



COMPUTER DISPUTES

**F. E. Taylor B.Sc. (Manchester), M.Sc. (Manchester), Ph.D. (Durham), C.Eng;
F.B.C.S., Associate Member of the Institution of Electrical Engineers**

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1. THE NATURE OF DISPUTES

Any form of dispute between persons or groups of persons representing themselves or a corporate body necessarily involves two or more parties holding a very different viewpoint on some issue which becomes the subject of contention. Can I immediately qualify this chapter by saying that it is restricted to disputes involving computer systems, services and personnel. It does not attempt to cover disputes where computers are implicitly involved because they form part of a path along which evidence has flowed, as is the case in mobile telephone systems, or they are simply a tool which has been used as a means of perpetrating a crime not specifically computer related. To give an example of the latter the Equity Funding Case in the United States approximately twenty years ago involved creating insurance policies for fictitious lives. Although these were stored on a computer, this would not be regarded by computer professionals as a specific computer dispute. It was in fact an insurance industry dispute.

1.1 Systems Disputes

In the systems area, disputes today can arise over several aspects of system supply or functioning after acceptance. Typical examples are as follows:

- a dispute over contract terms – for example exactly what is to be supplied and in what form? Difficult areas are areas such as support, and the chargeability of specialist installation work or support work undertaken for a specific customer which was not fully defined at the time of signing a contract. In the past it has been the practice of some suppliers to carry out such work during installation as the customer requests, making sure that one other employee of the customer company signs a request note in some form or another, then to put in a claim when supply is complete and the system is accepted. This covers items which the supplier does not consider to be covered by the original main contract. This practice can, and indeed in the past has caused some very major disputes.
- a second area for dispute is the area of functionality – during keen price negotiations and in order to get a sale, some salesmen will make promises of items which “could be supplied” but are effectively outside the contract and not stated in writing within the ultimate contract drawn up and signed . One then gets to the situation where the customer is expecting more functionality than he or she actually gets, and a dispute results.

- a third area where disputes have arisen in the past, but now very rarely arise today, is in the area of system performance. With computer hardware doubling its power approximately annually, and sometimes within an even shorter timescale, the solution to any performance problem is usually to change the hardware. This has not always been the case and twenty years ago it was very common to find disputes involving transaction processing systems which did not process transactions within an acceptable timescale. The cutting edge in that field at the time was computer systems supporting telephone ordering and telephone enquiry processes which necessarily at most had to respond within 3 or 4 seconds, otherwise the prospective customer literally went away. The worst system ever seen by the present author involved a system which took no less than 52 minutes to input a 4-line order received within a telesales operation. Not surprisingly, there was a very serious dispute over its fitness for purpose!

1.2 Employment

Another area where serious disputes can arise is in that of employment. The most common disputes in the author's experience are disputes over the performance of specific employees who may have been backed by considerable development investment and failed to produce the goods that they were instructed to deliver. This can result from several reasons – demotivation, bad management, or worse still an intention on the part of one or more employees to use development capital to produce perfectly good systems which they fail to pass on to their employer with the intention of breaking away from that employer and forming their own company and, at the same time, taking the end point of development with them. When this is detected it results in a so called “springboard action”, since the employees have effectively used their employer's development capital as a "springboard" to launch themselves within another company.

Another area where disputes are becoming increasingly frequent is in the area of personal use of INTERNET resources. Some companies ban use of all IT resources, including communications and INTERNET resources, for personal purposes at all times. It is usually to prevent reference to questionable pages from which viruses could foreseeably be downloaded, but at the same time it is also aimed at preventing the misuse of valuable employee time, paid for by the employer, whilst literally surfing the net. Fortunately the misuse of this type is not hard to detect from browser cache memory contents.

Another area involving employee behaviour is misuse of other corporate resources other than those just mentioned. In one case, approximately 20 years ago, an employee of a large government linked body was discovered running a service bureau for a number of small business using the computing resources made available to him for the purposes of his work. Not surprisingly, this was regarded as a serious breach of behaviour and he was summarily dismissed. His attempts to appeal, using the Industrial Tribunal machinery, were not successful in view of his conduct.

