projects for the past 10 years. The Managing Directors of both companies had even become close friends. Nevertheless, at some point the relationship broke down and Structures Ltd failed to pay Columns & Beams Ltd a handful of invoices across a number of projects. Mr Cahill considered that he was owed some £300,000. Mr Cahill had chased Structures Ltd for the outstanding payments to no avail.*

**The Client:** I just do not know what to do next – this is now out of my depth. I was very reluctant to contact you as I cannot afford a huge legal bill, but I simply had no other alternative.

## 1.1 Overview

The above exchange<sup>1</sup> took place between an English lawyer, who specialised in construction law, and his client, a specialist building contractor, at a law firm in London. It was their first face-to-face meeting. Prior to this, a dispute had arisen and the client, until this point, had dealt with the dispute largely on his own.

This first meeting and brief exchange set out above, in short, illustrates the starting point from which this thesis begins: *a construction lawyer's first gaze upon a construction dispute*. What happens hereafter is the focus of this research.

### **Too complex, too long, too expensive and too many?**

Construction projects in the UK and the disputes which arise as a result are notorious for their complexity, their cost, their involvement of an extensive range of actors and the length of time it takes to reach an outcome. By way of example, Lord Bingham of Cornhill highlighted this malady in his keynote address to the King's College Centre of Construction Law and Management when he stated (Bingham, 1998: 2):

*"It would, I think, be true to say that all the problems of excessive cost, excessive delay, excessive prolixity, excessive paper and so on are seen at their worst in this particular field."*

Lord Bingham identified eight main reasons why this is so: the fluidity of the product, the fluidity of the price, the period of time over which contractual performance takes place, the factual complexity, the number of active participants in performance, the often huge sums at stake (large enough to make litigation appear worthwhile), the use of contract documentation not necessarily well designed for the particular project in hand (and not necessarily easy to understand and construe) and the claims culture which he considers exists to an unusual extent in this industry (Bingham, 1998: 2-4).

In addition to the judiciary, construction lawyers also refer to the complex nature of construction disputes and construction projects. One commonly sees the following descriptions on law firms' websites, blogs and articles: *"...large disputes are complex and involve multiple contracting parties..."* (Berwin Leighton Paisner, 2014), *"Construction projects and the disputes that arise from them are invariably complex..."* (SR Shackleton, 2015), *"...it is sadly common for disputes to arise in the course of*

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<sup>1</sup> All names used in this thesis have been pseudonymised in order to protect client confidentiality. See Chapter 3 for further information in this respect.

*construction projects ... often the disputes are bitterly contested and the technical aspects are complex...*" (Field Fisher, 2015) and *"...providing an invaluable service to clients where projects have led to potentially complex and sensitive disputes..."* (Norton Rose Fulbright, 2015).

In 1998, Phillip Capper, a leading construction lawyer at White & Case and Nash Professor of Engineering Law at King's College London, summarised the technical nature of construction disputes. He noted that in terms of technical complexity, the construction industry of course is not unique in generating disputes that arise from matters of considerable scientific or technical difficulty. However, the terms within the industry's standard form contracts<sup>2</sup> and the exercises and evaluations which flow from these terms<sup>3</sup> combine to increase the technical content of construction disputes and exacerbate the occurrence of these technical disputes (Capper, 1998: 343-344).

The judiciary too recognises that construction contracts by their very nature have always generated disputes about payment (Coulson, 2015: 4). May LJ stated: In *"Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due."* (Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd, 2003).

In addition to the judiciary and the lawyers, the parties in dispute also voice concern regarding excessive delay and excessive cost. In the dispute *Columns & Beams Ltd v Structures Ltd* introduced above, Mr Cahill had spent some 10 months chasing payment from Structures Ltd by various means, before meeting Mr Hunter. Thereafter, it took a further nine months to reach a point where Mr Cahill was able to walk away from the dispute. The process carried on for approximately 19 months, cost Columns & Beams Ltd £50,000 in legal fees and endured three different forms of dispute resolution in order to achieve an outcome for this dispute (negotiation, litigation and adjudication). Throughout this process, Mr Cahill often made comments to his lawyer such as *"I have already spent more time and money on this*

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<sup>2</sup> Capper noted that the JCT and ICE forms of contract tend to postpone matters of uncertainty under the contract rather than seeking to determine them in, or prior to, the execution of the contract. It is left to the architect or engineer's discretion or judgmental evaluation during the course of the project (eg, how much work has been carried out and how much money should be paid and when) (Capper, 1998: 343).

<sup>3</sup> In this respect, Capper referred to the contract styles which involve the contract administrator, the parties and an army of specialists and advisors in various disciplines which are required to prepare, argue and defend claims disputing the technical evaluations (Capper, 1998: 343-344).

*than I had expected...” and “This has gone on long enough and I will do whatever you recommend, but I need this over and done with as quickly as possible...”*

The construction of the 90,000 seat Wembley stadium in London in 2007 perhaps best exemplifies this state of affairs. The project’s completion date was delayed by over a year, the cost of the stadium escalated by some £70m over the original budget (Guardian, 2006) and numerous disputes arose between the parties, many of which ended up in litigation. The Court of Appeal, the Technology and Construction Court (‘TCC’) and the Chancery Division of the High Court handed down over 20 judgments which concerned disputes between design consultants, contractors, subcontractors, sub-subcontractors and even suppliers. The disputes ranged in scope from the substantive merits of liability, to quantum, legal costs and even arguments over documents and procedural matters in relation to the litigation itself. By way of example, in a dispute between the main contractor, Multiplex Constructions (UK) Ltd, and the steelwork subcontractor, Cleveland Bridge UK Ltd, the proceeding was in the TCC for over two years, the trial bundle amounted to some 550 lever arch files, the costs of photocopying alone approached £1m and the parties’ legal costs amounted to over £22m (*Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited*, 2008).

In addition to being renowned for their complexity and cost, construction projects are recognised as being “*pregnant with disputes*” (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*, 1994). Since the early 1990s there have been significant concerns as to the high proportion of disputes within the construction industry (Coulson, 2015:4). The general consensus is that this industry endures more contractual disputes than any other industry (Fenn, 2002; Latham, 1994). As the construction lawyer Robert Peckar indicated (Peckar, 2012:13), one view is that disputes on construction projects are integral or inherent within the construction process:-

*“Some would say that disputes are as integral to the construction process as the preparation of plans and the placement of concrete. Yet so many industry participants have been heard to yearn for the reduction – if not elimination – of disputes on projects.”*

Whilst this is indeed a familiar story of *too many disputes* within the “hyperlexis explosion” (Galanter, 1983) debate<sup>4</sup>, it is notable that these complaints spans across the judiciary, lawyers and industry participants. There is a general cry to minimise disputes from the industry at large, not simply policy makers with the possible aim of cutting costs. Sohoni (2012:1601) notes that arguments about hyperlexis can be divided into three categories: formal (arguments focusing on the numerosity and complexity of law), institutional (complaints that law unduly intrude on state, local or individual prerogatives) and subjective (policy-based arguments about costs).<sup>5</sup> Whilst perhaps it is not possible to say how many construction disputes constitute *too many disputes*, it is clear that the complaints are in respect of the sheer number of these disputes, and in turn the cost incurred in dealing with them (from the point of view of parties involved, not policy holders). As exemplified above, the general consensus is among the judiciary, the lawyers and their clients. Whether or not these perceptions are founded is outside the scope of this research. However, the fact that these perceptions remain consistent and have not subsided lends weight to the argument that the number and complexity of these disputes is inevitable. It is therefore imperative that studies continue to investigate these disputes and how they are dealt with. The focus of this research is just that: the nature of the dispute itself, the environment housing the dispute as it matures and the influences which shape its outcome.

### **How are construction disputes resolved?**

More specifically, this research focuses on disputes from the point at which lawyers become involved, following and tracing the life of a construction dispute hereafter in order to achieve a better understanding of what influences and directs the outcome of a dispute, what role does the construction lawyer play in this process and what happens to a dispute once a lawyer is involved. For the avoidance of doubt, the aim here is not to examine how good English lawyers are at their jobs or critically appraise the system within which they work, as R.E. Megarry attempted to do in his 1962 Hamlyn Lecture (Megarry, 1962: 1). Nor is it to analyse the suitability of the various types of resolution procedures used for these disputes. Rather, it examines

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<sup>4</sup> *Hyperlexis* – a term coined by Manning (1977) as “*America’s national disease*”. In addition to Galanter (1983), see also Genn (2010) and Sohoni (2012). Sohoni (2012:1587) at fn 8 sets out the literature regarding the development of this concept.

<sup>5</sup> Indeed Sohoni (2012) goes further to argue that a fourth category of arguments are those which hyperlexis encroaches upon liberty. Indeed Sohoni notes that these categories are not mutually exclusive and “*Complaints about hyperlexis rarely remain confined to one category...*”

these disputes in the presence of lawyers and in the dispute resolution procedure chosen by the parties and/or their lawyers (or not as the case may be).

Whilst the construction of Wembley stadium and the disputes which followed (introduced above) illustrates the quintessential characteristics of a long, drawn-out and expensive litigation<sup>6</sup>, many construction disputes are not dealt with by litigation, rather they hold true to the general consensus that very few cases will be resolved by the full, formal litigation process in a courtroom (Kritzer, 1991). Construction disputes clearly follow the phenomenon in civil justice of the 'Vanishing Trial' (Genn et al, 2013: 139; Genn, 2010; Galanter, 2006; Kritzer, 2004). This is illustrated by the minimal numbers of reported judgments in the TCC over the past few years: in 2012 the TCC reported 82 judgments, in 2013 it reported 88 judgment and in 2014, 77 judgments.<sup>7</sup>

A recent survey conducted between 1<sup>st</sup> June 2006 and 31<sup>st</sup> May 2008 showed that more than 90% of cases started in the TCC settled before trial (Gould, King and Britton, 2010). Indeed in the period from October 2011 to September 2012, of the 475 new claims commenced in (or transferred to) the TCC, only 35 proceeded to trial with a judgement handed down. The TCC noted that a number of other trials started but were settled before judgement and furthermore, a feature of this period had been that a substantial number of cases were settled shortly, sometimes very shortly, before trial (Akenhead, 2013:7).

The question then is why are there so few construction disputes which proceed to trial and ultimately receive a reported judgment? Are these trials migrating to other forums/venues, morphing into some other form of dispute resolution procedure or simply vanishing owing to the devaluation of public trials and the support of public policies which promote alternative dispute resolution ('ADR') procedures (Resnik, 2004)? Has the chronology of the litigation explosion of the mid-20<sup>th</sup> century, resulting in a 'jaundiced' view of the civil justice system owing to the perception of opportunistic claimants, greedy lawyers and activist judges, followed by a trend

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<sup>6</sup> A further example is the dispute considered in *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH\_68. Here, the Architect issued a certificate of non-completion of the works in 1999 and the employer started court proceedings in 2000 regarding the contractor's entitlement to an extension of time (after having referred certain disputes to adjudication). After a number of hearings, amendments to pleadings and a lengthy trial, Lord Drummond Young handed down his decision in 2007. The employer then pursued an appeal. Accordingly, the parties were tied up in litigation and adjudication proceedings for over 10 years.

<sup>7</sup> <http://www.bailii.org/ew/cases/EWHC/TCC/>

therefore towards private dispute resolution procedures in the 1970s minimised those disputes which make it to court (Genn, 2010: 29-38; Galanter, 2006)?

Since the late 1990s, the courts' and UK government's approach to civil litigation of course plays an active part in encouraging parties to settle disputes rather than engaging in protracted litigation. The Civil Procedure Rules ('CPR'), introduced in 1999 following Lord Woolf's Final Report to the Lord Chancellor in 1996 (Woolf, 1996), and its overriding objective aim to ensure that costs are minimised and that cases are dealt with expeditiously, fairly and proportionately. The overriding objective of the CPR empowers the court to encourage parties to use alternative dispute resolution procedures ('ADR') if appropriate.<sup>8</sup> Furthermore, as parties may face adverse cost consequences for failing to mediate<sup>9</sup> or follow the Pre-Action Protocol<sup>10</sup> (where appropriate), the system is designed to avoid litigation if at all possible.

Indeed the latest reforms to the CPR<sup>11</sup>, commonly known as the Jackson Reforms, have already deterred protracted litigation. In the recent case of *Venulum Property Investments Ltd v Space Architecture Ltd & others* (2013) the Judge dismissed Claimant's application for an extension of time in which to serve the Particulars of Claim after having referred to the amended CPR which now requires the Court to enforce compliance with rules, practice directions and orders.<sup>12</sup> Looking at the circumstances as a whole and in the light of the stricter approach the courts now take, there were insufficient grounds to justify the court exercising its discretion to grant an extension of time. This decision demonstrates the Court's view and response to the Jackson Reforms: less indulgence towards, and tolerance of, parties who unnecessarily or without good reason delay proceedings or fail to comply with directions or the CPR.

No doubt the recent increase in the cost of commencing a claim may also have some impact on deterring claimants from using litigation in the future. It clearly is too soon to understand the impact; however in March 2015 civil court fees significantly increased for the recovery of money on claims worth £10,000 or more (The Civil

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<sup>8</sup> CPR r1.1 and r1.4(2)(e).

<sup>9</sup> CPR r44.4(3)(ii).

<sup>10</sup> CPR r44.4(3)(i).

<sup>11</sup> Civil Procedure (Amendment) Rules 2013: These new rules, which came into force on 1 April 2013, are significant changes to civil procedure. They follow on from Lord Justice Jackson's *Review of Civil Litigation Costs* (Jackson, 2010). The key objective of the Jackson Report was "to promote access to justice as a whole by making costs of litigation more proportionate".

<sup>12</sup> CPR r1.1(2)(f)

Proceedings and Family Proceedings Fees (Amendment) Order 2015). For these claims the new fee is five per cent of the value of the claim capped at a maximum fee of £10,000. So, for claims worth £200,000 and over, the maximum fee of £10,000 applies (where previously it would have been £1,515) – an increase of nearly 600%.<sup>13</sup>

Perhaps most notably for the construction industry, in 1996 the government introduced the Arbitration Act and the Housing Grants, Construction and Regeneration Act ('HGCRA'): two statutes regulating and providing rights/obligations in respect of arbitration and construction adjudication. Hereafter the industry certainly saw a dramatic increase in the use of statutory construction adjudication, perhaps deterring claims which were once destined for litigation.<sup>14</sup>

In addition to the judiciary's and government's approach in managing litigation and promoting the early settlement of disputes and use of ADR, construction contracts themselves also encourage the use of alternatives to litigation. The construction industry employs the widest range of dispute resolution procedures to settle these disputes out of court: arbitration, adjudication, mediation and negotiation - to name just a few.<sup>15</sup> Construction contracts include multi-tiered dispute resolution procedures as well as setting out the host of options available to the parties, thereby recognising and encouraging procedures other than litigation.

In addition to the more commonly used procedures of arbitration, adjudication and mediation, new forms of ADR have been created and attempted over the past 10 years: the TCC now offers the Court Settlement Process as well as Early Neutral Evaluation (HM Courts & Tribunals Service, 2014). Furthermore, new methods of dispute avoidance are also surfacing. For example, for the London Olympics 2012 established two dispute boards: an "Independent Dispute Avoidance Panel" and a "Dispute Adjudication Panel". This innovative approach, a new take on FIDIC's traditional dispute board, established these two panels at the outset of the project.<sup>16</sup>

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<sup>13</sup> Proposals at the time of writing indicate that the government is looking to double this figure: the £10,000 court fee could rise to 'at least' £20,000 (a 1000% increase). <http://www.lawsociety.org.uk/news/press-releases/increases-in-court-fees-will-impact-access-to-justice-july-2015/> accessed on 2 December 2015.

<sup>14</sup> See Section 1.3 below for an overview of statutory construction adjudication.

<sup>15</sup> See Section 1.3 below for a brief overview of these procedures.

<sup>16</sup> The intention was that these two panels would follow the construction works right from the start, thereby enabling them to become familiar both with the parties and the project. If any differences arose, the aim was that they would be referred to one of the panels which would provide either recommendations or decisions, as and when needed, such that grievances would not escalate into full-blown disputes.

Notably, owing to the complexity and distinct nature of these disputes and the multitude of options available, parties often find themselves engaged in not just one of these methods, but in fact several when resolving their dispute. In the case of *Michael John Construction Ltd v St Peter's Rugby Football Club* (2007), the rugby club was involved in two adjudications, enforcement proceedings in the TCC and also arbitration. This was all in an attempt to resolve a payment dispute with its contractor, valued at less than £100,000.

These “new” forms of dispute resolution which have developed since the 1990s clearly have become a stronghold in the construction industry and negotiation, mediation and adjudication continue to be the mainstay of the construction industry. Indeed the use of construction adjudication rivals, if not surpasses the use of litigation. The Glasgow Caledonian University Adjudication Reporting Centre published the statistic that over 1400 adjudications had been referred by Adjudicator Nominating Bodies (ANBs) between May 2007 and April 2008 (Adjudication Reporting Centre, 2010). This figure of course does not include those adjudications in which the Adjudicator is appointed by agreement between the parties, without the assistance of an ANB. When comparing this data to the 366 claims the TCC received in 2008 (Ministry of Justice, 2010), nearly 75% more claims were referred to adjudication over litigation.

Having said the above, it is important to highlight that generally the TCC is a well-respected forum for resolving disputes. This court, particularly the High Court in London, is renowned for its proactive administration. Construction lawyers generally no longer are of the view that litigation is a long drawn-out several year process. It certainly can be in some cases; however, depending on the type of dispute, the availability of the court and the determination of the parties, the TCC is highly regarded, on the whole, as efficient and proportionate. Of course some do take issue and have had problems with the inevitable bureaucracy of the public court, but I mention this overall perception of the TCC as it is not the case here that the rise of alternative dispute resolution forms has de-valued this forum.

### **Way forward?**

In any event, in order to resolve these disputes effectively in whatever forum and without the need for multiple forums, and to assist in the development of new techniques which ultimately become more effective than the current mainstream methods, a better understanding of a “construction dispute” is paramount.

Putting it another way, you need to know your enemy (Sun Tzu, 2010 [1908] [6<sup>th</sup> c.BCE]: 24).<sup>17</sup> Both lawyers and those construction professionals involved in a conflict need to know what they are dealing with – the dispute. Without appreciating its character and what factors fuel its momentum, avoiding the dispute or effectively settling the dispute is futile.

This research investigates these disputes from the point at which the lawyer is engaged and provides a glimpse into the life of these lawyers and these disputes. To do so, this study is ethnographic and is situated in a leading construction law firm in London, as is discussed further below and in Chapter 3. This provides an up front and personal view of the lawyers and the disputes in an attempt to understand just what makes these disputes do what they do. The narratives documented throughout this paper are intended to provide a rich description, both technically and pictorially, of events witnessed and are in themselves explanations of the phenomena observed. This research was privileged in that it had “access all areas” behind the closed doors of the law firm and benefitted from observing and recording all aspects of the firm’s activities, to the extent possible. In particular, the research documented 50 cases in more detail which formed the basis of a “Matter Database”, ultimately allowing an element of quantitative analysis. When an event or description within this paper concerns one of these matters, the reader will see the following convention: **Matter No XX [‘Brief description’]**. This of course is documented more fully in Chapter 3 below, though is introduced here for ease of reference and for use in this introductory chapter.

Understanding the composition of disputes is essential if we are to appreciate their likely trajectories and how best to manipulate this courses for the benefit of the disputing parties, as well as society as a whole, and this research aims to do just that.

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<sup>17</sup> *“It has been said before that he who knows both sides has nothing to fear in a hundred fights; he who is ignorant of the enemy, and fixes his eyes only on his own side, conquers, and the next time is defeated; he who not only is ignorant of the enemy, but also of his own resources, is invariably defeated.”*

## 1.2 Aims & objectives of the research

As introduced above, the construction industry is essentially a breeding ground for disputes. The economic, political, commercial and contractual conditions within the construction industry create an environment in which disputes are inevitable and indeed expected. It is common for there to be disagreements about defects, delays, variations and extra expense on a construction project (Coulson, 2015:4) and the industry does not consider that construction contracts necessarily help matters.

With regard to research exploring this malaise, generally there are two lines of investigation: those studies which consider why construction projects are fraught with complexity and dispute and those studies which analyse the effectiveness of the dispute resolution procedures employed and the body of law which forms as a result. Both are well-documented by practitioners and academia alike (Bingham, 1998; Capper, 1997, Chern, 2008; Coulson, 2015; Fenn, 1997:383; Gould, King and Britton, 2010; Love et al, 2010; and Roberts and Palmer, 2005).

However, these studies look at why construction projects are so prone to disputes (ie, what are the conditions which cause so many disputes) or whether the resolution procedures are effective once there is a dispute and what can be done to improve this (ie, how successful are the conditions/rules of the procedure in settling a dispute). Little research<sup>18</sup> focuses on the construction dispute itself, particularly from the point at which the lawyer is engaged, and to what extent do lawyers influence the direction of these disputes or how the client-lawyer relationship moulds and steers these disputes. In other words, from the point the lawyer gets his or her grubby little hands on the dispute, what happens? What factors which influence the dispute's identity, shape and outcome.

The emphasis to date has been on *why* construction disputes emerge and *how* best to resolve these disputes. The industry now needs a better understanding of *what* comprises these disputes and *how* do they behave and develop, particularly once lawyers are involved. Without this, it is arguable whether a dispute can ever be fully resolved or settled. In any event, without recognition or knowledge of the nature of

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<sup>18</sup> Chapter 4 of *Dispute Processes* (Roberts and Palmer, 2005) does profess to consider "*the nature of disputes and draws in the typology of dispute processes...*" However, this chapter looks more at dispute processes ("Typologies of Response" & "Reconstructing a Panorama of Decision-making") rather than the actual characteristics of disputes and those factors which influence their outcome. Roberts and Palmer do provide helpful historical examples of how "disputes" have been described over past century (pp 79-90). Furthermore, Roberts and Palmer's discussion relates to disputes in general and is not specific to construction disputes.

these disputes, a party to a dispute certainly will not “know its enemy” (at least in totality) and therefore may face the risk of repeated conflict/disputes or failure to achieve settlement.

With regard to the outcomes of a construction dispute, it is clear that there are at least three alternatives: (1) the parties reach a settlement; (2) a decision is imposed on the parties by a third, independent party (judge/arbitrator) after a formal dispute resolution procedure has been utilised; or (3) the parties simply walk away.

Understanding the nature of these disputes, why they develop in the way they do and what influences their result (namely, one or more of the three outcomes identified above) is essential if society is to minimise these disputes and their impact on the construction industry and the economy at large. Indeed empirical data, analysis and further insight into these disputes, in their full contextual complexity, is required in order to choose the appropriate behavioural response (Menkel-Meadow, 2004:18).

Accordingly, this research explores the question of:

***What influences the outcome of a construction dispute and to what extent do construction lawyers control or direct this outcome?***

To fully examine this question, the following must also be considered:

***What is the nature of a construction dispute?***

These two questions are inherently linked as an investigation of the latter is essential in order to answer the former, and equally, establishing answers to the former will continue to shed light on the latter.

The aim of this research is to advance the current understanding of why construction disputes progress and conclude in the outcome they do and ultimately gain a better understanding of the disputes themselves.

There appears to be a continuous search for how to avoid disputes – be it new forms of contract<sup>19</sup> or new forms of dispute resolution.<sup>20</sup> Without a deeper understanding of the disputes themselves, it is arguable that avoidance is impossible. How can one avoid something which has yet to be precisely identified? In any event, the swift and efficient “*resolution of disputes*” is imperative – or as this research suggests, a more

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<sup>19</sup> By way of example, PPC2000, currently in its 2013 edition, is the first form of partnering contract (published by the Association of Consultant Architects).

<sup>20</sup> See the discussion above in “Overview”.

accurate description of this goal is reaching “*a perpetual state of equilibrium*” or “*dispute dissolution*”. Quickly achieving an outcome which all parties are prepared to live with must be the ultimate goal: for commercial and financial purposes, yet alone peace of mind.

Accordingly, the objectives of this research are to gather empirical data on the outcome of disputes in the construction industry and, more specifically: to provide both qualitative and quantitative data on the nature and outcome of construction disputes; to explore how these disputes are handled by construction lawyers; to investigate the lawyer-client relationship with regard to construction disputes; to describe the environment of the resolution of disputes and the process by which ‘ordinary’ disputes are resolved (Kritzer, 1991:4)<sup>21</sup>; to provide a textual, narrative (ANT<sup>22</sup>) account of construction disputes in order to better understand their nature; and to make a significant contribution to the existing research on dispute resolution in the UK construction industry.

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<sup>21</sup> Owing to the data source, the research focuses on the lawyer’s perspective. It is recognised that depending on the relationship between the parties in dispute and their course of dealings, resolution of “ordinary” disputes may occur outside of the lawyer’s office, either in part or in whole.

<sup>22</sup> Actor-Network Theory (Latour, 2005). See below.

## **Contribution to knowledge**

As Kyle Wiens, CEO of iFixit, so eloquently put it (McLellan, 2013:42):

*“Once you grok<sup>23</sup>, your possessions, a world of possibilities opens up.  
Knowing how a thing works enables you to adapt it...”*

In line with the above sentiment on possessions, it is essential that we understand the composition of construction disputes and how they function in order to adapt and disassemble them. Considering the construction industry’s importance within the UK economy, its propensity for disputes and the amount of time and money society invests in dealing with them<sup>24</sup>, both in the public and private sectors, it is imperative that further research and efforts are focused on advancing our understanding of these disputes, how to minimise their existence and how to address and deal with them quickly, proportionately, justly and at minimal cost.

To assist and expand society’s understanding of these disputes, this research focuses on the socio-legal aspects of these disputes from the point at which a construction lawyer is engaged – an area not considered in any detail in previous studies. Certainly other social-legal studies have explored disputes or the lawyer’s role in disputes in other industries such as medicine, divorce, white collar crime and family law<sup>25</sup>, and indeed this research draws from and builds upon those findings. However, this research aims to advance and contribute to the knowledge and studies of lawyers and lawyering particularly in the construction industry: how does the agency of construction lawyers impact the dispute trajectory and to what extent do they shape and transform these disputes? What happens when the lawyer’s gaze falls upon the dispute?

In order to develop new approaches or methods for dealing with these disputes, which are more effective than the current mainstream ones, a new perspective and understanding must be achieved. The collection of such knowledge in this thesis aims to increase the awareness of both construction and legal professionals as to the nature of disputes, particularly from the point in which a lawyer is involved, and provide information to assist in the development of more effective dispute resolution techniques. Indeed, with the rise of the ‘vanishing trial’ and the increased use of

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<sup>23</sup> A term coined in *Stranger in a Strange Land*, Robert Heinlein (1961), meaning “truly understand”.

<sup>24</sup> Arcadis, 2015 reported that that in 2014, the average value of construction disputes was £17.2m and the average time taken to resolve these disputes was over 13 months.

<sup>25</sup> See by way of example: Mann, 1985; Sarat and Felstiner, 1995; Abel and Lewis, 1995; Mulcahy, 2001; Webley, 2010; and Webley, 2015.

ADR, society has less of an opportunity to see and learn from these disputes. This research offers an ‘up close and personal’ glimpse into the life of these disputes and the lawyers that deal with them – a standpoint rarely seen.

In addition, this research and scrutiny into the life of these disputes offers context and perspective for use in the development of contract law. The disputes researched here concern a wide variety of commercial and contractual issues arising out of contracts (or not as the case may be). Even with the prominent use of ADR in the construction industry today, these disputes of course still find their way to the court in some shape or form<sup>26</sup> and the sheer amount of disputes in the construction industry increases the likelihood that some of these disputes will reach the court. As the *“general principles of contract law are still, for the most part, of a judge-made character”* (Mulcahy, 2008:5), these contracts, the parties’ attitudes and behaviours in the use of them and ultimately the disputes which arise from them are most relevant to and indeed have the potential to influence the broader and over-arching framework and legal doctrine of contract law. They are particularly important for the development of English law, both from a classical contract law perspective as well as a social, economic and relation contract theory perspective.

Furthermore, the study of disputes historically has been from the point of view of the courtroom<sup>27</sup> or case reports. The office door of the law firm has been traditionally a significant barrier to exploring and researching what happens “behind the scenes” – the stage being the courtroom or other proceedings to which public access is more easily obtained (Halliday and Schmidt, 2009:187). Breaking down this barrier is essential if we are to grok, truly understand, the essence of disputes and just what is involved in “resolving” disputes. Further empirical research, particularly behind the office door, is *“valuable principally because it brings to the law a dose of the real world that there is a kind of reality deficit in the law”* (Riles, 2011:25).

Accordingly, this research aims to assist in removing this barrier and to contribute to the small, but hopefully growing, body of research which has managed to do so previously (Flood, 2013; Latour, 2010 [2002]; Sarat and Felstiner, 1995; Mann, 1985; Flood, 1983; Katz, 1982).

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<sup>26</sup> By way of example, see the recent Court of Appeal cases of *Brown & Anr v Complete Building Solutions Ltd* (2016), *Wilson and Sharp Investments Ltd v Harbour View Developments Ltd* (2015) and *MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd and Anr* (2015), along with the 85 judgments of TCC delivered in 2015 ([www.bailii.org/ew/cases/EWHC/TCC/2015](http://www.bailii.org/ew/cases/EWHC/TCC/2015)).

<sup>27</sup> More recently, see Roberts’s (2013) ethnography on the Mayor’s and City of London Court.

As Latour said (2010 [2002]):

*“wanting to transport knowledge via the routes of law would be like trying to fax a pizza...”*

Similarly, trying to resolve a dispute with a method which is simply incompatible with its disposition is futile. This research therefore seeks to discover the composition of construction disputes, what makes them tick and what influences their development after a lawyer is engaged, so that appropriate and aligned procedures can be developed (or existing ones used more effectively) to assist parties in conflict.

Whilst this research is specific to construction disputes and may only have validity in this area, it is hoped that the findings are potentially applicable to a wide range of contractual disputes. Indeed the findings here in relation to the role and impact of lawyers in respect of the trajectory and outcome of disputes are likely to be germane to a number of industries where lawyers are engaged in the disputing process.

### 1.3 Background: the construction industry

Before turning to the disputes themselves, by way of background, this section provides a brief overview of the construction industry, the projects and contracts therein, the type of disputes which arise from these projects and how the industry generally deals with these disputes. I begin first with a general description of what is meant by “construction projects”, “construction contracts” and “construction disputes”, followed by an account of the dispute resolution procedures commonly used to address the disputes arising out of these projects and contracts. It is particularly noticeable the extent to which the construction industry utilises dispute resolution procedures other than traditional litigation. As discussed above, the construction industry accords with the ‘vanishing trial’ phenomena, though not necessarily as a result of a lack of confidence in courts as a forum for dispute resolution

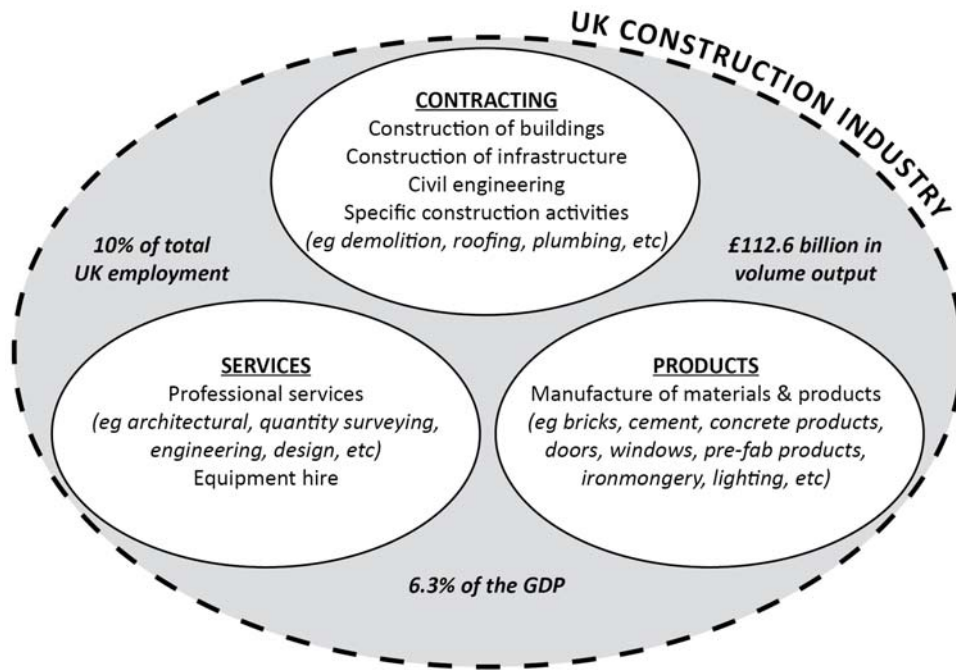
The construction sector is a key sector for the UK economy. It is one of the largest sectors in the UK and indeed the UK construction industry remains one of the largest in Europe (BIS, 2013: v; UKCES, 2012)<sup>28</sup>. To understand the sheer scale of the construction industry in the UK, the Office for National Statistics (‘ONS’) recently reported that construction currently accounts for 6.3% of the Gross Domestic Product. In monetary terms, the estimated construction industry annual volume output was £112.6 billion in 2013 (ONS, 2014: 1-2) and in employment terms, the construction industry accounts for 10% of the total UK employment (BIS, 2013: v).

The construction industry’s components can be categorised as: (i) construction contracting industry; (ii) provision of construction related professional services and (iii) manufacture of construction related products and materials (BIS, 2013: 1). This excludes the distribution and sales of construction products. Graphically, these components are as follows<sup>29</sup>:

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<sup>28</sup> The measurement in these statistics is based on employment, number of enterprises and gross value added.

<sup>29</sup> This diagram is derived from *Figure 1: Composition of the UK construction sector* (BIS, 2013).



**Figure 1**  
**The UK Construction Industry**

### **Construction projects and construction contracts**

For the avoidance of doubt, this research takes “construction projects” to mean those projects which concern building works or civil engineering works, or both<sup>30</sup>. Examples therefore include the refurbishment of a one-bedroom flat, the construction of a new 20-storey office building, the demolition of a disused railway, the upgrading of a metro or highway system and the construction of a new off-shore wind farm or power plant.

Construction projects may be “large” or “small” and may involve a range of stakeholders/parties. A small building project could, for example, involve one contractor designing and refurbishing an existing kitchen in a residential flat. In a ‘typical’ large building project – that is, in the £20-£25 million range – the main contractor may directly manage around 70 subcontracts of which a large proportion are small (ie, £50k or less) (EC Harris, 2013). This example of a large building

<sup>30</sup> The ONS defines the construction industry’s “output” as “the amount chargeable to customer for building and civil engineering work done in the relevant period excluding VAT” (ONS, 2014: 15).

project could involve numerous designers, consultants, subcontractors, suppliers, funders, and interest groups.

“Construction contracts” are essentially those contracts which are put in place in order to complete or manage these construction projects. Practitioners define a “construction contract” as a contract for the carrying out of works of construction (Fenwick Elliott LLP, 2012) and as including any contract where one person (including a corporation) agrees for valuable consideration to carry out construction works, which may include building or engineering works, for another (Furst and Ramsey, 2012: 1-002). In terms of a statutory definition, for the purposes of Part II of the Housing Grants, Construction and Regeneration Act 1996 (‘HGCRA’)<sup>31</sup>, as amended, Section 104(1) of the HGCRA defines a “*construction contract*” as:

*“...an agreement with a person for any of the following -*

- (a) the carrying out of construction operations;*
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;*
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.”*

The above HGCRA definition includes contracts for architectural services, design services, surveying, and providing advice on building, engineering, interior or exterior decoration or on the laying-out of landscape in relation to construction operations (Section 104(2))<sup>32</sup>.

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<sup>31</sup> The HGCRA is a significant piece of legislation in the construction industry. It introduced various amendments and additions to those contracts which are defined as “construction contracts” under the HGCRA. The HGCRA gives the parties the right to resolve their disputes on a temporary basis by way of adjudication and also imposes a stage payment regime – in the event that a construction contract does not expressly do so. In addition, the HGCRA regulates the right of set-off in the absence of written notice which must be given not later than the prescribed period before the final date for payment. The HGCRA has now been amended by the Local Democracy, Economic Development and Construction Act 2009 (‘LDEDCA’). The LDEDCA affects those contracts entered into after 1 October 2011.

<sup>32</sup> Some contracts/operations are specifically excluded by the HGCRA. By way of example, these include contracts of employment (Section 104(3)), contracts with residential occupiers (Section 106 HGCRA as amended), PFI contracts (SI 1998 No 648, paragraph 4) and finance/development agreements (SI 1998 No 648, paragraphs 5 and 6).

Section 105(1) of the HGCRA then goes further and purports to define what is meant by “construction operations” for the purposes of Section 104(1) and the HGCRA, which ultimately widens the definition of “construction contract” even further.<sup>33</sup>

The definition of “construction contract” and “construction operations” for the purposes of the HGCRA, as amended, can have a significant impact on both how disputes are dealt with, or “resolved”<sup>34</sup>, as well as the emergence of disputes. Contracts which fall within the definition of the legislation are entitled to have disputes, which arise under or out of the contract, resolved by way of “adjudication”<sup>35</sup> regardless of whether the contract expressly calls for adjudication or not. If the contract fails to provide adequate adjudication provisions, or any provisions whatsoever, the terms of the legislation are implied.<sup>36</sup> Accordingly, the legislation influences the process for the resolution of disputes – by including such provisions, it encourages disputes to be handled outside of the court in what is perceived and intended to be a quicker and cheaper process. The legislation does not force parties to refer their disputes to adjudication, nevertheless by including this method with construction contracts the option is available without the need to negotiate or agree the process.

In addition, by providing a definition of “construction contract” (and “construction operations”) within the HGCRA, this, perhaps unsurprisingly, can also influence the emergence of disputes as interpretation of the legislation is inevitable. On the face of it, these terms are clearly defined, nevertheless, as case law has demonstrated, disputes emerge simply from the interpretation of Section 104 and 105. Whether or not adjudication is available to a particular contract has been an issue in dispute ever since the HGCRA was introduced in 1996 (*Palmer's Ltd v ABB Power Construction Ltd* (1999), *Fencegate Ltd v James R Knowles Ltd* (2001), *Gillies Ramsay Diamond v PJW Enterprises Ltd* (2002), *North Midland Construction Plc v AE&E Lentjes UK Ltd* (2009), *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* (2010), *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* (2013)).

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<sup>33</sup> Again, some operations, such as the drilling for or extraction of oil or natural gas, are excluded from the meaning of “construction operations” (Section 105(2)).

<sup>34</sup> I employ the commonly used word “resolve” in the beginning of this thesis for convenience; however, see Chapters 4 & 5 for my analysis of this term and conclusion that construction disputes are often never “resolved” as such.

<sup>35</sup> See Section 2.2 below for a detailed description of statutory construction adjudication under the HGCRA, as amended.

<sup>36</sup> Section 108 (HGCRA, as amended). The same goes for the payment provisions within the contract (Section 109 – 113 HGCRA, as amended).

By way of example, in the recent case of *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* (2013), Mr Justice Akenhead in the Technology and Construction Court (TCC) held that the collateral warranty provided by Laing O'Rourke was to be treated as "construction contract", which in turn allowed Parkwood to refer any dispute under the collateral warranty to adjudication (see below for a brief overview of construction adjudication). Prior to this, it was not clear whether a collateral warranty could be a construction contract as the HGCRA is silent on this particular type of contract. This illustrates that the definition of "construction contract" may be wider than one might otherwise, thereby compelling interpretation which in turn may give rise to potential disputes.<sup>37</sup>

Accordingly, a construction contract is not simply a contract between a contractor and the person who instructs the building or engineering work to be carried out. Construction contracts are formed between a whole host of construction professionals, contractors and subcontractors, suppliers and building owner/employers<sup>38</sup>. Examples of construction contracts which might concern, say,

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<sup>37</sup> In *Parkwood v Laing O'Rourke*, Laing O'Rourke had entered into a standard JCT Design and Build contract ("the Contract") with Orion Land and Leisure (Cardiff) Limited to design and build a swimming and leisure facility in Cardiff. Under the Contract they were required to (and did) enter into a "deed of warranty" with Parkwood, the tenant which was to operate the facility. Once the facility was complete, a number of defects arose. As Parkwood did not directly engage Laing O'Rourke, their only course of action was to bring a claim under the collateral warranty. Parkwood considered that the collateral warranty was a "construction contract" as defined by the HGCRA and they therefore could refer the dispute to adjudication. They sought a declaration from the Court that they could do so as prior to this the law was uncertain as to whether a collateral warranty was a "construction contract".

The wording of the warranty was such that Laing O'Rourke "*warrants, acknowledges and undertakes*" that "*it has carried out and shall carry out and complete the Works in accordance with the Contract*". The Judge focused on the three opening words and found that the warranty was not merely warranting or guaranteeing a past state of affairs, it was also undertaking that future works would be carried out and completed to the standard, quality and state of completeness called for by the Contract. The Judge recognised that the works under the Contract remained to be completed, albeit that Laing O'Rourke had already carried out a significant part of the works and the design. As such, the collateral warranty did therefore constitute a continuing and future obligation to carry out construction obligations within the meaning of the HGCRA.

The judgment is certainly not to be taken as meaning that it will apply to every collateral warranty. For warranties that relate to works which are still to be carried out, the current position is that they are "construction contracts" to which the HGCRA, and therefore adjudication, applies. This is likely to include any warranties which contain obligations to provide advice and/or design during construction. However, if the warranty relates simply to past events, then it would not qualify as a "construction contract". As ever, it will depend on the circumstances and precise wording – and the Judge's interpretation of the legislation.

<sup>38</sup> Standard form construction contracts (eg the JCT suite of contracts, NEC3 suite of contracts, etc) tend to use the defined term "Employer" or "Client" when referring to the party who commissions the contractor or construction professional. Hereafter, this paper refers to this party to the contract as the "employer" or "building owner", so as not to be confused with the lawyer's "client".

the refurbishment of an office building, would include: a contract between the building owner and the contractor for the refurbishment works to the existing building, which may include works to the cladding, structure and internal fit-out (generally referred to in the industry as a “building contract”); a contract between the building owner and an architect for architectural/design services (and possible contract administration services of the building contract) in respect of the new design for the existing office building (generally referred to in the industry as a “consultant appointment” or “appointment”); a contract between the main contractor and its subcontractor for specific works (eg demolition) to the existing office building (generally referred to in the industry as a “subcontract”); and a collateral warranty between a subcontractor and the building owner, guaranteeing the past state or future state of the subcontract works.

In terms of the physical contract document itself, it is common practice in the UK to use one of the various standard form contracts available for construction and engineering projects. In general, the standard forms have been developed by professional institutions and trade bodies. Perhaps the most widely used standard forms are the JCT suite of building contracts, published by the Joint Contracts Tribunal (Malleon, 2013:8-21). The JCT range of contracts caters for traditional, design and build and management procurement routes.<sup>39</sup>

Other common standard form contracts include: the New Engineering Contracts (commonly known as the NEC3, as it is in its third edition); ICE or ICC engineering contracts (published by the Institution of Civil Engineers)<sup>40</sup>; GC/Works (sometimes used for engineering or public sector projects); FIDIC forms of contract (commonly used on international construction projects); IChemE forms of engineering contract (published by the Institution of Chemical Engineers for use on chemical and process engineering projects); IMechE/IET model forms of contract (published by the Institution of Mechanical Engineers and the Institution of Engineering and

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<sup>39</sup> This paper does not provide a detailed analysis of the various procurement routes available as it is not the focus of study. Nevertheless, by way of background, the “traditional” procurement route requires the employer (or rather, the employer’s design team) to prepare the design and construction information and the contractor to build to these drawings and specifications. The “design and build” procurement route shifts more risk onto the contractor as he is responsible for both the design and construction of the project. It is often the case that the employer will prepare an initial design (otherwise known as the “Employer’s Requirements” in the JCT contract), following which the contractor submits his proposal for how he intends to satisfy those requirements (otherwise known as “Contractor’s Proposals” in the JCT contract).

<sup>40</sup> On 1 August 2011 the ICE Conditions of Contract were withdrawn from sale and re-launched as the Infrastructure Conditions of Contract (ICC), now owned by ACE and CECA. The ICE now endorses the NEC3 suite of contracts.

Technology for use on electrical and mechanical works); and PPC2000 contracts (published by the Association of Consulting Architects and described as the first standard form partnering contract).

The National Construction Contracts and Law Survey 2013 (Malleon, 2013:8-21) revealed that the JCT contracts were most often used (48%), followed by the NEC contracts (22%), bespoke contracts (9%) and FIDIC Contracts (4%).

Standard forms for the appointment of professional consultants are also commonly used. Some examples include: the Royal Institute of British Architects Agreements 2010 ('RIBA'), the Royal Institution of Chartered Surveyors Forms of Appointments ('RICS'), the NEC Professional Services Contract ('PSC') and the Association for Consultancy and Engineering Agreements 2009 ('ACE').

The choice of contract or appointment is largely determined by the employer's preference for procurement, the nature of the works and the previous experience of parties involved. Parties also amend these standard forms, or alternatively use a standard form as a starting point or basis upon which to develop their own bespoke contract.

The fundamental characteristic which distinguishes construction contracts from other major commercial contracts is that as the work proceeds, it becomes fixed or attached to the owner's land and therefore becomes his property, whatever the financial rights or obligations of the parties may be at that point in time (Atkin Chambers, 2010: 1-001). This of course impacts on the ownership of goods and materials. In addition, construction contracts must address matters of time, price, scope of works, contract administration, what happens in the event of defects in the works, variations to the original scope of works and damages in the event of delay to completion of the works. Furthermore, construction contracts incorporate lengthy documents such as specifications, drawings, bills of quantities, and programmes (at times). This tends to create a complex and elaborate contract, unique to construction projects.

Looking holistically at the factors discussed above in terms of the contracts and contract documents employed on these projects, the number of participants involved, the technical complexity of construction itself, etc it perhaps is not difficult to agree that disputes in this context are inevitable.

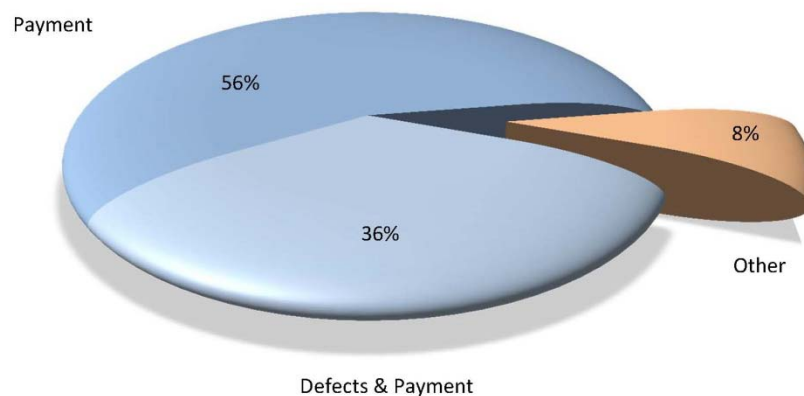
## **Construction disputes**

*“The archetypal disputes in the British construction industry arise of course from a contractor’s claim to be paid more for the increased time and cost of additional works; and the claims of building owners in respect of defects.”*

(Tackaberry and Marriott, 2003:545)

In terms of the disputes which arise out of these projects and contracts, to say that the basis of all of these disputes is either payment or defects, or both, is perhaps too general. That is a blanket statement which fails to take into account the nature of the parties and their relationship, the project and the specific issues in dispute. Nevertheless, it is a broad statement which generally holds true to many studies of construction disputes. Indeed, the detailed cases studied in this research generally did fall within these two categories: payment and defects.

Of the 50 matters observed and analysed in this research, 92% of the matters concerned payment or payment & defects. The “other” matters (8%) concerned issues of employment issues, property law issues, injunctions and professional regulatory issues.<sup>41</sup>



**Figure 2**  
**Typology of the Disputes**

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<sup>41</sup> See Chapter 3 for a detailed discussion of the methods employed in this research and the cases/matters studied.

56% of the matters concerned issues solely in respect of payment. 36% of the matters concerned either defects or defects and payment. Often, disputes regarding defects are inherently linked to payment: defects arose in the building/project and one party sought damages as compensation (payment) for remedying the defect(s). Regardless of the discrete issue, in general, one party sought payment from the other owing to a perceived liability. Money tends to be at the heart of construction disputes – though this perhaps comes as no surprise considering the commercial nature of construction projects. Having said that, there were several cases in which at least one of the motives or objectives of the client for pursuing the dispute appeared to be revenge and infliction of pain/heartache. To what extent alternative motives or factors other than money influence a client's decision making or perception of the dispute is outside the scope of this research owing to the methodology.

These findings accord with that of Flood and Caiger's research (1993:414):

*"Prima facie, the arbitral process in construction is most often about three type of dispute: delays in the construction process because of unforeseen obstacles; delays in payments, and problems over the technical aspects of construction. Ultimately, they all concern money and which party will be responsible..."*

A study regarding the use of mediation in construction disputes, carried out between 2006 – 2010 by the TCC and King's College London (the "TCC Research"), also demonstrates that construction disputes principally concern payment and/or defects. Of the cases under study, 28% concerned defects or payment issues – by far the largest proportion in terms of nature of the case / most common type of dispute.<sup>42</sup>

Whilst the type of disputes which arise arguably can be boiled down to two categories, the types of dispute resolution procedures employed in practice to address these disputes are numerous.

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<sup>42</sup> The other types of dispute in the TCC concerned property damage (13%), professional negligence (13%), design issues (12%), other (9%), delay (7%), adjudication (7%), scope of work (5%), arbitration (1%), site conditions (1%) and IT (1%).

## **Dispute Resolution for construction disputes**

*“In all societies, regardless of their location in time and space, there is a wide variety of modes by which disputes are handled and resolution sought. In general terms, the range of these procedures and their variation can be comprehended within a few broad categories...*

*the duel...*

*violent self-help...*

*avoidance...*

*transformation into symbolic and/or supernatural terms...*

*negotiation and adjudication...”*

*(Gulliver, 1979: 1-3)*

Gulliver’s categorisation in 1979 of the options available for handling and resolving disputes generally holds true today for the methods employed for construction disputes in the UK.

Of course the use of “***the duel***” to which Gulliver refers is not relevant for today’s construction industry (at least in the UK), though unfortunately “***violent self-help***” appears to still exist to some degree. By way of example, in at least two of the matters observed, one of the parties threatened physical abuse (assault) to the other if they did not receive payment or cease carrying out a particular action (or so this was alleged)<sup>43</sup>. In addition, during the general observations of the Firm’s activities, the lawyers every now and again would discuss stories or rumours they had heard from their clients which allegedly involved violence or threats of violence. Whether or not these were just rumours or the threats were carried, is not known. I did not observe any cases which concerned actual, physical abuse or destruction of property (ie criminal acts) and I am not aware of any criminal cases in which the Firm acted. However, allegations and stories (which of course could be rumour) of violent self-help do exist. The extent to which this method effectively deals with the dispute is clearly outside the scope of this thesis as there was not sufficient evidence or data of such events; however, it is notable that such behaviour still could exist at some level in the commercial, construction industry.

“***Avoidance***” of construction disputes is also an option which certain construction companies/individuals do choose: deliberate curtailing of further relations with the

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<sup>43</sup> **Matter No 34** [***Winding-up Petition***] and **Matter No 47** [***Final Two Invoices***].

other person, letting the matter rest, accepting the status quo (at least temporarily), seeking no specific decision on the dispute and preventing the escalation of it because of perceived difficulties that would result (Gulliver, 1979: 1-3). This was observed on a number of different occasions and the avoidance itself took a number of different forms. For example, on several cases, the dispute had not been escalated for a number of years for whatever reason. The clients approached the Firm either just before or just after the expiry of the limitation period, and thus were either just in time or just missed the boat. In one extreme case, **Matter No 39 ['Limitation']**, the client (one of the Firm's regular, repeat clients) approached the Firm with their dispute some 10 years after the project had finished. The client (a contractor) disagreed with the building owner (a developer) over the value of the completed works. A few letters had been exchanged between the parties over the course of the past 10 years, though no further action taken. What prompted the client to escalate the dispute just prior to the expiration of the limitation period and why they had not done so before is unknown. During the discussions with the lawyer, the client appeared to have already resigned to the view that they were unlikely to recover the outstanding money as they had left it so long; however, since their claim was over £2m (of which £300,000 was interest), they "*might as well give it a punt – nothing to lose*". This *punt* proved to be quite lucrative as the adjudicator awarded the client approximately £1m.

In other cases, disputes were not escalated owing to perceived difficulties. In **Matter No 46 ['Roof Defects']** the client (the building owner) only wanted to advance the dispute and serve a formal claim against the Main Contractor and their Subcontractor for defects/workmanship in the building – but not against the Architect for negligent design, as they were still at that point employing the Architect on other projects. It appeared that for political reasons and for perceived future difficulties in respect of the other projects, the client was only willing to investigate the dispute and the magnitude of the claim against the Architect and wanted to decide later whether to escalate the dispute.

A further type of avoidance was observed where a dispute arose though the client ultimately avoided proceeding any further with it. In **Matter No 26 ['Defective Glue']**, the client (a Subcontractor) was defending a claim against the Main Contractor. The client was a joinery company and custom-made a number of cabinets, desks and other joinery for the project. Some of the joinery required an adhesive glue to bond a laminate facing to an MDF substrate (medium-density fibreboard). Two months after the joinery was constructed and installed, significant

delamination occurred. The client had a good relationship with the Main Contractor and immediately rectified the delamination at his own cost, using an alternative adhesive. The client advised the Main Contractor and the Firm that the manufacturer had reported a potential “bad batch” of the particular adhesive originally used. The Main Contractor wrote to the client, assessing their costs to be £5,245 (not including any liquidated damages (LADs) the building owner may or may not seek). The client instructed the Firm to respond on his behalf to the Main Contractor and to contact the adhesive manufacturer. In a telephone call he indicated to the assistant solicitor that he wanted to recover from the glue manufacturer the money he had spent on remaking the joinery. The assistant solicitor’s attendance note recorded:

I telephoned [the client] today. He said that he spoke to [the Main Contractor] and that the £5,245 they are looking for is probably about right. He said that the £1000 included for management costs is probably over the top, but on the whole, the £5,245 is fine (provided the adhesive supplier/adhesive manufacturer will be picking this up). However, [the Main Contractor] owes him quite a bit of money from various other projects - he does not have an exact figure though it is probably at least £30k. So, he does not think that [the Main Contractor] will be chasing him for this £5,245 anytime soon.

He is putting his figures together for the claim against the adhesive supplier/manufacturer. He reckons that he will have this put together for next week (as he is away this weekend)...

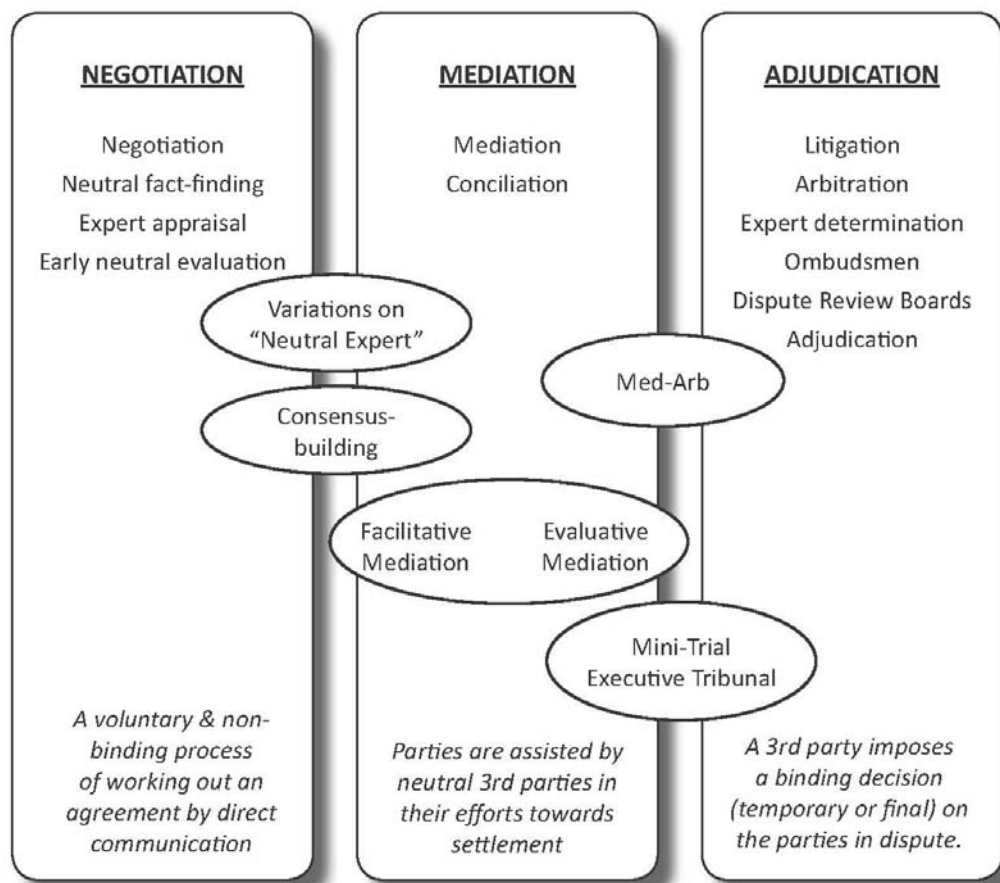
As it turned out, the client never sent the assistant solicitor any further documents or information for the claim against the adhesive supplier/manufacturer. The assistant solicitor telephoned the client several times, though he did not respond. The client did call again four months later apologising that he had been too busy with his business to put the information together and promised to send the documents shortly. The assistant solicitor never heard from the client again. The assistant solicitor understood from the Partner who had dealt with this client before that the client was not the confrontational-type and probably felt it was more of a hassle to escalate the dispute.

With regard to Gulliver’s category of “***Transformation into symbolic and/or supernatural terms***”, again, this perhaps is not immediately relevant to the UK construction industry. Gulliver refers to witchcraft accusations, performance in the ancestral cult or some other religious system and/or sporting contests. None of the cases observed utilised these particular measures to transform the dispute into something else; however, there was evidence of an alternative type of transformation. On several occasions discussions between lawyers or between

lawyers and their clients concerned the situation where a dispute arose regarding non-payment (ie the client was not paid the full outstanding amount) yet the client had been persuaded to “look the other way” or convert his disappointment into hope or delight. In other words, the client had been asked and was willing to transform the dispute over failure to pay, into a promise for future work. The debtor either awarded the client the next project (and therefore the promise of further income) or enticed them in some other way to move on from the dispute over non-payment. Gulliver noted that, as with avoidance, transformation of the dispute is not so much resolving the dispute, but deflecting it (Gulliver, 1979, 1-3). Deflection of the dispute may well be effective in terms of allowing the parties to carry on in a successful commercial relationship.

I turn now to the most common forms of dispute resolution in the UK construction industry: “***negotiation and adjudication***”. Specifically for construction disputes, this comprises: litigation, arbitration, adjudication and mediation/negotiation.

