ANOTHER EXPERT HORROR STORY: *CASTLE TRUSTEE LIMITED & ORS V BOMBAY PALACE RESTAURANT* [2018] EWHC 1602 (TCC)

In 2015, we published a case note entitled 'An Expert Horror Story': *Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited [2015] EWHC 3074 (TCC).* In that case, Mr Justice Coulson expressed grave concerns about the quality of expert evidence holding that one of the expert's reports was "*entirely worthless*". In the case of *Castle Trustee Limited & Ors v Bombay Palace Restaurant* [2018] EWHC 1602 (TCC), Mrs Justice Jefford DBE has gone one step further holding that a total of three experts' evidence was unsatisfactory, and in the case of one delay expert, that his report simply "*was not expert evidence*". This case provides yet another reminder to counsel of the importance of properly instructing and managing independent experts. It also serves as an instructive case on the potential risks in challenging decisions initially determined by adjudication.

Key issues

- There is limited, if any, value in expert reports that are confined to recitation of facts.
- Experts who fail to read the pleadings or master the documentary evidence risk alienating the Court.
- Expert evidence on delay may include an opinion as to the reasonableness of a baseline schedule. However, construction contracts often contain (or should contain) clauses that make it harder for parties to question the wisdom of the baseline schedule.
- Litigating construction disputes that have been determined by an adjudicator can be a high-risk strategy.

THE FACTS

This dispute arose out of the refurbishment of a residential property and an Indian restaurant in London. Essentially, the Indian restaurant owners (Bombay Palace or "BP") agreed to close the restaurant for a short period to allow for refurbishment of the entire building. In parallel, BP contracted the refurbishment contractor (Liberty) to refurbish the main part of the restaurant. However, BP decided to conduct its own refurbishment programme, relating to the restaurant kitchen, at the same time. The works were delayed and the restaurant remained closed longer than planned. BP blamed Liberty and Liberty blamed BP for the delay. Liberty also claimed compensation for variations from BP as a result of its allegedly expanded scope.

In November 2012, the disputed compensation claim for prolonged closure and the disputed variation claims were referred to adjudication. The adjudicator found that both parties owed each other money with a relatively small net balance being owed from Liberty to BP. Liberty did not accept that decision and sought to litigate the dispute in court. The matter was heard before Mrs Justice Jefford on 16-17 October 2017 and the judgment was issued on 6 July 2018.

THE JUDGMENT

Ultimately, the Court held that Liberty was entitled to an amount slightly less than it had achieved at the adjudication and BP to slightly more. In making her decision, Mrs Justice Jefford heard from three experts: two quantum experts and a programming expert. As a general comment, she held that the expert evidence submitted was "*remarkable*" and "*in many respects, unsatisfactory*". In relation to Liberty's quantum expert, Mrs Justice Jefford held that she had no doubt that she was an "*independent and honest witness doing her best to assist the Court*". However, the Court found that her

report, consisting of 8 lever arch files, failed to provide a view as to what items were variations or not and had used a pro-rating method for valuing certain claims that was obviously flawed.

As to BP's quantum expert, Mrs Justice Jefford found his report to be very limited in scope which had the result "*that what was before the Court was a report that dealt at a very high level with the quantum issues, did not set out clearly or at all* [the expert's] *assessments and cannot have fully taken into account all the available evidence, including the documentary evidence.*"

Turning to Liberty's delay expert, Mrs Justice Jefford was even more damning. Her criticisms include the following:

1. The delay expert had done little more than reproduce the expert report Liberty had commissioned for the adjudication "*in its entirety and without any material amendment*";
2. The expert "*had formed no independent view at all […] Quite extraordinarily*, [the delay expert] *had not even seen, and apparently did not think it relevant to see, the parties' pleaded cases or any disclosure*.";
3. The expert report contained extensive recitation of facts;
4. In cross-examination it became clear that the expert had not used any baseline schedule to back up his assumption that a reasonable completion period for the work would be four weeks;
5. The expert had not reviewed a contemporaneous schedule showing that the work would take ten weeks; and
6. In producing the expert's report, it was "*difficult to see what programming expertise had been brought to bear at all*".

