

# J2J Construction Online Seminars Series

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Construction Professionals and Expert Evidence

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# The purpose of expert evidence in construction disputes

- *“The object throughout and always is that the Court should reach a fully informed decision”*  
***United Bank of Kuwait Plc v Prudential Property Services Ltd*** [1995]
- Defects: liability, causation, nature
- Remedies, e.g. remedial schemes
- Delay: critical path analysis
- Breaches of professional appointments
- Quantum

# Expert disciplines

- **Most commonly:**

- Building surveyor
- Quantity surveyor
- Architect or engineer

- **Other specialisms**

- Delay
  - Project manager
    - (see *Royal Brompton Hospital NHS Trust v Hammond* [2002] EWHC 2037 (TCC))
  - Environmental
  - Fire engineer
  - Building control
- And the list goes on...

# How to choose?

- Experience/qualifications
- Possibility of overlap?
- Particular niche specialism required?
- Other specific context of the individual case
- The individual expert
  - Communication
  - Price
  - Conflict
  - Availability

# Expert or adviser?

- Often impossible to begin construction dispute without expert input
- Role of adviser:
  - No report (necessarily)
  - No duty to the Court
  - No costs information required (but you may want to claim it)
  - No need to disclose identity
  - No need to be independent (but be careful!)

# Procedural Codes for Experts

- Starting point: the CPR
  - Part 35
  - Practice Direction 35
- Guidance for the instruction of experts in civil claims
- Specific court guides, especially the TCC Guide

# What if you get it wrong?

- *Robinson v Liverpool University Hospital NHS Foundation Trust & Dr Chris Mercier* (Liverpool CC, 9 Sept 2021)

*“a flagrant reckless disregard for his duties to the Court”*

- *ECU Group PLC v HSBC Bank PLC & Ors* [2021] EWHC 2875 (Comm)

*“considerable misgivings about the reliability of the opinions that he expresses in his reports and a concern that he has approached his analysis in a way which tended to confirm his views rather than put before the court a balanced view of the possible (and likely) conclusions which can properly be drawn from the available data... I cannot give any independent weight to his conclusions”*

# When Do We Actually Need Experts? (1)

- The ‘*well recognised exception*’ admitting opinion evidence
  - ❖ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
  - ❖ Civil Evidence Act 1972, s 3
  - ❖ Procedural code (eg, CPR, Part 35, TCC Guide)
- Limits of a ‘Procedural Code’
  - ❖ *Rogers v Hoyle* [2015] QB 265
  - ❖ *DN v Greenwich LBC* [2005] LGR 597
  - ❖ *Humber Oil Terminals v Associated British Ports* [2012] L & TR 435





# When Do We Actually Need Experts? (2)

- Professional Negligence Claims
  - ❖ *ACD v Overall* [2012] EWHC 100 (TCC)
  - ❖ *Avondale Exhibitions v Gallagher Insurance Brokers* [2018] EWHC 1311 (QB)
- *The Kennedy v Cordia* [2016] UKSC 6 criteria



# Restrictions on Use of Expert Evidence

- Case and Costs Management
- Attempts to Circumvent Formal Requirements of Expert Reports
  - ❖ *New Media Distribution Company SEZC v Kagalovsky* [2018] EWHC 2742 (Ch)
  - ❖ *Illumina v TDL Genetics Laboratory* [2019] EWHC 1159 (Pat)



# Expert Evidence in Litigation

- Procedural Guidance
  - Pre-Action Protocol for Construction and Engineering Disputes
  - TCC Guide
- Quality and Scope of Evidence in Court
  - ❖ *Imperial Chemical Industries v Merit Merrell Technology* [2018] EWHC 1577
- Format of Presentation
  - ❖ Single Joint Expert
  - ❖ Hot-tubbing
  - ❖ Oral (and Written)? – *Edwards Lifesciences LLC v Boston Scientific Scimed Inc* [2018] EWCA Civ 673

# Expert Evidence in ADR (1)

- Arbitration

- ❖ Institutional guidelines and rules for expert evidence
- ❖ Law of seat
- ❖ Tribunal appointments

- Expert Determination



*“These smug pilots have lost touch with regular passengers like us. Who thinks I should fly the plane?”*

## Expert Evidence in ADR – Adjudication (2)

- Are expert-driven claims too complicated?
  - ❖ Fact- and document-heavy (vs. extreme time pressure)
  - ❖ Legally complex (vs. non-lawyer adjudicators)
  - ❖ *London & Amsterdam Properties v Waterman* [2003] EWHC 3059 (TCC)
- Complexity seldom prevents enforceability
  - ❖ *CIB Properties v Birse Construction* [2005] 1 WLR 2252
  - ❖ *HS Works v Enterprise Managed Services* [2009] BLR 378
  - ❖ *AMEC v Thames Water* [2010] EWHC 419 (TCC)
- Professional Negligence Bar Association Adjudication Scheme
- (Ir)recoverability of Costs
  - ❖ *National Museums and Galleries on Merseyside v AEW Architects and Designers* [2013] EWHC 2403 (TCC)
  - ❖ *Enviroflow Management v Redhill Works* [2017] EWHC 2159 (TCC)

# Thank you!

Any questions?

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