

## CLAIMANT PUNISHED FOR EXPERT'S FAILINGS

**The Message:** Parties to property disputes need to be sure as to the merits of their expert and his/her evidence before they commence costly proceedings.

**The Case:** A Claimant has not only lost a very substantial and costly case because its expert's evidence was not accepted but has been ordered to pay additional costs to the Defendant because of its expert's conduct (Balmoral Group Limited-v- Borealis (UK) Limited (17/10/2006)).

In a case which should sound a large warning to all experts in all fields, the High Court has seen fit to punish a party for the failings of its expert in relation to both the preparation of his expert's report and the evidence he gave at trial.

The Claimant lost a case in which it was claiming damages of more than £60 million in relation to allegedly defective fuel tanks. The Defendant argued that the conduct of the case was so unreasonable that the Claimant should be ordered to pay its costs on an indemnity basis, rather than on the standard basis that normally applies.

Costs on the indemnity basis can be particularly beneficial to a party as it entitles them to recover a higher percentage of their costs as, firstly, it places the onus on the paying party to establish that any costs are unreasonable and, secondly, the Court cannot disallow any costs on the ground of proportionality.

However, indemnity costs are only awarded very rarely. To be so punished, a party must have wrongly refused to accept a reasonable offer or behaved unreasonably in the conduct of the proceedings or in the making of particular allegations or in the quantification of its claim.

In this case, the Defendant relied on various grounds to obtain indemnity costs but the only one that succeeded related to the expert evidence. As is nearly always the case, expert evidence is crucial to the outcome of any litigation. Examples in the property field are valuation and boundary disputes and dilapidations and rent review proceedings or arbitrations.

The Judge held that there were considerable flaws in the approach and evidence of the Claimant's expert, Mr Clements. He had given contradictory evidence in other proceedings and had not revealed certain data relied on which, when finally disclosed, did not actually fully support his findings. His deficiencies always favoured his client and had hidden the weaknesses of the claim and led to considerable unnecessary costs being incurred.

The Claimant argued that, as experts nowadays owe a duty to the Court and not to their client, they should not have to bear any responsibility but the Judge held that a party could not distance itself from its expert in this way. It was far more fitting that the party who had chosen and instructed the expert should bear the consequences for his failings rather than the totally innocent other party.

The Judge, therefore, ordered the Claimant to pay on an indemnity basis the additional costs incurred by the Defendant as a result of the expert's conduct. As an expert witness generally enjoys immunity from any claim relating to the giving of expert evidence, it would appear unlikely that the Claimant will be unable to recover any of the costs it has incurred, or been held liable for, from the expert.

This case illustrates how important it is to select an expert carefully and to obtain detailed advice as to the merits of the case from that expert before he adopts the role of an expert witness and has the benefit of immunity from any claim. It should also drive home to experts that both their profession and reputation can be destroyed if they fail in their duties to give full and frank independent evidence to the Court.