Another area involving employee behaviour is that of ownership of programs. The author will always remember interviewing a prospective software writer, approximately 15 years ago, who was asked about licensed and paid for items of software at the time, such as WORD, PC TOOLS, NORTON UTILITIES etc. His immediate response was, “Yes, I am familiar with them – I have my own copies here in my case which I

have copied from my last employer ...”)? Needless to say he did not get the job as his technique of copying software and carrying it forward illicitly would almost certainly have been repeated if he had been taken on! Software is also involved in some springboard actions where groups of employees break away from a company, doctor or adapt the software they have been developing and working on and launch it with a new name, but similar functionality. This plagiarism is usually easily detected by putting the original and allegedly new software on two independent PCs or workstations, literally side-by-side, and going through all the user interfaces on a step-by-step, phase-by-phase basis. The similarity of such interfaces normally emerges quite quickly.

1.3 Money

A surprisingly large number of disputes in the IT field revolve about money. In these cases there is usually no dispute about the accuracy, precision, functionality or operability of the solutions supplied by a supplier, be they hardware, software, communications or a combination of any of these. The dispute is about money – and in an example quoted earlier the recording of employee-requested enhancements to systems during installation, which are then charged for, inevitably causes a dispute of this type.

2. CIVIL OR CRIMINAL ISSUES OR BOTH

Certain types of dispute involving the public interest to a lesser or greater degree have led to legislation over the last 20 years – in which the BCS has been involved as a leading proponent. Statutory instruments which have appeared during that timescale include:

- The Data Protection Acts (1998) – dealt with elsewhere in this book
- The Copyright Acts (1988) which make theft of computer software a criminal offence, punishable by custodial sentences in some cases.
- The Computer Misuse Act 1990, which makes attempted or successful unauthorised access to a computer system for unauthorised purposes a criminal offence. The need for this was heightened and emphasised when the Duke of Edinburgh’s personal mailbox was broken into in the 1980s by Shifreen & Gold, who left their calling card to indicate that they had made an unauthorised access.

The specific IT controls, from a legal viewpoint set out above, are complemented when required by more general legal instruments and controls which are too numerous to list exhaustively, but include such controls as:

- The Sale of Goods Act (1885 and as later modified) which, in short, requires that goods are fit for purpose and of merchantable quality. In terms of fitness for purpose in the IT field, this normally means that systems must pass any reasonable acceptance tests before payment is made. In terms of merchantable quality it means that they must be reliable and have an entire system lifetime, based on the lifetime of various components, which is at least that which would be expected from the expected lifetimes of the components in question. In the 1980s there was a spate of cases involving the

ingress of very fine dust into disk drives, which, over a period of time, damaged the surface and rendered them inoperable. So far as the author is aware no one actually reached a judgement in court, although one in particular involved a considerable number of court hearings at considerable expense before an out of court settlement was negotiated.

- In serious cases of deviation of a system supply from its specification, e.g. a graphics card of brand A being quoted for and a graphics card of brand B being supplied, where brand B has an inferior specification to brand A, then a more severe statute can be invoked by the local authority only, by the Trading Standards Department. This is the Trade Descriptions Acts (19XX- Ed pse complete) which requires that components and assemblies supplied must be in line with the contract of supply and must be in line with any industry specifications and descriptions, including trade names where relevant. Other statutory instruments invoked in some IT disputes involve misrepresentation where there have been problems with a salesman making promises in order to get a sale, and then failing to implement the promise in full, and other relevant Acts such as the Forgery Act (1981), when items such as credit cards are duplicated.

3. RESOLUTION

The first thoughts of many faced with a serious dispute are that “I’ll take you to court,” or “I’ll see you in court” in the case of the defending party. There are many stages to be gone through before one reaches court, but it must be said that appearance in court is an extremely costly process in the case of both civil and criminal disputes. While the cost of criminal disputes may be picked up by the state, the process of assembling and giving evidence, including the time taken out from one’s mainstream business to do so, needs to be avoided if at all possible. If not avoidable, as may the case in criminal cases, then it should be minimised as far as possible.

At the time of writing this chapter barristers’ fees can easily run up to £1500 per day, to which must be added solicitors’ charges, and the charges of expert witnesses which, at the time of writing are typically between £150 and £250 per hour.

