

THE COUNCIL QUARTERLY

Issue 1 SUMMER/AUTUMN 2016

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Chairman's Foreword – Keith Azopardi QC

Welcome to the first issue of the Council Quarterly. It is with great delight that we are launching this electronic newsletter. Its objective is to inform members of our work and of legal developments of interest. It will, by its very nature, be a brief highlight only of events, legislation, cases or news but we think it will be of value in circulating information. The Council Quarterly will be published in September, December, March and June of each year, commenting on a range of matters that are relevant to the legal profession in Gibraltar: non-contentious, litigious, regulatory and of course, social.

As this is the first issue, it will provide information on the elected members of the Bar Council as well as discussing key decisions, areas of regulatory development and recent social and professional events.

There is no doubt that the biggest development this summer has been the BREXIT referendum and the implications it has for the legal profession as well as for Gibraltar, Europe and beyond. It would be impossible to do justice to that issue in a newsletter of this kind which inevitably is a summarised form of news, so I will simply flag the fact that I will make some observations on this important area at the Opening of the Legal Year.

It is the vision of the editorial team and I that this quarterly digest remains relevant to all practitioners, irrespective of your field of practice. **Warm regards, KA**

Summer Social - My Wines

Following on from the event which took place last December, the Bar Council arranged a second social event at My Wines on the 28th July. This time the event was open to all members regardless of their seniority (the restriction of the first event to the 'Young Bar' having the unfortunate consequence of reminding many of our members of their age).

Once again the event was a resounding success and was well-attended by a wide range of our members.

The Council is committed to arranging further social events in order to provide a casual and relaxed atmosphere in which our members can meet to discuss matters of interest to the profession.



Legal Services Consultation

On 11th July 2016 the Ministry of Justice and the Bar Council issued a Consultation Paper in respect of a draft legal Services Bill. The objective is to modernise a law that has not been fundamentally reviewed for 50 years and attempts to keep pace with the growth of the legal profession and current working environment. The draft Bill and consultation deals with the regulation of reserved activities and updating standards, codes of conduct, disciplinary rules and the governance of legal services.

This is a long-standing aspiration of the Council. The consultation closed on 21st September 2016 and the Council will now work on the next stage to consider representations and move forward.

Here is a link to an interview where Minister Gilbert Licudi QC discusses what the Bill aims to do - <https://t.co/2HqpJobQ16>

Gibraltar's regulation of crypto-currency businesses

After attending a crypto-currency conference in September 2014 I [Anthony Provasoli] immediately became an enthusiast. I had of course read about Bitcoin and the Blockchain in the press but my understanding of the concept was very basic. At the conference itself and in conversation with several crypto-currency business operators I understood the huge potential and the significant impact this could have on the future of payments.

Given that crypto-currency generally was not on Gibraltar's radar two or three years ago, it is encouraging to see that Gibraltar has, over the last 18 months or so, been exploring a regulatory regime for crypto-currency businesses that is flexible enough to enable businesses to thrive yet robust enough for consumers and partners (e-commerce merchants, banking partners or insurers for example) to feel comfortable engaging with them. It is well known that Gibraltar did this very successfully in the e-gaming sector and it has been suggested that a similar regulatory model can be applied to crypto-currency.



Gibraltar also boasts a dynamic and reputable financial services industry regulated by the Gibraltar Financial Services Commission (FSC) and given the obvious links to payments services, it would make sense that the FSC be involved in any proposed regulation of crypto-currency businesses in Gibraltar.

There have been attempts at regulation in other jurisdictions but most regimes have been highly criticised for either being too onerous or not going far enough to address the key issues such as anti-money laundering, banking and security. It is important for Gibraltar, therefore, that the right balance is struck.

One of the greatest threats to crypto-currency businesses is theft. We have seen over the years several crypto-currency exchanges getting hacked. The most recent was suffered by Bitfinex last week, where one of crypto-currency's leading exchanges lost in the region of 120,000 bitcoins valued at approximately \$70 million USD and this issue will certainly have to be tackled in Gibraltar's proposed regulatory framework. Will regulation impose "Multisig" – a script containing instructions as to how many signatures are required and what public keys correspond to private keys that are authorised to sign – which effectively means that more than one person must authorise a transaction before it is valid? Will wallet providers and exchanges be obliged to keep a certain percentage of the crypto-currency they hold for their customers in reserve and in "Deep Cold Storage" – in servers that are stored inside bunkered vaults for example with multiple access controls and surveillance systems – so that essentially they can repay their customers in the event of theft? Perhaps a combination of both Multisig and Deep ColdStorage is the best solution but these are all options which are available to businesses seeking to provide added security to their customers.