Whilst these four are most common, there is a wide range of dispute resolution methods available in the UK which the construction industry does draw from. These methods tend to be categorised into three distinct groups, “the three pillars” of dispute resolution - negotiation, mediation and an adjudicative process (Gould *et al*, 2010; Mackie *et al*, 2007; Pickavance, 2007:436; Gould *et al*, 1999):



**Figure 3**  
***The Dispute Resolution Landscape<sup>44</sup>***

With regard to the pillars of negotiation and mediation, the outcome of the dispute is controlled by the parties. With regard to the pillar of adjudication, the outcome of the dispute is controlled by an independent third party in that a decision is imposed.

The following does not attempt to describe all of these various methods in detail or to analyse the differences between them - nor does it address the suitability of each method for construction disputes. However, by way of background and context, the following is a brief description of the four most common methods observed during the course of this research.

<sup>44</sup> Figure derived from a chart by Professor Green of Boston University (1993), Gould *et al* (1999), Mackie *et al* (2007) and Gould *et al* (2010).

## **Litigation**

Traditional litigation (ie, a public form of dispute resolution that takes place through the courts before a judge (Bailey, 2011: 1735)) is of course an option available for construction disputes and is regularly used.

Construction disputes are generally commenced in the specialist Technology and Construction Court (TCC) if they fall within the definition of a “TCC Claim”<sup>45</sup>: a construction, engineering or technology claim which involves issues or questions that are technically complex, or it is otherwise desirable for a TCC judge to hear and determine the claim.<sup>46</sup> The Civil Procedure Rules<sup>47</sup> (CPR), as amended, govern the conduct of TCC proceedings in the High Court and County Court.

The TCC has been increasingly busy ever since 2006. Court statistics show that since 2006 there has been an overall increase in claims commenced in the TCC – 85 more claims were commenced in 2013 as compared to 2006 (Ministry of Justice, 2010 – 2014). Notably there was a 69% increase in claims from 2008 to 2009 and then a general decrease in claims since then<sup>48</sup>:

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<sup>45</sup> CPR r60.1. Also, Practice Direction 60, at paragraph 2.1, identifies examples of TCC claims: building, construction or engineering disputes, claims against engineers and architects, landlord and tenant disputes, environmental disputes, claims relating to the design, supply and installation of computers and computer software, etc.

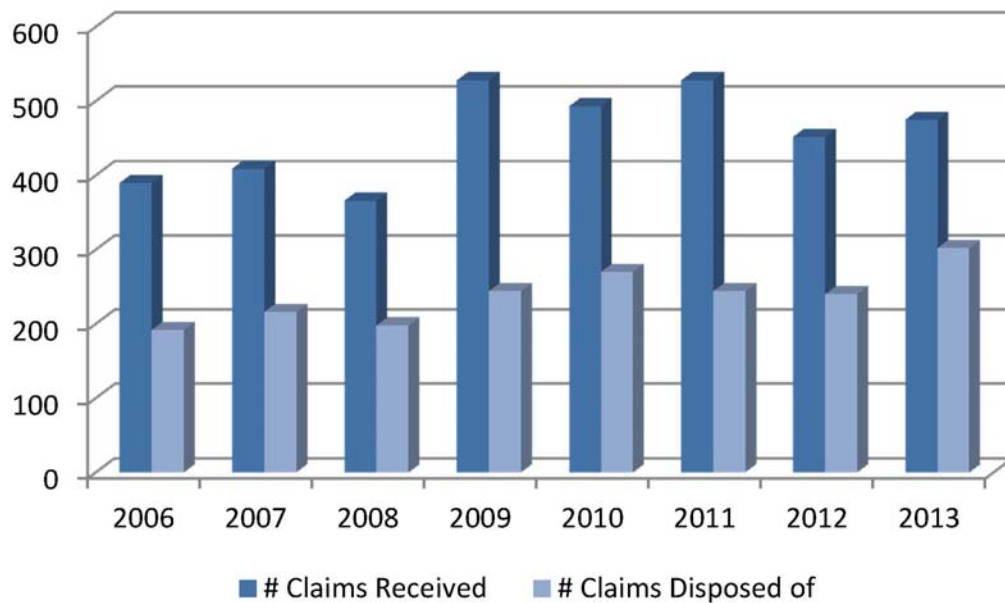
<sup>46</sup> For example, in *CFH Total Document Management Ltd v OCE (UK) Ltd* (2010) Edwards-Stuart J held that it may be desirable for a TCC Judge to determine a claim where it involves a question of the construction of a standard form of contract with which TCC Judges are familiar, even though there may be no issues of technical complexity.

<sup>47</sup> The CPR was made pursuant to the Civil Procedure Act 1997 and took effect on 26 April 1999.

<sup>48</sup> The TCC Annual Report 2011-2012 noted that the reduction in claims in 2012 did reflect the decision in February 2012 in *West Country Renovations Ltd v McDowell & Anor* (2012) to transfer many types of case having a value of less than £250,000 to the Central London County Court (Akenhead, 2013). Previously, the general rule was that TCC claims for more than £50,000 are brought in the High Court, while those below £50,000 are brought in the county court. This decision is now embodied in the latest revision of the TCC Guide (HM Courts & Tribunals Service, 2014, paragraph 1.3.1).

	2006	2007	2008	2009	2010	2011	2012	2013
# Claims Received	390	409	366	528	493	528	452	475
# Claims Disposed of	192	216	198	244	270	244	240	302

(\*Figures extracted from MoJ Court Statistics Reports)



**Figure 4**  
**Number of Claims in the TCC 2006-2013**

Despite the overall increase in claims, litigation is still viewed as a lengthy and costly process. This was observed time and time again during the fieldwork. Lawyers at the Firm advised their clients to avoid litigation, if at all possible, owing to the cost and time involved. This was often the case when clients were “one-shotters” (Galanter, 1974) and very concerned with legal costs<sup>49</sup>. Of course in other situations the lawyers would recommend litigation, particularly if other methods were not available or viable, or the client was a “repeat player” and already familiar with and/or comfortable with the litigation process.<sup>50</sup> Of the 50 matters observed/researched, 17 (32%) of them involved litigation at some point during the trajectory of the dispute.<sup>51</sup>

<sup>49</sup> For example, Matter Nos 6, 14, 17, 22 and 47.

<sup>50</sup> For example, Matter Nos 7, 11 and 13.

<sup>51</sup> The history of the dispute/outcome of five of the matters is not known (eg the client did not report back to the lawyer, the records/archives are not available, etc). Accordingly, the basis of the percentage is 17 of 45 matters.

This view of “time and expense” appear to continue despite the introduction of the Civil Procedure Rules (CPR) in 1999 which aimed to improve access to justice and reduce the cost and complexity of litigation. Even the introduction of the “Jackson Reforms” in 2010 (see further below) has not changed this view: on the whole, lawyers continue to view litigation as a costly exercise for their clients and in some situations the new requirements imposed as a result of the Jackson Reforms only intensify that view (see further below).

Lord Justice Jackson’s *Review of Civil Litigation Costs*<sup>52</sup> in 2010 (Jackson, 2010) sought to bring about a substantial shift in the way in which litigation was conducted and would improve the culture of litigation: controlling costs and promoting access to justice for all. The key objective of the Review was to ‘*promote access to justice at a proportionate cost*’ (Jackson, 2010:2). Following on from the Review, the Civil Procedure (Amendment) Rules 2013 came into force on 1 April 2013. The changes to the CPR included new rules in respect of conditional fee agreements (CFAs), disclosure, cost management, witness statements and Part 36 offers (“the Jackson Reforms”).

By way of example, in respect of cost management, if the sum in dispute is under £2million, under the new rules, parties must file and exchange detailed cost budgets before the first case management conference (“CMC”)<sup>53</sup>. The budgets must detail both incurred and estimated costs for each stage in the proceedings. The court may then make a cost management order that will record the extent to which budgets are agreed or approved. The recoverable costs of the “winning party” are then assessed in accordance with the approved budget unless there is a good reason to depart from it. Most lawyers are familiar with and accustomed to providing clients with costs estimates and budgets. However, as the amended CPR has potentially serious consequences if the estimates are exceeded, more onerous obligations are now placed on lawyers to manage and accurately estimate costs.

As a result, this particular amendment to the CPR and the recent case of *Mitchell v News Group Newspapers* (2013)<sup>54</sup> has compelled lawyers at the Firm to adjust how they conduct their litigation practices – particularly for smaller cases. The general view appears to be that the cost budget requirement creates additional work and in turn increases clients’ legal fees. For example, in **Matter No 47 [‘Final Two**

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<sup>52</sup> This was the largest review of the civil procedure in England and Wales since Lord Woolf’s Access to Justice in 1996 (Woolf, 1996).

<sup>53</sup> CPR r3.12-3.18 and Practice Direction 3E.

<sup>54</sup> See Chapter 3.4 for a further discussion of *Mitchell v News Group Newspapers* (2013).

**Invoices**]<sup>55</sup> when the lawyer took on his new client (who was a Claimant already in the midst of court proceedings), he discussed with the client that the proceedings were at a stage where the next step was the CMC, and therefore the costs budget and disclosure report<sup>56</sup> had to be filed in advance (once the CMC was listed). The lawyer advised that rather than pressing the Court to list the CMC, the Defendant should be contacted without prejudice to investigate whether they were willing to consider mediation. If so, this would avoid, at least in the interim, the need to complete the costs budget and disclosure report. Ultimately the dispute was settled out of court, after several other dispute resolution procedures employed - the cost budget and disclosure report were avoided.

In addition to complying with the CPR, when advising on the advantages/disadvantages of litigation, lawyers are required to consider with their clients and comply with the Pre-Action Protocol for Construction and Engineering Disputes (PAP) prior to filing a claim. The aim of the PAP is to ensure that before court proceedings commence, the Claimant and the Defendant have provided sufficient information for each party to know the nature of each other's case, have had an opportunity to consider the other's case and are in a position where they may be able to settle the case early without recourse to litigation, failing which the proceedings will be conducted efficiently owing to this pre-action investigation by the parties (Pre-Action Protocol, paragraph 2). The PAP requires the service of detailed correspondence between the intended parties (the "Letter of Claim" and the "Defendant's Response"<sup>57</sup>) and a pre-action meeting, non-attendance of which can be disclosed to the court. If either party fails to comply, the court may make appropriate orders as to costs and the recovery of interest. In addition the court may also stay proceedings where a party has not complied with the PAP.

The use and outcome of the PAP appears to vary greatly between disputes. During the course of the fieldwork, both in the detailed investigations into the 50 matters and/or in observations and conversations with the lawyers, in some cases the PAP was strictly adhered to<sup>58</sup>, and in other cases, the lawyer would advise that the PAP

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<sup>55</sup> See Chapter 4.2 for a detailed narrative of **Matter No 47** [*Final Two Invoices*].

<sup>56</sup> CPR r31.5(3): Not less than 14 days before the first CMC each party must file and serve a report (Disclosure Report) which describes what documents exist or may exist, where the documents are located/stored and what the broad range of costs could be if standard disclosure were to be ordered. In cases where the Electronic Documents Questionnaire has been exchanged, this should also be filed with the Disclosure Report (CPR r31.5(4)).

<sup>57</sup> To be served within 28 days of the Letter of Claim, unless agreed otherwise (Pre-Action Protocol, paragraph 4.3).

<sup>58</sup> Matter No 25.

was not applicable owing to the history of the parties and negotiations which had already taken place<sup>59</sup>. Regarding the pre-action meeting, in some cases the meeting did take place<sup>60</sup>, and in other cases it did not<sup>61</sup>. In some cases the PAP resulted in settlement<sup>62</sup>, and in some cases it did not<sup>63</sup>. Furthermore, the use of the PAP (or lack thereof) may also create additional disputes regarding procedure, add further complexities to the process or transform the shape of the existing dispute<sup>64</sup> (see Chapter 3.5 below for a further discussion in this regard).

### **Arbitration**

Arbitration, in a construction context, refers to the resolution of a dispute, on a final basis, pursuant to a consensual mechanism under which the dispute is adjudicated upon by a private tribunal in a similar manner to how a court adjudicates on matters before it (Bailey, 2011: 1620).

Arbitration in England and Wales is governed by the Arbitration Act 1996. It is a voluntary procedure, provided as an alternative to litigation, and generally is enforceable through the courts. For the legislation to apply, a written arbitration agreement is required, or the written contract between the parties must contain an arbitration clause<sup>65</sup>. Many standard form construction contracts and appointments contain arbitration clauses and parties must actively select arbitration as their choice of dispute resolution<sup>66</sup>. The parties may choose to incorporate a standard arbitration procedure (eg the Construction Industry Model Arbitration Rules, ICC Rules of Arbitration, etc.).

On the international scene, it is clear that there is a preference towards arbitration as a mean by which to resolve construction disputes. In a recent 2013 international arbitration survey of corporate entities (PwC, 2013), it was found that 84% “agreed” or “strongly agreed” that arbitration is well suited to the construction industry. Furthermore, arbitration ranked first (over mediation, litigation and adjudication/expert determination) in terms of the most popular dispute resolution method: 68% choose arbitration as their most preferred method.

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<sup>59</sup> Matter No 6.

<sup>60</sup> Matter No 25.

<sup>61</sup> Matter No 7.

<sup>62</sup> Matter No 25.

<sup>63</sup> Matter Nos 6 and 7. In some cases, the settlement occurred after proceedings commenced.

<sup>64</sup> Matters Nos 6 & 7

<sup>65</sup> Arbitration Act 1996, section 5.

<sup>66</sup> JCT Standard Building Contract 2011, Contract Particulars, Article 8; NEC3, Contract Data; RIBA Standard Agreement 2010, 2012 Revision, Project Data.

The main reasons for the popularity of construction arbitration on an international level are: neutrality, confidentiality, enforcement and competence/experience of the tribunal (Bell, 2012; Bell, 2006). In terms of supporting international arbitration, the English courts are renowned for their supervisory approach in enforcing international arbitration agreements and awards, which involves intervention only on rare occasions (Bailey, 2011: 1625)<sup>67</sup>. The recent case of *Honeywell International Middle East Ltd v Meydan Group LLC* (2014) is one such example. The TCC refused the Meydan's application to set aside the Order by which Honeywell was given leave to enforce the Award.

Domestically, arbitration in England and Wales traditionally was preferred over litigation in the local courts as it is a private and confidential<sup>68</sup> means of obtaining a binding decision to a construction dispute. Nevertheless, many see arbitration as a formal, traditional process which often takes longer than litigation in the TCC and is often more expensive. Accordingly, though it is an alternative to litigation, arbitration tends not to be categorised as an ADR procedure for construction disputes (Gould and Goldsmith, 2013:344). With the rise of adjudication and mediation (see further below) domestic arbitration is arguably no longer as widely used as it once was in the construction industry (Bell, 2006).

Of the 50 matters observed during the research, seven of them employed arbitration to resolve the dispute. Four of these were international arbitrations and three were domestic.

### **Adjudication**

Construction industry adjudication ("statutory adjudication" or "adjudication") was introduced in England, Wales and Scotland in May 1998 under Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Since its introduction, adjudication is now well-established within the construction industry (Gould, King and Britton, 2010:2) and is a "common occurrence" (Gould and Goldsmith, 2013:348). Its wide use is demonstrated by the number of appointments made by the adjudicator nominating bodies (ANB) and the regular surveys produced by the Adjudication Reporting Centre based at Glasgow Caledonian University (Gould and Goldsmith, 2014:348).

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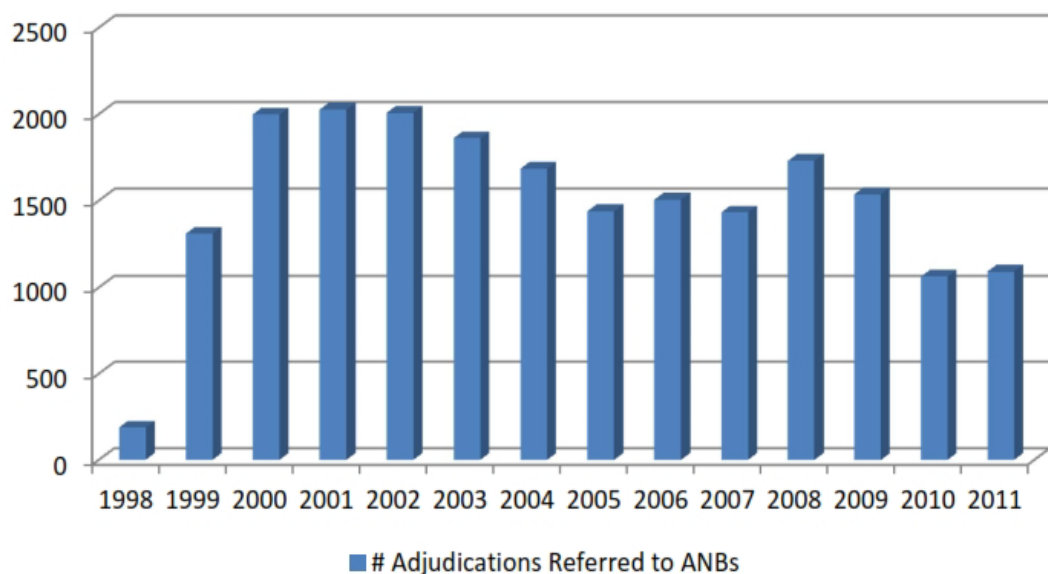
<sup>67</sup> "New York Convention awards" of course benefit from s100-104 of the Arbitration Act 1996. An award made in a state which is party to the New York Convention is treated as having been made at the seat of the arbitration and will be enforced pursuant to the Arbitration Act so as to become a judgment of the court, with exception only in limited cases.

<sup>68</sup> Though query whether arbitration is in fact confidential (Smellie, 2013).

From May 2011 to April 2012, the ANBs reported 1093 referrals to adjudication – a 3% increase from the previous year. These figures do not include adjudications conducted by agreement of the parties or those adjudications where the adjudicator was named in the contract. Accordingly, the number of adjudications carried out each year well exceeds the number of cases referred to the TCC (see above). Having said that, the reported figures illustrate an overall decline in adjudications since 2002. Trushell, Milligan and Cattnach, 2012, consider that this pattern, at least between 2008-2011, may be as a result of the economic recession causing constraints on resources to deal with disputes and, in addition, a willingness to settle rather than to refer disputes to adjudication (Trushell et al, 2012:3; Kennedy et al, 2011). Kennedy et al (2011) also suggest that parties may be accessing adjudicators directly by agreement between the parties rather than through ANBs – which in turn would show a downturn in referrals through ANBs.

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
# Adjudications Referred to ANBs	187	1309	1999	2027	2008	1861	1605	1439	1506	1432	1730	1538	1064	1093

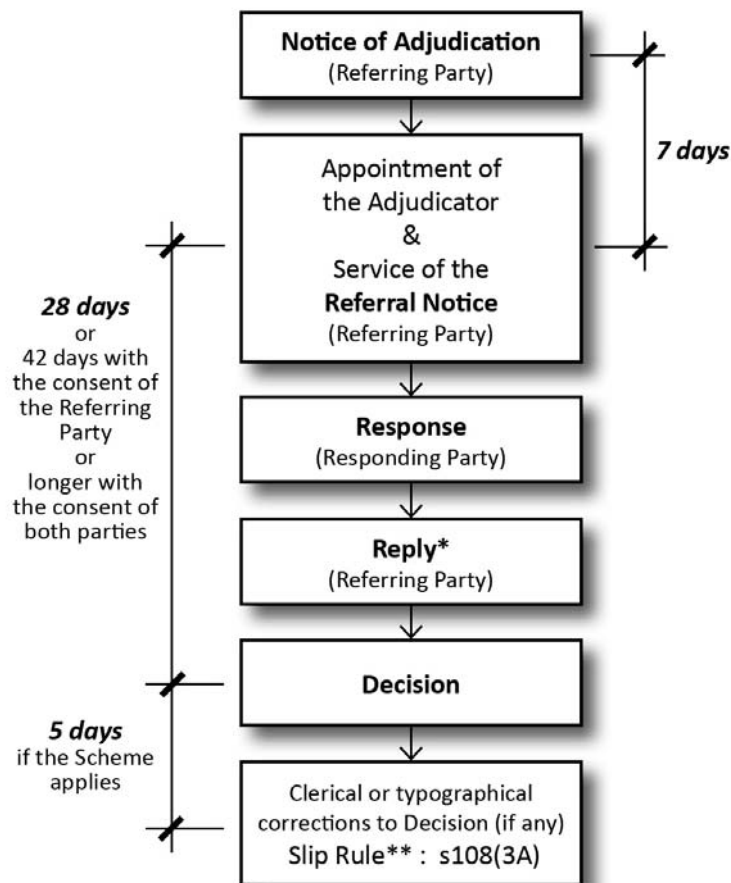
(\*Figures extracted from Trushell, Milligan and Cattnach, 2012:2)



**Figure 5**  
**Number of Adjudications Referred to ANBs**

Adjudication is a 28-day process (which can be extended by agreement of the parties<sup>69</sup>) whereby an independent third person (an adjudicator) issues a decision which is binding, unless or until it is revised either through arbitration or litigation. In other words, the decision is interim binding. Under the HGCRA, with limited exceptions, the parties have an implied right to statutory adjudication provided the contract falls within the definition of 'construction contract' under section 104 of the HGCRA. The parties have the right to refer a dispute '*at any time*' (Section 108(2)(a)) - ie regardless of whether the project has been completed or other proceedings, such as litigation, are underway.

The procedure for adjudication under s108(2) of the HGCRA, as amended, is:



\* The Referring Party does not have an automatic right to serve a Reply. A direction is required from the Adjudicator. Similarly, if the Responding Party wishes to serve a Rejoinder (following the Reply), a direction is required.  
 \*\* See *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] BLR 314

**Figure 6**  
**Adjudication under the HGCRA 1996**

<sup>69</sup> HGCRA, as amended, s108(2)(c) & (d).

The aim of the HGCRA was to provide a speedy and cost effective means of resolving disputes. It put into effect the key recommendation made by Sir Michael Latham's report, *Constructing the Team* (Latham, 1994), that adjudication, supported by legislation, should be the normal form of dispute resolution. The process was designed to remedy the perceived problems of cash-flow on construction projects (ie, payment by the employer was not filtering down to the subcontractors). As Lord Howie described it in 2006:

*"The essence of an adjudication is that it should be quick ... as the Minister knows and as Clause 106 allows, that adjudication produces rough justice, but it is a rough justice which can be put right at a later stage."*<sup>70</sup>

"Rough justice" and "a quick fix" are common phrases associated with construction adjudication (*Sykes v Packham*, 2011). However, as the Adjudicator's decision is not binding, it is perceived that rough justice is therefore somehow acceptable. His decision is only interim binding *"until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement"* (Paragraph 108(3) of the HGCRA, as amended). Disputes therefore may hang in limbo unless or until determined by litigation or arbitration – or the parties agree otherwise.

Indeed, as Lord Lucas put it:

*Is this cheap and cheerful, or just quick and dirty?"*<sup>71</sup>

One notable requirement of the HGCRA (as amended) is that the parties to a construction contract have the right to refer any 'dispute' to adjudication (Section 108(1)). Accordingly, as case law has demonstrated, a dispute must be in existence before a party has a right to refer it to adjudication. In other words, a dispute must have crystallised between the parties before the legislation will apply. This requirement for 'crystallisation' and the definition of 'dispute' has been the subject of

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<sup>70</sup> Lord Howie, Hansard, 22 April 2006, column 985, proposing an alternative to the Scheme then being proposed.

<sup>71</sup> Lord Lucas, Hansard, 22 April 2006, column 996, responding to an alternative proposal to the Scheme as then formulated.

a number of cases before the TCC Judges<sup>72</sup>. See Chapter 4.1 for a further discussion of the definition of a 'dispute' in terms of adjudication.

Of the 50 matters observed during the research, 14 of them utilised adjudication in an attempt to resolve the dispute.

### **Negotiation & Mediation**

Negotiation is *"a very flexible process involving written and/or oral communication between parties and/or their lawyers with a view to reaching settlement"* (Blake et al, 2013: 124). Blake et al, 2013 assert that negotiation is the most commonly used form of ADR (Blake et al, 2013: 124). This appears to hold true for the construction industry as well. The participant-observation in this research reveals that nearly 100% of cases observed involved some sort of negotiation at some point during the trajectory of the dispute, either before and/or after the clients approached the Firm. Of the 50 detailed matters researched, only two did not employ negotiation at some point.

Firstly, in **Matter No 2 ['Chase Payment No 1']** the client was owed £15,000 – the invoice had been outstanding for over seven months and his attempts to obtain payment had not been successful. The client sought the advice/assistance of his lawyer who merely drafted one letter demanding payment of the full sum. Shortly thereafter the full amount of the invoice was paid – with no negotiations. Secondly, in **Matter No 15 ['Professional conduct complaint']** the client was called before his professional body's conduct committee as a result of a complaint by a member of the public. No negotiations took place. The client simply disputed the allegation, submitted evidence and was required to attend the hearing before the tribunal to give reasons for this conduct and/or defend the allegation made and prove the competency of his company.

Mediation is *"a flexible, cost-effective, confidential process which can be arranged relatively speedily, in which a neutral third party (the mediator) facilitates discussions and negotiations between the parties in dispute within a relatively structured but flexible process, in a formal setting, during a defined period of time, all of which helps to create an impetus for settlement"* (Blake et al, 2013). In other words: *"a form of neutrally assisted negotiation"* (Aird v Prime Meridian Ltd, 2006). It has gained wide

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<sup>72</sup> *Cantillon Ltd v Urvasco Ltd* (2008), *Bovis Lend Lease Ltd v The Trustees of the London Clinic* (2009); *Allied P&L Ltd v Paradigm Housing Group Ltd* (2009) and *Working Environments Ltd v Greencoat Construction Ltd* [2012].

acceptance in England and Wales as an appropriate and efficient means by which construction disputes can be resolved. A recent survey carried out by the TCC and King's College London ("The TCC Research") showed that 35% of all disputes referred to court are resolved by mediation. Of these mediations, 91% occurred as a result of the parties' own initiative, and not as a result of an indication by the court (Gould *et al*, 2010). No doubt the Civil Procedure Rules have played a part in encouraging this acceptance:

- (i) all parties to litigation have an obligation to consider whether some form of alternative dispute resolution (ADR) might enable them to settle the matter without court proceedings<sup>73</sup>; and
- (ii) the court may now consider cost penalties against a party who unreasonably refuses to mediate<sup>74</sup>.

Many of the standard form construction contracts include a reference to negotiation and/or mediation as part of their options for dispute resolution<sup>75</sup>. For example, Clause 9.1 of the JCT Standard Building Contract 2011 states:

*"...if a dispute or difference arises under this Contract which cannot be resolved by direct negotiations, each party shall give serious consideration to any request by the other to refer the matter to mediation."*

Mediation is not mandatory, either in the standard forms or by the Courts, though it is nevertheless strongly encouraged – particularly in the TCC. The recent revision of the TCC Guide states at paragraph 7.1.1 (HM Courts & Tribunals Service, 2014):

*"The court will provide encouragement to the parties to use alternative dispute resolution ("ADR") and will, whenever appropriate, facilitate the use of such a procedure... In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator..."*

The Courts will also enforce agreements to mediate where they are part of such a procedure/contract. In *Cable & Wireless Plc v IBM United Kingdom Limited* (2002)

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<sup>73</sup> CPR r1.1 and r1.4(2)(e).

<sup>74</sup> CPR r44.4(3)(ii).

<sup>75</sup> Examples include: JCT Standard Building Contract 2011, Clause 9.1; RIBA Standard Agreement 2010 (Rev 2012), Clause 9.1; Infrastructure Conditions of Contract, Design and Construct Version, August 2011, Clause 66A(2); etc.

the Court was asked to award a stay of proceedings while the parties undertook the ADR processes provided for within that Contract. The ADR provisions were held to have binding effect. The ADR clause was a sufficiently defined mutual obligation upon the parties to go through the process of initiating mediation, selecting a mediator and at least presenting the mediator with its case and documents. Since the clause described the means by which such an attempt should be made the engagement required not merely an attempt in good faith to achieve resolution of the dispute, but also the participation of the parties in the procedure specified. That procedure had sufficient certainty for a Court readily to ascertain whether it should have been complied with.

However, a note of caution has been sounded in the recent case of *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd* (2008). In this case the mediation agreement was characterised as nothing more than an “*agreement to agree*”. Unlike the mediation agreement in *Cable & Wireless*, it was held to be too uncertain to be enforced by the Court. The Judge went on to say that he would only stay a claim and counterclaim for mediation if he concluded that:

- “a) the party making the Claim and or Counterclaim was not entitled to summary Judgment on that Claim and/or Counterclaim, i.e. that there was an arguable defence on which the other party had a realistic prospect of success; and
- b) the best way of resolving that dispute was a reference to mediation.”

Again, this follows the general view of the Courts in England and Wales. For at least the past 15 years, the Courts have been active supporters of mediation: from Lord Woolf’s fundamental review of the civil justice system and his *Access to Justice* reports of 1995 and 1996 (Woolf, 1995 & 1996) to the most recent case law in 2013 concerning the meaning of “unreasonable refusal to mediate” (*PGF II SA v OMFS Company 1 Ltd*), the Courts have encouraged mediation and/or ADR at all stages of the litigation process<sup>76</sup>.

In the recent TCC case of *PGF II SA v OMFS Company 1 Ltd* (2013), the trial Judge accepted that OMFS’s silence in the face of two offers to mediate amounted to an unreasonable refusal, and agreed that it was appropriate to depart from the usual

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<sup>76</sup> For a full historic account of the judicial development of mediation law, see Genn *et al*, 2013: 141-146.

order that costs follow the event.<sup>77</sup> The Court of Appeal agreed with the first instance Court and held that not only was OMFS's silence tantamount to a refusal to mediate, but that, as a general rule, silence itself was unreasonable. This was the case regardless of whether there was a good reason to refuse ADR. The Court described this as only a "modest" extension of the *Hasley* principles<sup>78</sup>.

Furthermore, the UK government is also committed to promoting mediation. On 23 June 2011 the government signed a *Dispute Resolution Commitment*, replacing the Alternative Dispute Resolution Pledge 2001, which requires all government departments and agencies to use ADR forms such as mediation, arbitration and conciliation, where possible, prior to commencing litigation (Ministry of Justice, 2011b).

With regard to mediators in the construction industry, the vast majority tend to be legally qualified in construction disputes. The TCC Research showed that only 16% of the mediators were construction professionals. There is no requirement that mediators undertake some form of training prior to appointment; however, it is common practice for mediators to obtain accreditation by one of the commercial mediation training schemes.

Appointing bodies such as the Centre for Effective Dispute Resolution are sometimes utilised to appoint mediators; however, the TCC Research suggests that the construction mediation market is quite sophisticated and parties more often appoint a mediator by agreement, choosing ones they have worked with previously.

In summary, the TCC Research demonstrates that mediation is well-established in the construction industry and those advising parties appear to consider mediation as a sound means by which to resolve a dispute. Lawyers in the Firm had no hesitation in proposing mediation to their client if the situation warranted it. In this study, six of the 50 disputes witnessed employed mediation. Of these six, five were settled during the mediation or shortly thereafter (with further correspondence and negotiation).

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<sup>77</sup> The issue before the Court was whether the Claimant should have its costs in respect of the 21 days after the date on which its Part 36 offer was made. In practical terms, the decision meant that OMFS was not entitled to its costs for this period.

<sup>78</sup> *Halsey v Milton Keynes General NHS Trust* [2004].

### **Other forms of dispute resolution**

Litigation, arbitration, adjudication and mediation/negotiation are perhaps the most commonly used methods for dealing with disputes; however, other forms do exist and are used, depending on the nature of the project and type of dispute.

#### ***Expert determination***

One such example is expert determination: generally used where a quick, binding process is needed for settling a technical dispute. A third party, 'the expert', is selected because of his or her particular expertise in relation to the issues between the parties. It is a creature of contract and an essential feature of expert determination is that the decision by the expert should be final and binding. According to Kendall et al (2008:1 & 6):

*"Expert determination is a means by which the parties to a contract jointly instruct a third party to decide an issue between them. The third party is now commonly known as an expert, and is a person who has usually been chosen for expertise in the issue between the parties..."*

...

*"There is nothing very new about expert determination. It has been a feature of English commercial and legal practice for at least 250 years. The first reported case is found in 1754: Belchier v Reynolds..."*

The origins of expert determination arose out of the need to deal with circumstances where parties required machinery for determining a price without negotiations, often where the obligation to pay is in the future – as is the case with options, the right to buy property at a future date (Kendall et al, 2008:6). Expert determination is commonly used for rent reviews (Fenwick Elliott, 2012; Kendall et al, 2008). As the technique lends itself to valuation and complex technical issues, it has also been used in a wide variety of other circumstances: valuing shares in private companies, certifying profits or losses of a company during sale and purchase, valuing pension rights on transfer and determining market values in long term agreements (*Arenson v Arenson* (1977), *Nikko Hotels (UK) Ltd v MEPC plc* (1991), *Jones v Sherwood Computer Services Plc* (1992), *Mercury Communications Ltd v Director General of Telecommunications and Anr* (1996)).

Traditionally expert determination has been equated with arbitration: a private method which leads to a binding result. However, as Kendal et al (2008:2) discuss, experts are a distinct species of dispute resolver whose activities are subject to little or no control by the court. There is no opportunity for appeal from their decisions, though they may be liable for negligence in performing their functions. Arbitrators, by contrast, are subject to control by the court, some of their decisions may be appealable (in theory) and they are immune to claims of negligence. Furthermore, while litigation and arbitration require the “due process” rule of natural justice – the requirement that each party must be given a fair opportunity to be heard – expert determination does not (unless otherwise agreed between the parties).

With regard to the construction industry, expert determination currently is and has been used historically, particularly for the construction of process plants as the standard form contract published by the Institution of Chemical Engineers (IChemE) refers a number of disputes to an expert: disputes concerning nominations of subcontractors, specified variations, documentation, certificates, performance tests, specified defects and suspension.<sup>79</sup> Parties may also refer other disputes to the expert under this standard form; however, any dispute which is referred to the expert is no longer referable to arbitration.

Though expert determination is used in the construction industry, it was neither employed nor discussed by any of the lawyers in the Firm during the course of this research as a possibility for any of their disputes. This perhaps was because no disputes concerning process plants were available for observation in this research and/or because expert determination is simply not that common in main stream construction disputes outside process plant disputes.

### ***Dispute Boards***

“Dispute Boards” is a general term used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the project’s duration – a ‘job-site’ dispute adjudication process (Chern, 2011:2). It may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project. Depending on the contract, the Dispute Board may provide informal assistance, recommendations about how disputes should be resolved and/or binding decisions.

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<sup>79</sup> Model form of Conditions of Contract for Process Plant, Lump Sum Contracts, 5<sup>th</sup> ed, 2013, Clause 48.1.

“Dispute Review Board” (DRB) and “Dispute Adjudication Board” (DAB) are relatively new terms (Gould and Goldsmith, 2013:351) and are, in essence, types of Dispute Boards. DRBs were originally developed in the US for domestic, major projects. It is understood that the first use of a DRB in the US was in 1975 for the Eisenhower Tunnel (Gould and Goldsmith, 2013:351). DRBs continue to be used primarily on US domestic projects, though their use has also spread internationally. The principle function of a DRB is to make a recommendation which the parties voluntarily either accept or reject. It is thought that this may assist with settlement procedures as the parties can accept or reject the Board’s recommendations.

Conversely, the purpose of a DAB is to issue written decisions that bind the parties and must be implemented during the project. The DAB has evolved out of the DRB and is utilised owing to the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards (Gould and Goldsmith, 2013:351). The World Bank and FIDIC are two organisations which have opted for a binding dispute resolution process (DAB) during the course of projects.<sup>80</sup>

Furthermore, the International Chamber of Commerce (ICC) developed Dispute Board Rules<sup>81</sup>, which is arguably a hybrid approach. Should a contract incorporate these rules, three alternatives are available to the parties: the establishment of a Dispute Review Board (DRB), a Dispute Adjudication Board (DAB) or a Combined Dispute Board (CDB). Parties specify whether the Dispute Board shall be a DRB, a DAB or a CDB at the time they enter into the contract (Article 3).<sup>82</sup> In addition, a Dispute Board can also be a flexible and informal advisory panel. Article 16 of the ICC Dispute Board Rules (Informal Assistance with Disagreements) allows any party

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<sup>80</sup> See clause 20.2-20.8 of the Conditions of Contract for Construction, “the Red Book”, 1<sup>st</sup> edition, 1999, the Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition), “the Harmonised Red Book”, June 2010 and the World Bank’s Standard Bidding Document, Procurement of Works & User’s Guide, March 2012, which incorporates the Harmonised Red Book.

<sup>81</sup> These Rules came into force on 1 September 2004.

<sup>82</sup> *Dispute Review Board (Article 4)*: The DRB issues a Recommendation, in line with the traditional approach of DRBs. The parties may comply with it, but are not required to do so. However, if neither party expresses dissatisfaction with the written recommendation within 30 days, then the parties agree to comply with the recommendation. The recommendation therefore becomes binding, if it has not been rejected by one of the parties. *Dispute Adjudication Board (Article 5)*: The DAB issues a Decision which is binding on the parties and is to be complied with “without delay”, in other words immediately, notwithstanding any expression of dissatisfaction by one of the parties. *Combined Dispute Board (Article 6)*: The CDB attempts to blend the DAB and DRB. The ICC rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests, and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

to invite the Dispute Board to informally assist with the resolving of any disagreement during the performance of the contract.<sup>83</sup>

In any event, Dispute Boards tend to be part of a multi-tiered dispute resolution system. If the Board issues a decision, it is interim-binding, in the same way that statutory construction adjudication is (see above). If either party is dissatisfied, they must comply with the decision, issue a notice of dissatisfaction and then proceed to arbitration.

The London Olympics 2012 was a high-profile construction project which opted for Dispute Boards and employed a multi-tiered dispute resolution system. The Olympic Delivery Authority set up an Independent Dispute Avoidance Panel (IDAP) of ten construction professionals under the Chairmanship of Dr Martin Barnes. Those disputes not resolved by the IDAP would then be referred to an Adjudication Panel, comprising eleven Adjudicators under the Chairmanship of Peter Chapman (Baker, 2009). To date, the Olympic Delivery Authority has not released any information or statistics regarding these panels. Other examples of projects which implemented the use of Dispute Boards include: Ertan Hydroelectric Dam (China), Hong Kong International Airport, Katse Dam (South Africa), the Docklands Light Railway (UK) and the Saltend Private Gas Turbine Power Plant (UK).

Of the 50 cases researched in this study, two of them involved dispute boards.

### ***Early Neutral Evaluation, Court Settlement Process, etc.***

New forms of ADR have been established and attempted over the past 10 years. By way of example, the TCC now offers the Court Settlement Process as well as Early Neutral Evaluation (HM Courts & Tribunals Service, 2014). Both of these procedures utilise a specialist TCC Judge.

Early Neutral Evaluation allows the parties, in appropriate cases and only if agreed, to refer the case or a particular issue in the case to the Judge (or any other qualified person whose opinion is likely to be respected by the parties). The Judge's evaluation of the case is not binding on the parties and if the evaluation does not result in settlement, an alternative TCC Judge will be assigned to the case, unless otherwise agreed (HM Courts & Tribunals Service, 2014). The Court Settlement

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<sup>83</sup> The assistance may be in the form of a conversation on site between the parties and the Dispute Board and/or a written note based on documents and/or a site visit. Again, if the parties are not satisfied they may either request a formal written Recommendation or progress the procedure for a formal written Decision.

Process (HM Courts & Tribunals Service, 2014:7.6) is essentially a form of mediation carried out by a TCC Judge. Again, the Judge who conducts the Settlement Process will take no further part in the proceedings if the mediation is not successful.

In addition to all of the dispute resolution procedures discussed above, numerous further procedures, rules and variations on the mediation/conciliation/ADR are available. This research does not attempt to identify nor quantify those available; nevertheless, by way of example, these include: ICE Mediation/Conciliation Procedure (2012)<sup>84</sup>, CEDR Model Project Mediation Protocol and Agreement (2006)<sup>85</sup> and the Chartered Institute of Arbitrators' 100 Day Arbitration Procedure<sup>86</sup>.

None of the cases observed/researched in this thesis utilised the TCC's Early Neutral Evaluation or Court Settlement Process, Project Mediation or a particular mediation procedure established by an industry body (eg CEDR, ICE, etc). On one occasion I did observe a lawyer discussing the possibility of the Court Settlement Process with their client; however, it did not appear to be a serious consideration for settlement of the dispute as no further conversations or steps were taken to propose it to the other side or investigate it as an option. The Court Settlement Process does appear to be utilised by some, the case of *McLennan Architects v Jones and Roberts* (2014) being a recent example. However, it is not something which the Firm appears to regularly recommend and/or is regularly involved with.

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<sup>84</sup> Available for download at: <http://www.ice.org.uk/Information-resources/Document-Library/ICE-Mediation-Conciliation-Procedure>.

<sup>85</sup> Available for download at: [http://www.cedr.com/about\\_us/modeldocs/?id=22](http://www.cedr.com/about_us/modeldocs/?id=22).

<sup>86</sup> Available for download at: <http://www.londonarbitrators.org/sites/default/files/100DayProcedure.pdf>.

### **A complex network**

Collins (1999:28) considers that when two individuals enter into a contract, *“they create a discrete communication system”*, though *“...one which is never entirely closed...”* and the legal system *“is charged with the task of evaluating and regulating contractual behaviour in the light of this complex normative matrix”*. In summary, the purpose of the description of the construction industry, its projects, its participants, its contracts and its dispute resolution procedures in this chapter was to provide a contextual account and overview of the environment within which construction lawyers and these disputes exist and operate; in other words, the *complex normative matrix* of the construction industry. As seen above, the complexity of the formal law, the contractual and procedural mechanisms for dealing with disputes and the framework of the construction participants themselves makes for an intricate platform within which these projects are constructed and the subsequent disputes are fought. On one view, as we will see next in Chapter 2, these relations form a complex network, each of the entities dependent on the other to take the shape they do: the projects are built in accordance with the documentation prepared by the parties (or not as may be case), the disputes are argued within the context of the contract mechanisms agreed (or not as may be the case), the contract mechanisms are formulated within the context of the formal legal rules/legislation (or not as may be the case). When viewing the industry in this light, a contract, cannot be perceived in isolation – and nor, as I will argue, can a dispute.

### 1.3 Chapter Overview

This research explores the nature of construction disputes by *tracing their associations* in the context of the law firm and the construction industry. To do so, the thesis is constructed by providing an ethnographic description of the disputes, the lawyers and other interfacing elements. Narratives are provided throughout to present the data and illustrate the findings. As with Latour (2010 [2002]:x), this thesis is not a presentation of construction law within the English legal system or an analysis of the UK construction industry: it is a zoom-free ethnographic account in an attempt to be a good ANT's view of disputes. Context is provided by way of background to site the data collected and narratives provided.

Following this introduction, Chapter 2 reviews the literature in respect of the contractual/non-contractual and commercial context of transactions and the relevant literature concerning disputes, dispute transformations and lawyers/lawyering.

Chapter 3 then outlines the methods employed in this research to study these disputes and the agency of the construction lawyer. It explains the strategy, approach, ethical issues and obstacles encountered.

Chapter 4 investigates construction disputes. I consider those entities which shape or transform construction disputes: the associations. During the course of the fieldwork carried out at the law firm, it was clear that the following were significant in terms of influencing the identity of the disputes and their outcome: documentation and evidence, lawyering<sup>87</sup>, costs, the client's conduct and objectives and the substantive law. Illustrations from the data collected are incorporated and discussed.

Chapter 5 utilises and traces the associations discussed in Chapter 4 to explore the identification of the dispute and how lawyers define it. Felstiner, et al. (1980-81) assert that a dispute is not a dispute until a claim has been rejected and that lawyers play a role in the dispute transformation: recommending whether a claim should be made, setting the strategy as to negotiations/settlement, providing only minimal assistance (at times) thereby arresting further development of a dispute, etc. (Felstiner, et al., 1980-81:645-647). This research recognises and confirms lawyers' influence on construction disputes and goes on to find that, once engaged, one of

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<sup>87</sup> This generic term is used to cover the broad range of issues which concern the lawyers' conduct and their relationship and dealings with their clients.

their principle objectives/roles is to identify or *name* (or rename) the dispute. As such, a reverse trajectory of Claiming, Blaming, Naming... is seen. The chapter concludes with the notion of lawyering utilising the “Reverse Trajectory” – or in other words, the notion of “designing disputes”. Naming the dispute in the best possible light for their client in order to achieve the desired outcome is akin to the creative process of design. The transformation of a dispute is not linear, but rather, iterative and spatial as it requires alliances, constraints and dependencies to take the shape it does.

Chapter 6 reviews the data gathered from the fieldwork and presents an analysis of the outcomes of construction disputes. This examination reveals a new perspective on the nature and behaviour of construction disputes and questions whether the *resolution* of disputes in the construction industry is in fact possible.

Finally, Chapter 7 provides a summary of the findings and conclusions.

## CHAPTER 2

### THE LITERATURE: DISPUTES & LAWYERS

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*As it transpires during the course of their first meeting, this was not the first time Columns & Beams Ltd had approached a lawyer in respect of their dispute with Structures Ltd. There was a potted history and complex background to the dispute, which was well under way and which set the scene. This provided the initial framework within which the lawyer, Mr Hunter, had to work.*

*Approximately six months ago, Mr Cahill approached a general commercial lawyer who had advised that litigation was the best way forward. On this advice, Columns & Beams Ltd commenced proceedings. For the first three months, the lawyer conducted the proceedings – he drafted the claim and corresponded with Structures Ltd’s lawyer. For the last three months, Mr Cahill conducted the proceedings as a litigant-in-person, with informal advice from friends and various others as his lawyer was no longer able to act for him. Rather than engage a new lawyer, Mr Cahill had decided to carry on without the use of a lawyer in order to minimise costs.*

*However, the proceedings then reached a point where Mr Cahill considered legal advice necessary. A friend of his suggested that he contact Mr. Hunter.*

**The Client:** As I said, I need this over and done with as quickly as possible and I understand there is something called “summary judgment”. I hear this may be a good idea in order to end this quickly.

**The Lawyer:** Well yes, a summary judgment in your favour certainly would end the proceedings sooner rather than later; however, based on what I have heard so far, your chances of success in a dispute such as this are limited. Let me consider this further and I will get back to you next week.

**The Client:** Thank you. Let’s go for it if it will put an end to this quickly – whatever it takes.

**The Lawyer:** Well, I suppose the biggest risk is that if you lose, you would have to pay both your costs of the application as well as their costs – so say approximately £40k.

**The Client:** What?! No, never. I can’t afford that.

**The Lawyer:** Ok, I see. Well, have you ever considered adjudication? It is unfortunate that this is in court already as this possibly could have been wrapped up in a quick adjudication.

**The Client:** No, what’s that?

**The Lawyer:** A quick 28-day dispute resolution process. If you lose, you would only be liable for my costs and the adjudicator’s costs – which perhaps could be more in the order of £25k.

**The Client:** As I said, I just cannot risk that sort of money.

**The Lawyer:** Ok fine. Let me consider all of this, review the strength of your case, and I will get back to you with the various options and their associated costs. We can then discuss how you want to take this forward.

**The Client:** Ok great, thank you.

*This framework, the Client's previous procedural and emotional history with the dispute and the Client's approach to costs along with the personal, commercial and contractual background to the project and the dispute, provided a starting point and perspective for the Lawyer and set certain initial boundaries and constraints for his advice and the way forward.*

## **2.1 The contextual and theoretical framework**

As seen from the background provided in Chapter 1, the construction industry endures a plethora of disputes which concern a wide variety of commercial and contractual issues arising out of contracts (or not as the case may be). As this research concerns the socio-legal aspects of these contractual disputes, with the recognition that the classic legal doctrine of contract and construction law cannot merely be placed to one side whilst doing so, it is important to begin briefly with the socio-legal literature which considers the 'lived world of contract' (Mulcahy, 2008:5; Mulcahy 2013/2016) and the commercial context in which these transactions occur (and ultimately their disputes). Reflecting on construction contracts and transactions in this light provides a basis and perspective for the disputes in this research, as well as an insight into the disputes which construction clients present to their lawyer at the outset of the engagement.

As such, with regard to the theoretical framework, context of this research and structure of this chapter, the following first reviews the literature in respect of the contractual/non-contractual and commercial context of business transactions generally, thereby giving perspective to the construction contracts and the disputes which follow. This chapter then reviews the literature in respect of 'disputes': the existing and commonly used definitions in both a legal and socio-legal context, the transformations of disputes and an overview of the perspective or theoretical framework from which this research approaches these disputes, this being Actor-Network Theory (ANT). Finally, this chapter concludes with a review of the literature in respect of 'lawyers': the sociology of the profession, followed by the literature on use/non-use of lawyers, thereby shedding light on the parties in these dispute.

### **The (non)contractual and commercial context**

How does the business community at large use contracts? Do they carefully plan contracts in advance of the transaction? Once agreed, if adjustments are necessary, are they formally amended? Is the contract referred to when one party feels aggrieved? Does the construction industry conform to these general findings of the wider business community? The following briefly discusses these questions in the context of the relevant literature and then the construction disputes investigated in this research: the use and non-use of contracts and contract law and the need for flexibility in contracts.

Before doing so, I note that the examples given below in respect of construction contracts are included to provide a flavour of the transactions out of which the disputes in this research arose. In addition, the discussion below is included to begin to reflect on the construction industry and to what extent it is aligned with the general business community's approach to contracting. One certainly cannot draw conclusions here on the construction contracts and construction industry's approach to contracting as the emphasis in this research is on the disputes from the point at which the lawyer becomes involved. Nevertheless, this discussion provides a useful background and context to these disputes. Future research specifically investigating today's modern construction industry's consciousness and use and non-use of contract law would be welcomed.

### ***The use/non-use of contracts and contract law***

The starting point of course for literature in this arena is Stewart Macaulay's seminal text *Non-contractual Relations in Business* (Macaulay, 1963)<sup>88</sup>. In his exploration into how businesses in the manufacturing industry use contracts, he found in essence that though legal sanctions are not an everyday affair, they are not unknown in business (Macaulay, 1963:62):

*"... there is little evidence that ... today's businessmen would use the courts to settle disputes ... while detailed planning and legal sanctions play a significant role in some exchanges between businesses, in many business exchanges their role is small."*

I put forward the above finding first so as not to advance any misunderstandings in Macaulay's work, namely: businesses do not use contracts at all, the law of contract is dead and/or it is acceptable to criticise and disregard the actual law (Campbell, 2013:159-162). Rather, Macaulay is of the view that the parties' contract has been drafted on a classical understanding of contract law which does not fit with the way the parties wish to conduct their relationship and in turn, as the contract therefore may well be irrelevant or harmful to the relationship, the parties simply respond with its "non-use" and "non-contractual relations". In other words, the parties do not follow the document which they agreed to at the outset, but nevertheless it is useful in that it did establish the relationship, the economic exchange and hopefully the co-operative attitudes towards the contract.

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<sup>88</sup> See also Macaulay, 1963a.

In terms of the detailed planning and contract negotiations Macaulay found that businesses were not overly concerned about planning their transactions in advance (Macaulay, 1963:58):

*"While businessmen can and often do carefully and completely plan, it is clearly that not all transactions are neatly rationalized... Businessmen often prefer to rely on "a man's word" in a brief letter, a handshake, or "common honesty and decency" even when the transaction involves exposure to serious risks."*

In discussing why non-contractual practices are so common, Macaulay found that in most situations a contract was not needed: its functions are served by other devices and most problems are avoided without legal sanctions as the parties recognise there is room for honest misunderstandings or good faith differences of opinion about the nature and quality of the seller's performance. In addition, customs of the industry (in this case manufacturing) can fill gaps in the agreements of the parties as those who read and write specification are experienced professionals and, at the end of the day, most products are or can be tested to see if it is in accordance with the order (Macaulay, 1963:62-63). Macaulay did distinguish between 'important transactions' and 'routine transactions' noting that important transactions not in the ordinary course of business are dealt with using a detailed contract where as routine transactions are dealt with by 'standardized planning', this generally being an exchange of standard terms and conditions (Macaulay, 1963:57). In conclusion, he found that while many business exchanges will involve a high degree of planning, equally many *"reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and effect of defective performances"* (Macaulay, 1963:60). Accordingly, as Campbell (2013:165) notes, it is not the literal non-use of contracts, but rather *"a complex interplay between the use of legal and non-legal sanctions"* which Macaulay explains by reference to *"the functions and dysfunctions of using contract to solve exchange problems"* (Macaulay, 1963:56).

Approximately 10 years after Macaulay's seminal text, Beale and Dugdale's also considered the extent to which businessmen consciously use contract law, this time in the UK context and specifically in respect of engineering manufacturers. Their findings generally supported Macaulay's study. In addition, they found that professionals in this industry considered it expensive to plan in detail in advance of the transaction, that a carefully negotiated contract might be insufficiently flexible to meet even foreseeable events and too much negotiation might sour a peaceful

relationship (Beale and Dugdale, 1975:47). Furthermore, the businesses in Beale and Dugdale's study traded regularly with each other and the perception was that each knew what the other would accept. Firms stated that they would take more care in planning their contracts with those who they were not familiar – particularly those outside of the engineering trade. Beale and Dugdale found that only rarely were contracts formed as a result of detailed negotiation. When they were, it was generally for engines or machinery worth more than £50,000, this being a sufficient sum to justify the time and trouble (Beale and Dugdale, 1975:47).

Nearly 10 years after Beale and Dugdale's study, Richard Lewis investigated the tendering practices specifically in the building industry and the commercial relationship between general contractors and their sub-contractors when bidding for a project (Lewis, 1982). Lewis found that, in respect of the relationship between these two parties, informal remedies such as re-negotiation between the parties, cost cutting by sub-contractors or the use of economic "muscle" by general contractors were more important methods of regulating the relationship, rather than recourse to the contract or more formal legal remedies available (Lewis, 1982:169). Though this is but one relationship within the construction industry it is certainly an exemplary relationship and notably supports the previous studies of the manufacturing industry.

More recently, Hugh Collins has expressed his dissatisfaction with Macaulay's and other's empirical studies on the non-use of contracts (Collins, 1999:136-140). Collins considers that these studies fail to appreciate the presence of all three normative frameworks in all contractual contexts, these being: the business relation framework, the economic deal framework and the contractual framework (Collins, 1999: 137).<sup>89</sup> The competing presence of these three frameworks is constantly at play, though one discourse will take priority over another for good business sense. This does not mean that the other frameworks fall away, but rather, they may be temporarily "occluded" and will be "resuscitated" at a later point in the business relationship. Collins interprets the non-use of contracts as the contractual framework being used whenever it is, or is not, rational to do so: *"non-use of contracts is not fuelled by an irrational hatred of lawyers, nor a blinkered incompetence in business planning, but guided by good business sense"* (Collins,

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<sup>89</sup> Collins also suggests that these original studies need to be viewed in the context of American industry in the 1950s and 1960s. He asserts that now that the post-war boom is over, it is probable that behaviour towards contracts has altered under the pressures of global competition (Collins, 1999:138).

1999:140). Accordingly, a business's conduct or behaviour is governed to some extent by all three frameworks simultaneously, with one dominating over the others in order to achieve a particular outcome. By way of example, where a business deems it sensible to overlook breaches of contract in favour of maintaining a long-term business relationship,<sup>90</sup> the contractual framework has been curbed for the moment, though may well be invoked at later point in time if the long-term relationship is about to terminate.

Indeed David Campbell's recent work goes further to assert that the terms "non-use" and "non-contractual relation" should no longer be used as they *"poorly capture the relationship of economic exchange and legal contract that Macaulay has done so much to reveal to us"* (Campbell, 2013:161). Campbell notes that Macaulay did not and does not want to be responsible for the death of contract (Campbell, 2013:160,185) but importantly has shown us the *"irrelevance of traditional contract theory"* (Gilmore, 1995). In Campbell's view, it is not the law of contract that is at fault, but rather *"the contracts entered into on the basis of the classical law of contract. Complex contracts do not have to take the classical form which leads to their non-use..."* (Campbell, 2013:177)

A stark example of this non-use of contracts and non-contractual relations is seen in Sally Wheeler's study of *Romalpa* clauses<sup>91</sup> (Wheeler, 1991). Here Wheeler found that although 92% of the sellers reviewed the *Romalpa* clauses in their standard form contract, they had little understanding of what this actually meant or how to enforce these clauses. Rather than use the contractual provisions to pursue a breach of contract, claims simply were not advanced or negotiations were attempted.

In terms of the construction industry, many of the contracts involved do fall into the category of "the complex" or "the relational" contract (see further below). Indeed they are to be distinguished from the contracts involved in the Macaulay and Beale and Dugdale studies. This certainly is not to say that the contracts investigated there were not complex or relational, but rather, contracts in the construction industry comprise a whole host of issues which often go beyond sale and purchase agreements. Beale and Dugdale's study was in respect of sale and purchase

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<sup>90</sup> Collins (Collins, 1999:134) refers to an example in Macaulay's study where a regular business customer cancelled an order and the sales representative took no action (Macaulay, 1963) and in Beale and Dugdale's study where a defect in a product is repaired without charge or prices are reduced in future transactions (Beale and Dugdale, 1975:45 and 59).

<sup>91</sup> The term *Romalpa* clause, generated from the case of *Aluminium Industrie Vassen BV v Romalpa Aluminium* (1976), is a clause which seeks to protect the seller in the event of the buyer's insolvency.

agreements between engineering manufacturers; for example, contracts involving the sale and purchase of small tools, machines and engines. Macaulay also was concerned with exchanges primarily between manufacturers, though not all specifically engineering and not necessarily all sale and purchase agreements. Sale and purchase agreements of course are part and parcel of the construction industry; for example, the contractor or subcontractor's hire or purchase of equipment or tools for use when carrying out their services. However, these agreements are but one element of the industry. The upstream contracts, from which these hire/purchase contracts ultimately flow, are contracts between the employer and the contractor(s) as well as those contracts which employ the design professionals are contracts for services - these being design and/or construction services which could potentially last for a number of years<sup>92</sup>. Here, the 'product' (eg, the office building, the wind farm, the highway) generally is not something which is designed for replication and generally is a bespoke product. Furthermore, it could be case that: (1) the employer may not necessarily have specified the product in any detail (or even have a developed concept design for that matter) when the contract is entered into; (2) the site conditions, environmental conditions and/or innovative technology/materials are unknown or unfamiliar; and (3) the cost of the product has not or cannot be determined. The contracts used tend to be either industry standard form contracts or bespoke contracts (often derived from those standard forms), some with complex payment terms such as target cost/maximum cost provisions and pain share/gain share mechanisms. A business's own standard terms and conditions are used as well, particularly for smaller projects between contractors and subcontracts.

