

# How to Prove Your Case Lessons from the Bombay Palace

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# Castle Trustee Limited v Bombay Palace Restaurant Limited [2018] EWHC 1602 (TCC)



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## ➤ 2 Hyde Park Square:

- Plan to re-develop residential flats above the Bombay Palace
- Developer needed the restaurant to close so that services passing through could be upgraded
- Deal done to:
  - compensate restaurant for closure (£100k plus £40k per week)
  - pay for refurbishment works according to a specification

## ➤ Dispute:

- £1.1m: 52 items of additional work / variations
- 18.5 week extension of time (closure compensation of £730k)

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# The issues were relatively straight-forward but a procedurally problematic case



## ➤ Issues:

- Were additional works or variations instructed?
- Was restaurant closed because of the development or the restaurant works?

## ➤ Procedure:

- Adjudication proceedings:
  - Restaurant won on closure compensation
  - Claimant won 50% of variation / additional works claims
- Bombay Palace went dormant and did not serve witness evidence or expert evidence as ordered
- Claimant attempted to prevent BP from serving evidence late but court permitted it
- Parties had 2 weeks to file evidence
- 1st trial adjourned – insufficient time as nothing agreed (1 week to 2 weeks)

# The evidence served was thin...and was severely criticised



## ➤ *Witnesses of fact:*

- *Claimant:*
  - *Mr Harris - covered 8 of the 50+ variations and no evidence on delay*
  - *Claimant in effect delegated issues of fact to quantum expert – could only attempt to prove its case on the documents*
- *Defendant:*
  - *Mr Brown - covered all variations with a paragraph each and some evidence on delay*
  - *Dealt with matters so superficially that his evidence struggled to survive contact with the barest of detail in the available documents*

# The witness evidence was poor...and was severely criticised



## ➤ Jefford J on the Witness evidence:

“Each party criticised the other for failing to adduce relevant evidence from material or potentially material witnesses and lack of proof of Liberty's case was a primary theme of BP's submissions. I shall deal with those submissions on an item by item basis. It is plainly open to me to have regard to the contemporaneous documentation as part of the relevant evidence but I bear in mind that I am doing so without the benefit in many instances of the evidence of those responsible for the documents.

“In any event, neither Mr Harris nor Mr Brown was a satisfactory witness. They were, of course, giving evidence about events that had happened 6 or more years earlier and, in some instances, going back nearly a decade. Both may have been tempted to reconstruct what had happened, putting the best gloss on the documents available to them. But, in my view, they both went far further than that. They were both too inclined to act as advocates not witnesses and to purport to give evidence about what others had said or done or meant which they were not in a position to give evidence about. On occasion they both showed themselves unwilling or unable to give a simple answer to a straightforward question. I approach their evidence with suitable caution.”

# The programming evidence served was poor...and was severely criticised



- *Claimant's Delay Report from Mr Bordoli - "In a case of fairly remarkable reports, this was the most extraordinary."*
- It became clear that Mr Bordoli's report had been prepared over a few days - he had been given an expert report prepared by a colleague for the adjudication. His report stated:

*"I have considered Mr Burley's report, the document he has referred to, the methodology he has adopted and the conclusions he has reached. I agree with Mr Burley's approach and have independently reached the same conclusions in respect of cause(s) of delay to the Building Programme and the extent of such delays. Sever limitations of time, the requirement for me to submit my report by Friday 23 June [2017] and as a proportionate response I have adopted the findings of Mr Burley ....".*

- What Mr Bordoli then did was reproduce Mr Burley's report in its entirety and without any material amendment. The Judge was unconvinced:

*"...it is right that the Court should adopt a healthy scepticism in a case such as this where one programming expert adopts wholesale the views of another. Where it is done, as Mr Bordoli expressly stated it had been, because of pressure of time, it must call into question the extent of the expert's investigations and the care taken in forming his opinions."*



# The programming evidence served was poor...and was severely criticised



## ➤ *Mrs Justice Jefford's conclusion:*

“In fact, in this case, it seemed to me that Mr Bordoli had formed no independent view at all. I am frankly at a loss to understand on what basis he could possibly have formed such a view. Quite extraordinarily, Mr Bordoli had not even seen, and had apparently not thought it relevant to see, the parties' pleaded cases or any disclosure. He had, therefore, paid scant regard to BP's case – indeed he did not have BP's pleaded case or evidence before him. He had however been provided with (and to some extent relied upon) Liberty's witness statements in the adjudication – or at least Mr Burley had - even though no statements from these witnesses had been served in the litigation and their evidence was not before me. I fail to see how, in those circumstances, Mr Bordoli can have thought that he was providing the court with an independent view.

