Case No: HT-2015-00093

Neutral Citation Number: [2015] EWHC 3455 (TCC)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice
Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 1 December 2015

**Before** :

**MR ALEXANDER NISSEN QC**
**(Sitting as a Deputy High Court Judge)**
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**Between :**

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| **(1) MR KENNETH ALEX WATTRET**<br>**(2) MRS LAURIE GRACE WATTRET** | **Claimants** |
| **- and –** | |
| **THOMAS SANDS CONSULTING LIMITED** | **Defendant** |

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**Mr Jonathan McNae** (instructed by **Colman Coyle LLP**) for the Claimants
**Ms Lynne McCafferty** (instructed by **Beale & Company Solicitors LLP**) for the Defendant

Hearing date: 20 November 2015
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# Judgment

**MR ALEXANDER NISSEN QC:**

## Introduction

1. This judgment concerns the question of whether expert evidence should be permitted in these proceedings. At the Case Management Conference on 20 November 2015, I heard an application from the Defendant to adduce expert evidence from a quantity surveyor with expertise in dispute resolution. The application was opposed by the Claimants. I made my decision on the application on the day, allowing expert evidence to be adduced, but indicated that I would give my reasons for that decision in due course. This judgment contains those reasons.

## Background

2. Mr and Mrs Wattret, ("the Claimants") are the freehold owners of a property at 28, Burkes Road, Beaconsfield, Buckinghamshire. The Defendant is a firm of chartered quantity surveyors with expertise in quantity surveying and dispute resolution services relating to construction matters.

3. By these proceedings, the Claimants seek damages from the Defendant in contract and tort in relation to the provision of professional services. The Defendant acted on the Claimants' behalf both before and in an arbitration between the Claimants and their builders in relation to a building project on their property. The arbitration concerned a final account dispute which involved many issues including one about termination. The arbitration resulted in an Award being made in favour of the builders and against the Claimants. There are numerous allegations made against the Defendant in respect of the services provided to the Claimants. Amongst others, the Claimants contend that the Defendant gave them over-optimistic views of the strength of their position in the arbitration; failed to appreciate potential problems with the claim; failed to advise that the risks outweighed the benefits; failed to put forward offers of settlement; failed to advise on procedures available through the NHBC or ADR generally; failed to advise on the costs of the arbitration; failed to advise the Claimants to obtain ATE insurance; instructed a quantity surveyor within the Defendant to act as the expert; and failed to take legal advice. Damages are claimed in various permutations which, essentially, compare the actual financial outcome following the arbitration with that which, so it is said, would have occurred had one of the various offers made to the Claimants by the builders been accepted. The highest figure claimed against the Defendant is in excess of £1.2m. This includes the relevant costs of the arbitration on both sides.

4. The Defendant denies each and every one of the allegations. Liability, causation and quantum are in issue. One key contention raised by the Defendant is that the Claimants were at all times controlling the settlement negotiations with the builder and made their own decisions in respect thereof.

5. Paragraphs 11 and 12 of the Particulars of Claim are in the following terms:

> "Paragraph 11
>
> It was an implied terms (sic) of the First and Second retainers that the Defendant would act in relation thereto with the

reasonable skill and care of reasonably competent chartered surveyors who held themselves out as competent to advise and represent parties in adjudications. Further or in the alternative, the Defendant owed a like duty to the Claimants at common law.

Paragraph 12

Further, and without prejudice to the foregoing, the Defendant on various occasions acting through Mr Thomas and Mr Harley held itself out as being as well or even better qualified to conduct construction law cases than qualified legal professionals; further and alternatively, as specialists in construction law. In the premises, it was an implied term of the retainers alternatively [the] Defendant assumed and owed a duty to the Claimants to act in a manner that was consistent with the standard of reasonably competent legal professionals with experience of arbitration and adjudication proceedings; and matters relating to construction law, namely solicitors."

6. In respect of those paragraphs the Defendant pleads as follows:

"Paragraph 18

It is admitted and averred that it was an implied term of each and all of the Four Appointments that the Defendant would supply the services thereunder, and would act in relation thereto, with reasonable skill and care of ordinarily and reasonably competent and skilled chartered quantity surveyors who held themselves out as competent to advise and represent parties in adjudications and arbitrations; and it is admitted that the Defendant owed a like duty to the Claimants at common law.