I point out these distinguishing factors merely to emphasize the incredible complexity of certain contracts within the construction industry. This is not to say that Macaulay's and Beale and Dugdale's findings are not relevant because the subject nature of the contracts is different, but quite the contrary. It is clear that businesses in the construction industry are in line with businesses in the manufacturing industry at least to some degree: in certain situations contracts are highly used and pre-planned in fine detail, and in other situations no formal contract is used whatsoever. For example, some of the disputes in this study arose out of a 'gentleman's agreement' or projects where no contracts were put in place. Either way, recourse to the courts to settle disputes is seen as a last resort both in the manufacturing industry as well as the construction industry.

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<sup>92</sup> For example, one dispute investigated in this research concerned a project whose concept design, detailed design, procurement and construction services were carried out over the course of 15 years (albeit the original programme called for 10 years).

Macaulay did consider “non-use” in a construction context in his review of the construction of the Johnson Administration Building<sup>93</sup>, designed by the world-renowned architect Frank Lloyd Wright in 1936 (Macaulay, 1996). Here, he investigated *“how people can perform complex commitments without formal planning and even implicit threats to use legal sanctions”* (Macaulay, 1996:77). Macaulay certainly depicts a vivid tale of Frank Lloyd Wright, Hibbard Johnson (the President and controlling shareholder of the Johnson Company) and John Ramsey (the General Manager of the Johnson Company) in their trials and tribulations concerning the design, construction, costs, innovative materials, defects, delay, personalities and behaviours. In summary, Wright advised Johnson at the outset of their relationship that the building would cost \$200,000. Three years later (this being two years longer than the Johnson Company expected) the reported costs were thought to be in the region of \$750,000 - \$900,000 (Macaulay, 1996:99). There appears not to have been a signed, formal, detailed agreement between Wright and Johnson – only correspondence to the effect that Wright would be paid 10% of the construction costs. Whilst the Johnson Administration Building certainly could not be labelled “your typical building project” as it involved creating a landmark, iconic building with materials and innovations not yet tried and tested and designed by celebrity architect, the problems this project encountered in the 1930s are nevertheless illustrative of the problems in today’s construction industry: variations, defects, delay and cost overruns. Macaulay offers explanations as to why the parties dealt with these problems the way they did and did not resort to contract law and litigation in the courts: a relational contract approach pointing to management of the relationship and a commitment to cooperate so that *“each gains appropriate, but not necessarily equal, returns”*, in other words, “mutuality” (Macaulay, 1996:111). Contributing factors, amongst a whole host of imbedded relations, included the parties’ friendship, the Johnson Company’s reputation and desire for a Wright-designed building and Wright’s need for flexibility.

In terms of today’s use of contracts and contract law in the construction industry, firstly I must note again that as the focus of this research concerns construction disputes from the point at which a lawyer is engaged, conclusive findings of course cannot be presented. One might even argue that owing to the fact that a party has approached a lawyer, this research can only suggest that contract law must therefore be alive and thriving in construction industry and to say otherwise is unfounded. If

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<sup>93</sup> For SC Johnson and Son Inc, headquartered in Racine, Wisconsin, who was one of the world’s largest consumer chemical products manufacturers in the 1960s-1980s (Macaulay, 1996: 78).

so, I would respectfully disagree. During the course of this ethnography, as well as drawing on my 18 years of experience in construction industry (both from a design as well as legal perspective), I witnessed numerous interviews and meetings where clients passionately and elaborately recounted the troubled history of their projects to their lawyers. Furthermore, mediations and without prejudice meetings and negotiations between disputing parties also provided insight into their past use or non-use of contracts and their views on the role of contracts. Whilst recognising that these are often one-sided accounts and/or accounts which are made in a disputing situation, one cannot simply turn a blind eye to reoccurring events in this respect.

With regard to the disputes in this ethnography, as indicated above, some disputes clearly arose in situations where no formal contract had been negotiated and/or put in place. Other disputes concerned projects where the parties did enter into a contract, but they simply signed the documents and then never used them again (ie, the contract mechanisms were never followed). Nevertheless, many of the disputes in this research did arise out of carefully planned and negotiated contracts and these contracts were drafted and amended by the businesses themselves. Alternatively an industry standard form was agreed, used and carefully followed. Indeed, in support of Beale and Dugdale's findings, many disputes also arose in situations where parties contracted for a project of particular significance and/or expense and used lawyers to carefully plan and negotiate the contract. In summary, the majority of the disputes witnessed during the course of the fieldwork did arise out of a formal, physical contract that existed between the parties and had been negotiated at least to some extent. It could be argued this research would only witness disputes arising out of contracts and parties which were minded towards the use of contract law as otherwise they would not be knocking on the lawyer's door. Perhaps; however, when considering the parties' conduct during the course of these projects and the clients' overwhelming general desire to avoid litigation, simply because a contract exists and was negotiated to some extent, does not necessarily equate to use of that contract. It does suggest that the parties see benefit in establishing some sort of contract at the outset of the relationship, though beyond that, use of the contract is then dependent on the behaviour of the parties, the context of the project and other economic and relational factors.

To what extent the specific contractual clauses and obligations/entitlements were invoked or enforced after contract formation, during the course of the project, varied widely. Some disputes observed certainly did arise out of the non-use of contractual mechanisms, most notably in relation to payment provisions. By way of example,

firstly, a number of disputes concerned the parties' failure to operate the payment notice regime required under the HGCRA 1996, as amended.<sup>94</sup> A number of disputes arose seemingly out of the fact that the employer failed to serve a Pay Less Notice before withholding money from the sum stated in the Payment Notice as being due to the contractor (as required by Section 110A and Section 111 of the HGCRA, as amended). Whether the employer/contract administrator was aware of the payment regime and simply chose not to comply with it, or alternatively was unaware of the detailed regime, is specific to each case. However, it is worth noting the number of instances in which disputes arose out of the non-use or improper use of this payment regime. This perception is supported by the number of recent cases which have been before the court on this very point within the past year.<sup>95</sup> A second area of non-use appears to concern, to some extent, the "compensation event" procedure under the NEC3 standard form contract. A compensation event is an event which changes the cost and/or time needed to complete the works and are events which are not the fault of the contractor. The NEC3 contract aims to highlight and assess these events as early as possible during the course of the project and therefore imposes strict notification provisions on the contractor. In accordance with clause 61.3, if the contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to his claim for a change in the price or the completion date of the works. Whilst some projects clearly operated the procedure religiously, others were rather "loose" and when the relationship broke down, only then did arguments over this clause ensue. The disputes witnessed in this respect concerned whether the procedure had been followed during the course of the project; specifically, did the contractor notify the event within the relevant timeframe and therefore was entitled to submit the (sometimes numerous) compensation events when it did and did the event fall within the specified list of compensation events (at clause 60.1 or as amended). Had the relationships not become strained, it is arguable whether a dispute over of the interpretation of this clause would have occurred and whether further "non-contractual" relations would

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<sup>94</sup> Generally, both standard form building and bespoke contracts do tend to expressly address and incorporate the HGCRA 1996 terms to this effect, otherwise, they are implied into the contract.

<sup>95</sup> *Harding v Paice*, Court of Appeal (2015); *Galliford Try Building Ltd v Estura Ltd* (2015); *Caledonian Modular Ltd v Mar City Developments Ltd* (2015); *Leeds City Council v Waco UK Ltd* (2015); *ISG Construction Ltd v Seevic Coolege* (2014).

have continued. Notably, very little case law specifically concerns the NEC3's compensation event procedure.<sup>96</sup>

Whilst there are certainly instances where the construction community fails to or chooses not to use the contractual machinery, it must be recognised that the contractual provisions of standard form and bespoke contracts are often followed. Many large and small contractors, developers and commercially minded design professionals do systematically comply with the contractual requirements of notices, claims and payment, these requirements being commonly included and expected in contracts throughout the industry. Clearly further research in this area would be welcomed to understand better the construction industry's knowledge and use of particular commonly included and/or implied contractual provisions.

Collins (1999: 139) suggests that once Macaulay's thesis about the non-use of contracts in the manufacturing industry is interpreted in the light of his three frameworks, the findings/evidence may be generalised across markets and across time. This certainly accords with the construction contracts concerned in this research: the use and non-use of construction contracts and the clauses contained therein is a composite of competing frames of reference: the business relationship, the economic deal and the contract.

### ***The need for flexibility***

A further notable element of the contracts in the business community is that, *"contrary to the classical model's assumption about the importance of certainty, flexibility is highly valued..."* (Mulcahy, 2008:40). Contracts in the construction industry certainly embody this desire for flexibility owing to amount and variety of uncertainty in process and business of construction.

With regard to the issues which arise with employing flexibility in contracts, Collins (1999) argues that whilst legal reasoning values a precise expression of entitlements contained within a signed formal contract, this is dangerous as the contract documentation does not express adequately the business expectations of the parties (Collins, 1999:173). Collins notes the tension between the lawyer's role in explicitly planning the contract documentation and the advantages of flexibility parties value in contracts: to take advantage of design and innovation in technology, to exploit

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<sup>96</sup> In *Atkins Ltd v Secretary of State for Transport* (2013) the contract was a heavily amended NEC3 and the case concerned the validity of Atkins's claim for a compensation event for a greater number of potholes (which it was obliged to repair) than it had anticipated at the outset of the contract.

new market opportunities, to permit the deal to continue despite unexpected events which render the original bargain not economically satisfactory for one or both parties (Collins, 1999:167). Collins refers to construction projects as an example of how a governance structure can be put in place to resolve aspects of “incompleteness” in the contract: an architect is empowered in the construction project to determine how much the contractor is due on a monthly basis. Nevertheless, as he notes, there still will be an element of “incompleteness” in the contract in respect of how this neutral third party should exercise the discretion conferred upon him or her (Collins, 1999: 169).

Campbell and Harris (1993) considered flexibility in long-term contractual relationships and, using the two paradigms of individual utility maximization and co-operation, explained long-term contracts as requiring *“the rejection of immediate individual self-interest as the measure of economic rationality and its replacement by common interest as this measure”* (Campbell and Harris, 1993:167). In other words, co-operation in long-term contracts is the adequate form of self-interest. Campbell and Harris noted that parties to a contract demonstrate a commitment to flexibility far in excess of what any contractual document could provide: at times, when contracts purport to fix liabilities, they are typically ignored and the parties resort to extra-strategies to avoid formal remedies when their documents fail to provide for a reasonable resolution of such difficulties.

The issues introduced above in respect of flexibility holds true in the construction industry and its contracts. Parties to a construction contract generally recognise at the outset of project a whole host of circumstances which are likely to arise, but cannot be foreseen and/or dealt with prior to formation of the contract. In other words, what do the parties agree should happen ‘if’ a particular event occurs? Both standard form and bespoke contracts attempt to address these issues with express contractual terms. If one conceptualises standard form contracts as a *“private form of ordering in which industries are able to formalise shared understandings about what constitutes fair practice and sound economic sense”*, then these contracts positively and proactively plan for future relations and allow for flexibility (Mulcahy, 2008: 168).

By way of example, the following is a brief, non-inclusive list of some of the issues construction contracts typically address:

<i>Issue</i>	<i>Event</i>
Variations	What happens <i>if</i> the employer <sup>97</sup> wants to change the specification or something else in the contract documentation?
Delay	What happens <i>if</i> the contractor is in delay?
Completion	What happens <i>if</i> the contractor does not complete by the date stipulated in the contract?
Defects	What happens <i>if</i> there is a defect in the works found during the course of the project, or after?
Payment	What happens <i>if</i> the employer fails to pay the contractor or intends not to pay the contractor?

A significant factor which results in the need for flexibility is of course the extensive time it can take to complete construction projects. By way of example, it is inevitable that over time legislation and regulations may change, as well as business objectives and the employer's specification for the project. In addition, a further contributing factor is the frequent 'unknowns' which may exist at the time of contract formation (eg, certainty of scope and events which cannot be foreseen).

This research encountered numerous examples of disputes arising out of unforeseen events, events which had not been considered in the contract and events which were not wholly and/or not clearly covered in the contract – therefore being ripe and open for various interpretations. Many of the matters discussed in Chapters 4 – 7 illustrate the issues and disputes arising out of different contract interpretation where the contract was not suitably flexible and/or considered. Outside of this research, the well-known example of course is the classic and well-debated construction case *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991) which reached the Court of Appeal. The plaintiff sub-contractor (a carpenter) was in delay and was not going to meet the agreed completion date, which meant that the defendant main contractor would have been penalised for late completion under the main contract with the employer. The parties then reached an agreement whereby

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<sup>97</sup> Standard form construction contracts tend to use the defined term "Employer" or "Client" when referring to the party who commissions the project. Again, this research employs the term "employer" or "building owner" in this context, so as not to be confused with the lawyer's "client".

the main contractor promised to pay the sub-contractor additional monies to accelerate his work and complete what he was already contractually bound to do. The main contractor failed to pay this promised money and the Court of Appeal found that “*the doctrine of consideration should not restrict the ability of commercial contractors to make periodic consensual modifications, and even one-sided modifications, as the work under a construction contract proceeded*” (Steyn, 1997) – the sub-contractor was entitled to payment. Here, the contract was not suitably flexible enough to provide for the events which occurred, which arguably could not be foreseen or fixed at the outset of the contract. Indeed, the doctrine of contract law was not suitably clear or flexible enough to accommodate this transaction or modification of the contract, which resulted in a judgment in considerable interest and subsequent discussion. As Campbell, 2014 notes *Williams v Roffey* is remarkable in the sense that this case concerned challenges to two central features of construction contracts of any complexity: (1) they do not agree price but leave an estimate open to modification; and (2) a main contractor who agrees too low a price with a subcontractor is acting contrary to his own interests as he will never get the job finished without paying more money.<sup>98</sup>

### ***The relational contract and the relational dispute***

As can be seen from the above discussion and from Chapter 1, construction contracts and their use/non-use is a complex area consisting of, but not limited to, the parties’ relationship (their understandings and expectations) in both the past and the future, established trade practice in the industry, the commercial context, the contractual context and the legal context. In other words, they are by no means straight-forward. When the parties’ contract or transaction does not go according to plan, and the dispute finds its way to the lawyer’s doorstep, the lawyer is presented with this ‘baggage’ and complex set of competing factors, regardless of what the classical law of contract and legal reasoning says about the resolution of the dispute. As such, the theories in respect of these implicit dimensions of contracts (Campbell, Collins and Wightman, 2003) and specifically the late Macneil’s relational contract theory, or *essential contract theory* as he belatedly renamed it (Macneil, 2003; Macneil, 2000) are useful to contextualise construction disputes.

The purpose of this section is not to provide a comprehensive account of relational contracts, relational contract theory and the development of the two (for which one

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<sup>98</sup> *Williams v Roffey* [1991] 1 QB 1 (CA); 10G.

can refer to the leading and seminal texts<sup>99</sup>). Rather, it is merely to set the context of the construction contracts, and therefore the construction disputes, which were presented to the lawyers studied in this research. Relational contract approaches tend to describe construction contracts and construction processes more effectively and more suitably than neo-classical<sup>100</sup> ones – indeed this is what Macaulay said in respect of the construction of the Frank Lloyd Wright’s Johnson Administration Building (Macaulay, 1996:111).

On one view, relational contract theory distinguishes *discrete contracts* from *relational contracts* in that a relational contract fundamentally embodies the long-term business interests of the parties. A relational contract requires trust, co-operation and a recognition and consideration of all significant relational elements surrounding a transaction (Macneil, 1980) and the express terms of the contract are part and parcel of a “*dense web of relations*” (Macneil, 2003:208). Performance of the contract persists over a period of time and the contract provides an incomplete specification of obligations. In contrast, a discrete contract is a one-off transaction such as purchasing a newspaper. On another view, this *discrete* versus *relational* description is a simplistic account of relational contract theory and some consider this to be overly simplistic and not particularly helpful in that there is no such distinction between the two as implicit dimensions are involved in both discrete and relational contracts (Campbell, 1996; Collins, 1999:141). Indeed, the main thrust of Macneil’s work is rather to reveal the relational constitution of all contracts (Campbell, 2001: 5) and in this respect his ten common contract norms apply to and underpin all contracts: (1) role integrity; (2) reciprocity; (3) implementation of planning; (4) effectuation of consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance and expectation interests – the ‘linking norms’; (8) creation and restraint of power; (9) propriety of means; and (10) harmonisation with the particular social matrix (Macneil, 2003; Macneil, 1983). A further description of relational contract theory is the concept of the ‘network’ (Collins, 2003:19<sup>101</sup>), a common example being “*a construction project, where the employers of the main contractor may not have direct contractual relations with sub-contractors and the*

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<sup>99</sup> See for example: Macneil, 1978; Macneil, 1980; Macneil, 2000a; Macneil, 2000b; Wightman, 1996; Campbell, 2001; the collection of essays in Campbell, Collins and Wightman, 2003 (specifically Macneil, 2003 and Macaulay, 2003); and the collection of essays in Campbell, Mulcahy and Wheeler, 2013/2016.

<sup>100</sup> “Neo-classical” is what Macneil described modern contract scholarship which concerned the failure of the classical law (Macneil, 1977). I use the term here as Macaulay utilises this term, particularly in Macaulay, 1996.

<sup>101</sup> See also Chapters 9-12 of Campbell, Collins and Wightman, 2003, to which Collins refers.

*employees of any of the contractors*” (Collins, 2003:20). Indeed Campbell also utilises the notion of the contract ‘spectrum’: a range from the simplest to the most complex, with the latter more clearly evidencing “*the self-consciously co-operative action by the parties that Stewart Macaulay called non-contractual relations*” (Campbell and Harris, 1993; Campbell, 2013; Campbell, 2013/2016:138). Campbell prefers the term “*complex contracts*” to “*relational contracts*” as it is less confusing and more natural (Campbell, 2013:179).

Though traditionally the courts do not recognise “relational” contracts (*Baird Textile Holdings plc v Marks and Spencer plc*, 2001), the recent decision of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* (2013) perhaps demonstrates an interesting development in this respect in the context of the doctrine of good faith. Leggatt J recognised the existence of such contracts (para 142):

*“English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such ‘relational’ contracts, as they are sometimes called, may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements.”*

Having said that and though not wishing to rain on this parade, one must note Mr Justice Akenhead in the TCC declined to draw any principles from *Yam Seng Pte* in his judgment in *TSG Building Services Plc v South Anglia Housing Ltd* (2013) which

concerned an alleged implied term of good faith in a standard form partnering contract<sup>102</sup> (para 46):

*"Because cases and contracts are sensitive to context, I would not draw any principle from this extremely illuminating and interesting judgment which is of general application to all commercial contracts. I do not see that implied obligations of honesty or fidelity to the contractual bargain impinge in this case at all."*

As Macneil summarised, the four core propositions which inform any relational approach to contracts are (Macneil, 2003; Macneil, 2000):

- "1. every **transaction** is embedded in complex relations...*
- 2. understanding any **transaction** requires understanding all elements of its enveloping relations that might affect the **transaction** significantly...*
- 3. effective analysis of any **transaction** requires recognition and consideration of all significant relational elements...*
- 4. combined contextual analysis of relations and **transactions** is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of **transactions**..."*

[My emphasis added]

This helpful summary not only digests relational contract theory and sheds light on the complexity of the construction projects and contracts which clients present to their lawyer at the outset of the engagement; it also encapsulates the perspective from which this research views disputes, as well as its proposal for approaching the disassembly of disputes. In other words, consider the following which replaces the word "*transaction*" with "*dispute*" in Macneil's summary above:

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<sup>102</sup> The contract was based on the ACA Standard Form of Contract for Term Partnering (TPC 2005, amended 2008) and a bespoke amendment was agreed in that the terms of the contract was to be "*an initial period of four ... years extendable at the Client's sole option to a further period of one ... year...*" Mr Justice Akenhead considered that this express clause meant that either party could terminate at any time before the term of four years was completed, for no good or bad reason, and that South Anglia was entitled to terminate the contract when it did. "*That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term*" (para 51).

1. every *dispute* is embedded in complex relations...
2. understanding any *dispute* requires understanding all elements of its enveloping relations that might affect the *dispute* significantly...
3. effective analysis of any *dispute* requires recognition and consideration of all significant relational elements...
4. combined contextual analysis of relations and *disputes* is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of *disputes*...

The above amended quote succinctly summarizes and establishes this research's viewpoint of disputes. The following now considers the literature in respect of disputes. Chapter 4.6 summarizes the relational characteristics of disputes and Chapter 6 considers further the relational dispute and how one needs to disassemble its relations to achieve a state of equilibrium.

## 2.2 Disputes

The existing data and literature with respect to construction disputes has largely been compiled by legal and construction professionals in an attempt to pin point why construction projects are so likely to encounter some kind of disagreement or dispute. In the early 1990s the UK government commissioned Sir Michal Latham to review the contractual and procurement arrangements in the construction industry. In 1994 he published his highly influential report *Constructing the Team* (Latham, 1994) which provided recommendations for limiting the quantity and effect of construction disputes. Sir John Egan then followed in 1998 with *Rethinking Construction* (Egan, 1998), making further recommendations for change in the construction industry. Academics at the King's College Centre for Construction Law & Dispute Resolution also provide further reasons as to why there are so many disputes in the construction industry (Capper, 1997). In each case the emphasis has largely focused on the design, contractual and economic conditions of construction projects as the genesis for construction disputes.

Similarly, there has been, and of course continues to be, considerable analysis of the legal and procedural aspects of established dispute resolution methods (Chern, 2008; Chatterjee and Lefcovitch, 2008; Coulson 2015). In addition 'disputing', negotiation and settlement of disputes, both in and out of the court context, have been widely considered. Seminal works in this arena would include, and of course are limited to: Galanter 1974; Kritzer, 1990; Kritzer, 1991; Menkel-Meadow, 1995; Dezalay and Garth, 1996; Genn, 1999; Roberts and Palmer, 2005; Prince and Belcher, 2006; Genn, 2007; Bernard, 2008; Genn, 2010.

As this research focuses on that influences the outcome of construction *disputes*, it is imperative to begin with a review of both the legal and socio-legal definitions of what constitutes a 'dispute'.

### **Definitions of a 'dispute'**

In order to understand what influences the outcomes of disputes, it is important to recognise that there are various definitions 'dispute' and the context in which they are used are wide-ranging. The Oxford English Dictionary provides perhaps the most commonly used definition: "*a disagreement or argument*" (OED, 2014). Practically speaking, they are "*messes which need to be cleared up*" (Simon and Roberts, 2005:79).

However, in a legal context (that being terminology used by lawyers and the courts) the definition becomes much more complex and fine-tuned to the practices and procedures of the court and legal system.<sup>103</sup>

Perhaps one of the first construction cases to consider the “legal” definition of a dispute was *Monmouthshire County Council v Costelloe & Kemple Ltd* (1965). Here, the contractor referred certain claims to the engineer under clause 66 of the ICE conditions, 4<sup>th</sup> edition. Thereafter, the contractor commenced arbitration. The Council challenged the arbitrator’s appointment contending that there was no dispute as the contractor’s claims had been referred and settled by the engineer some years ago. In relation to this issue Lord Denning MR said:

*"The first point is this: was there any dispute or difference arising between the contractors and the engineer? It is accepted that in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected you cannot say that there is a dispute or difference. **There must be both a claim and a rejection of it in order to constitute a dispute or difference...**"<sup>104</sup>*

[Emphasis added]

After nearly four decades of caselaw which developed this definition<sup>105</sup>, Jackson J (as he was then) summarised the position in *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2004)<sup>106</sup>. He adopted a flexible approach to the question of identifying when a dispute has arisen and the meaning of a dispute in the context of construction adjudication and arbitration cases. His seven propositions included<sup>107</sup>:

1. *The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its*

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<sup>103</sup> Unless otherwise stated, this thesis considers and refers to only the practices and procedures of the TCC and construction lawyers.

<sup>104</sup> *Monmouthshire County Council v Costelloe & Kemple Ltd* (1965) at page 89.

<sup>105</sup> See for example *Tradax International v Cerrahogullari TAS* (1981), *Ellerine Brothers (Pty) Ltd v Klinger* (1982), *Cruden Construction Ltd v Commission for the New Towns* (1995), *Halki Shipping Corporation v Sopex Oils Ltd* (1998), *Sindall Ltd v Solland* (2001), *Fastrack Contractors Ltd v Morrison Construction Limited* (2000) and *Beck Peppiatt Ltd v Norwest Holst Construction Ltd* (2003).

<sup>106</sup> Approved by the Court of Appeal: *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291.

<sup>107</sup> *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC) at paragraph 68.

*normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*

2. *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.*
3. *The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") 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.***
4. ***The circumstances from which it may emerge that a claim is not admitted are Protean.** 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.*
5. *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 respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.*
6. *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.*

7. *If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.*<sup>108</sup>

[Emphasis added]

Jackson J identified that a dispute does not arise until a claim is not admitted, and the non-admission is dependent on circumstance.

A more recent definition is summarised by Akenhead J<sup>109</sup> in the case of *Witney Town Council v Beam Construction (Cheltenham) Limited* (2011):

- “(i) *A dispute arises generally when and in circumstances in which a **claim or assertion is made by one party and expressly or implicitly challenged or not accepted.***
- (ii) *A dispute in existence at one time **can in time metamorphose in to something different** to that which it was originally.*
- (iii) ***A dispute can comprise a single issue or any number of issues within it.** However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.*
- (iv) ***What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted.** Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every*

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<sup>108</sup> For example, in *VGC Construction Ltd v Jackson Civil Engineering Ltd* [2008] EWHC 2082 (TCC), Akenhead J held that one must look at all the surrounding circumstances in deciding whether a claim is nebulous or ill-defined. A briefly defined one-line claim may not necessarily be nebulous or ill-defined, depending on the circumstances.

<sup>109</sup> In developing this definition Akenhead J referred to the following cases: *Cantillon Ltd v Urvasco Ltd* (2008), *Amec Civil Engineering Ltd v Secretary of State for Transport* (2004), *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* (2004), and *Fastrack Contractors v Morrison Construction Ltd* (2000).

*construction contract is a commercial transaction and parties can not broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication..."*

[Emphasis added]

Here, the Judge also asserted that a dispute does not arise until a claim has been expressly or implicitly rejected by the other party. Indeed he went further to recognise that a dispute has the potential to change or transform its nature, 'metamorphose', into something different – it may not be a static or fixed issue/disagreement which requires resolution. The Judge also appreciated that a dispute is a question of fact – facts which may need to be investigated or interpreted. This perhaps recognises that each party puts forward its own set of facts: facts which are subject to and originate from their own perspective – facts which perhaps have been manipulated to make a legal argument (Graham, 2005:34).

In the cases above the court was concerned with the definition of 'a dispute' primarily as a result of the legislation in respect of alternative forms of dispute resolution: the Housing Grants, Construction and Regeneration Act 1996 (HGCRA)<sup>110</sup> and the Arbitration Act 1996. The existence of a dispute is required before it can be the subject of dispute resolution processes such as adjudication<sup>111</sup> or arbitration<sup>112</sup>. In the absence of a dispute, an appointed adjudicator or arbitrator will not have jurisdiction. Accordingly, much case law has developed, particularly in the context of construction adjudication, which considers whether a dispute has crystallised.<sup>113</sup>

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<sup>110</sup> As amended by the Local Democracy, Economic Development and Construction Act 2009.

<sup>111</sup> S108(1) of the HGCRA, as amended, states that a party has no right to adjudicate unless there is a dispute arising under the contract. Responding parties may challenge a reference to adjudication on the basis that there is no dispute. *Working Environments Ltd v Greencoat Construction Ltd* (2012) is a recent example in which the court held that a dispute had not "crystallised".

<sup>112</sup> S31 of the Arbitration Act 1996 allows parties to object to the substantive jurisdiction of the tribunal. In the case of *AMEC* (considered above), AMEC objected to the jurisdiction of the arbitrator on the basis that no dispute existed for purposes of clause 66 of the ICE conditions ("If any dispute or difference of any kind whatsoever shall arise between the employer and the contractor in connection with or arising out of the contract ... it shall be referred to and settled by the engineer...") Following their s31 challenge they commenced proceedings in court under s67 of the Arbitration Act 1996 ("Powers of the court in relation to the award: Challenging the award – substantive jurisdiction").

In addition, s6 defines "arbitration agreement" as an agreement to submit "present or future disputes". Therefore the possibility arguably remains open for a party to seek summary judgment if there is "no dispute".

<sup>113</sup> See Chapter 1.3 for a further discussion of this caselaw.

As a result, lawyers in practice are likely to view disputes in the context of the above framework as in order for their clients to succeed they must frame their arguments accordingly. They represent the disputes as ‘cases’ – *“discrete, bounded and pathological episodes, generated by rule-breach”* (Roberts and Palmer, 2005:79; Menkel-Meadow, 2004:12).

Turning now to the meaning of ‘a dispute’ in a socio-legal context, these definitions are no longer orientated towards the practice and procedures of dispute resolution. These definitions are not seen through *“the eyes of the existing political structure”* and do not accept *“conventional understandings as adequate and conventional ideas of justice as acceptable”* (Felstiner, et al., 1980-81:632).

Felstiner, et al., defines a dispute as a *“social construct”*, its shape reflected by *“whatever definition the observer gives to the concept”*. In terms of the environment in which disputes thrive, they consider that *“a significant portion of any dispute exists only in the minds of the disputants”* (Felstiner, et al., 1980-81:631-632).

Roberts and Palmer also consider that disputes are informed by social values (Roberts and Palmer, 2005:1):

*“The nature of disputes, the appropriate responses to disputing situations, and the remedies considered proper are inevitably informed by fundamental social values and even cultural identity.”*  
(Roberts and Palmer, 2005)

Mather and Yngvesson use the term dispute to mean *“a particular stage of a social relationship in which conflict between two parties (individuals or groups) is asserted publicly – this is, before a third party”* (Mather and Yngvesson, 1980-81:776). This is a narrow definition as compared to the two above and somewhat resembles the “legal” definitions in that it is a *stage* which has been reached. In any event, Mather and Yngvesson recognise that there is a social element to a dispute and that it represents a particular point in time – it is not a static event, but rather changes and transforms over time. They assert that *“the definition of a dispute articulated by each participant is a social construct which orders “facts” and invokes “norms” in particular ways – ways that reflect the personal interest or values of the participant...”* (Mather and Yngvesson, 1980-81:780) and equate this to Comaroff and Roberts’s *“paradigms of argument”* (Comaroff and Roberts, 1977).

Accordingly, these “socio-legal” definitions suggest that disputes develop over time and their nature depends upon the meanings given to them and by those involved in

them. A dispute is something which changes in shape and identity depending on time and other social factors. In this context, a dispute is not simply a question of fact which can be interrogated and determined by a judge. It is something deeper and more complex which evolves out of the workings of society, organisations and the culture/social values of the individuals involved.

### **Transformation of Disputes**

As can be seen above, the definition of 'a dispute' tends to be linked or entwined with how the dispute itself comes into existence (if at all). The genesis and evolution of grievances and complaints and what motivates people or companies to initiate legal action (or not as the case may be) has been an area of research for many law and society scholars (Felstiner, et al., 1980-81; Miller and Sarat, 1980-1; Fitzgerald and Dickens, 1980-1; Trubek, 1980-81; Galanter, 1983; Trubek, et al., 1983; Bumiller, 1988; Kritzer, et al., 1991; Ewick and Silbey, 1998; Genn, 1999; Nielsen, 2000). Similarly, scholars have explored what prompts (or deters) dissatisfied users or consumers to complain and the relationship between dissatisfaction and complaints (Mulcahy and Tritter, 1998; Annandale and Hunt, 1998), as well as and how mishap, dissatisfaction and complaints have come to be defined and conceptualized (Mulcahy, 2003).

As Mulcahy and Tritter (1998) note, two models of complaining or dispute trajectories have been particularly influential: one which portrays the process of complaining as a pyramid, dissatisfied users and all injurious experiences at the base and complainants or claims/disputes at the apex (Engel and Steele, 1979; Miller and Sarat, 1980-1; Murayama, 2007) and the other which portrays it as a pathway, along which dissatisfied users move before making a complaint (eg Felstiner et al, 1980-1, see further below). Mulcahy and Tritter (1998) go further and identify the notion (by reference to Lempert, 1980-1 and Best and Andreasen, 1977) that voiced grievances are at the tip of an iceberg: the complaints people make represent only a fraction of the problems people perceive.

Scholars<sup>114</sup> suggest that in the pathway and pyramid dispute models, if disputes do emerge, they do so only after having been through a series of events which transform human experiences into legal claims – though not all claims result in formal legal

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<sup>114</sup> In particular, Law & Society Review, Issue 15, 1980-81, was an influential issue on dispute processing and civil litigation in which authors studied disputants, their representatives, the context of disputes and the processing of disputes.

disputes.<sup>115</sup> This *transformation*<sup>116</sup> of the dispute, or dispute processing, moves away from the concept of “cases” to a broader notion that the life of a dispute occurs before, during and after formal legal disputes (Menkel-Meadow, 2004:12).<sup>117</sup>

The seminal text concerning transformations is of course Felstiner, Abel and Sarat’s “*Transforming of Disputes: Naming, Blaming, Claiming...*” (Felstiner, et al., 1980-1981) – hereafter referred to as *Naming, Blaming, Claiming...* Their theory asserts that a dispute exists only after a claim has been asserted by one party and rejected by the other. More specifically, a dispute only takes shape after a series of transformations: an unperceived injurious experience transforms into a grievance and that grievance ultimately is transformed into a dispute.

The first stage, *Naming*, occurs when one party or person recognises or perceives that they have been ‘injured’ in some way. It is at this point that an “unperceived injurious experience” becomes a “perceived injurious experience”. The second stage, *Blaming*, occurs when the injured person attributes fault or blame to someone else. The perceived injurious experience is now transformed into a grievance. The third stage, *Claiming*, occurs when the injured person communicates its grievance to the person it considers responsible. Finally, a *dispute* only materialises if this claim is rejected, in whole or in part, by the person allegedly responsible. In other words, a dispute only exists after the *Claiming* stage when the grievance is rejected. Prior to this stage, the theory holds that a dispute has not formed and that the parties are merely assessing their respective positions, determining who is to blame for their grievance and taking advice as to whether or not a claim should be made. A dispute only takes shape after all transformations are complete.

At a high level, the dispute transformation described in *Naming, Blaming, Claiming...* is largely similar to the recent judicial definitions of ‘a dispute’ provided by the court (see above). Akenhead J’s definition – “*claim or assertion is made by one party and expressly or implicitly challenged or not accepted*” – recognises that a series of events must have occurred in order for a dispute to exist. Of course *Naming, Blaming, Claiming...* goes further to recognise the social construct within which the transformation takes place.

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<sup>115</sup> “It turns out that although almost any social interaction could, in theory, become a matter of contest and dispute, few do.” (Ewick and Silby, 1998: 19) See also: Nader and Singer, 1976:262; Best and Andreasen, 1977:701; and Burman, et al., 1977:47.

<sup>116</sup> The term “transformation” is of course not new and was developed and discussed in Aubert (1963), Mather and Yngvesson (1980-81) and Felstiner, et al. (1980-81).

<sup>117</sup> See also Abel (1973), Felstiner (1974) and Felstiner, et al. (1980-81).

On the whole, *Naming, Blaming, Claiming...* considers how subjects and agents affect the transformation *prior* to the ultimate 'dispute' stage. Many examples cited in the seminal work focus on why (or why not) a grievance is transformed into a formal claim and as such, the focus and purpose of *Naming, Blaming, Claiming...* is to consider the transformation of grievances at their early stages and what impacts the aggrieved's decision as to whether to continue the transformation.

Research since this seminal work has argued that the various stages are not necessarily connected, nor are they necessarily consecutive – people do not necessarily arrive at their perceptions and decisions in a specific order. Sally Lloyd-Bostock first challenged the traditional trajectory in her study of personal injury actions (Lloyd Bostock, 1984). She argued that blaming does not logically precede consideration of legal action and that knowledge of the legal remedy is an important consideration in claiming behaviour. Then in her review of Kritzer's study on the propensity to sue in both England and the US in personal injury cases under the law of tort (Kritzer, 1991a), Lloyd-Bostock disagreed to an extent with Kritzer's 'Developmental Theory of Litigation' model, which is premised on *Naming, Blaming, Claiming...* (Lloyd-Bostock, 1991). In Kritzer's model, individuals progress through a series of steps or stages, crossing a series of barriers/transition points, each stage being contingent on the one before to some degree. Kritzer finds 'blame' or 'recognition' central to and preceding the process of 'claiming' or 'attribution'. Lloyd-Bostock differs to Kritzer in that *"too much of what happens in practice does not sit easily in a model of this kind"* (Lloyd-Bostock, 1991:430). Lloyd-Bostock considers that people in different situation may move through the dispute transformation in a different order, not necessarily a consecutive order, and indeed a particular stage may even be skipped altogether: *"the model does not easily accommodate the to-and-fro, interactive processes of evolving attributions of cause and fault, arriving at perceptions of entitlement to compensation, and bringing and pursuing claims"*. In her recent consideration of the public perception of risk and the 'compensation culture' in the UK, Lloyd-Bostock again argues that such models of disputing and talk of compensation culture in the context of tort claims are *"framed by norms of disputing, and it is this that gives them plausibility"* (Lloyd-Bostock, 2010:107). She asserts that we can expect rules and norms about attributing responsibility and liability operating when investigating the social processes of disputing; however, we should not take them for the process itself (Lloyd-Bostock, 2010:108). Dispute processes will change if the relevant norms change.

A further development is Mulcahy's and Tritter's study of the NHS health service. Here, they found that satisfaction, dissatisfaction and complaining (complaints being a similar, though distinct, area of research) are "*sometimes but not inevitably linked*" (Mulcahy and Tritter, 1998:827) and need to be seen as distinct constructs. Some may complain about certain issues but not others, just because dissatisfaction is not expressed it does not therefore mean that there is an expression of satisfaction and "*complaining is an atypical reaction to dissatisfaction and is rarely considered as an option by aggrieved patients*".

As to what motivates one to take that final step and make a claim or a complaint, various factors have been identified: by way of example, the source and amount/desire for compensation, conditions which affect the ability and willingness to transform injuries into claims (Galanter, 1983) and legal consciousness which shapes perceptions and the ability/willingness to claim (Sarat, 1990; Ewick and Silbey, 1991-2; Ewick and Silbey, 1998; Galanter, 2001-2; Cowan, 2004). With regard to complaints, in contrast to model developed by Felstiner, et al., 1980-1981, Mulcahy and Lloyd-Bostock (1994a) developed an "account model" which argues that not all disputes are aimed at seeking compensation or some other personal benefit – citizens may use complaint systems to call a public agency into account when their expectations are not met (see also Lloyd-Bostock, 1999 and Mulcahy, 2003).

Whilst research continues to develop and refine the *Naming, Blaming, Claiming...* model, it nevertheless continues to be a useful framework for research on disputes and their transformation (see for example Morris (2007) which considers the propensity to claim in personal injury disputes).

### **The role of the third party in dispute transformations**

It is important to recognise that dispute transformations described above are not simply a linear and straight-forward process, but rather, they are subjective, unstable, reactive, complicated and incomplete (Felstiner, et al, 1980-1:637). In other words, disputes and their transformations are messy. A further complexity in the transformation is the role of third parties in this process and previous research has revealed various parts which these actors might play: shaper, translator, gatekeeper, dispute handler, opposition/support roles, etc.

In *Naming, Blaming, Claiming...* Felstiner, et al., discuss the distinction between what is being transformed ("*the subjects of transformation*") and what does the

transforming (“*the agents of transformation*”). They highlight such categories as, for example, the parties, attributions, the scope of conflict, objectives sought, representatives and officials (ie lawyers) and dispute institutions as subjects and agents which influence dispute transformations. Though certainly not the focus of their study, Felstiner, et al. (1980-1) do offer examples as to how/why lawyers (“representatives and officials”) settle or shape the grievances/claims. For example, Felstiner, et al., refers to Macaulay’s research on consumer cases which finds that lawyers may be reluctant to start a claim for fear of offending potential business clients (Macaulay, 1979). The Felstiner, et al., study never intended to address what happens to a dispute once it has materialised and a lawyer is engaged, though they do suggest by reference to other literature that lawyers have a hand in shaping the dispute and have a certain amount of control over their clients and the course of the litigation (Felstiner, et al., 1980-81:645). Importantly, they note that lawyers are probably the most important agents of dispute transformation.

Conversely, Mather and Yngvesson in “*Language, Audience, and the Transformation of Disputes*” (Mather and Yngvesson, 1980-81) consider, to some extent, the outcome of disputes and their transformation *after* the conflict had been brought to, or in front of, a third party<sup>118</sup>. Their definition of *transformation of a dispute* is (Mather and Yngvesson, 1980-81:777):

“...a change in its form or content as a result of the interaction and involvement of other participants in the dispute process.”

Mather and Yngvesson identify the importance of language, participants and audience as three factors which influence the transformation. They explored the relationship between the definition of a dispute and its transformation and assert that the transformation involves a process of *rephrasing* – a process whereby the disputants and others (ie third parties) might accept a different formulation of the dispute. This rephrasing may involve *narrowing*<sup>119</sup> or *expansion*<sup>120</sup> of the dispute in

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<sup>118</sup> Mather and Yngvesson use the term “third-party” to mean a mediator, go-between, judge, supporters or audiences. However, the majority of the examples do not concern adjudicators or judges as such, but rather supporters and/or audiences within the community who participate in the negotiations and/or defining of the dispute (Mather and Yngvesson, 1980-81:776).

<sup>119</sup> Narrowing is the “*process through which established categories for classifying events and relationships are imposed on an event or series of events, defining the subject matter of a dispute in ways which make it amenable to conventional management procedures.*” (Mather and Yngvesson, 1980-81:778).

<sup>120</sup> Expansion is a “*rephrasing in terms of a framework not previously accepted by a third party ... it refers to change or development in the normative framework used to interpret the dispute.*” (Mather and Yngvesson, 1980-81:778-79).

order to reach the desired outcome and indeed *how a dispute is phrased* may affect that outcome. Accordingly, this *rephrasing* also takes into account the transformation of the scope and content of the dispute – not merely the trajectory of the dispute.

By way of example, Mather and Yngvesson refer to the *Ox Cart Dispute* – a dispute in the Thai provincial court, as recorded by Engel (1978:120-124). Here, a 16-year-old daughter of one man accidentally killed the son of another man when the wheels of her ox cart struck the boy. According to the customs of this community, the father was liable for his daughter's acts. The two men agreed what compensation was owed to the father of the dead boy; however, he subsequently pursued additional money through the Thai court system. To do so, he had to comply with the legal code which required that the dispute be *rephrased*: he was not the proper representative of the dead boy as his marriage had not been registered (his wife was the proper representative) and according to the legal code it was the 16-year-old girl who was responsible for the death, not her father. As a result, the dispute was redefined, involving the wife of one and the daughter of the other. Ultimately, the claimant lost as he failed to appropriately or adequately *rephrase* his dispute (he did not have standing as his marriage to the boy's mother had not been registered).

The *Ox Cart Dispute* exemplifies the need to shape/shoehorn the definition of a dispute in a particular way in order to make it suitable for legal action. Indeed the *Ox Cart Dispute* also highlights that skills and knowledge of a specialised language are necessary to do so (Mather and Yngvesson, 1980-81:791).<sup>121</sup>

A further example is seen in the Mulcahy and Lloyd-Bostock (1994:185) study of senior managers who handle complaints about the NHS. They found that the managers had multifaceted roles in terms of the transformation, management and resolution of disputes. Depending on the situation, the manager may be a gatekeeper, dispute handler, opposition/support roles, etc.

In the context of a construction or engineering project, disputes (the rejection of a claim) often materialise prior to the lawyer's involvement and indeed without the lawyer's involvement. The practices and customs of the construction industry, construction contracts and at times the economic climate, encourage this behaviour. It is not commonly the case that aggrieved construction professionals approach construction lawyers to explore who is to blame for their grievance as it is generally

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<sup>121</sup> This is similar to Cain's notion of *translation* (Cain, 1979).

apparent from the contracts and/or professional relationships developed during the course of the project. It is more the case, at least in the disputes observed in this study, that legal assistance is required in terms of taking the dispute to the next stage (or not as the case may be). This research explores this next stage in the trajectory of disputes: once a lawyer is involved, what influences the outcome of a dispute and to what extent do lawyers shape that outcome? The background of dispute transformations discussed above is useful in terms of the context of disputes generally and indeed informative in terms of the various stages of the disputing process.

### **Actor-Network Theory**

In order to examine construction disputes and explore the relationship between their identity/definition and their transformation, this research required a perspective and framework that would allow for, or at least provide the potential for, revealing all influencing factors on disputes. The Actor-Network Theory (ANT) provides a most useful platform for observing these disputes in this respect as it empowers both human and non-human participants to be active entities in the study ("symmetrical anthropology", see Latour, 1993). Ultimately, ANT places the dispute at the heart of the study whilst enabling a flexible and broad empirical investigation of those entities which shape and develop its outcome.

ANT is mentioned only briefly here in order to provide an initial understanding of how this research views and investigated the disputes as ANT is adopted in this research more for its 'method' than for the whole of its organising theory and Latour's approach to thick description ethnography. In this respect, please see Chapter 3 for a further description of ANT.

As Harman (2014:viii) notes, ANT rejects sweeping categories of analysis such as "society" or "capitalism" and favours the specific *actors* or *actants* at work in any situation. Latour (1) "*empties the world of the traditional objects or essences that one might think lie hidden behind the overt actions they perform*" and (2) breaks down the "*typical modern distinction between humans and the world, or culture and nature*". In other words, ANT is largely concerned with relations and that entities are constituted by these relations. ANT treats all entities in the same way – there is no real versus non-real and size is no barrier either (anything from atomic matter to green giants is fair game). Provided an entity "acts" in some way and has an "effect" on something it is considered relevant or inherent in the situation. Therefore both animate and inanimate objects are equal and can contribute equally in a relationship.

This perspective results in investigating or “tracing” the relations – tracing the associations – looking at what the relations have left behind, what effects they have on some other entity, and describing them. Accordingly, what perhaps looks like data, both in this research and elsewhere (eg, Latour, 2010 [2002]), is actually an assemblage of traces that are in themselves an explanation of linkages (an explanation of the entities) – not simply connected static objects. Relations can only be understood by reference to other relations.

In terms of this research, the ANT perspective/method was most useful in a number of respects. Firstly, it assisted methodologically with the ethnographic fieldwork carried out in that it allowed the ethnographer to view a whole host of entities and associations, both human and non-human of any size, which influenced or formed part of the dispute and the dispute’s trajectory. This research is not simply about the actions of lawyers and their resulting impact on disputes. As such, it was most important to have the ability to view other *actants* and how disputes responded, developed and took shape as a result. In other non-Latourian words, ANT has the ability to reveal influencing factors on disputes which goes well beyond the actions of the law firm.

Secondly, as ANT deals in “relations”, “associations” and “alliances”, this approach allows for the understanding (of the reality or truth) of things in a similar way that relational contract theories do of contracts: every object (ANT) or transaction (essential contract theory) is embedded in “*dense web of relations*” (Macneil, 2003:208). The idea that “*alliances are more important than hidden individual essences and potentialities*” (Latour, Harman and Erdélyi, 2011:51) is central to both: in relational contract theories, understanding the essence of a contract requires recognition of all relationships and alliances, not simply the express terms of a contract and the formal legal rule of contract law. If alliances (or non-contractual relations) become more important than the contract itself, parties look outside of the contract provisions to conduct their transaction and any problems arising. Furthermore, with regard to “translation”, ANT’s notion that “*one thing can never be fully translated into another place or time ... there is always going to be information loss, or energy loss ... you have to pay a price when translating something from one place to another...*” (Latour, Harman and Erdélyi, 2011:28) is along the lines of what relational contract theorists might say of interpreting a complex contract using formal legal rules: translating a complex contract using the express words of the contract and formal legal rules is irrelevant and fails to capture the true essence of the parties’ intentions. This is not to say that in ANT everything is relational and

notably Latour is clear that he does not associate himself with the doctrine that “*everything is relational*” (Latour, Harman and Erdélyi, 2011:43). Rather, Latour tightly holds to his original epiphany that “*nothing can be reduced to anything else, nothing can be deduced from anything else, everything may be allied to everything else*” (Latour, 1988a:163) – this being his *irreduction* principle which asserts that anything can be explained by itself and does not need to be reduced to something else – but yet it can be, provided the proper labour is done and a more fundamental layer of reality is revealed. The intention here is not to set out Latour’s “philosophy” in detail,<sup>122</sup> but instead to illustrate that ANT in some respects is aligned to, or rather sits nicely alongside, theories of complex contracts, which in turn provides a solid platform for investigating disputes. Some of these similarities which exist between ANT and relational contract theory was by no means essential as this research was not focused on contracts per se; however, as most of the construction disputes witnessed were largely contractual disputes, an integrated contractual and dispute perspective provides a greater depth of understanding into the events which occurred between the disputing parties, and why. These aligned perspectives enable a holistic approach to this research as disputes and their trajectories are relational, linked not merely to the day-in and day-out actions of the lawyer and legal process but also to those entities which comprise the contract – these entities being much more than simply the express terms of the contract.

Paradigms other than ANT were of course considered at the outset, though these did not capture the essence and needs of this research. In short, they did not appear to allow for a wide enough examination of both real and non-real objects/concepts in the microcosm of disputing and therefore were not immediately appropriate for this ethnography. By way of example, I considered Bourdieu’s work on the notions of habitus, capital and field. As set out above, the questions this research investigates are not solely confined to the impact of lawyers on disputes. Bourdieu’s social agents and theories in respect of the power of law and lawyers/legal culture (Bourdieu, 1987) appear more applicable to “*the broader context of law’s interrelationship with social forces other than those immediately at stake only in the microcosm of law*” (Dezalay and Madsen, 2012:436) and in turn, it would have been difficult to investigate disputes from this perspective. Having said that, as Dezalay and Madsen note, studying the effect of the force of law and lawyers on the sociology of law calls

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<sup>122</sup> As to which one can refer to such books such as: Harman, 2009; Latour, Harman and Erdélyi, 2011; Latour, 2012; Harman, 2014; and Schmidgen, 2015.

for Bourdieu's work on reflexive sociology, this being the need for (Dezalay and Madsen, 2012:447):

*"...the researcher both to follow the agents and their actions in order to empirically document actual movements and to seek to impose a different and scientifically guided agenda. Basically, the researcher has to follow the agents in order to observe what is the alleged core of the game, but at the very same time he or she must also examine and reframe the issues at play by, for example, relating them to the agents' multiple national and international interests. In this reflexive engagement, the sociologist has the advantage that he or she has far greater mobility within the field than the actual agents who by definition are more trapped by their specific position in the field ... What we suggest here is basically to turn the logic of field inside out as a means for deconstruction social practices and reconstructing them in terms of fields."*

Whilst this type of approach is seemingly helpful and could have been employed in this research, again, it seemed limiting in that nonhuman entities would not have been immediately included.

In any event, again, ANT is adopted in this research more for its 'method' than for the whole of its organising theory. ANT's view of entities as "associations" (albeit irreducible objects at the end of the day) and its method of tracing of these associations, results in the ethnographic data itself being the explanations of these associations. The challenge then of course is to understand the significance of these explanations and this case, determine what that means for disputing.

## 2.3 Lawyers

As Flood (2013:19) notes, “*the majority of research on the legal profession has to a large extent taken for granted what lawyers actually do (cf Abel and Lewis 1989).*” One of the aims of this research is to fill this gap and add to the more recent studies of what exactly is it that lawyers do (Flood, 2013; Kirkland, 2012). As to what others say lawyers *do*, it is notable the extent to which lawyers wear a number of hats when carry out their services: lawyers as translators, transformers, storytellers and engineers.

### **Sociology of the profession**

Firstly, before turning to the lawyers’ hats, the foundation of course for any research in the sociology of the professions is the works of Talcott Parsons<sup>123</sup> and Everett Hughes<sup>124</sup> (Dingwall and Lewis, 1983:1). With regard to Parson’s work of the professions (before moving onto the nature of the normative order of modern capitalist societies), his study of medical practice in the Boston area (US) is of particular interest. He used this context to explore the question of “*What modifications did the accepted theories require in the light of this empirical observation?*” (Dingwall and Lewis, 1983:3). The study illuminated the importance of health, illness and medicine in the functioning of a society, their cultural meanings and their relationship to the human life cycle: being sick was not simply a “state of fact”, but was also an institutionalised role (Fox, et al., 2005:6). Even though this study dealt with the medical profession, it nevertheless addressed the professional/client relationship and the professional knowledge in that industry. Parson was able to demonstrate the social foundation of its knowledge and its *translation* into the impersonal normative order of science (Dingwall and Lewis, 1983:3). In addition, it appeared<sup>125</sup> to embody some of the principles of ANT (well before ANT was established) as both human and non-human participants were active in the empirical study and Parsons was essentially *following the actors*. With regard to Hughes, his contribution most relevant to this research is the assertions concerning licence and mandate: he recognises the influence and authority that professionals have over the conduct of their work and their ability to set the very

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<sup>123</sup> See Parsons, 1947 and Parsons, 1939.

<sup>124</sup> Dingwall and Lewis claim that Hughes’s greatest legacy lies in his students Howard Becker and Blanche Geer and that his sociology was transmitted almost as an oral culture available in an assortment of papers only ever substantially collected and published in the *The Sociological Eye* in 1971 (Dingwall and Lewis, 1983:1).

<sup>125</sup> Few details of this research were ever published. In Chapter 10 of the *Social System*, Parsons drew upon his unpublished research (Parsons, 1951).

terms of thinking about problems which fall in their domain (Dingwall and Lewis, 1983:5).

Specifically in respect of the legal profession, as Flood (2013:18-26) documents, there are two approaches to past research: the structural approach and the interactional approach. In terms of the structural approach (this being research which analyses the client-base, religious, ethnic, class and values of lawyers, though has been unable to reveal what lawyers actually do for whatever reason) Flood traces the research from Garrison (1935) & Twining (1968) to Carlin (1962 & 1966) & Smigel (1969) and finally Heinz and Laumann (1982). McCahery and Picciotto (1995) note that structuralism was predominant from circa 1975 to 1995 and focused on the control of specialised expertise. In respect of the interactional approach (this being research which produces "*a dynamic picture of the processes involved in being a lawyer*") Flood considers the research of Rosenthal (1974), Macaulay (1979), Hosticka (1979), Mann (1985), Griffiths (1986), Sarat and Felstiner (1986), Macaulay (1984), Cain (1983 & 1985), Maynard (1984), Travers (1997), Mather (2003) and Scheffer (2010).

This research of construction disputes and construction lawyers is closely aligned to the interactional approach. Whilst it does not purport to provide a full account of what construction lawyers do, the aim is obtain a better understanding of how their actions and professional services influence their clients and their clients' disputes. For a further description of the Firm which was the study of the ethnographic research and the lawyers therein, see Chapter 3; however, I note here that the Firm did not fit squarely in either of the two hemispheres of the legal profession identified by Heinz, et al., (2005): one side representing large organisations and practice in large firms and the other side representing individuals and small businesses, practice in small firms and solo practitioners (Heinz and Laumann, 1982; Heinz, et al., 2005; Kritzer, 2012). On balance, the values, ethos and actions of the Firm arguably, probably was more akin to the small business hemisphere.

As the full literature in respect of the theories of the professions and the studies of lawyering is better documented elsewhere, see in particular McCahery and Picciotto (1995), here I consider those concepts on lawyering which were particularly influential on this research: lawyers and power, lawyers as translators, lawyers as transformers, lawyers as storytellers and lawyers as engineers:

### ***Lawyers and power***

Research into power in lawyer/client interactions and power as a function of coercion, knowledge and economic advantage (Hosticka, 1979; Mann, 1985; Sarat and Felstiner, 1995) is a well-investigated arena. The perceived dominance of the lawyer and the degree to which lawyers have the ability to exercise control over their clients continues to engage discourse (Johnson, 1972; Rosenthal, 1974; Bankowshki and Mungham, 1976; Foucault, 1977, Flood, 2009). This originally was highlighted in Magali Larson's and Richard Abel's work which argued that the legal profession generally aimed to "*secure monopolistic markets for its specialized services by controlling the production both of and by the producers, or by seeking to create a demand for these services*" (Larson, 1977; Abel and Lewis, 1989; McCahery and Picciotto, 1995).

### ***Lawyers as translators***

As introduced above in relation to the role of third parties in dispute transformations, lawyers have the capacity to become as "*conceptive ideologists*", guardians of a translation process and "*peddle the language of the law*" (Cain, 1979|1983). Cain considered that the ability to translate and reconstitute issues had trans-situational applicability. Lawyers also have the ability to shape, define, present, phrase and rephrase disputes (Mather and Yngvesson, 1980-81).

### ***Lawyers as transformers***

*"Of all the agents of dispute transformation lawyers are probably  
the most important..."* (Felstiner, et al., 1980-81:645)

When researching the *mediators*<sup>126</sup> of construction disputes, it quickly became apparent that construction lawyers and the legal framework within which they operate are clearly entities which transform, translate and modify meaning in the context of disputes. As the quote above indicates, Felstiner, et al., considered that lawyers influenced dispute transformation, though they did recognise that, at that time, relatively few studies of lawyer conduct had been informed by a transformation perspective (Felstiner, et al., 1980-81:645). Indeed they called for further transformation studies that observe lawyer/client interactions (1980-81:649-652). Since then, further studies have of course been conducted and *Naming, Blaming, Claiming...* has proven influential in studies of disputing behaviour and legal

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<sup>126</sup> For a definition 'mediators', see "*Actor-Network Theory*" in Chapter 3 and for the mediators in this research, see Chapter 4.

consciousness (see discussion above, along with, Merry, 1990; Ewick and Silbey, 1998; Albiston, 2005).

More recently, in the medical negligence arena, Mulcahy (2001) asserts that lawyers *“do much more than reproduce the arguments made by their clients. They play a pivotal role in the evolution of the grievances their clients present to them...”* though mediation also undermines or challenges their ability to define these disputes.

### ***Lawyers as storytellers***

In addition to all of the other hats lawyers might wear, a professional skill of the lawyer is that of a storyteller. Lawyers create and tell stories during the course of providing their services (Kirkland, 2012). The more recent socio-legal research has considered the professional skills lawyers require when dealing with clients and their disputes. The research of Graham (2005) and Kirkland (2012) focus on the roles and tasks that lawyers are required to complete for their clients. Both Graham and Kirkland posit that the skill of litigators is the making of legal arguments to both support the client's position and destroy the legal arguments advanced by the other parties (Graham, 2005:1&5) and to make factual and legal cases for their corporate clients (Kirkland, 2012:152). In this sense, the corporate litigator is the *“architect of the story of her client's case”* (Kirkland, 2012:171).

Along this same vein is the lawyer's role in creating and contesting meaning – the meaning of law, the legal system and the client's position therein (Sarat and Felstiner, 1995; Graham, 2005).

### ***Lawyers as engineers***

Finally, though not conclusively, we see the *lawyer as engineer* (Collins, 1999:149). This notion is discussed and developed further in Chapter 6, though introduced here in that the lawyer, when assembling contracts and transactions has the ability to plan, construct and, I posit, design, the competing needs, constraints and relations of the parties and their contract. In a different vein, Pound (1954) also viewed the capability of the lawyer as a “social” engineer.