In sum, Mrs Justice Jefford considered that his expert evidence "*was not expert evidence; it did not comply with the Court's Order […] and it patently could not stand as factual evidence*".

COMMENTARY

Beyond being a general reminder of the importance of ensuring that expert evidence is pertinent and produced in a readable form, this case highlights the need for experts to have a mastery of the evidence, particularly in construction disputes. Both BP's quantum expert and Liberty's delay expert were severely criticised for putting together hurried reports that failed to take account of the evidence on the record. All three experts also came under fire for not providing opinions that utilised their expertise. Courts are clearly not afraid to dismiss dense and technical reports that fail to come to the point.

For instructing counsel, this case underlines the requirements to properly instruct and manage expert witnesses. While Mrs Justice Jefford was careful not to criticise instructing counsel directly, in relation to Liberty's programming expert, she held that Liberty's conduct compounded the "*impression that little real attention had been paid to the delay case throughout the proceedings*". The clear implication of this decision is that counsel must take on a significant degree of responsibility for defining the scope and policing the quality of the expert reports submitted on behalf of their clients. Ultimately, this may mean that if a proper or helpful report cannot be prepared within the allocated timeline, it is better not to submit a report at all.

Specifically, in relation to expert evidence on matters of delay, Mrs Justice Jefford held that, "*The process of establishing a baseline programme includes verifying that the planned programme was realistic and achievable, otherwise it provides no basis from which to assess the effect of delay. If the programme in use was, in fact, unrealistic, then one of the exercises a delay expert may properly undertake is the establishment of a credible baseline programme, that is one that sets out what could have been done (rather than the recorded intent)*". This view is in line with the 2017 Society of Construction Law Delay and Disruption Protocol which, in relation to the performance of an impacted as-planned analysis, provides that, "*Before embarking upon the analysis, the analyst needs to confirm that the sequences and durations for the works shown in the programme are reasonable, realistic and achievable and properly logically linked within the software, to deal with the risk that the baseline programme contains fundamental flaws which cannot be overcome*."

One potential difficulty with this approach is that a number of construction contracts include a representation, or at least an acknowledgement, by the parties that the baseline programme is achievable and realistic. In such cases, it will be incumbent on counsel to advise their expert and client accordingly before preparing an expert report that considers the reasonableness of the baseline programme. Parties may also wish to consider the inclusion of such a clause in their contracts where the baseline schedule is available and considered to be reasonable and reliable at the time of entering into the contract (albeit subject to assumptions).

CLIFFORD
CHANCE

Finally, this case is noteworthy for its result. Since the adjudicator's determination in 2012, Liberty and the other claimants spent approximately five years seeking to negotiate and litigate their way to a different outcome. In the end, the result they achieved in Court appears to have been less favourable than the original determination. Presumably, the claimants spent considerable amounts on legal and expert fees in the process of reaching this outcome. While there may be circumstances where it will most definitely be in the commercial interests of a party to challenge an adjudicator's determination, this can be a high-risk strategy and it is important to get frank and realistic legal and expert advice before embarking on further proceedings.

CONTACTS

Audley Sheppard QC
Partner, London

T +44 20 7006 8723 **E** audley.sheppard@cliffordchance.com

Ben Luscombe
Partner, Perth

T +61 8 9262 5511
E ben luscombe@cliffordchance.com

Dr Sam Luttrell
Partner, Perth

T +61 8 8 9262 5564
E sam.luttrell@cliffordchance.com

Paul Coates
Partner, Dubai

T +971 4503 2684
E paul.coates@cliffordchance.com

Peter Harris
Counsel, Perth

T +61 8 9262 5581
E peter.harris@cliffordchance.com