Arbitration Chambers

London NW5 3DS

This paper does not contain advice. It is for conference discussion only

SOCIETY OF CONSTRUCTION ARBITRATORS

TOLEDO CONFERENCE – 2-3 MAY 2015

PORKIES AND DUNLOPS

1. The task and the Health Warning. The task set by Ian was to develop the above items of cockney slang under the umbrella of "Process". This therefore is the "Undue Process" element of this morning. However, since there is nothing like a person involved in a contentious dispute when it comes to embracing with enthusiasm any and every conspiracy theory going, it is important to preface this with a health warning. It goes like this: *Neither fraud nor malice is to be imputed to circumstances that are explicable on the basis of simple incompetence.* The threshold for establishing deliberate falsehood is a high one.

2. Body Language. As Richard Fernyhough emphasised in the discussion that followed these few words, each of us takes in and evaluates an enormous amount of information in the first instants of looking at someone – especially for the first time. The vast majority of this information is acquired subconsciously, but will influence our views of and reactions to the individual we see – and of course vice versa. I use the crude portmanteau phrase "body language" to describe the aspects of the seen person which trigger this information. I suggest that it is important when evaluating a witness to be aware of the existence of this flood of information – for two reasons – first of all to minimise the risk of one 's own biases affecting one's evaluation[1]; and second to see if there is guidance on key issues as to whether the witness (rightly or wrongly) believes what he or she is saying or if indeed there may be a porky sliding across the witness table. I mention this element of witness evaluation

[1] There is the West Texas Judge who was recently reprimanded for saying to an associate that he "looked like a muslim with that beard – I certainly wouldn't employ you" to take a very obvious example.

because I have raised the question of body language with people who judge and have been interested to learn that some give it virtually no conscious evaluation at all[2].

3. One needs to approach this sort of evaluation with care. The behaviour of people is sometimes prone to give an erroneous impression – a good example is Saddam Hussein and the WMD. His refusal to allow inspection led people to assume that he had them when he didn't. And honest people can be nervous. But there is a difference between nervousness, which is likely to afflict all the evidence of an individual, and occasional reactions. Similarly there is a difference between behaviour such as Mr. Hussein's – taking a position and maintaining it whatever the reality[3], even though it can be misinterpreted – and sitting in a witness box and deliberately lying.

4. I would suggest that people who know that they are lying – as opposed to people who have persuaded themselves of the gold plated truth of their assertions, regardless of the facts, the documents and common sense – will often give off some sign or manifest a tic which suggests discomfort. For this reason, for example, I prefer witnesses sitting or standing at a table which does not have a table cloth to the floor – particularly for a sitting witness, the movements of feet can be instructive, if they differ appreciably from what has gone before as relatively non contentious items are being discussed.

5. The information to be gained from careful observation perhaps explains why psychiatrists dislike discussing matters with patients on the phone – they cannot see the body language and thus are deprived of a substantial body of information. (I appreciate that a psychiatrist will extract much

[2] By contrast when I did the California Bar Exam, i was interested to find that Bar Bri, an organisation that provides courses for those taking US Bar exams, offered an optional course in reading body language, as something that might assist one assuming one managed to pass the exam in the first place.

[3] Of course he may have been misinformed by his sidekicks – an "up to a point Lord Copper" situation.

more information from such situations than mere arbitrators will but that is not a reason for keeping the tool in the toolbox and never using it. We all judge by appearances and are often right[4].)