Paragraph 19

The allegation that Mr Thomas, Mr Harley, or the Defendant held themselves out as being "as well or even better qualified to conduct construction law cases than qualified legal professionals" is unparticularised and vague. That allegation is not admitted…. At no stage did Mr Thomas or Mr Harley ever hold themselves out as qualified legal professionals….In all these circumstances, and in any event, it is denied that it was an implied term of the Appointments (or any of them) that the Defendant would: exercise the reasonable skill and care of ordinarily and reasonably competent and skilled legal professionals or solicitors; or act in a manner consistent with the standard of reasonably competent legal professionals or solicitors….Save as aforesaid, Paragraph 12 is denied."

7. The Claim Form was issued on 5 March 2013. The Particulars of Claim were issued on 23 May 2015. The Defence was served on or about 24 July 2015. There have been some Requests for Further Information on both sides, which have been answered.

8. The CMC was held on 20 November 2015. Helpfully, the parties had largely agreed all issues between them save for the question of expert evidence and matters consequential thereupon. As a result of that productive input, it is now anticipated that the trial of this action will take place in October 2016 lasting 7 days.

9. In anticipation of the forthcoming CMC, solicitors for the Claimants wrote to solicitors for the Defendant stating: *"It seems to us that this is not a case where either side will require expert evidence. Please confirm you agree."* In a later letter they added: *"The reason why we do not think expert evidence is required in this case is that we doubt that the Court would be assisted by such evidence"*. Solicitors for the Defendant responded that, in the absence of expert evidence, the Claimants' claim should fail. Later they added: *"our client is not a firm of solicitors (regulated by the SRA) but rather a firm of chartered quantity surveyors. The suggestion that this case is akin to one of solicitors' negligence is flawed"* and *"we disagree with your assertion that there is essentially no difference in the scope of a duty of a firm of solicitors compared to that of a firm of chartered quantity surveyors acting as surveyor advocate"*. The arguments developed on both sides. The Claimants pressed the Defendant to identify any alleged differences, on the facts specific to this case, between the scope of duty applicable to a solicitor and that referable to a quantity surveyor acting as surveyor advocate. The Defendant refused to provide particulars of what expert evidence was required.

10. Immediately prior to the CMC the parties completed the Case Management Information Sheet. In respect of the question: *"Do you wish to use expert evidence at the trial or final hearing"*, the Defendant said: *"Yes"*. The Claimant said *"No, subject to the Court's view"*.

11. The burden of proof in relation to the requirement for expert evidence lies with the party seeking permission to adduce it: see ***JP Morgan Chase Bank v Springwell Navigation Corporation*** [2006] EWHC 2755 (Comm.) at paragraph 19. On that basis, I invited the Defendant to open the application.

**The Defendant's submissions**

12. Appearing on behalf of the Defendant, Ms Lynne McCafferty submitted that in this case I should permit expert evidence to be given by a quantity surveyor with expertise in dispute resolution. She submitted, by reference to ***Pantelli Associates Ltd v Corporate City Developers No.2 Ltd*** [2010] EWHC 3189 (TCC), that it is standard practice that an allegation of professional negligence must be supported by a relevant professional with the necessary expertise. Whilst accepting this was not an immutable rule, she said that there would need to be a compelling reason for departing from it. She drew my attention to ***Sansom v Metcalfe Hambleton*** [1998] PNLR 542 at 549.

13. Ms McCafferty submitted that no compelling reason had been advanced for departing from the general rule. She submitted that the claim was not, as had been contended, akin to a solicitors' negligence claim and suggested that the question of whether there was a difference between the duties and standard of care was one of the very issues to

be determined in the present circumstances. Her contention was that to refuse expert evidence would be to pre-judge that very issue. She pointed to the fact that solicitors and quantity surveyors acting as advocates are regulated by different codes of conduct and have completely different training. For that reason she distinguished the case of ***Bown v Gould & Swayne*** [1996] 1 PNLR 130 which had been cited in the exchanges between solicitors. That was a case where the issue was one of law not practice. She also noted that Jackson & Powell on Professional Liability 7th Edition suggests, at paragraphs 11-101 and 102, that the position of a legal executive, unqualified clerk or trainee may be different from the position of a qualified solicitor. If there are differences between the standards applicable to those persons, she submits, it would follow that the standards should be expected to differ as between someone who is not even a member of the legal profession on the one hand and a qualified solicitor on the other. She cautioned against the Court falling into the trap of assuming, inadvertently, that the standards are the same merely because the standard applicable to a solicitor experienced in construction disputes would be familiar to the Court.

