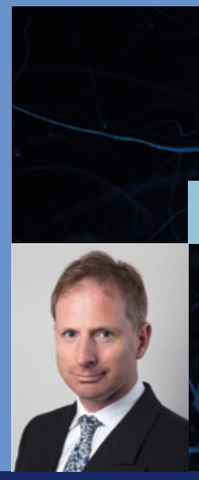
CASE ANALYSIS:
Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd



***Justin Mort QC** analyses the key points arising from the judgment on quantum issues in ICI v MMT, and considers the role of expert evidence at trial.*

Mr Justice Fraser has now handed down judgment on quantum issues arising in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*.[1]

In late 2012, ICI appointed MMT to supply and install some steelwork at its new state of the art paint factory in Northumberland. The parties' contract incorporated an amended version of the NEC3 form of contract. It therefore provided for mandatory adjudication (clause W2), and compensation events including project manager instructions (PMIs).

From an early stage of the project, ICI substantially expanded MMT's scope of work, starting with PMI 3, so as to include the supply and installation of mechanical services (i.e. pipework, and the welding of pipework both off site and in situ). This meant that whilst the initial contract value was approximately £1.9 million, the total value of MMT's project by the time that MMT came to leave site was substantially greater.

The project as a whole, and in particular MMT's part of it, ran over budget. ICI's response was to dismiss MMT from the site summarily in February 2015.

From about that time the parties participated in four adjudications, three in 2015 and a late one in 2016, some time into the litigation, shortly before liability issues were due to be determined in the TCC.

The project has also given rise to five sets of court proceedings and a number of TCC judgments, in relation to *inter alia* the enforcement of two of the adjudication decisions (in October 2015 and October 2016), disclosure (July 2016), an application to adjourn the trial on liability (October 2016), the liability trial itself (July 2017) and now quantum (June 2018). Many members of the specialist TCC bench, and a number of members of the specialist construction bar, have had some input into the case.

The main event in the recent quantum trial was ICI's attack on the valuation of MMT's account, and ICI's claim for repayment of what it maintained was a significant overpayment.

By the time of the quantum trial, ICI had paid £21,749,659 to MMT. Much of that payment arose from ICI's failure to serve the requisite payment notice or pay less notice, in relation to two payment applications, rather than as a result of an assessment or valuation by the project manager: adjudications 1 and 4.

Because ICI had repudiated the contract in February 2015, it had deprived itself of the opportunity to correct the payment assessment in a subsequent payment notice, and recover overpayment by that route, as is expressly allowed for in the NEC3 form of contract (clause 50.5 and 51.1). Similarly, because ICI had decided not to operate the termination provisions of the NEC3 form, it had deprived itself of the termination assessment process and mechanism for payment / re-payment set out in clause 90.4.

1 [2018] EWHC 1577 (TCC).

In the liability trial heard in 2017, the judge determined that, notwithstanding ICI's repudiation of the contract, and notwithstanding the decision in *ISG Construction Ltd v Seevic College*,[2] ICI was nonetheless entitled to challenge the notified sum and recover any overpayment: [2017] EWHC 1763 (TCC). That decision has been subsequently approved and followed in *Grove Developments Ltd v S&T (UK) Ltd*.[3]

In the quantum trial, ICI contended that the proper value of MMT's account was £11,886,101.13, and that in those circumstances it was entitled to repayment by MMT of some £10 million.

Even ICI's valuation of the account was considerably greater, by a factor of six, than the original contract sum. It was therefore not in dispute but that MMT's scope of work had changed dramatically over the course of the project. In addition, it could not be disputed but that those changes in scope had been instructed on behalf of ICI in a somewhat piecemeal and chaotic fashion, in circumstances where design of the facility was developed in parallel with work on site.

In those circumstances, MMT's account was made up of a large number of conventional variations (i.e. additional work or modifications to work already executed), but also claim type items, such as:

(1) additional preliminaries arising from the prolongation of the project, additional work and the manner in which additional work had been instructed;

(2) disruption or unproductive working at MMT's fabrication shop arising from repeated changes in design;

(3) loss of productive working time, for a period whilst welding work was suspended but labour resources were nonetheless maintained on site.

