Access to Justice Review Public Hearing

Le Capelain Room, States Assembly Building

15:15 – 16:00, Friday 11 July 2014

Advisory Panel:
Senator P.F. Routier (Chairman)
Deputy J.H. Young of St. Brelade
Connétable J. Gallichan of St. Mary

Officers in support:
Mr. T. Walker
Mr. S. Cartwright

Attendees:
Mr. D. Rothband

[15:15]

Senator P.F. Routier (Chairman):
Welcome. Thank you very much for coming to see us. We have received lots of written submissions, which yours is one of them, and we thought it would be useful to invite people in who have made some interesting comments to perhaps develop those. For the purposes of the recording, because this is a public hearing, there is going to be a transcript of it, I will do the introduction. I am Senator Paul Routier, Assistant Chief Minister. I am joined by ...

Connétable J. Gallichan of St. Mary:
Constable Juliette Gallichan of St. Mary.

Deputy J.H. Young of St. Brelade:
Deputy John Young.

Mr. T. Walker:
Officer in support, Tom Walker.

Mr. S. Cartwright:

Steve Cartwright.

Mr. D. Rothband:
Thank you very much.

Senator P.F. Routier:
We have some questions and if there is anything after that you want to add, you are very free to do that. You touched on the subject of a tribunal to hear commercial disputes. Perhaps if you would like to explain why you thought that might be a useful step forwards for the Island, in a positive way, because it is all about moving forward?

Mr. D. Rothband:
Yes. From my recent experiences since I have been working on my own as a sole trader, it is fairly focused in on the construction industry, development. Now, I have come across so many people who have a potential dispute, it could be a client with a designer or a contractor, it could be a main contractor with a subcontractor, a subcontractor with a main contractor, it could be someone with the Planning Department, it could be all sorts of combinations of those. The dilemma that a lot of them find themselves in is their dispute which if you narrow it down is really basically down to a debt, they are owed some money. There is a huge gap between the threshold in the petty debts court to claim that money back and then if it is over that threshold of £10,000 and what it would be worth to go to the Royal Court. There is a rule of thumb I have heard from certain lawyers, if the amount you are claiming is anything less than £150,000 you should not even consider going to the Royal Court because of the potential cost of issuing proceedings. So unless you are very wealthy and you want to do something on a matter of principle, to the man in the street it is either the petty debts court or spending £30,000, £40,000 initially to issue proceedings. A lot of it falls away from there and the person holding the money - possession being nine-tenths of the law - knows that they are in a vulnerable position and says: “Well, if you want to sue me, sue me.” That is what prompted me to write a letter to the Bailiff at the time just to say my view and I think I said in my letter in 2010 that put forward a figure of £50,000, possibly more like £100,000 I am thinking now would be a good way of doing it.

Senator P.F. Routier:
So do you just think by raising the cap it would resolve the issues? Because you spoke about a tribunal as opposed to perhaps raising the cap as well.

Mr. D. Rothband:
Yes, there is more than one way of skinning a cat. I felt that when I have been to petty debts assisting somebody as an expert witness, if you like, putting forward their case ... I do not think it

would be appropriate to mention the parties that were taken there but one case being what is known as a day work contract - you probably do not know what a day work contract is - compared with a measured contract. It is a very, very simplistic calculation. You do a job for somebody, you take the number of hours, you multiple it by the labour rates, it gives you the labour cost. You put the receipts in for the materials and the plant and you add those up and put a prearranged percentage mark up on it and that is the amount that you are owed. In other words, it is cost plus. Now, that was a fairly simplistic process and in fact it worked well in the petty debts court. The judge heard the case from both sides and people were able to cross-examine one litigant in person and one represented by an advocate. That was fairly easy. So that might be one way of doing it, purely raising the threshold so it goes through the petty debts court. But if we were to change things and move forward my proposal would be to have some sort of tribunal based on either the employment tribunal, which people can represent themselves or have laypeople representing them, that framework; or something under the Channel Islands branch of the Institute of Arbitrators, they have an arbitration process. So these are people who are experts or knowledgeable about their own field, can all sit round the table. Someone will sit and make a decision but with the advantage of having one party there represented or assisted by their quantity surveyor to look at the money side of it, and the other party there being assisted by their architect looking at the technicalities of the job; and pick through it all, make their own submissions both in writing and oral, give the necessary evidence, the drawings, the contract - if there is one - the agreement, the emails that went backwards and forwards about this, that, and the other, and make a value judgment. Now, yes, there are pitfalls with different types of alternative dispute resolution and arbitration is not always 100 per cent of the way to go forward. But I find it a little bit more cohesive than a mediation. So if within the petty debts court they say - again, this is just giving you one scenario of what I think could happen - the threshold is raised but they go in and there is a directive to say: “Go to a States controlled arbitration first and then come back and see if you have reached an agreement.” Then you go away, have the mini tribunal, without the expense of the Royal Court hearing, with people who know their subject sat around the table and assisting people, and then to go back and give that judgment. It is a lot cheaper for the parties and I think that is the main thing, and it does not involve Royal Court proceedings.