## CHAPTER 3

### THE METHOD: THE LAW FIRM

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*Following the initial client/lawyer meeting at Mr Hunter's office, the next four months were filled with various actions:-*

*Mr Hunter's assistant researched various legal points, Mr Cahill forwarded numerous documents and further information to Mr Hunter, Mr Hunter drafted an advice for Mr Cahill regarding his recommended way forward and Mr Hunter and Mr Cahill exchanged numerous telephone calls and emails regarding legal costs and next steps.*

*Once a strategy was agreed (on the basis of Mr Hunter's advice) Mr Hunter then drafted an aggressive letter to Structures Ltd's lawyer. Exchanges of written correspondence between the lawyers then ensued. Mr Hunter and his assistant internally discussed each letter/email received and liaised with and advised Mr Cahill by both telephone and email, following which Mr Hunter and his assistant drafted a response. The exchanges continued, each side asserting its position and representing it as a position of strength with good chances for success.*

*Accordingly, these four months essentially concerned emails, letters, telephone calls, meetings, brief conversations between lawyers in the corridor, the review of documents, etc – all actions centred around and stemming from the law firm.*

### 3.1 The Method

*“Where is law most “in action” in society? Very often, it seems, where it is difficult if not impossible to observe directly. Courtrooms can be observed, though private offices can hide bargaining and discretion... For scholars of the legal profession, a significant obstacle to penetrating law’s power has been the office door, behind which lawyers and clients engage in dialogue, bound by the claim of “lawyer-client privilege”. But all the clues received from aggregate data to anecdotal evidence, not to mention instinct, drove researchers to break down these barriers.”*

(Halliday and Schmidt, 2009:187)

This research adds to those few who previously broke down the barrier of the law firm door (for example, Flood, 2013; Latour, 2010 [2002]; Sarat and Felstiner, 1995; Mann, 1985; Flood, 1983; Katz, 1982). In an attempt to understand how lawyers deal with construction disputes and how disputes evolve and develop once the client engages the lawyer, this research utilised ethnography to follow the actors’ own ways and the traces they left behind (Latour, 2005:29). To do so, the fieldwork was sited in and amongst construction lawyers, where “*law is most in action*”: the law firm. This enabled a front and centre position – a viewpoint essential for obtaining valuable empirical data on the influencing factors and outcomes of disputes. The above events in ***Columns & Beams Ltd v Structures Ltd*** exemplify some of some very actions which were the subject of the fieldwork.

Before turning to the methodologies employed in this research, a description of the actions/actors studied and a discussion of the site and the fieldwork carried out, it is important first to set out briefly the context of “construction law” and “construction lawyers” in England and Wales in order to have a baseline and background for the field investigated.

#### **Construction law and construction lawyers**

Until the latter part of the twentieth century, there was no branch of law that identified itself as “construction law” (Bailey, 2011:1). Cases which concerned construction projects were regarded as a “contract” case, a “negligence” case, a “tort” case, etc depending on the issues involved. Over time, legal matters in respect of construction projects became more developed and more complicated, construction

contracts became more elaborate and ultimately government introduced new legislation specifically targeted at the construction industry (Bailey, 2011:2). Accordingly, the law surrounding these issues became highly specialised, as did the lawyers practising in this area.

Today, construction lawyers are generally either found in law firms which specialise solely in construction law or alternatively, in a larger multi-discipline/multi-service corporate law firm (either in a specialist “construction” department therein or as part of another department such as “litigation” or “projects”). The top 25 construction law firms, according to Legal500, include (Legal500, 2015):

	<b>Law Firm</b>
<b>1</b>	Berwin Leighton Paisner LLP
	Pinsent Masons LLP
<b>2</b>	Ashurst
	Baker & McKenzie LLP
	CMS
	Eversheds LLP
	Fenwick Elliott LLP
	Freshfields Bruckhaus Deringer LLP
	Herbert Smith Freehills LLP
	Hogan Lovells International LLP
	Mayer Brown International LLP
	Nabarro LLP
	White & Case LLP
<b>3</b>	Addleshaw Goddard LLP
	Charles Russell Speechlys LLP
	Clifford Chance
	Clyde & Co LLP
	DLA Piper
	Dentons
	Jones Day
	K&L Gates LLP
	Macfarlanes LLP
	Norton Rose Fulbright
	RPC
	Reed Smith LLP
	Taylor Wessing LLP
	Trowers & Hamblins LLP
	Vinson & Elkins LLP
	Wragge Lawrence Graham & Co LLP

The firms listed in the above table are either firms specialising solely in construction law or are departments within a large corporate law firm. The construction lawyers within these firms are, on the whole, specialists in construction law and contracts/disputes involving construction projects. Some construction lawyers go further and specialise either in contentious or non-contentious matters. By way of example, some construction lawyers only advise on the assembling of contracts (putting the deal together and project financing) and the interpretation of contracts, though do not represent parties in the event of a dispute arising out of or under those contracts. Having said that, many construction lawyers do advise on both contentious and non-contentious matters – though clients/construction companies may not necessarily instruct the same law firm to do both tasks (Flood and Caiger, 1993:426).

Construction law is not a specific discipline within the undergraduate law degree at universities (like that of Contract Law, Tort Law, Property Law, etc). A Masters degree in Construction Law is available (eg, King's College), though the majority of construction lawyers appear to specialise simply by practising solely in this area for a number of years.

This research focuses on disputes in this specific area of law and these specialist lawyers. To see these actors in action, the research employed ethnography as its principle methodology and the fieldwork took place over the course of 18 months at a London law firm specialising in this field (described further below).

### **Ethnography and Participant observation**

As the research question inherently called for an investigation into the actions of lawyers and any other influences on construction disputes, ethnography was most appropriate as it provides *“uniquely privileged opportunities to enter into and to share the everyday lives of other people”* as well as *“the challenge of transforming that social world into text and other forms of representation that analyse and reconstruct those distinctive lives and actions”* (Atkinson, 2015:3).

The ethnography enabled a first-hand experience of *“the relative messiness of practice”* (Law, 2004:18-19) in the social and cultural setting in which it occurs (Atkinson et al, 2001). It was most fitting as it allows for the *“analysis of social action and social organisation”* through the collection and analysis of data in *“the interests of developing systematic conceptual frameworks”* – it is not about simply *“amassing an inchoate array of personalised impressions and experiences”* or *“creating*

*evocative descriptions of personal experience*" (Atkinson, 2015:6-7). Nevertheless, it is a *"method for those who wish to describe the culture of a group or organisation"* (Silby, 2002), which aligns with the needs of ANT (Actor-Network Theory), a theoretical perspective of which this research adopts more for its 'method' than it does for the whole of its organising theory (see further below).

As the aim of this research is to gain a better understanding of what influences construction disputes, it was imperative to be literally surrounded by construction disputes, *"living with and living like those who are studied ... [with] an ongoing interaction with the human target of study on their home ground"* (Van Maanen, 1988). Utilising ethnography meant that I was able to collect and record various types of data from various sources and situations during the course of the fieldwork.

The ideal environment for this full-time involvement and an *in situ* monitoring of construction disputes (Latour and Woolgar, 1979) is in a law firm specialising in construction disputes, or alternatively in the construction department of a multi-disciplinary law firm. I was fortunate to be able to secure this position which allowed for an immersion within construction disputes, construction clients and construction lawyers (see further below).

The ethnography involved and emphasised participant observation and the collection/analysis of the documentation and conversation material gathered and involved in these construction disputes. A mere analysis of reported case decisions, governmental reports and academic writings was unlikely to reveal the full picture given that most of law's "action" occurs behind closed office doors (Halliday and Schmidt, 2009:187). Indeed, as ways of resolving disputes are culturally and socially determined (Roberts, 1979) a methodology was required that allowed for an insight into how lawyers and parties deal with disputes on a day-to-day basis.

When designing the methodology for this research I did consider supplementing the ethnography with a series of interviews with the lawyers involved and/or their clients. However, after much deliberation it seemed to me that in this particular circumstance, these proposed interviews raised a number of adverse issues which outweighed any perceived benefit to the research.

Firstly, I was conscious that the interviews would provide little or no opportunity *"to investigate the multiple forms of social organisation and action that are the stuff of everyday life"* or *"to study the techniques and skills that social actors deploy in the course of their daily lives, or in accomplishing specialised tasks"* (Atkinson, 2015:92).

Formal interviews certainly would have obtained the lawyers' and clients' point of view on the disputes and their development; however, they would have done so in a vacuum and in a very formal setting. The participant observation and essentially living and working within the law firm afforded the opportunity generally to understand the lawyers' views on a particular case in any event: I observed intralawyer conversations, posed informal questions to them in passing as appropriate and witnessed a multitude of other correspondence between lawyers, their clients and their peers. As the research was primarily focused on the dispute, this provided more than sufficient data and it seemed there was little else to explore further by way of interview which would assist. With regard to interviewing clients, at the outset of the research I did initially "test the waters" with a few informal interviews with past clients with whom I was familiar; however, it quickly became clear that their views on the dispute, the disputing process and the involvement of lawyers were not revealing any additional information, but rather, were either a confirmation of the factual elements of the case and the legal process and/or a reiteration of their frustrations with the opposition. With regard to their views of the lawyers involved and the services, advice and influence they provided, their comments and reflections were rather limited. I can only speculate; however, as it is quite possible that these clients viewed me a part of the Firm, it perhaps was the case that they were only willing to say so much, regardless of whether the information was for academic purposes or otherwise. They, perhaps unsurprisingly, mentioned such topics as the "costs of lawyers" and "billing" (ie, high hourly rates), but did not venture much further.

Secondly, I was of the view that formal, or even informal, interviews would compromise the necessary relationship I required with the Firm to carry out the ethnography and participant observation. Participant observation requires the researcher to be both stranger and friend (Powdermaker, 1966) in the environment under study. The participation element is vital to the ethnography in that *"only by attempting to enter the symbolic lifeworld of others that one can ascertain the subjective logic on which it is built and feel, hear and see a little of social life as one's subjects do"*. Equally, observation is essential in that it allows the researcher to *"stand back and analyse in a way possibly foreign to the subject, asking questions deemed eccentric or irrelevant for practical purposes by the subject"* (Rock, 2001).

In this study, the participant observation oscillated between 'complete participant' and 'observer-as-participant' (Hammersley & Atkinson, 2007; Junker, 1960; Gold, 1958). On some matters, the fieldwork involved complete participation – assisting

the partner in charge of the matter, locating relevant documents and authorities, obtaining information from clients/witnesses, attending meetings and hearings, conducting legal research, etc. In this sense, the research followed in the footsteps of Mann (1985), Flood (1991) and Cunningham (1992). On other matters or events within the office, the fieldwork was more akin to pure observation. I was seated amongst the lawyers and secretaries in the office which provided a front row seat for observing how their daily activities are carried out. This location enabled observation of lawyer/lawyer and lawyer/client conversations and telephone calls<sup>127</sup>. As I was perceived as a participant within the daily life of the Firm I quickly achieved the methodological goal of becoming a full member in the scene: to '*settle down and forget about being a sociologist*' (Goffman, 1989).

This oscillation between 'complete participant' and 'observer-as-participant' facilitates the search for a relationship between the *emic* and *etic*<sup>128</sup> understanding of human behaviour and enables the researcher to maintain an *insider* and *outsider* point of view during the study (Madden, 2010).<sup>129</sup> It also enables the documentation of people's experiences of law in daily life (Griffiths, 2005) whilst maintaining a certain level of camouflage as the researcher is identified as belonging to their particular environment (Flood, 2005). Perhaps a similar experience is that of Latour and Woolgar in Roger Guillemin's laboratory at the Salk Institute, where it is noted (Latour and Woolgar, 1979):

*"In practice, observers steer a middle path between the two extreme roles of total newcomer (an unattainable ideal) and that of complete participant (who in going native is unable usefully to communicate to his community of fellow observers). This is not to deny, of course, that at different stages throughout his research he is severely tempted towards either extreme."*

I certainly could have conducted interviews at the end of the participant observation exercise to avoid jeopardising the necessary 'stranger and friend' relationship. On

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<sup>127</sup> With regard to telephone calls, these were either "one-sided" in the sense that I could only hear the one end of the conversation (generally the lawyer) or were conference calls on a speaker phone where both sides of the conversation could be heard.

<sup>128</sup> Madden states that an *emic* perspective is one that reflects the research participants' point of view (insiders), whilst an *etic* perspective is one that echoes the researchers' point of view (outsiders) (Madden, 2010).

<sup>129</sup> In 1965, Hortense Powermaker described this as *involvement* and *detachment*, which she considered to be at the heart of participant observation (Powdermaker, 1965): "*Involvement is necessary to understand the psychological realities of a culture, that is, its meanings for the indigenous members. Detachment is necessary to construct the abstract reality: a network of social relations including the rules and how they function...*"

conclusion of the 18 months of ethnographic fieldwork I reassessed my initial decision not to carry out interviews. However, considering the amount and quality of data collected during the fieldwork (discussed further below), there were few, if any, areas left within the boundaries defined by the research question and aims/objectives of the research that could benefit from further development by way of interview. No doubt there is a wealth of further information and research which could be achieved from such interviews with these lawyers and their clients; however, I must leave that to future studies and other research questions. Here, I am most interested in the shape and development of disputes after the lawyer is engaged, and identifying those elements which influence this - not strictly or necessarily from any particular lawyer or client point of view. Lawyers and clients may well have different views and agendas as to why disputes develop as they do; however, the purpose of this research was to identify and analyse the influences. Their perceptions in this respect are of course helpful in terms of the potential identification of the relevant influences, though these perceptions are only useful to a limited extent given their subjective and pointed nature. Indeed this data was collected outside of formal interviews in any event. This, combined with the issues identified above, rendered it clear that interviews were not fitting and/or essential for this particular research.

### **The Firm**

In terms of the location of the ethnography, immersion in and amongst construction disputes was critical and the most suitable location for this was within a law firm with both lawyers and the disputes continuously in action. I was fortunate to have the opportunity to conduct this ethnographic fieldwork at a leading construction law firm in London. For confidentiality reasons which I discuss further below, I shall refer to this organisation or collection of construction lawyers generically as “the Firm”.

The ethnography perhaps could have been situated in a construction/building firm (a builder’s/contractor’s office) or a real estate firm (a developer’s office). However, this would not have been ideal as these options present various difficulties. Firstly, with regard to both contractors and developers, the company would have needed to be large enough to have its own in-house counsel or legal department as the research is concerned with lawyer involvement. These companies certainly do exist, though access to them would have required a special relationship or link which was not readily available to me. Conducting this research in a practice without an in-house

counsel/legal department would have been most problematic as access to those disputes which involved outside lawyers (this being lawyers in private practice whom they instruct) likely would have been limited. Secondly, the work which in-house counsel/legal departments take on is not necessarily all dispute work – a proportion of it is inevitably transactional (eg advising on and negotiating contracts, joint ventures, property issues etc). Therefore, any ethnographer would not necessarily be encapsulated by disputes in this environment.

The Firm in which this ethnography took place was ideal on a number of levels. Firstly, the Firm specialises in construction law, thereby enabling the ethnographer with continuous access to the type of disputes in focus. On the whole, it does not advise on other construction-related issues such as banking and finance, corporate matters, tax, intellectual property or environmental/land law issues. The Firm does advise on non-contentious matters though the majority of the Partners are largely concerned with disputes or potential disputes (see further below).

Secondly, and perhaps most importantly, I had the requisite access to this particular firm. Prior to commencing this thesis, I was employed by the Firm to assist in the publication of articles, legal research and with the filing and bundling<sup>130</sup> of documents on particular cases. I joined the Firm in this limited capacity in order to gain a better understanding of the legal profession, having worked as an Architect in the construction industry for nearly 10 years. This initial connection with the Firm ultimately rendered this research possible – the research depended upon the successful negotiation and maintenance of this access (Atkinson, 2015:176).

I was aware of the potential issues this connection raises: would this impair my ability to approach the fieldwork with an open mind, did I see myself as an insider and/or part of the Firm which would therefore skew my perspective or data collection and had I already developed pre-conceived ideas about the Firm, these lawyers and/or the disputes they deal with? Whilst I was most conscious of these issues, I had to assess these concerns in the context of obtaining an appropriate site for the fieldwork which would grant me a *“licence to witness, participate in and converse about issues that might otherwise reach a more restricted social circle ... having privileged access to the everyday activities ... that are based on some sense of membership”* (Atkinson, 2015:176). On balance, it seemed to me that whilst I had been employed previously by the Firm, I certainly was not deemed to be a complete

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<sup>130</sup> A term used by the lawyers when files of documents are required to be put together for various purposes in the life of a dispute or matter. By way of example, bundles are required for trial and for the submission of pleadings in litigation, arbitration and adjudication.

“member” of the Firm: at that point I was not a qualified Solicitor and I had only been at the Firm for one year. I previously worked as an Architect and the whole culture and ethos of law and lawyers was still a strange new world to me. I did not feel any particular affinity to the Firm or any obligation to depict it in a particular light – recognising of course that I would need to be a perceived member in due course as a successful ethnography inherently relies on this. Having said that, I had gained sufficient membership in the Firm to obtain the necessary trust and dialogue with the Partners to secure access. This unique position enabled ample distance to maintain an open mind for the collections of data and reflection/analysis whilst still maintaining “...a personal, intellectual and even emotional commitment to the lives of” those in the Firm (Atkinson, 2015:172, 173).

I was also mindful of the issues in respect of selecting this particular Firm for the fieldwork, over other construction law firms, or alternatively, using only one firm rather than several to witness the disputes in different law firm environments. Having analysed some of the leading construction law firms in London (those being selected from the Legal500 list above - many of which are also identified in Chambers UK and The Lawyer UK200 both in terms of the services they provide and the structure of the firms (to the extent possible), there was no perceived advantage or disadvantage of any one firm – it is likely that many of them would have been appropriate for such a study. Of course internal company politics and/or the structuring of the departments within each of these firms are inevitably different and unique on some level, thus perhaps in turn having its own influences on disputes. However, on the face of it I could not see any one firm being more advantageous than the others and the as I had good access to the Firm, this became the determining factor for the selection. With regard to conducting the ethnography on multiple sites, this raised more complex issues of: would I be given the same “membership” status in each firm and access to the same type of data, to what extent could I analyse and draw conclusions from the data if access was different for each site and to what extent would the experiences, disputes and firms be comparable? No doubt a larger and longer study would overcome these issues; however, for the purpose of this research question, one site was sufficient to collect the necessary data.

Given the above, I therefore appreciate that some may view this research as being limited to those disputes and lawyers found within the Firm. Of course that may well be the case for certain findings, though given the variety and number of disputes and lawyers witnessed during the course of the fieldwork, it seems to me that some conclusions are able to be generalised and extrapolated to other construction

disputes in the industry – not just those which involve the Firm. This research therefore is an in-depth look at the Firm’s disputes and lawyers, which in future studies could be compared and contrasted to other firms and construction disputes. However, certain elements in the following chapters clearly are representative of the industry as a whole, as exemplified by the case law, literature and other research reference herein.

### ***Composition***

With regard to the composition of the Firm, at the time I conducted the fieldwork there are 14 partners leading the Firm, five of which are considered the ‘Senior Partners’. Each partner is a specialist in construction law. The Firm is comprised of 50 individuals including:

14	partners
11	associate solicitors
3	assistant solicitors
3	litigation executives/paralegals
13	secretaries
6	other support personnel

### ***Services***

The Firm provides a number of services across a range of industry sectors. Broadly speaking, these services can be categorised into ‘*contentious*’ and ‘*non-contentious*’. The contentious services include advising and representing a party in any of the dispute resolution methods: negotiation, mediation, adjudication, arbitration, litigation, etc. The non-contentious work is that of a transactional nature and includes advising on, drafting and negotiating construction contracts - these being building, energy or engineering contracts and agreements for professional services. Of the 14 partners, at the time of writing, only one solely deals with non-contentious matters, whilst the remainder either specialise in contentious matters or their practice consists of a mixture of the two, with an emphasis on disputes.

### ***Clients & their disputes***

The Firm’s clients range from design professionals, such as Architects and engineers, to contractors, subcontractors, developers, investors, local authorities, utility

companies and state corporations. There does appear to be an emphasis on employers (ie those that require the construction works to be carried out and engage others to do so) and contractors.<sup>131</sup> The type of clients scales from corporate multi-million pound companies to government bodies, small companies/partnerships and individual residential occupiers. Their clients are a mix of both repeat players as well as one-shotters (Galanter, 1974).

The legal profession is commonly thought of as being divided into two hemispheres: the first half of the profession serves corporations and large organisations and the second half serves individuals and small businesses (Kritzer, 2012). The Firm does not fit squarely into either of these hemispheres in that it serves both types of clients (large and small) and is instructed by a mixture of both repeat clients and first-time clients.

These clients engage the Firm to advise on and resolve a wide variety of disputes. The list is arguably endless, including health and safety matters, professional negligence and contract interpretation points; however, the majority of disputes appear to concern payment, defects and delay.<sup>132</sup>

Indeed, these three ‘types’ of disputes are often inherently linked and could be considered as three elements of one dispute which informs the dispute’s development and outcome. By way of example, a contractor may be aggrieved because it has not been paid by the employer the full amount agreed in the contract; however, the employer has not done so because it considers the contractor responsible for the defects in the building and the delay to the completion date.

### **Structure**

In terms of the Firm’s management structure, it does hold true to the *traditional model* (Gabarro, 2007:xix). In contrast to the *corporate model*<sup>133</sup>, the Firm does not have a clear demarcation between producers and managers and indeed the partners

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<sup>131</sup> As consultants (eg Architects and engineers) are required to have professional indemnity insurance in place, their insurers tend to conduct any disputes on their behalf (or appoint their preferred lawyers) owing to their right of subrogation. As the Firm is not instructed by insurers, this is likely to be a contributing factor as to why the Firm’s clients tend to be employers and contractors/suppliers.

<sup>132</sup> See Chapter 2.1 and Appendix 1 (“The Matter Database”) for a further description of the types of disputes observed and recorded in the research.

<sup>133</sup> Gabarro notes that the corporate model evolved in the early 19<sup>th</sup> century to manage the size, scale and complexity of large manufacturing business that emerged owing to the industrial revolution and that its distinguishing feature is its emphasis on specialization by function – a clear separation of manufacturing, marketing, sales and engineering (Gabarro, 2007:xix).

of the Firm are “*producing managers*” – they continue to practice law even though they have management/leadership responsibilities (Lorsch and Mathias, 1987). The Firm is not organised into separate marketing, sales and production functions. Rather, all of these activities reside in the role of each partner. There are two employees who are designated as “marketing” individuals for the Firm; however, they merely assist the partners in their marketing duties – by way of example, they research new business opportunities, organise client parties and marketing functions and manage the Firm’s publications, graphics and website, etc. The Firm is essentially a *three-tiered, stratified apprenticeship* in that the practice of construction law is learned on the job, working directly on client matters under the supervision of one or more senior professionals (Gabarro, 2007: xx).

In terms of the organisation of resources for each of the cases, the Firm is a *loosely coupled organization* (Weick, 1979). The work is carried out in small teams and these teams are not permanent. As new matters are taken on, new teams are formed based on the expertise required and the availability of the fee-earners. A team can range in size from merely one partner, to one partner and one fee-earner, to several partners, several fee-earners and paralegal support.

### **Ethics**

Though “*ethnography is among the most ethical forms of research*” (Atkinson, 2015:172) I am acutely aware, and was so both before and throughout the duration of the fieldwork, of the ethical and moral issues ethnography does raise (Hammersley and Traianou, 2012:8-11), some of these being: client confidentiality, informed consent and membership. For the avoidance of doubt, before commencing any of the fieldwork described further below I sought and obtained approval from the University’s Research Ethics SubCommittee.

With regard to consent, at the outset I discussed the proposed research initially with the Senior Partner. I explained what the research was investigating, along with the proposed participant observation and ethnography. I described how I was most interested in all aspects of each case and would be, if agreed, utilising data collected from meetings, hearings, conversations and electronic/hardcopy files. I assured him that the identity of the clients and the cases would be confidential and that I would obtain the clients’ consent to participate where appropriate and necessary. The Senior Partner generally did not have any concerns provided there would be no burden or tasks required of his lawyers and that client confidentiality would be not be jeopardised. I had understood that he intended to discuss the research at a

partnership meeting, though I do not know to what extent this occurred as I of course was not party to those meetings. I had no choice but to leave that to his discretion. After further discussing client confidentiality the Senior Partner agreed to the research. He signed a “Consent Form” which I prepared stating:

*“We understand that Stacy is carrying out research for her PhD thesis regarding construction disputes which may involve interviews, ethnography and/or the collection of data at our firm. We understand that any client data will remain confidential and anonymous and no individual will be identifiable from the collected data, written report of the research, or any publications arising from it.”*

The Senior Partner did not necessarily take issue with the research identifying the name of the Firm in this thesis; however, when carrying out the research, it became clear to me that a further level of anonymity would help to ensure the confidentiality of the individuals involved.

In terms of the other lawyers and their clients, I approached each Partner responsible for the matters which I intended on investigating in more detail and asked whether they would like me to approach the client to obtain consent, or whether they wanted to do so themselves. On the whole the relevant Partners choose to discuss the research with their client. Again, I had no choice but to leave this to their discretion. It was clear that the relationship between the lawyer and his or her client is unique and personal and the lawyers generally were very conscious as to how the relationship was managed, not wanting anything to jeopardise the relationship or upset the client unnecessarily. I did discuss the research directly with a number of clients. In these situations, I explained the purpose of the research and that I would review and observe all documentation and correspondence/conversations when possible, in addition to providing assistance on their case as needed (generally document work). Provided the research did not adversely affect their case, it would not incur a cost to them and both they and their opponent remained suitably pseudonymised, the clients did not have a concern with regard to the research.

It seemed to me that, despite having discussed the academic nature of the research, the clients still viewed me as one of their lawyers. Whilst this perception was generally helpful when conducting the fieldwork, I did appreciate the ethical issues this raises. I therefore questioned to what extent their consent was a fully “informed

consent” (Atkinson, 2015:173; Miller and Bell, 2012) and to what extent I could even establish the boundaries of informed consent (Murphy and Dingwall, 2007). Whilst I did describe the research in as much detail as they would allow (they often were only willing to give limited time to hear about the research) it was clear they did not want to be concerned with it provided there were no adverse effects or actions required of them. I therefore revisited the client’s position continuously throughout the research, almost on their behalf as it were. Continual reflection throughout was essential for issues of consent (Miller and Bell, 2012). As it turns out, there really was never a situation where I considered that the research fieldwork or its findings would jeopardise the clients’ identity or dispute. In this respect, I took great care during the write up of this thesis when describing the disputes and individuals involved, such that events and names are suitably anonymous or pseudonymous. By way of example, in the photographs included in Chapter 4, I used various software packages to ensure that any parties’ names on the lever arch files in the photographs are not readable and that the Firm’s logo is greyed out on the files.

### **Actor-Network Theory**

As described in Chapter 2, the basis of the theoretical framework of this research is the Actor-Network Theory (ANT). ANT is best described as a *method* (Latour, 2005) and indeed I adopt ANT more as a method than as an organising theory in keeping with Latour’s approach to think description ethnography. I therefore include here a brief discussion on ANT in order to contextualise the type and nature of data collected, before turning to the data itself which is discussed further below, and to provide further perspective and background on the methodology implemented in this research – and indeed its link to the theoretical framework.

In order to examine construction disputes and explore the relationship between their identity/definition and their transformation, ANT provides a most useful platform for observing these disputes as it empowers both human and non-human participants to be active entities in the study. It does so by making a *change of scale* a consequence of using organizational as well as material technologies (Latour, 2012:11). Ultimately, ANT places the dispute at the heart of the study whilst enabling a flexible and broad empirical investigation of those entities which shape and develop its outcome.

ANT, developed by sociologists Latour<sup>134</sup>, Callon and Law, holds that entities take their form and acquire their attributes as a result of their relations with other entities (Law and Hassard, 1999; Latour, 2005). In other words, an event or object can only be understood through these associations. ANT takes as a basic assumption that nothing has a reality or form outside of these associations or relations (Law, 2007). As such, this theory/method<sup>135</sup> enables not only those human elements which influence the development and shape of a dispute to be studied (eg the lawyers and the parties in dispute), but also non-human elements (eg evidence, documents and economic factors). This includes the dispute itself - the dispute is a central character in the shaping of its future/outcome. When exploring the nature and characteristics of a dispute, ANT enables an investigation which focuses on those entities which are necessary for a dispute to exist and transform. Researching disputes via ANT is essentially a study of their attributes and *traces*<sup>136</sup> their associations or connectors.

At its most basic level, ANT is a method of describing *actors* and *networks* - or *objects* and *relations*. Actors are objects of all sizes, real or unreal in physical terms, and are black boxes that you can open up to find many more actors hidden within. Each actor influences other actors. Relations, or associations, are formed only occasionally and require a *mediator*, or third entity, to link the actors (Latour, Harman and Erdélyi, 2011). ANT distinguishes between *mediators*, those entities which transform, translate and modify meaning when it comes into contact with another entity, and *intermediaries*, those entities which transport meaning or force without transforming the object itself (Latour, 2005:39).

This approach to social theory seeks to describe why an object or *network* takes the shape it does or behaves in a particular way. It asserts that whenever an attempt is made to define an entity (ie an actor), one must deploy [or recognise] its attributes, that is, its network (Latour, 2010:5). The word *network*<sup>137</sup> is used not simply to designate things that have the shape or characteristics of a net, but rather to

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<sup>134</sup> For an historical account of ANT, see Latour's *"Biography of an Inquiry – About a Book on Modes of Existence"* (Latour, 2012) which discusses the development of ANT and the modes of existence from a biographical perspective. Latour cites *"Unscrewing the Big Leviathans"* as the foundational text of ANT (Callon and Latour, 1981).

<sup>135</sup> Whether ANT is a "theory" is doubtful (Law, 2004:157) and may indeed be more appropriately be classified as a *method*. Nevertheless I discuss its use and relevance here, rather than in the *Methodology* section below, as it is fundamental to the theory and context of disputes/disputing and the basis to the approach of this research.

<sup>136</sup> ANT uses this term to mean *follow*, *map out* or *track* actors and their associations. It is also used as a noun in the context of *"traces left by the formation of groups"* (Latour, 2005:30-34). Here, the term is perhaps synonymous with *evidence*, *residue* or *trails*.

<sup>137</sup> Latour asserts that this is a confusing term with too many meanings and would offer *worknet* or *action net* as a substitute if he thought there would be any chance of it sticking.

*“designate a mode of inquiry that learns to list ... the unexpected beings necessary for any entity to exist”* (Latour, 2010:5). A network is what is *traced [left behind]* by the *translations of scholars’ accounts* or represents a *flow of translations* (Latour, 2005:108,132). It is a *concept, not a thing out there* and is a *tool to help describe something, not what is being described* (Latour, 2005:131). Latour notes the four important features of a network (Latour, 2005:132):

- “a) a point-to-point connection is being established which is physically traceable and thus can be recorded empirically;*
- b) such a connection leaves empty most of what is not connected, as any fisherman knows when throwing his net in the sea;*
- c) this connection is not made for free, it requires effort as any fisherman knows when repairing it on the deck.*

...

*[(d)] a network is not made of nylon thread, words or any durable substance but is the trace left behind by some moving agent...”*

In order to follow an *actor-network*, one must recognise its complete *reversibility*<sup>138</sup>: an actor is nothing but a network, except that a network is nothing but actors (Latour, 2010:5). In this context, an actor is not the source of action, but rather is a *moving target of a vast array of entities swarming toward it* (Latour, 2005:46). As such, this social theory dissolves the individual versus society conundrum (Latour, 2010:9) and champions Gabriel Tarde’s notion that the micro/macro distinction stifles any attempt at understanding how society is being generated (Latour, 2001).

Accordingly, using ANT’s *infra-language*<sup>139</sup>, this research is an investigation into (or rather, search for) the *mediators* of construction disputes, and how they affect the disputes’ development or outcome – construction disputes being actors, networks and a *group formation*<sup>140</sup>. As ANT maintains that an object (or system) is only

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<sup>138</sup> Latour equates this to defining a wave-corpuscle in the 1930s.

<sup>139</sup> ANT prefers to use language or terminology *“which remains strictly meaningless except for allowing displacement from one frame of reference to the next.”* ANT does so as it prefers for the language of actors to be heard rather than the jargon of the sociologist (Latour, 2005:30).

<sup>140</sup> ANT’s first source of uncertainty (*“No Group, Only Group Formation”*) is: with regard to the nature of *groups*, there exist many contradictory ways for actors to be given an identity (Latour, 2005:22 & 27-42). Arguably, though I have used the term *group formation* here (a term used by ANT theorists), *group*, a term more commonly used by sociologist of the social, would perhaps be more appropriate as *construction disputes* is a grouping or category commonly given to those disputes which concern building or engineering projects. It is a pre-

understood through a set of associations with other objects and events - it is these objects and events which warrant scrutiny. ANT therefore enables an investigation of those objects which appear to influence the identity, shape and outcome of disputes. This is explored in Chapter 4 and includes (and is by no means limited to): the lawyer/client relationship, the lawyer's conduct, the objectives of the parties, the evidence and documents available, the time and costs associated with resolving the dispute and the substantive law. ANT was chosen as it provides a robust framework within which to study each of these factors. The theory/method enables a systemic approach to the research<sup>141</sup> in an attempt to find something of value with respect to construction disputes and how lawyers deal with them.

The dynamic interaction between ANT as the basis for the theoretical framework (a framework which is so intrinsically linked to method) and ethnography as the core of the methodology provides a unique perspective on the study of construction disputes and their outcomes.

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established group, set-out prior to the research being carried out. Nevertheless, I maintain the term *group formation* as the research was not limited by the vernacular term "*construction disputes*". The research held true to the method and followed the actors' own ways. The group formation of construction disputes identified in this research is unlikely to equate to the mainstream term used by lawyers in their day-to-day practise.

<sup>141</sup> Or as systemic as is possible given that law is part of the world which is "*vague, diffuse or unspecific, slippery, emotional, ephemeral, elusive or indistinct, changes like a kaleidoscope, or doesn't really have much of a patter at all*" (Law, 2004:2).

## 3.2 The Data

### **Fieldwork and Data collection**

As introduced above, the fieldwork was conducted over the course of approximately 18 months. It consisted primarily of participant observation and data collection for quantitative analysis.

#### ***Participant Observation***

The primary focus of the research concerned participant observation of all of the Firm's activities, namely: lawyer/client discourse (telephone conversations & meetings), lawyer/lawyer discussions and meetings in the office, lawyer/expert discourse, lawyer/client/other side<sup>142</sup> interactions (telephone conversations & meetings) and dispute resolution procedures (litigation/arbitrations hearings, mediations, etc).

The participant observation was not confined to a particular partner or specific case within the Firm. On the whole, I had access to all matters – a 'matter' being the term the Firm uses for an individual case or dispute for a particular client.<sup>143</sup> Accordingly, this ethnographic study encompassed a wide typology of construction disputes in addition to a wide range of dispute resolution procedures.

#### ***Collection of data for quantitative analysis***

In addition to participant observation, the fieldwork included the collection of data from both the Firm's current files (electronic and hard copy files) as well as its archives stored off-site. The files generally consisted of lawyer/client correspondence (emails/letters of advice/bills/etc), client documents, inter-party correspondence and formal documentation such as pleadings, court forms, applications/notices, etc.

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<sup>142</sup> A term used by the lawyers when referring to the party (and their legal representatives) who their client considers is responsible for the creation of a dispute (or potential dispute).

<sup>143</sup> However, if a matter had been archived it was more difficult to research as it required retrieving boxes of files from an off-site storage facility. Nevertheless, most of the Firm's information is stored electronically, particularly for matters commenced within the past 10 years and therefore most archived cases will have at least some information available electronically.

Furthermore, there were some cases which I was not able to access either because: (1) the nature of the case was so confidential that those working on it required security clearance of some kind; and/or (2) there were conflicts/information screens in place which prohibited accessing data.

This data supplemented the information gathered from participation observation on particular matters, as well as provided information for quantitative analysis of 50 specific matters within the Firm (see “Matter Database” below). Collecting/researching this data was particularly useful on those matters which commenced several months or even years prior to when I began the study. It provided me with a historical account of: the procedures followed, the trajectory of the disputes and, at times, an insight into the relationship between the lawyer and client. Lawyers were not always available (or willing) to take the time to provide a detailed chronology of the dispute. Accordingly, the ability to research the Firm’s files greatly assisted in my general understanding of what took place previously.

Furthermore, as field notes taken during the course of participant observation are inevitably ‘selective’ (Emerson, Fretz and Shaw, 2001) in that the ethnographer writes about certain things that seem significant and leaves out other matters, the quantitative data gathered from the Firm’s files provided a further account and data which is less subjective. It also offered a further factual account, irrespective of whether I found it significant, from a different point of view or perspective – one which I was not able to choose or construct.

This quantitative method complements the qualitative information obtained from participant observation and ‘*should be viewed as a complementary rather than rival camp[s]*’ (Jick, 1983). A combination of qualitative and quantitative research methods may be pursued either to obtain knowledge about the issue of the study which is broader than the single approach provided or to mutually validate the findings of both approaches (Flick, 2009). Here, the use of two methods provided a broader understanding of the nature of disputes and assisted in identifying those factors which appear to influence their shape and outcome.

The use of these qualitative and quantitative methods resulted in: (1) the production of field notes; and (2) the creation of the “Matter Database”.

### **Field notes**

In 1922, Bronislaw Malinowski, the grandfather of ethnography, called for an ‘*absolutely candid and above board*’ manner with respect to the description and presentation of methods used in the collection of ethnographic material (Malinowski, 1922) – later coined as ‘data transparency’ (Madden, 2010). In order to achieve this necessary transparency, field notes are vital to the research.

The type of field notes generated during the participant observation was dependent on the circumstance and how much I had participated or witnessed. They can be categorised as either “*general notes*” or “*specific notes*”.

### **“General notes”**

By “*general notes*”, I refer to those field notes taken which may not relate to a specific matter, but rather, describe the research setting or the general experience of the daily life in the Firm. In addition, *general notes* are those which I was not able to determine which matter the conversation or event related to. By way of example, on one occasion, I overheard a partner discussing a case with an assistant solicitor as they entered the partner’s office. It became apparent that the assistant solicitor was drafting a response to the ‘other side’ either in the form of a pleading or letter:

- |                   |   |
|-------------------|---|
| <b>Partner:</b>   | How does that help our Defence? Why are we referring to that subcontractor?   |
| <b>Assistant:</b> | That is the subcontractor who supplied the defective adhesive.  |
| <b>Partner:</b>   | How does this assist us?  |
| <b>Assistant:</b> | It doesn’t, but I just wanted to show that a contribution could be made from this subcontractor. I can take it out if you like... |

The above conversation is clearly only a snippet of a larger conversation; however, it seems to suggest that lawyers may create a somewhat virtual environment (either correctly or incorrectly) by choosing which facts to include or exclude in a submission (ie, a Defence). As this conversation appeared interesting at the time and perhaps could contribute to a better understanding of the trajectory or resolution of disputes, I quickly transcribed the brief exchange. As I had no knowledge of which matter this referred to, I simply recorded it and filed it under *general notes*.

### **“Specific notes”**

By “*specific notes*”, I refer to those field notes taken which relate to matters I was either familiar with or knew which matter the conversation or event related to. During the course of the fieldwork, I closely followed approximately 50 cases, attending meetings and assisting the relevant partner in charge as necessary. For these cases, where possible, I took notes of specific conversations between: the lawyers in the Firm, the lawyers and their clients and the lawyers and their opponents (ie, lawyers for the ‘other side’).

I also took notes of meetings and hearings. Furthermore, I took notes on documents, emails and letters. I essentially took notes on every aspect of the case that the Firm was party to and in which I was in attendance. As I was aware of which case I was recording, I considered these notes to be “specific” to a particular dispute/matter.

For each field note, where possible, I attempted to code each one with applicable key words if relevant. When I first began the field notes, these key words were merely descriptors of what the event or conversation concerned. As the research progressed, clear and recurring themes or descriptors emerged as I was able to code my notes more effectively. This enabled the notes to be categorised and organised for use during the analysis of the fieldwork. By way of example, some of the key words used include:

<i>translation</i>	<i>communication</i>	<i>reacting to the client</i>
<i>double translation</i>	<i>costs</i>	<i>outcome</i>
<i>creative translation</i>	<i>facts v opinion</i>	<i>evidence</i>
<i>legal v technical</i>	<i>no dispute</i>	<i>strategy</i>
<i>searching for facts</i>	<i>what is the dispute?</i>	<i>selection of dispute resolution method</i>

I by no means limited the field notes to events which fit the emerging key words. As my aim was to create a full ethnographic ‘description’ of the lawyers and the disputes, something which is most difficult to do as “*it requires so much metaphysics just to find the right description*” (Latour, Harman & Erdélyi, 2011), I simply took notes where possible and without tailoring or choosing their subject matter. This of course resulted in many field notes which were not as informative as others.

The field notes varied in both length and nature. Some notes were 20+ pages of hand-written or typed notes taken during meetings, hearings or on telephone calls. Other notes were only several lines, or only several words, of hand-written text when say I manually noted a brief exchange between two lawyers as they passed in the corridor. Accordingly, I generally took field notes during the event or shortly thereafter. At times it was necessary to generate field notes at the end of the day, though this was limited where possible. Digital recording generally simply was not possible and therefore I was not able to employ this method of documentation. There were certain circumstances which presented themselves where a recording was possible or available, as some lawyers record events for their own purposes (eg the taking of a witness statement). However, as on the whole this was not an

available option, and in order to maintain the façade of the “insider”, I chose not to utilise digital recordings in this research.

### **Matter Database**<sup>144</sup>

As introduced above, the field work also included the collection of data from both the Firm’s current files as well as its archives on 50 of the Firm’s contentious matters. This data formed the basis of the “Matter Database” – a spreadsheet capturing detailed information on the disputes and the parties involved. Please see **Appendix 1** for an overview of the database.

I selected the 50 matters included in the Matter Database primarily on the basis of access to information and access to the lawyers involved. The selection of the matters was random to a certain extent – I did not seek out cases which had particular qualities, partners or issues in dispute. The selection was principally on the basis of what matters were in the office at that time and whether I had sufficient access to the data. For 86% of these matters (43 of the 50 matters) I was afforded the opportunity to closely follow, observe and/or participate on either a part of the matter or for the whole duration of the matter. For the other 14% (7 matters), I gathered the information from the Firm’s files and archives and had informal discussions with the lawyers involved if possible.

The matters included in the database range in size (value of the claim), duration, complexity, type of dispute resolution procedure invoked and nature of the parties. They are not specific to one partner, nor do they include a matter from each of the 14 partners: they concern 9 of the 14 partners. The matters selected are representative of the cases the Firm takes on, but by no means represent the sole extent of the services provided by the Firm.

For each matter, information such as the type of client, the typology of the parties, the type of dispute, the methods of dispute resolution employed (or attempted) and the duration of the dispute is recorded.

The Firm identifies each matter by a unique number. In addition, clients are also allocated a unique number. Accordingly, where one client instructs the Firm for different disputes say on different projects (most likely a “repeat-player”), the client number will remain constant and a unique number is applied to each new dispute.

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<sup>144</sup> The word “*matter*” is used as not all of the cases followed will be ‘disputes’ per se (Felstiner, Abel and Sarat, 1980-1981). In addition, this is the terminology the Firm uses to describe each case.

This assists the Firm on a number of levels including the management and billing of both clients and their documents.

In order to preserve the anonymity of the clients and confidentiality of the cases, client and project names have been generalised in the database. In addition, I have not referred to the Firm's unique matter number when referencing the case, but have instead re-numbered the matters (Nos 1-50) to maintain further privacy and confidentiality. By way of example, the following is a reference to one of the matters in the database:

**Matter No 47 [*Final Two Invoices*]**

The label, '*Final Two Invoices*', aims to assist the reader in identifying the matter as a number of matters are discussed several times throughout the thesis to exemplify the themes and conclusions which have emerged from the research. The label is brief description of the issues or dispute concern and attempts to act as an aide memoire.

The following is a list of statistics generated from the matters included in the database:

**MATTER DATABASE STATISTICS:**

<b>Number of matters</b>		50
<b>Number of clients<sup>145</sup></b>		39
<b>Number of repeat player clients (RP)</b>		22
<b>Number of one-shotter clients (OS)<sup>146</sup></b>		15
<b>Typology of the parties<sup>147</sup>:</b>		
OS v OS		4
RP v OS		4
OS v RP		5
RP v RP		26
Unknown		11

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<sup>145</sup> Nine of the Firm's clients had more than one matter in the database.

<sup>146</sup> I was not able to confirm the nature/status of two of the clients (ie whether they were a repeat player or a one-shotter).

<sup>147</sup> As I often had little contact or no contact with the other side, these figures are based on my perception and knowledge of the other side. For some parties, I was aware that they had been involved in disputes/proceedings previously. Where I simply had no knowledge of the other side, I classified the typology of the parties as "unknown". The "unknown" category also includes the two matters in which I was not able to confirm the nature of the Firm's client.

<b>Type of clients:</b>	
Employers	4
Developers	2
Contractors	24
Subcontractors	12
Consultants	2
Government Bodies	1
Individuals	5
<b>Position of the client:</b>	
Claimants	29
Defendants	21
<b>Value of Claim:</b>	
£0 - £9,999	3
£10,000 - £99,999	14
£100,000 - £999,000	16
Over £1 million	10
Not applicable or value unknown	7
<b>Duration of matter<sup>148</sup></b>	
0 – 6 months	22
7 months – 1 year	8
1 – 2 years	3
2+ years <sup>149</sup>	7
Unknown <sup>150</sup>	10
<b>Dispute resolution procedure<sup>151</sup>:</b>	
Negotiation	43
Mediation	6
Adjudication	14
Arbitration (domestic)	3
Arbitration (international)	4
Dispute Boards	2
Litigation	17
Other tribunals	1
None	1
Unknown	5
<b>Matters which employed Counsel</b>	<b>18</b>
<b>Matters which engaged experts</b>	<b>16</b>

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<sup>148</sup> The period of time was calculated from when the client instructed the Firm – not from when the client or the parties considered that a dispute had arisen.

<sup>149</sup> These disputes include those which were “resolved” after two years from when the client instructed the Firm, as well as those disputes which are still ongoing and not “resolved” during the course of the fieldwork.

<sup>150</sup> The duration of these disputes are unknown for a number of reasons: (i) the Partner left the Firm and took his client and the matter with him; (ii) I was not able to determine the outcome or duration of the matter from the Firm’s archives; (iii) the client did not report back to his lawyer/the Firm as to the outcome of the dispute; and (iv) the matter is still ongoing (and under two years at the time of writing).

<sup>151</sup> On the whole, each matter involved more than one dispute resolution procedure.

With regard to the nature of the 50 matters/disputes in the database, they included issues of payment, defects, delay, employment, land and negligence. Please see Chapter 1.3 (“Construction disputes”) for a further description and analysis of the disputes included in the Matter Database.

The purpose of the Matter Database was to complement the information gathered from the participant observation. This often enabled a detailed and deeper understanding of the issues concerned, the history of the matter and the actors involved. In addition, as the database included a diverse and wide-ranging set of clients and matters (illustrated in the statistics above) this afforded a better appreciation as to the basis of the themes and conclusions drawn from the participant observation.

## CHAPTER 4

### A CONSTRUCTION DISPUTE: THE ASSOCIATIONS

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*The actions which ensued over the course of four months developed the nature of the dispute.*

*Immediately after their initial meeting Mr Hunter and Mr Cahill exchanged further emails and telephone calls to finalise the strategy and next steps.*

**The Client** ...Thank you for your time yesterday... I have spoken to my business partner and we would like you to act on our behalf. I truly believe that they don't want to go to court over this as they have a pretty weak case and they run the risk of accumulating huge legal costs should this go to court. I hope that seeing you act for us will send a message that we mean business and we have gone to specialists to put this to bed.

We briefly went over costs and unfortunately this is a big factor for us as we are a small company which is already hurting from the ongoing costs from the legal process.

You mentioned £5k to get things started, would it be possible to get back to me with where this would take us as I think that it may be the case that instructing you to act on our behalf and some pretty aggressive letters may be enough to bring this to a close or at the very least bring in an improved offer...

**The Lawyer** ...Further to our conversation yesterday and your email below, our initial £5k fee is likely to include the following:

- Reading in (the documents you have sent, thank you, plus any further document available);
- Providing you with an appraisal of the merits of your case – including advice as to strategy on the way forward, the likely costs/timetable going forward (if the case continues in Court) and your query regarding summary judgment;
- Going on the record as acting for you (which includes sending a notice to both Structures Ltd and the Court); and
- Conducting settlement negotiations (which probably will include a strong, open letter to Structures Ltd, followed by a series of Without Prejudice letters).

At this point, it is difficult to confirm what else the initial fee might include. It really depends on how Structures Ltd responds to our initial letters/moves. It may be that the dispute can be concluded within a few letters in which case your costs will be more in the region of £2k or £3k. Equally, the £5k could also include part of a mediation (if any) or the next steps in the proceedings (disclosure/witness statements)...

*In due course, Mr Hunter advised Mr Cahill that an application for summary judgment was possible, but it was by no means “a sure thing”. As Mr Cahill was not willing to take the risk of liability for the legal fees in the event that it was unsuccessful, Mr Hunter dismissed this option. On this same basis, Mr Hunter also advised it was not worth considering adjudication given Mr Cahill’s position on costs.*

*Ultimately Mr Hunter and Mr Cahill agreed that the strategy was to settle the dispute as quickly as possible by mediation, if Structures Ltd were willing to attend.*

*To encourage Structures Ltd to mediate, Mr Hunter recommended first sending a series of “strong” letters reasserting the strength of the claim and introducing further legal arguments which to date had not been included. After this, Mr Hunter then would send the offer to mediate.*

**The Lawyer:** I appreciate you want this over with as quickly as possible, but for this to succeed, you need to mediate from a position of strength – and we need to create this impression first.

**The Client:** Fine, I will do whatever you suggest.

What makes a disputes move in a particular direction? Why does it develop the way it does? Latour distinguishes between *intermediaries*, those entities which transport meaning or force without transforming the object itself, and *mediators*, those entities which transform, translate and modify meaning when it comes into contact with another entity. In other words, mediators “*make others do unexpected things*” (Latour, 2005:39,106). In essence, one of the goals of this research is to find out just what makes a construction dispute do what it does – what are the *mediators* which influence a dispute’s trajectory?

By way of example, looking at the extract from the case of *Columns & Beams Ltd v Structures Ltd* above, Mr Cahill’s objectives and position in respect of risk and legal costs was a significant factor influencing the direction of the dispute. In addition Mr Hunter’s view on the strength of Mr Cahill’s legal position clearly fueled the basis of his legal advice and suggested next steps. The costs of the legal processes, the client’s objectives and the lawyer’s advice are beginning to characterise the dispute in a different light and force it in a particular direction: these *mediators* are beginning to *make* the dispute take a particular shape. Indeed, we see the lawyer suggesting the need for a new “impression” of the dispute: to present the dispute differently and to have the dispute be perceived differently. To do so he intends to introduce further legal arguments which have not been raised previously between the parties with the intention that the dispute’s direction changes course and ends up in mediation, rather than continuing along its current path (this being litigation before a judge).

This chapter considers those entities identified during the course of the research which behaved as *mediators*, causing disputes either to develop, to disintegrate or to act in a particular way by the very relations or associations they create. The mediators are both human and non-human actors, but nevertheless each influenced the development of the disputes, shaped their identity and had an impact on their outcome. This was evident by the traces they left behind and the way in which the disputes transformed. Without these entities, associations would not have been made and the disputes would not have taken the shape they did, or perhaps even have existed at all. As will be demonstrated in this chapter, disputes are dependent and contingent upon an assembly of these associations.

The mediators which formed associations during the course of the research broadly fall into five categories:

- 4.1 Documentation & Evidence
- 4.2 Lawyering (communication & translation and conduct)
- 4.3 Costs
- 4.4 Client's Conduct & Objectives
- 4.5 Substantive Law

This list of course is by no means a conclusive list of entities which influence disputes; however, these five appeared to have the largest impact on the cases studied in this research. Either one or more were evident in most, if not all, of the cases – none of them were confined or specific to any one particular matter and/or lawyer. These mediators were apparent in disputes of high or low value, with both repeat player and one-shotter clients and with both individual as well as corporate clients. No dispute witnessed seemed to escape one of these five.

To begin, I start with “the document”, the one unavoidable entity in any dispute.

## 4.1 Documentation & Evidence

When considering the physical landscape of the Firm, one object certainly could not be overlooked: document files. They were everywhere.

*“What is more grey, more dusty, more worthy of contempt than piles of files?”*

(Latour, 2010 [2002]:70)

Even with society’s apparent aim for the “paperless office”, the Firm was nonetheless filled with them: correspondence files, client documents, trial bundles, research files, etc. They lined each office and each corridor – from floor to ceiling – and were shoehorned into any available space. By way of context, below are four photographs of client documents within the Firm:



**Photograph A:** Client documents in temporary box files, shoehorned into empty space above a cupboard. Client documents are also stored in the cupboards which line the corridor.



**Photograph B:** Client documents in the “trial-prep room” – all of these documents are in support of one particular matter.



**Photograph C:** Client documents behind a lawyer’s desk.



**Photograph D:** Again, client documents in temporary box files, shoehorned into empty space above a cupboard in the corridor. Client documents are also located in the storage box in the foreground, waiting to be shipped off to the off-site storage facility.

On top of this, archived documents were kept off-site in a secure location, managed by a commercial document storage company. In addition, electronic files also consumed vast amounts of virtual space in the Firm and were dealt with by a sophisticated document management system. Of the various types of files and documents which the lawyers and the Firm dealt with, created and stored, it was the *client documents* (those documents which the client provided to his lawyer) which consumed a considerable amount of time, energy and space. The lawyers poured over these documents, if and when available, to determine their advice to their clients and strategically used them in, and *for*, their course of dealings.

In summary, as will be discussed below, the data revealed that the documents themselves and how lawyers dealt with and perceived them was fundamental to provision of their professional services and the identity and outcome of the dispute. They influenced *how* and *when* the lawyer carried out his professional service and in turn their significance and meaning were determined by this professional service. This reciprocal relationship had implications for the outcome of the matter as the

dispute evolved based on these professional services and the perception of the parties.

The following first examines the nature *documents*, particularly in the context of client documents utilised in construction disputes. In doing so, narrative examples from the research as to how lawyers dealt with these documents are considered. This reveals how lawyers *review*, *reassemble* and *reconstruct* these documents, and the events to which they relate, when dealing with their clients' case. Documents are employed to reassemble past events – how and when the lawyer receives them may influence how their professional services are carried out. Secondly, using illustrations from the research, the following then considers how lawyers in turn influence the significance and meaning of these documents when carrying out this professional service. In this reciprocal relationship we see that lawyers utilise documents as tools in an attempt to manage their clients' position in negotiations and in formal proceedings and to define and identify the dispute in the best light possible for their client. I argue that this elevates the document to that of a *fluid commodity* in order to shape the trajectory and outcome of a dispute.

### **Client documents**

What is a *client document*? On the face of it, this is perhaps a mundane question with an obvious answer: a document or piece of evidence which the client provides to his lawyer to be used when dealing with the case and in evidence. However, when examining the role of lawyers and tracing disputes involving construction projects, it is clear that the definition of a *client document* is much wider than one might expect.

A *document* is, ordinarily, a *textual record* (Buckland, 1997:804). In the context of litigation, CPR r.31.4 supports this wide definition: '*document*' means *anything in which information of any description is recorded*. One might reasonably expect say letters, emails, reports, photographs, videos, text messages and social media to be included in this definition. Indeed in the context of construction disputes and litigation, the documents which clients put forward to explain and evidence their case include, but are not limited to: project meeting minutes between the contractor and the consultants, contract and tender documentation, emails and correspondence, site labour records, supplier/subcontractor invoices and payment records, etc. Drawings and photographs are also important client documents as they may evidence delay, disruption and/or defects. It is not difficult to see how drawings and photographs are included in the category of *client documents* - indeed this convention grew out of American documentalists who defined *documents* as '*graphic*

*records* or *'any expression of human thought'* in order to include pictures and other audio-visual materials (Buckland, 1997:805).

Further historical definitions of *documents* encourage a wider reading of the term. In 1934 Paul Otlet asserted that *objects themselves* can be regarded as documents if one is informed by the observation of them – he cited artifacts, educational games and works of art as examples (Otlet, 1934:217). Suzanne Dupuy-Briet, a librarian and documentalist from 1924 to 1954, defined a *document* as “*evidence in support of a fact*” and “*any physical or symbolic sign, preserved or recorded, intended to represent, to reconstruct, or to demonstrate a physical or conceptual phenomenon*” (Briet, 1951:7). Briet discusses how an antelope running wild on the plains of Africa should not be considered a document. However, in contrast, an antelope which has been captured, placed in a zoo and made to be an object of study is a document (Buckland, 1997:806).

Similar to Briet’s antelope, where disputes in the construction industry concern delay, defects or workmanship issues, the project itself (eg, the building, the bridge, the roof extension, etc.) becomes a critical document which lawyers and experts scrutinise in order to shape their clients’ argument. It is an essential record of the events which took place and is most crucial in terms of evidencing the claim and the shaping of the dispute.

This is exemplified in **Matter No 7 [‘Additional Works’]** where the documents involved played a significant role in the evolution of the dispute after proceedings commenced in court. This case concerned a dispute between a main contractor and the building owner which ultimately found its way into the Technology and Construction Court. The issues at the outset of the litigation were wide-ranging and included delay, defects and contract interpretation arguments. After the parties’ lawyers had exhausted their arguments in correspondence and pleadings, a mediation was agreed. Both in preparation for and during the course of the mediation, many of the issues which had been hotly debated previously were parked to one side and the primary issue essentially boiled down to “*What were the defective works?*” Each side disagreed as to what was defective. Investigations of the building and the building’s components by experts on both sides had been ongoing both prior to and during the course of the proceedings. Accordingly, similar to Briet’s antelope, the building itself and its defects became *documents* which each side analysed as an object of study and which formed the basis of their arguments, both in the litigation and in the mediation. The contractor’s and the building owner’s interpretation of the

building components (as either defective or not) were evidence in support of their respective claims, and the identity of the dispute transformed as the parties agreed and disagreed on the defects and the state of the building. Photographs were not used as there were hundreds of components in dispute which required inspection (this requiring more scrutiny than a photograph could capture) and, in certain circumstances, additional testing.