Whilst the NEC3 form does not refer to generic "*claims*" in this way, it was accepted by both parties that, to some extent, it was necessary to bundle issues together (e.g. a global claim for further prolongations), rather than trying to apply the compensation event regime religiously. Hence there was, for example, a general preliminaries item rather than an attempt to identify the impact of individual compensation events on preliminaries.

A distinctive feature of the case was that ICI did not have available to it at the trial in 2018 any of the quantity surveying resources or commercial management that had been involved in the detail of the project at the time, that is to say in 2013 and 2014. The precise reason for this was not revealed, but it is to be inferred that there had been some sort of falling out between ICI and its professional team, and/or between ICI and some of its former employees responsible for the project.

2 [2015] 2 All ER Comm 545
3 [2018] EWHC 123 (TCC) at [130]

ICI was able to call a Henk Boerboom, a project manager appointed to the project by ICI's parent company (Akzo Nobel) a few months before ICI's repudiation of MMT's contract. However: Mr Boerboom only arrived at the end of the project; he was not involved in the detail of the disputed account; and in any event, for numerous other reasons, the judge found him to be an unsatisfactory witness.[4]

"There are relatively few final account type disputes which reach the High Court, let alone cases under the NEC3 form."

That particular set of facts as summarised above gave rise to a number of points of potentially general interest.

Firstly, an issue arose as to which party has the burden of proof, in circumstances where the employer claims to have overpaid as a result of the payment notice provisions of the contract.

Ordinarily, the burden of proof is not particularly important since both parties will adduce positive evidence on a given issue and the tribunal will decide the point by reference to the evidence it finds most persuasive. Determination of a given issue in those circumstances is likely to be the same whichever party has the burden of proof. Here, ICI was seeking a significant repayment, but in circumstances where a lot of detail from the project was no longer available.

The judge held at [84] that the burden of proof was on ICI.

Secondly, the case is possibly of interest simply because there are relatively few final account type disputes which reach the High Court, let alone cases under the NEC3 form.

In fact, once the judge had determined that ICI had little or no evidential basis for its attack on MMT's account, it was more or less inevitable that each and every individual item of dispute, and there were many, would be decided in MMT's favour.

In the event, the court found that the correct value of MMT's account was £22,018,084, so that MMT had in fact been *under*paid by £268,425. Therefore ICI's hard won right to challenge the notified sum did not quite have the consequence it had hoped for.

An interesting hypothetical point to consider is whether an adjudicator (for example a QS adjudicator), expected to take the initiative in ascertaining the facts, would have reached the same conclusions.

Expert Evidence

It is the judge's comments about ICI's expert witnesses that are of most interest.

ICI's experts in both the liability trial and the quantum trial (that is to say: four experts in total), in each case made a number of elementary errors, with catastrophic results for the evidence of that expert and in turn for ICI's case.

These errors prompted strong criticism in the judgment. The judge also referred to similar criticisms of the experts made by Coulson J, as he then was, in *Bank of Ireland v Watts Group plc*,[5] and raised the hope that these apparently partisan experts were not part of "*a worrying trend*."

I refer to just two examples taken from the quantum judgment in *ICI v MMT*.

