



3 recent cases – Pausing for thought

By Steve Oates, Solicitor at the Birmingham office of Robin Simon LLP

Recent case law has shown just how diverse the duties placed on the modern professional can be, and the importance of knowing where potential pitfalls lie.

A recent case delivered unwelcome news to professionals acting as expert witnesses. The case of ***Phillips & Harland v Symes & Others v Phillips & Others [2004]*** has explored the possibility that an expert witness can be joined into legal proceedings as a Respondent for costs purposes. This preliminary issue arose out of an expert Psychiatrist's report alleging mental incapacity on behalf of a Defendant who was subsequently found to have mental capacity.

The Court stated that an expert witness had an objective duty to comply with the duties imposed upon him under the Civil Procedure Rules (CPR). The Court then examined in what circumstances a Third Party Costs Order could be made against somebody as a result of the manner in which he gave evidence as a witness:-

- The witness had to have adequate warning that the evidence they gave could lead to a Costs Application against them.
- Whether a person should be warned and how, was approached by reference to individual circumstances.
- This represented a scale, at which one end stood legal representatives who had no need of such a warning and at the other end lay witnesses, where the Court has to ensure that cross examination is not used as a precursor for subsequent costs applications.
- In the middle stood the expert witness, where the only warning required was self evident under the CPR and in the statement of truth signed by all expert witnesses.
- It was expected that an expert would be alive to the possible consequences of giving evidence and the duty owed to the Court.

For an expert witness to be joined for costs purposes however did require a high level of proof to be established of gross dereliction of duty or a flagrant, reckless disregard of his duties to the court.

A line has to be drawn between last minute negotiations and unilateral amendments that amount to unfair dealing. In ***George Wimpy UK Limited v VI Components Limited [2004]*** a Purchaser sought rectification of a contract for the purchase of development land from the Defendant Vendor. Under the contract the Vendor agreed to sell the land for an initial purchase price and a deferred purchase price. This deferred part was negotiated as a formula that would vary depending upon certain factors. However, shortly before the contract was signed, an employee of the Purchaser was faxed an amended formula by a Surveyor

acting for the Vendor. The employee accepted the formula but the Purchaser was unaware of the amendment. The Purchaser argued that the omission was a mistake that warranted rectification and that the Vendor had wilfully "shut its eyes to the obvious" or wilfully failed to ask such questions as an honest and reasonable man would ask in such circumstances.

The Court found that the evidence of the Surveyor and director of the Vendor could not be relied upon and that the Surveyor did not discuss the omission with the Purchaser's employee or alert them in any way to its absence. Both the Director and the Surveyor should at least have suspected that the employee and others at the Purchaser had made a mistake.

The law does not rule out the possibility of a party putting forward a proposal at any stage before final commitment is reached between parties. However, in this case, a consensus in principle had been reached and there was no reason for the Vendor to suspect that the Purchaser should, at that late stage, wish to voluntarily agree to amend the formula to the substantial benefit of the Vendor. In the Court's opinion, an honest and reasonable man would have drawn attention to the omission when it had seemingly gone unnoticed by the employee of the Purchaser. It was this failure that caused the crossing of the line from negotiation to unfair dealing.

In the Case of ***Montlake & Others v Lambert Smith Hampton Group Ltd [2004]***, the Claimant Trustees of a Rugby Club claimed damages for breach of contract and negligence arising out of a 1996 valuation of the Club's ground by the Defendant. As Rugby became a professional game, the Club's assets and liabilities including the ground were transferred to a company. The ground was transferred at the Surveyors 1996 valuation of £832,500. In 1999, the ground was sold by the company with the benefit of outline planning permission for residential development for £8.9 million. The Club claimed the surveyors were negligent in making their 1996 valuation, as they failed to make proper enquiries and to appreciate the prospects of obtaining residential planning permission leading to a substantial undervaluation of the ground. Although the valuation was initially made for the purposes of Capital Gains Tax, such a valuation assumed a contemplated disposal and required an open market valuation including development prospects of any kind. The Court considered that it was at least the purpose of the 1996 valuation to enable the Club to decide whether, and if so at what value, to dispose of the ground and the Surveyors should have or did know that it would be relied upon for that purpose. The Surveyors were therefore found negligent. It was decided by the Court that a fair assessment of loss was the difference between the valuation of £832,500 and the "non negligent" 1996 valuation of £3.25 million, plus interest from the end of 1996 as this was the date that the Club would have realised that sum.

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Robin Simon LLP 37a Waterloo Street, Birmingham B2 5TJ
Philip Steel T +44 (0)870 839 0950 F +44 (0)870 839 0951 E philip.steel@robinsimonllp.com



**ROBIN
SIMON
LLP**