**Matter No 7 [*Additional Works*]** also illustrates how the potentially ambiguous nature of documents involved in construction projects fuels disputes. Here, whether a building element was defective, or failed to comply with the specification, was dependent on each party's interpretation of the original scope of works/specification, along with one's definition of '*defective*'. If the technical requirements set out in the drawings, specifications and statutory requirements had been clear and unequivocal, arguably this would have minimised the development of the dispute. However, the parties disagreed as to the meaning of the documents, these being both the building defects and the hardcopy documents used on the project (eg, drawings, specifications, contract obligations, instructions, change orders, meeting minutes, emails, etc). The building owner argued that the contractor was obliged to construct further works than he had done and that certain works were defective, whereas the contractor argued that he had already gone beyond the contracted scope of works (as determined by the contract documents) and that the alleged defects either were not defects or were minor and still in accordance with standard building workmanship.

The potential for multiple interpretations in documentation (contract documentation or otherwise) is ripe in the construction industry and seemingly the basis of many disputes observed in this research. This was particularly so if the documents contained ambiguous or conflicting terms, were taken out of context or were difficult to view (eg, in the case of building works which have been covered up). Equally disputes evolved as parties had different expectations of what was to be built, these expectations having been derived from vague, incomplete and/or conflicting contract documentation.

In most, if not all, of the disputes the clients provided their lawyer with a wide range of documentation, both electronic and hardcopy. In some of the disputes the documentation amounted to several terabytes of data. Considering that a number of cases concerned documentation which was complex, contradictory and/or countless in number, I suggest many lawyers would agree with Latour's assertion that

documents are “*the most despised of all ethnographic objects*” (Latour, 1988b:54). Nevertheless, regardless of the quantity or nature of the client documents, lawyers interpret and *translate* (Cain, 1979) the information provided into their own “legal” language (see further Chapter 4.2 below). However, before doing so, they must manage and scrutinise these documents. In addition to the document itself, the manner in which lawyers deal with these document, and indeed how these documents are provided to them, influences the trajectory and outcome of the dispute.

### **reReview, reAssemble & reConstruct**

How lawyers deal with and manage client documents depends on the manner in which the documents are provided to them. The research revealed two situations:

**Category 1:** Circumstances in which the client selected and provided the lawyer with apparently all relevant documents at the outset and then, for various reasons, further relevant (and necessary) documents subsequently surfaced.

**Category 2:** Circumstances in which the client provided the lawyer with all documents (whether relevant or not) and the lawyer subsequently selects, in his opinion, the ones required.

### **Provision of client documents: Category 1**

Category 1 situations are those matters in which the client did not provide all necessary documents from the outset and therefore the lawyer’s professional services were carried out in an iterative manner. By *outset*, I mean either at the initial instruction of the lawyer or whenever it was agreed that the documents should be provided. Often the lawyer would request from the client all documents which are relevant and essential for him to provide initial advice. If the matter continued to court or arbitration, the process of disclosure, the mainstay of the corporate litigator’s work (Brazil, 1980; Kirkland, 2012:153), of course requires a wider search and clients are required to identify all relevant documents, which both help and hinder their case. Category 1 also includes these matters which subsequently endure disclosure as the process of the client carrying out this further search is itself iterative in nature.

In general, on receipt of the documents, the lawyers reviewed the information and began to *assemble* their understanding of the past events based on the information

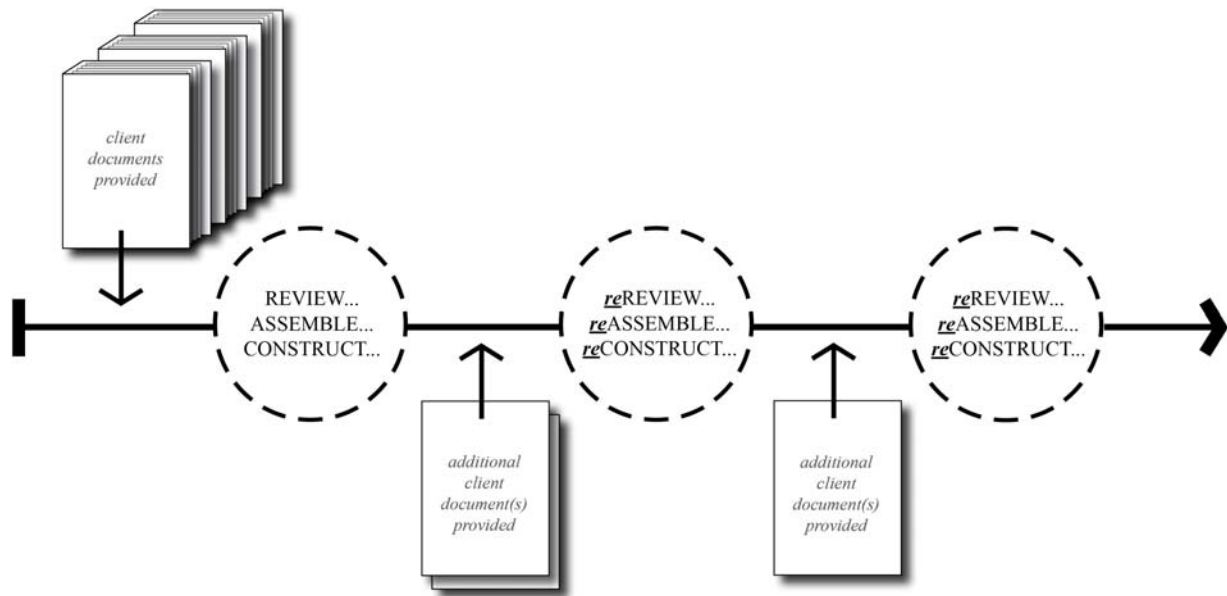
provided. Having done so, they then *constructed* their client's case/argument – providing advice and taking instructions as to how to proceed. As Duffy Graham notes, lawyers simply do not take documents on face value, they translate the information, to the extent that they can, for their particular purpose (Graham, 2005:4)

*“The litigator does not take information obtained through discovery and from other sources at face value. The litigator seeks to give the information meaning, possibly even by challenging what it appears to mean. In litigation, a fact is not a fact until the court says it is – a statement, a document, an event does not have legal consequences until the court find that it does...”*

Subsequently, further documents surfaced. This was either as a result of the lawyer's request for further documentation in respect of a particular issue, or the client simply was able to locate further relevant documents for whatever reason. In some matters, the client had not understood what was relevant or required at the outset, or had misunderstood the lawyer's request. In other matters the client only wanted to provide the lawyer with the essential and minimal documentation as they felt this would minimise their costs.

Owing to the new documentation received, the lawyers had no choice but to *re-review* the further documents, and the collection of documents as a whole, *reassemble* their understanding of the past events in light of the new information and *reconstruct* their arguments (as necessary). In many cases, this process of document discovery was ongoing and continued throughout the duration of the lawyer/client relationship, resulting in an iterative process for the construction of the case.

The illustration below depicts, in general, the process described above:



**Figure 7**  
**Category 1: Additional Client Documents Surface**

In any event, when dealing with client documents and navigating through the process of disclosure - *the trench warfare of litigation* (Graham, 2005:4) - lawyers regularly interpret documents and make decisions which call into question what is true and who might have information that would shed light on the truth (Kirkland, 2012:152-153). They spend their time “*both challenging and constructing apparent meaning by assiduously examining context*” (Graham, 2005:6), the client document being the first and foremost piece of evidence documenting that context.

By way of example, in **Matter No 7 [‘Additional Works’]** (the main contractor/building owner example discussed above) the client provided documents to his lawyer in a Category 1 manner. Here, when the client (the main contractor) initially approached the lawyer, he explained his version of the dispute: the building owner had denied him access to the site to complete the works and his claim for additional monies had been rejected. The client provided the documents he deemed relevant. The lawyer *reviewed* these documents (the building contract, drawings, schedules, etc. which amounted to several boxes of hardcopy files) and *assembled* the past events based on the information available. He then *constructed* the legal argument and advised the contractor to commence proceedings in court for a claim worth approximately £600,000 as building owner had refused to engage in settlement negotiations. When the proceedings commenced, the building owner eventually served a counterclaim for over £1.6m for some 250 defects in the

building. Prior to this, the client had informed the lawyer that defects did exist, though he had not been clear on their extent and the lawyer as a result was unaware of the possibility of such a significant counterclaim: either the client had not been clear or the lawyer had not fully appreciated or understood the information the client had conveyed to him. Following further investigations by the expert witnesses during the course of the proceedings, it came to light that some of the defects were substantial and, if substantiated, allegedly each worth over £1m in their own right. As a result, the lawyer *re-reviewed* the documentation, *re-assembled* the past events and *re-constructed* their legal argument. Notably, deciphering how the client perceived the defects against how their experts perceived the defects was no small task for the lawyer. Certain documents were not available or simply lost and the experts disagreed with the client's employees on certain items. Assembling the past events (ie the correct version of the story) was not straight forward as a complete picture was not always available.

Ultimately the parties proceeded to mediation. Immediately before and even during the mediation even further documents surfaced (eg emails and letters) which the lawyer again took into account and *re-assembled* and *re-constructed* the argument and negotiation strategy. Eventually the parties did reach a settlement agreement.

Had the documentation regarding the defects in the building been available from the outset, the lawyer may have advised a different course of action. This became evident during the mediation. On Day 2 of the mediation, the lawyer and his clients were idly chatting whilst the mediator was in the other room consulting with the building owner. They reminisced on the events and proceedings of the last two years:

<b>The Client:</b>	What a mess this is. These works are going to cost us hundreds of thousands of pounds.
<b>The Lawyer:</b>	Yes - had I known of the true state of the works, we would never have commenced proceedings...

The client and the lawyer were referring to the defects which were under discussion (those which were allegedly the fault of the contractor). Prior to commencing proceedings, clearly the lawyer (and potentially even the client) had not appreciated the extent of the defects, what was required to put them right and, therefore, the complexity of any counterclaim.

In this case, at the outset of lawyer/client discourse the perception and nature of the dispute was based on the documentation available and the interpretation of that documentation. These documents therefore established the initial shape of the dispute and on one level caused the commencement of proceedings. As the pleadings and further evidence unfolded, this perception of the dispute, the dispute itself and ultimately how they dealt with the dispute transformed and evolved into a much different dispute.

A further example of a Category 1 situation is **Matter No 11 ['Façade Defects']**. This case concerned a dispute between a main contractor and a subcontractor in respect of a defective cladding system. The parties eventually referred the dispute to arbitration and a preliminary issue hearing concerned the validity of an alleged settlement between the parties a number of years.

The lawyer assisted his client, the claimant main contractor, with two witness statements during the proceedings which concerned this alleged settlement. One of his client's witnesses claimed in his statement that he had attended a meeting in September in relation to the alleged settlement. This accorded with the respondent subcontractor's version of events. The client's other witness was certain that this alleged September meeting had *not* occurred and that neither of them had attended. The two witnesses could not agree. Indeed, one witness swore blind that he had attended while the other produced documents to demonstrate he certainly could not have attended on that day as he was out of town. Accordingly, the lawyer had to *assemble* a version of events which reconciled this information and then *construct* an argument. He had to *reconcile multiple, competing accounts of the dispute in a way that ... achieve[d] the client's ends, without obstructing the process or thwarting the goals of the system* (Kirkland, 2012:152).

After the witness statements were exchanged with the other side, the client's witness then realised that he too could not possibly have attended a meeting in September as he too was not in the country that week. He admitted that his previous recollection must have been incorrect. He provided documents in support (eg, diaries, passport, a witness statement from his travelling companion, etc).

This caused the lawyer to *re-review, re-assemble* and *re-construct* the events and legal arguments. As a result, a round of supplemental witness statements was required – incurring further costs to the client.

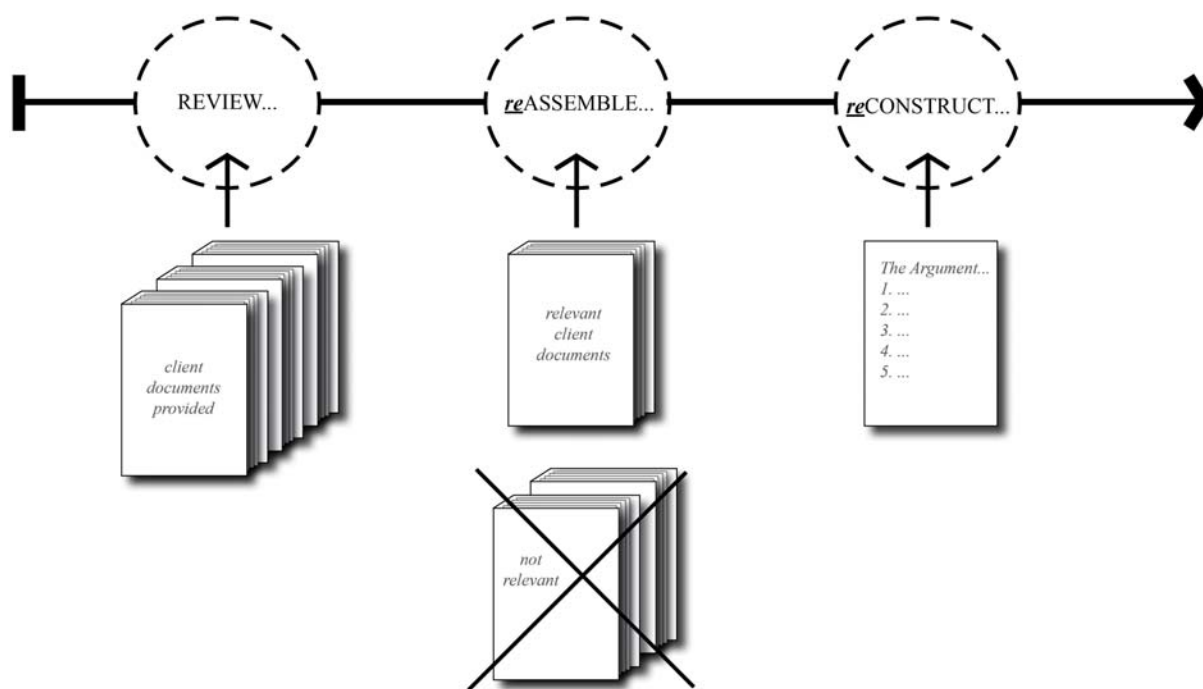
*Reviewing, assembling and constructing* are part and parcel of the lawyer's professional services. The exact timing of the *re-reviewing, re-assembling* and *re-constructing* may influence the outcome of the dispute and whether or not further costs are incurred. In **Matter No 7 ['Additional Works']** the identity of the dispute and the lawyer's strategy for the proceedings was significantly influenced by the iterative provision of documents. In **Matter No 11 ['Façade Defects']** the iterative provision of documents/information affected the factual argument and again resulted in further costs to the arbitration. Either way, the documents caused the disputes to morph and take on a new form or perspective.

### **Provision of client documents: Category 2**

Category 2 situations are those matters in which the client provided the lawyer with all documents (whether relevant or not) and the lawyer, in carrying out his professional services, subsequently assisted in selecting those required. In these situations, the lawyers *reviewed* all documents provided and then both physically *reassembled* the documents which were relevant/required and also conceptually *reassembled* a version of the past events based on the documents available. They then *constructed* or *reconstructed* the legal argument – just as the lawyers did in Category 1 situations.

By selecting the documents required, the lawyers assigned meaning or value to particular documents – giving the document a significance which it perhaps did not have previously.

The illustration below depicts, in general, the process described above:



**Figure 8**  
**Category 2: Lawyer Selects Relevant Documents**

Matters concerning complex issues or large disputes are one example where lawyers tend to be intimately involved in the disclosure process and therefore are confronted with all of the client's documents from the outset. Two matters observed concerned disputes where the amount claimed was well in excess of £100 million. One matter was in arbitration and the other was in the TCC. In both instances the clients provided the lawyers with access to all of their documents (both electronic and hardcopy). When complying with the court's/tribunal's requirements for disclosure, the lawyers reviewed each document, identifying it as '*relevant*', '*not relevant*' or '*privileged*'. If relevant, they often assigned further labelling to the document to associate it with a particular legal or factual issue to which it pertained.

On both matters the lawyers (and paralegal team) reviewed literally thousands of documents. By identifying those documents which were relevant, the lawyers actively selected and *reassembled* those events which were important to their argument. Of course all documents whether they helped or hindered the case had to be disclosed under standard disclosure (CPR r31.6), but nevertheless in choosing those documents which best supported their case they were able to reassemble the events/facts in a light most conducive to their client.

On another matter, the client's documents totalled seven million. Here, the lawyers, in conjunction with the client's paralegal team, were required to devise a strategy to retrieve and review the necessary documents from the millions of documents housed on the client's server in order to establish the strengths and weaknesses of the case and formulate the claim. The active selection of the documents assisted the lawyers in the establishment of facts:

*"At the beginning of every case, no facts are assumed or given. The litigator seeks to establish facts that support the client's legal arguments. He also seeks to prevent the establishment of facts that would support the other party's legal arguments..."*

(Graham, 2005:3-4)

By *reassembling* the facts from the documents found and selected, the lawyers were by no means fabricating events – but rather were telling the client's *story* (Kirkland, 2012: 152) with perhaps a different emphasis than would have been used at the time of the events.

Two further examples of Category 2 situations include those matters in which the client was inexperienced and in which the client lacked the resource and/or know-how for reviewing and analysing documents. In **Matter No 20 [*Pro Bono*]** the Local Council had refurbished an exterior wall of a council flat. The refurbishment resulted in defects which caused damp and mould to the home owner's (the client's) flat. The client sent the lawyer three boxes of documents at the outset. The client had no experience or understanding of what the lawyer required and literally sent all documents relating to his flat. Of the three boxes sent, the lawyer utilised approximately 30 documents during the course of the proceedings – in the lawyer's opinion, the other documents did not relate to the issue in dispute. The lawyer reassembled the facts by selecting the relevant documents and then constructed the argument.

In the above examples, the documents again cause the dispute to develop in a particular way, only this time it is the lawyer selecting the document after having reviewed it, and then attaching meaning or significance to the document for the purpose of the legal argument. Here, as with Category 1, the documents transform both the lawyer's actions as well as the dispute.

## **Fluid Commodity**

As discussed above, the research revealed that documents (the existence of and the receipt of) influence *how* and *when* lawyers carry out their professional service. In addition, lawyers in turn influence the significance these documents: they can be transformed into objects of value which enable them to be used as strategic or negotiating tools. At times, lawyers bestow upon these documents meaning or value which they may not have had previously. In this respect, documents are a *fluid commodity* for lawyers as this value may be applied and then taken away, depending on situation or the stage in the proceedings, or both. The temporal nature of the documents allows lawyers to manipulate their meaning and bestow significance as and when required. What is of value today may not be tomorrow. This is similar to Dezalay's application of *symbolic capital* – Bourdieu's term which he applies to arbitrators in the arbitration market (Dezalay and Garth, 1996:18-19):

*"Different kinds of symbolic capital may gain or lose in value over time...."*

In using these documents as commodities, either strategically or for negotiation purposes, the research also revealed that lawyers often hunt, or at least are on the lookout for, the "showstopper" document – a document which was pivotal to the case or a document which would undeniably prove that their client was in the right and the other side was wrong or to blame.

### ***As strategic tools***

One example of the use of *documents as strategic tools* is seen when the lawyer exploits them to deter a pending claim. For example, on two separate matters<sup>152</sup>, when the lawyer received a pre-action letter on behalf of his client (either owing to the Pre-Action Protocol or otherwise) which set out an alleged claim and requested certain documents, the lawyer provided a substantial amount of documents in return.

The lawyer responded to the alleged claim by briefly identifying why his client was not responsible for the amount claimed and then attached several lever arch files of documents in support of the defence. By providing copious amounts of documentation it appeared that the lawyer hoped his opponent would be

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<sup>152</sup> **Matter No 4 [In liquidation]** and one other matter not recorded in the Matter Database.

discouraged from wading through the copious amount of documentation and advise this client that issuing a formal claim would have little chance for success.

The two matters referred to above concerned claimants which were companies in liquidation. As administrators had been appointed to deal with the companies affairs, they would have to assess their chances of success prior to proceeding. The lawyer, in recognition of the administrator's position, strategically chose to provide more rather than less. His strategic use of the documents on these two particular matters paid off as, at the time of writing, no formal claim has been filed.

Similarly, the same tactic was taken on a matter involving insurers. **Matter No 27** [**Fire: Insurance Policy**] concerned an insurance claim regarding a fire. A plumber, employed by the building owner, accidentally set fire to the roof of a building – the insulation was ignited with a blow torch. The parties agreed that the plumber caused the fire as he failed to follow best practice. The contractor (the Firm's client) denied causing or even contributing to the fire – he had constructed the roof correctly and had not employed the plumber. The lawyer advised his client that the response to the insurer should be *"in some detail to stop [the claim] in its tracks, otherwise in my experience with insurance companies is that it is likely to rumble on"*. After the lawyer sent a detailed letter, supported by evidence, the insurance company said that they were instructing an expert. No further correspondence was exchanged after that – it appeared as though the insurer no longer pursued the claim.

In this case, on the face of it, providing more evidence, rather than less, appeared to dissipate the dispute sufficiently. On other matters, lawyers only provided what was requested (or less) depending on the facts and the case strategy.

Equally, a further illustration of *documents as strategic tools* concerns the opposite situation: documents which have been specifically requested are withheld from the opposition. In **Matter No 11** [**Façade Defects**], during the course of the arbitration the respondent requested various documents. The lawyer responded by stating that there was no legal basis for disclosure of these documents at this point in time – the documents would be provided in due course during the proceedings as part of the formal disclosure process (which was in approximately two months time). By not providing the documents in advance the lawyer elevated their status – previously they had no meaning and now they were of some value: the opposition wanted them and the lawyer was not willing to relinquish them. The lawyer's motive was ambiguous; however, it was clear that strategically it was important not to hand over the documents at that time owing to a possible pending mediation.

This strategic use of documents, either refusing to provide documents or, to the contrary, providing a healthy amount of documentation, contradicts previous research which highlights that *most corporate litigators generally read requests for documents narrowly, thereby reducing the universe of “responsive” documents* (Kirland, 2012:157; see also Suchman, 1998 and Gallagher, 2011). In the liquidation cases discussed above there was a wide interpretation regarding the request for documents – resulting in a copious amount of documents provided. In other cases, a wide interpretation was also taken when the lawyers were of the view that to withhold documents would simply delay the process<sup>153</sup>. Of the matters observed at the Firm, there of course were also situations which aligned with the prior research – the specific documents requested by the opponent (using a narrow interpretation) were provided. However, this was by no means the general position. In any event, the data collected was not wide enough to support or oppose categorically the previous research – lawyers at the Firm simply responded to document requests in the manner which suited their client and still fell within the CPR. This entailed either providing the exact documentation or taking a wide/narrow interpretation of the request. Accordingly, it cannot be said that the lawyers “*generally read requests for documents narrowly...*” Rather, they made a conscious, strategic decision prior to supplying the documentation.

### ***As negotiating tools***

Lawyers also elevate certain documents to *commodity* status during the course of negotiations. In all most all of the mediations witnessed during the course of the research, documents were essential to each party in order to demonstrate the strength of their case. Prior to the mediations, each lawyer would ensure that all necessary documents were part of the mediation bundle (agreed in advance with the opposition) or alternatively that the client intended to locate them and have them available at the mediation. If one party held a document which appeared to prove a particular point (no matter how trivial), they somehow felt empowered and therefore entitled to further money or unwilling to compromise on their position. The more convincing documents one party had, the stronger their stance and their perception that they had more leverage.

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<sup>153</sup> By way of example, in **Matter No 38 [‘Designing Disputes’]**, the client and the lawyer agreed to provide all documents requested as to do otherwise would merely slow down the dispute resolution procedure and ultimately delay payment to the client. Furthermore, the contract required transparency and partnering – and to withhold documents would not uphold the intended spirit of the contract (and therefore not be viewed positively in front of the tribunal).

For example, during the two-day mediation in **Matter No 7** [*Additional Works*], the building defects were the topic of most discussion (prior to the issue of legal costs at the end of Day 2). Whether or not the building components were in fact defective was hotly debated. The mechanical and electrical (M&E) system was one item in particular which caused the most heartache – if certain elements were found to be defective, it would cost the contractor (the Firm’s client) millions of pounds to remedy. The M&E system, as a document itself recording the alleged defect, was physically an expensive commodity. The documents which evidenced the state of the system (expert reports, meeting minutes, etc) were of course also valuable in the sense that they represented the state of the system and gave weight to one party’s argument. Some of the documents clearly evidenced defects which the contractor was prepared to remedy whilst others were ambiguous thereby providing the contractor with leverage to argue that they were not liable for other M&E elements. In the end, a compromise was reached whereby the contractor would rectify certain building elements and others would be discussed on the completion of further investigations.

### ***The showstopper***

Whether the lawyer employed documents strategically or for the purpose of negotiations, in both situations there was a hunt for that one document which was crucial to the outcome of the dispute. It was a search for that piece of evidence – *the showstopper* – which ‘sealed the deal’ or made their argument undeniable. Rarely was a showstopper ever located. In fact, of the 50 matters under study in the research, not one true showstopper was found. In some matters, alleged showstoppers were uncovered that of course strengthened the client’s case, but they did not contain enough evidence or hold enough weight to end the matter there and then or to force the opponent to settle immediately. Equally, many of these alleged showstoppers were only significant to one issue in the dispute. As such, these documents were *fluid* in the sense that at one point in time, they were crucial – though once the parties moved on to next legal issue, their significance was diminished. Nevertheless, during the course of the proceedings these alleged showstoppers would, at times, gain meaning once more (eg, in cross examination or during mediations). Their value was constantly in flux - dependent on timing, the development of the dispute and the emphasis the lawyers bestowed on them.

It was clear that some lawyers are of the view that the showstopper document simply does not exist as cases are never that black or white; nevertheless, they are

aware of its possible presence and are mindful to carry out a sufficient investigation to keep their mind at rest.

To take the example discussed above, in **Matter No 11 [*Façade Defects*]**, when the witness realised that he could not possibly have attended the alleged settlement meeting in September as he was not in the country and provided documents in substantiation, the lawyers were exuberant and appeared confident in their *reconstructed* argument. The lawyers view the documents as pivotal to ‘winning’ the point regarding the alleged meeting. However, these documents were not so significant that the arbitration would turn on this point or these documents. Once the documents were disclosed to the other side, they admitted that a meeting could not have taken place. Thereafter, the other side (the subcontractor) then downplayed the importance of the alleged meeting and attempted to turn the focus of the proceedings to other legal issues; in other words, the subcontractor *reconstructed* its argument on receipt of the documents. These documents were devalued as the arbitration proceeded – they were only significant for a moment in time during the hearing on cross-examination of the witness.

### **Influencing the outcomes**

As illustrated in the narrative examples above, client documents influence how lawyers carry out their services and how the dispute evolves. They have the ability to force the identity and development of the dispute to transform as they are located, reviewed and assembled. Indeed how parties and their lawyers perceive and approach the dispute depends on their understanding, interpretation and translation of the documents.

To summarise, in **Matter No 7 [*Additional Works*]**, the lawyer advised the client, based on the information and documents available at that time, to commence proceedings in court. When further documents came to light (ie, significant alleged defects and the documents which represent them) the lawyer reassessed his strategy. Ultimately, as the dispute evolved and its emphasis focused on the building defects, the lawyer advised his client to attend a mediation and settle out of court where possible. In **Matter No 11 [*Façade Defects*]**, the preliminary issue of the arbitration concerned an alleged settlement meeting. The lawyer devoted many hours (and therefore fees) to constructing the client’s argument based on the recollections of witnesses and the documents available. Once further documents surfaced evidencing that the meeting could not possibly have taken place on that day (owing to the witness clearly being out of the country on that day) the opponent

attempted to advance the nature of the dispute down other avenues in order to diminish the significance of that issue.

These are but two narrative examples of how documents influence the identity and outcome of the dispute. Other matters under study in the research demonstrate that documents may: deter imminent proceedings, change the course of the proceedings or the basis of the claim, escalate the costs of the proceedings (which in turn may result in further disputes), narrow the issues in dispute (where parties agree on the interpretation/meaning of certain document) and widen the scope of the dispute (where parties disagree on the relevance of certain documents). The following table lists a few of these examples:

<b>Matter No 38 [<i>Designing Disputes</i>]</b>	When the lawyers and the client's expert witnesses inspected the documents available and the records kept by the client (the contractor) it appeared impossible to quantify certain elements of the claim and therefore an alternative strategy and basis of claim was formulated.
<b>Matter No 46 [<i>Roof Defects</i>]</b>	When the lawyers requested specific documents from the client at the outset, the client sent 10 boxes of documents which took the lawyer's trainee several days to wade through and document their contents. The requested documents were not contained within the 10 boxes and additional costs were incurred.
<b>Matter No 48 [<i>Final Two Invoices – Adjudications</i>],</b>	The lawyers used the absence of a particular document as the basis of the claim (the contractor had failed to serve a withholding notice on their client) and to narrow the dispute and commence adjudication on a particular point: the failure to pay an invoice.

Accordingly, client documents are not simply static lever arch files which fill cupboards, occasionally dusted off to support claims. They influence *how* and *when* the lawyer carries out his professional service and in turn their significance and meaning are determined by this professional service. This reciprocal relationship has implications for the outcome of the dispute as it evolves based on these professional services and the perception of the parties. The dispute takes shape as the parties seemingly 'win' or 'lose' particular issues based on the strength of their documents.

How and when lawyers carry out their professional service, in the context of construction disputes, is a function of the timing and nature of these client documents. Either the client provides the lawyer with relevant documents in a piecemeal fashion (Category 1) or he provides all documents, whether relevant or not, and the lawyer undertakes the process of selection (Category 2). This influences how lawyers *review* these documents, *assemble* past events and *construct* legal arguments. In doing so, lawyers transform documents into objects of value, *fluid commodities*, which in turn enables them to utilise the documents as strategic or negotiating tools. The value or meaning these documents acquire may be temporary or in flux, or both, depending on the issue to which they relate. Rarely is there one document which is so valuable that, on the face of it, determines the outcome of the dispute. If these documents had a voice, they perhaps would identify with Marilyn Monroe's statement:<sup>154</sup>

*"I don't look at myself as a commodity, but I'm sure a lot of people have."*

As seen from the discussion above, documents are part and parcel of disputes – mediators which cause the dispute and other entities such as lawyers to act or change in a particular way.

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<sup>154</sup> This quote from Marilyn Monroe appeared in the 3<sup>rd</sup> August 1962 edition of Life Magazine, page 81. It was recorded by Richard Merymen for her last interview prior to her death on 5<sup>th</sup> August 1962.

## 4.2 Lawyering

It perhaps will come as no great surprise that the research revealed that lawyers and the professional service which they provide was a significant force on the nature of the dispute – the second category of mediators. One rather expects their lawyer to influence the direction of the dispute, is that not what we pay them to do? However, the processes by which they do so and the words they deem are necessary to do so are in themselves important mediators in the life of a dispute. The lawyer's communication, translation and conduct actively shape the dispute and it is essential to establish an awareness of these actions if we are to appreciate fully the depth and complexity of disputes.

### **Communication & Translation**

As Mellinkoff (1963) said, "*law is a profession of words*" and, I would suggest, so too is the lawyer/client discourse and relationship. Communication, or words, greatly impacts the identity of disputes. How lawyers and clients communicate and relay information to each other shapes their understanding and perception of the dispute, as well as its transformation. Whilst lawyers play critical roles in introducing and explaining the legal process to their clients, as well as doing the formal legal work (Sarat and Felstiner, 1995:3), the way in which they do so impacts the trajectory of the dispute. Furthermore, as will be seen below, the way in which clients describe past events (or not as the case may be) or communicate their version of the dispute to lawyers is also highly influential.

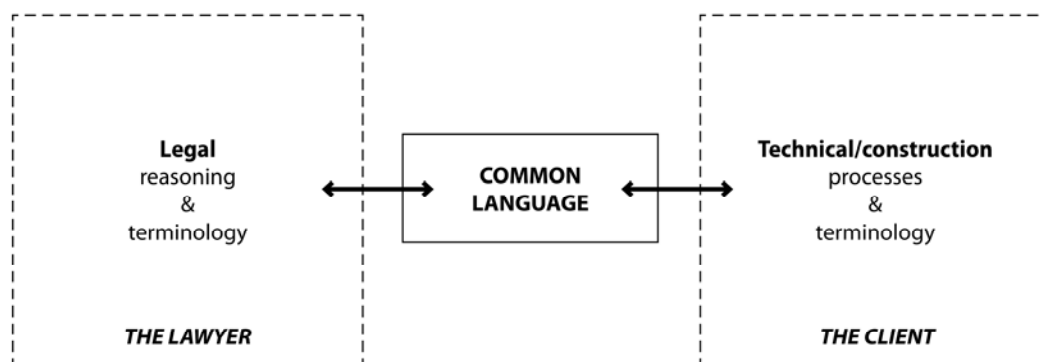
When observing lawyer/client discourse during the course of the research, it became apparent that the lawyers are indeed, to coin Maureen Cain's term, *translators* (Cain, 1979:335):

*"...Lawyers are translators – that is their day-to-day chore. They are also creators of the language into which they translate... It is in this sense that lawyers are conceptive ideologists."*

The lawyers translated technical building and engineering terminology and the construction events which their clients relayed to them into their own "legal" language (either correctly or incorrectly) and used the translated account in their legal arguments/pleadings. In addition, not only did the lawyers constantly carry out translations – but their clients did so as well. Clients often assisted their lawyer by rephrasing or simplifying the technical construction processes and terminology into

a more common language, easier for their lawyer to understand. The phrase I commonly heard clients say with regard to technical issues or events was typically along the lines of: *"I've made it easy so the lawyers can understand it."*

In some instances, this resulted in numerous conversations before both the client and lawyer appeared confident that a mutual understanding had been reached. The lawyer then translated his understanding of the events into legal terms which suited or supported his client's case. Having constructed a legal argument in his own profession's language, in order to advise the client and seek instructions regarding the way forward, the lawyer then had to *reverse translate* his findings back into a common language in order to advise the client. This constant translation between the lawyer and the client into a common language is illustrated in the figure below:



**Figure 9**  
***Iterative Translation***

The translation between the clients and the lawyers was an iterative process, one which oscillated back and forth until a mutual understanding was in place and a legal argument was constructed – an argument which held weight in law and suited the client's case. The clients knew their own histories and goals, which the lawyers needed to learn about, and the lawyers knew the law and legal process, which the clients needed to find out about, at least to some degree (Sarat and Felstiner, 1995:149).

For example, in **Matter No 11 [‘Façade Defects’]**, during the course of a conference call between the solicitor, the barrister and client's expert witness, the barrister requested that the expert explain to him the design of the fixings for the cladding

system. The expert used the technical term “*factor of safety*” to describe one of the design parameters. The barrister was of the view that this was an important issue in the case, yet was confused as to the meaning of this term. He repeatedly requested that the expert describe this phrase “*in layman’s terms*”. After the expert described the meaning, the barrister endeavoured to translate the description provided into a common language:

**The Barrister:** ...so what you mean is...

**The Expert:** ...er, no, no, that’s not quite right. Let me explain again...

The expert repeatedly attempted to describe the technical phrase and the barrister repeatedly attempted to translate. Eventually, after an hour of failed attempts, the barrister and the expert finally agreed on a description for “*factor of safety*” in a language which they both understood. Valuable time, and therefore money, was spent on this one phrase. It was a phrase that the barrister returned to in subsequent meetings and conference calls throughout the case to ensure his understanding was accurate.

This iterative translation into a common language occurred in most matters observed in the study. It did not depend on whether the client was a repeat player or a one-shotter. Repeat players tended to have less questions regarding procedural issues the more often they engaged the Firm. For example, once a client had been through one adjudication, the next adjudication appeared to be more straight forward in that the client knew what to expect procedurally with the timetable and what the lawyer would be looking for in terms of documents. However, each new case involved different legal issues which inevitably required translation of some degree to the client. In addition, each new case involved a different construction project – if defects were an issue, clients (whether repeat player or not) had to translate the new technical terminology and issues into a common language, for the lawyers to translate this into the legal argument in turn.

**Matter No 14 [‘Electricity Supply’]** is a further example which typifies the complexities of *translation* between construction clients and their lawyers. Here, the lawyer’s client was a property developer who had a dispute with a large electrical company on one of his projects. The client was a one-shotter (Galanter, 1974): he did not appear to have any prior experience with construction law or legal proceedings. Until this point, he had managed to conduct his business without the

need for a lawyer. However, when he found himself as a defendant in litigation against the large electricity company, he engaged the Firm to act for him.

Once the lawyer drafted the Defence, he requested the client to review and approve the draft Defence prior to service. In doing so, the client became frustrated over the language used within the Defence. The client said to the lawyer that the Defence was somewhat of a “black art” to him and he was unable to understand it as it was written in “legal speak”. He said that he could only comment on the factual elements of the Defence:

**The Client**

I think it best if I leave the dark side of the legal process to the lawyers and focus on the actual practical matter of [the electricity company] providing me with electrical supplies...

When reviewing the draft Defence, the client spent considerable efforts describing to the lawyer the difference between a “*best practice solution*” and a “*non-standard solution*” – the client considered that the electricity company had over charged him because they provided him with a “*non-standard solution*”, when they should have provided him and charged him for a “*best practice solution*” (which would have been cheaper and less time consuming). To describe the ins and outs of this to the lawyer, the client summarised the technical issues involved and used examples to translate his point into a common language. The lawyer in turn updated the Defence accordingly.

The lawyer and the client held various discussions on particular factual points concerning the technical aspects of the project and what that meant in legal terms. When the lawyer had a better understanding of the technical elements and events which occurred, elements of the Defence were amended to accord with that account.

Once the Defence was served the lawyer advised the client in respect of a Part 36 offer. In a telephone conversation, the lawyer recommended that the client make a “Part 36”<sup>155</sup> offer at some point in order to protect his costs position in the proceedings. The lawyer began to describe a Part 36 offer and its implications when the client interrupted him. He was noticeably frustrated by the “excessive” use of legal terminology and made it clear to the lawyer that he simply wanted the matter

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<sup>155</sup> A “Part 36 offer” is a legal phrase which describes an offer made by either party in litigation proceedings in accordance with Part 36 of the CPR. This imposes severe costs sanctions in the event that the offeree rejects the offer and at trial fails to recover a higher sum. CPR r.36 sets out specific criteria which the offer must comply with (eg the offer has to be in writing and must be open for acceptance for 21 days).

settled and would follow whatever the lawyer advised. The client said he was not willing “to engage in a discussion of the ins and outs of the legal processes” – he felt this was best left to the lawyers. Again, he referred to the legal process as a “black art”.

However, in order to make the Part 36 offer, the lawyer nonetheless required clear instructions from the client and again attempted to describe the term. This time however, he merely stated that an offer should be made to the electricity supplier to comply with court rules. He suggested a figure to “get the ball rolling”.

Notably, as soon as the lawyer mentioned costs and suggested an amount that the client might offer to the electricity company to settle the dispute (ie an amount which the client would have to pay out), the client appeared to understand and relate to what information and instructions the lawyer required. Costs, of any nature, appeared to be level playing ground for both the lawyer and the client – numbers, rather than words, and discussions which concerned the client’s bank account were a common language.

In order to obtain clear instructions and be certain that the client knew what he was offering to the electricity company, the lawyer had to translate between his “lawyer’s language” and legal concepts into a common language which they both could use. In this instance, numbers was the means by which this was achieved.

During the course of the proceedings, other legal terms and processes frustrated the client as he was not able to understand them and appeared reluctant to do so in any event. The following two terms are examples where the client was not able to grasp the meaning of the term or concept:

<b><i>“natural justice”</i></b>	The client often used the term “natural justice” in conversations with the lawyer, in the sense that justice would only be achieved if his position was vindicated. This is similar to Sarat and Felstiner’s account (Sarat and Felstiner, 1995:88-95) of Jane and Norb’s divorce when Jane’s lawyer discusses with her the legal system and what she ought to demand in negotiating the settlement. Both the
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	<p>client here and Jane focus their concept of justice by requiring compensation or acknowledgement that they have been treated unjustly, which does not align with what the legal system is able to provide: Mr Developer and Jane juxtapose legal justice with ultimate justice (Sarat and Felstiner, 1995:94).</p>
<p><i>“evidence”</i></p>	<p>The client did not understand the level of evidence which the lawyer required for the litigation. He became agitated when he had to take the time to locate documents and on a number of occasions questioned why it was necessary as <i>“it must be obvious”</i>. The lawyer repeatedly had to request certain documents from the client as they were not forthcoming.</p>

Translation of the above terms, in addition to the Part 36 offer, appeared to try the lawyer’s patience. It was not so much that he was unwilling to explain; however, as he was aware of the client’s concern of legal costs, this constant implied request to translate made it difficult for the lawyer to keep to the cost estimate he had indicated originally to the client. There was a clear tension between providing the requisite level of translation and minimising legal costs.

After the Defence was served, the lawyers began without prejudice negotiations by telephone. It was clear neither party wanted to proceed to court; however, the lawyers recognised that they would have to motivate their respective clients to agree a settlement figure. The lawyer for the electricity company said that if a *“half reasonable offer”* is made, the parties would be likely to settle. He stated that his client is only pursuing this matter for a point of principle:

<b>Lawyer (Electricity Co)</b>	Did you get my message the other day?
<b>Lawyer (Developer)</b>	Yes, it wasn't a very serious offer.
<b>Lawyer (Electricity Co)</b>	Well, yes, actually it was ... There is an underlying commercial imperative for our client to go forward with this.
<b>Lawyer (Developer)</b>	My client thinks he's been appallingly treated by [the electricity company] and they did a shocking job. Frankly, he is of the view that he will have sympathy from the court....  I've not yet taken instructions, but I'm sure we could get to half, if that works for your client...  Your claim to recover the fees is hopeless. I've even had counsel's view.
<b>Lawyer (Electricity Co)</b>	I've had counsel's view too! And he said the opposite!
<b>Lawyer (Developer)</b>	Do we want to carry on dancing around this?
<b>Lawyer (Electricity Co)</b>	If you can send me an offer, that would be helpful... My client is not cost sensitive, yours is likely to be. It is a point of principle for my client...
<b>Lawyer (Developer)</b>	I will get you an offer very shortly. However, if this does not settle within a matter of days, my advice to my client will be to make a Part 36 offer and carry on...

During the course of the negotiations, the lawyers appeared transparent. They advised each other of their way forward if a settlement could not be reached and they agreed that if they could each get their respective client "half way", then a deal could probably be done. On some level, the lawyers were actually acting as mediators. To do so, the lawyers used language and terminology which they were comfortable with. They would name drop legislation and case law to bolster their arguments. When the lawyer reported back to his client, he rarely described the legal arguments he had used to the full extent or the law he relied on. He summarised the points, left out the "lawyers' speak" and translated the legal rules into the vernacular with the use of examples (Sarat and Felstiner, Chapter 4). Eventually the parties reached a settlement agreement.

The oscillation between the client's use of translation and the lawyer's use of translation occurred throughout the proceedings, via a common language that they both understood and were confident that the other understood. Whether or not they

in fact did is not known; however, at the end of the day the lawyer achieved the client's goal of ending the court proceedings.

In **Matter No 14** [*'Electricity Supply'*] it was not apparent what exactly, if anything, was lost in translation. The client clearly did not fully comprehend the ins and outs of the legal process and legal concepts the lawyer mentioned; and it is not known to what extent the lawyer ultimately understood the technical issues. The mere need to translate certainly frustrated and complicated the process and could have resulted in additional costs; however, on the face of it there was no adverse outcome. What the lawyer understood informed his perception of the dispute and the strength of the case and inherently influenced how he negotiated with the other side and conducted his professional service.

In other cases, it was evident that the translation required was not successful and resulted in an unfavourable outcome owing to either *miscommunication* or *mistranslation*. At times it was unclear as to the cause of the miscommunication or mistranslation, though in any event the dispute did take shape or morph as a result.

**Matter No 7** [*'Additional Works'*], described above, contained an element of miscommunication or mistranslation. Here, how the client initially portrayed the defects to the lawyer resulted in, perhaps, an inappropriate strategy and course of proceedings. The defective works were more extensive and costly than the lawyer had appreciated at the outset of the instruction. It was not apparent why the client did not adequately convey the defects to his lawyer: perhaps they were not aware of the extent of the defects or, alternatively, they were aware of the defects though failed to see their significance/impact on the proceedings. In any event, the nature of the defects was lost in translation. As described above, this became apparent during the mediation:

**The Lawyer:** Yes - had I known of the true state of the works, we would never have commenced proceedings...

This statement to his client, along with other internal discussions with his assistant, confirmed that a different course of action might have been taken had he known the extent of the defects and the remedial works required. The lawyer had advised litigation on the basis of his perception of the dispute and of the defects – he had envisaged a minimal or straight forward Defence & Counterclaim. The lawyer did not offer or state what strategy he would have employed, though nevertheless we can see the traces left behind and the outcome which ensued: a dispute which lasted

over two years and employed four types of dispute resolution procedures to end the dispute (negotiation, mediation, litigation and a costs determination).

Further examples are those cases where the lawyer, for whatever reason, simply got the wrong end of the stick and failed to understand the client's wishes or instructions. This was either owing to a breakdown in communication or a failure to appropriately translate. For instance, lawyers drafted clauses or letters not completely in line with what the client had in mind, which resulted in a number of exchanges to settle on the agreed wording. A certain amount of "back and forth" undoubtedly is inevitable and clearly not all disputes will develop adversely simply owing to an initial miscommunication or mistranslation.

Rather, it is those instances where the miscommunication or mistranslation is unconscious or not realised and the dispute advances in a particular direction where perhaps it would not have done so otherwise. In this situation the potential certainly exists for the lawyer/client discourse to shape the dispute adversely, prolonging and complicating its trajectory in a costly manner, as demonstrated by **Matter No 7 ['Additional Works']** above. Notably, not all lawyer/client discourse will result in the development of the dispute. When the lawyer transports the client's version or account of the events without transformation (eg, relays non-controversial information to the opponent) the lawyer is merely an *intermediary* of the client's perception of the dispute (Latour, 2005:39).

### **Coexisting perceptions**

Whether or not translation has a perceivable influence on the outcome of a dispute, the above examples reinforce Latour's specialised meaning of *translation*: *a relation that does not transport causality but induces two mediators into coexisting* (Latour, 2005:108). As the identity and trajectory of construction disputes arise out of collaboration between the lawyer and his client, translation tends to be an iterative process whereby both the lawyer's and the client's perception of the events and issues exist alongside the common language they create to communicate and to develop the dispute. It is a process, not a mere, singular cause and effect event whereby the client puts forward his account and the lawyer transports that into a legal argument. Rather, the two perceptions or understandings of the issues coexist to identify and deal with the dispute.

In **Matter No 14 ['Electricity Supply']** translation occurred to the extent required for the lawyer to carry out his professional services in a way which suited the client's

objective. The lawyer and the client clearly only translated an element of the legal jargon, to the extent that the lawyer was content that he had the appropriate and informed instructions he required. It is likely therefore that each had a different understanding of certain issues and a different perception of the dispute. In any event, a sufficient level of translation had been carried out which created the common language to coexist alongside their individual perceptions of the dispute. The lawyer and his client jointly collaborated to bring the dispute to an end.

To use the example described above in **Matter No 11** [*Façade Defects*], the barrister and the expert collaborated on the meaning of a particular technical phrase and their understanding of it: “*factor of safety*”. Both the expert’s understanding and the barrister’s understanding coexisted, albeit documented in a common language which informed the barrister’s legal argument and analysis of the case.

### **Conduct**

As we will see specifically in Chapter 5, the lawyer’s conduct and process by which he carries out his professional services can play a significant role in developing and changing the identity of the dispute. This discussion is best left for Chapter 5, but by way of introduction, the research found that (1) lawyers play a part in controlling or directing the outcomes of disputes by influencing the design and the identity of the dispute – the naming of the dispute; (2) they, on the whole, generally collaborate with their clients in terms of identifying the dispute and setting a strategy - they do not merely dictate control over the client at all times; and (3) their role is constantly in flux, reacting to and dependent upon the dispute and the objectives of their client.

Having said this, the lawyer’s conduct or actions may not always transform a dispute. Lawyers may simply be required to relay information or transport their client’s perception of the disputes without influencing or transforming it. As indicated above, we see this where the client simply requires non-controversial information to be sent to the other side or perhaps the lawyer is acting in a transactional capacity and is “filling forms” for various statutory purposes.

The effect of the lawyer’s conduct on disputes of course is specific to the context and type of action required. Nevertheless, the communication and translation (or *miscommunication* and *mistranslation* as may be the case) involved when doing so can actively shape the dispute.

### 4.3 Costs

During the course of the research, most, if not all, of the cases considered or concerned legal costs at some point – and some to the degree that these costs defined the dispute between the parties. Disputes may take on new meanings and transform merely because of costs: the scope of the dispute can expand or contract simply by the sheer existence of these costs. Furthermore, looming costs may encourage parties to settle or may influence how lawyers carry out their services.

The recent case of *Bellway Homes Ltd v Seymour (Civil Engineering Contractors) Ltd* (2013) is a classic example of how costs define the shape or existence of a dispute. In *Bellway Homes*, the losing party in an adjudication sought to recover what was paid out pursuant to the adjudicator's decision. At the eleventh hour before the trial was due to start, the parties settled a relatively modest claim relating to delay and related costs on a civil engineering project. The settlement was for £146,953 but the combined costs had been over £1 million. In settling the case, the parties were unable to agree who should pay these costs. This issue was left for the court to resolve. Accordingly, the dispute between the parties would have dissipated, but for the issue of costs. This issue breathed life back into the dispute and the parties were in court yet again, albeit for a different type of dispute: a dispute over costs.

To understand the extent to which legal costs transform disputes, a further detailed investigation and analysis which includes the client's perspective and perceptions is necessary and beyond the scope or possibility of this study. Nevertheless, owing to the traces left behind, this research revealed that legal costs clearly had an impact on the scope and outcome of disputes as well as how lawyers carry out their professional services.

#### **Influencing the scope & outcome of disputes**

A number of the narratives discussed elsewhere in this thesis illustrate how legal costs shape the scope and outcome of disputes. In particular **Matter No 7** [*Additional Works*], similar to the case of *Bellway Homes Ltd*, exemplifies how a further form of dispute resolution was required in order to resolve the dispute on costs, which evolved at the end of the proceedings. Here the parties managed to settle all other issues at the mediation, but were unable to agree a settlement regarding the legal costs. Separate proceedings then ensued to determine liability for costs.

Conversely, we also see in a number of other cases that as soon as clients appreciate the extent of the legal costs, they appear to turn their attention and efforts to settling the dispute rather than incurring further costs.<sup>156</sup> We see in the unfolding narrative of *Columns & Beams Ltd v Structures Ltd* how the client, Mr Cahill, is particularly cost conscious and will do whatever it takes to reach a settlement as quickly as possible in order to avoid further legal costs. Having said that, as we shall soon see, there is a notable tension between the client's determination "to get what he is rightly owed" and his financial need to minimise or avoid legal costs. Mr Hunter, the lawyer, had already recognised this potential tension, which no doubt he had seen previously in his experience, at the outset when he said:

**The Lawyer:** I completely understand. If this runs the course, you quickly could run up huge costs. We need to find a balance. At the end of the day, you might be better off walking away frustrated, than continuing with this...

Again, this demonstrates the potential for legal costs to shape the outcome of the dispute.

### **Influencing lawyering**

Legal costs also influenced the lawyers' professional service. For example, where clients had fixed and/or tight budgets for legal costs, lawyers tailored their services accordingly. To do so, they took actions such as devising strategies to ensure that no more than a set amount days or hours were spent on the case, minimising the length and frequency of conference calls and meetings and carving out of their scope or delegating certain tasks to others which they otherwise may have carried out themselves (eg, locating documents, preparing quantum figures and/or drafting preliminary witness statements). They also, at times, obtained confirmation from the client on every particular issue prior to recording time or incurring any other cost (though arguably this increased the client's costs as a result of the number of emails and telephone calls this required).

Furthermore, lawyers choose particular methods of dispute resolution over others owing to the projected costs. We have already seen evidence of this in *Columns & Beams Ltd v Structures Ltd*. It was clear that Mr Hunter would have advised commencing adjudication had Mr Cahill not been so risk adverse to the costs of the adjudication. Mr Cahill's position in respect of costs influenced the lawyer's advice and directed the dispute away from adjudication at this point.

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<sup>156</sup> Matters Nos 17, 41 and 47.

Equally, in litigation or arbitration cases, the lawyer's actions or advice on certain procedural elements in the proceedings can be influenced by its costs. For example, if a case reached the disclosure of documents stage, the costs associated with the various types of e-disclosure platforms influenced the lawyer's recommendation in terms of the disclosure strategy. The advice certainly was also dependant on the number of documents involved, the state of the client's documents and/or the value of the sums claimed; however, the costs of the e-disclosure platforms and the resource required to implement them appeared to be an important factor in the decision. The use or non-use of these platforms, and the specific one chosen if so, impacted the dispute in turn; for instance, the non-use of a platform had the potential for lawyers to overlook or miss certain documents and the incorrect use of a platform made it difficult for lawyers to locate evidence.

A further example is the Jackson Reforms (discussed further below at Chapter 4.5). Clearly this is another procedural area concerning costs which is likely to influence lawyering. The majority of the fieldwork was carried out just prior to the implementation of these reforms. As such, conclusive data of their impact on lawyering could not be collected. Nevertheless, I did observe the sentiment of some lawyers that the reforms are not appropriate for certain cases and may result in additional costs (rather than achieving the objective of minimising costs). One example did arise where the costs which would have been incurred in complying with the Jackson Reforms caused the lawyer to avoid the CPR requirements by implementing an alternative case strategy.

The costs of lawyering and litigation and its influence on disputes is of course is wide and complex area of study beyond the scope of this research. Nevertheless, it is important to note that legal costs are highly influential on the development of construction disputes and their effects were readily apparent in the disputes witnessed in this research.

#### **4.4 Client's conduct & objectives**

The clients' conduct and objectives are further entities which shape the dispute and steer its outcome. Whilst this research could not be conclusive on the clients' intentions, objectives or goals owing to the standpoint and methodology of the research<sup>157</sup>, it nevertheless revealed and documented situations in which the clients' conduct shifted the course of the dispute or had an impact on its identity. This was made possible by the extensive observation and participant observation in meetings, hearings and correspondence.

The clients' conduct which influenced disputes generally fell into two categories: those actions which provided *explicit* direction for their lawyer, and those actions which provided *implicit* direction for their lawyer.

##### **Providing explicit direction**

On a number of occasions, the client was explicit either in his instructions (written or oral) or in his conduct, or both. This was particularly the case for repeat clients and 'repeat player' clients who were confident in the direction they wanted the dispute take and how they wanted their lawyer to proceed. Being explicit however did not necessarily equate to the lawyer simply taking the requested course of action. The clients' directions were often one of a number of factors on which the dispute trajectory was dependent (see Chapter 5). If the lawyer had no other entities or factors which conflicted with the clients' express instructions, then, on the whole, the lawyer simply would proceed as requested. If lawyer was of the view that certain issues should be brought to the clients' attention (generally substantive legal or procedural issues), then he/she did so and the lawyer and the client took a collaborative approach thereafter achieving the client's objectives to the extent that it was possible.

##### ***Repeat players***

Repeat player clients are one illustration of how clients' explicit instructions direct or influence the course of a dispute. These clients, having been through the dispute process previously with lawyers and perhaps even have in-house counsel, tend to embody at least some of the capabilities of an intelligent customer – they have a clear, or at least some, understanding and knowledge of the product or service being

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<sup>157</sup> It was clear from the outset of this research that, on the whole, direct access to the clients would either not be possible owing to the lawyer/client relationship or not be feasible in the time allowed.

provided (HSE, 2014). This appears to enable or empower them to comment on how the dispute is portrayed or, in other words, named.

In **Matter No 38 [*Designing Disputes*]** the client had experienced in-house counsel. When creating the pleadings, the lawyers investigated the past events on the project and developed the legal argument and identity of the dispute - the 'story' as they termed it. As the story unfolded and the lawyers drafted the pleading, the client would confirm, amended or discount the picture of the dispute which emerged. When the client felt the lawyer was not stressing a particular point or event (either sufficiently or at all) he would raise this as an issue and the lawyers responded, typically by redrafting. If the lawyers had good reason for drafting the pleading in a particular way, discussions took place and a jointly acceptable narrative was developed: acceptable from the point of view that the client was content that the correct version of events or picture was put forward and the lawyers were content that the legal argument had a sound basis and was robust and convincing.

In **Matter No 46 [*Roof Defects*]** the client was concerned regarding defects in the roof of their new building which had been completed nearly six years ago. After the lawyer carried out an initial assessment of the alleged defects and the expert reports which had been prepared to date, the lawyer advised that most likely proceedings could be commenced against the contractor, the subcontractor and the Architect (after obtaining further expert reports). The client replied to say that it probably would be best not to commence an action against the Architect as they were continuing to work with them on other projects. In a subsequent meeting, the client was adamant that he did want to claim against the Architect (if it was likely that he was responsible for the defects). Then, out of the blue, several months later, the client emailed to say that he would rather not sue the Architect if that did not prejudice the claim against the Contractor. Clearly the client had competing objectives which were unknown to the lawyer, but nevertheless, traces of this were apparent and influenced the existence of a dispute against the Architect and how the lawyer proceeded with the dispute. The lawyer advised the client in his email:

**Lawyer:** ...if you decide not to include them [the Architect] at this stage, it will not prejudice your claims against [the contractor] or [subcontractor]. We just need to keep in mind the limitation period. As we are still investigating the defects and the Architect's liability in this respect, it is still too early to say whether a claim against them would be advisable/successful. We suggest that once the experts have updated their reports, we

assess the situation at that point and you can decide whether to proceed with a claim against them...

As the lawyer advised that making a claim against the Architect did not impact the dispute against the contractor, it was largely down to the client as to how to proceed on this point. At the time of writing, the client had not come to decision.

These two cases exemplify how clients' conduct and objectives may influence the identity of the dispute, how it is portrayed to their opponents and whether a dispute even materialises.

### ***Non-monetary, emotionally-driven disputes***

Disputes which are non-monetary and emotionally significant to the client further illustrate where a client's explicit instructions could direct or influence the course of a dispute. By this I mean those disputes in which the client has an objective other than merely to recover money owed: the client's reputation is at stake, the client has a point to prove to his opponent, the client is seeking revenge of some sort, etc. In other words, the client is emotionally involved with the dispute. I did not witness any disputes which were motivated by a desire to improve or serve the collective good; however, equally this could fit within this category of disputes.

By way of example, in **Matter No 10 [*High end residential*]** the Firm's client, a contractor, carried out and completed the extension and refurbishment of a high end residential property. The client then ceased trading for various reasons. The home owner subsequently threatened arbitration, seeking payment for defects and repayment of sums which they contended was overpaid. The lawyer advised the client that the proceedings possibly could be avoided if the company was closed using a creditors' voluntary liquidation. The client refused. He said he was prepared to personally fund the cost of the proceedings and "*fight it until the end as I did nothing wrong*". It turned out that the contractor and the home owner had previously been close friends and some event (which appeared not to be the defective works) had occurred which caused the relationship to end. The dispute was personal and though he may have been entitled to avoid the dispute owing to a particular legal argument (the solvency of his company), the client did not want to peruse that avenue – he wanted to carry on until either an arbitrator determined the dispute, which he was confident he would win, or the home owner/former friend made an offer he was prepared to accept. Accordingly, the lawyer followed his client's wishes and carried on – there was no conflicting reason (either legally or

otherwise) why he should not do so as the client had sufficient funds to personally fund the proceedings.