So the golden rule is to analyse the dispute as it proceeds, and try to settle it at the earliest reasonable opportunity. It has to be said that if the expert witnesses on each side, or in the case of a low value dispute, the joint court expert do their work carefully and set out the facts based on technical evidence, then many points of dispute will be reduced in significance or go away completely. A major dispute involving the present author as an expert started with a claim of around £250,000 against a small, specialised niche area software house. After careful reporting and analysis of circumstances by experts on both sides, it was discovered that the ‘system requirements’ statement was ambiguous to start with, and secondly the requirements which were finally agreed on verbally and in writing in combination were satisfied by the system delivered, the entire dispute was settled just before going on in court for a figure of £15,000, paid by the defendant to the plaintiff, for relatively minor matters which had not been implemented as they should have been. This then should be the ultimate goal for those involved in resolution of computer disputes and convergence on a settlement can usually be achieved when emotions are put aside and objective personal from the legal profession and the IT expert witness sector are brought to bear on the problem.

Whilst discussing resolution, the author must mention disputes which may be impacted by insurance. Disputes involving fire, flood, power surge – howsoever caused, and in some cases project failure and loss of profits may, and indeed whenever possible should be covered by insurance. The insurance company itself may later decide to take on the responsible party, but in such cases the insured party is not usually involved at a capacity which takes responsibility – they simply give evidence on behalf of the insurance company. A recent case in London County Court – alleged shortening of the life of the highly expensive disk drive fitted to an IBM Mini Series computer due to ingress of rainwater from a temporary roof allegedly negligently fitted by a roofing contractor, ran to a final judgement and the roofing contractor was held responsible for water ingress into the disk drive. The fact that there had been a freak storm during the weekend in question was considered but did not impact the final judgement.

4. CRIMINAL CASES

In almost every criminal case the police will be involved. In the majority of cases, such as alleged unauthorised access to the INTERNET or retrieval of material from the INTERNET which is allegedly illegal in the UK, the procedure is that the police seize the computer, take one or more CD images of its hard disk drive and then use those as evidence for investigation and, where necessary, presentation in court. In some cases video tapes of pictorial evidence from the secure CDs just mentioned are taken and shown in court as an alternative to using computer systems and projection-type displays. This technique was used very successfully in the case of *EIRR v Graham Robinson – Portsmouth Stipendiary Magistrates Court (2000)*, when the defendant was acquitted of charges of retrieving illegal images from the INTERNET.

It is not possible to go into great detail with regard to the treatment of evidence by the police. Those who wish to dig deeper may like to refer to the “Good Practice Guide for Computer Based Evidence” published by the Association of Chief Police Officers of England, Wales and Northern Ireland Version 2 1999. Sometimes such good practice is not followed, which gives the defence a very strong point. In the case of *R v Paul Griffin – Preston Crown Court (September 2000)*, it was discovered that before the hard disk drive of a critical and sensitive laptop seized computer had been imaged, the police officers had, after seizing, started it up and accessed it to view the evidence in an unauthorised way. (The belief was that they had done this out of curiosity or for entertainment purposes but this was not established). Regrettably, whilst they were making such a first illicit surveillance of the evidence, the computer was dropped which totally destroyed the evidence on that computer and indeed the entire disk drive of that machine. When guidelines such as the ACPO guidelines just referred to are breached as in this case, such a breach has to be taken into account by the judge in his final judgement.

Some civil cases lead on to Criminal cases or should do so. In the case of Jonathan Sharma at Staffordshire County Council - West Midlands Chancery Courts 1998 - the plaintiff had been manipulated to leave over lunch a PC which he had set up for development and modification at the customer's premises of the source code of a proprietary software package which he had originated and owned. Only object code was issued to the defendant as with all other customers so that they had to commission the owner to undertake all modifications and provide support as a condition of supply - a common arrangement.

During lunch an employee of the Defendant took an unauthorised back up of the working PC and in doing so obtained a pirated copy of the source code. Shortly afterwards Jonathan Sharma was informed that his support and modification services were no longer required as the customer had a copy of his source code. This was eventually admitted to be illicit and the defendant conceded the case in Court just before the final judgement. Once they did this they had also conceded that their employee had breached the Copyright Designs and Patents Act (1988) and also by virtue of unauthorised access the Computer Misuse Act 1990 - both criminal matters.