6. For the same reasons, I dislike a traditional witness box – you can only see the witness from the waist up, but even that may provide you with information. In a novel written by an experienced barrister, where the protagonist – unsurprisingly a (lady) barrister called Selena – is talking to an apparently innocent and harmless person – Dolly - who was in the vicinity of the death – Deidre. Relating the occasion to a colleague, Selena says this:

> *You know how it is, Julia, when one is cross-examining a witness, that sometimes there is something about the way they answer a particular question which means they are not telling the truth? Well, the thing is –it would be absurd, of course, to think oneself infallible – but if we had been in court when Dolly told me about being with Deidre on the roof terrace, and if she had said it in the same tone and manner – well, the thing is, Julia, I'd have staked my reputation that she was lying.*[5]

7. Finally, when I was writing this, I came across an (admittedly light) example of body language which the Metro blazoned across its front page at the end of April. Under a headline which began "Dopey Robber", it told the story of the son in law who covered his face and adopted a strange accent when he held up his mother in law's shop but was recognised by her by his gait. "'He is one of those people who has a certain type of walk,' she said. ...I recognised him a mile off ...'". The report noted that the CCTV "shows her stifling a laugh as she realises it is him". Working in a convenience store perhaps makes one consciously observant.

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[4] To put it another way, speed dating often works.

[5] From "The Shortest Way to Hades" by Sarah Caudwell at page 156-7 of the Penguin Edition 1986. (It would be a spoiler to tell you whether or not Dolly *was* lying. But you may think that you know.)

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8. Deliberate Forgery. In construction disputes there is a lot of paper. Usually nearly 100% of the contents will be irrelevant to the particular disputes that have proved so insoluble that they have made it all the way to a contested hearing. Matters which suddenly come into stark focus in the hearing will often have passed almost unnoticed or uncommented upon at the time. One of the consequences of this is that it is really very difficult to forge, after the event, a document which fits seamlessly into the appropriate context but suits the very specific needs of the case. There are various ways to go investigating the provenance of a document that seems to be too good to be true. For example:

a. First and foremost, how does the key topic or topics fare in the documentation that is more or less contemporary with the document under consideration? Is there any discussion of the topic round about the same time in any other minute or letter? Does it make sense that this particular letter was written at the time in the terms in which it was written and what, if any, was the response/s?
b. Had the situation on site reached the point where ALL the letters were addressed to the other side but written to the arbitral tribunal?
c. Can one find other documents emanating from the same source whose reliability can be evaluated – for example because the statements in the other documents are non-controversial or were controversial but are now generally accepted by all the parties?
d. Is there any peripheral document that may help? This is less useful these days because of the strict limits on disclosure which are admirable, but they do detract from this exercise. For example, in a case in the Caribbean, the deputy resident engineer kept a diary. The document was foolscap size – his writing was tiny and bordered on the illegible and he had filled a whole page for every day of the contract. I doubt that it would have appeared in the disclosure in

any modern case. At the time, however, it did surface and happily someone could read it. When analysed, it contained a devastating critique of the history of the project and of the people involved in it at all levels, and included such useful side lights as a decision to continue to use a particular material despite the contractor maintaining that it did not work[6] – payoffs had been included in the agreed price.

e. A detailed financial analysis may help. Cooper's, long before it metamorphosed into Cooper's and Lybrand, was brought in by the arbitrator to audit the contractor's accounts. After service of the report, the contractor's financial controller was to be heard expressing admiration for the report – no one previously, apparently, had found the slush fund used to keep important non official locals happy, e.g. the man who was in charge of the labour only subcontractors supply, or effectively (as opposed to legally) controlled access to some key storage areas and the like.

f. Typing a letter to go into the bundle is another very difficult thing to do particularly if it is of any length, as it will often have to be to have the necessary verisimilitude - i.e. for it not to be obviously too good to be true. – And there are mechanical difficulties. For example, many people who type letters both before and after the arrival of computers put the date of the letter on each subsequent page to the first page. It is apparently surprisingly difficult to turn off the auto pilot and to remember to change those dates as well as the date on the first page. And with the arrival of computers, which often do this thing automatically it can be even trickier, since the computer may be set to use the current date, rather than the date on the first page. (I remember a witness who had not seen this coming doing briefly rather well by saying that all the documents in his office were automatically printed with the date of printing which