Senator P.F. Routier:

Tribunals are - as you say - cheaper than going to the court, but they still incur costs. I know the employment tribunal does cost some money, obviously when it was established ...

Mr. D. Rothband:

Yes, and an arbitration will cost money, a mediation will cost money.

Senator P.F. Routier:

Yes, so how do you think that could be funded?

Mr. D. Rothband:

Well, the 2 options I would say is either by the parties themselves or by the States. Sorry, you were trying to get me to say something not the States. But, no, it is one option. If it is going to help the process ... I think that you might find that after a few years or a few of these arbitrations tribunals that it will probably ease off the people out there having problems and then ending up coming to the Royal Court on principle. But those are the 2 options.

Deputy J.H. Young:

Would I be right in thinking that in commercial transactions, a building contract for example, people can agree anyway in their contracts between the contractor and the client to have a dispute clause to go to a mediation or conciliation or what, would they not? They can do that already, can they not?

Mr. D. Rothband:

Yes, yes.

Deputy J.H. Young:

In fact there would be strong argument to do that, would there not?

Mr. D. Rothband:

There would, absolutely.

Deputy J.H. Young:

Rather than have a contract that says nothing about it in which case you are into the Royal Court if the amount is over the threshold.

Mr. D. Rothband:

Well you can, I suppose, between the 2 parties say: "Well, we do not have an arbitration clause in the contract but would you agree do to do that?"

Deputy J.H. Young:

But what you said though, the person who owed the money would be probably not likely to agree to it retrospectively, would they, the person ...

Mr. D. Rothband:

Yes.

Deputy J.H. Young:

Yes, it is not balanced, it is not in equality ...

Mr. D. Rothband:

That is true, that would happen. But, I mean, take for instance the J.C.T. (Joint Contracts Tribunal) minor works contract, there is a clear clause to say if there is a disagreement go to arbitration.

Deputy J.H. Young:

Would I be right in saying the sort of pieces of ordinary litigation you are describing, they probably would not have in many cases written contracts, would they?

Mr. D. Rothband:

No, most of them do not have a written contract. They sometimes have an agreement. They sometimes have a letter or: "I would like to start work on Tuesday afternoon." You are quite right, most of them do not have a formal contract.

Deputy J.H. Young:

Because it occurred to me one day, could people like the construction industry council, could they not issue a standard document for use in all that sort of work, you would put it on a website, if you want to do small works it has an arbitration clause automatically built in the agreement?

Mr. D. Rothband:

Yes, they could.

Deputy J.H. Young:

Obviously it becomes relevant to funding because obviously it is a question of who pays. To me there seems to be a stronger argument for the contracting parties to pay through some structure, and if it was done through a co-operative arrangement through the industry bodies it would be pretty low cost, I would think, to get a standard contract, civil small works, drawn up.

Mr. D. Rothband:

Yes, an agreement. You can have a contract by saying: "Those are the drawings, that is the specification" and a letter of agreement: "I hereby agree to carry out those works."

Deputy J.H. Young:

So there might be a commercial opportunity for yourself?

Mr. D. Rothband:

Well, I do it anyway, I capitalise on an opportunity anyway. People come to me and say: "Look, David, what do you suggest I do in this situation?" I say: "Well, have you got a written contract?" "No." "Have you got any photographs?" "No." "Have you got any letters?" "No." "Have you got any emails?" "Well, not many." "All right, well, let us have a look at it." The industry itself does not set themselves up, so I hear what you are saying. They do not set themselves up ...