Following the consultation paper, it appears that the scope of regulated activities in Gibraltar would likely capture – crypto-currency exchanges; wallet providers; payments systems; ATM providers; and people who advise on the sale and purchase of crypto-currency; and it is probable that regulated entities will have to have some form of physical presence in Gibraltar. All these matters, however, are currently in the process of consideration.

In my view, the industry is crying out for regulation. When I first started talking to people in Gibraltar about crypto-currency in 2014 there were only a handful of people who had even heard about it, but the level of understanding and enthusiasm seems to have spread dramatically since then. Given the closeness of the various financial services related professions with the relevant competent authorities and the success Gibraltar has had implementing effective regulation, whether it be in e-gaming or financial services sectors, I don't think it will be long before we see the regulation of crypto-currency related businesses in Gibraltar. I for one am excited to see how this all develops.



Anthony Provasoli, Partner
Hassans
anthony.provasoli@hassans.gi
T: (+350) 20079000

Gibraltar Company Law Update: The Companies Act 2014 and Tasmania Investments Ltd

Summary

A Supreme Court judgment that could have had potentially serious consequences for thousands of companies has been overturned by the Court of Appeal. The result of the Court of Appeal decision in *Re the Matter of the Companies Act 2014 and Tasmania Investments Limited* [Civ. 3 of 2016] is that any company that was struck off under the provisions of the Companies Act 1930 looking to be restored to the register should seek to restore the company under the 1930 Act and not the Companies Act 2014.

Background

In the case of *Re the Matter of the Companies Act 2014 and Tasmania Investments Limited* the Supreme Court held that it was not possible for the company in the related case to be restored to the register as it had been struck off under the Companies Act 1930. The decision of the Supreme Court was that the restoration provisions of the Companies Act 2014 were constructed in such a manner that it did not permit a company that was struck off of the register of companies under section 267A of the Companies Act 1930 (previously numbered section 203A prior to the re-numbering of the Act in 2004) to be restored under section 414 and 415 of the Companies Act 2014. The effect of this judgment left companies struck off under the 1930 Act without a way to restore themselves to the register as the 2014 Act repealed the 1930 Act save certain provisions. The Court of Appeal reversed that decision and held that: (1) by section 33(2)(c) of the Interpretation and General Clauses Act 1962 a company struck off under the 1930 Act could apply to have itself restored to the register, notwithstanding the repeal of the 1930 Act; (2) that by virtue of transitional provisions introduced under Insolvency Legislation, the provisions under the 1930 Companies Act that permitted applications for restoration remained in place hereby allowing applications to be made in respect of companies struck off under the 1930 Act.

The outcome of the decision is that applications for a restoration of companies struck off under the 1930 Act can continue to be made under Part VI of the 1930 Act.



Philip Vasquez
TSN Law
pv@tsnlaw.com
T: (+350) 20079423

Middle & Inner Temple Events in Gibraltar

Over the past 12 months the Gibraltar Bar has had the benefit of visits and events hosted by two of the four honourable societies of the Inns of Court.

September 2015 saw Inner Temple host a weekend of events, including a seminar celebrating the 800th anniversary of the Magna Carta which was swiftly followed by an advocacy training weekend held in the Supreme Court of Gibraltar. The Middle Temple hosted the launch of the Gibraltar Middle Temple Society in June 2016 which was attended by almost 100 Middle Templars as well as visiting practitioners and senior members of the Bar including Lord Justice Clarke. The high turnout of the event evidenced the Inn's close ties with Gibraltar members of the bar, with the most senior local member in attendance being Louis W. Triay QC who has been a member of the Inn since 1946.

Both societies have expressed a continuing commitment to nurture and develop their ties with Gibraltar by providing support, events and training in Gibraltar in the future. The Council is following up possibilities with both.

Statutory Adjudication: An alternative approach to resolving construction disputes

What is statutory adjudication?

In an ideal world all construction contracts would run smoothly, projects would all complete on time and there would be no issues with costs or quality of work. However, as we all know

there are, unfortunately, circumstances where things do go wrong and parties to a construction contract may need to resolve disputes. There are various forms of dispute resolution and these include:

- Negotiation;
- Mediation;
- Adjudication;
- Arbitration; and
- Litigation.

Adjudication involves the appointment of an adjudicator who will consider the facts and provide a determination of an issue. In Gibraltar, parties to a construction contract are free to agree that any dispute should be referred to adjudication; by contrast, the position in the UK is that adjudication is a statutory right which means that a party has a legal right to refer a matter to adjudication at any stage without the other side having to agree to this.

The origins of statutory adjudication in the United Kingdom

Prior to the 1990's arbitration was the principal means of resolving construction disputes in the UK. Arbitration came to be seen as unduly slow, expensive, and, therefore, incapable of providing an effective remedy for contractors and sub-contractors who were unable to obtain payment for work carried out in a timely fashion whilst a dispute was ongoing.