[6] It failed fairly critically. It was supposed to sink in water to provide a locally resourced base for other works. Sadly it floated. (The work – I seek to support your literary enthusiasms – Black Faces, White Faces by Jane Gardam arose, in a sense, out of the same case but this sort of detail is not to be found in it.)

explained why the subsequent pages had a relatively recent date – "that was when we printed out for the solicitors to produce by way of disclosure". Nice try – but it was odd that that the front page did not have the same date; and it opened the door to some other oddities which could not be blamed on the computer. The judge from that moment on was not interested in ANY aspect of their case. Sadly I cannot find the judgment.

g. E discovery of course can provide pretty devastating information as to the dating of documents – the whole process becomes positively archaeological.

9. Borrowing the opponent's documents. This tends to go down badly if discovered by the tribunal. In one case, someone took a wop letter from the papers belonging to the counsel on the other side photocopied it and then had it sent from a feasible independent source, with the aim of making it available to the court. The document contained markings by counsel. This enabled the party whose document it was to demonstrate to the judge that the original must have been pilfered from the papers in court – which did little for the evildoer's case. However there can be some surprising embargoes on it being so discovered. In another case, documents were taken from the papers of party A, probably on a Friday evening, and at some time over the weekend were put through the letterbox of the counsel for party B. The papers were relevant to the likely line of cross examination of a party B witness on the Monday. The arbitration was taking place on the fourth floor of Party B's solicitors. Party B's solicitors asserted that some intruder must have got in. Intriguingly the two firms of solicitors agreed that the tribunal should not be told about it. In a third case, an unlucky articled clerk was – according to him – sent to have a look at the papers of counsel on the other side during the lunch break and was unfortunately discovered with a piece of paper when the owner of the papers returned unexpectedly to get a document to discuss over the meal. The document in hand was a rude

note about the representatives on the clerk's side that the owner of the papers and his solicitors had been happily exchanging during the course of the morning.

10. Sticky fingers. Two examples illustrate the benefit of sharp observation on the part of executives in a company. When the M1 was being built there was a quantity surveyor who in due or possibly undue course unfortunately found himself with a family to support at each end. This puts a strain on the income as well of course as on the person who is spending a lot of time travelling. He supplemented the no doubt miserly remittance that his employer provided to him with agreements with subcontractors which added modest sums to the valuations. No doubt the idea was that £25 added here and there would be unlikely to be spotted. But it was. The sums tended to be conveniently rounded up and eventually someone noticed that the rounded up ones came from a particular set of valuations. Then there was the Scotsman in the accounting department of a large contractor who came up with the neat idea of paying sums of money to subcontractors who had in the past done work for the contractor but who did so no longer. The contractor had a minimum amount for posting purposes and the payments were carefully kept below the minimum, thus ensuring that they were "lost" in the rounding up. Our ingenious accountant managed to persuade a bank manager to open a convenient account and into that account went substantial sums, which, as it happens, were carefully and sensibly invested in a small string of betting shops. And of course when the invoices came and were paid, the records were destroyed. BUT a supervisory executive noticed one going through; remembered that the company from which the bill came had worked for the contractor but did so no longer; and investigated. The contractor eventually took over the betting shops. The Scotsman spent a considerable time in an open prison (no doubt honing his computer skills.....).

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11. It is difficult to run a fraud successfully. Like Macavity, you need to be a Napoleon of Crime[7].

12. The thin line. The health warning is worth remembering. Take *Eurocom Limited v Siemens plc [2014]EWHC 3710 (TCC).* This is the adjudication case where the TCC formed a **provisional** view as to the existence of fraudulent misrepresentation based on the list of names in the "conflicts" box on the ANB's form.