5. CIVIL CASES - ALTERNATIVES TO LEGAL RESOLUTION

Already outlined in section 3 above, dealing with an overview of resolution, resolution at the first possible point in time is highly desirable in civil cases. There are a number of established procedures which should be at least considered before proceeding with the formal steps required for legal resolution. They include:

5.1 Counseling

A number of suitably qualified personnel - some but not all of which are expert witnesses, undertake counseling work to try to bring the parties in a dispute together. If, as sometimes happens, there are misunderstandings due to misinformation or incorrect education and training, counseling can be particularly effective. Examples are aspects of a system such as user interfaces - a required feature may be provided but not be operable by the customer for reasons just given. Counseling can highlight and set out the solution to such problems which in many cases removes, at least, the seriousness of the dispute.

5.2 Insurance

As already mentioned, in some cases the parties involved in a dispute can pass responsibility to their insurers who may then take up the position of the insured, as permitted by the insurance policy, and fight the matter in court. On at least on such occasions the responsibility of the insured party becomes relatively small - and is normally limited to giving evidence for and on behalf of the insurance company as instructed.

5.3 Alternative Dispute Resolution

This depends subjectively on the case, but in general is a form of advanced counseling/negotiation aimed at homing in on a negotiated settlement as an alternative to going through the courts. If ADR is contemplated as a serious solution to a dispute then it is suggested that the solicitor in the case, together with the party they are representing, briefs the ADR body on their position, as also does the other party, and then seeks proposals from the ADR body for resolution at a detailed step-by-step level, detailing the work that will be carried out and its costs. If, as sometimes happens, the cost looks like escalating to the level of a court case, then a decision has to be taken by those involved as to

whether to continue with ADR or go to court. The key is getting a detailed, accurate and complete proposal from the ADR supplier before proceeding.

5.4. Arbitration

This is a step beyond ADR and involves a highly skilled arbitrator, or sometimes an arbitration team who examine the relative claims of both sides and weighing one up against the other in such a way that ultimately a financial settlement from one party to the other can be suggested by the arbitrator. If both parties trust the arbitrator and are happy to be bound by the arbitrator's decision, then this is a good way to proceed. However, if there is any feeling of unacceptability by any party, either before, during or after arbitration, then the only possible recourse then is to go to the courts.

Sometimes arbitration is advised for operational reasons. In 1990 the present author was retained as an expert in a case which involved a complete failure of a very complex, unmanned system for handling materials involving a number of handling PLCs or program or logic controllers driving materials handling machines and a master tandem control computer which kept a dynamic map of actions and locations. The master computer failed due to a combination of supplier omission and employee negligence on the part of a junior employee who frankly had never been trained properly and did not know any better. The cost of manually recording the status of the system and item locations approached £1m. Although the user body initially contemplated a court action, they were ultimately dissuaded from this because it was ultimately pointed out to them that, if they went to court, the first thing that the supplier would do after issue of a writ would be to withdraw support and they would immediately find that the return on their very massive investment of around £10m in the automated robotic system in question would end immediately and they would have to 'mend it with a new one.' So, an alternative approach was taken to go to arbitration, accept the arbitrator's decision regarding financial compensation for the loss which had occurred due to the supplier omission just mention.

6. CIVIL CASES - LEGAL RESOLUTION

When all other permissible alternatives have been examined and either discarded, investigated and then not progressed, progression of dispute resolution along a well-established path is then the only option left. This involves several stages as follows:

6.1 What is in dispute?

A key document, from a legal point of view, is the Statement of Claim which is drawn up by the aggrieved party - often but not always the user party, who states what they were expecting but did not get. Sometimes the reverse is the case - if payment has been withheld from a supplier, the supplier will simply state that payment is due for a system supplied in accordance with specification and agreement - which is inevitably disputed. All the technical details emerge in the

following documents which, legally, are collectively known as 'Further and Better Particulars'. Prior to drawing up a statement of claim and/or preparing the F & BP documentation, it is vital that an expert witness who is competent in the relevant technical area is appointed and gives a technical view of what is and what is not covered by the contract. A more detailed discussion of contracts and their scope and coverage appears as Section xx of this document.

Within the Statement of Claim, the solicitor in the case needs to set out what has not been supplied or executed or fulfilled which may be missing components, missing installation services and/or training or a missing quality such as reliability to give representative examples. In other words, in formal legal language, the nature of the dispute. The main legal instrument relevant to supply disputes is, as mentioned earlier in this chapter, The Sale of Goods Act 1885, as extended, and as extended to cover services where there may be a dispute over system maintenance and/or reliability. If, as sometimes happens, the Statement of Claim is prepared before an expert is brought in and appointed then the solicitor and expert need to then work very closely in moving matters forwards via the legal two-way interchange of documents termed 'Further and Better Particulars', just referred to.

