37TH IMIA MEETING – ROME, SEPTEMBER 2004

UNCLEAR/IMPRECISE WORDING AND COMMON LAW PRINCIPLES OF CONSTRUCTION

1. INTRODUCTION

1.1 In this paper, I outline the basic principles which a Common Law Court will bring to the construction of policy provisions. I say common law, because these principles apply in all such jurisdictions, the principal ones of course being the various states of the USA, the Courts of the UK and of Ireland, Australia, New Zealand, South Africa and India.

1.2 I am going to look at this under various headings (slide 2):

(1) The basic principles of problems of application.
(2) Some useful tools.
(3) Remedies.
(4) Practicalities – a case study.

1.3 The basic principles are the same in all the jurisdictions I have mentioned. Similarly, the Courts have the same tools and remedies to assist them in resolving contradictions/ambiguities/imprecisions in policy wording. The method of application may differ in emphasis between some jurisdictions (particularly between America, Australia and England), but those differences are fine distinctions of emphasis which require a detailed analysis of the various applications, which is not the purpose of today. Broadly, these principles apply equally in all the jurisdictions I have mentioned.

1.4 If time allows, I will then give you an example from an actual case of mine, dating from the late nineties, to demonstrate how in practical terms a real case of a problem wording was resolved.

2. THE BASIC PRINCIPLES AND PROBLEMS OF APPLICATION (slide 3)

2.1 The overriding principle which a common law Judge brings to problems of construction and interpretation of meaning in an insurance policy dispute is (slide 4):

"To give effect to the mutual intention of the parties as objectively discernible from the wording of the policy."

2.2 In other words, where the parties have (as they always have in the case of an insurance policy) reduced the contract to writing, the Court must confine themselves to a consideration of what was written. There are various tools that can be brought to bear to assist the Court in its interpretation and, in extremis – but I emphasise that it is

the exception rather than the rule – there is a basis to take evidence from the parties as to what they meant and in certain circumstances to rectify the writing as it appears. These tools and these remedies I shall examine later. What I want to look at first is the problems with the application of the principle (slide 5).

2.3 It would be nice to think that the Courts and the Judges were always consistent in their application of the principle, but of course that cannot be the case. Interpretation of language is a subjective exercise. There are in effect two ways to attack the problem. Some Judges adopt a "purposive" approach. They look at the wording in a very broad way in order to try to assess the purpose of the provision and construe it in a way that gives effect that that purpose, even if it is not strictly a literal application of the words in question. Such an approach tries to give effect to what the parties may be thought objectively to have meant. Those who criticise this approach say that it is not the place of the Court to rewrite the parties contract and the parties only have themselves to blame if they didn't get it right. These are the Judges who adopt the "literal" approach to construction. The parties live and die by what they wrote and it is not for the Judges to help them out.

2.4 Examples of this contrasting approach can be seen in recent English House of Lords decisions. Contrast the approach of Lord Hoffman with that of Lord Mustill. (Slide 6 and 7). Hoffman approaches the problem by trying to establish what the parties intended irrespective of what the actual words say; Mustill says that the Court must take the words as they come and not theorise about underlying intent.

2.5 (Slide 8) Of course, it is not just that Judges may follow different approaches to interpretation. There is also the fact, as I have already observed, that the interpretation of language is always subjective. Words and phrases mean different things to different people. One man's meat is another man's poison. It often depends on what you notice or count as important and what you don't. In one recent case of mine, there was a particular provision which in my view was completely meaningless or nonsensical, until it was pointed out to me that if a comma was removed and the two parts of the clause which I read as separate and diverse put together, a meaning could be discerned. Punctuation is very important to me and the alternative construction was not apparent until it was pointed out. (In the old days, English lawyers particularly in property transactions, used to omit punctuation altogether so as to avoid interpretative problems of that kind. However, to image an insurance policy without punctuation would be like trying to look at a foreign film without subtitles. But, just as the subtitles can sometimes be confusing because they oversimplify and do not give the true effect of what is said – or sometimes are just plain wrong, so the same can happen with punctuation if the draftsmen aren't skilled. People can put commas in the strangest of places!)

2.6 It is not also just a problem of different interpreters. Language itself is often capable of more than one meaning. Words and phrases can mean completely different things in different contexts. The word "dear", for instance, is usually taken as a word of affection. However, it can also be used as a term of regret - "oh dear", "dear, dear". It also means expensive. Spelt wrong, it's an animal. Similarly, the parties may agree a definition between them. President Clinton's statement, "I did not have sexual relations with that woman" is a very good example. The statement was in itself misleading, but strictly accurate within the definition which the Prosecutor had given

him in earlier exchanges. Another language difficulty, which I will come back to a number of times in this talk, is the rather fine distinction (and sometimes confusion) between "defect" and "damage".