13. The central point in the case was summarised in this way:

> *[Siemens] submits that a false statement was made deliberately and/or recklessly by [Eurocom's agent in filling in the box] and that a nomination based upon such a misrepresentation is invalid and a nullity so as to go to the foundation of the adjudicator's jurisdiction.*[8]

14. Alternatively and based upon obiter in *Makers v Camden*[9], it was an implied term of the subcontract between Siemens and Eurocom "that a party seeking a nomination should not subvert the integrity of the nomination process by knowingly or recklessly making false representations to the adjudicator nominating body or so as improperly to limit or fetter the ability of the nominating body to [choose] an adjudicator"[10].

15. Eurocom argued that a reasonable short cut had been taken and that Siemens was reading much too much into the use of the box to identify adjudicators that Eurocom did not want appointed. There was nothing wrong with preferring one adjudicator to another; and Eurocom could

[7] No clues as to where that comes from.
[8] See paragraph 45 of the judgment
[9] [2008] EWHC 1836 (TCC)
[10] See paragraph 47

simply have asked for a nomination; refrained from serving a referral if it did not like the appointee; and issued a fresh notice of adjudication[11]. Since this was a time consuming and expensive process, Eurocom had simply listed parties whom Eurocom did not want appointed – the endorsement in the box said in terms that "we would advise that the following should not be appointed". There is no implied term preventing parties making representations as to who might be appointed – Siemens could have made its own representations. And in any event, there was no complaint about the adjudicator actually appointed[12].

16. The TCC did not like it and it is unlikely that the matter went to full trial; but it does provide an example of a case where one needs to be cautious about the characterisation of the behaviour complained of – as the TCC recognised - hence the provisional nature of the conclusion, given the lack of any cross examination. The line here – the physical line of the box in the form – is a thin one separating carelessness from deliberate intent[13].

17. Dishonesty by "admission". A couple of decades ago, Cameroon Airlines – Camair – contracted with South African Airways - which became Transnet – for the maintenance of Camair's planes. Many moons later Transnet's accountants began to raise some queries and the upshot was that Transnet started proceedings in the South African courts against a company called ATT, that had been involved in the negotiations, to recover secret commissions that had been included in the fees and which, it transpired, were remitted, when Camair's bills were paid, by way of anonymous orders to an account in the Lebanon. Maintaining large jets is

[11] An approach sanctioned in *Lanes Group PLC v Galliford Try [2011] EWCA Civ 1617,* both at first instance and in the Court of Appeal.

[12] No marks for guessing who this was!

[13] A fuller discussion of this and other cases is at http://www.39essex.com/adjudication-in-uk-construction-contracts-a-critical-look/

an expensive business and the secret commissions amounted to very substantial sums.

18. Unsurprisingly, these proceedings, being in the High Court in, I think, Pretoria, came to the attention of Camair. Camair then started arbitration against Transnet to recover the commissions. It seems likely that the objectionable arrangements were made between a senior executive on either side, neither of whom was still involved with the principal companies and from neither of whom was any evidence garnered in Pretoria or in the arbitration.

19. In the course of the arbitration proceedings, Camair sought summary judgment on the basis of the assertions in the Transnet High Court proceedings. The Tribunal refused summary judgment but did hold that

> *that in its judgment:*
>
> *(i) The Respondent is responsible as a matter of law for any acts of bribery committed by its servants or agents in the course of their employment; and*
>
> *(ii) Relevant averments of the fact of bribery and corruption made by or on behalf of the Respondents in its affidavits or pleadings in the Johannesburg proceedings will be taken to constitute admissions in this arbitration*

20. The case ultimately ended up in the Commercial Court but the issue was the behaviour of the Tribunal, not the parties! See *Cameroon Airlines v Transnet [2004] EWHC 1829 (Comm)*.

21. Conclusion. There is no reason why arbitrators cannot identify iniquity and wrong doing but it is a conclusion that must be reached only with the greatest care.

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ANNEX

THIS IS THE SOURCE OF THE HAND OUT ON RHYMING SLANG

http://www.businessballs.com/cockney.htm