Fenwick Elliott
The construction law specialists

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# Dispatch

*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

## Expert Evidence
### Guidance for the Instruction of Experts

The Civil Justice Council has published revised guidance for the instruction of experts in giving evidence in civil claims. Whilst there is little new of substance, the publication of the guidance serves as a useful reminder of some of the key issues which need to be considered by both those instructing and the expert himself. The guidance is expected to be annexed to Practice Direction 35. The objectives underpinning the instruction of experts remain to:

(i) Encourage the exchange of early and full information about the expert issues involved in the prospective legal claim;
(ii) Enable the parties to avoid or reduce the scope of litigation by agreeing the whole or part of an expert issue before the commencement of proceedings; and
(iii) Support the efficient management of proceedings where litigation cannot be avoided.

Above all else, whilst experts owe a duty of reasonable skill and care to those instructing them, they have an overriding duty to the court, over and above the obligation to those paying them. The guidance states that if an expert has previously acted in an advisory capacity, *"they will need to give careful consideration as to whether they can accept a role as expert witness"* bearing in mind the need to ensure there is no conflict between their advisory role and their duties to the court as an expert in proceedings.

For example, those instructing experts must not do so in such a way as to encourage experts to avoid reaching agreement or to defer doing so. An expert cannot ignore arguments raised by the "other side". Where there are material facts in dispute, it is said that experts should express separate opinions on each hypothesis put forward. It is also suggested that those instructing experts should seek to agree, where possible, the details of the instructions for the experts, which should include any difference in the factual material that they are to consider.

Conditional or contingency fee arrangements remain prohibited, as this goes against the presumption of independence and objectivity. The new guidance states that the court may require experts to provide an estimate of their costs, and that the expert's fees and expenses may be limited by the court. Experts should also be aware that any excessive delay or failure to comply with court orders may result in adverse costs orders.

Finally, the guidance suggests that a useful test of independence is whether the expert would express the same opinion if given the same instruction by the other side.

## Expert evidence: delay, snagging and practical completion
### Walter Lilly & Company Ltd v Mackay and DMW Developments
[2012] EWHC 1773 (TCC)

We discussed this case back in July (Issue 145). In the course of his judgment Mr. Justice Akenhead made a number of interesting comments about the approach to the expert evidence. In terms of the delay evidence, he preferred the approach of establishing critical delay by reference to the *"logical sequence(s) of events which marked the longest path through the project"*. This was both *"logical and conventional"*.

Regard should be had to the likely longest sequence of the outstanding work on a monthly basis as being the primary pointer to what was delaying the work at any one time. This the Judge thought was a wholly logical approach and, indeed is the approach used by most delay experts when there is a usable baseline programme from which to work. The logic, explained the Judge, is simply that if there are, say, two outstanding items of work, A and B, and A is always going to take 20 weeks to complete but B is only going to take 10 weeks, it is A which is delaying the work because B is going to finish earlier; overall completion is therefore dictated by the length of time needed for A. Put another way, it does not matter if B takes 19 weeks, it will be the completion of A that has prevented completion. Thus, if one is seeking to ascertain what is delaying a contractor at any one time, one should generally have regard to the item of work with the longest sequence. Therefore it is necessary to have regard to how long individual items actually took to perform and not just to how long one party or the other at the time was saying it would take.

The Judge was also clear that what an expert cannot do is to prepare a report that simply says that the "other side" has not proved its case. He stressed that: *"it is not for an expert to suggest this type of thing."* Further the adoption of an approach based on determining the most "significant" matters preventing practical completion is not helpful as it tends to reflect a subjective approach as to what a client thought was significant.

In the delay assessment exercise the court should be very cautious about giving significant weight to the supposedly contemporaneous views of persons who did not give evidence. Without testing the evidence, it is unclear whether the relevant person who made that particular statement had undertaken any analysis or had considered all the matters that had been put in issue in the proceedings or even whether they have given an informed view.