In 1994, Michael Latham published a report which came to be known as The Latham Report which found that 'adjudication should be the normal method of dispute resolution'. The Latham Report's recommendation that adjudication should apply to all construction contracts was accepted by the UK Parliament which passed the Housing Grants, Construction and Regeneration Act, 1996 ("the Act") making the option to refer a construction dispute to adjudication a legal right in England.

The right to invoke adjudication

Only disputes relating to 'construction contracts' are covered by the Act. 'Construction contracts' are defined as an agreement for carrying out construction operations including sub-contracted work and architectural design or surveying work or advice on building, engineering or decoration. 'Construction operations' is widely defined but excludes a long list of operations including, amongst others, installation of plant for power installation or water or effluent treatment.

Statutory adjudication is only applicable to contracts which are in writing.

The Act is not restricted to payment disputes; disputes may relate to issues such as time, quality and any other matter giving rise to a difference between the parties. Significantly, the Act states that a party must be enabled to give notice of a dispute 'at any time', meaning that parties do not have to wait until after completion of the contract to refer the matter to adjudication.

Process and Procedure

The process involved in having a matter adjudicated is as follows:

Step 1: The "Referring Party" will provide the other side with a written "Notice of Adjudication" setting out their intention to refer the dispute to adjudication. The Notice will provide a brief description of the dispute and the nature of the redress sought.

Step 2: The Referring Party is to identify an adjudicator who may be: (a) named in the contract; (b) appointed by a Nominated

Body named in the contract; or (c) appointed by any other Adjudicator Nominating Body. The person selected to adjudicate the matter should indicate their willingness to act within 2 days.

Step 3: The Referring Party is to serve a Referral Notice on the Adjudicator and on the other party 7 days after the Notice of Adjudication has been served. The Referral Notice will contain

extracts from the contract as well as any other information relied upon. The other side will then provide their response. At this juncture there is the possibility of having an all party meeting but this is optional.

Step 4: The adjudicator is to reach his decision not later than: (a) 28 days after receipt of the Referral Notice; (b) 42 days after receipt of the Referral Notice if the Referring Party consents; or (c) such longer period as both parties may agree.

Key principles

The Act made wide ranging changes to the construction industry in England and Wales by doing things such as removing pay when paid clauses and introducing statutory payment provisions. Specifically in relation to adjudication, the Act introduced a mechanism which provided parties with a legal right to refer a dispute (at any time during the life of the contract) and have this determined within 28 days of it being referred to the adjudicator allowing the parties to continue with the project once the dispute has been resolved.

The adjudicator's decision is temporarily binding on the parties (until finally determined by a court or arbitrator) but in practice, the parties often accept the adjudicator's determination as final meaning that there are no further proceedings. Statutory adjudication provides a quick and cost effective way to settle differences which ensures that a dispute between the parties does not lead to undue delays in completing the project. Statutory adjudication is less cumbersome and formal than

arbitration and litigation with some going as far as to suggest that it provides "quick and dirty justice". The reality is that statutory adjudication has worked and it is presently the most widely used form of dispute resolution in the UK construction industry.

Statutory adjudication in Gibraltar?

The overwhelming success of statutory adjudication has led to it being adopted in a number of common law countries such as the Republic of Ireland, Australia, New Zealand and Singapore.

Would statutory adjudication work in Gibraltar? There is no reason why it would not and if it ensures that the construction industry remains buoyant and provides an effective method of resolving disputes then surely it is something worth considering.



Gemma Vasquez, Partner
Hassans
gemma.vasquez@hassans.gi
T: (+350) 20079000



Darren Martinez, Associate
Hassans
darren.martinez@hassans.gi
T: (+350) 20079000

Upcoming Events

Opening of the Legal Year

The OLY will take place on the 14th October 2016 with the lunch being held at the Rock Hotel. The Red Mass will commence at 9.45am at the Cathedral and will be followed by the formal Opening of the Legal Year Ceremony at the Supreme Court. Members should contact Madge Bishop - barcouncil@gibtelecom.net to ensure that their subscription fees are up to date.

We hope you've found this first edition informative and useful. The next issue will be published next quarter.

Online Media

New Website

The Bar Council has launched its new website which we invite you to visit at www.barcouncil.gi. If there are any features you would like to see added to our website, please contact us at barcouncil@gibtelecom.net

Facebook and Twitter

The Bar Council has also now launched its Facebook page and Twitter handle. You can link directly to them via the icons below. Please follow us, encourage your followers to follow us, and share and like our posts. Suggestions for posts are encouraged!



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