**Matter No 41 [*Redirecting monies*]** was a further example of a personal dispute. Here, the parties (two businessmen) had a shareholder's agreement setting out how the profits of the construction company would be allocated between the two of them. The two shareholders met some 10 years ago while doing business and became close friends. Eventually the client became concerned that his fellow shareholder was diverting monies and projects away from their company, to one of his other companies, and commenced an arbitration. Ultimately, the client instructed the Firm after the proceedings were already underway. The lawyer reviewed the dispute, as identified in the existing pleadings and the documents available. He advised his client that there was little concrete evidence at that time to support his claim and therefore his chances for success were questionable. The client disagreed. He said that once the arbitrator heard his side of the story, which in his opinion was compelling, the arbitrator would be persuaded. Indeed, the client believed that the fact that certain evidence was missing, was clear proof that his fellow shareholder was redirecting monies away from the company. The client said he was extremely disappointed in the breakdown of the relationship and was adamant that he wanted the proceedings to carry on, despite the lawyer's initial findings and despite the projected cost estimates for the legal and expert fees. Again, the lawyer found no compelling reason as to why they could not continue and began to craft legal and evidential arguments in conjunction with the client. The lawyer appeared sceptical, but in the best interest of his client's case, he proceeded and collaborated with the client.

In each of these two cases, the client had a personal, emotionally-driven objective, not all of which was ever revealed or apparent to the lawyers. These objectives and their subsequent conduct influenced the direction of the dispute. Here, but for the clients' conduct, the dispute may have ended earlier and with a different outcome.

### **Providing implicit direction**

In other cases, the client's conduct or state of affairs implicitly influenced the trajectory of the dispute. Here, the client's instructions to the lawyer or their preference for the direction of the dispute were not expressed. Rather, their conduct, mannerisms and approach to particular issues suggested how they wanted the lawyer to proceed or left no choice for the lawyer but to proceed in a particular direction.

By way example in many cases, not surprisingly, clients were particularly concerned with the cost of proceedings or the cost of the legal advice, or both. If clients regularly questioned the lawyer's fees or the cost estimate going forward, the lawyer had a heightened awareness of the client's possible reluctance to proceed.

Again, we have seen clear evidence of this in *Columns & Beams Ltd v Structures Ltd*. Mr Cahill regularly questioned Mr Hunter right from the outset on the cost estimate going forward and what services he would receive in return. As we saw, Mr Cahill often looked for confirmation that the dispute would be resolved for a certain fixed price, which the lawyer could not provide:

**The Lawyer:** At this point, it is difficult to confirm what else the initial fee might include. It really depends on how Structures Ltd responds to our initial letters/moves. It may be that the dispute can be concluded within a few letters in which case your costs will be more in the region of £2k or £3k. Equally, the £5k could also include part of a mediation (if any) or the next steps in the proceedings (disclosure/witness statements)...

It was apparent that the client wanted to achieve a quick settlement of the dispute without incurring significant legal costs. As discussed above, even though the lawyer was of the view that an adjudication should have been commenced he did not recommend doing so at this point owing to the irrecoverable costs involved and the client's risk adverse position on costs. Here, whilst the client did not expressly disagree to adjudication, the implication was that any course of action which was costly or irrecoverable, was not a viable option.

In **Matter No 41** [*'Redirecting Monies'*] the client's silence during the course of the proceedings directed the lawyer's professional service and implicitly relayed his preference for the dispute's trajectory. During the course of the arbitration, the client did not agree to pay the expert accountant's fee – he considered the fee to be too expensive and that he could find a different expert for less. The arbitrator had fixed the timetable by this point. The client advised the lawyer that once he had secured an expert, he would forward the contact details such that the documents could be sent to him. The lawyer never heard from the client again. The lawyer repeatedly emailed and telephoned the client to no avail. Even when the deadline for exchange of the expert reports was nearing, the lawyer was not able to contact the client. As the lawyer had no instruction from the client he could not advance the dispute. Ultimately, the arbitrator emailed to congratulate the parties on reaching a settlement. This was the first the lawyer had heard of the settlement. Clearly the

client, via his personal assistant, had negotiated directly with the other side. The client's silence provided an implicit direction to the lawyer: do nothing.

In other cases, the clients' failure to pay the lawyer's fees or the expert's fees also implicitly directed the lawyer (or the expert) to do nothing. The lawyers were often willing to work without payment for a period of time; however, if the outstanding account became too significant, the lawyer had no choice but to cease acting (if it did not prejudice the client's position) or curtail his services until the account was paid. The lawyers gave their clients advanced warning in these situations and attempted to seek a solution where possible. Nevertheless, the client's failure to pay impacted the professional service, or the momentum of the disputes or both.

### **Conclusion**

Whether or not the client's objectives in respect of the disputes were made clear to their lawyer, either at the outset of the instruction or during the course of their relationship, the traces they left behind and their conduct shaped the course and identity, or even existence, of the dispute.

## 4.5 Substantive law

When advising clients and developing case strategy, taking into account legislation, case law and procedural rules is part and parcel of a lawyer's professional service. Each of the matters in the research illustrated this in one way or another. As the law is not fixed and lawyers are able to construct and deconstruct its meaning (Kirkland, 2012) a lawyer's interpretation of the legislation, case law and procedural rules may influence the existence of a dispute, the shape of the dispute and its outcome.

### Case law & Legislation

With regard to case law and legislation, it will come as no surprise that the lawyers clearly took this into account when considering the strengths and weaknesses of their clients' case. Their advice to clients influenced the direction of the dispute: if the lawyer advised that their case was weak on a particular point (or on the whole) and had little chance for success on the basis of previous case law and the requirements stipulated in legislation, on the whole, clients tended to follow that advice.<sup>158</sup> Where ambiguity was involved and the lawyers were required to analyse and assess that ambiguity, the situation was less straight forward.

If there was any ambiguity in the case law or legislation, the lawyers tended to qualify or caveat their advice. This qualification provoked different reactions from clients depending on the lawyer/client relationship, which in turn influenced the direction and shape of the dispute.

For repeat player clients, many of them acknowledged and appeared to be aware of the existence of grey areas in the law. When the lawyers caveated their advice, repeat player clients were not necessarily overly concerned, albeit at times would express their disappointment, and appeared to build the qualification into any risk analysis undertaken when deciding on and agreeing the way forward with the lawyer. Repeat player clients appeared at least somewhat comfortable with the notion of ambiguous or conflicting case law and legislation. They were interested in their chances of success, either on a particular point or for the claim as a whole, though did not dismiss a claim simply because the lawyer could not provide an assurance on the outcome. The direction and shape of the dispute was dependent on

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<sup>158</sup> Having said that, there are of course exceptions to the rule. By way of example, in **Matter No 41 [*Redirecting Monies*]** the lawyer and the barrister advised the client that as there was little or no evidence to put before the tribunal other than witness evidence, his chances for success were minimal. The client disagreed in the first instance and carried on. This client was a repeat player and had a personal legal advisor who appeared comfortable in continuing with the claim despite the lawyer's advice.

the client's risk analysis in conjunction with the lawyer/client discussions as to the possible outcomes and associated costs. In **Matter No 11** [*Façade Defects*] and **Matter No 38** [*Designing Disputes*], the lawyers advised their respective clients on the case law and legislation in respect of limitation and the issues this presented for the case. Both clients appeared to appreciate the risk and, following other discussions of costs and outcomes, decided that the benefit of proceeding outweighed the risks which arose out of the law on limitation.

One-shotter clients generally did not have the same approach as repeat players to the grey areas of the law. As the one-shotter clients did not have prior experience of contentious matters, they were extremely cautious with any decision and preferred to make decisions only where the lawyer was near certain of the outcome. When ambiguity in the case law or legislation arose and the lawyer advised the client that the outcome was not certain, one-shotter clients had difficulty making decisions on the way forward. As a result, they required more attention and more discussions with the lawyer – they were in search of answers as to why there was no guarantee on a particular point of law or why the lawyer could not provide an assurance on the outcome. Often, if the client was not able to make a decision, he or she tended to put their trust in the lawyers and required that the lawyer decide (provided he or she had sufficient funding to follow the lawyer's advice).

### **Limitation**

Of the legislation and case law which shapes the trajectory of a construction dispute, one area of the law which appears to have a significant influence and is a regular consideration for construction lawyers is *limitation periods*. The matters studied in the research revealed that issues of limitation not only affect the trajectory of a dispute, but also, the sheer existence of a dispute. As one might expect, on many, if not all, of the matters observed, the lawyers considered the limitation period as part of their initial advice to their clients. If limitation clearly was not an issue, it would not necessarily have been discussed with their client; however, if there was even a remote possibility of time becoming an issue in respect of bringing a claim, the lawyers either discussed it directly with the client or included it within a written advice, or both.

A broad definition of 'limitation period', and one which is employed in this research, is "*any provision which specifies a time-limit within which legal proceedings of a particular kind must be brought or, exceptionally, within which notice of a claim or dispute must be given to another party*" (McGee, 2010: 1). The three basic questions

which McGee (2010:3) highlights, and indeed which lawyers appear to be most concerned with in practice, include:

1. When does time start to run?
2. How long is the limitation period?
3. What happens when time expires?

Question 1 was the question which the lawyers appeared most concerned with and which formed the basis of decision-making in respect of the strategy and way forward regarding the dispute. Question 2 was of course important, though generally identifying an answer was, on the whole, either straight forward or relatively easy to at least form an opinion: limitation periods are imposed by statute (primarily the Limitation Act 1980) and in respect of construction contracts and construction claims, the answer generally is either six years or twelve years<sup>159</sup> – though this may be extended in the case of latent defects.<sup>160</sup> Similarly, the answer to Question 3 is largely well-established.<sup>161</sup>

Question 1 requires the lawyer to analyse the alleged facts provided by client and interpret the relevant legislation and case law.

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<sup>159</sup> Clear and express words would be needed to exclude the right to rely on a limitation defence under the Limitation Act 1980 - see *The Oxford Partnership v The Cheltenham Ladies College* (2007).

<sup>160</sup> A claim in relation to a **contract** must be brought within six years from the date on which the cause of action accrues (Section 5 of the Limitation Act 1980). If the contract is executed as a deed, it must be brought within 12 years (Section 8 of the Limitation Act 1980 – see also *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* (2005)).

As for **negligence** claims in tort in respect of physical damage to property, the limitation period is ordinarily six years from the date the damage occurred. However, if the damage is discovered after this six-year period, section 14A of the Limitation Act 1980, as amended by the Latent Damage Act 1986, extends the time period to three years from the date when the claimant had both the knowledge required for bringing the action and the right to bring such an action. There is a 15-year long-stop date from the date of the defendant's negligent act.

For **personal injury or death**, these claims must be made within three years of the cause of action or the date of knowledge of the injured person, whichever is later.

For **fraud or concealment**, section 32 of the Limitation Act provides that the limitation period does not start to run until the claimant could have reasonably discovered the fraud or concealment.

There is also **other specific legislation** in respect of limitation. By way of example, when bringing a claim under the Defective Premises Act 1972, the claim must be brought within six years from completion of the dwelling. Alternatively, if specific works are carried out to rectify a defect, the limitation period in respect of this further work will run from the time it was completed.

<sup>161</sup> The law in respect of limitation bars the remedy of bringing a claim, but does not extinguish the underlying right to bring a claim. Accordingly, a claimant may bring a claim after time has expired under the relevant period, provided the defendant does not rely on a defence under the Limitation Act 1980 (which in most cases witnessed, they do, unless ill-advised).

Just to give a flavour of the legal context of limitation within which construction lawyers operate and refer back to, in general, time starts to run from the date of a breach of contract or, for negligence, from when a breach of the duty of care gives rise to relevant damage<sup>162</sup>. Accordingly, this may not be the same point in time when the loss or damage was suffered (Bailey, 2011:1750). Where a contractor is liable under a contract to carry out and complete all of the works, and fails to do so by the date for completion, the breach is continuing from that date until the time the works are actually complete.<sup>163</sup> With regard to latent defects, the limitation period runs from the date of completion of the entire works (ie practical completion), not from any earlier date when the subject matter of the defects was carried out.<sup>164</sup> Under the doctrine of temporary disconformity<sup>165</sup> anything before then may be seen as being a work in progress and therefore not a breach of contract. There is some uncertainty as to whether a contractor can be in breach of contract before practical completion, for example, in those contracts where the contractor had design obligations which were the subject of the breach. Clearly the design will be prepared prior to the relevant works being constructed, so the question arises whether the breach of contract occurs when the relevant deficient design is prepared such that the limitation period runs from that date. However, cases such as *Brickfield Properties v Newton* (1971) have held that a designer is under a continuing duty to check his design and to correct any errors that may be discovered. On this basis, and because a building contract is an entire contract, the date that the breach of contract occurs is not the date the deficient design is prepared but the date of practical completion or handover to the employer.

As demonstrated by the above, the position is not straight forward and is likely to turn on the specific facts of the case in question. This was seen in a number of instances in the cases observed which concerned issues of limitation. Lawyers spent many hours debating the legal merits of limitation arguments, investigating the factual events to understand from when time started to run (which often was not clear) and indeed even commenced proceedings when the position was not certain so as to protect their client's position; "*just to be safe*" as one lawyer often said.<sup>166</sup>

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<sup>162</sup> *The Oxford Partnership v The Cheltenham Ladies College* (2007) at paragraph 22.

<sup>163</sup> *Ibid.*, 23.

<sup>164</sup> See *Tameside Metropolitan B.C. v Barlow Securities Group Ltd* (2001).

<sup>165</sup> Lord Diplock in *Kaye (P&M) v. Hosier & Dickinson* (1972).

<sup>166</sup> Matters Nos 38 and 46.

A notable example in the research concerned **Matter No 39 ['Limitation']** which exemplifies how a dispute which had been in hibernation for a number of years can take shape and build up momentum owing to the possible expiry of the limitation period. Here, a well-known contractor constructed a new build housing scheme for a developer. Practical Completion was achieved, and then, for the next 10 years, the parties debated the final account, sporadically, with no prospects of achieving agreement. The contractor then sought advice from the Firm – the dispute had not progressed, nor had the contractor even corresponded with the developer for some time. The lawyer advised commencing adjudication simply owing to the near expiration of the limitation period. The contractor, a repeat-player who is normally adverse to proceedings if at all possible, had essentially written off this project as a loss. However, after discussions with the lawyer and given the impending expiry of limitation said “*there is little to lose and even more to gain – so worth a try*”. In due course, following a 28-day adjudication, the adjudicator awarded the contractor over £1,000,000 and the developer duly paid.

Here, the proceedings may not have commenced at the time they did, and the dispute would have continued to hibernate longer, but for the expiry of the limitation period. Interestingly, owing to the recent judgment in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* (2013), the verdict still could be out on whether the dispute has finally been “resolved” in **Matter No 39 ['Limitation']**.

In the case of *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* (2013) the Court of Appeal ultimately considered the question of just how long do you have to commence legal proceedings to determine a dispute which was the subject of adjudication? If one party pays money to the other in compliance with the adjudicator’s decision, does the paying party’s cause or right of action to recover the money paid out run from the date of payment (and therefore the six year limitation period runs from that moment)? Or does the cause or right of action run from whenever it otherwise did before the adjudicator’s decision was issued? The Court of Appeal, who overturned Mr Justice Akenhead’s decision at first instance<sup>167</sup>, held

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<sup>167</sup> Mr Justice Akenhead, referring to and distinguishing *Jim Ennis Construction Ltd v Premier Asphalt Ltd* (2009), held that there was nothing in the Parliamentary debates to suggest that Parliament intended to create in every construction contract incorporating the Scheme an implied term along the lines suggested. The fact that there had been an adjudication did not mean that the limitation clock started to run afresh. He held that there was no implied term in the contract that the paying party (Aspect) remained entitled to have the dispute finally determined by legal proceedings. He found that Aspect’s claim was therefore barred by limitation. Accordingly, the claim was dismissed.

that if a payment is made in compliance with an adjudicator's decision but subsequent proceedings decide that it should not have been paid, there must be some mechanism whereby it can be recovered. The Court of Appeal confirmed that the date of the cause of action is the date of the overpayment as this is the date the losing party becomes entitled to have the overpayment returned to him. In addition, the court held the counterclaim brought by Higgins was a consequence of the original breach, and not the repayment claim. The applicable limitation period for this was six years from the alleged breach. As more than six years had passed since the breach, the court held that the counterclaim was time-barred.

In other words, this judgment provides a lifeline for those disputes which have been the subject of adjudication. The unsuccessful party in the adjudication (the paying party) has the benefit of limitation running from the date they made payment, with the added comfort that the successful party is barred by limitation from bringing a counterclaim. The life of the dispute is extended if the unsuccessful party chooses to carry on.

Accordingly, thanks to the Court of Appeal in *Aspect Contracts*, there still may be life yet in **Matter No 39** [*Limitation*].

Three months after the adjudicator's decision, the developer sent a letter to the contractor stating that they disagreed with the adjudicator's decision on a number of points and considered that they had overpaid the contractor. The contractor contacted his lawyer for advice. The lawyer advised:

**The Lawyer:**

...As discussed yesterday, in my view we should respond robustly to this letter. In reality, if [the developer] is going to take this further, they will have to commence Court proceedings for a determination of the entire final account. This is a huge exercise which will cost hundreds of thousands of pounds. I really doubt they would do that. Indeed, if they did, they would run the risk of you getting an even higher award, for instance on loss and expense where recovery was poor.

I am surprised at how lame the letter is. If I was going to complain, I would have complained about more than just a small overpayment.

I suggest I write responding to the arguments they raise and explaining...

At the time of writing, the developer had not responded. The client had however heard of the Court of Appeal's decision in *Aspect Contracts* and emailed the lawyer:

**The Client:** Re attached... does this mean that [the developer] could take us to court for repayment but we could not argue for more out of the original dispute...?

The lawyer replied:

**The Lawyer:** Yes potentially. But you could still argue the overall value of the final account as a defence of abatement. But as you say, when the total is divy'd up it means you couldn't get more than originally paid. So, for instance, if the Court decided you got too much for interest, but you persuaded the Court this was offset by an entitlement to additional loss and expense, [the developer] wouldn't get paid anything. It's a pretty tricky and emerging area.

The only way round it would be to start proceedings prior to expiry of limitation period and then not progress them, so we would protect the position as regards limitation but not incur significant costs in doing so.

If you wanted to go down this route we should diarise the 12 year expiry and then issue the claim form immediately prior to it. Remind me, but the key dates are...

So again, here we see the lawyer raising the possibility of commencing proceedings just prior to the expiry of the limitation period in order to protect the client's position. The jury is still out on whether either party will commence proceedings, or whether the dispute has sufficiently dissipated.

In summary, **Matter No 39 ['Limitation']** illustrates how disputes have the ability to hibernate or dissipate for what can be lengthy periods of time and how limitation periods may breathe life back into them. In addition, this case exemplifies how new case law may influence the dispute's trajectory: what perhaps was a dispute which was dissolved, or nearly dissolved, may well take further shape and carry on merely because one party is attempting to protect their position in light of the unknown. The law in respect of limitation periods in construction contracts/disputes contains a level of uncertainty – which in turn creates an element of ambiguity for some disputes as to when the parties have actually achieved an end to the dispute.

### **Procedural Rules: CPR/Pre-Action Protocols**

Procedural rules, such as the CPR and Pre-Action Protocols, are a further area of influence on disputes and their trajectories. The objective of the CPR is to ensure that costs are minimised, cases are dealt with expeditiously, fairly and proportionately and alternative forms of dispute resolution are encouraged where

appropriate (CPR r1.1 – 1.4).<sup>168</sup> CPR r1.4(2)(f) goes further to state that active case management includes helping the parties to settle the whole or part of the case. Accordingly, the court aims to assist in the resolution of disputes and minimising the issue in dispute where possible.

Nevertheless, the research revealed that when complying with the CPR, disputes may widen or take on further complexities: disputes expand to include issues regarding the applicability or interpretation of the rules or become more complex than they otherwise might have been. Three areas in which this was observed include: compliance with the Pre-Action Protocol, compliance with the CPR in respect of time and compliance with the new “Jackson Reforms”.

### ***Disputes regarding compliance with the Pre-Action Protocol***

The Pre-Action Protocol for Construction and Engineering Disputes, as introduced in Chapter 1.3 above, requires detailed correspondence between the parties and a pre-action meeting prior to the claimant issuing proceedings. This does amount to a certain level of cost expenditure prior to the issuing of a claim, which some clients do express their dissatisfaction thereof; however, the Protocol aims to minimise costs in the long run by settling the dispute as soon as possible. Lawyers interpret the requirements of the Protocol in the best light for their client and in line with their case strategy, and in doing so, disputes can expand in complexity or take on new meaning.

By way of example, in **Matter No 31 [‘Gentleman’s Agreement’]**, in a last attempt to deter proceedings, the lawyer strategically referenced the Protocol. Here, an Architect sought his fees in respect of a planning application (approximately £5,000) which he had prepared for a home owner (the Firm’s client) and which the local council had rejected. There was no contract between the parties and the client was of the view that they had gentleman’s agreement in place regarding the fees and therefore the Architect was not entitled to any further monies (he had already paid the Architect £1,500). The Architect threatened proceedings. After a series of short email correspondence over the period of two weeks, the lawyer emailed the Architect to say that his client’s position had not changed and that the Protocol had not been complied with:

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<sup>168</sup> This research does not consider or address whether the CPR achieved its objective in the cases observed.

**The Lawyer:** Dear Sir

We stated our clients' position in previous correspondence – the information you have provided does not change that position.

We note that you have not complied with the Construction & Engineering Pre-Action Protocol – a copy of which is enclosed for your use. Should you proceed with your claim without doing so, we reserve our clients' entitlement to draw this matter to the attention of the Court on any question as to costs.

Yours faithfully

The Architect replied to say that he was taking professional advice regarding the Protocol, but in any event had applied to the County Court. Until this point, the Architect had conducted negotiations and the correspondence personally without formally instructing a lawyer. The lawyer never received the Claim Form, nor did the client contact the lawyer to say that it had been served on him personally. Whether or not the threat of non-compliance with Protocol deterred proceedings is unknown; however, the lawyer's reference to the Protocol certainly provoked the reaction he was looking for: to dissipate the dispute, at least to the extent that his client did not require his professional services. Seemingly, the dispute evolved into an area in which the Architect felt he required professional advice, a complexity to the dispute which perhaps he had not previously envisaged. Here, the lawyer relied on the full extent of the Protocol in light of his client's needs.

At the opposite end of the spectrum, lawyers at times loosely adhered to the Protocol if it was necessary for their client's case and if the dispute had been the subject of correspondence and negotiations for a number of years.

In a different case, the lawyer served the Pre-Action Protocol letter, attaching a draft Particulars of Claim. When the other side requested a five-month timetable to respond and attend the Protocol Meeting, the lawyer advised and agreed with his client to take the aggressive approach: implement a strict approach of the Protocol, not agree to the extension requested and serve the Claim Form after the requisite 28-day period for their response had expired. In due course the lawyer served the claim. The parties continued to debate the timetable but still could not reach agreement. In the end, the parties found themselves before an unimpressed Judge who compromised and struck a balance between the parties in respect of the timetable. Accordingly, the Protocol in this case formed the basis of the dispute between the parties. The substantive dispute expanded to include procedural issues in respect of the Protocol, which in the end evolved even further to include a dispute

over the timing for the service of the Defence & Counterclaim. The lawyer's interpretation of the Protocol as to when his client was entitled to commence proceedings suited his client's position and case strategy.

**Matter No 6 [*Timetable*]** was similar with regard to the lawyer's strict interpretation of the Protocol. In this case, the lawyer issued proceedings in the TCC for approximately £200,000. The defendant failed to file an Acknowledgement of Service or a Defence within 14 days (CPR r.10.3) and the lawyer applied for judgment in default pursuant to CPR r.12.3(1). The defendant's lawyer eventually contacted the claimant's lawyer and correspondence was exchanged in respect of the claimant's alleged failure to comply with the Protocol and the defendant's request for a three-month extension of time for service of the Defence & Counterclaim. In one letter the defendant's lawyer stated:

...Your clients have failed to comply with the Construction Protocol despite your protestations to the contrary. It is of course entirely up to your client if they wish to abandon the Protocol but we will bring this to the attention of the Court regarding costs...

Ultimately the defendant applied to the court for the extension when the claimant only agreed to a 14-day extension. The defendant's application was on the basis of, amongst other issues, the claimant's failure to comply with the Protocol. The lawyer's witness statement claimed:

...It is my and my clients' opinion that the Claimant, who has not adhered to the Pre-Action Protocol for Construction and Engineering ("the Protocol") or the Overriding Objective of the Civil Procedure Rules, served these papers in order to inconvenience and upset the Defendants as much as possible. This is largely because at the end of [year], and just before the Christmas break, the Claimant's solicitors sent a substantive letter (with 110 pages of enclosures), which they (wrongly) claim complies with the Protocol. Even though the aforementioned letter does not comply with the Protocol, the Claimant's solicitors make reference to it being a Letter of Claim and so the intent was that the Defendants would have to put in their acknowledgement and response under pressure over the Christmas period... I do not consider that this letter is a Letter of Claim as required by paragraph 2.4.1 of the Protocol.

At the hearing, the claimant's barrister argued that the Letter of Claim had been sent to the defendant nearly a year ago, following which discussions took place. She also brought to the court's attention that the claimant had offered either mediation or adjudication with a view to disposing of the matter cheaply and expeditiously. She

noted that the defendant did not agree and would only consider mediation on receipt of a detailed response to its correspondence – which the claimant did by way of its Letter of Claim.

At the hearing, the judge was extremely critical of the lawyers – he was of the view that the hearing was unnecessary, expensive<sup>169</sup> and should have been avoided. The judge awarded the defendant the three-month extension, after reprimanding them for being disorganised on several accounts.

Again, in this case the lawyer interpreted the Protocol in favour of his client's position and argued that it had been complied with. This resulted in procedural complexities, disagreements between the parties and added costs, in addition to the substantive dispute.

### ***Disputes regarding procedural issues***

In the two cases described above disputes concerning the Pre-Action Protocol expanded to include disputes over the procedural timetable. The parties were not able to agree the timing for service of the Defence & Counterclaim and required assistance from the court. These two matters were by no means unique – a number of the matters observed during the course of the fieldwork concerned procedural issues which resulted in expanding or complicating the existing substantive dispute. These included, but are not limited to: the length of time required for services of pleadings, witness statements, expert reports, etc (arbitration and litigation); whether the defendant was entitled to security for costs; whether further, specific documents should be disclosed (as one party had failed to include certain document during the disclosure stage of the proceedings); and whether the proposed defendant should disclose documents prior to the commencement of proceedings.

In each situation, the lawyer interpreted the relevant rules and advanced an argument to support the client's case, in line with the evidence available. These procedural issues often resulted in increased costs to the client, which were often not recovered.

### ***Disputes regarding the new "Jackson Reforms"***

The introduction of the new "Jackson Reforms" is a further and recent area out of which disputes escalate and take shape. As briefly introduced in Chapter 1.3 above,

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<sup>169</sup> The claimant's cost statement amounted to £3,707.50 and the defendant's costs statement amounted to £1,572. The Judge awarded the defendant £250 in respect of costs.

the key objective of Jackson's Review was to '*promote access to justice at a proportionate cost*' (Jackson, 2010:2) and the Reforms include new CPR rules in respect of conditional fee agreements, disclosure, cost management, witness statements and Part 36 offers. As one might expect, disputes have materialised out of the interpretation the recent Reforms; most notably, *Mitchell v News Group Newspapers* (2013) and the conjoined appeals of *Denton/Decandent/Utilise* (2014) in the Court of Appeal.

In *Mitchell*, the costs budgets, as required by the new rules<sup>170</sup>, were not agreed and Mitchell's solicitors failed to respond to NGN's attempts to discuss the budgets as the firm was overstretched and had very limited staff resources. NGN's budget was filed on time but Mitchell's budget was filed six days late, after his solicitors were prompted by the court. As a result of the late filing of Mitchell's budget, it was necessary for the original hearing to be adjourned. The Court of Appeal held that in light of the new overriding objective (CPR r.1.1) governing the conduct of litigation at CPR r.3.9 ("*the need for litigation to be conducted efficiently and at proportionate cost*"), the courts are required to enforce compliance with rules, practice directions and court orders strictly. The Court of Appeal confirmed that relief from sanctions will only usually be given if: the breach can be regarded (on a strict basis) as being truly trivial; the party seeking relief has otherwise fully complied with court rules, practice directions and court orders; and the application for relief is made promptly. Alternatively, there has to be a good, or very good reason why relief should be granted, in which case the application for relief should again be made promptly.

A series of cases since *Mitchell* then tested the court on what it meant by "trivial" or "good reason" for breach of the court rules.<sup>171</sup> "*Trivial breach*" was held to include, for example, very narrowly missing a deadline given in a court order but otherwise fully complying with its terms, or a failure of form but not substance. "*Good, or very good reason*" is to be construed very strictly and would be likely to be a reason that is entirely outside of the control of the party or its legal representative.

As of 5 June 2014, the CPR now allows parties to extend certain time limits by up to 28 days by prior written agreement, without formal application to the court, provided that any hearing date is not put at risk as a result.<sup>172</sup> This enables the court

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<sup>170</sup> CPR r3.12-3.18 and Practice Direction 3E.

<sup>171</sup> By way of example, see *Summit Navigation v Generali Romania* (2014), *Wain v Gloucestershire CC* (2014), *Azure East Midlands v Manchester Airport* (2014), and *McTear v Englehard* (2014).

<sup>172</sup> Civil Procedure (Amendment No 5) Rules 2014, r.3.8.

to retain overall control while still allowing the parties some latitude to deal with unforeseen events.

Most recently, on 4 July 2014, the Court of Appeal handed down its judgment on the conjoined appeals in *Denton/Decadent/Utilise* (2014)<sup>173</sup>. While amplifying the guidance it had set down in *Mitchell* eight months earlier, it set out a new three-stage test for the granting of relief from sanctions, which requires a consideration of all the circumstances of the case. The following new three-stage test<sup>174</sup> replaced the decision in *Mitchell*:

- |                |  |
|----------------|--|
| <b>Stage 1</b> | assess the significance and seriousness of the default which led to the application for relief;  |
| <b>Stage 2</b> | if the breach is significant and serious, consider why the default occurred and whether there was a good reason for it; and  |
| <b>Stage 3</b> | irrespective of any conclusion that might have been reached at Stages 1 and 2, evaluate all the circumstances of the case to enable the application to be dealt with justly: in particular, the need for (i) litigation to be conducted efficiently and at proportionate cost and (ii) to enforce compliance with court rules, practice directions and orders. |

Seemingly this new three-stage test was meant to clarify the position in *Mitchell* and minimise further disputes in respect of court orders and the CPR. However, as the judgment requires a balance between the court rules/orders and procedural discipline, interpretation as ever will still be necessary.

The disputes regarding procedure in *Mitchell* and *Denton/Decadent/Utilise* stemmed from the lawyers' interpretation of the new CPR rules – for various reasons strict compliance with the rules was not possible and arguments supporting their clients' actions ensued. The Reforms are too recent to assess the impact on the Firm and the Firm's clients/disputes. I am not aware of any cases in which the Firm or the Firm's clients fell foul of a court order or rule/practice direction and required relief from sanctions. *Mitchell* and *Denton/Decadent/Utilise* do appear to be at the forefront of

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<sup>173</sup> In *Denton*, the claimant served six new witness statements two months before trial, in *Decadent*, the claimant sent a cheque to the court by DX on the date on which the unless order expired (which subsequently went missing) and in *Utilise* the claimant filed a costs budget late.

<sup>174</sup> See paragraphs 24 to 38 of the judgment.

their minds and regularly feature in conversations between the lawyers and have been the subject of Continuing Professional Development (CPD) seminars. The lawyers appear conscious of the severe implications of this case law<sup>175</sup> and are most concerned with the new costs management and e-disclosure regimes<sup>176</sup>. There is a heightened awareness of the care which is required in preparing these documents and the time and expense that may materialise as a result – particularly in cases with low value claims.

The influence of the Jackson Reforms and the *Denton/Decandent/Utilise* judgment on the professional practice of lawyers is a possible area for further research in due course.

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<sup>175</sup> By way of example, see CPR r32.10, r.31.21 and r.3.14.

<sup>176</sup> See Chapter 2.2 above and CPR 31.5(3), 31.5(4) and 3.13.

#### 4.6 Conclusion: a temporal assembly of the associations

This chapter considered how the associations of documents, evidence, lawyering, costs, the client's conduct and objectives and the substantive law influenced the nature of the dispute and/or the perceptions of the dispute. Each of these entities caused disputes to do something different, to move in a different direction, to take a different shape. Without an assemblage of these components, with the dispute itself and other entities, the dispute would not have developed or dissipated at the time it did and in the manner it did.

Notably, if any one of these components changed in some way, became more or less influential than the others, the dispute would in turn transform again. The dispute is a constantly evolving form depending on its associations. It seems this notion is highly reminiscent of the concepts within relational contract theories, particularly Hugh Collin's competing frames of reference or competing norms of contractual behaviour (Collins, 1999:132). In Chapter 2, we saw how Collins considers that the three normative frameworks of the business relation, the economic deal and the contract are competing and constantly at play in the context of economic transactions. When one framework takes priority over another for good business sense, this does not mean that the others fall away, but rather, are temporarily occluded and perhaps may be resuscitated and brought to the forefront at some later point. In a sense, this is an excellent description of exactly how a dispute transforms: one entity (or mediator) forms a relation with the dispute at a particular point in time, taking priority over the other entities/relations for some good reason, evolving or changing the dispute in some way. As Macneil set out when summarising the four core propositions which inform any relational approach to contracts (Macneil, 2003; Macneil, 2000), *"...understanding any transaction requires understanding all elements of its enveloping relations that might affect the transaction significantly."* By this same token, understanding any *dispute* requires understanding all elements of its enveloping relations that might affect the dispute significantly.

This research revealed at least five categories of relations that significantly affect construction disputes: documents, lawyering, costs, the client's conduct/objectives and the substantive law – and no doubt these are just the tip of the iceberg. The descriptions and narratives included in this chapter are the traces of these relations, that are in themselves an explanation of the assemblages. They have been included to demonstrate the competing and complex nature of the entities which affects

disputes. At any one point in time, any one of these entities can transform, develop or dissipate the dispute to some degree.

This illustrates the temporal and constantly changing nature of disputes and these associations. A particular association may exist and be significant for periods of time during the case, informing how decisions are made and how the dispute is perceived by both parties and their respective lawyers. At other times they may become benign: though still in existence they are not connected to the heart of the matter which gives momentum to the dispute. To put this in context, as we saw in Chapter 4.5, this was most noticeable in disputes concerning, or influenced by, limitation periods. The impending expiry of a limitation period breathed life back into disputes which perhaps had been dormant for some time. The disputes had lost momentum owing to the disassembly of certain relations, for whatever reason, yet took shape and force once again. Put another way, the parties collectively, though not expressly, for whatever reason deemed the dispute, at a point in time, not worth pursuing. This is not to say that the dispute no longer existed, quite the contrary. Rather it dissipated or hibernated until other entities or factors brought it back to the forefront – one of which being the expiry of the limitation period.

As we have seen, any of the competing associations may fuel the scope and identity of the dispute at various points throughout the trajectory of the dispute. The next chapter now turns to the lawyer's involvement in these associations. As we shall see, these associations are part and parcel of the lawyer's professional service - lawyers are aware of these associations and use or avoid them when developing the dispute in the best light possible to suit their clients' case.

## CHAPTER 5

### A CONSTRUCTION DISPUTE: THE IDENTIFICATION & ASSEMBLY

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*Mr Hunter then drafted a series of “strong” letters as he had advised.*

*Firstly, in a five-page open letter to Structure Ltd’s lawyer, he notified them that he now acted on behalf of Columns & Beams Ltd. He then reasserted Columns & Beams Ltd’s claim, which had been made previously and was set out in their on-going, albeit protracted, proceedings.*

*Mr Hunter then went further introducing new legal arguments which had not been made previously in the pleadings. He asserted that Structures Ltd had failed to serve Pay Less Notices during the course of the project and had failed to allow Columns & Beams Ltd to return to site and rectify the alleged defects. He quoted Pearce and High Limited v Baxter & Anr (1999) as strong evidence of what the consequences would be.*

*In due course, after several exchanges of correspondence, Mr Hunter then sent a without prejudice letter suggesting mediation:*

**The Lawyer:** Your Client’s offer does not fairly reflect our Client’s entitlement and is rejected. As you can see from our letter to the Court, having considered our advice, our Client proposes to pursue its claim vigorously.

Nevertheless, whilst our Client is confident in the strength of their case, they of course are mindful of the time involved to see such proceedings to Trial, as well as the costs which, no doubt, will escalate going forward.

As such, the parties are at an important crossroads and it would only be prudent to explore whether there is an opportunity for settlement.

Our Client is therefore willing to participate in either a without prejudice meeting, with lawyers present, or alternatively a half-day mediation...

*Structures Ltd agreed in due course and the parties established a time, date and venue for the mediation.*

*Then, on the eve of the mediation, Structure Ltd’s lawyer sent the following email cancelling the mediation:*

**The Lawyer:  
(Structures Ltd)**

Further to our previous correspondence on this matter, we appreciate that the parties are currently due to attend mediation. Unfortunately, for the reasons which we detail below, our client does not consider that a mediation [tomorrow] would enable the parties to reach a settlement in relation to all of the matters in dispute...

*The email went on to detail further new claims Structures Ltd considering that it had against Columns & Beams Ltd. In light of this, they were not willing to attend a mediation without understanding the extent of these new claims which they suggested had just come to light. The email concluded by suggesting that the mediation be adjourned for a period of four weeks to enable them to continue their investigations.*

*Mr Cahill was furious. He considered this to be a further delay tactic and found it astonishing that Structures Ltd could possibly have any new claims.*

*Mr Hunter advised Mr Cahill to go on the attack.*

*Previously Mr Hunter had avoided adjudication, now he suggested it was time. He considered that negotiations would only prolong matters.*

*Mr Cahill was still somewhat reluctant considering the costs/risks involved. However, Mr Hunter agreed to cap the fees for the adjudication. In light of this, Mr Cahill agreed and within seven days Mr Hunter served the Notice of Adjudication for failure to serve any Pay Less Notices prior to withholding the monies owed to Columns & Beams Ltd.*

In the above extract from the *Columns & Beams v Structures Ltd* narrative, we now see the parties' dispute taking momentum and evolving into different issues, different forms of dispute resolution and different levels of complexity. Clearly the lawyers' advice and actions have had a significant impact on the trajectory of the dispute. We see that Mr Hunter has changed course, owing to the actions of Structures Ltd, and now has advised adjudication. Mr Cahill has followed suit. The dispute which has now been referred to adjudication is different to dispute which is in litigation – it now includes issues of Pay Less Notices. Indeed seemingly from Structures Ltd's alleged viewpoint, there are further new claims or arguments which have yet to be included in the formal proceedings and are preventing settlement until their extent is fully realised. Either way, the parties now have a very different dispute to what they had previously.

To arrive at this newly defined dispute, both sets of lawyers have put forward new and competing arguments – some being legal arguments, others being procedural or commercial arguments – all of which concern the identity and scope of the dispute. This focus on the identity and scope of the dispute is not new – the following two, seemingly simple, questions have gainfully employed construction lawyers and the judiciary for nearly a century, if not more<sup>177</sup>:

- (1) Is there a dispute?
- (2) What is the extent of the dispute?

The answer to the first question must be “yes” if a party wishes to commence adjudication or arbitral proceedings. The answer to the second question must fall within the applicable rules which govern the proceedings.<sup>178</sup> Accordingly, the definition of a dispute and what comprises the dispute is crucial to lawyers and their clients from a formal legal standpoint if proceedings are to be successful and without any valid jurisdiction issues. Lawyers therefore seek to ensure not only that a

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<sup>177</sup> S1(1) of the Arbitration Clauses Protocol Act 1924 considered the relationship between arbitration and court proceedings in English law and the court's jurisdiction to stay proceedings. The MacKinnon Committee Report of 1927 at paragraph 43 (MacKinnon, 1927) recognised a need for the court to have jurisdiction to stay the proceedings if it is “*satisfied that there is a real dispute to be determined by arbitration*”. The Arbitration (Foreign Awards) Act 1930 then amended the Arbitration Clauses Protocol Act 1924 and this wording was carried through into the Arbitration Acts 1950 and 1975, from which a long line of case law arose (eg *Eagle Star v Yuval* (1978), *Nova (Jersey) v Kammgarn* (1977), *Ellerine v Klinger* (1982), *Hayter v Nelson* (1990), etc.) See the judgment of Swinton Thomas LJ in *Halki Shipping Corporation v Sopex Oils Ltd* (1997).

<sup>178</sup> By way of example, this may include any terms identified in the parties' contract, the Arbitration Act 1996, the HGCRA 1996 (as amended), case law concerning crystallisation of a dispute and what constitutes “more than one” dispute, etc.

dispute exists, as defined by case law and any contractual provisions, but also to identify the dispute in the language of the law, in the best possible light which suits their clients' case.

As we will see in this chapter, the process lawyers invoke to define the dispute often is an iterative process of assembling various components – a process which is dependent on constraints and associations. These constraints and associations stem from a number of sources including, no less, case law, legislation and the client's objectives. Put another way, lawyers seek to name their clients' disputes in a way which attempts to ensure a successful outcome. I suggest this is a process of design: a creative pursuit which must take into account dependencies and alliances when developing the end result.

This chapter considers: the definition of a dispute and the lawyer's search for its identification; how the search for this identification equates to the "naming" stage identified by Felstiner, Abel and Sarat (Felstiner, et al., 1980-1981) and what follows is an iterative, and sometimes messy, Reverse Trajectory of "*Claiming, Blaming, Naming...*". Finally, this chapter reflects on how lawyers, through the act of "naming", creatively design disputes to obtain their clients' objectives, as the cartoon below aptly illustrates.



"From now on no one says 'hit and run.'  
We're calling it a 'touch and go.'"

## 5.1 Defining the dispute: the search for identification

### Is there a dispute?

As introduced above, lawyers spend an extensive amount of time debating whether or not a dispute exists, the reason being largely dependent on the complexity of the law. As far as lawyers are concerned, disputes may be defined by and dependent on both case law and the terms of the parties' contract. In the context of adjudication and arbitration, lawyers and their clients are particularly concerned as if there is "*no dispute*", the adjudicator or arbitrator does not have jurisdiction to determine the matter. Considering its significance in the context of lawyer's conduct and advice, the following briefly develops the doctrinal issues previously set out in Chapter 2.2, so as to contextualise the lawyer's actions and the discussion which follows in this chapter.

### **Case law**

In order to decide whether there is a dispute, the courts have spilt much ink on defining the term "*dispute*", particularly in the context of arbitration before statutory adjudication was introduced in 1996. The Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd* (1997) summarised previous case law in order to determine whether the plaintiffs were entitled to bring Order 14 proceedings<sup>179</sup> to enforce a claim to which the defendants allegedly had no arguable defence, where the claim arose under a contract containing an arbitration clause.

The plaintiffs/appellants (Halki) submitted that a "*dispute*" meant a genuine or real dispute, and that a claim which is indisputable because there is no arguable defence does not create a dispute at all. They submitted that it follows that claims to which there is no arguable defence are outwith the scope of s9 of the Arbitration Act ("*matter which under the agreement is to be referred to arbitration*"). The defendants/respondents (Sopex) argued that a "*dispute*" meant any disputed claim, and therefore covered any claim which is not admitted as due and payable, thus leaving no scope for court proceedings save where it had made a positive admission. In doing so, they relied on the decision in *Hayter v Nelson* (1990) where Saville J (as he then was) held that the word "*dispute*" in an arbitration clause should be given its ordinary meaning and that just because a person has no arguable grounds for disputing something, does not mean in ordinary language that he is not disputing it.

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<sup>179</sup> Proceedings for summary judgment under the Rules of the Supreme Court 1965 before the CPR was introduced in 1999. This is now Part 24 of the CPR.

The court dismissed the appeal, in favour of Sopex. They found that an unadmitted claim gives rise to a dispute, however unanswerable or flimsy such a claim might be.<sup>180</sup>

Once the HGCRA 1996 introduced statutory adjudication, a number of reported cases followed concerning the “crystallisation of a dispute” for the purpose of adjudication (ie when did the dispute materialise). It has been argued frequently by the responding party that the referring party’s alleged dispute was not a matter which had previously arisen between the parties. The responding party’s argument generally is that such a claim, since it had not been considered, let alone rejected, could not be said to be in dispute at the time of the adjudication notice and therefore the adjudicator does not have jurisdiction to determine the dispute (Coulson, 2015:44). In short, the argument goes that no dispute existed prior to the referring party serving the Notice of Adjudication.

As set out in Chapter 2.2, in the leading case of *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2004) Jackson J (as he then was) set out seven propositions for the meaning of a dispute and the identification as to when a dispute has arisen in the context of construction adjudication and arbitration cases. In short, he held that a dispute arises when it emerges that a claim is not admitted. To arrive at his seven propositions, Jackson J considered a long line of previous case law regarding both arbitration and adjudication, including *Halki*,<sup>181</sup> adopting and summarising various points and not endorsing others. Notably, he did not endorse the suggestions in some of the earlier cases that a dispute may not arise until negotiation or discussion had been concluded or that a dispute should not be lightly inferred<sup>182</sup>.

In approving Jackson J’s seven propositions, the Court of Appeal added further guidance and narrowed the definition in the context of adjudication as costs will be incurred against tight timescales. Rix LJ stated that “*the respondent should have a reasonable time in which to respond to any claim.*”<sup>183</sup> Accordingly, the existence of a dispute will depend on the particular circumstance: the responding party should have a reasonable opportunity to respond to the claim and a reasonable time will need to have expired. Silence, ie not responding to a claim within a reasonable time,

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<sup>180</sup> See paragraph 58 in Jackson J’s judgments in *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2004).

<sup>181</sup> See footnote 19 above for the list of cases cited.

<sup>182</sup> Noted by Clarke LJ in *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* (2004) at paragraph 63.

<sup>183</sup> *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2005) at paragraph 68.

may amount to a dispute as the claim has not been admitted.<sup>184</sup> In any event, the court has been clear that the word “*dispute*” should be given its ordinary English meaning and not some form of specialised meaning for the purposes of adjudication.<sup>185</sup>

Notably, Felstiner, Abel and Sarat’s definition accords with the court’s definition: a *dispute* only materialises if this claim is rejected, in whole or in part. Furthermore, Felstiner, et al. also assert that rejection need not be expressed by words: “*delay that the claimant construes as resistance is just as much a rejection as is a compromise offer (partial rejection) or an outright refusal*” (Felstiner, et al., 1980-1981:636).

Cases since AMEC further summarise the court’s position as to whether a dispute has crystallised prior to the Notice of Adjudication. By way of example, in *Cantillon Ltd v Urvasco Ltd* (2008) the Judge held at paragraph 55<sup>186</sup>:

- “(a) Courts (and indeed adjudicators and arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is.
- (b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is.
- (c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration.
- (d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.”

Here, the court interpreted “*dispute*” broadly and held that the referring party was not limited to the precise arguments, contentions and evidence put forward before the dispute crystallised. *Cantillon* was followed in *Bovis Lend Lease Ltd v The*

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<sup>184</sup> *Tradax International v Cerrahogullari TAS* (1981) and *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2004).

<sup>185</sup> *Beck Peppiatt Ltd v Norwest Holst Construction Ltd* (2003) and *Cowlin Construction Limited v CFW Architects (A Firm)* [2003] EWHC 60 (TCC).

<sup>186</sup> See also paragraph 55 of *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* (2007).

*Trustees of the London Clinic* (2009)<sup>187</sup> and *Working Environments v Greencoat Construction* (2012).<sup>188</sup>

The above by no means documents all of the case law on this point, but rather, is intended to demonstrate the intricacy of the issues lawyers face and why they consider the existence of a dispute, prior to commencing proceedings, to be so critical.

### ***Contract***

In addition to case law, the parties' contract may define whether a dispute (or a claim) exists. The IChemE, ICE, FIDIC and NEC3 standard forms of contract are such examples. To provide a flavour of what these contracts stipulate and the behaviour and events which follow as a result, the following briefly discusses the ICE and NEC3 forms.<sup>189</sup>

#### ***ICE***

Clause 66<sup>190</sup> of the ICE Conditions of Contract, 7<sup>th</sup> edition, includes a process whereby "a dissatisfaction" is referred to the engineer prior to a dispute coming into existence:

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<sup>187</sup> In *Bovis Lend Lease*, the referring party's quantum and breakdown of the loss and expense claim included in the referral notice was different to the quantum and breakdown of the claim made shortly after the project was completed. The responding party claimed that a dispute over loss and expense had not crystallised at the time of the referral. The Judge held that a dispute had crystallised as it was not a materially different claim, noting that the quantum had merely been updated.

<sup>188</sup> *Working Environments* is a recent example where the court found that not all of the dispute had crystallised prior to the Notice of Adjudication. Here the Judge confirmed the dicta in *Cantillon* that adjudication decisions were severable, enforced a large bulk of the adjudicator's decision and severed two items which had not arisen until some 22 days into the adjudication process.

<sup>189</sup> With regard to the IChemE, see Clause 46 of the IChemE Form of Contract (5<sup>th</sup> ed, 2013, The Red Book) states that a dispute does not exist until the "dissatisfaction" has been referred to and determined by the Project Manager. With regard to FIDIC, see Clause 20 (Claim, Disputes and Arbitration) of the FIDIC Conditions of Contract for Construction (the Red Book, 1<sup>st</sup> ed, 1999) which provides a further example of a condition precedent. Here, the contractor must give notice to the engineer pursuant to Clause 20.1 if he considers himself entitled to additional time and/or money. See also the recent case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* (2014) in which the TCC considered Clause 20.1 of the FIDIC Yellow Book. The

<sup>190</sup> In *JT Mackley & Co Ltd v Gosport Marina Ltd* (2002) the Judge held that obtaining the decision of the engineer under Clause 66 (ICE Condition 6<sup>th</sup> edition) was a condition precedent to a "dispute" and therefore arbitration, even in the context of a previous adjudication.

*“66(3) The Employer and the Contactor agree that no matter shall constitute nor be said to give rise to a dispute unless and until in respect of that matter*

*(a) the time for the giving of a decision by the Engineer on a matter of dissatisfaction under Clause 66(2) has expired or the decision given is unacceptable or has not been implemented and in consequence the Employer or the Contractor has served on the other and on the Engineer a notice in writing (hereinafter called the Notice of Dispute)*

*(b) an adjudicator has given a decision on a dispute under Clause 66(6) and the Employer or the Contactor is not giving effect to the decision, and in consequence the other has served on him and the Engineer a Notice of Dispute*

*and the dispute shall be that stated in the Notice of Dispute. For the purposes of all matters arising under or in connection with the Contract or the carrying out of the Works the word "dispute" shall be construed accordingly and shall include any difference.”*

Whilst this contract does attempt to avoid disputes by prolonging or avoiding the specific use of the word “dispute”, the question does arise as to whether there is fundamentally or in practice any real difference between “dissatisfaction” and “dispute”. The case of *AMEC Civil Engineering Ltd v Secretary of State for Transport* (2004), discussed above, concerned Clause 66 of the ICE Conditions (5<sup>th</sup> edition). Here, six months prior to the expiration of the limitation period, defects became apparent. Twelve days before the expiration date, the Highway Agency referred the matter regarding the defects to the engineer pursuant to Clause 66 – in essence, they requested the engineer to decide whether AMEC was liable for the defects. When they referred the matter to the engineer, they did not term the matter a “dissatisfaction”, but rather a “dispute”:

*“1. We copied you our letter to AMEC Civil Engineering Ltd dated 6th December 2002.*

*2. AMEC Civil Engineering Ltd has not acknowledged that it is responsible for the situation with Thelwall Viaduct by close of business on Tuesday, 10th December 2002.*

3. We refer the dispute to you as engineer pursuant to clause 66 for your decision."

[Emphasis added]

Seven days later the engineer gave his decision in that AMEC were responsible for the defects and the day after that the Secretary of State served its Notice of Arbitration. AMEC argued that there was no dispute or difference in existence which could be referred to arbitration owing to the timescales. The Judge disagreed as meetings had taken place many months before and it was clear that AMEC did not admit to the defects. Therefore the engineer's decision was not unfair procedurally and the Notice of Arbitration was valid. In this case, the Secretary of State (Highway Agency) did follow the condition precedent of referring their dissatisfaction to the engineer, albeit in an extremely short timescale. Clearly it did so in light of the limitation period and as a matter of procedure in order to commence arbitration. As such, the name "dissatisfaction" at the time it was referred to the engineer was arguably immaterial and superficial as eight days later the same was now termed a "dispute" for the purposes of the contract.

### NEC3

As can be seen from the case law on condition precedents<sup>191</sup>, in addition to defining what a dispute is and identifying whether a dispute exists prior to the commencement of proceedings, lawyers may also spend considerable time crafting an explanation as to why their client is entitled to make a claim in the event that they fail to comply with the contractual notice provisions. The NEC3 standard form of contract certainly keeps lawyers busy in this respect.

Core Clause 6 across all the NEC3 suite of contracts is concerned with compensation events. Compensation events are those events which change the cost of the work or the time needed to complete the work for which compensation has to be given. The contract provides a list of compensation events, the basis of their assessment and the procedure by which they are to be notified, assessed and implemented. The aim is

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<sup>191</sup> See *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) where the court confirmed their approval for condition precedents, though they will be construed strictly and narrowly: they must state the precise time within which the notice is to be served and must make it clear that unless the notice is served within that time the party making the claim will lose its rights (*Bremer HandelsGesellschaft MBH v Vanden* (1978)). The analysis in *Multiplex* was followed subsequently in *Steria Ltd v Sigma Wireless Communications Ltd* (2008) and *WW Gear Construction Ltd v McGee Group Ltd* (2010).

that the events are assessed as early as possible, and if possible, prior to the event occurring (Thomas, 2012:231).

Within Core Clause 6, Clause 61.3 establishes an eight-week time bar for making a claim, which is a condition precedent for entitlement to time and/or money:

*“If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.”*

During the course of the research, I observed a number of matters or discussions which involved lawyers’ considering their clients’ right to claim for more time or money in light of Clause 61.3. The lawyers had a number of conversations with their clients regarding the factual events and how to construe them in light of the phrase “...of becoming aware of the event...” By way of example, in **Matter No 9 [‘Compensation Events’]** the employer engaged the contractor (the Firm’s client) under an amended NEC2 contract. Ultimately the contractor sought payment and time for nearly 500 Compensation Events. Of these 500 Compensation Events, the employer accepted some of them and disagreed that the others amounted to Compensation Events. When advising the client, the lawyer and his assistants spent considerable time analysing each event for the following issues such as: whether it was a defined Compensation Event, whether an early warning or notification had been given, the reasons why the contractor (the client) says it is a Compensation Event, the reasons why the employer says it is or is not a Compensation Event, and the quantum in respect of the alleged Compensation Event.

The lawyer advised the contractor on his merits in respect of each Compensation Events and armed him with arguments as to why he was entitled to (almost all of) the events. The contractor was a repeat client and a repeat player, often capable of negotiating with employers without the presence of lawyers. Eventually the parties settled without the need for formal proceedings. Nevertheless, what constituted a Compensation Event (which entitled the contractor to a claim for more time or money) and whether notification of such event was provided occupied a significant portion of the lawyer’s time in this matter.

Whether creating an argument regarding the existence of a dispute, or an entitlement to bring a claim in the event a contractual notice provision was missed,

both case law and the parties' contract inform how lawyers develop their argument and present their clients' case.

### **What is the extent of the dispute?**

This is the second question which regularly engages construction lawyers during the course of their professional service – largely as a result of the case law which has built up around statutory adjudication and the jurisdiction of the adjudicator. The authorities are clear that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in the Notice of Adjudication (Coulson, 2015: 221). Accordingly, it is the dispute identified and defined in the Notice of Adjudication which the adjudicator has the jurisdiction to decide – only by express agreement between the parties can this be amended.<sup>192</sup>

This raises a number of issues which lawyers now need to consider, in light of the case law over the last 18 years, when drafting Notices of Adjudication: is the notice wide enough to embrace the claim made<sup>193</sup>; is the notice wide enough to allow cross-claims by the responding party<sup>194</sup>; is the dispute referred a single dispute<sup>195</sup>; and does the single dispute arise out of multiple contracts, and if so, is it still one dispute?<sup>196</sup>

*Witney Town Council v Beam Construction (Cheltenham) Limited* (2011) illustrates the difficulties lawyers face when identifying the scope and extent of the dispute in the Notice of Adjudication and the court's recognition of the fluidity of disputes. Here, Beam served a Notice of Adjudication and Referral Notice which identified that a dispute had arisen and set eight questions to be decided by the Adjudicator. The

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<sup>192</sup> In *KNS Industrial Services Ltd v Sindall Ltd* (2001) HHJ Lloyd QC held that further documents which come into existence after the Notice of Adjudication “do not cut down, or, indeed, enlarge the dispute (unless they contain an agreement to do so)”.

<sup>193</sup> *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* (2005) and *Pilon Ltd v Breyer Group PLC* (2010).

<sup>194</sup> *VHE Construction Plc v RBSTB Trust Co Ltd* (2000) and *Letchworth Roofing Company v Sterling Building Company* (2009).

<sup>195</sup> The HGCRA only allows a single dispute to be referred, unless the parties agree otherwise: Clause 8(1) of the Scheme. See *Fastrack Contractors Ltd v Morrison Construction Ltd* (2000) at paragraph 20. Cases on this point include, though not limited to: *David McLean Housing Ltd v Swansea Housing Association Ltd* (2002), *Michael John Construction v Golledge* (2006), *Grovedeck Ltd v Capital Demolition Ltd* (2000), *CIB Properties Ltd v Birse Construction Ltd* (2005), *David and Teresa Bothma (In Partnership) T/A DAB Builders v Mayhaven Healthcare Ltd* (2007) and *Witney Town Council v Beam Construction (Cheltenham) Ltd* (2011).

<sup>196</sup> See *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* (2008), *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* (2009), *Supablast (Nationwide) Ltd v Story Rail Ltd* (2010) and *Amec Group Ltd v Thames Water Utilities Ltd* (2010).

Council made it clear that it considered that four disputes, rather than one, had been referred to the Adjudicator.