2.7 Absurdity is always just round the corner, even in such a mundane document as an insurance policy. It is easy to read a document – often many times over – in the sense that you understand it without seeing the ambiguities which are quite apparent to a complete stranger coming to the document for the first time. That is the nature of words, as Lewis Carroll pointed out in "Alice in Wonderland" (slide 9).

Follow the text of slide 7:

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean, neither more nor less".

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all".

You couldn't have a better example of the subjective nature of language.

2.8 My job as a lawyer is to find the best solution for my client. When the meaning of any provision is not clear, the first question to the underwriter is, "What did you intend the provision to mean? What was its purpose? Why did you put it in?" The question at least is clear, but unfortunately it is not always the same with the answer. (Slide 10) Here are some of the more common ones:

(1) We've used this wording for years. We've never really thought about this clause. We always assumed it added something.
(2) Had we thought about it, we would have intended this.
(3) We intended this, but we didn't realise the clause had other applications.
(4) We intended this, but overlooked the modifying effect of other policy provisions.
(5) We have no idea what was intended, but we want it to mean this.

2.9 Sometimes it is the facts of the claim itself which give rise to the problem. The wording simply didn't anticipate the kind of event which occurred. However the issue arises and whatever it is, where there is more than one interpretation, one which benefits the insured and one of which benefits the underwriter in varying degrees, and particularly where a lot of money may turn on the issue, the parties' positions rapidly become polarised.

2.10 The case study will demonstrate that where there is a will there is a way. But suppose the parties cannot agree or find some way of resolving their disagreements amicably, how do the Courts set about assessing which meaning these draftsmen intended? This has to be done from the document itself. There's no point in asking the draftsmen because they are likely to give conflicting answers, depending which side they are on.

3. TOOLS OF CONSTRUCTION (slide 11)

3.1 Here's a basic list (slide 12).

(1) Precedent.
(2) Necessary implication.
(3) Incorporation by reference.
(4) Presumptions.
(5) Contra proferentum.

I will run through these briefly in turn.

3.2 PRECEDENT: This is a Common Law Court's first and most important tool. It is of particularly useful application in the case of standard wordings. One Court may be asked to look at the wording of a particular provision and set out its interpretation. This will then inform all disputes in future. In the English and American system, a Superior Court's decision is binding on all Lower Courts. Decisions of Courts of equal standing are persuasive, as also are the decision of Courts in other common law jurisdictions. There is therefore a great bank of material to which the Court can have access, and there are books and dictionaries that keep tally of what a particular word or phrase has been decided to mean by the Courts in the past.

3.3 There is of course another useful side effect of precedent. A particular market may find themselves faced with a decision which they don't like or which goes against the original intention. The market therefore gets together to form a new wording in order to get round the decision they don't like. Perhaps one of the most famous examples is the development in marine insurance of the additional perils/latent defect clause, which was originally called the "Inchmaree" clause, after the name of a ship concerned in the decision which gave rise to the problem in the first place.

3.4 I choose the Inchmaree example quite deliberately, because it is the precursor of the faulty design/latent defect clause that appears in construction policies. The language of these clauses is notoriously loose, and at the moment there is little or no precedent to assist interpretation of the ambiguities. Here is an example (slide 13):

"FAULTY DESIGN/LATENT DEFECT

Physical damage to the subject matter insured during the period of insurance, caused by faulty design, faulty or defective materials, faulty or defective workmanship, including physical loss of, defect in or physical damage to the faulty part, shall be covered even though the faulty design etc occurred prior to attachment."

This wording is taken from a case on my desk at the moment. It concerns a massive energy construction project. There are two basic problems of interpretation. Does the clause, because of the reference in the third line to the inclusion of "defect in", give cover for pure latent defect without the incidence of consequential damage of any kind? And if it does, what is the meaning of "faulty part" in the context of the construction of a processing plant. For instance, if there is a problem with condensers, is one particular pipe in the condenser the part or the condenser itself? This depends upon the context, but the clause gives no clue as to context.

Regrettably, precedent also is of no assistance. Clauses of this kind have given rise to a great many disputes, but very few if any at all have come to Court and those that have have not resulted in any useful definitions of what is meant in this context by the use of the words "defect" and "part". Precedent therefore has its limitations.

