When claims consultants become the lawyers, or do they?

by

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There is a long-established tradition in English arbitration law that arbitration is not the exclusive preserve of lawyers. Many arbitrators are neither barristers nor solicitors and claims consultants, often quantity surveyors, regularly represent their clients in arbitration. The latter can do a very good job. They are much more comfortable either formulating or dissecting the nuts and bolts of a contractor's final account than the average lawyer. On the other hand, the lawyer has the whip hand when it comes to legal issues, perhaps particularly in a common law jurisdiction with its reliance on previous legal precedent. However, many claims consultants provide a 'one-stop' service, from pleadings right though to the advocacy at the final hearing.

The provision of a service may lead to an allegation of professional negligence against a professional adviser. The English courts are familiar with the management of these claims against solicitors. It would be an exceptional circumstance in which a Court would need the services of an expert to inform the judge as to the way in which a competent solicitor would conduct himself in a particular situation. So said the English Court of Appeal in ***Brown v Gould & Swayne*** [1996] 1 PNLR 130.

In cases, other than those that concern lawyer negligence, there is clear presumption in favour of the use of an expert to assist the judge in understanding the practices of a particular profession (***Pantelli Associates Ltd v Corporate City Developments (No. 2)*** [2010] EWHC 3189 (TCC)). In the case of a building defects claim, the need to use a structural engineer expert may be self-evident. But what of claims consultants, who may be said to be acting as lawyers? Is an expert necessary?

The question arose at a case management stage in ***Kenneth Alex Wattret / Laurie Grace Wattret v Thomas Sands Consulting Ltd*** [2015] EWHC 3455 (TCC) where the Court considered the Defendant's application for permission to rely on expert evidence. It is important to remember that the case is ongoing and the Court has made no findings on liability, merely on part of the procedure to reach a judgment at Trial.

The Defendant had acted for the Claimants in an unsuccessful arbitration. Those Claimants now allege professional negligence. Taken from the pleadings, the judge listed the Defendant's alleged failures as being (a) over-optimistic advice, (b) a failure to advise that the risks outweighed the benefits, (c) a failure to put forward offers of settlement, (d) a failure to advise on the availability of NHBC and ADR procedures, (e) a failure to advise on the costs of the arbitration, (f) a failure to advise the Claimants to obtain ATE insurance, (g) use of a quantity surveyor from within the Defendant's practice as expert witness and (h) a failure to obtain legal advice.

The Defendant requested permission to rely upon expert evidence. The judge identified that the Claimants had pleaded their case in two ways. First, they alleged that the Defendant held itself out to be at least as competent as lawyers but if that was not established at Trial, '… *it will be necessary to judge the Defendant solely by the standard of a reasonably competent quantity surveyor providing dispute resolution services*.' Had the Defendant sought permission to rely on expert evidence as to the conduct of a reasonably competent solicitor that would have been unnecessary – '*I am quite sure that any Judge trying this case would not need any expert evidence to explain what a lawyer in a construction dispute should do or say.*'

Therefore, expert evidence was necessary, though its scope should be strictly limited. Were the Court required to deliver in due course a judgment on liability it will be one to read with interest.

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