Judicial analysis of expert evidence in architect's negligence case; recoverability of adjudication costs in subsequent litigation

The Board of Trustees of National Museums & Galleries on Merseyside v AEW Architects & Designers Ltd & anr [2013] EWHC 2403 (TCC) and [2013] EWHC 2576 (TCC)

Mr Justice Akenhead awarded damages of £1.1m against the architect and contractor for various defects in the design and construction of the new Museum of Liverpool, which opened in 2011. The judgment is highly fact-specific, but is notable for the judge's detailed comments on the evidence of the various experts instructed by the parties. **Sean Brannigan QC** represented the successful Claimant (the Trustees).

This was a claim by the Trustees against the architect (AEW) relating to a wide range of defects in the Museum. AEW brought in the contractor as a third party. The defects included problems with suspended ceilings leading to their collapse; and serious problems with the steps and terraces that linked the building at pavement level with the first floor in a 'half-amphitheatre' design. The judgment was delivered in two parts, the first relating to all aspects of liability and contribution, and to quantum of the heads of claim relating to the steps and terraces; the second part related to quantum of the ceiling claims.

The expert evidence - from architects, engineers, and quantity surveyors - was decisive in determining issues of liability, contribution and quantum, as is often the case in the TCC. Mr Justice Akenhead's detailed analysis of the expert evidence is instructive, giving an insight into what judges are looking for from expert witnesses. The judge was particularly impressed by the Trustees' architect expert because he was an extremely experienced architect, as well as an experienced expert. He was praised for explaining himself in language that non-architects could understand, and for giving credible evidence about responsibility for the defects and the need for remedial works as well as about the technicalities. By contrast, the judge criticised AEW's architect expert because he "*had given little or no coherent thought*" to the issues (including, surprisingly, what could reasonably be expected of architects in AEW's position); he was overly-dependent on AEW's engineering expert; and he was faltering in his evidence. Indeed, the judge noted that AEW's architect expert had admitted under cross-examination that he was trying to "*defend the indefensible for the benefit of AEW*".

The judge was also impressed by the Trustees' engineer expert because he was straightforward, authoritative and pragmatic. He was less impressed by AEW's engineer expert because he was "*often argumentative if not combative*" during cross-examination, and too quick to try to explain away the answers given by AEW's architect expert. The judge commented on this "*firefighting approach*" that "*I would not describe him as partisan but this behaviour in the witness box inevitably has coloured my views about his reliability in this case*". The judge was also critical of his tendency to oversimplify problems which had appeared intractable and insoluble during the project. In addition, the judge commented that he was unpersuaded by the argumentative and "*somewhat academic*" approach of the contractor's engineer expert.

Of the quantity surveying experts, the judge preferred the evidence of the Trustees' expert, who he described as "*highly experienced, decent, straightforward, independent and pragmatic*". He was critical of both AEW's and the contractor's QS experts for too often proceeding on the basis of the minimum cost of future remedial work that could be justified as opposed to "*the reasonable or probable cost*". In particular, the judge criticised AEW's expert for allowing nothing where no invoices were available to support remedial work carried out rather than allocating a reasonable sum.

This judgment confirms the importance of careful selection and preparation of expert witnesses. Judges will be impressed by those experts who are highly experienced and pragmatic, and who deliver their evidence in an authoritative and objective manner using language that is easily understood by a layman. An argumentative style will not find favour with judges.

The judgment was also notable for its discussion of the recoverability of costs incurred by the Trustees in adjudicating a dispute with the contractor relating to design responsibility for the seats and steps in the amphitheatre. Akenhead J decided that the Trustees were entitled to recover their costs of the adjudication because there would have been no adjudication but for AEW's negligence, and it was reasonably foreseeable that there would be an adjudication in the circumstances of the case and because "*adjudication is a fact of life now in construction contracts*". The judge said that the causative link between AEW's negligence and the adjudication would only have been broken if the Trustees had acted unreasonably or its solicitors had advised negligently in relation to the adjudication. It had previously been widely assumed that parties could not recover costs of adjudication in subsequent litigation, but this judgment would appear to contradict that assumption where there is a causative link between the adjudication and the defendant's negligence.

Stricter approach by courts to non-compliance with rules and orders in post-Jackson litigation

Venulum Property Investments Ltd v Space Architecture Ltd & ors [2013] EWHC 1242 (TCC)

This important judgment of Mr Justice Edwards-Stuart confirmed that the Courts will adopt a much stricter approach towards litigants who fail to comply with rules, practice directions and orders following the changes to the CPR that came into effect in April 2013. **Lord Marks QC** represented two Defendants who successfully resisted the Claimant's application for permission to extend time for serving a Particulars of Claim.