3.5 NECESSARY IMPLICATION: (slide 14) One such clause did come before the English Court recently and conveniently demonstrates this particular tool. The issue in the case which concerned the construction of an off-shore pipeline, was whether or not the insured needed in the context of the clause on the screen to demonstrate physical damage at all. The italicised words in brackets on the screen did not appear in the clause, but the Judge decided that without the implied inclusion of those words, the clause made no sense at all. He therefore decided that those words should be included by necessary implication and that therefore it was necessary to prove physical damage. Both sides to the dispute expected that this decision would be overturned on appeal, and the case was compromised before it reached the Appeal Court. There is a strong school of thought to say that the Judge overstepped the mark in this case, adopting a far too purposive approach and was in effect rewriting the contract for the parties.

3.7 INCORPORATION BY REFERENCE: This is a straightforward example and needs no illustration. The parties do not have to confine themselves only to the terms of the written contract they have agreed. They can incorporate other documents into their own contract, provided they do so clearly. The obvious example is the incorporation of standard market wordings. In other cases, particularly specific liability insurance policies, the provision of the insured's contracts can also be included as a basis for assessing the existence of liability. There are many other examples.

3.8 PRESUMPTIONS: (slide 15) These are many and various but I have listed some of the more important ones on the slide of the screen:

(i) Words Should be Given their Ordinary Meaning

The parties are assumed to have intended that ordinary rules of grammar apply, and that the accepted popular meaning of words should be preferred unless the context demands otherwise. A good example can be given from a case of mine some years ago which turned on the question whether a crack in a platform leg constituted the defect itself or the consequential damage. One eminent English Judge stated that it would be an "abuse of language" to consider it as anything other than damage. In so deciding, he put forward the current English view on the distinction between defect and damage which, in the context of a developing crack from infinitesimal to visible, is that it is a question of degree.

(ii) Words may be Given a Particular Technical Meaning

The policy may define the meaning for a particular word, or that particular word may by custom or usage have a settled meaning in a particular market. A good example would be a slip provision that says "average to apply". Any insurance practitioner would have no difficulty in understanding that the reference to "average" is a reference to the principle of proportionate reduction in cases of under-insurance.

(iii) Words are to be Construed in their Context

This is something I discussed in my introduction. The context is itself shifting ground. The context may be the phrase or clause in which the word appears, the section of the policy, the policy as a whole, or even the particular trade to which the insurance relates. One English Judge, in a recent case on the meaning of the word occurrence or event, pointed out that depending upon the point of view in time, a battle in a war could be an event or if viewed from a later perspective, the war itself could be an event.

(iv) Commercial Efficacy/Avoid Unreasonable Results

The English Courts in particular have a history of trying to bring commonsense to bear on these questions. They will try to give a business-like interpretation to the document and will not apply the literal meaning of the word if it produces a wholly unrealistic result, and they will avoid absurdities. Again, as we have already seen, this is a somewhat subjective exercise. Some Judges may go further down this route than others feel is appropriate.

3.9 This is by no means an exhaustive list of the presumptions that may apply. There are many others, but of more particular application. One example is the "eius generis" presumption, which is that unless the contrary is demonstrated, any list is presumed to consist of similar like items. Therefore, in case there was any doubt about the list on the screen, the Court would presume that everything listed was intended to be a presumption rather than anything else. The relevance of this is in fact to the eius generis rule itself. As I have just said, it is sometimes referred to as a "rule" which rather suggests that it applies in every case, but it is not in fact a rule as such, but merely a presumption which can be rebutted by evidence of a contrary intention in the text itself.

3.10 CONTRA PROFERENTEM: This is my final example. In my experience, this is a much talked about rule but one which often has little application in practice. The rule is that where there is an ambiguity in the wording, it should be construed against the party who prepared the wording. Note that the application is against the party that drafted the document, not against the party that is making the argument as is sometimes mistakenly thought. This rule usually works against the insurer, particularly in the US where the Courts also apply a principle of reasonable expectation as to intended effect, but it is not always the case. Certainly in the London market, many wordings are prepared by the brokers which arguably works against the insured – except that of course American insureds will very often argue that they were sold the cover by the broker and should not be punished for any ambiguity which the broker introduced – again, an example of the principle of reasonable expectation. Finally, it must be remembered that the rule can only apply in cases of clear ambiguity, and rather than impose a solution by application of the contra proferentem rule, the Court may prefer to allow the parties' other remedies, which brings me to my next section (slide 16).