14. She said that it was not appropriate for the Defendant to have to explain the difference between the duties owed by a quantity surveyor representative and the duties that would have been owed by a solicitor providing legal services. In particular, she said that it would be wrong to require the Defendant to provide that information at this stage because it would pre-empt what the expert may say.

15. Ms McCafferty concluded her submissions by saying that expert evidence was necessary to enable the Court to determine the pleaded issues and that, in any event, the Court would find it of assistance.

**The Claimants' Submissions**

16. Mr McNae, appearing on behalf of the Claimants, drew my attention to ***British Airways plc v Spencer*** [2015] EWHC 2477 (Ch), a recent case on the admissibility of expert evidence. Mr McNae submitted that expert evidence was not necessary to enable the issues in this case to be resolved and that the Defendant had failed to demonstrate that any such evidence would be of assistance to the Court.

17. The Claimants' primary submission was that, on the facts of this case, there ought to be no difference in principle between the standards of a solicitor on the one hand and a quantity surveyor experienced in dispute services on the other. On that basis it was said that the Court should be able to determine the case without expert evidence. However, if, as the Defendant contended and the Claimants were minded to accept, there was a theoretical distinction between the two standards, it was incumbent on the Defendant to identify the practical distinctions on the facts of this case.

18. Mr McNae said it was crucial that any expert evidence that may be allowed was narrowed down to what was strictly required. He was critical of the Defendant's failure to have explained, prior to this application, how it said that the difference in scope of duty between the two professions could occur in the context of this claim.

19. Mr McNae also submitted that, even if I was in favour of allowing expert evidence, I should only permit such evidence to be adduced by way of a single joint expert. He pointed out that the case was likely to turn on the significantly contested factual history and that expert evidence was unlikely to be determinative. Ms McCafferty

opposed that latter submission on the grounds that the value of the claim warranted an expert on each side and it was fair that each party be permitted to call their own expert.

**Decision**

20. By way of introduction, I can do no better than respectfully adopt paragraphs 21 to 23 of Warren J's decision in ***British Airways plc v Spencer*** [2015] EWHC 2477 (Ch):

> "21 The starting point is CPR 35.1. It provides:
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> > 'Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.'
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> 22 There is an instructive note at para 35.1.1 p 1161 of the White Book which repays reading. I do not propose to set it out at length but note the underlying policy objective of this rule which is to reduce the incidence of inappropriate use of experts to bolster cases. It is also to be noted that the rule refers to evidence required 'to resolve the proceedings'. It does not refer, as well, to evidence required 'to resolve any issue within the proceedings'. I will have more to say about this distinction later.
>
> 23 In the context of a suggestion that expert evidence is necessary in order to help understand the impact of actuarial considerations on how the Trustees should have acted, it is helpful to bear in mind what Aikens J said in his judgment in JP Morgan Chase v Spingwell at [23]:
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> > 'I should mention one further practical matter, which I think is relevant to large commercial disputes. It is inevitable when there is a dispute between commercial entities that covers a long period of time (as this case does) and concerns a very large sum of money, that a huge amount of documents will have to be considered. There is a natural tendency of parties and their advisors to consider employing experts to assist in digesting this material, particularly if it relates to any area that might be recondite, such as trading in Russian debt in the 1990s. There is a tendency to think that a judge will be assisted by expert evidence in any area of fact that appears to be outside the "normal" experience of a Commercial Court judge. The result is that, all too often, the judge is submerged in expert reports which are long, complicated and which stray far outside the particular issue that may be relevant to the case. Production of such

> expert reports is expensive, time-consuming and may ultimately be counter-productive. That is precisely why CPR Pt 35.1 exists. In my view it is the duty of parties, particularly those involved in large scale commercial litigation, to ensure that they adhere to both the letter and spirit of that Rule. And it is the duty of the court, even if only for its own protection, to reject firmly all expert evidence that is not reasonably required to resolve the proceedings.'"

