

# Final Account Disputes

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12 November 2019

- How do you gain an edge in light of ICI v Merit Merrell Technology Limited?
- What evidence do you need and what are the obligations of your experts?

## ICI v Merit

- [2017] EWHC 1763 (TCC) – 12/7/17 – liability judgment
- [2018] EWHC 1577 (TCC) – 21/6/18 – quantum judgment

# The Facts

- ICI engaged MMT to carry out works on NEC3 conditions
- ICI ceased paying. Alleged widespread defects in MMT's welding and repudiatory breach of contract & sought to terminate
- Adjudications resulted in ICI paying MMT £20.9m
- Brought claim for overpayment of c. £10m.

# Liability Trial

- Fraser J held was in fact ICI who had repudiated the contract
- That did not remove its contractual right to recover overpayments
- Required an analysis of the final value of the works executed by MMT

# Quantum Trial

- Valuation of MMT's account as at date of repudiation (17/2/15)
- Analysis of quantum of MMT's counterclaim for damages for the wrongful repudiation

# Ultimate conclusion

- Account for the works of £22,018,083.66
- Less amount already paid by ICI of £21,749,658.88
- So further payment due from ICI of £268,424.78
- Sum awarded to MMT on the counterclaim of £2,047,170
- Balance due to MMT of £2,315,594.78 (minus agreed sum of £187,500 for defects)
- Total award to MMT of £2,128,094.78

# Disclosure

- Retention & preservation of:
  - Documentation
  - Physical evidence – the missing “meeting room welds”
- Degree to which the lack of documentation / evidence impacted upon the issues was addressed on issue by issue approach

# Scott Schedule & General Approach

- Scott Schedule of the 29 sub-issues and 12 PMIs submitted in agreed form day after oral closing subs
- Found that the way that the matter of the final valuation of the MMT works was presented & fought by both sides was unacceptable
- Considerable challenges in terms of judicial resolution

# Contemporaneous assessments & agreements

- Ability to revisit PM's assessments under NEC3 contract terms?

Yes but has to be some evidential basis to depart from them

- Ability to revisit agreements reached with ICI personnel & PM?
- Consistency of claim

# Quantum Experts

- Proper use of (a) Scott Schedules, (b) Joint Statements
- Correct approach:
  - (1) Consider liability judgment & take express note of relevant findings as to how the role of PM was interfered with leading to PM's resignation
  - (2) Consider contemp agreements reached
  - (3) Consider the factual evidence and conduct at least alternative valuations on the basis that the court may accept such evidence

# ICI's Quantum Expert

- Took position on issue of fact and law for the court – not for expert
- Re-writing of parties' contractual bargain
- Failure to stay within pleaded issues
- Argued case for party / adopted points in partisan fashion

# MMT's Expert

By contrast....

- Took starting point as the contractual agreement
- Performed exercise independently

# Principles that govern expert evidence

“The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amount at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it. In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in ***The Ikarian Reefer*** [2000] 1 WLR 603. They are examples of the application of those principles in practice.” [237]

# Summary of 6 points at [237]:

- (1) Access to the same material
- (2) Not place of expert to identify which version of facts they prefer – matter for the court
- (3) Should not take partisan stance on interloc applications
- (4) Process of experts meeting under CPR 35.12, discussing the case & producing an agreement (where poss) is an important one. Should be constructive & co-operative process. Governed by CPR so O. Obj should be considered to apply. This requires the parties (& their experts) to save expense & deal with the case in a proportionate way

- (5) Where late material emerges close to trial, & expert considers going to lead to further analysis / consideration / testing, notice should be given to that expert's oppo asap. Save in exceptional circs where unavoidable, no expert should produce a further report actually during a trial that takes oppo completely by surprise
- (6) No expert should allow the necessary adherence to the principles in ***The Ikarian Reefer*** to be loosened

# Thank you! Any questions?

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