4. REMEDIES

4.1 As I have said, the basic rule is that the Court must interpret the written document. It cannot ask the parties about the negotiations leading up to the conclusion of the contract nor what the parties subjectively intended the document to mean – but there are certain exceptions to this (slide 17).

4.2 "PAROL EVIDENCE": This rule sets out when the Court may, as an exception, take verbal evidence from the parties to supplement the written words. (Parol is an old English word for "verbal".)

4.3 The scope for producing verbal evidence is very confined. The Courts will generally resist it unless there is a clear ambiguity on the face of the wording, ie: there are basically two equal but conflicting interpretations which make it almost impossible for the Court to decide.

4.4 An alternative basis on which verbal evidence can be introduced is if one of the parties alleges that the documents should be set in a context, which completely changes the nature of the doubtful provision, for example:

- throughout the negotiations the parties had proceeded on a certain basis, and when the provision is read in that context its meaning becomes entirely clear or,
- the provision should be read subject to a market practice which has developed as to how it should be applied.

Introducing evidence of market practice is by no means straightforward. Very often, one hears from one side or the other that a certain provision has "always been applied in this way". However, that is evidence only of personal experience or personal practice. For market practice you have to show a universal practice in the market – ie: that everybody practising in the particular market would understand the provision in a particular way.

4.5 The parol evidence rule applies in all jurisdictions. It applies equally in the US as in the UK, although the application can vary in the US from State to State.

4.6 RECTIFICATION: In truly exceptional cases, the Court may be prepared to correct - or "rectify" - the contract. This is very rare in the commercial context. In 25 years of practice, I have only come across it once. The principle is that if the parties can show that the contract provision does not properly express their true agreement, the Court will correct it. There is no need in this case for the parties to demonstrate an ambiguity in the wording. They must, however, demonstrate a mutual intention to show that the written document is incorrect or incomplete: in simple terms, that the document says "red" when everybody intended that it should say "blue". It is very difficult to achieve rectification without some kind of written evidence to support the mistake. The obvious example is a clear mistake between the placing slip and the ultimate policy wording, for instance that the slip refers to one type of wording, but the policy has introduced quite another. In those circumstances, one party can ask the Court to rectify the policy wording and introduce the wording agreed by the slip. The

other party would have to show that the slip did not constitute an agreement to incorporate that wording.

4.7 MISTAKE: An English Court will avoid the contract (tear it up altogether) if one party can show that they entered into the contract under a clear mistaken assumption of fact and the other party knew it and took advantage of it. In those circumstances, the Court will say that there was no mutual intention and that therefore the contract should be treated as void. In many US States, the Court will, as an alternative remedy, rectify the contract in order to give effect to the mistaken basis, if that seems a fairer thing to do.

5. CONCLUSION

5.1 The basic rule is that the parties must live or die by the document which they agreed and reduced to writing. The Courts will try to interpret it in a practical and sensible way, but there is a limit to how far they will depart from the meaning of the words as they are set down. Some Judges are prepared to go further than others.

5.2 As we have seen, context is highly important to meaning, and often one party will try to introduce verbal evidence to demonstrate the context in which the contract was agreed, so as to support argument for a particular meaning. Very often, the other party will resist that attempt, arguing to the Court that such evidence is inadmissible. From a tactical point of view, the attempt to introduce oral evidence is always worthwhile, because even if it fails, it does at least indicate to the Court what happened before. Even if the Court is then forced to ignore it and interpret the disputed provision purely on the basis of the wording, the attempt must inevitably colour the Court's own subjective understanding.

5.3 In conclusion, I thought I would illustrate the application of these rules with one final example (slide 18). Take for instance property and business interruption cover for a port. The BI cover is extended to cover financial losses resulting from damage to property in the vicinity of the premises which prevents or hinders the use of the premises or access thereto. In this case, let us suppose that the port is served by a branch line off the main railway line, approximately twenty miles long. At the junction with the mainline there is a tunnel which collapses. Is this in the vicinity of the port? (slide 19).

5.4 This is a typical kind of language problem. "Vicinity" is not a precise term. The dispute arises because the insured says that the tunnel collapse is clearly within the terms of the wording, but the underwriter says that this is not at all what he intended. There were discussions beforehand and he paid a visit to the port. He noted that the access to the port was along a limited stretch of land and that if something were to happen to that route of access (which was not part of the port's own property) there would be an interruption to business. He had no intention of giving cover for damage to something twenty miles away.