“...I place no reliance on Mr Bordoli's evidence as such. It was not expert evidence; it did not comply with the Court's Order; Mr Bordoli had not acted in accordance with CPR Part 35; and it could patently not stand as factual evidence.”

# But out of this emerged useful guidance on the use of expert programming evidence



## ➤ Mrs Justice Jefford clarified the limited circumstances in which the TCC valued

“[The] directions had explicitly limited such evidence to evidence that truly involved the exercise of expertise in programming. .... On one view the cause of delay is entirely a matter of fact but expert evidence may be admissible and may assist the court in a number of ways. For example, there may be a complex programme for the works produced using programming software. There may be issues as to the validity of a baseline programme which involves expertise either in programming as such or in the construction process. Assessment of the impact of a factual event on the programme may involve running or manipulating or adjusting the programme which itself involves an expertise (not to mention software) which the court does not possess. The programme may have been adjusted on numerous occasions over the course of a lengthy project and that itself may be the subject of expert opinion. The programme and impacts of events on the programme may involve analysis of logic links and dependencies which again may involve expertise in programming and/or the construction process.

The present case is not one that involves a particularly complex construction process or sequence; there were no computer generated programmes for the works to be manipulated; and, so far as I am aware, no programmers at work on the project.

I infer from [the directions that the previous judge] regarded this case as one in which there were unlikely to be any particularly complex programming issues and any issues relating to delay were likely to be questions of fact, a view with which I wholeheartedly agree.

In any event, BP did not adduce any such evidence.”

# The quantum evidence served was also criticised



## ➤ Claimant's Quantum Evidence: Report from Ms Allen

“On quantum, Liberty relied on the evidence of Ms Allen. I have no doubt that Ms Allen was an independent and honest witness doing her best to assist the Court. She was open and helpful in giving her oral evidence. I make it clear that, in many respects, she was an impressive witness and that I have no personal criticism of her. She had, however, served a report which extended to approximately 8 lever arch files of material. The reason her report was so lengthy was that on the Scott Schedule items she had set out what was, in effect, a narrative addressing (i) the basis on which works were said to be additional, (ii) what works were said to be additional and (iii) what works fell within the scope of the Agreement, as well as the valuation of (ii) and (iii). BP understandably expressed concern that Ms Allen was attempting to give factual evidence, although in due course Mr Williamson QC recognised that what Ms Allen may have been seeking to do was work through her own understanding of the items. Having said that, in the joint statement of the experts, Ms Allen recorded that she had been asked to provide a view as to whether items were to be considered as variations or not. In any event, Ms Allen's report could not be evidence of fact although it may have provided assistance to both parties and the Court in identifying relevant documents.”

# Our quantum evidence was thin...and was entirely ignored



## ➤ Defendant's Quantum Evidence: Report from Dr Champion

"Dr Champion recited his instructions as being "to assess the value of the claimed variations on a figures-as-figures basis". His report said that he had adopted the following approach:

*"In order to assess the value, if any, of a change it is necessary to understand (a) what it is the contractor was originally obliged to carry out under the agreement; (b) the work in fact carried out; (c) how or why the change arose and (d) any matters agreed between the parties as to the basis upon which the original work or changes were to be carried out. Hence, ordinarily it would not be sufficient to identify an additional amount incurred. ...."*

All of that is plainly right and makes it clear that Dr Champion fully understood the issues that arose and the significance, or otherwise, of identifying the additional amount incurred."

Dr Champion had prepared his report in a rush and with limited information. He prepared a report in which he valued as much as he could (which was very little).

"I have no doubt that in doing this Dr Champion was trying to do his best in what were challenging circumstances not of his making. However, it had the result that what was before the Court was a report that dealt at a very high level with the quantum issues, did not set out clearly or at all the basis for Dr Champion's assessments, and which cannot fully have taken into account all the available evidence, including the documentary evidence. I attach very little weight to it."