In his written report, ICI's QS expert expressed the opinion that, under the contract, some compensation events (but not all) should be valued by reference to the actual cost of labour incurred by MMT, rather than by reference to the parties' agreed labour rates (which he accepted should be used for assessing the other compensation events). That opinion as expert evidence was misguided:

(1) in circumstances where the same contractual regime applied to all compensation events, there was no conceivable quantity surveying or other reason to value some (high value) compensation events in a way that was more favourable to ICI;

(2) in any event, the meaning of the contract was a matter for the judge, and/or a matter for legal submission;

(3) at the time of expressing this view in his report, the expert did not have a clear understanding of what documents were incorporated into the contract (in circumstances where the invitation to tender, which was a contract document, made clear what was intended); further:

(a) the expert nonetheless expressed a strong view, albeit as a quantity surveyor, as to how the contract should be applied;

(b) during his oral evidence (but, it would seem, not at any earlier stage) he sought clarification of what documents were incorporated into the contract, yet his written report did not refer to any such limitation in his understanding: in short, he had expressed a firm view as to how the contract should be understood, without first ascertaining what documents the contract consisted of;

(4) the ICI expert compounded these errors by asserting that MMT would enjoy a "*windfall*" if it were paid by reference to the agreed contractual rates rather than actual cost, i.e. a pejorative and unnecessary comment.[6]

"Any advocate or litigator dealing with an expert will use the internet to see their track record: to see whether they have given evidence before, and if so how they fared."

The second example I refer to is in relation to ICI's accountancy expert, who addressed MMT's counterclaim.

The ICI accountancy expert reported that his opposite number, that is to say MMT's accountancy expert, had agreed with him that she did not have information from MMT necessary for her to be able to discharge her function as an expert.[7]

4 See the judgment at [103]

5 [2017] EWHC 1668 (TCC)

6 See the judgment at [183] to [186].

7 See the judgment at [223] and [224].

In circumstances where MMT's expert had been instructed for nearly a year, that was a potentially damning statement, if correct: it implied that she was incompetent, that she had failed to alert her client to the need for more information from an early stage, and that MMT had failed to provide the information that its own expert now agreed was essential for her task.

In fact the statement was incorrect, and indeed MMT's expert had refused to agree that she lacked the necessary information when that statement had been proposed to her by ICI's expert. ICI's expert had therefore seriously misrepresented the position.

There were various other examples, and yet more examples in the liability trial in 2017.

In each case these ICI experts gave evidence that was in some way unfair upon the other party (MMT). The judge concluded, at [236]

> *"It is a matter of concern that in a TCC case, with the sums at stake exceeding 10 million, there should be such a preponderance of partisan experts, all called by the same party."*

Judgments of the High Court are all reported, in the sense that they inevitably appear on Westlaw, Bailii, Lexis, and Lawtel. Judgments in the TCC, on any topic of substance, are also likely to be reported in the BLR and Con LR, as well as being the subject of articles on the internet and general industry discussion. Any advocate or litigator dealing with an expert will use the internet to see their track record: to see whether they have given evidence before, and if so how they fared.

In short, judicial criticism of this kind is highly visible to the world.

It is now being suggested that certain categories of expert witness (e.g. some quantity surveyors), are increasingly reluctant to appear in the TCC, against the possibility of attracting judicial criticism of this kind. Obviously there is no equivalent risk for an expert who gives evidence exclusively in adjudication and/or arbitration.

To a lawyer this reluctance seems bizarre, for two reasons:

(1) giving evidence in the High Court is surely an opportunity for an expert to perform a good job in a relatively public environment, just as it is for an advocate or other litigator; an expert witness who has impressed a High Court judge in the face of cross examination on issues within their field of expertise has genuine credibility;

(2) surely the way for a competent expert to avoid judicial criticism is to ensure that they discharge their duties properly and in accordance with the spirit and letter of the CPR, rather than refusing to accept any instructions that involve giving evidence in court.

It is not clear how these expert evidence disasters come about: whether pressure is put on the expert by their client at the report drafting stage, or whether the expert is simply keen to make comments that they think might assist the client (but which in practice then have precisely the opposite effect). A possible implication is that in some cases an expert quantity surveyor will not be instructed unless he or she is prepared to act as *de facto* advocate for their client's cause.

It is essential that, when drafting their report, an expert asks him or herself: is this the evidence I would be giving if I were instructed by the other side, and would I be presenting it in this language, assuming the same information were available?

If the answer to that question is *"possibly not"* then *prima facie* something has gone wrong with the process.