There was also discussion of snagging. In the assessment of which events caused what overall or critical delay, one should remember that it is not necessarily the last item or the area of work that is finished last which causes delay. Often on building projects, the last item of work is the final clean up of the site, something that may only take a short time. However, it is the task which takes longer than anticipated and so delays the final operation that must be assessed. There will always be minor deficiencies or incomplete items of work which will be required to be completed before handover.

If there is an excessive amount of snagging and therefore more time than would otherwise have been reasonably necessary to perform the de-snagging exercise has to be expended, it can potentially be a cause of delay in itself.

There was some disagreement between the experts as to what "Practical Completion" meant. The Judge noted that it means completion for all practical purposes and what that completion entails must depend upon the nature, scope and contractual definitions of the Works, as they may have developed by way of variation or architect's instructions. There was common ground between the experts that de minimis snagging should not be a bar to Practical Completion unless there is so much of it that the building in question cannot be used for its intended purposes.

Whilst it may not seem unreasonable to pose the question: *"what were the most significant matters which, at any given time, were preventing practical completion from being achieved?"*, this could lead to a subjective approach. Further, it was not the case that just because works are finished before Practical Completion they cannot have delayed completion.

## Confidentiality of arbitration documents

### Gray Construction Ltd v Harley Haddow LLP
[2012] CSOH 92

Gray claimed sums from Haddow arising from an arbitration with the NHBC about defective foundations. Haddow sought the disclosure of documents relating to the arbitration, including the pleadings and the terms on which the arbitration settled. It was not disputed that, in order to make out its claim for damages, Gray had to show not merely that it had acted reasonably in compromising the arbitration on the agreed terms but also that the settlement was, objectively, a reasonable one. Gray explained that to do this, they intended to produce a statement from the solicitor who had acted for them in the arbitration. That would be sufficient as the evidence could then be tested on cross-examination.

Haddow disagreed arguing that to prepare for cross-examination, it needed to see documents from the arbitration which were relevant to assessing the reasonableness of the settlement. Haddow needed to know the legal and factual basis of the NHBC's claims and also the circumstances in which Gray settled the claim on the terms that it did. The court proceeded on the basis that confidentiality extended to all documents produced or created by or on behalf of the parties in connection with the arbitration proceedings. As Lord Hodge said, one of the attractions of arbitration is its privacy and this benefit would be negated if a party to the arbitration were not bound to respect confidentiality. Such an obligation should be implied unless the terms of the parties' agreement exclude such implication. However there must be exceptions to those obligations, for example, where a party needs to use such documents to enforce its award or otherwise to protect its legitimate interests or where the disclosure is in the public interest.

In what circumstances can the court override the obligation of confidentiality to require disclosure of documents or information in some other form? The basic answer is that the public interest in the administration of justice can override a private obligation of confidentiality. Lord Hodge noted that it was arguable that in an arbitration, the private obligation of confidentiality may be supported by the public interest in enabling people to resolve their disputes privately if they so wish. But the court must be able to override what remains a private obligation if that is in the interests of justice.

In the Judge's view the court should seek to strike a balance between respect for the honouring of the obligation of confidentiality and the public interest in the fair administration of justice. Where it is necessary to disclose documents in order to achieve the fair disposal of an action, the court may well order their production. The test is not one of absolute necessity; the court, in deciding how to achieve a fair disposal of the action, may take into account how a party can reasonably prepare to present its case. If the documents are not essential to the action or if the information can be recovered elsewhere without breaching a confidence, the court may refuse to order recovery.

Here, to enable Haddow to prepare it was necessary that it had access to the relevant documents. It would not be consistent with the fair disposal of the action to require it simply to accept the solicitor's evidence in chief and then only be able to review the facts about the arbitration and settlement for the first time on cross- examination. As the documents were not commercially sensitive, they could be used, but only, as is standard, for the purposes of the case at hand. This was, of course, an unusual case decided entirely on its facts, but it is a useful reminder of the basic principle that documents created as part of arbitration proceedings will, in the usual course of things, be treated as confidential. That is, after all, as the Judge made clear, one of the key reasons why parties enter into arbitration agreements in the first place.

*Dispatch* is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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