5.5 So, can I help this underwriter in this instance? To my mind, the answer is plainly not. A straw poll around the office produced the same result. If the underwriter had really meant to confine cover to the piece of land immediately adjacent to the port, then that is what he should have said. In the event, he used the word "vicinity" which

goes wider than "immediately adjacent". Vicinity is a relative term. Viewed from space, Rome and Paris are in the same vicinity. They're on the same continent. Note also that in the dictionary definition above, vicinity can mean proximity not only in space but in relationship. There can be no doubt that the port had a relationship of dependence upon that tunnel, and that any damage to the tunnel would inevitably result in an interruption to the port's business, so that it is fair in those circumstances to interpret vicinity as being sufficiently wide as to embrace the whole of the branch line and the tunnel in particular. If the underwriter had wanted cover to be more precisely defined, he ought to have used a more precise definition. The only way this objective conclusion could be attacked would be if there had been some discussion at the time which could be said to vary the context. The underwriter may say that it was clearly understood by both sides that the cover was intended to be limited to the stretch of land immediately adjacent, but since there is not really ambiguity but merely imprecision in the wording, the Court would I think be very unlikely to permit oral evidence as to subjective meaning and would decide on the basis of the words as they appear in the policy.

5.6 That concludes the main part of my talk. I am happy to take questions, but (time allowing) I would like to work through a practical case study, taken from a case of mine in the late nineties, showing how the parties approached a wording problem and resolved it in this particular instance without what otherwise would have been long and expensive litigation (slide 20).

6. PRACTICALITIES – A CASE STUDY

6.1 (Slide 21) The insured in this case was a turnkey contractor of a power station. Due to design difficulties and other problems there was a year's delay in completion, which gave rise to a claim under the turnkey contract by the employer against the insured for liquidated damages in excess of £50million.

6.2 This would not in most circumstances give rise to a policy claim, but this was a professional indemnity cover with a difference. The exclusion for contractual penalties and liquidated damages was qualified (slide 22).

6.3 More than that, the brokers had failed to obtain underwriters' agreement on the final amendments to the wording. The proviso that appears on the screen existed in two alternatives. The italicised wording constituted handwritten corrections to the original text and the underlined wording had been struck through by hand, but not initialled or agreed by the underwriter.

6.4 So this wasn't just a case of an imprecise and ill-thought-out wording. There were in fact two potential alternative wordings. Neither version was easy to apply to the facts.

6.5 Given the amounts involved, these difficulties and the problems of applying the proviso whichever version was adopted, created the potential for protracted legal dispute. Fortunately in this case there was an insured and an insurer who wished to maintain relations and were committed to finding a solution. I think it is how the solution was found and the methods involved that will interest you today.

6.6 In an attempt to clear up the ambiguities surrounding exclusion 9 and its proviso, the underwriters issued a protocol in the following terms (slide 23). What in effect this protocol says is that the intention was to provide cover for liability for delay but only for the actual loss suffered by the principal rather than the liquidated amount. This solution gave rise to as many problems as it solved.

6.7 The biggest problem is that it required proof by the insured of the actual financial loss suffered by his employer, in circumstances where his employer was entitled to liquidated damages and did not have to provide any proof at all as to his actual loss. In effect, therefore, the provision was one which required of the insured an onus of proof which it was virtually impossible to meet.

6.8 Another question was what happened if you removed the liquidated damages provision in the original construction contract. Was the effect of that to provide for unlimited liability – or without the liquidated damages provision, was there in fact a basis to say that there was no liability at all for delay? In the latter case, there would therefore be no contractual liability to recover under the insurance policy.

6.9 There was an additional complicating factor. Not all of the delay was due to design problems. There had also been other incidents, in particular damage during the commissioning process due to operator error, which was covered under the CAR policy. The CAR policy also contained a delay-in-start-up section. The delay resulting from the damage in this incident, was covered under that section and specifically excluded from the liability policy, which contained an exclusion for any loss indemnified under CAR or public liability policies.

6.10 All in all, what appeared to be a problem without a solution.

6.11 However, the insured could not afford to go without a solution, and in essence practicalities intervened to make a solution possible. The solution originated in a joint strategic review of the position between insureds' and insurers' lawyers and it worked out in the following way.