Deputy J.H. Young:

Just widening it out a bit. Obviously the sort of method that you described, do you think that would work across other sort of litigation disputes areas? Or does one come in those areas back to saying: "Increase the petty debts limit to give them more scope up to £100,000" I think you were saying?

Mr. D. Rothband:

Yes, I think so. From the type of debts I am hearing about, the types of dispute, it does not take very long for a subcontractor to build up money that is owed on one certificate to £100,000.

Deputy J.H. Young:

Do you think the Petty Debts Court can cope? I mean, it would get a lot more work, would it not?

Mr. D. Rothband:

Yes, they would get a lot more work but, no, I have not researched whether the Petty Debts court would cope with that. Put it this way, there is a lot of people out there who cannot cope because they are not being paid.

Deputy J.H. Young:

So it has economic effects, people are doing work and not getting paid and they are employing people and so on.

Mr. D. Rothband:

Yes, definitely.

Deputy J.H. Young:

So the fact that the system is not working is quite significant economically?

Mr. D. Rothband:

Whether it is significant economically or not, I have seen people who have serious issues socially and economically because of what they are not being paid.

Deputy J.H. Young:

Have firms gone bust because they have not been paid?

Mr. D. Rothband:

Yes.

The Connétable of St. Mary:

You have experience and a certificate in commercial mediation, but you tell us that you are concerned about the limitations of mediation. Is it simply just a question of people going straight to the: "I know you say you are owed this but will you take X?" Or are there other reasons why it might be an alternative but it is not the best option?

Mr. D. Rothband:

I think with alternative dispute resolution it is like anything, with the contract that you sign between the parties there is the right contract for the right job. There is also the right alternative dispute resolution for the right dispute. Taking Deputy Young's point that, yes, I think that on other commercial situations or other disputes, mediation can work across the board. You do not, in my opinion, have to be a specialist with knowledge of that particular industry or that particular area. But it does tend to be - I know this from first hand in the Petty Debts Court - right, what is going to make this go away? You are owed £2,000, what will you accept, and it starts. That - with the greatest of respect ...

The Connétable of St. Mary:

It is not mediation.

Mr. D. Rothband:

It is negotiation, it is not mediation, yes. So mediation is where the 2 parties, with a little bit of persuasion and cajoling, make their own decision on how to resolve it. A mediator merely sits between the 2, moving ideally room to room, round a table at the beginning and round a table at the end when you come to the final agreement, backwards and forwards between the rooms and then they decide between them. I will give you a statistic which is quite interesting. What do you think the most common request from one party in a mediation to resolve a matter is statistically?

What do you think is the most common one? "What I want is X." What do you think it is? You would be quite surprised, by far and above the most common.

[15:30]

Mr. T. Walker:
It must be an apology.

Mr. D. Rothband:
Yes, you are right: "All I want is for that person to come in here, apologise, say he or she has made a mistake and shake my hand and that is all. I am not bothered about the X thousand pounds." It does happen more often than anything else. That is mediation. Whereas in a construction dispute it is arbitration and it is about paying money that is owed, in my experience.

Senator P.F. Routier:
Do you have any questions?

The Connétable of St. Mary:
I do not think so. I mean, you did say, did you not, the tribunal could meet up with paper, it would not necessarily need to be people present, you could almost do it by paper?

Mr. D. Rothband:
The Channel Islands branch of the Institute of Chartered Arbitrators has a procedure that is oral evidence and there is one which is just written evidence. So, yes, there are ways to go about it like that.

Deputy J.H. Young:
Presumably as a tribunal you mean the body, you kind of call it the tribunal but there would be individual mediators sitting on each case, as it were? You would not have 3 mediators on a case?

Mr. D. Rothband:
No, no, but I think you might have a specialist assisting one party. A client who was a layperson in the construction industry - this is the example I have used - and then another specialist for the other side. But, no, there would just be one arbitrator, judge, referee, whatever you want to call them.

Senator P.F. Routier:
Okay, all right, I think we have covered all the points. Thank you very much for your submission.

Mr. D. Rothband:

Thanks for giving me the opportunity.

Senator P.F. Routier:

This is an interim report which we are just preparing now and which will be published in a few days. There is going to be a written transcript from this recording so that will be published as well, you will be able to see it on the website eventually so you will see what you have said. Thank you very much for coming in.

[15:32]