The Claimant (Venulum) was a property developer who purchased land with planning permission for a scheme that it later discovered was impossible to build. It then took Venulum over five years to instruct solicitors to pursue claims against the vendors, the architects, the surveyor, and its estate agent (Mr Miller and the firm who employed him). A claim form was issued on 12 November 2012 but only served on 12 March 2013, the very last day for service, and it was not accompanied by any Particulars of Claim. In fact, due to an error by Venulum's solicitors the Particulars of Claim were not served before the long-stop deadline provided in CPR r7.4(2) and 7.5(1), which is four months after issue of the claim form.

Venulum applied for permission to extend time for serving the Particulars of Claim; all Defendants consented except Mr Miller and his firm (the Miller defendants), because any fresh action against the Miller defendants would be statute barred.

Mr Justice Edwards-Stuart refused permission, thereby ending Venulum's claim against the Miller defendants, although he noted that the factors to be taken into account in deciding whether to exercise discretion under CPR r3.9(1) were finely balanced. One of the principal factors that swung the balance against Venulum was "*the effect of the new "post-Jackson" regime approach to the enforcement of, and compliance with, orders and time limits*". The judge characterised the post-Jackson amendments to CPR r3.9 (which took effect on 1 April 2013) as 'radical': they removed the nine factors which were previously to be considered and replaced them with the requirement that the court consider all the circumstances of the case including the need "*to ensure compliance with rules, practice directions and orders*". The judge noted that this same wording was reflected in the addition of sub-paragraph (f) in the over-riding objective in CPR r1.1(2). He said that this amendment to the over-riding objective required the court to take a "*more robust approach*" when exercising a discretion to extend time, citing the criticism in the Jackson Report that courts had lost sight of the damage which the culture of delay and non-compliance with orders was inflicting on the civil justice system.

The reason for the non-compliance with the time limit was that Venulum's solicitors had overlooked the long-stop deadline in CPR r7.4(2) and 7.5(1), wrongly believing they had 14 days after service of the claim form to serve particulars. The judge held that this was not a good reason for non-compliance, and this was an important factor to be taken into account.

The judge was particularly unimpressed by the absence of any explanation for Venulum's five year delay in instructing solicitors to pursue the claim. He emphasised that claimants who leave it late to pursue claims will be under an even greater duty to comply with court rules and orders: "*it is not satisfactory or in the interests of justice to have claims brought in the closing weeks or months of a long limitation period. Delay is bad for justice. I agree with Lord Marks that the court should adopt a stricter approach where a claimant has, seemingly through its own choosing, left the start of proceedings until the last minute*".

In the same vein, the judge also commented that "*where a claimant for no good reason leaves it until the last minute to issue proceedings he is under a high obligation to ensure that the claim that is finally presented is clear, cogent and properly particularised*", particularly where (as here) allegations of bad faith are made. The judge was particularly influenced by the fact that the claim against the Miller defendants was neither coherent nor strong, and that Venulum had apparently stronger claims against the other defendants.

This judgment confirms that in this much-changed litigation landscape the Courts are taking a significantly stricter approach to non-compliance with rules and orders, and claimants who leave it late to bring claims forward will find themselves under particularly close scrutiny.

Oral settlement agreement binding on parties

Mr & Mrs AB v CD Ltd [2013] EWHC 1376 (TCC)

In this case Mr Justice Edwards-Stuart considered whether an oral agreement reached after an unsuccessful mediation hearing was legally enforceable notwithstanding a standard clause in the mediation agreement providing that no agreement was to be legally enforceable unless incorporated into a written agreement and signed by the parties. The mediation agreement was very similar to a CEDR standard form hence the findings based on the agreement's wording are likely to be of wide application. **Anthony Speaight QC** represented the successful Claimants (AB).

AB and CD were approaching the trial of a claim for architects' negligence in the TCC when they participated in mediation. The mediation hearing ended without agreement, but subsequently negotiations continued in the days that followed with the mediator acting as an intermediary. In telephone conversations with the mediator, CD's solicitor made an offer of settlement which AB's solicitors accepted. AB said that a settlement agreement had thereby been reached, but CD (who later wished to modify its costs offer) argued that a legally binding agreement had not yet been reached because no agreement had been committed to writing.

AB brought an application for a declaration that the claim had been settled by agreement, which was heard on the day fixed for the start of the trial. Some of CD's arguments were fact specific, but one is of general application. CD said that the clause in the mediation agreement stating that no agreement was to be legally enforceable unless incorporated into a written settlement agreement and signed by the parties covered subsequent communications through the mediator. AB argued to the contrary. Mr Justice Edwards-Stuart found for AB on this and all other points.

Such clauses are very common in mediation agreements. The consequence of this decision is that, if parties and/or mediators wish the provisions of mediation agreements (including clauses as to confidentiality and mediators' fees, as well as the need for agreements to be in writing) to be an umbrella over all negotiations in which the mediator is involved, the wordings which have commonly been used will need to be redrafted.

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