6.12 In the first place, the insured told his employer that he could not afford to meet a claim for liquidated damages because it left him without insurance cover. He would therefore have to challenge the validity of the liquidated damages provision of the contract, unless the employer was prepared to waive liquidated damages and prove his actual financial loss due to the delay. The employer agreed to do so, with the result that he recovered less than £50m and at the same time also produced a financial assessment which the insured could use in order to try to quantify the loss recoverable under the policy. It did at least allow the parties to extrapolate a figure for the actual daily loss.

6.13 That still left two difficult issues. Firstly, how much of the delay was due to design problems rather than anything else, because only design problems would be recoverable under the professional indemnity policy. Secondly, the compromise with the employer was upon the basis that they could otherwise have claimed liquidated damages. The issue for the insurance was whether there was a claim for delay at all apart from the liquidated damages, which was a point insurers were still able to explore within the spirit of the protocol on the screen.

6.14 You will be hearing tomorrow morning from Robert Glynn about the advantages of mediation, which is a very useful tool for resolving disputes – but not one that really could apply here. A mediation is pure negotiation, it cannot without more structure resolve issues. A mediation in this case would result in a long protracted negotiation wearing both sides down and meeting somewhere in the middle without regard to the issues. Both sides wanted something better than that.

6.15 In the event, the parties resolved to negotiate a specific and detailed reference to arbitration. In so doing, each side waived certain arguments and defined the outstanding issues between them in a series of questions which the Arbitrator was expected to answer. Each side did calculations of what they considered to be their best possible position, and the arbitration reference also agreed that these calculations represented the minimum and maximum amounts of the Award (slide 24).

6.16 The slide on the screen summarises the principal features of the arbitration reference.

(i) The questions which the Arbitrator was to decide were clearly defined and set out in the terms of reference.

(ii) Depending upon his answer to those questions a minimum and maximum Award was stipulated. The parties undertook to waive extraneous issues not covered in the questions.

(iii) It was agreed that the Arbitrator should express his answers in terms of the number of days delay. The proposal was that the parties should (and they ultimately did) agree a monetary figure for each day's delay.

(iv) The parties were to agree an extensive Chronology and Statement of Facts. This meant that no other evidence was required. It was possible to do so in this case, because there was no dispute about the basic facts, but rather a dispute as to the causative effect of the various problems – how much delay was due to design problems and how much to operator error etc? These issues were defined by the agreed questions. If there had been an area of factual dispute, this could have been defined in the terms of the reference and additional provision made for evidence to be given and for the Arbitrator to decide defined questions of fact.

(v) The arbitration was to be final and determinative of all disputes, although the right of appeal was maintained for both sides in the event of some kind of miscarriage.

(vi) There would be no claim for interest and no claim for costs. Each side would bear their own costs in the arbitration. This, combined with the stipulation of the minimum and the maximum amounts for the Award, gave both sides considerable financial certainty.

(vii) It was agreed that the arbitration should proceed by the parties exchanging simultaneous written submissions, with simultaneous exchange of reply if required, followed by a hearing.

(viii) It was also agreed that the whole process including formulation of the agreed factual statement and the hearing and the Award, would be completed within six months. This was stipulated as a condition upon the appointment of the Arbitrator chosen.

6.17 This process provided a structured framework by which the parties could quickly and cheaply resolve their issues, within a good degree of certainty. It therefore offered each side some margin of comfort and reason to agree to the process. This process went forward, but actually the parties were able to compromise it before it got to a hearing. The whole process of agreeing the questions and then agreeing the facts made it quite apparent to both sides what would have been the likely terms of the Arbitrator's Award.

6.18 This arbitration took place about five years ago. If the parties had not chosen this way to settle their differences, I am quite certain that the litigation would still be ongoing and this would be one of the biggest cases on my desk right now.

6.19 This case study shows what can be achieved by a creative approach to the resolution of disputes, but it requires commitment from both sides, which is very often absent when the problem between the parties is about what was agreed in the first place. My job as a lawyer is to find the best solution for my client but where the words are not clear and where the intention is difficult to discern, the solution can be hard to find and resolution very expensive. Sometimes a little more care over the wording at the point of origin can save an enormous amount of expense and trouble later on.

NIGEL CHAPMAN
Partner – Clyde & Co.
14th September 2004

BIOGRAPHICAL:-

Nigel Chapman has been a partner in Clyde & Co since 1983. His principal practice is to advise underwriters on coverage and recovery issues, relating in particular to energy (off and on-shore), engineering and construction insurance risks. For further details, see www.clydeco.com.