21. At paragraph 68 he added:

> "…it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:
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> (a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.
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> (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in Mitchell the court would have been able to resolve even the central issue without the expert evidence).
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> (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings."

22. In my view it is necessary to have expert evidence in this case. There is authority of long standing which is applicable to cases of professional negligence. I refer particularly to ***Sansom v Metcalfe Hambleton*** [1998] PNLR 542 at 549 in which Butler-Sloss LJ said:

> "A court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule as Sachs LJ (in ***Worboys v Acme Investments Ltd*** [1969] 4 BLR 133 at 139) indicated in his example but unless it is an obvious case, in the

> absence of the relevant expert evidence, the claim will not be proved."

23. As was pointed out by Butler-Sloss LJ, this is not an absolute rule. One example in which expert evidence is not required is if the answer is obvious. Thus, one does not need an expert to provide an opinion that it was negligent to design a house without a front door. It is not suggested that this type of example applies in the present case. Another, more pertinent, example flows from the decision in ***Bown v Gould & Swayne***. In that case the Court of Appeal applied the earlier judgment of Oliver J in ***Midland Bank Trust Company Ltd v Hett, Stubbs & Kemp*** [1979] 1 Ch 384. In the Court of Appeal, Simon Brown LJ said:

> "Mr Pearce-Higgins submitted that what the solicitors should have done is a matter of practice such as falls into the category of evidence that is properly the subject of admissible expert evidence within Oliver J's formulation in Midland Bank. That, however, in my judgment, is a fundamental misconception and it underlay all his submissions on the point. What solicitors should properly do in the very particular and highly individualistic circumstances of this case is by no means a matter of practice. It is a matter of law to be resolved by the judge.
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> Each of the seven respects in which the appellant's solicitor's first affidavit sought to contend that expert evidence would assist the court, proves, on analysis, to involve either a question of law or a question of fact. None of those matters can sensibly be regarded as inviting a view as to "some practice in [the solicitors'] profession, some accepted standard of conduct … laid down … or sanctioned by common usage".
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> I entirely share the view of the judge below that, on the contrary, the evidence here sought to be adduced falls foul of Oliver J.'s dictum. It would amount to no more than an expression of opinion by the expert, either as to what he himself would have done, which could not assist, or as to what he thinks should have been done, which would have been the very issue for the judge to determine."

24. Millett LJ agreed with this and added:

> "Good practice in establishing the existence of a right of way is the ordinary machinery of investigating title. That is a matter of law and not practice. It does not require to be established by an expert witness. It is also a question of law whether the purchaser's solicitor was under a duty to inspect the property….
>
> All these are matters of law, not practice…

> If it is necessary to assist the judge to understand the proper machinery for the deduction and investigation of title, the proper way to do it is to cite the textbooks such as Emmett, Farrand, Williams and Dart, if necessary supplemented by Law Society opinions."

25. Paragraph 6-008 of Jackson & Powell 7th Edition cites two cases on this point. ***Archer v Hickmotts*** [1997] PNLR 318 was a decision in the County Court in which it was held that expert evidence in solicitors' negligence cases is admissible depending upon the circumstances and context in which it is given and the issues to which it is directed. In ***May & anor. v Woollcombe Beer & Watts*** [1999] PNLR 283, HHJ Raymond Jack QC sitting in the High Court, allowed expert evidence in respect of conveyancing practice because there was a lack of guidance on the point from textbooks and the Law Society.