# Approach of the Court to the variation claims



- Having dismissed the reliability or admissibility of most of the evidence, the Judge decided to do the best she could with the contemporaneous, documentary evidence.
- Not happy about it:
  - Scott Schedule cases, in which the parties and the Court work their way, item by item, through claims or defects or whatever it may be, are comparatively rare in the Technology and Construction Court, despite the origins and the name of the Scott Schedule lying in what was formerly Official Referees' Business. Such cases can be inordinately time-consuming and the Court, with the assistance of the parties, will always try to find ways to focus the arguments and reduce the scope of the issues. Unfortunately, in this case, by the time the matter came to trial, virtually every item of 52 numbered items was still largely in issue and it is necessary in this judgment to address each item separately.
- Useful guidance on the Common law position:
  - “...where one party requests another to carry out additional work, the expectation is that some reasonable sum will be paid for that work. There was no variations provision in the Agreement but that did not mean that it was not the contemplation of the parties that there would be any additional works which were not within the scope of the Agreement. If such work was requested by BP, then Liberty was entitled to be paid for it either pursuant to an implied term of the Agreement or pursuant to an entitlement that arose outside the Agreement on a quantum meruit basis.” §78

# Although the judge did a lot of work, she simply refused confused or incomplete claims



Water storage claim: “This is unfortunately another item on which the quantum claimed appears to be utterly confused. ... Despite the apparent agreement of the experts, I am unable to accept this figure...”

Ceiling Coffers: There was no evidence of fact on this issue from Liberty. ... All of this paints a completely obscure image of what further work was done and why and on this issue I find that Liberty has failed to prove its case.

Kitchen Wall Cladding: Liberty adduced no factual evidence to support that case or to establish the request for additional work relied upon. **Instead Liberty relies heavily on Mr Brown's evidence in cross-examination.** ... it went some way to establishing some of those facts but it fell short ... the evidence was confusing but it did not establish any liability.

# The Judge also constrained C to its pleaded case and was unwilling to prolong the agony



## ➤ Constrained by pleaded case:

- Kitchen Canopy: 2 pleaded causes but no way to sub-divide the quantum of the claim, but only one the liability of D. *“...It seemed to be suggested to Mr Brown in cross-examination that the additional work might be solely attributable to the increase in air extract capacity [i.e. not the pleaded case]. It seems to me far too late to be advancing a new case ....That leaves Liberty with the difficulty that, whilst there might be a claim in principle, I have no evidence before me on which I can assess what sum might be reasonable for the ductwork for which BP accepts liability. ... the claiming party ought to have identified its discrete claims or given the Court a basis on which to apportion cost... I, therefore, find that Liberty has failed to prove the sum claimed and on this item I find in BP's favour.*

## ➤ Unlikely to get a second bite at the cherry:

- BP very fairly suggest that that might still be a matter for agreement between the experts. I do not, however, consider it appropriate to seek further evidence at this stage. ... **to invite further submissions after trial is not to be encouraged.**

# As Defendant we were given a little more latitude



- The Court will treat any new case with suspicion:
  - Ductwork: “By the time of trial, there was a considerable shift in BP's case... I note that shift in case because it means that I approach BP's case with some degree of circumspection. ”
- But it will not be terminal:
  - Extract works: “Whilst I hesitate to find in BP's favour on a matter that is unpleaded, it would, in my judgement, be wholly artificial to find that Lockhart's design was the cause of these changes when that was patently not the case and on this item I find in favour of BP.”
- The Court is alive to attempts by D to deliberately confuse:
  - Boilers: “BP submits that this item is one of the most factually complex claims. In my view, BP is simply seeking to obfuscate the issue...BP put Liberty to proof that the additional boiler works were caused by the redesign of the kitchen. The documentary evidence provides a body of proof.”



