

# Cerno

Distinguish; determine; resolve.

Date 2 November 2012

## Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. This issue considers the burden and standard of proof required when making any claim.

## How do you prove that?

When making a claim two matters have to be considered; firstly who has to prove the facts alleged and secondly to what degree must those facts be proven. Those two matters are requirements in criminal and civil legal cases. In both divisions of the law the maxim "he who asserts must prove" stands; a party making a claim must prove what they are asserting. In criminal legal cases the court must be sure of the alleged facts beyond reasonable doubt. In civil legal cases, with which this article is primarily concerned, the case must be demonstrated on the balance of probabilities; but what does that mean?

Ultimately it is for the tribunal of fact (whether a Judge or jury in court, or an Arbitrator or Adjudicator in alternative dispute resolution processes) to decide whether sufficient evidence has been provided to prove the fact, or facts in issue. That decision comes once only, after the parties to the litigation have called all of their evidence. The question, however, must be addressed significantly before that, by the parties and their attorneys.

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*"Yes" or "No"; but never "maybe"!*

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The obligation on the party alleging a particular fact is to bring sufficient evidence to allow the question in issue to go before the Judge or Arbitrator. That burden is discharged when there is sufficient evidence to justify a favourable finding. The degree of cogency required to satisfy the "balance of probabilities" test is that there must be a reasonable degree of probability. The tribunal should be able to conclude "we think it more probable than not".

The legal profession and the law works on a binary system; "yes" or "no". If the tribunal considers that the fact alleged is more probable than not it is considered that the burden of proving that fact has been met; a "yes" is returned and the party relying upon the fact alleged can succeed on that fact. If the tribunal considers that the evidence shows the event claimed to be less probable then a "no" is returned and the party relying upon the fact alleged fails. Where the evidence is such that it is considered too close to call, the law requires that a "no" is returned again.

Over the years there has been much debate as to whether the balance of probabilities is higher or lower depending upon the nature of the claim being made; whether the degree of cogency varies from case to case according to the seriousness of the allegations made and the potential consequences of the decision to the parties.

This came about from the flawed reasoning that the more serious the matter the less likely that it happened deliberately. The consequence was that in several cases there was an apparent raising of the bar for the standard of proof in civil cases.

The myth of a variable standard to be applied to the "balance of probabilities" test was dispelled in the case of *Re B (Children)* [2008] UKHL 35; a case in the House of Lords in England. The subject of the case, the welfare of a child being removed from her family, was most serious.

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*The test to be applied in all civil law cases, for every fact alleged, is the simple balance of probabilities.*

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Baroness Hale of Richmond, giving the judgment that was wholly approved by the four other law Lords hearing the case, concluded that the test in all cases, irrespective of the seriousness of the allegation or of the consequences, was the simple balance of probabilities; neither more nor less. There is no logical or necessary connection between seriousness of an issue and the probability of its occurrence.

### **Conclusions**

The simple balance of probabilities means, as before described, more like than not. In mathematical terms that would be 51%. If an assessment of the evidence drew the conclusion that event or fact was 49% or even 50% likely the case must fail in law.

What is important in all cases is the degree of evidence tendered. To establish a case most often requires establishing more than one fact. For example and notwithstanding that a contract can require more onerous burdens of proof, if a construction project is delayed the contractor, in order to demonstrate his entitlement to a claim for additional payment, must prove several facts each on the balance of probabilities. Firstly there is the fact of the alleged event to be proven. Secondly there is the alleged liability of the other party. Thirdly there is the extent of the alleged consequence of the event, which in claims for extension of time and payment of additional cost will require evidence in demonstration separately for both elements. Fourthly there is the need to show absence of culpability or contribution.

In the preceding example, the contractor may be able to prove an event and that the event is the liability of the other party but may be unable to prove, to the balance of probabilities standard, that the event caused a delay or even incurred additional cost for which the other party is liable.

## **CI Arb News**

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### *New Patron for the Caribbean Region*

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The Chartered Institute of Arbitrators is pleased to announce that The Right Honourable Sir Dennis Byron has consented to be the Patron of the Caribbean Branch of the Chartered Institute of Arbitrators.

The Trinidad & Tobago chapter of the Chartered Institute of Arbitrators (CI Arb) is a sub-branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CI Arb can obtain information directly from the Institute ([www.ciarb.org](http://www.ciarb.org)) or by writing to [info@cerno.org](mailto:info@cerno.org).

## Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to [info@cerno.org](mailto:info@cerno.org) and provide relevant details.

**22-23 & 26-27 November 2012:** Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to [jccfidic2@gmail.com](mailto:jccfidic2@gmail.com).

**24-30 November 2012:** Mediation Week & 3<sup>rd</sup> Annual Mediation Symposium. For details and registration e-mail to Janelle Luke; [jluke@ttlawcourts.org](mailto:jluke@ttlawcourts.org).

## Contact Information

Cerno can be contacted by e-mail to [info@cerno.org](mailto:info@cerno.org).

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