Ultimately, the Adjudicator awarded some £70,500 to Beam. When the Council failed to pay, Beam commenced proceedings for enforcement of the Adjudicator's decision. Mr Justice Akenhead, having reviewed the relevant case law, drew the following conclusions at paragraph 38:

- “(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.*
- “(ii) **A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.***
- “(iii) **A dispute can comprise a single issue or any number of issues within it.** However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.*
- “(iv) **What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted...***
- “(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.*
- “(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise...*
- “(vii) Whether there are one or more disputes again involves a consideration of the facts... A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or part of disputed claim No 2, that establishes a clear link and points to there being only one dispute.”*

[Emphasis added]

After considering the facts in light of the above, the Judge held that there was only one dispute between the parties by the time of the Notice of Adjudication and only one dispute which was referred to adjudication. That dispute was what was due and owed to Beam. Judgment was in favour of Beam and the Adjudicator's decision was enforced.

In arriving at his decision, the Judge recognised that a dispute has the potential to change or transform its nature, "*metamorphose*", into something different, ie it is not a static entity. He also appreciated that a dispute can comprise a single issue or multiple issues and is a question of fact which may require investigation or interpretation. As such, it is not difficult to understand why lawyers spend so much time describing the dispute and precisely wording the Notice of Adjudication.

### **Identifying & redefining the dispute**

In *AWG Construction Ltd v Rockingham Motor Speedway Ltd* (2004) Judge Toulmin CMG QC stated at paragraph 145:

*"In some cases the basis on which the claim is made will be clear and obvious. In others it will have been the subject of sophisticated legal argument on the precise legal basis which the claim is made..."*

Here the Judge recognised that at times the basis of a claim will be a sophisticated legal argument constructed by lawyers. Acknowledging that lawyers construct these arguments and develop facts in support of that argument is not novel (Graham, 2005:3). Nor is the recognition that lawyers are "adversarial architects" who construct and deconstruct law's meaning (Yngvesson, 1988-1989; Sarat and Felstiner, 1995; Kirkland, 2012:160). As Yngvesson summarises (1988-1989:1691):

*"...law creates the social world by 'naming' it; legal professionals are empowered by their capacity to reveal rights and define wrongs, to construct the meanings of everyday events (as just or unjust, as crime or normal trouble, as private nuisance or public grievance) and thus to shape cultural understandings of fairness, of justice, and of morality."*

However, what has not been fully appreciated is the extent to which lawyers identify or redefine the dispute itself. Case law, the parties' contract and the clients' objectives require that the lawyer reframe or rename the dispute in a legal context.

As introduced above, lawyers place great emphasis on appropriately drafting the Notice of Adjudication and defining the dispute therein such that their clients' claim does not fall foul of prior case law. The same holds true in arbitration and litigation. Lawyers develop the identity of the dispute in a legal context and draft Notices of Arbitration, Claim Forms, Particulars of Claim, lists of issues, skeleton arguments, etc. In addition, witness statements and expert reports are all prepared in support of the dispute which the lawyer has identified.

Litigation in the TCC does not necessarily require the full identity of the dispute prior to commencing proceedings. However, the process itself encourages the parties to narrow the issues in dispute and agree, where possible, certain elements of the dispute or at a minimum the nature of the dispute.<sup>197</sup> It is recognised that disputes exist prior to the precise *naming* of them and it is the process itself which searches for the identity. As Judge Kirkham sated in *Cowlin Construction Limited v CFW Architects (a firm)* (2003):

*"...Many court and arbitral proceedings are begun before the nature of the dispute or difference between the parties has been explicitly set out..."*

During the course of this research nearly every matter, if not all, involved the lawyer identifying the dispute and defining it (or redefining it) in a legal context. Whether it was for the purposes of negotiation, adjudication, arbitration or litigation – or simply advising clients on the merits or possible outcome of their case – each matter involved the lawyer investigating the clients' version or description of the dispute, satisfying himself as to its existence and identity (or lack thereof) and redefining it thereafter, as needed in a legal context. In doing so, lawyers are in a sense producing (or reproducing) a reality of the dispute, similar to how the practice of science *produces* its realities as well as describing them (Law, 2004:13).

**Matter No 24 ['Termination']** illustrates one way lawyers identify disputes and confirm that they have crystallised for the purposes of adjudication under the HGCRA. In this case, a home owner had engaged a contractor to refurbish a residential property and design and build a new extension to it. The parties' relationship deteriorated and eventually they *"agreed to terminate the building contract"*.<sup>198</sup> Their respective quantity surveyors (QS) then spent the next 18 months arguing about how much the contractor was entitled to (payment) without reaching an agreement. The contractor's QS finally contacted a lawyer at the Firm as his

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<sup>197</sup> The Pre-Action Protocol, CMC, etc.

<sup>198</sup> This is how the client described the events to the lawyer in due course.

colleague had used him before with good results. The lawyer ultimately wrote three letters in total prior to the parties reaching a settlement agreement. The parties' QSs did most of the negotiating and even drafted the proposed settlement agreement in order to minimise legal costs.

In the lawyer's second letter to the home owner's QS, he confirmed crystallisation of the dispute. If a settlement was not forthcoming, his advice to the contractor was to commence adjudication and to do so, this required clear evidence that a dispute existed. His letter to the home owner's QS stated:

**Lawyer:** Further to our letter of [x], we note that our clients provided your client with extensive documentation over the last 22 months to substantiate their claim. Our clients and/or their representatives also met with your client or her representatives on a number of occasions. In these circumstances, it is clear that your client is unwilling to pay our clients the monies they are entitled to - £49,767.27 plus VAT, as set out in...

Doubtless, you are familiar with the line of authorities which state that a dispute crystallises once a claim has been challenged or rejected. By way of example we refer you to the case of *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC).

Notwithstanding our clients' entitlement, they are still prepared to accept a reasonable offer as they acknowledge the time and cost implications of proceedings...

In this letter, the lawyer set out that a number of meetings had taken place and that extensive documentation had been sent by the contractor substantiating his claim; however, the home owner was still unwilling to make payment. Accordingly, the lawyer asserted that a dispute had arisen. The lawyer did not expressly state that adjudication would be commenced; however, his reference to *Cantillon* was strategic in that this implied his next course of action would be service of a Notice of Adjudication.

With regard to defining and redefining the dispute to suit their client's case, those cases which concerned adjudication were particularly specific as to the identity of the dispute (owing to the case law set out above). Disputes often concerned non-payment and the lack of withholding notices (now known as Pay Less Notices) as required by s111 of the HGCRA, as amended. The client (usually either a contractor or a subcontractor) approached the Firm complaining that the building owner (ie, the employer) had not paid one of their invoices or interim certificates. The lawyers investigated the facts and if it turned out that a Pay Less Notice had not been issued, the lawyers would redefine the non-payment dispute as a dispute regarding the

building owner's failure to serve the notice – and following on from that, their failure to pay the amount rightly due to their client.<sup>199</sup>

In the context of litigation, **Matter No 7** [*Additional Works*] is one such example of lawyers redefining the dispute. Here, the client (a contractor) approached the lawyer with their dispute in respect of the additional works under the contract. The client essentially said that the building owner had rejected their claim for payment of these additional works. There was some mention of defects, though the client described them as minimal and in any event an agreement had been reached. When drafting the Particulars of Claim, the lawyer couched the dispute as a breach of 50 separate contracts for non-payment – one contract for each additional element of work. The dispute, as described in the Particulars of Claim, was defined as a non-payment dispute, using a legal analysis which skirted around the difficult set of facts that one contract for the additional works could not have come into existence.<sup>200</sup> The Particulars of Claim made no mention of defects or that their contract(s) had been wrongfully terminated as the building owner refused to let them back into the site to complete the works. The dispute, irrespective of how the contractor or the developer perceived it, was redefined by the lawyer to suit his client's case.

It is important to note that in each of the cases described above, and indeed all of the 50 matters within the Matter Database, the client approached the Firm with an understanding or perception that a dispute already existed – this being a claim that had been put to the other side and rejected (or not responded to). The lawyer then investigated the dispute and redefined as necessary. This process, which Chapter 5.2 will now consider, is perhaps inevitable in the construction industry owing to the contractual requirements of construction contracts.

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<sup>199</sup> Notably, **Matter No 44** and *Columns & Beams Ltd v Structures Ltd*.

<sup>200</sup> No specific agreement had been reached and the personnel with the capacity or agency to enter the parties into a contract were not in attendance at a particular meeting.

## 5.2 The Reverse Trajectory: Claiming, Blaming, Naming...

As introduced above, the empirical data illustrated that when clients approached the Firm, they generally did so with the knowledge that a dispute existed: they were on the receiving end of a formal claim or they wanted to escalate the dispute to the next level, if so advised by the lawyer. Either way, disputes generally exist prior to construction clients approaching their lawyers – and the research therefore concerns the trajectory of the dispute after the lawyer's first gaze upon the dispute.

A dispute's existence prior to the engagement of a lawyer is of course not unique to the construction industry. In Hazel Genn's two *'Paths to Justice'* studies which concerned a wide range of 'justiciable problems'<sup>201</sup>, 68% of the respondents in England and 77% of the respondents in Scotland made contact with the other side to try to resolve the dispute directly, prior to obtaining advice (Genn, 1999; Genn and Paterson, 2001).

Nevertheless, whether grievances are referred to the lawyer, as was discussed in *"Naming, Blaming, Claiming..."*, or disputes are referred, lawyers generally, though certainly not always, produce a transformation (Felstiner, et al., 1980-1981:645):

*"...lawyers (and others) help people understand their grievances and what they can do about them. In rendering this service, they almost always produce a transformation..."*

The suggestion here is that lawyers advise their clients as to what options they have for their grievance. In addition, lawyers may play a part in shaping disputes *"to fit their own interests rather than those of their clients. Sometimes they systematically 'cool out' clients with legitimate grievances..."* Accordingly, both passages imply that lawyers assist in the transformation grievances, through the various stages, which may or may not result in a dispute. Felstiner, et al., perhaps could not have been more specific as to the influence of lawyers on this transformation as they recognised that data about lawyers and dispute transformations was incomplete and atheoretical owing to the paucity of observational studies of lawyer-client relationships (Felstiner, et al., 1980-1981:646).

In any event, the results of this research supports the perception that claiming and disputes in the construction industry are part and parcel of construction contracts

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<sup>201</sup> By way of example, these problems included employment, residential property, rental accommodation, money, divorce, faulty goods and services, family matters, accidental injury, etc.

(Latham, 1994). The traditional transformation of *"Naming, Blaming, Claiming..."*, and any other ordering of these stages (Lloyd-Bostock, 1984) generally occurs before the construction clients engaging their lawyers. Dispute(s) tend to exist already before the lawyer's first gaze and notably a number of disputes and dispute trajectories may have materialised. Once clients instruct their lawyers in respect of the dispute(s) which already exists, the process thereafter is reversed at that point to: *"Claiming, Blaming, Naming..."* This is not say, as we shall see, that *"Claiming, Blaming, Naming..."* necessarily happens in this specific order or indeed the transformation only occurs ones. Quite the contrary – the dispute transformations witnessed were muddled, messy, iterative and complex, difficult. What was constant however, was the end goal of *"naming"*. The process was reversed in the sense that the aim of the lawyer is to *name*, or *rename*, the dispute in an appropriate legal context to suit his clients' objectives. We investigate this reverse trajectory first with an understanding *"claiming"* in construction contracts.

#### **"Claiming" in construction contracts**

Construction contracts by their very nature provoke the existence of disputes. The procedures and requirements set out within these contracts require that claims are made if, for example, additional payment or extensions of time are to be effected. As such, the moment one party does not agree with and rejects a valuation of the works or any other decision of the contract administrator, in essence, a dispute comes into existence. The term *"claims"* (eg, a contractor's claims) is regularly used on projects to mean *"application"* or *"request"* for additional time and/or money. It is not necessarily an adversarial term and employers/building owners and their contract administrators expect to receive contractor's claims during the course of a project if the works do not run as-planned. As defined by Chappell, et al., (2009, 82), a *"claim"* is:

*"...[a] word...commonly used to refer to a contractor's application for loss and expense and/or an award of an extension of time (qv). Strictly speaking, the contractor does not submit or make a claim [under the JCT contracts], but gives notice to the architect/contract administrator to address the content of the notice in accordance with the provisions in the contract..."*

In addition, when settling the final account<sup>202</sup>, some parties may refer to the contractor's submission as the contractor's "*claim*". Today's standard form contracts tend to avoid the use of the word "*claims*" in spirit of collaboration and cooperation, unless it is in the context of the dispute resolution procedure. Nevertheless, it is still a commonly used word in their course of dealings, negotiations and otherwise. In addition, some standard form contracts still expressly refer to "*claims*".

For example, Clause 41.1 of the IMechE/IET Model Form of General Conditions of Contract (2010 edition)<sup>203</sup> provides that in every time a contractor considers that he is entitled to additional monies, he must make "*a claim*". If he fails to make a claim in accordance with this clause, the purchaser will not be liable to make payment in respect of that claim. This clause is not the dispute resolution clause of the contract – it is merely the clause under which the contractor must notify his request for additional monies.

***Notification of Claims***

*41.1 In every case in which circumstances arise which the Contractor considers entitle him, by virtue of the Conditions, **to claim additional payment** the following provisions shall take effect:*

- (a) within 30 days of the said circumstances arising the Contractor shall, if he intends to make any claim for additional payment, give to the Engineer notice of his intention to make a claim and shall state the reasons by virtue of which he considers that he is entitled thereto;*
- (b) as soon as is reasonably practicable after the date of the notice given by the Contractor of his intention to make a claim for additional payment, and not later than the expiry of the last Defects Liability Period, the Contractor shall submit to the Engineer (with copies for transmission to the Purchaser) full particulars of and the actual amount of his claim. The*

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<sup>202</sup> "A phrase used to describe the calculation of the overall amount due to a contractor for works carried out under and in accordance with the contract... Not all the standard forms of contract make use of the phrase 'final account', but it is in common use nevertheless." (Chappell, et al., 2009:203).

<sup>203</sup> For the supply of electrical, electronic or mechanical plant – with erection (MF/1, rev 5).

*Contractor shall thereafter promptly submit such further particulars as the Engineer may reasonably require to assess **the value of the claim...***

[Emphasis added]

The express terminology used is “*claim*” – a claim is required if the contractor believes he is entitled to additional monies for whatever reason. This quickly establishes the potential for a dispute. If the engineer disagrees with the value of the contractor’s claim, a dispute exists – not necessarily a dispute which one of the parties wants to escalate to arbitration or adjudication, but one which requires attention and agreement in order to settle the final account at the end of the project. Here “*claim*” is akin to “*request*” or “*application*”.

The current version of JCT suite of contracts (2011) does not expressly use the term “*claim*” in this way. Rather, the contractor must “*notify*” the Architect/contract administrator if it becomes reasonably apparent that the progress of the works is being or is likely to be delayed (Clause 2.27 of the SBC/XQ 2011) or must make an “*application*” to the Architect/contract administrator if in the execution of the contract he incurs or is likely to incur direct loss and/or expense that he considers requires additional payment (Clause 4.23 of the SBC/XQ 2011). Whilst this terminology is employed, it is nevertheless akin to the use of “*claim*” in the IMechE contract above.

Notably, the JCT has not always avoided the use of the word “*claim*”. In the 1980 edition of the Domestic Sub-contract (DOM/1) the following clauses indicate the use of the word “*claim*” to mean “*application*” or “*request*” for loss and expense:

*Clause 13.1: Disturbance of regular progress of Sub-Contract Works  
– Sub-Contractor’s claims;*

*Clause 13.2: Disturbance of regular progress of Works –  
Contractor’s claims; and*

*Clause 24: Contractor’s claims not agreed by the Sub-Contractor –  
appointment of Adjudicator.*

By the 2011 edition of DOM/1, the authors updated “*claims*” to “*rights*”:

*Clause 19: Matters affecting regular progress - direct loss and expense - Sub-Contractor's rights*

However, Clause 6.14.2 (Breach of Joint Fire Code – Remedial Measures) of the 2011 edition still refers to Clause 19 as “*Disturbance of regular progress of Sub-Contract Works – Sub-Contractor’s claims*”. Possibly a typographical error, though nevertheless, this evidences the continued use of the term “*claim*” to mean “*application*” or “*request*”. Furthermore, Clause 1.8.1.4 and 1.8.1.5 uses the term “*claim*” to mean “*application*” or “*request*” in respect of the effect of the final payment:

“1.8.1.4      *conclusive evidence of final settlement **of all and any claims which the Sub-Contractor has or may have arising** out of the occurrence of any of the matters referred to in clause 4.20 whether such claim be for breach of contract, duty of care, statutory duty or otherwise;*

1.8.1.5      *conclusive evidence of final settlement **of all and any claims which the Contractor has or may have arising** out of the occurrence of any of the matters referred to in clause 4.21, whether such claim be for breach of contract, duty of care, statutory duty or otherwise.”*

[Emphasis added]

The same is true for the NEC3 standard form contracts. On the whole, if the contractor considers that he is entitled more time or money he must “*notify*” the project manager under Clause 61 of a compensation event. Though the contract does not specifically employ the term “*claim*”, it does recognise that it is a well-understood term as Clause 80.1 recognises that “*claims*” may be made during the course of the project.

80.1 *The following are Employer's risks.*

- **Claims**, proceedings, compensation and costs payable which are due to
  - *use or occupation of the Site by the works or for the purpose of the works which is the unavoidable result of the works,*
  - *negligence, breach of statutory duty or interference with any legal right by the Employer or by any person employed by or contracted to him except the Contractor or*
  - *a fault of the Employer or a fault in his design.*

[Emphasis added]

The intention here could well be third-party claims, as the contractor recovers his costs through Clause 60.1, though nevertheless, the contract is unclear (Thomas, 2012:312) and the authors perhaps used “*claims*” because they considered it to be a well-known or often used concept.

Not only do some contracts expressly use the term “*claim*” within their conditions, but parties (contractors, consultants, etc) often refer to “*claims*” on regular basis in conversation and correspondence. Again, by “*claim*”, they do not mean a “*claim*” in the contentious, formal dispute context, but rather merely a “*claim*” for an extension of time or a “*claim*” for more money – ie, a request for something. This also tends to be transcribed in bespoke contract terms. In ***Columns & Beams Ltd v Structures Ltd*** one of the parties’ contracts at Clause 10 stated:

*“This contract is offered at an agreed fixed sum of £X + VAT and shall not be subject to fluctuation in any event. Under no circumstances will **any claim for additional costs** be considered unless it relates to a chargeable variation requested by us...”*

[Emphasis added]

The following table contains three examples of other clauses extracted from bespoke contract terms and conditions:

*“The Hirer may not set-off against any monies due to The Owner under The Contract **any amount claimed** by or due to The Hirer from The Owner whether under this contract or on any other account whatsoever.”*

*“The Main Contractor shall be entitled to issue any direction to the Sub-Contractor omitting any part of the Sub-Contract Works and employ others to complete the omitted part of the Sub-Contract Works. The Sub-Contractor **shall not make or be entitled to make any claim** against the Main Contractor for any loss of profit or opportunity or contribution to overheads which but for such direction(s) the Sub-Contractor would have received in respect of the omitted work.”*

*“...all interim applications for payment shall set out in sufficient detail the gross cumulative value of the Sub-Contract Works properly carried out up to and including the Valuation Date together with appropriate deductions for any Main Contractor’s Discount and Retention and state the net sum that the Sub-Contractor considers to be due to him and any applicable VAT and be prepared as follows:*

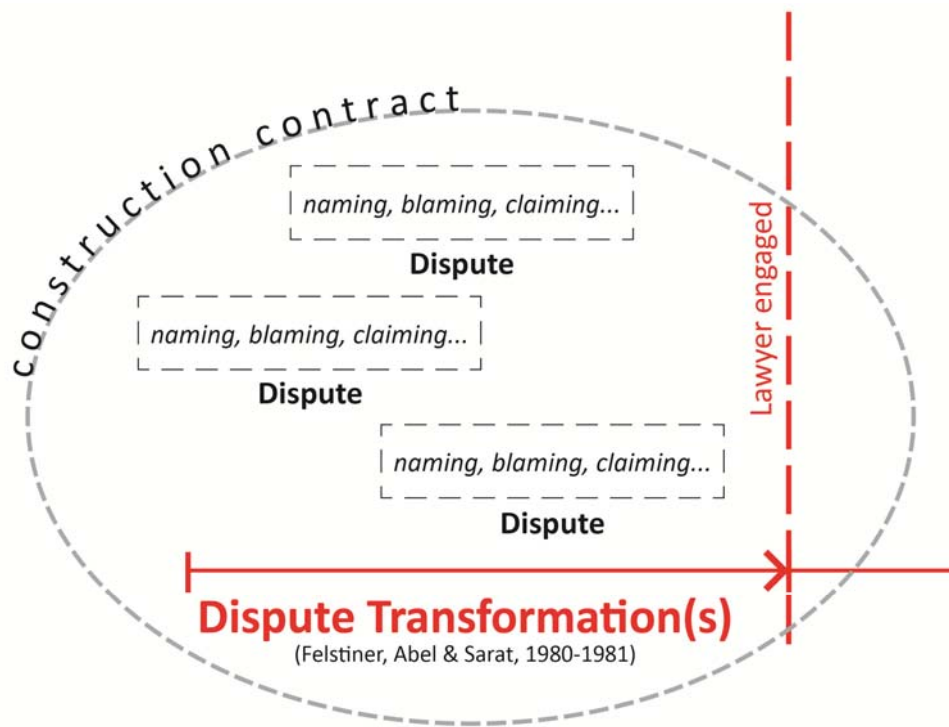
***...any claim for the reimbursement of direct loss and/or expense** together with sufficient details in support of each amount. The Sub-Contractor agrees that the inclusion of any direct loss and/or expense in an interim application of itself shall not be deemed to be compliance with the requirements of Clauses 11.12, 11.13; 11.14 and 11.15.”*

Furthermore, the way in which the payment mechanisms under these contracts generally operate quickly gives rise to disputes. This research does not document or provide a full historical account of the payment provisions under all of the various construction contracts; however, in general and irrespective of whether the contract is a lump sum or a measurement contract, the contractor is paid in instalments (often at monthly intervals) according to the work carried out or an agreed schedule. The amount due to the contractor at each instalment is often as a result of an assessment

or valuation carried out by the contract administrator. By way of example, under Clause 60(1) of the ICC Conditions of Contract (August 2011), the contractor submits to the engineer at monthly intervals a statement showing the amount he considers is due. Within 25 days of the date of delivery of that statement, the engineer must certify what he considers is due (Clause 60(2)), final payment of which is due three days later. Accordingly, each month the contractor submits his assessment and should the engineer disagree, the potential for a dispute arises.

In summary, claiming in the construction industry is part and parcel of construction contracts and how adjustments to time and cost are dealt with. Applications and notifications for time and/or money are made to the contract administrator. If the amount is not awarded, technically, that is a rejection of a claim and a dispute arises. This tends to occur throughout the course of a project – be it for loss & expense or extensions of time. In addition, the valuation, certification and payment processes under these contracts, along with the Pay Less Notice procedure established by the HGCRA (as amended), encourages claims/notifications to be made immediately if one party disagrees with the amount certified, eg interim certificates and payments. Ultimately, negotiations are carried, evidence is submitted and the parties ideally agree on a final account, taking into account variations, delay and defects, at the end of the project.

Accordingly, the traditional dispute trajectory occurs during the course of the project, generally as required by the specific terms of the construction contract, and on a number of occasions in respect of different project events and is common practice. If the contractor makes multiple applications or notifications of loss and expense or extensions of time, multiple disputes may arise. Equally, if a Pay Less Notice follows an interim certificate, a dispute is likely to exist. The potential exists for the “*naming*” and “*blaming*” and “*claiming*” stages to be relatively straightforward: a contractor becomes aware that he is entitled to more time owing an event caused by the employer (*naming*), he clearly is aware that it is the employer’s risk or responsibility as per the contract terms (*blaming*) and serves his application or notice in accordance with the contract (*claiming*). If the employer or contract administrator does not agree, a dispute exists. Graphically, this is represented in the following diagram:



**Figure 10**  
***"Claiming" in construction contracts***

### **Disputes (pre-lawyer)**

For those cases included in the Matter Database, all of the clients dealt directly with the other party in respect of their initial dispute, for at least some period of time, prior to approaching the lawyer. This included both one-shotter and repeat player clients. They either negotiated directly with their opposition to try and achieve a solution or they instigated the dispute resolution procedures required by the contract. Either way, all of the clients took matters into their own hands, at least in the first instance. Generally, the client approached their lawyer at the point they believed they had taken it as far as they could, or felt that the only way to achieve an outcome (either a successful outcome or at all) was to have "a legal letter" sent directly from the lawyer. An analysis of the data shows that many construction clients approach their lawyers simply to advance a formal or "legal" claim, as they have been unable to achieve a desired result through their own efforts. This may involve the lawyer formally representing the client and advancing a claim against the perceived responsible party. Alternatively, the lawyer may draft letters for the client, incorporating "legal speak" such that the client can more effectively continue to advance the claim itself.

Of the 50 matters in the Matter Database, the clients in all but two of the cases approached their lawyer with a clear vision that, unless there was some legal or strategic reason not to, the lawyer would take the next step and the next communication would come via the lawyer. This included sending letters which demanded payment and threatened proceedings, serving proceedings or offering and conducting negotiations. Whatever the next course of action was, it was to be carried out by the lawyer on behalf of the client.

In the two matters where the lawyers did not deal with the clients' opposition, the clients merely approached the lawyer for advice only as they intended to continue directly with the negotiations or dispute resolution procedure without the lawyer's involvement. For example in **Matter No 36** [*1-Meeting Advice*], the client met the lawyer for advice in advance of a without prejudice meeting the parties had scheduled. The parties were negotiating and operating the dispute resolution clause of their contract which required a meeting of the Directors. The client had been offered payment of approximately £300,000 in full and final settlement of the matter. It appeared that the client requested this meeting with the lawyer to get an answer to the following question:

**The Client:** Will we recover more in adjudication than the £300k WP offer on the table currently?

Following the meeting with his new client, the lawyer sent a long email confirming his views and answering the client's question: he advised that the contract machinery had not been operated and therefore it was not necessarily a straight-forward dispute. In addition, the contract was not a straight-forward lump sum contract or reimbursable contract. He advised that on balance it probably was a lump sum contract, but if an adjudicator found otherwise, the £300,000 probably would be more advantageous. The lawyer ended by encouraging a settlement if possible:

**The Lawyer:** ...if you can tease out something with a number starting with 5 or more, take it...

Eventually the lawyer learned that a settlement had been reached – the parties had carried out the contract dispute resolution procedures on their own without any further input from lawyers.

This was not the only instance where clients carried out their own negotiations. Lawyers regularly received telephone calls from their repeat clients for quick advice in advance of meetings or advice regarding interpretation of a contract provision. In

addition, lawyers drafted letters demanding payment and otherwise which were then sent from the client on the client's headed paper so as not to appear too aggressive. When clients were unsure of what approach to take the lawyer and the client typically collaborated and discussed the best way forward. Even repeat player clients with extensive legal experience (in-house counsel, etc) often wanted to discuss the options as to the way forward. At times this would result in the lawyers drafting and sending the opposition initial "*claiming*" letters, following which their clients would carry out the negotiations directly without their assistance. If the negotiations were not proceeding in a timely manner, further "lawyer's letters" were sent.

In addition, there were several matters where the client commenced proceedings, or was on the receiving end of such a claim, and felt capable of dealing with the dispute and the proceedings without the use of a lawyer. When the proceedings reached a point where the client was either well out of his depth or for whatever reason no longer felt able to continue unadvised, he reached out to the lawyer.<sup>204</sup>

In any of the above scenarios, the dispute existed in some shape or form prior to the client engaging the lawyer. What happened thereafter was the Reverse Trajectory: *Claiming, Blaming, Naming...*

### **Claiming. Blaming. Naming...**

As set out above, the empirical data gathered shows that, in general, the existence and knowledge of a dispute often occurs even before a party approaches his lawyer. The aggrieved party approaches the lawyer already conscience that a dispute exists as a claim has already been made and rejected either in part or in whole. Owing to the procedural requirements of standard form contracts and indeed standard practice in the construction industry, this perhaps comes as no surprise.

Once the lawyer is instructed, his goal is to identify the dispute in the language of the law, in the best possible light which suits their clients' case. This identification of the dispute is analogous to the "*naming*" stage of Felstiner's, et al., traditional dispute transformation. In doing so, the subsequent lawyer/client relationship and process which follows mirrors the "*claiming*" and "*blaming*" stages.

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<sup>204</sup> See for example **Matter No 14** [*Electricity Supply*] and **Matter No 29** [*Agency staff*].

### ***“Claiming” & “Blaming”***

With regard to the initial stages of “*claiming*” and “*blaming*”, this was dependent on the type of dispute in existence and the clients’ objectives. In those cases where clients considered an agreement had been reached or they were due an agreed, fixed amount of money pursuant to an invoice or certificate, once instructed, the lawyers immediately (where appropriate) wrote to the other party, informing them that they now were on the record and reasserted their clients’ claim. Their action in the first instance was to reassert the claim to instigate a reaction and possible payment – it often was a strategic move to demonstrate that their client meant business if payment was not forthcoming.

For example, in **Matter No 24 [‘Termination’]** (see above) the lawyer’s first letter was to the home owner and stated:

**The Lawyer:** We act on behalf of...

On [x] you entered into an agreement with our client to refurbish the above property and to design and build an extension to it (“the Contract”). The Contract incorporates the JCT Minor Works Building Contract with Contractor’s Design, Revision 2 2009.

On [x] it was agreed between the parties that the Contract would come to an end, subject to certain conditions and provided that our client would be paid for the works carried out to date.

Over the course of the past 22 months our client has attempted to reach an agreement with you regarding the amount owing. You appear unwilling to reach an amicable agreement (as most recently evidenced in the last meeting on [x] with your representative). Our client is not prepared to wait any longer for the sums it is entitled to, namely...

Whilst our client would rather not resort to formal legal proceedings, it will be left with no other choice unless an agreement is reached promptly. Accordingly, if you are unable to resolve this matter with our client by [x], our instructions will be to commence proceedings. You may then become liable for our client’s legal costs.

Yours faithfully

The lawyer stated that he was instructed, reasserted the claimed amount and threatened proceedings if an agreement was not reached promptly. Following this, the lawyer briefly considered whether blame could be placed elsewhere and swiftly moved onto redefining the dispute in a legal context – “*naming*” (see the lawyer’s second letter above). Accordingly, if the client is already aware of who to blame

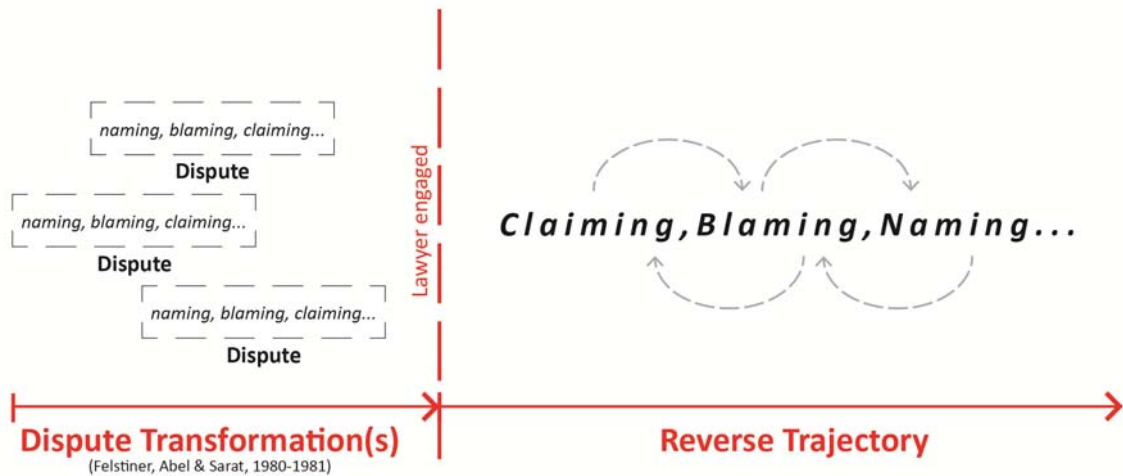
(likely because of the contract in place and the relations during the course of the project), the “*blaming*” stage may not exist in the Reverser Trajectory. Alternatively, if the lawyer consider that further parties are liable, he may allocate blame elsewhere, and then proceed to claim.

As such, in some matters, the process of “*claiming*” and “*blaming*” was iterative and circular, and perhaps even involved the “*naming*” stage. Should the claim (or reassertion of the claim) again be rejected, the lawyer may then continue to advance further “legal” arguments, renaming or redefining the dispute, before commencing formal proceedings. Alternatively, the lawyer may look to *blame* and/or *claim* against other parties depending on how the evidence and situation unfolds.

This was particularly the case on those matters where the client had a dispute with one party and the lawyer subsequently advised that others may also be liable from a legal perspective. Here, the lawyer and the client collaboratively investigated the alleged facts of the dispute, possibly engaging experts if defects were involved, and allocated blame to other parties as and when (“*blaming*”), at times, sending initial letters putting them on notice though not necessarily detailing the exact basis of the dispute (“*claiming*”). The identity of the dispute developed as the lawyer compiled the relevant facts and formed the basis of the claim and the legal argument which he believed would result in the best possible outcome for the client (“*naming*”).

### ***The Reverse Trajectory***

It follows that once the lawyer is involved, this traditional dispute transformation is reversed to: “*Claiming, Blaming, Naming...*”, though not necessarily in consecutive order, but always with the aim of *naming* the dispute. Once the lawyer is engaged, the trajectory is a messy and iterative process, dependent on a whole host of factors, and not necessarily including the “*blaming*” stage if this was made crystal clear either from the existence of the contract or from the events of the project. The diagram below graphically illustrated this Reverse Trajectory, following on from the existence of a dispute having arisen out of the claiming culture in the construction industry:



**Figure 11**  
**The Reverse Trajectory: Claiming, Blaming, Naming...**

In summary, a general description of the Reverse Trajectory is as follows:

1. A dispute exists before the client approaches the lawyer.  
  
The client has already made either a formal or informal “claim” (eg, a request or an application under the contract provisions), against the other side – which has been rejected. In this respect, the client has already carried out the traditional “Naming, Blaming, Claiming” process, or some other trajectory, which has resulted in a dispute and feels there is nothing more they can do without the assistance of a lawyer.
2. Once engaged and if appropriate in the circumstances, after a brief consideration of the merits of the claim, the lawyer reasserts the claim to the other side, previously made by his client (“Claiming”) and Reverse Trajectory begins. *Claiming* at this stage is not transforming the dispute, it is merely transporting it again to the other side. Although arguably by the sheer presence of the lawyer, in some cases this may begin the transformation.
3. The lawyer then considers the dispute in more detail. In doing so, the lawyer may widen the original claim made by the client and make allegations against other parties (“Blaming”). Or alternatively he may skip the *Blaming* stage if the contract and events are clear. In

conjunction or thereafter, the lawyer identifies the dispute in legal terms (“*Naming*”) to best suit his client;

4. All three stages of *Claiming*, *Blaming* & *Naming* may be iterative in an attempt to settle the dispute and avoid formal action;
5. Ultimately, if settlement does not appear possible, formal action is then taken (“*Claiming*”).
6. The reverse transformation continues as the formal claim proceeds: parties “*blame*” each other for specific issues/events and lawyers refine their arguments and may “*rename*” the dispute in doing so.

In short, the findings show that not only is the dispute transformation reversed once a construction client engages its lawyer, but the transformation may also be a non-linear and iterative process, requiring *alliances* (Latour, 1988a) to take the shape it does. The aim of the trajectory is *naming the dispute*, irrespective of the ordering of the stages or the necessity for all of the stages to have occurred.

To best illustrate the Reverse Trajectory, we return to ***Columns & Beams Ltd v Structures Ltd***. When Mr Hunter was engaged, the dispute between Columns & Beams Ltd and Structures Ltd clearly already existed. By writing his initial letter to Structures Ltd notifying them that he acted for Columns & Beams Ltd and re-asserting the existing claim, he commenced the dispute down the Reverse Trajectory (“*Claiming*”). Here, there was no need for the *Blaming* stage owing to the parties’ contract and it being clear Columns & Beams Ltd was recovering the money from. Mr Hunter then proceeded to name the dispute in a different light, by asserting different legal arguments (“*Naming*”). When the adjudication finally commenced, the dispute was renamed yet again to suit the proceedings and the argument which Mr Hunter felt had the best chance for success.

In ***Columns & Beams Ltd v Structures Ltd*** the various factors which shaped the dispute at particular points of its trajectory included: the substantive law in respect of payment under the HGCRA, as amended; the client’s budget for legal costs; the client’s objectives of minimising legal costs and ending the dispute as soon as possible – which included payment to him; the former lawyer’s knowledge of construction law, statutory adjudication and summary judgment in respect of construction disputes; the parties’ perceptions of the dispute; and the documents and evidence Mr Cahill provided to Mr Hunter.

### 5.3 Designing Disputes

As discussed above, lawyers commonly employ the Reverse Trajectory of “*Claiming, Blaming, Naming...*” when carrying out their service – their aim being to name or identify their client’s dispute in order to achieve their client’s desired outcome. They have both an objective and a brief when naming their clients’ disputes. If there are options to choose from during the naming process and external factors influence the decision making, a creative and strategic element is also at play during this selection process. Put another way, lawyers *design* the dispute or tailor its description into a form they believe has the greatest chance for success.

The following investigates “lawyers as designers” and how the design of an argument, claim or legal position is inherent within the service the lawyer provides.

#### **What is “design”?**

Charles Eames, in an interview with Madame Amic in 1972, offered his definition of “*design*” (Eames, et al, 1989:14-15):

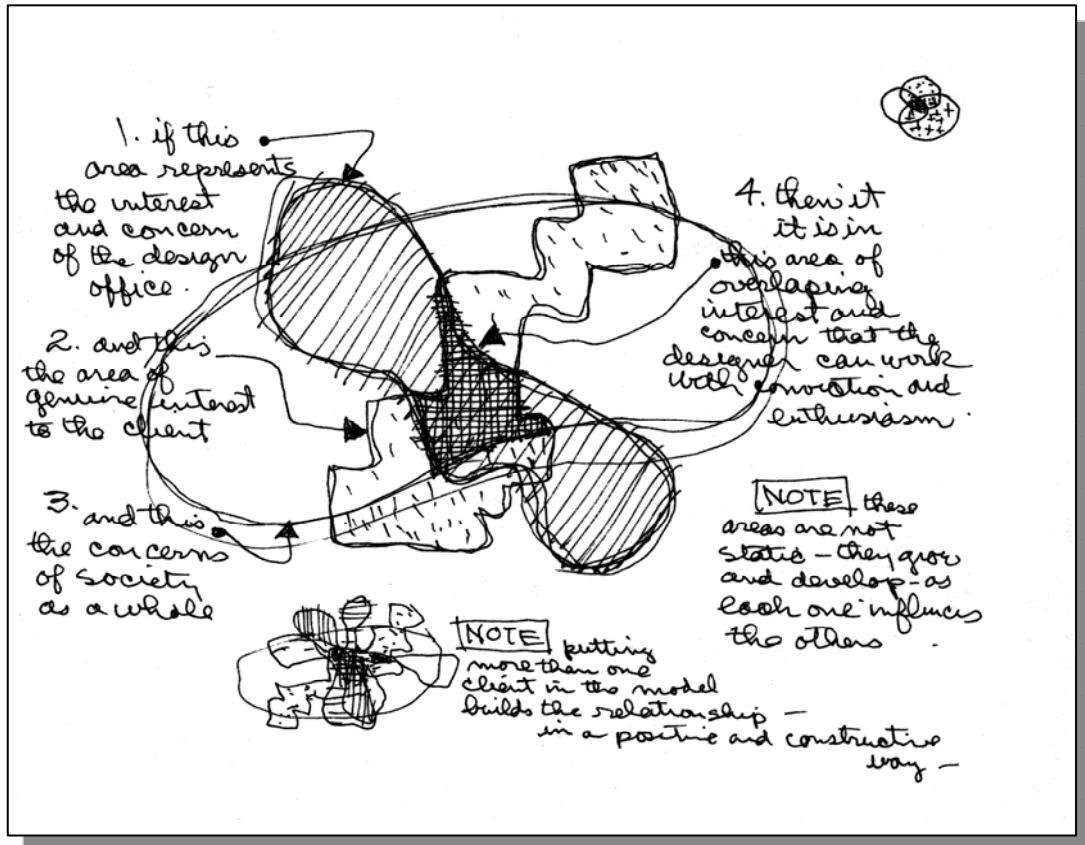
***“Mme. L. Amic:***        *What is your definition of “Design”, Monsieur Eames?*

***Charles Eames:***    *One could describe design as a plan for arranging elements to accomplish a particular purpose.”*

His definition suggests that design is somehow a map or a strategy, comprised of discrete entities, to meet an objective. He also recognised the impact of “*constraints*” on design. When asked if there is a design ethic, Eames replied: “*There are always design constraints and these usually include an ethic.*” In addition, in respect of constraints he stated:

*“Design depends largely on constraints... Here is one of the few effective keys to the design problem – the ability of the designer to recognize as many of the constraints as possible – his willingness and enthusiasm for working within these constraints – the constraints of price, of size, of strength, balance, of surface, of time, etc; each problem has its own peculiar list.”*

Charles Eames created the following diagram to explain the design process as achieving a point where the needs and interests of the client, the design office and society as a whole, can overlap. The diagram was made for the 1969 exhibition “What is Design?” at the Musee des Arts Decoratifs in Paris, France.



**Figure 12**  
**'Design Diagram'**  
 © 2016 Eames Office, LLC

Put differently, this diagram succinctly depicts how the lawyer's services, the client's interests and objectives and society as a whole have an overlapping interest in the design (and therefore dissolution) of the disputes. As Eames notes in the diagram, the areas are not static entities, they develop and influence each other in turn. Eames also notes the relational aspects of these components and the act of design: "putting more than one client in the model builds the relationship in a positive and constructive way".

More recently, academics Ralph and Wand carried out an analysis of the literature on the existing definitions of design and settled on the following as their proposal for a formal definition of design (Ralph and Wand, 2009):

*“(noun) a specification of an object, manifested by an agent, intended to accomplish goals, in a particular environment, using a set of primitive components, satisfying a set of requirements, subject to constraints;*

*(verb, transitive) to create a design, in an environment (where the designer operates)”*

Again, this definition recognises that constraints are inherent in the design process. It also relies on the concept of “requirements” (ie, objectives, brief, specification, etc).

There are endless definitions of “design” and “designing”:

*“the controlling of the evolution of an idea”<sup>205</sup>*

*“...what links creativity and innovation. It shapes ideas to become practical and attractive propositions for users or customers. Design may be described as creativity deployed to a specific end”<sup>206</sup>*

*“the fundamental soul of a man-made creation that ends up expressing itself in successive outer layers”<sup>207</sup>*

Others include notions of problem solving, communicating a message, and collaboration. These definitions are used in various contexts and derived from professionals across multiple industries. For example, Eames was an Architect and product designer and Ralph and Wand are academics in software engineering and information systems.

In the context of law, “design” is now often associated with “Dispute System Design (DSD)”. DSD is “the process of identifying, designing, employing and evaluating an effective means of resolving conflicts within an organisation” (PON, 2008). It is “the study of how one assembles a comprehensive program of dispute resolution, one that encompasses a range of dispute resolution procedures specifically designed for a

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<sup>205</sup> Professor Janice Kirkpatrick OBE, Graven Images (informal interview).

<sup>206</sup> Sir George Cox (Cox, 2005).

<sup>207</sup> Steve Jobs, Apple, interview in 2000 that appeared in Fortune, [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2000/01/24/272277/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2000/01/24/272277/index.htm), accessed on 22 November 2014.

*particular institution, organization or stream of conflict situations*” (Bordone, 2008-2009). DSD concerns designing a process or procedure for resolving a dispute(s). By way of example, see Chris Gill’s ‘*Dispute System Design Model for Consumer Dispute Resolution*’ presented at a workshop recently convened to investigate the implications of the new EU Directive on consumer ADR (2013/11/EU) (Brennan, Creutzfeldt, Gill and Hirst, 2015:3).

Lawyers are frequently called upon to assist with the creation and management of these systems. Lawyers may create systems or procedures for individuals, institutions, organisations and nations and in doing so, have been referred to “*dispute process architects*” in this respect (HNMCP, 2014).

Accordingly, the notion that a lawyer has some sort of ability to design is not new. Collins (1999:149) discusses “lawyers as engineers” in the context of translating “*the economic deal into a legally enforceable written agreement*”. He considers that when carrying out their task of planning a transaction, they are (1) required to resolve ambiguities in the stipulated performance by suggesting express terms for the contract; (2) allocate risks of foreseeable and unforeseeable contingencies; (3) use the contract to construct non-legal sanctions; and (4) give detailed attention to the manner in which disputes should be resolved (Collins, 1999:151). In doing so, they are assisting in the *construction* of the deal and Collins equates this to a kind of engineering for a business relation. “Engineer” arguably suggests something rather more scientific and systematic, with less subjectivity involved. Nevertheless, design is an essential element of the engineer’s profession. In terms of “creativity”, this term too has been applied to tasks involved in lawyering. McCahery and Picciotto (1995) argued that the lawyer has a creative role when structuring a client’s business strategies and transactions and optimising their advantage in relation to the regulatory framework. They provide the example that this may entail achieving a desired economic outcome for their client which had been impeded by a regulatory obstacle – devising a new legal means or finding significant cost-savings for the client by structuring the transaction in some creative way. When Collins referred to the “lawyer as the engineer” and McCahery and Picciotto referred to “creative lawyering”, they largely were referencing the transactional lawyer in the context of assembling contracts and business strategies. I suggest this equally can be applied to the contentious lawyer in the context of assembling disputes.

### **What is a “designer”?**

Paul Rand (1914-1996), a graphic designer and art director most notably known for, amongst many other accolades, the corporate logos of IBM and ABC, said this of the designer's problem (Rand, 1947:12):

*“The designer does not, as a rule, begin with some preconceived idea. Rather, the idea is (or should be) the result of careful study and observation, and the design a product of that idea. In order, therefore, to achieve an effective solution to his problem, the designer must necessarily go through some sort of mental process. Consciously or not, he analyses, interprets, formulates. He is aware of the scientific and technological developments in his own kindred fields. He improvises, invents or discovers new techniques and combinations. He co-ordinates and integrates his material so that he may restate his problem in terms of ideas, sign, symbols, pictures. He unifies, simplifies, and eliminates superfluities. He symbolizes – abstracts from his material by association and analogy. He intensifies and reinforces his symbol with appropriate accessories to achieve clarity and interest. He draws upon instinct and intuition. He considers the spectator, his feelings and predilections.*

*The designer is primarily confronted with three classes of material: a) the given material: product, copy, slogan, logotype, format, media, production process; b) the formal material: space, contrast, proportion, harmony, rhythm, repetition, line, mass, shape, color, weight, volume, value, texture; c) the psychological material: visual perception and optical illusion problems, the spectators' instincts, intuitions, and emotions as well as the designer's own needs.*

*As the material furnished him is often inadequate, vague, uninteresting, or otherwise unsuitable for visual interpretation, the designer's task is to re-create or restate the problem. This may involve discarding or revising much of the given material. By analysis (breaking down the complex material into its simplest components... the how, why, when, and where) the designer is able to begin to state the problem.”*

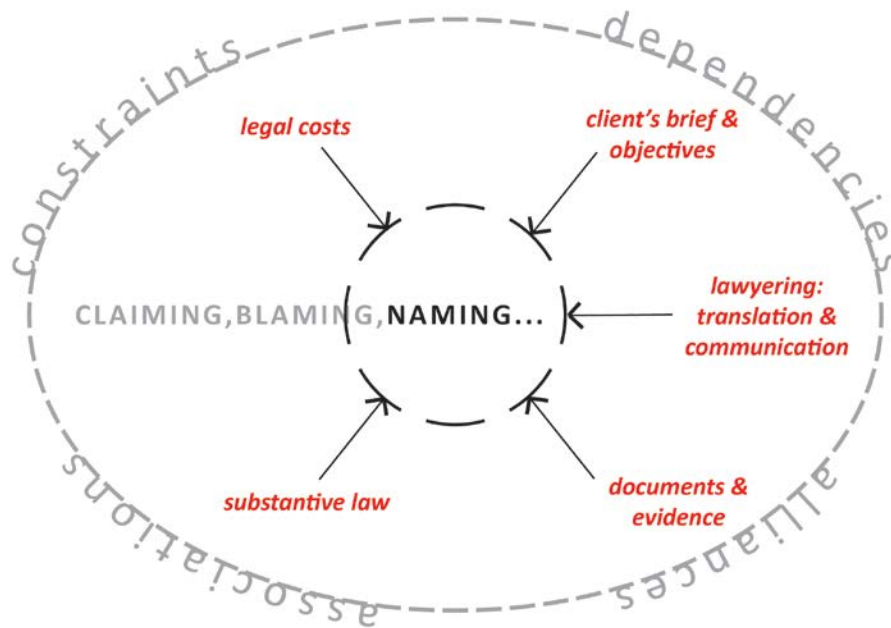
This passage succinctly and robustly sets out the task of a designer – tasks which certainly are reminiscent of the lawyer’s tasks: re-creating or restating the problem, discarding or revising much of the given material.

Designers (architects, engineers, product designers, etc) all work within constraints. The architect, for example, designs buildings bounded by the restraints of: the client’s objectives/brief/specification, the budget, building regulations, planning regulations, material availabilities and capabilities, his own personal agenda and aesthetic preferences, etc. The list is endless. Similarly, so do lawyers: the client’s objectives/instructions, the budget, the substantive law, his own view of various disputing processes, etc.

### **Designing disputes: lawyers as designers**

The previous chapters discussed why lawyers routinely identify disputes, the importance of doing so in the context of formal dispute resolution procedures and how identifying the dispute is equivalent to “*Naming*” in the Reverse Trajectory of “*Claiming, Blaming, Naming...*” ***Columns & Beams Ltd v Structures Ltd*** illustrates that naming a dispute is an iterative process and lawyers regularly rename or develop the identity of the dispute depending on the circumstances.

To name the dispute, lawyers take into account various requirements. In the cases observed in this research, the factors which most influenced the name of the dispute were the five associations of documentation/evidence, lawyering, costs, the client’s conduct/objectives and the substantive law (see Chapter 4). Lawyers assembled these associations to construct the dispute: in other words, they *designed* the dispute taking into consideration these constraints and dependencies, as the diagram below depicts:



**Figure 13**  
**Designing Disputes**

Designing disputes is perhaps most apparent when drafting claims or other pleadings. **Matter No 38 ['Designing Disputes']** typifies this process of designing disputes and assembling the necessary associations. Here, the employer and the contractor agreed to a bespoke, complex contract with a number of intricate payment mechanisms. On completion of the project, it was clear that the contract had not necessarily been understood and/or operated by either party as a dispute arose regarding payment and the following issues: what was the value of the works, which party took on the risk of any overspend and was the contractor entitled to any further money.

By the time the contractor engaged the Firm, the dispute had already existed for a number of years. The contractor had identified the amount he considered due and outstanding, blamed the employer and made a claim for payment. The employer rejected the claim and the dispute came into existence – arguably the traditional dispute trajectory. Thereafter, the dispute, in various forms, went through the processes of negotiation, adjudication, litigation and a dispute board – all during the course of the project. At each stage, the dispute took a different shape and the lawyers created different legal arguments depending on the process and identity of the disputes.

When the Firm was instructed to advance the dispute after the project had been completed, to recover all project costs incurred, the team of lawyers again set out on redefining the dispute. To develop and draft the claim document, they took into account: the decisions of the previous tribunals; the documents and other evidence available and able to be collected in the time allowed; the terms of the parties' contract; the legislation and previous case law in respect of payment, limitation, interpretation of contracts, etc; the client's objectives in respect of recovery and procedure; the client's budget for legal costs and what could be achieved therein; the constraints of time and available resources; the employer's previous position in respect of the dispute and the client's perception as to how they would respond on particular issues; and the lawyer's and client's previous experience regarding the issues involved, their knowledge of the tribunal and their perception of the dispute.

When considering how the payment provisions of the contract were to be construed and how they envisaged that the costs should be calculated, the lawyers made the following remarks:

**Lawyer No 1:** We essentially have two options in terms of the calculation, each of which reveals issues. We therefore just need to decide which way is best.

**Lawyer No 2:** This how the argument works intellectually for both options...

**Lawyer No 1:** We need to get the party line on this right... It doesn't matter if we have pages and pages of narrative – that will be undermined if this is not right...

**Lawyer No 2:** It can be argued either way... They actually produce the same result, though intellectually they are two different ways of looking at it. As they produce the same result, we could just provide the other as an alternative argument.

*[45 minutes later after a lengthy discussion on the strengths and weaknesses of each option...]*

**Lawyer No 3:** Ok fine. That will be the intellectual basis of our claim...

In the above exchange, the lawyers recognised that the financial outcome of either calculation was identical – it was the *“intellectual”* argument which would be different depending on approach taken. In other words, they were most concerned with how to describe the dispute and why calculation should be carried out in a particular way. They were of the view that they needed *“to get the party line on this right”* to maximise their client's chances for success.

In **Matter No 6** [*Timetable*] the drafting of the particulars of claim and basis of the dispute was criticised as being “*creative*” by the other side. Here, the contractor considered that he was owed additional monies in respect of variations, retention and delay damages. When he was unable to obtain payment from the home owners, he engaged the Firm. Eventually the lawyer commenced litigation in the TCC. The parties exchanged correspondence regarding the contractor’s alleged failure to comply with the Pre-Action Protocol and the home owner’s request for an extension of time for service of the Defence & Counterclaim. One basis for the request was that the matters raised in the Particulars of Claim were new. In one letter, the home owner’s solicitor stated:

**The Lawyer:** ...The amount of some £173,000 now claimed by way of variations is over six times the amount originally demanded by your client. The purported entitlement to these additional sums appears to stem from what can only be described as a “creative” interpretation of the Contract terms. This has replaced the approach taken by your clients in their purported satisfaction of the Construction Protocol ... by suggesting that such entitlement was due to various “non-contractual variations”, whatever that might mean...

[Emphasis added]

The implication here was that the scope of the dispute had expanded owing to the lawyer’s interpretation of the contract terms. In **Matter No 8** [*Settlement Agreement*] the extent of the dispute also morphed as a result of the lawyer’s creative interpretation. Here, a dispute arose between a developer and a contractor regarding payment, defects and the final account. The parties began negotiations but did not reach an agreement. The developer engaged the Firm at this point. After an initial meeting with his new client, the lawyer drafted a letter to the contractor, which was sent on the developer’s letterhead. The developer did not want to be seen as “going legal” just yet. The email from the lawyer to the client enclosing the draft letter stated:

**The Lawyer:** Dear [Client]

Further to our meeting yesterday, attached is a draft letter to [the contractor] for your consideration. I have highlighted any queries in bold.

You will see that in relation to payment, I have added a new argument - that as there has been no application then there is no entitlement to payment. I think that it is worthwhile including this particularly as you said that

[the contractor] had only failed to issue applications once or maybe twice before.

However, this argument does contradict the issue of a further Certificate and withholding notice. My view on this is that you still issue the new Certificate but that we put some wording into the cover letter that says something along the lines of "in the absence of an application, I have undertaken a valuation of the works and enclose my Certificate". The withholding notice can be served and include some wording to reserve the position as to the applicability of clause 4.10 in any event...

[Emphasis added]

The lawyer considered the parties' dispute, as described by the developer and the documents he provided. He then redesigned the dispute and the contents of the letter reasserted the claim, including an argument that an application was a condition to payment. This had not been in dispute between parties previously. The letter was sent and ultimately the parties met and negotiated directly, reaching an initial agreement.

In addition to drafting new claims and reasserting old ones, witness statements are a further area where a lawyer's confection is witnessed.

### ***Witness Statements***

A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally (CPR r32.4) and stands as evidence in chief (CRP r32.5). They first came into existence with the 1986 Rules of the Supreme Court. Before this, witnesses gave direct oral testimony at trial. The introduction of the witness statement was intended to save costs, eliminate surprises in respect of the witnesses and their evidence and identify the true matters in issue (Snelling and Sofroniou, 2014). However, by 1996 they no longer served their original purpose. As Lord Wolf stated in his 1996 Access to Justice report: "*witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting*" (Woolf, 1996). He was of the view that this stemmed from a fear that witnesses would not be permitted to depart from or amplify their statements at the trial itself. Accordingly, with the implementation of the CPR, the rules now provide that witnesses are allowed to amplify their witness statement and give evidence in relation to new matters which have arisen since the witness statement was served (CPR r.32.5(3)). Nevertheless,

witness statements are still considered lengthy, elaborate and cunningly crafted by lawyers, as the quotes from the Court below indicate.

In *Berezovsky v Abramovich* (2012) Mrs Justice Gloster (as she then was) noted that the approach to evidence in that case *“led to some scepticism on the court's part as to whether the lengthy witness statements reflected more the industrious work product of the lawyers, than the actual evidence of the witnesses”*. In *Gestmin SGPS SA v Credit Suisse* (2013), Leggatt J noted that a statement will inevitably go through several iterations before it is filed with the court and will often be drafted by lawyers conscious of the significance for the issues in the case of what the witness does or does not say.

With regard to the witness statements in matters observed at the Firm, they were drafted by both the lawyers and their clients, depending on the particular case and the particular witness. If the case was in litigation or arbitration, the lawyers generally drafted the statements. Some clients provided initial narratives which the lawyers used as a starting point, though on the whole the lawyers took oral statements and developed the written statements in collaboration with the witness. If the case was in adjudication, the drafting of the witness statement appeared dependant on the size (value) of the claim. In order to minimise costs on smaller adjudications, lawyers often recommended that the witnesses draft their own statements. The lawyers would provide a template, advise on what the statement should include and review the statement once drafted. In both situations, the lawyers, working collaboratively with their clients, designed the statements to support and evidence the dispute.

### ***Designing the assembly***

As discussed above, design in any profession takes into account constraints, dependencies, associations and alliances. It is a creative and iterative process, with an objective, and the designer must work with and manage all competing elements of the design such that all entities required are assembled appropriately.

For example, we saw in **Matter No 11 [‘Façade Defects’]**, the case where the witnesses’ recollections did not accord as to whether a meeting took place, that there was a tension and dependency between the design of the evidence (eg, the witness statement) and the design of the dispute. Here, the alleged facts of the witness statements changed as the case progressed and the dispute morphed as a result. The lawyers scrambled to design and redesign the evidence and the dispute: the iterative

design process evolved the identity of the dispute. The lawyer endeavoured to align the design of the evidence with the design of the dispute, such that the two supported and complemented each other. Had they been inconsistent, with a misalignment of the facts and arguments, the lawyer would have run the risk of failing to convince the tribunal or the other side of their client's entitlement.

The same holds true for the associations: each component must fit together at any point in time if the dispute is to be viable and compelling. As new associations arise and existing ones dissipate, the dispute's identity evolves. Ironically, lawyers spend a considerable amount of their time designing the assembly of these associations in an attempt to "resolve" the dispute for the benefit of their client. As the next chapter discusses, this emphasis and energy should be turned to "disassembling" the dispute to the extent possible.