26. In my view, the exception to be derived from ***Bown v Gould & Swayne*** does not apply to the present case. This is not a solicitors' negligence case. It is a claim against a firm of quantity surveyors. It is true that the Claimants allege that the Defendant held itself out as at least as competent as lawyers but that allegation is pursued in the alternative and may not be proven on the facts. In those circumstances, it will be necessary to judge the Defendant solely by the standard of a reasonably competent quantity surveyor providing dispute resolution services. In respect of its defence to the holding out case, the Defendant does not seek to adduce expert evidence to demonstrate what a reasonably competent solicitor would have done in the circumstances. Had it done so, the question would have arisen as to whether it was necessary to adduce expert evidence and whether the contentions were matters of law or matters of practice. It seems to me that, unlike ***Bown***, they would be largely, if not wholly, matters of practice. However, the Technology and Construction Court is a specialist Court. All its Judges have had considerable experience of dealing with construction disputes and, particularly, arbitrations relating to such disputes. 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. But, for the reasons I have given, that point does not arise.

27. On the facts of this case, I can see that there may be instances where there may be differences between what a legal practitioner would do or say in a given situation and what a quantity surveyor might do or say. It will suffice to give three examples. In doing so, I make clear that I am making no finding that there is in fact a difference. I am merely identifying examples of situations in which I can see that there may be a difference. The first relates to ATE insurance. The Claimants complain that the Defendant should have alerted them to the existence of ATE insurance or other funding options. It may be that a reasonably competent quantity surveyor engaged in dispute resolution would be less well versed in that type of funding than would be a solicitor. The second example relates to the allegation that the Defendant should have obtained legal advice. By definition, this is not something which a solicitor would have needed to consider. The third example relates to the provision of advice on the merits. When advising on the merits of a final account claim, it may be (depending on the facts) that a quantity surveyor is fulfilling a different function from a lawyer. When advising on the merits, a solicitor will rely on the expert evidence which he has obtained from a quantity surveyor. The solicitor must then take into account his own

views on the likelihood of that evidence being accepted from a forensic perspective. On the other hand, the quantity surveyor will be focussed on the valuation aspect of the case. As regards the valuation disputes, he will have a greater understanding of the underlying valuation issues than would a solicitor yet he may be less well placed to provide an independent view on the likelihood of that evidence being accepted from a forensic perspective. It all depends on what he is asked to do.

28. In all the circumstances, I conclude that expert evidence is necessary. This is a case of professional negligence where evidence from someone in the same professional field is required. But, in any event, there are issues in respect of which the evidence would be of assistance and it is reasonable to require expert evidence to be given in the context of the proceedings as a whole.

29. Nonetheless, I agree with the Claimants' submission that this evidence should be confined to that which is strictly required.

30. I have therefore come to the clear conclusion that the appropriate course is to allow expert evidence on condition that it is subject to close control. I am mindful of the Court's significant experience of dispute resolution in the construction sphere and in respect of which it will not require any assistance. I am also concerned that, if unrestrained, there is a real risk that experts will provide swathes of commentary on each communication passing between the parties, giving their own slant or interpretation of what happened and what ought or ought not to have been advised: see the passage from Aikens J in ***J P Morgan*** cited above. That must not happen in this case. If evidence of that sort is provided, the Court will be able to make adverse orders for costs, even on an indemnity basis, against the party seeking to rely on such evidence.

31. The course I have decided to adopt is to require the Defendant to provide a list of issues by reference to the pleadings which identifies the specific points on which it intends to provide expert evidence and what the relevant question for the expert should be. The focus should obviously be on those points where the standard or duty is said to be different to that which would be applicable to a lawyer engaged in the business of construction disputes since the latter is a matter about which the Court will be familiar. The Claimants will have an opportunity to respond to the list. Thereafter, the parties should endeavour to agree a list. If there remains a disagreement about the scope of expert evidence to be obtained in light of these exchanges then the matter can be referred to the Court for determination on paper. Once the list has been finalised, it will provide an agenda on which the experts can report.

32. Mr McNae suggested that a list of issues of the type described would serve as the basis for instruction of a single joint expert. In my view, this is not an appropriate case for a single joint expert. This is a claim of significant value and is one in which both parties should have an opportunity to call their own evidence. Whilst both parties accepted that expert evidence would be secondary to the findings of fact, that feature does not mean it will be wholly peripheral. In respect of a given issue it is possible that the evidence could be determinative.

33. For the reasons given, I will permit expert evidence to be given, subject to the procedural constraints that I have identified.