

TCC CRITICISES "PARTISAN" EXPERTS AGAIN

- ▶ Experts who are not sufficiently independent do not find favour with the courts
- ▶ Experts and lawyers should take careful note of the principles governing expert evidence
- ▶ How to avoid serious transgressions of the rules on expert joint statements

What's it about?

In two recent cases, the TCC highlighted again the importance of expert impartiality and the necessity for experts and their instructing solicitors to adhere to the rules which govern expert evidence as set out in the Practice Direction to Part 35 and the TCC Guide.

In Imperial Chemical Industries Limited v Merit Merrell Technology Limited [2018] EWHC 1577 (TCC) the court considered quantum issues in relation to a dispute arising from a contract between Merit Merrell Technology Ltd ("**MMT**") and Imperial Chemical Industries Ltd ("**ICI**") for works at a paint manufacturing facility.

Both parties' experts approached the valuation of MMT's final account differently. MMT's expert valued the works in accordance with the Contract and taking the factual context with regard to various interim assessments reached between the parties, whilst ICI's expert undertook the exercise based on actual cost, in most instances ignoring the interim assessments and agreements.

Justice Fraser, preferring the evidence of MMT, in his judgment, considered the independence of ICI's experts and noted that they were "*not sufficiently independent of the party who has instructed them*". He raised concerns that all four experts called by ICC were found "*to have been lacking in independence*" and hoped that this lack of independence would not become "*part of a worrying trend in this respect*".

In the case of BDW Trading Limited v Integral Geotechnique (Wales) Limited [2018] EWCH 1915 (TCC) (in which it was held that IGL had not failed to give proper advice in respect of asbestos risk) it became apparent during the trial that one of the experts for IGL had shared the first draft of the joint expert statement with his instructing solicitors for comments and made changes to the draft as a result of the solicitors' comments on the statement.

In deciding the case HHJ Stephen Davies issued valuable guidance on expert joint statements noting that there was a "serious transgression" by the expert witness in seeking solicitor's comments on a draft joint statement. The Judge confirmed that the TCC Guide envisages that an expert may, if necessary, provide a copy of the draft joint statement to the solicitors, but that:

- ▶ the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement; and
- ▶ the solicitors should not make any comments or suggestions, save for in the very limited circumstances identified in the TCC Guide at paragraph 13.6.3 and the Practice Direction to Part 35 - where legal representatives are concerned that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact and any such comments should be made to all experts involved.

Why does it matter?

An expert who is partisan or who breaks the rules governing expert evidence will not help his client in court. The comments in both cases highlight the importance of independence in expert evidence and are a helpful reminder:

- ▶ of the guidance set out in Practice Direction 35;
- ▶ that experts should consider all issues relevant to their report and should not identify versions of the facts to be preferred over others – this is the job of the courts;

- ▶ that the principles that govern expert evidence must be carefully adhered to, both by the experts themselves and the legal advisers who instruct them;
- ▶ that the duty of the expert is to the Court; and
- ▶ that the utmost care should be taken when instructing experts so as not to compromise accuracy and independence.

Who to contact

THOMAS HURST
Managing Associate

0113 209 7630
07739 924141



SARAH WILSON
Associate

0161 934 6341
07710 857935



10-25806448-1

addleshawgoddard.com

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