## CHAPTER 6

### A CONSTRUCTION DISPUTE: THE DISASSEMBLY & DISSOLUTION

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*The adjudication attack was successful.*

*The adjudicator awarded Columns & Beams Ltd the full amount claimed in the adjudication, some £150,000. The full amount claimed in the litigation could not be recovered in adjudication; however, Mr Hunter had suggested that prior to the adjudication that a strong win would enable further negotiations after the adjudication for the remainder of the monies Mr Cahill sought.*

*Unfortunately, the story does not end here. Structures Ltd failed to pay the awarded sum.*

*Mr Hunter recommended enforcement proceedings in the TCC. Again, Mr Cahill immediately questioned the costs of this procedure. Mr Hunter, again, capped the fees for this stage of the proceedings as Mr Cahill was very concerned with costs – having said that, he appeared to recognise that this was the only way to achieve payment. Capping fees is not normal practice for Mr Hunter though, as it transpires, Mr Cahill is related to one of Mr Hunter's repeat clients.*

*Mr Cahill agreed to the enforcement proceedings and Mr Hunter served the claim.*

*On receipt of the enforcement proceedings, Structures Ltd immediately contacted Mr Cahill. They wanted to reach an agreement out of court. Mr Cahill was prepared to settle only if: he received all of the monies he considered to be owed to him on past projects, including outstanding retention monies, his legal fees to date and an agreement that there were no further issues or claims to come, as suggested on the eve of the mediation.*

*Eventually the parties reached a settlement agreement and the enforcement proceedings were stayed, along with the litigation proceedings which were still under way.*

#### ***Is there still a dispute?***

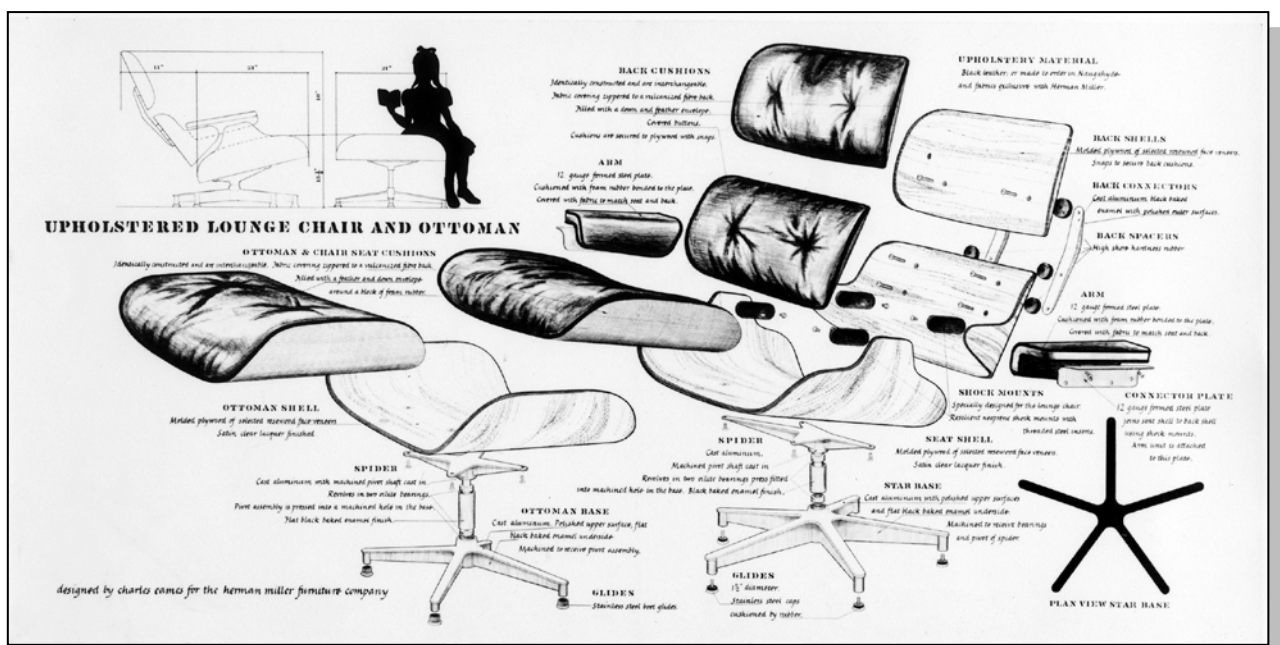
*During the course of the negotiations, Structures Ltd refused to include any terms in the settlement agreement in respect of the issues they still considered to be "live" issues.*

*Nevertheless, Mr Cahill took this risk and agreed even though this part of the dispute would still be in limbo – he had no idea whether Structures Ltd truly had a valid claim which they intended to peruse. Will Structures Ltd chose to allow the dispute to remain dissolved or whether it will pick up momentum in due course?*

*Only time will tell...*

As seen in Chapter 5, disputes are an assemblage of associations – they are dependent on and constrained by a number of factors. They take shape as lawyers design and redesign their identification, all in the pursuit of “resolving” the dispute. The stronger their client’s case is, or is perceived to be, the more chance they have of settling the dispute, or having a judgment, in their client’s favour. However, now that we have begun to identify the components of these disputes, the question which follows is: why is there so much emphasis on designing and assembling the identity of the dispute? How can the focus be shifted to disassembling the dispute, rather than reconfiguring or rebuilding it?

This chapter considers: a review of the outcomes of the disputes in the Matter Database and the extent to which they are concluded following the legal process implemented between the parties; the notion of disassembling the dispute to the extent that the parties reach a state of equilibrium which they both are prepared to live with; and how the concept of dispute “resolution” does not, on the whole, exist in the construction industry and the aim of the parties and their lawyers should be to “dissolve” the bonds which hold together the associations forming the identity and existence of the dispute: dispute “dissolution”.



**Figure 14**  
**'Exploded Lounge Chair'**  
 © 2016 Eames Office, LLC

Charles and Ray Eames's '*Exploded Lounge Chair*' diagram above<sup>208</sup> succinctly illustrates the concepts of assembling, disassembling, equilibrium and associations. Each object of the lounge chair is a component in its own right. Provided the components of the chair are not assembled, arguably there is no chair in a form suitable for sitting. However, once the components are assembled once again, the chair takes shape and meaning: an object of a different value. By the same token, if the components of the dispute, like the components of the chair, remain detached and their momentum is slowed to a halt, the dispute goes no further. The components of the dispute have no relation to the others and therefore there is no dispute suitable for argument. However, this state is only temporal. If associations begin to reform and reassemble, the dispute takes shape and builds energy once more. If assembled again, either in its original form or otherwise, the dispute is again in existence, capable of action and argument.

As this research revealed, disputes are rarely "resolved" in the true sense of the word. It may take many years before disputes finally reach a true state of equilibrium and the parties no longer engage with the dispute – not necessarily resolved, just not pursued – the components are left to live other lives, fulfil other actions. Accordingly, the pursuit of the parties and their lawyers must be "dispute dissolution" as quickly and as cost efficiently as possible.

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<sup>208</sup> The Eames Lounge Chair and Ottoman was design by Charles and Ray Eames in 1956. The Eames Office created this exploded view for the manufacturer, Herman Miller, Inc.

## 6.1 An overview of the outcomes

An analysis of the disputes in the Matter Database revealed that the transformations of these disputes were not linear and did not proceed at a consistent pace. Indeed, even when on the fact of it there appeared to be a conclusion to the dispute, this outcome was not necessarily clear.

Firstly, by way of a background and an overview of the 50 cases in the Matter Database (Appendix 1), the following are brief statistics of the outcomes on the disputes included therein:

### *How did the parties reach a conclusion?*

NO OF CASES	MEANS OF CONCLUDING
15	A judge or other third party (adjudicator, arbitrator, tribunal, etc) handed down a decision. <sup>209</sup>
23	Settled by way of negotiation (either with or without the assistance of a mediator). <sup>210</sup>
12	Unknown (either because the case is ongoing or the data simply was not available).

### *How many forms of dispute resolution procedures were implemented?*

NO OF CASES	NO OF PROCEDURES IMPLEMENTED
1	No procedures (the lawyer demanded payment in a letter and the full sum was paid)
13	1 procedure (negotiation) <sup>211</sup>
18	2 procedures
11	3 procedures
2	4 procedures
5	Unknown

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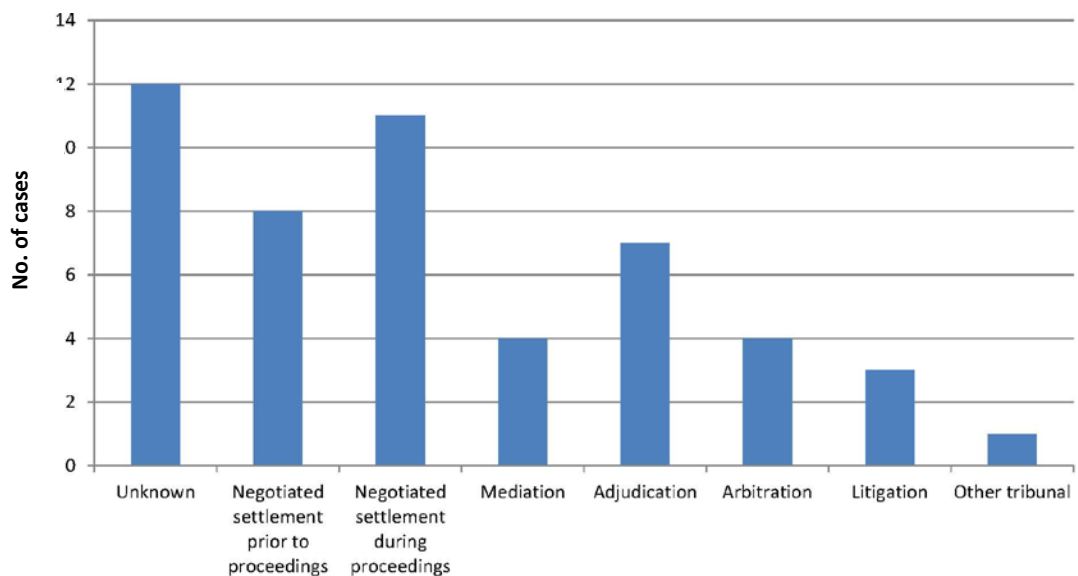
<sup>209</sup> In other words, in these 15 cases, the matter may have undergone a number of dispute resolution procedures (arbitration, adjudication, etc) including negotiation, though to reach a conclusion, the process required an independent party to deliver a verdict of some nature.

<sup>210</sup> In these 23 cases, the matter may or may not have undergone, or was in the process of, a formal dispute resolution procedure; however, to reach a conclusion the parties negotiated a settlement, either with or without the assistance of a mediator or legal representatives.

<sup>211</sup> 12 of these cases were negotiation, with the exception of one case where the client (a consultant) was brought before its professional body's complaints tribunal.

***What procedure ultimately dissipated the dispute?***

NO OF CASES	PROCEDURE
3	Litigation
4	Arbitration
7	Adjudication
1	Other tribunal
4	Mediation (employed after some form of proceedings were commenced)
11	Negotiation – settlement agreed after other proceedings were commenced
8	Negotiation – settlement agreed prior to any commencement of proceedings
12	Unknown (either because the case was ongoing or because the data was not available)



***Figure 15***  
***Which procedure dissipated the dispute?***

The diagram above shows how many cases were ended by each of the various forms of dispute resolution. I use the word “ended”, though this refers to the dispute only at that point in time. On a number of the disputes, it was clear that what had ended was either (1) only part of the dispute, and further negotiations were to take place between the parties on the remainder; (2) the identity of the dispute at that point in time and further issues existed to shape the dispute in such a way that meant it was likely to continue; or (3) the dispute as determined by a third party and it was unclear whether one of the parties intended to challenge the decision. Some of the factors which contributed to the state of the outcome, ie the temporal nature of the outcome of proceedings and indeed the dispute itself (many of which are discussed elsewhere in this paper) include: the interim nature of adjudication decisions; the obligation on the referring party to choose the identity of the dispute referred to the adjudicator; the issue of limitation; settlement agreements; the payment and dispute resolution provisions of the parties’ contract; and the objectives and perception of the parties.

### **Adjudication**

With regard to the interim binding nature of adjudication decisions (see Chapter 1.3 above), this at times created ambiguity between the parties as to whether the dispute had completely “ended”. For example, in **Matter No 39 [‘Limitation’]** we saw that the adjudicator awarded the contractor over £1,000,000. The developer paid promptly. Several months later the developer wrote to the Firm, expressing his disagreement with the adjudicator’s decision. The lawyer responded and following that they heard nothing further from the developer. The lawyer and the client discussed whether the developer would continue with the dispute in litigation. They thought it was unlikely, but possible. In **Matter No 38 [‘Designing Disputes’]** the adjudicator did not award the Firm’s client the decision they were seeking. Both parties were aware that the client would carry on with the dispute – though unsure as to when and how. A number of months later, it served proceedings using a Dispute Board which had been established by their contract.

In order to get a better understanding of the percentage of disputes which end with the adjudicator’s decision and those which carry on and are reconsidered in the context of litigation or arbitration (or enforcement proceedings were necessary), further research and interviews are required. Whilst I did observe or hear of enforcement proceedings on a number of adjudications, it appeared that many of the disputes did end with the adjudicator’s decision, even if one of the parties was

expressly disappointed. However, the analysis cannot be conclusive without further research.

The other aspect of adjudication which influences the nature of the outcome is the fact that only one party identifies the dispute referred to adjudication. The referring party has the obligation to define the dispute in the Notice of Adjudication – they choose whether the entire dispute is referred or only one element of it is referred. As such, this leaves open the possibility that not everything in dispute is before the adjudicator. In a number of adjudications observed, the referring party only defined the dispute as the responding party's failure to serve a Pay Less Notice in respect of a particular certificate. Accordingly, they were looking for a quick payment in respect of a particular sum<sup>212</sup>. Any other issues of defects, extensions of time, etc were outside the scope of the adjudicator's jurisdiction (unless relevant to a claim of set-off in the responding party's Response). As seen in *Columns & Beams Ltd v Structures Ltd* the adjudication only concerned payment in respect of two invoices and the other issues of retention, interest and outstanding invoices under other contracts fell outside of the adjudications, only to be dealt with during the settlement negotiations<sup>213</sup>. As such, the parties, or at least Mr Cahill, were well aware that the dispute would continue even after the adjudicator awarded his decisions.

### **Limitation**

As seen in Chapter 4.5 above, issues of limitation tend to breathe life back into disputes which have been left to hibernate for a number of years for whatever reason. In some cases, perhaps claimants see it as their last opportunity to take action and if they have the financial capability to take the risk, they might as well take the chance (as in **Matter No 39 ['Limitation']**). In other cases, where latent defects appeared on, around or after expiry of the limitation period, this prompted creative legal arguments in order to continue a dispute which seemingly had been settled many years before (as in **Matter No 11 ['Façade Defects']**).

### **Settlement agreements**

The drafting of settlement agreements and the language used therein is a further area which contributed to the continuation of disputes in a situation where parties

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<sup>212</sup> This actually is the reason why statutory adjudication was introduced back in 1996: payment by the employer was not filtering down to the subcontractors and the intention was that adjudication was an interim remedy to release cash flow during the course of the project. In this case however, the adjudications took place nearly a year after practical completion of the project.

<sup>213</sup> Or by the court had the litigation in the district court continued.

seemingly concluded their dispute, only to have it take shape and momentum later on. This was particularly the case when the parties' agreement was vague, ill-worded or poorly documented. For example, the settlement in **Matter No 11** [*Façade Defects*] was reached allegedly in a meeting (during the course of the project and without the involvement of lawyers), following which the client (the contractor) sent an email to the other side (the subcontractor) which stated:

- "1. Upon obtaining a snagging list from [the building owner], a site inspection will be arranged whereby the scope of these works can be agreed and executed.*
- 2. All documents required from [the subcontractor] by the client [building owner] to obtain practical completion will be forwarded to [the contractor].*
- 3. Upon receipt of a practical completion certificate from [the building owner] in respect of the works, [contractor] will pay to [the subcontractor] £4,840.00.*
- 4. [The subcontractor] cancels all amounts due from [the contractor]."*

The subcontractor did not specifically respond to this email. The above events were generally carried out and the contractor issued an invoice (on receipt of payment). The invoice included the following:

*"In full and final settlement of all claims on this project between the parties for whatever reason whatsoever.*

*Consideration is given by way of the promise of [the contractor] not to pursue any claims for whatsoever against [the subcontractor] and [the subcontractor] promise not to pursue and claim whatsoever against [the contractor]."*

The contractor did not state at the time they received the invoice whether they agreed to these terms. When the cladding panel became detached from the building and the contractor commenced proceedings, the subcontractor asserted that the settlement agreement prevailed, the terms they included on the invoice were part of that settlement agreement and therefore the contractor was barred from bringing any claims for latent defects. This led to the subsequent preliminary issue in the arbitration, discussed earlier.

This issue was not unique to **Matter No 11 [*Façade Defects*]** and I observed a number of disputes arising out of the terms of settlement agreements.

### **Objectives of the parties**

Whilst this research does not purport to have investigated the objectives of the parties in any detail (as interviews, etc would have been required to do so), I certainly observed traces which were left behind as to their intentions, goals and issues which they deemed significant. These appeared to influence the status of the outcome, any decisions concerning procedure and whether or not the dispute would continue.

For example, on some cases, even though the lawyer's advice was "50/50" in respect of their chances for success on an appeal of a Judge's decision or advancing further proceedings, the client still chose to proceed in light of the significant amounts in dispute. On other cases, even though the client was not satisfied with an adjudicator's decision, they were not able to pursue the matter any further in court owing to the costs which that required (and they did not have available) and their position with regard to the risk of losing. Furthermore, in some instances, the clients made comments which suggested they were not willing to spend any further time pursuing the matter and therefore "accepted" the adjudicator's or tribunal's decision (in these situations it was not about costs, but rather their willingness to expend any further effort or resources).

### **The Spatial Morphosis**

The above are examples of entities which inform the trajectory and momentum of the dispute and whether its outcome is fixed or still in flux. Considering the constant fluidity of these disputes and the human and non-human associations and dependencies which assemble (and are assembled) to give them their identity, these disputes can best be described as spatial<sup>214</sup>, amorphous systems which are constantly changing in shape and in name: a spatial morphosis.<sup>215</sup> Accordingly, for those disputes that are still in flux and no definitive end has been reached, it is difficult to see how a party might know when their dispute is truly “resolved”. It may be the case that they do not intend to take any further action, but will the other side? Alternatively, whilst a dispute has been “resolved” by a third party (ie, a judgment has been awarded), are the parties sufficiently happy to walk away?

Lawyers and their clients therefore need to establish, where possible, what associations and issues continue to drive the momentum of the dispute. If this can be decelerated to a point at which parties are no longer willing to invest in its morphosis, then perhaps this is what the parties should be striving for, as the next section considers.

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<sup>214</sup> The term and meaning *spatial* in this context is as Lefebvre’s defined it: social space is a “shared enterprise” and “is dynamic space; its production continues over time and is not fixed to a single moment of completion”. (Lefebvre, 1991 [1974]) and as discussed in (Awan, Schneider and Till, 2011).

<sup>215</sup> The term *morphosis* having a number of derivations, but most recently referred to in *Witney Town Council v Beam Construction (Cheltenham) Limited* (2011)

## 6.2 Disassembling disputes to reach the perpetual state of equilibrium

As introduced above, the dispute – a spatial morphosis which feeds off of and takes its shape through associations, dependencies and contingencies – is constantly in flux. It is either gaining in momentum as lawyers and their clients name and rename its identity and progress its development, or it begins to slow down, moving at a glacial pace, if parties are no longer concerned with its content. Ideally, the goal must be to decelerate the dispute's momentum to point at which the parties walk away. The challenge is how to do this, as quickly as possible, without the dispute reforming and taking shape in due course.

A number of disputes in the study went through both periods of acceleration and periods of deceleration. For example, in **Matter No 46 ['Roof Defects']** the client instructed the Firm to commence formal claims if viable as they had taken the dispute as far as they could. The lawyer and the client collaboratively progressed investigations and the definition of the dispute for the first five months. Then, for whatever reason, the client distanced itself from the dispute and the lawyer. The lawyer found it difficult to collect information and obtain instructions. The dispute lost momentum and the question arose as to whether the client intended to continue with the dispute. Eventually the momentum picked back up. In addition to this, the issue of whether to claim against the Architect was constantly changing at variable speeds. It is not possible to suggest what motivated the client's actions and perception of the dispute, though it was clear that their actions influence the morphosis of the dispute and the rate at which it did so.

The same is true of **Matter No 41 ['Redirecting monies']**. Here, the arbitration had been ongoing for a number of years, even before the Firm was instructed. At times, the client quickly advanced the proceedings, promptly providing information and instructions to his lawyers, and requested that the timetable for the proceedings be as tight as possible. At other times, the lawyers hardly heard from the client: he did not return telephone calls or emails. This impacted the proceedings significantly. At one point, the other side applied to the tribunal to have the claim struck out. This application appeared to refocus the client's attention and the proceedings were salvaged owing to creative arguments constructed by the lawyer.

Further examples are those matters where clients sought advice from their lawyer, often with a degree of urgency, and then, after receiving the advice, did not inform the lawyer of their next steps, intentions or outcome of the dispute. Either the

lawyer simply was never advised of the outcome of the matter as the client never mentioned it again and did not required any further services, or the lawyer literally never heard from that client again. In some instances, when the lawyer contacted the client inquiring as to the outcome, it turned out that the client simply chose not to take the dispute any further, irrespective of whether the lawyer's advice had been positive or negative. The research could not be conclusive on why the client chose this particular course of action; however, based on the brief discussions they had with the lawyers, factors such as maintaining business relationships, the effort and resources it would have required (time) and money certainly appeared to influence their decision. Of course in other instances, clients continued the dispute, though without the use of their lawyer. They merely sought advice on the strength of their case, which perhaps informed their next steps.<sup>216</sup>

What enables disputes to lose momentum? Just as the associations discussed in Chapter 4 above assemble the dispute, these are the same associations which disassemble the dispute, causing them to decelerate. If an association is no longer bonded to or feeding into the identity of the dispute, the dispute begins to lose energy. The aim therefore must be to disassemble these associations to the point at which the dispute becomes static, or in other words, to the point at which it reaches a perpetual state of equilibrium.

The associations from which disputes are designed and assembled are three-dimensional objects which do not simply disappear. These objects may change in shape or significance to the dispute, though are not entities which can be eliminated. By way of example: the client's objectives might change from rectifying all of the defects at any cost, to rectifying only those defects which can be completed in a particular time period and the costs of which can be recovered somehow; the law may change providing more clarity on a particular issue; the client may no longer want to commence proceedings against a particular party for whatever reason, even though they still consider that a dispute exists; evidence is located which, though its meaning and content are controversial and disputed, suggests one party's position on a particular issue is stronger than the other's position; and the lawyer amends or caps his fees, making a particular dispute "resolution" procedure viable for his client.

No matter what the association, even if an entity is disassembled from the dispute, thereby inherently morphing the shape of the dispute, that entity still exists in some form or outline of its former self. The key is to keep that association disassembled

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<sup>216</sup> See for example, **Matter No 36** [*'1-Meeting Advice'*]

from the others and to disassemble as many as possible, thereby slowing the momentum of the dispute and creating a state which is stable and no longer in motion.

Irrespective of whether a judgment from a third party has been awarded or the parties have reached a settlement, both sides must be willing to live with that outcome and walk away. If either side attempts to take issue with any one point, the dispute simply builds momentum again. The point at which both sides no longer want to engage with the dispute is the point at which the dispute has reached its equilibrium. It may not be clear whether that equilibrium has been achieved (owing to issues of limitation, latent defects, the possibility of appealing a decision, etc) though only time will tell. *Columns & Beams Ltd v Structures Ltd* exemplifies this. The lawyer and the client attempted to settle the dispute in respect of the outstanding issues. However, they were unable to persuade Structures Ltd to do so. Accordingly, this left Mr Cahill in the frustrating position of not knowing whether Structures Ltd would continue with the dispute in the future.

There are of course matters where the state of equilibrium is achieved quickly and with a high level of certainty. For example, in those matters where companies are liquidated and there is no longer an entity to pursue, a client may have no choice but to do nothing: he does not have an option to continue the dispute in that form (provided there are no allegations of fraud or misconduct whereby a claim against a director of the former company could be investigated). Equally if one party makes a payment following negotiations, neither party appears dissatisfied and the business relationship continues, perhaps the equilibrium is reached at this point. Having said that, as observed in several settlement cases discussed above, there is still the potential for a dispute to recrystallise, perhaps in an amended form, and carry on several years later.

Either way, reaching the state of equilibrium where parties are no longer willing to engage with the dispute is the only point at which the dispute is discontinued. To do so, the associations and dependencies which give life to the dispute must be disassembled to some degree to enable this to be achieved. How this is most effectively achieved and to what extent the professional practice of lawyers can be changed to assist in this respect is certainly the basis for further research, drawing from the data collected herein. As their current practice is a constant search for the name and the design of the dispute, the focus now needs to shift from assembling the dispute, to disassembling the dispute.

### 6.3 Dispute resolution v dispute dissolution

In light of the data collected and discussed above, I suggest that construction disputes are rarely ever “*resolved*” completely. Whilst an independent third party (ie, a judge or arbitrator) may hand down a judgment, or the parties reach a settlement agreement, this state is often only temporal: disputes do not necessarily end at that point. Resolution of something suggests that a problem has been completely solved or determined.<sup>217</sup> This research reveals that this, owing to the level of uncertainty and ambiguity surrounding and contained within the associations discussed in Chapter 3 above, can only occur in certain circumstances and therefore is not the norm when dealing with construction disputes.

By way of example, the table below lists those situations observed during the course of the fieldwork where complete resolution was not achieved:

1.	An adjudicator’s decision was awarded, was interim binding and it was uncertain whether one of the parties would continue with the dispute at some point in the future.
2.	The dispute referred to the adjudicator was only part of a larger dispute, which carried on following receipt of the adjudicator’s decision.
3.	The parties reached a settlement agreement, but only in respect of a discrete issue.
4.	The parties reached a settlement agreement on vague or poorly worded terms.
5.	Limitation had not expired and it was unclear whether latent defects existed or would arise.
6.	One of the parties was not satisfied with the settlement agreement reached.
7.	The end of one dispute sparked the beginning of another.

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<sup>217</sup> The Oxford English Dictionary online definition of “*resolution*” is “*the action of solving a problem or contentious matter; the quality of being determined or resolute*” (OED, 2014).

As discussed above, some construction disputes even dissipate, or reach a state of hibernation, for a period of time and then pick up momentum and energy some years later. Therefore, as set out in Chapter 6.2, the ultimate goal in “dispute resolution” (to use the commonly accepted term) must be for all participants to reach this *state of equilibrium* as quickly and as cost effectively as possible: the slowing down of the spatial morphosis and reaching the ultimate and perpetual state of equilibrium. Again, this suggests that the concept of “*dispute resolution*” cannot exist in the construction industry.

Even when parties mediate and reach an agreement, it is difficult to see whether the problems have actually been “*resolved*”. In a number of mediations and negotiations, the Firm’s clients agreed to settlement terms, though they clearly were disappointed. Nevertheless, they did not want to engage with the dispute any further, and terms were achieved that both parties could walk away (at least at that point in time). This is perhaps best exemplified by one’s lawyer’s advice to his client on the morning of a mediation:

*“At the end of today, if we reach an agreement with them and neither of you are happy, but both can live with it – today will have been a success.”*

This notion that resolution is not possible has been touched on briefly in the past. When Gulliver discusses dispute avoidance and other transformations of disputes, he states: “*the dispute is not so much resolved as deflected*” (Gulliver, 1979, 1-3). In addition, Felstiner, et al. (1980-81) states:

*“People never fully relegate disputes to the past, never completely let bygones be bygones (Abel, 1973:226-229): there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, color later conflict. Furthermore, there is a continuity to disputing that may not be terminated even by formal decision. The end of one dispute may create a new grievance, as surely as a decision labels one party a loser or a liar.”*

Disputes are not simply resolved and fully relegated to the past. The best one can hope for is a quick dissolution of the dispute, reaching a state whereby the parties are no longer willing to engage with the dispute and the momentum of the dispute is no longer in flux. To do so, lawyers and their clients must focus on dissolving the bonds and disassembling the associations: “*dispute dissolution*”.

## CHAPTER 7

### CONCLUSION: DESIGNING + (DIS)ASSEMBLING DISPUTES

#### *Columns & Beams Ltd v Structures Ltd (cont...)*

*Mr Cahill's final email to Mr Hunter:*

**The Client:**

Dear Mr Hunter

I hope that you are well? I wanted to drop you a quick email to say thank you. I received the final payment late on Friday afternoon which cleared. The whole episode has been a complete drain on both finances and my mental well-being for the past 2 years and had I not contacted you I am sure that this would have dragged on for a lot longer. From the moment I came and saw you at your offices I felt in safe hands and your guidance and tactics throughout the case proved too much for that shithead...

## 7.1 Designing + (Dis)assembling Disputes

*Any time one or more things are consciously put together  
in a way that they can accomplish something better  
than they could have accomplished individually,  
this is an act of design.*

**Charles Eames**

Simon Roberts (1979:46) recognised that certain types of conflict may be inherent in the very manner in which a society is organized. This clearly holds true for the construction industry and in 1986 Lord Donaldson stated that it is simply the nature of the beast that disputes arise and this is not to the discredit of either party to the contract. However, what is to their discredit is that *“they fail to resolve those disputes as quickly, economically and sensibly as possible”* (Lord Donaldson, 1986)<sup>218</sup>.

In order to assist the industry in understanding these inborn disputes, this research explored the questions of *what influences the outcome of a construction dispute* and *to what extent do construction lawyers control or direct this outcome?* The starting point of the research is from the lawyer’s first gaze on the dispute – how does the agency of construction lawyers impact the dispute trajectory and to what extent do they shape and transform these disputes? In doing so, one of its aims and contribution to knowledge and previous studies was to break down the office door of the law firm, which traditionally has been a significant barrier to exploring and researching what happens “behind the scenes”. The research aimed to provide a textual, narrative account of construction disputes in order to better understand their nature. With the rise of the ‘vanishing trial’ and the increased use of ADR, society has less of an opportunity to see and learn from these disputes. This research offered an ‘up close and personal’ glimpse into the life of these disputes and the lawyers that deal with them.

To achieve this, the research approach was ethnographic and took place at a leading construction law firm in London for approximately 18 months. The primary focus was participant observation in all of the firm’s activities, centring principally on those lawyers involved in disputing. The lawyers were involved in wide-range of dispute “resolution” procedures (to use the commonly accepted term) including litigation, arbitration, dispute boards, adjudication, mediation and of course negotiation. The basis of the research method, and indeed part of the theoretical framework, was the Actor-Network Theory (ANT). This was most productive as it enabled the study to include not only those human elements which influenced the

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<sup>218</sup> Speech delivered by Lord Donaldson in 1986, cited in Chern (2011:1).

development and shape of a dispute (eg the lawyers and their clients), but also non-human elements (eg evidence, documents and the substantive law). Notably ANT method of tracing of these associations, results in the ethnographic data itself being the explanations of these associations. Accordingly narratives were provided through out to demonstrate the findings of the research and provide a contextual account of these disputes.

As such, this research viewed a dispute as a set of associations – an entity which takes form and acquires its attributes as a result of its relations with other entities. The research investigated these other entities and events which appeared to influence the dispute's identity, shape and outcome, revealing the five categories of associations discussed in Chapter 4: documentation and evidence, lawyering, costs, client's conduct and objectives and the substantive law.

In addition to the participant observation, a database was compiled from the firm's files and archives, thus providing information for quantitative analysis (the Matter Database, see Appendix 1). This method proved most successful as I was able to observe and participate in numerous disputes and dispute resolution procedures, thus providing access to construction lawyers and the dealings they had with their clients during the trajectory of construction disputes. Being both participant and observer, stranger and friend, enabled me to obtain an in depth understanding of the lawyer/client relationship, the activities the lawyers carried out in an attempt to achieve their clients' objectives, the issues the lawyers considered significant on each case and the factors which influenced decision-making and the trajectory of the dispute.

The Matter Database was particularly helpful in that as it documented key characteristics of the clients and their disputes, I was able to analyse the themes which emerged against the typology of the client and the dispute. For example, the notions of the Reverse Trajectory, designing/assembling disputes and "*dispute dissolution*" were applicable to both one-shotters and repeat player clients.

I observed the lawyers, the lawyer/client relationship and the construction disputes across a wide variety of cases, right from the point at which the client engaged the lawyer through to the outcome of the dispute. During the course of the fieldwork, clearly not all of the disputes I witnessed were concluded with a distinct outcome owing to the variable length of time required to dissolve disputes. In fact, as the research illustrates, it is arguable whether I did actually witness any disputes which were completely dissolved: the temporal nature of disputes and their ability to lose

momentum and dissipate, only to take shape again in the future, results in the perhaps frustrating situation for the parties that they cannot be certain the dispute has ended. Furthermore, as people rarely let bygones be bygones and residual attitudes, perceptions and sensitivities still exist after the dispute seemingly has ended, certain associations and entities which created the dispute may be eternal. This certainly was the sentiment in *Columns & Beams Ltd v Structures Ltd* as we saw above in Mr Cahill's final email to Mr Hunter.

Having followed the lawyers, their clients and the disputes, the research revealed that construction disputes typically materialised prior to any one of the parties approaching a lawyer. Once the lawyer is engaged, the Reverse Trajectory of "*Claiming, Blaming, Naming...*" is invoked. The lawyer's role and aim is to identify or name (or rename) the dispute in the best possible light for their client in order to achieve the desired outcome – the development of which is akin to the design process. The transformation of a dispute is not linear, but rather, iterative and spatial as it requires alliances, dependencies and contingencies to assemble and take the shape it does.

Lawyers play a part in controlling or directing the outcomes of disputes by influencing the design and the identity of the dispute – the naming of the dispute – in collaboration with their clients. In designing the dispute, they assemble associations, contingencies and dependencies, these being the factors which influence the outcome of construction disputes. Their role is constantly in flux, reacting to the momentum of the dispute and the objectives of the client. They do not merely dictate control over the client at all times, they jointly identify with the client the best strategy and best way forward taking into account and designing the dispute from the associations categorised in Chapter 4 above (eg, evidence, client's objectives, the substantive law, etc). The lawyers studied often led the process and the decision-making in terms of the creative legal and intellectual arguments and any procedural issues. This is in line with Goffman's (1959:152) notion of lawyers as "*service specialists*" in that they "*formulate the factual element of a client's verbal display, that is, his team's argument-line or intellectual position*". Having said that, there were also occasions where the lawyers collaborated on these topics with informed clients (generally repeat player clients). Indeed, some clients even dictated the procedural approach. Accordingly, the lawyers' role is fluid and dependent on the dispute and their client.

Furthermore, the client too was not a stable entity and transformed during the trajectory of the dispute. As their requirements, objectives and perceptions morphed, so did the dispute. This research did not purport to (nor could it possibly) identify specifically what these elements were; nevertheless, their transient presence clearly influenced lawyering and the nature of the dispute. In addition, the communication and translation process between the lawyer and his client added to the shape and complexity of the dispute. Each had their own language which required interpretation into a common language, or a common environment, that both could operate such that decisions could be made and next steps taken. The oscillation between these environments provided challenges for efficiently dealing with the dispute and indeed miscommunication and mistranslation has the potential to manipulate the dispute in a manner contrary to the client's objectives, possibly renewing the dispute or expanding and redefining it.

The temporal nature of the lawyer's role, the client and the lawyer/client relationship are inherent within the fluid composition of the dispute, which in itself is temporal and dependent. When referring to individuals and the presentation of self, Goffman (1959:13) stated:

*"Information about the individual helps to define the situation, enabling others to know in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response from him."*

I suggest this is equally applicable to disputes: given the complexity of these disputes, lawyers and their clients need information about the dispute to define the situation and know how best to act and call forth a desired response. This research assists in the provision of that general understanding of the composition of construction disputes. For the future, lawyers need a better understanding and a heightened awareness of the specific associations for each dispute, if these are to be appropriately disassembled.

As disputes are continuously in flux, the goal of the parties must be to slow down the momentum of their dispute and reach a perpetual state of equilibrium whereby they both are no longer willing to engage with the dispute. To do so, the associations and dependencies which give life to the dispute must be disassembled to some degree to enable this to be achieved. How this is most effectively achieved and to what extent the professional practice of lawyers should be changed to assist in this respect is

certainly a basis for further research, drawing from the data collected herein. As their current practice is a constant search for the name and the design of the dispute, the focus now needs to shift from assembling the dispute to disassembling the dispute. To what extent this disassembly can be achieved without first naming and renaming the dispute is an important exercise as there is the potential to save on time and costs in concluding these disputes.

In light of the greater understanding of the nature of construction disputes revealed within this research, I suggest “*dispute resolution*” does not exist in the construction industry: this is neither a true description of the processes implemented to deal with disputes nor is it a true portrayal of their outcome. Many of cases observed illustrated that either one or both of the parties were not satisfied with the outcome of the dispute. Whether or not they were willing to continue the dispute (or had the option to continue) was subject to various known and unknown factors. As certain issues and sentiments were unlikely to be forgotten, describing and informing the parties that their dispute is “*resolved*” was simply masking and denying that matters and concerns were still in existence, but the parties had opted to walk away.

Accordingly, I posit that “*dispute dissolution*” is a more appropriate term and does not provide a false hope to parties in advance of engaging a lawyer. Managing client expectations is perhaps one element in the quest to disassemble the dispute. The goal of *dispute dissolution* is to disassemble the components/associations of a dispute to the extent they are kept in equilibrium eternally. The industry would be well-advised to investigate to what extent this is possible without first renaming and designing the dispute.

In this respect, the relational and complex contract theories discussed in Chapter 2 are informative. Let us consider again the following which replaces the word “*transaction*” with “*dispute*” in Macneil’s summary of the four core propositions which inform any relational approach to contracts are (Macneil, 2003; Macneil, 2000):

1. every ***dispute*** is embedded in complex relations...
2. understanding any ***dispute*** requires understanding all elements of its enveloping relations that might affect the ***dispute*** significantly...
3. effective analysis of any ***dispute*** requires recognition and consideration of all significant relational elements...

4. combined contextual analysis of relations and ***disputes*** is more efficient and produces a more complete and sure final analytical product than does commencing with non-contextual analysis of ***disputes***...

As with relational contracts, if we approach relational disputes in the same light, those dealing with disputes need to recognise all significant relational elements which form or influence the disputes prior to carrying out a combined contextual analysis the dispute and its relations. In the fourth core proposition above, the “product” which the parties and their lawyers must be striving for is the complete equilibrium of the dissipated disputes.

How this analysis of the relational dispute is carried out is food for thought, though borrowing the concept of “*reverse design*” from Karl Aspelund, a designer across a number of disciplines, may offer a way forward (Aspelund, 2015:14). Firstly, Aspelund considers there to be seven stages of design: (1) Inspiration; (2) Identification; (3) Conceptualization; (4) Exploration/Refinement; (5) Definition/Modeling, (6) Communication and Production. Whilst he paints these stages in a structured light, Aspelund recognises this is not “the real world” and that the reality of the design process is not quite so linear and clear, though the stages can be examined as such. He deems that “*a designer’s work is concerned primarily with solving problems by developing and explaining ideas. The “look” of a product is just one of many possible problems*” and that once ideas go through the seven stages, a tangible design results (Aspelund, 2015:1).

Firstly, drawing from Aspelund’s seven stages of design, if we recall the lawyer’s role within the disputing process (naming the dispute in the best possible light for his client) and appreciate how this is akin to the design process, it seems Aspelund’s trajectory may have some relevance to the lawyer’s design process in respect of assembling disputes. Secondly, in terms of practically disassembling the dispute, though this has not been explored in this research, Aspelund’s notion of “*reverse-design*”, along with concepts borrowed from relational contract theories, may be one starting point (Aspelund, 2015:14):

*“Reverse-designing an object requires you to choose an object as close as possible to the one you intend to design ... and then trace its progress backward through the seven stages. Reverse-designing an existing design is meant to create questions and give you points of reference for your own process. Once this exercise is completed, you will have a very good general idea of the path you will take.”*

Aspelund considers that having traced the design process backward, “you can now see the way forward for any project” (Aspelund, 2015:16).

It seems to me that perhaps the next step in understanding and disassembling construction disputes is to undertake one such “reverse-designing” exercise on a dispute, as described above. To do so, as Aspelund goes on to explain, this would require “considering [the dispute’s] elements, components, structures and production methods, as well as the inspiration and motives for its design.” As with relational contract theories this requires a broader understanding of and involvement with the parties and the lawyer.

Again, food for thought, but if we view construction disputes and their associations in the light within which this research has done, perhaps going forward, by using the design process itself, we can redirect the lawyer’s efforts from “naming” and assembling the dispute to dissolving and disassembling the components of the dispute to the extent that they are kept in equilibrium eternally.

# **APPENDIX 1**

## **THE MATTER DATABASE**

## MATTER DATABASE KEY

Outcomes	
1	Litigation
1A	Litigation - adjudication enforcement
1B	Litigation - arbitration issue
1C	Other formal tribunal (ie professional bodies)
2	Arbitration
3	Dispute Board
4	Adjudication
5A	Mediation - settlement - after proceedings commenced
5B	Mediation - settlement - prior to any proceedings commenced
6	Other recognised form of ADR
7A	Settled - negotiation - prior to any process/proceedings
7B	Settled - negotiation - after process/proceedings commenced (but not by way of mediation)
8	Contract negotiated and executed
9	Unknown

Client type	
RP	Repeat Player
OS	One-Shotter Client

Typology of the parties	
I	OS v OS
II	RP v OS
III	OS v RP
IV	RP v RP

Work Types		
Code	Client	Matter
1	Individual	Construction Litigation
2	Individual	Other Litigation
3	Individual	Non Litigious
4	Individual	Adjudication
5	Individual	Arbitration
6	Individual	Mediation
7	Construction Company	Construction Litigation
8	Construction Company	Other Litigation
9	Construction Company	Non Litigious
10	Construction Company	Adjudication
11	Construction Company	Arbitration
12	Construction Company	Mediation
13	Other Company	Construction Litigation
14	Other Company	Other Litigation
15	Other Company	Non Litigious
16	Other Company	Adjudication
17	Other Company	Arbitration
18	Other Company	Mediation

## APPENDIX 1: The Matter Database

MATTER NUMBER	MATTER NAME	CLIENT NAME	PARTNER	WORK TYPE	SUMMARY OF DISPUTE	ISSUE IN DISPUTE	DURATION (matter opened to outcome)	OUTCOME	# of DISPUTE RESOLUTION PROCEDURES ATTEMPTED	HISTORY OF PROCEDURES ATTEMPTED (may not all be with Solicitor)	CLIENT TYPE	TYPOLGY OF THE PARTIES	CLAIMANT   DEFENDANT	CONTRACT TYPE (VALUE)	AMOUNT CLAIMED	AMOUNT COUNTERCLAIMED (if any)	EXPERTS ENGAGED	COUNSEL ENGAGED
1	Individual v <b>Individual</b> ('Drains')	Private Client (Individual)	B	1	Neighbour dispute regarding use of sewer	Other - land law issue	4 months	9	1	negotiation	OS	I	Defendant	no contract	n/a	n/a	No	No
2	<b>Contractor v Employer</b> ('Chase payment No1')	Main Contractor	D	7	Payment of outstanding invoice	Payment	1 month	7A	0	demand payment	RP	IV	Claimant	unknown	£15k	n/a	No	No
3	<b>Contractor v Employer</b> ('Chase payment No2')	Main Contractor	D	7	Payment of outstanding invoices	Payment	1 month	7A	1	negotiation	RP	IV	Claimant	unknown	approx £250,000	£0	No	No
4	Subcontractor v <b>Main Contractor</b> ('In liquidation')	Main Contractor	D	7	Defending claim from administrators	Payment & Defects	ongoing	9	2	litigation (stat demand), negotiation	RP	IV	Defendant	unknown	£60,000	£300,000 - set-off claim	No	No
5	<b>Employer v Consultant</b> ('Consultant conflict of interest')	Employer	E	13	Advice regarding consultant's services & conflict of interest	Payment	unknown	9	unknown	unknown	RP	unknown	Claimant	unknown	unknown	unknown	No	No
6	<b>Contractor v Individual</b> ('Timetable')	Main Contractor	E	7	Contractor claimed for variations, retention and delay damages. Employer counterclaimed for removal and rental accommodation.	Payment	24 months	5A	3	negotiation, litigation, mediation	OS	unknown	Claimant	Standard Form: Plain English Domestic Contract (~£600,000)	~£200,000	£40,000	Yes	Yes
7	<b>Contractor v Building Owner</b> ('Additional Works')	Main Contractor	D	7	Contractor claimed for variations - Employer counterclaimed for Defects	Payment & Defects	29 months	5A	4	negotiation, litigation, mediation, mini-arbitration (on costs)	RP	IV	Claimant	Standard Form - JCT SBC 2007 (~£12,000,000)	~£600,000	£1.5m +	Yes	Yes
8	Contractor v <b>Developer</b> ('Settlement Agreement')	Developer	G	7	Dispute over final account and outstanding defects	Payment & Defects	3 months	7B	2	negotiation, adjudication	RP	IV	Defendant	Standard Form: JCT D&B 2005	£150,000	defects - amount unknown	No	No
9	<b>Contractor v Employer</b> ('Compensation Events')	Main Contractor	B	7	Contractor claims for compensation events	Payment	12 months	7A	1	negotiation	RP	IV	Claimant	Standard Form: NEC2 (amended)	£1,031,267	£0 (but arguments of delay & defects)	Yes	No
10	Employer v <b>Contractor</b> ('High end residential')	Main Contractor	E	11	Employer claiming for overpayment and damages	Payment & Defects	unknown	2	2	negotiation, arbitration	OS	II	Defendant	Standard Form: JCT Minor Works 1998 (£780,000)	£573,561	£398,851	Yes	Yes
11	<b>Contractor v Subcontractor</b> ('Façade Defects')	Main Contractor	E	7	Contractor/ Subcontractor Defects Claim	Defects	unknown	2	3	negotiation, litigation, arbitration	RP	IV	Claimant	Bespoke (~£1,000,000)	£710k	£0	No	Yes
12	Employer v <b>Contractor</b> ('Off shore wind turbines')	Main Contractor	B & G	11	Dispute concerning defects, delays and payment.	Payment & Defects	ongoing	2	2	negotiation, arbitration	RP	IV	Defendant	Bespoke	€78m + declarations	€20m + declarations	Yes	Yes
13	<b>Contractor v Subbie</b>	Main Contractor	E	10	Charge on Subbie's property and monthly payments in lieu of enforcing TCC judgment	Payment	9 months	7B	3	adjudication, litigation, negotiation	RP	IV	Claimant	unknown	approx £440,500	£0	No	Yes
14	Service Provider v <b>Building Owner</b> ('Electricity Supply')	Private Client (Individual)	B	7	Contractor/ Developer (Individual) Final Account Dispute	Payment	9 months	7B	3	adjudication, litigation, negotiation	OS	II	Defendant	Standard Form	£50,000	£0	No	No
15	Regulatory Body v <b>Consultant</b> ('Professional conduct complaint')	Consultant	A	13	Review of competence from professional regulation body	Other	12 months	1C	1	litigation (2 tribunal hearings)	OS	III	Defendant	n/a	n/a	n/a	No	Yes
16	Individual v <b>Contractor</b>	Main Contractor	D	7	Employee is concerned with design of a component of a project - whistleblowing issue	Other	unknown	9	1	negotiation	RP	III	Defendant	employment contract	n/a	n/a	No	No
17	Main Contractor v <b>Home Owner</b> ('Delay')	Private Client (Individual)	I	1	Contractor/ Homeowner Final Account Dispute	Payment	5 months	5A	3	negotiation, litigation, mediation	OS	unknown	Defendant	No contract	£7,500	£14,000	No	No

MATTER NUMBER	MATTER NAME	CLIENT NAME	PARTNER	WORK TYPE	SUMMARY OF DISPUTE	ISSUE IN DISPUTE	DURATION (matter opened to outcome)	OUTCOME	# of DISPUTE RESOLUTION PROCEDURES ATTEMPTED	HISTORY OF PROCEDURES ATTEMPTED (may not all be with Solicitor)	CLIENT TYPE	TYPICOLOGY OF THE PARTIES	CLAIMANT / DEFENDANT	CONTRACT TYPE (VALUE)	AMOUNT CLAIMED	AMOUNT COUNTERCLAIMED (if any)	EXPERTS ENGAGED	COUNSEL ENGAGED
18	Foreign government body v Main Contractor	Government body	C	13	Disputes regarding liability/payment of VAT	Payment	24 months	2	3	negotiation, Dispute Board, Arbitration	RP	IV	Claimant	Standard Form: FIDIC Pink Book (with amendments)	USD 2.5m	n/a	Yes	Yes
19	Individual v Consultant	Consultant	B	7	Dispute regarding failure to carry out professional services with skill & care - Employer seeking payment for defects as a result of the consultant's breach of appointment.	Payment & Defects	2 months	9	unknown	unknown	OS	I	Defendant	£10k (appt.) "£550,000 (JCT Rev 4 2002)	£894,047	unknown	No	No
20	Local Council v Home Owner ('ProBono')	Private Client (Individual)	E	2	Landlord/Leaseholder dispute - unpaid service charges & defects	Payment & Defects	24 months	1	3	negotiation, litigation, mediation (during stay of proceedings)	OS	II	Defendant	lease (property)	£14,000	£75,000	No	Yes
21	Contractor v Subbie	Main Contractor	D	7	Contractor/Subbie Final Account Dispute	Payment & Defects	20 months	4	2	negotiation, adjudication	RP	IV	Claimant	Standard Form: DOM/2 (~£7,000,000)	Time (17 weeks EoT = approx £595,000)	unknown	Yes	No
22	Subbie v Contractor	Subbie	E	7	Contractor/Subbie Final Account Dispute (Subbie seeking payment from Main Contractor)	Payment	3 months	7A	1	negotiation	OS	III	Claimant	No contract	£25,000	£0 (but arguments on defects)	No	No
23	Subbie v Contractor	Main Contractor	D	10	Contractor/Subbie Final Account Dispute (Subbie seeking payment from Main Contractor)	Payment	3 months	4	2	adjudication, negotiation	RP	IV	Defendant	Bespoke (Contractor's Standard T&Cs) (~£100,000)	£124,301	£0 in the adj (but has other claims outside of this adj)	No	No
24	Contractor v Home Owner ('Termination')	Main Contractor	E	7	Dispute regarding payment on termination of contract	Payment	4 months	7A	1	negotiation	OS	I	Claimant	Standard Form: JCT Minor Works (D&B)	approx £50k	£0	No	No
25	Contractor v Supplier ('Supply Agreement: Rebate')	Main Contractor	D	7	Dispute regarding breach of Supply Agreement. Contractor claimed entitlement to rebate which supplier failed to pay.	Payment	5 months	7A	1	negotiation (and use of Pre-Action Protocol)	RP	IV	Claimant	Bespoke	£229,320	£388,000	No	No
26	Contractor v Subbie ('Defective Glue')	Subbie	A	15	Contractor/Subbie Defects Dispute	Defects	unknown	9	1	negotiation	OS	III	Defendant	unknown	not yet quantified	£0	No	No
27	Employer v Contractor ('Fire: Insurance Policy')	Contractor	D	7	Insurance claim - fire concerning the Contractor's product - claim that the defective produce caused/contributed to the fire	Payment & Defects	unknown	9	unknown	unknown (letters exchanged and no further correspondence from the insurer)	RP	IV	Defendant	unknown	over £68k	£0	No	No
28	Subcontractor v Main Contractor ('Outstanding Invoices')	Subbie	D	7	Payment of outstanding invoices	Payment	12 months	7B	2	litigation, negotiation	RP	IV	Claimant	Bespoke (~£800,000)	approx £50k	approx £470,000	No	No
29	Subbie v Contractor ('Agency staff')	Contractor	K	7	Payment of outstanding monies	Payment	2 months	7B	2	negotiation, litigation	RP	IV	Defendant	unknown	£10,015	£0	No	Yes
30	Home Owner v Contractor	Private Client (Individual)	D	4	Dispute regarding Final Account	Payment	9 months	4	2	negotiation, adjudication	OS	II	Defendant	No contract ("cost plus" price for works)	£470,000	£0	Yes	No
31	Consultant v Developer ('Gentleman's Agreement')	Developer	E	7	Payment for architectural services	Payment	2 months	9	1	negotiation	OS	I	Defendant	No contract: "gentleman's agreement"	approx £5k	£0	No	No
32	Contractor v Employer	Employer	D	16	Dispute regarding release of the retention	Payment & Defects	2 months	4	2	negotiation, adjudication	unknown	unknown	Defendant	Standard Form - JCT SF8 1998	£250,000	£0	No	Yes
33	Contractor v Employer	Contractor	I	7	Dispute concerning payment for works pursuant to a Letter of Intent (remaining invoice outstanding)	Payment	5 months	5A	3	negotiation, litigation, mediation	RP	IV	Claimant	Bespoke - Letter of Intent (~£150,000)	£41,377	£68,000	No	Yes
34	Subcontractor v Contractor ('Winding-up Petition')	Subbie	D	7	Payment for several outstanding invoices on two projects	Payment	4 months	1	2	negotiation, litigation (winding-up proceedings)	RP	IV	Claimant	unknown	approx £25k	£0	No	Yes
35	Subcontractor v Contractor ('Railway Platforms')	Subbie	A	7	Dispute concerning payment	Payment & Defects	12 months	4	2	negotiation, adjudication	RP	IV	Claimant	Standard Form: CECA - amended (~£900,000)	£140k (initially)	£160k (by way of set-off for defects)	No	No

MATTER NUMBER	MATTER NAME	CLIENT NAME	PARTNER	WORK TYPE	SUMMARY OF DISPUTE	ISSUE IN DISPUTE	DURATION (matter opened to outcome)	OUTCOME	# of DISPUTE RESOLUTION PROCEDURES ATTEMPTED	HISTORY OF PROCEDURES ATTEMPTED (may not all be with Solicitor)	CLIENT TYPE	TYPICOLOGY OF THE PARTIES	CLAIMANT / DEFENDANT	CONTRACT TYPE (VALUE)	AMOUNT CLAIMED	AMOUNT COUNTERCLAIMED (if any)	EXPERTS ENGAGED	COUNSEL ENGAGED
36	Contractor v Employer ('1-meeting Advice')	Contractor	A	7	Dispute concerning payment	Payment	1 day	7A	1	negotiation	OS	III	Claimant	Bespoke (~£5,000,000)	£1m	unknown	No	No
37	Main Contractor v Subcontractor	Subbie	C	11	Defects in the design & construction of a power plant, resulting in delay & therefore termination of contract	Defects	18 months	7B	2	negotiation, arbitration	RP	IV	Defendant	Bespoke (~£25,000,000)	\$60million	\$12million	Yes	Yes
38	Contractor v Employer ('Designing Disputes')	Main Contractor	A	11	Payment (Costs significantly exceeded the agreed price)	Payment	ongoing	9	4	negotiation, adjudication, dispute resolution board, litigation,	RP	IV	Claimant	Bespoke	over £100million	unknown	Yes	Yes
39	Main Contractor v Developer ('Limitation')	Main Contractor	D	10	Final Account Dispute	Payment	5 months	4	2	negotiation, adjudication	RP	IV	Claimant	Standard Form: JCT 1998 Private With Quantities with amendments (~£3,000,000)	~£1m	n/a	Yes	No
40	Subbie v Contractor ('Withholding monies')	Subbie	A	7	Main Contractor withholding monies from Subcontractor	Payment	1 month	7A	1	negotiation	unknown	unknown	Claimant	Bespoke	£88k (originally £131k in the Subbie's first email to the Solicitor)	£242k (contra charges, LADs and cost of appt of new subbie)	No	No
41	Individual v Individual ('Redirecting Monies')	Supplier	D	5	Dispute concerning payment pursuant to a shareholder agreement	Payment	10 months	7B	2	negotiation, arbitration	RP	unknown	Claimant	Bespoke MOU	Approx £2m - not quantified because of issues in dispute: fraud	Approx £1m	Yes	Yes
42	Contractor v Employer ('Off shore wind farm defects')	Main Contractor	B & G	7	Dispute concerning defects	Payment & Defects	ongoing	1	2	negotiation, litigation	RP	IV	Claimant	Bespoke	£30m	No	Yes	Yes
43	Contractor v Subbie ('Adjudication terminated')	Main Contractor	D	10	Dispute concerning the Contractor's entitlement to payment of a sum in a Pay Less Notice	Payment	2 months	7B	2	negotiation, adjudication	RP	unknown	Claimant	Standard Form: NEC3 (~£1,500,000)	approx £1.8m	£0	No	No
44	Subcontractor v Main Contractor ('Payment Conditional on Warranties')	Subbie	H	7	Dispute concerning payment - Main Contractor failed to make any payment	Payment	4 months	4	2	negotiation, adjudication	RP	unknown	Claimant	Standard Form: JCT Standard Form of Subcontract	approx £50k	£0	No	No
45	Employer v Contractor	Employer	A	7	Dispute concerning flooring and roof defects	Defects	ongoing	9	unknown	unknown	RP	IV	Claimant	Standard Form: JCT Standard Form - amended (~£8,000,000)	unknown	unknown	Yes	No
46	Employer v Contractor ('Roof Defects')	Employer	A	13	Dispute concerning roof defects	Defects	ongoing	9	unknown	unknown	RP	IV	Claimant	Standard Form: JCT Standard Form - amended	unknown	unknown	Yes	No
47	Subcontractor v Contractor ('Final Two Invoices')	Subbie	D	7	Dispute concerning the Contractor's failure to pay the Subcontractor's the last 2 invoices on two projects - no Pay Less Notices	Payment	9 months	7B	3	negotiation, adjudication, litigation	OS	unknown	Claimant	Bespoke (approx £200k and £100k)	approx £120k	£150k, plus injunction, plus further costs not yet quantified	No	No
48	Subcontractor v Contractor ('Final Two Invoices - Adjudication')	Subbie	D	7	Dispute concerning the Contractor's failure to pay the Subcontractor's the last 2 invoices on two projects - no Pay Less Notices	Payment	2 months	7B	3	negotiation, adjudication, litigation (enforcement proceedings)	OS	unknown	Claimant	Bespoke (approx £200k)	approx £75k	n/a	No	No
49	Subcontractor v Contractor ('Wrongful termination')	Contractor	D	7	Dispute concerning the wrongful termination of a Subcontract	Payment & Defects	15 months	7B	3	negotiation, litigation, mediation	RP	IV	Defendant	Standard Form: NEC3 Subcontract	£205,584	£625,000	Yes	Yes
50	Contractor v Subcontractor ('Intellectual Property')	Subbie	D	7	Dispute concerning Subcontractor's alleged use of Main Contractor's drawings/designs	Other	unknown	9	1	negotiation	OS	unknown	Defendant	n/a	unknown	n/a	No	No

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