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My method is better than yours!

Expert witnesses opining on delay must have confidence in the delay analysis forming the basis of their reports on which they will be cross examined. The Tribunal must have confidence in it too. The damage to an individual's reputation can be significant if their evidence fails to assist the Tribunal. Unnecessarily complicated analyses and reports are not looked upon favourably by those trying to unravel them in order to gain a clearer insight into the complexities of a case. An Expert relying on such, risks having its evidence cast aside.

While the vast majority of Experts are aware of their duties under the civil procedure rules, adherence to the overriding objective of "…enabling the court to deal with cases justly and at proportionate cost" CPR 1.1 (1) and compliance with the duty under CPR 35.3 (1) "… to help the court…" sometimes become strained.

Influences over time can result in cumbersome analyses and reports in which the thrust of the main arguments become overshadowed by unnecessarily lengthy debates. One of these influences is the desire that Experts often have to differentiate their analyses, lest they be seen to be agreeing with the opposing Expert's approach too early. This can be led by their instructing lawyers and scope development of the individual briefs, something which Sir Antony Edwards-Stuart recognised and commented on in Fluor v Shanghai Zhenhua Heavy Industry Co, Ltd: "… it is difficult to know the extent to which the approach taken by any one of the experts is a reflection of his own view or is one that has been guided by input from the lawyers, or a combination of both."[1]

The scope of Expert instructions can differ such that one Expert's analysis is limited to a single phase of a project, whereas another may be required to cover two or more phases. This can drive the selection of different analysis methods, making it difficult for the tribunal to compare the opinions and form a clear view of validity and preference and potentially adding to the costs of dealing with the case.

An Expert should be mindful of whether instructions are likely to detract from its duty to the court. Under CPR 35, an Expert could face questioning in court if it is satisfied that there are reasonable grounds to examine the statement of instructions[2]. Additionally, the Civil Justice Council Guidance says Experts should inform those instructing them without delay if they consider their instructions are insufficient to complete the work and if the basis of their instruction differs from that of another Expert. The Guidance goes further suggesting that "where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case."[3]

External influences aside, there is often much debate over who has applied the more appropriate analysis which sometimes strays into the realms of preference, leading to a battle of ideology between Experts, even when some common ground exists in their results. Whole sections of reports can be given over to debating the merits of a

[1] [88] Fluor v Shanghai Zhenhua Heavy Industry Co, Ltd [2018] EWHC 1 (TCC), (11 January 2018)
[2] Civil Procedure Rules 35.10(4)b and Practice Direction 35 (5) – Experts and Assessors
[3] Civil Justice Council Guidance for the instruction of experts in civil claims, paragraphs 23b, 25 and 27

selected method in minute detail which exceeds the requirement for proportionality.

> "The damage to an individual's reputation can be significant if their evidence fails to assist the Tribunal."

The SCL Protocol recognises the distraction and expense caused by disagreements over methodology "…it is recommended that the parties try to agree an appropriate method of delay analysis before each embarks upon significant work on or after the event delay analysis" but, in the author's experience, this rarely happens. The Tribunal are recommended to take a failure to consult the other party into account when awarding and allocating recoverable costs of the dispute[4].

Further debate which inflates reports, is the extent to which an Expert's application of an adopted method complies with one set out in industry guidance. While an assessment of the application of an adopted method is vital to appraising the quality of a delay analysis, there is a balance to be struck between:

- demonstrating that the application was inconsistent with a standard method in guidance; and
- assessing whether the analysis arrives at a suitable result.

Digression from a standard method is often criticised at length, even where the deviation is clearly explained and results in a logically sound, common sense and unbiased answer, as opposed to an absurd answer resulting from adherence to a prescribed or standard method.

The recent judgement of White Construction also casts doubt on such criticisms "… the fact that a method appears in the Protocol does not give it any standing, and the fact that a method, which is otherwise logical or rational, but does not appear in the Protocol, does not deny its standing" - Hammerschlag J [191][5].

So, what does make one method better than another?

It could be argued that this is a matter of perspective; a client and, to some extent, a lawyer will tend to prefer a method that is favourable to their case without pushing the boundaries of impartiality too far. The Expert, while mindful of the desires of its client and instructing lawyers, will be aware of the duty of impartiality and reputation, so will want to maintain a reasoned approach for adopting a particular method in preference to another. The Tribunal will welcome clarity and proportionality. However, some common themes arising in judgements indicate that an analysis should:

- Be based on evidence that is factual not speculative;
- Establish cause and effect[6]; and

[4] SCL Protocol Paragraph 11.8
[5] [191] White Constructions Pty Ltd v PBS Holdings Pty Ltd [2019] NSWSC 1166
[6] [331] Bluewater Energy Services BV v Mercon Steel Structures BV [2014] EWHC 2132 (TCC) - "… the question of any delay caused … must be the subject of an analysis which establishes that the particular revision caused delay…" Ramsey, J

- Comply with the stated method in the contract, if any, where sensible and possible to do so, although deviating from the contract method is risky but not necessarily doomed[7].

An overly complex approach to analysis in the first report submitted, often reflected in the response and reply reports that follow, may grow in detail and complexity and become a hinderance to the tribunal. Wherever possible, keeping analysis methods and subsequent reports compliant with common sense, concise and useful, will serve to benefit all, including the Tribunal. Importantly, such an approach is likely to secure a better outcome.

If you require any further information, please contact Lori Noeth at lorinoeth@hka.com.

[7] [50] Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2017] NIQB 43 - "the information as to the actual time and cost expended by the consultant should be made available to allow this court as Tribunal to fairly assess the compensation event." Deeny, J