6.2 Amount of the Dispute or its Value - under £15000

If the amount in dispute is less than £15,000 currently, i.e. so called legal 'quantum' or the direct financial value of the amount in dispute is less than that figure, then, under the Wolfe rules which became effective in April 2000 a joint expert is appointed by the court who reports to the Court having considered both sides of the dispute. The two parties involved are given limited periods of time to comment on the joint experts' report when produced, after which the report and such comments as may be made are considered and weighed against each other by the relevant judge who then reaches a judgment binding on both parties.

6.3 Amount of the Dispute or its Value - under £15000

When the amount in dispute or quantum is currently greater than £15,000 each side will usually need to appoint an independent expert.

6.4 Selecting your Expert

It is only possible briefly within this chapter to deal with the issue of *choosing and retaining an expert* - suffice it to say that factors which should be considered in choosing and retaining an expert, which by the way should be jointly undertaken by the solicitor in the case and his client party, include:

- Qualifications of the experts being considered - both academic and professional

- An assessment of the ability of the expert to think fast, think laterally and think on their feet, which is vital at the time of cross-examination
- Their experience in terms of general experience within the IT industry and specific experience with preceding cases.
- Their track record in *similar* previous cases which have run to a judgement in Court
- Their knowledge of the law so that they will not give inappropriate answers during cross-examination.
- Their charges - usually on a 'per hour' basis - there may be differences between potential experts in the charges made for traveling time, support time etc., which need to be considered and, last of all
- Their availability prior to and at the anticipated time of the Hearing.

7. WHAT DOES THE EXPERT DO - ALTERNATIVE APPROACHES TO THE CASE ?

7.1 Approach to the Case

Depending on the time available before a Court Hearing and the nature and structure of the case, then two alternative approaches to a case by experts are common - they are:

- .1 The expert takes a *two-stage approach* to the case in a similar way to a barrister. *Stage one* is that he or she produces an opinion document corresponding to a barrister's advice which sets out the relative strengths of the client case, technical issues where the client's case is upheld and technical issues which may contradict the client's case and ultimately comes up with an opinion as to whether there is as strong or relatively weak case. This is very valuable for the solicitor in the case and if involved by that time, Counsel. It may result in a go or no go decision being taken at a relatively early stage.

Stage two consists of a detailed examination which will build on and utilise that work undertaken during stage one. It will involve investigating all relevant evidence, including the system itself where necessary, and production of a detailed technical report by the retained independent expert, which will be revealed to the other side on an agreed exchange date determined by the solicitor in the case and/or the Court.

- .2 The alternative - especially when time is short or when the expert may be involved in a criminal case where much of the initial work done by the police and/or the Crown Prosecution Service is to go straight to the

point of producing an exchangeable technical/administrative expert's report which will deal with all aspects of the matter in question from both a technical, project and management viewpoint. This is a 'one shot' approach.

7.2 Instructions to the Expert

Instructions to the expert are pretty standard in terms of concept, although the words used may differ in various cases. The expert is normally:

- .1 Instructed to read all relevant papers referred by the instructing solicitor. Sometimes instructing solicitors try to restrict papers revealed under so called discovery by both their own side and the opposing side. They do this in order to try to restrict the expert's fees, but this can be at a cost if there are vital facts in the papers the expert has not seen, which can on occasion totally sink that side of the case in court. To quote a proverb, it is very easy for tight-fisted solicitors to spoil the ship for a ha'porth of tar!
- .2 The next task forming an instruction to an expert is to examine all actual evidence in the form of print-outs, any screen photographs which may exist or screen prints, and the actual equipment itself if it exists and is relevant.
- .3 The next instruction is usually to carry out a collaborative examination where required - dealt with in the next sub-section.

