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An Expert Horror Story: Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited [2015] EWHC 3074 (TCC)

In the recent case of *Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited* [2015] EWHC 3074 (TCC), the English Technology and Construction Court issued a judgment, in which it was wholly damning of one side's quantum expert. The judgment is a wake-up call for disputes lawyers as to the importance of selecting, instructing and supervising expert witnesses, and the need to stress-test their reports before submission.

The facts

The case concerned the laying of a thirty-inch gas export pipeline relating to the Shetland Gas Project in Scotland (the **Project**). When complete, the Project will process gas from the Laggan and Tormore fields located 125km northwest of the Shetland Islands.

The Project Owner is Total E&P UK Limited (**Total**). Total engaged Allseas UK Limited (**AUK**) as Main Contractor to carry out all onshore and offshore works including the laying of a pipeline to take the gas from the northwest coast round to Friths Voe on the eastern coast. AUK engaged Van Oord, and SICIM Roadbridge (collectively, **OSR)** to perform a range of construction and engineering services including flooding, cleaning, gauging and testing of the pipelines and other offshore works.

The Project fell into delay and OSR made claims against AUK for:

- Disruption and prolongation costs arising from unforeseen ground conditions;
- Disruption and prolongation costs arising out of an alleged failure by AUK to obtain permission for temporary crossings; and
- Additional supervision costs resulting from an alleged delay by AUK in supplying the 55 tonne beach valve and cabin.

OSR's quantum expert valued OSR's claims at GBP10 million.

The Court's views on the expert reports

In considering OSR's quantum expert's evidence Mr Justice Coulson did not hold back in his criticism. Coulson J stated:

"[the expert's] *abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the stress he was under. But I regret to say that I came to the conclusion that his evidence was entirely worthless*".

The Court then gave the following twelve reasons for this view:

1. The expert took OSR's pleading at face value without checking the underlying documents;
2. He only looked at OSR's witness evidence;
3. He refused to value the claims on any other basis or subject to any other assumptions than those propounded by OSR;
4. Actual costs incurred by OSR were disregarded in favour of made-up or calculated rates;
5. The expert made fundamental errors and did not critically analyse the Claimants claims – and he was therefore forced to make multiple concessions under cross-examination;

6. The expert admitted under cross-examination that he was unhappy with his reports;
7. The expert admitted under cross-examination that his reports were confusing and, in one instance, misleading;
8. He had not read in detail, or at all, documents appended to his report;
9. The expert made assertions that, on cross-examination, turned out to be based purely on the subjective views of OSR – and such assertions had been used to "*plug the gaps in OSR's evidence*";
10. He did not prepare documents that he claimed to have prepared many of which contained errors;
11. Rather than checking OSR's claims, he "*preferred to recite what others had told him*"; and
12. The expert had not cross-referred the value of line items in his report with fair and reasonable rates. On the contrary, "*he seemed almost proud that he had not embarked on that exercise*".

In sum, OSR's quantum expert's testimony made "*a mockery of the oath which Mr Lester had taken at the outset of his evidence*". Even OSR's own QC accepted that its expert fell far below the required standards expected of an independent expert. To make matters worse, by contrast AUK's expert was found by the judge to be "*an independent and clear expert witness*".

As a result of the unreliability of the Claimants' expert, the Court could therefore only reasonably rely on AUK's expert – who had valued a number of line items at zero.

Commentary

It takes an extreme case such as this to drive home the danger in putting forward an expert who is not only obviously partial but who has also failed to follow proper process and procedure in writing the expert report. Under cross-examination a good opponent will easily discredit such a report (and the expert witness) beyond redemption. It is doubtful whether the expert in this case will ever be able to appear as a credible expert witness again.

Other recent examples of experts who have come undone on the stand include the Claimants' valuation expert in the *Yukos* case where the Tribunal noted that "[the expert] *had been influenced by his own pre-determined notions as to what would be an appropriate result. Similarly, the Tribunal can put little stock in Claimants' calculations based on the comparable transactions method, since both Parties agree that, in fact, there were no comparable transactions, and thus no basis that would allow a useful comparison*".

But the fault cannot be laid solely at the expert's door. The legal team responsible for co-ordinating with the expert has a duty to both its client and the court or arbitral tribunal to ensure the independence and integrity of the expert witness. This may include managing a client that puts pressure on the expert to exaggerate or be selective.

The criticisms made by Mr Justice Coulson should be easy to avoid through the establishment of standard working protocols. A legal team experienced in working with expert witnesses should be well versed in how to test the credibility of an expert's findings and to test the ability of their reports to stand up under aggressive cross-examination.

Depending on the forum, there may be rules or guidelines in place that should also be consulted – by the expert and the legal team. For the courts of England and Wales, in addition to the procedural guidance in Section 13 of the TCC Court Guide, Civil Procedure Rule 35 and its associated Practice Direction set out the duties of expert witnesses and provide directions on the approach to expert evidence in general. The equivalent in Australia is the Federal Court's Practice Note CM7.

In international arbitration, the rules of most of the major arbitral institutions tend to limit directions on expert witnesses to the procedure for use and appointment of experts, rather than setting out duties and more substantive guidance on how reports should be presented. However, there are professional guidelines for expert witnesses in international arbitration, such as the Chartered Institute for Arbitrators' *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*. The *IBA Guidelines on Party Representation in International Arbitration* also contains guidance on ethical practice relating to use of expert witnesses.

Finally, the experts' own supervisory bodies, such as the RICS, also provide practice notes and guidelines to ensure expert witnesses meet the standards required of them. With all of this literature in mind, it is surprising that cross-examination disasters, such as in this case, continue to occur.

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