# Similarly on delay – there was no way the Judge could disentangle the mess



- I have found above that some (but not all) of the items referred to in this report were additional works requested or instructed by BP. Even as an extension of time claim, Liberty's evidence would not allow me to make any informed assessment of the extension of time due. As I have said above, Mr Bordoli ... did not present anything that might be described as an expert analysis of the effect of the carrying out of additional works and there was no factual evidence. Even if that were not the case, the causes of delay relied upon were not all BP additional works and there is no evidence or analysis which would allow me to disentangle the alleged effects of those items that I have found to be additional works and those that I have not.
- ...At a very high level, it might well be open to me to conclude that the carrying out of additional works must have caused the restaurant to be closed for longer than was originally anticipated but the evidence offers me no assistance in identifying when and for what period.
- Faced with these difficulties, Liberty sought to piece together a factual case as to the causes of delay in its closing submissions. This amounted in my view to a new case and one that was very much a matter of impression. It provided no sensible basis on which I could determine what might have caused delay in the completion of the Restaurant Works, still less what had caused the restaurant to be closed

## ➤ Adjudication:

- Variations £594,932.54
- Closure compensation: £732,142
- **Net sum due to Restaurant: £137,209.46**

## ➤ Litigation:

- Variations £409,442.25
- Closure compensation: £732,142
- **Net sum due to Restaurant: £322,699.75 (an additional £184,490.29)**

# What lessons can we learn from this case?



- Prove your case: “The Court is simply left in the position of having to do the best it can with the evidence before it.”
  - As claimant there is no excuse you prepare your case to meet the deadlines ordered – you should never lose control of the litigation
  - Keep it simple – confusion defeats good claims
  - There is less the Claimant’s advocates can do to improve the position at trial
  - More latitude as the defendant but you need to have your best case identified – it is a risk to develop your case at trial

# Model guidance is available!

## Cheat Sheet 1 – Witnesses of Fact:



- **Witness evidence (TCC Guide – Section 12)**
  - A witness statement is prepared with the assistance of lawyers but should set out an individual's recollections in their own words.
  - Witnesses are expected to clearly identify facts that are in their own knowledge and those which are information or belief from other sources.
  - A witness should present facts. A witness should not argue the case.
  - A witness should not make extensive reference to contemporaneous documents. Witnesses should provide explanations on relevant issues that may not be clear from the documents.
  - All witnesses must confirm that the facts stated in their statement are true to the best of their knowledge and belief.

# Model guidance is available!

## Cheat Sheet 2 – Expert Witnesses



- Civil Justice Council's Guidance for the instruction of Experts in Civil Claims (referred to in TCC Guide – Section 13)
  - When they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise (CPR 35.3).
  - Experts should be aware of the overriding objective that courts deal with cases justly and that they are under an obligation to assist the court in this respect.
  - Experts must provide opinions that are independent, regardless of the pressures of litigation.
  - Experts should confine their opinions to matters which lie within their expertise.
  - Experts should take into account all material facts before them. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.
  - Experts should inform those instructing them without delay of any change in their opinions on any material matter.

# Model guidance on evidence is available

## Cheat Sheet 3 – Delay and Disruption



### ➤ SCL Delay and Disruption Protocol

Method of Analysis	Analysis Type	Critical Path Determined	Delay Impact Determined	Requires
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	<ul style="list-style-type: none"> <li>Logic linked baseline programme.</li> <li>A selection of delay events to be modelled.</li> </ul>
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	<ul style="list-style-type: none"> <li>Logic linked baseline programme.</li> <li>Update programmes or progress information with which to update the baseline programme.</li> <li>A selection of delay events to be modelled.</li> </ul>
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> <li>Logic linked baseline programme.</li> <li>Update programmes or progress information with which to update the baseline programme.</li> </ul>
As-Planned versus As-Built Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	<ul style="list-style-type: none"> <li>Baseline programme.</li> <li>As-built data.</li> </ul>
Retrospective Longest Path Analysis	Effect & Cause	Retrospectively	Retrospectively	<ul style="list-style-type: none"> <li>Baseline Programme.</li> <li>As-built programme.</li> </ul>
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	<ul style="list-style-type: none"> <li>Logic linked as-built programme.</li> <li>A selection of delay events to be modelled.</li> </ul>

# Finally – think of the merits and do all you can to get your tribunal on side



- Reasonable conduct – get the Court on your side!
  - Adjudication
  - Listen and react to court directions
  - Reasonable approach to procedure
  - Compromise and limit issues

# Thank you for listening.

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