7.3 Collaborative Examination of Evidence

Collaborative examination of evidence in the more major disputes is an absolutely vital stage. If the dispute is over functionality then the two experts together will observe and assess functionality - and determine whether or not the system, as it exists, will do the job it was contractually required to do or whether it fails and if so how and where. If it fails, the areas of failure must be delineated and set out very clearly. Similar comments apply to any dispute over performance, although such disputes, as stated previously, are relatively rare. Some disputes may involve interrogative tools e.g. to recover and then observe files from a hard disk which have been previously deleted. Somewhat surprisingly the tools used for this are in many cases almost a generation behind current technology because tools based on the earlier DOS operating system go down to a much greater level of detail than is possible using later operating systems such as Windows 98. The current author has in relatively recent months still used NORTON V4.5, running under DOS, to undelete files so that evidence could be assessed.

When the collaborative examination is complete it is absolutely vital that any points which are agreed by the experts are recorded – usually in the form of a hand-written note **WHICH MUST BE SIGNED, DATED AND TIMED BY BOTH EXPERTS**. It is also normal practice for both experts to initial every sheet of a multi-sheet hand-written document. Such Heads of Agreement documents are crucial – and avoid Court time being wasted later during a Hearing on issues which are not in dispute. Such a procedure should home in on the real issues of dispute and reduce their number. In the best cases they will become minimal and make it possible for a negotiated financial settlement to then occur. Where such a step is not possible, then the collaborative examination allows the Court Hearing which follows to focus and 'home in' on the unresolved issues and concentrate on those issues. All in all collaborative examination is an absolutely fundamental and vital step just before the Court Hearing.

7.4 Exchange of Reports

After the collaborative examination, each expert will normally finalise their report on the evidence including, and often emphasising, the evidence obtained during the collaborative examination which is then exchanged on a date and in a way determined by the solicitor in the case. Exchange is normally followed by each expert producing written comments on the other's report which comments often go into the Court paper bundles for the hearing.

8. THE COURT HEARING

This is essentially the ultimate legal procedure. Both experts, or the joint expert in relevant cases, must be available throughout the Hearing and indeed may be called to the witness stand if there is any question of evidence being incomplete or the process of discovery is alleged to be incomplete. Discovery is a legal process whereby all relevant documents are revealed to the other party by their holder. It is vital in most I. T. civil cases and in too many is alleged to be incomplete in the author's experience.

Discovery may be extended during the actual Hearing. In the case of *Russell Thompson ats Powertrain - W. Midlands Court 1999* - the defendant disputed the fitness for purpose of a data collection computer collecting data from a test rig for remanufactured diesel engines for commercial vehicles, for which they were refusing to pay. During the hearing and by chance it was discovered that whilst strapped for cash the Defendant Company had prior to the Hearing used the disputed system to test and record data for two safety critical diesel engines for a major textile manufacturer which used them to drive pumps in a fire extinguishing system activated in the event of fire. It had furthermore issued certificates of Compliance with the required standards after the tests. At this point the argument that the system was not fit for purpose became a little hollow to say the least!!

During the Hearing it is not uncommon in today's cases for either or both experts to be questioned directly by the judge as he or she formulates their judgement. Such questions can be informal and can come at any time.

The legal procedure then proceeds to its ultimate end – and a judgement is ultimately declared. This may be subject of an Appeal, but discussion of such legal steps is outside the scope of this chapter.

10. POSTSCRIPT

This chapter has attempted to set out the legal procedures involved in resolving IT disputes with some emphasis on resolution procedure and the use of alternative resolution methods wherever possible. The legal processing of any form of serious dispute is not a cheap process – and to deliberately reverse a well-known proverb, “You take your choice and pay your money”!

In more simple terms, prevention of legal disputes is cheaper than remedy. If a dispute occurs, resolution at the earliest possible stage prior to a court Hearing is highly desirable to say the least.

F. E. Taylor

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Frank Taylor’s computing career began in 1956 when he literally sat at the feet of Tom Kilburn, the man who had made the first computer ever at Manchester University, in June 1948. He has recently retired from full time work but continues as Honorary Professor of Computer Science in the University of Hull.

Within the BCS Frank Taylor was the founder and first Chairman of the BCS Security Committee from 1977 to 1992. In the expert witness field the Company that he founded in 1978, Systems Technology Consultants Limited, has assisted with the resolution of more than 310 disputes since that time. It may now be contacted at Unit 68-70, Shelton Enterprise Centre, Bedford Street, Stoke-on-Trent ST1 4PZ UK. Telephone: + 44 (0)1782 286321, or e-mail: sytech@ebstar.co.uk

