



John K Daly & Co Ltd.

CHARTERED QUANTITY SURVEYORS

'Hot-tubbing' gamble or a Single Joint Expert for a Set Fee?

Ever since the '*Jones v Kaney case*' which scuppered the immunity of the Expert, the stakes just got higher and quite rightly made the role of the '*hired gun*' untenable. That being said, the new vogue to put the experts in the witness box at the same time brings a different pressure for the expert who may be excellent technically but not a slick and accomplished speaker, although an experienced neutral ought to be able to see through a '*bluffer*' and/or '*bully*'.

Whilst it may be necessary for both sides to have their own expert[s] clearly were they not on their game this could have far reaching consequences as to the outcome overall as very often it will come down to what evidence the neutral preferred were it inconclusive.

For in my experience when experts were cross-examined separately, I was never comfortable that once the witness had given evidence they were allowed to remain present at the tribunal whilst other later witnesses gave evidence. So at least that aspect would be avoided or not taken advantage of although I haven't seen this being done first hand myself.

Then looking at the disputes arena currently, protagonists are faced with a myriad of choice although mandatory Adjudication is still the most popular, although timescales and costs are often disproportionate to that when the Construction Act was first brought in to achieve for what is only an interim binding process and to free up cash wrongly withheld.

More and more complex cases and arguments are brought in front of Adjudicator's and then with the lawyer's hell bent on trying to trip them up, and often leading to an enforcement being necessary and/or an Appeal as to the decision being overturned for lack of jurisdiction.

Although trying to get parties to agree to anything once they're in dispute is virtually impossible as not wishing to display a weakness, and the reason Mediation is

rarely used other than when part of a Litigation (and is mandatory in relation to costs later on) – but I'll not wander in to that area here.

As normally any expert engagement is via a solicitor in either Litigation or Arbitration, but this does not have to be the case, although many experts prefer this.

Recently I was approached by a solicitor and asked if I could give them a guide as to my fee to act as a Single Joint Expert and for which they were representing the Claimants, and I duly obliged but heard nothing further and assumed the Defendants thinking I were a '*hired gun*' or would show favour to the Claimants.

Then nearly 9 months later and to my surprise, they accepted my appointment and the parties set about agreeing the scope of the matter in dispute they wanted me to report on, and was to be for the benefit of the County Court in Central London for a matter in dispute of c£70k. I then gave a timescale as they knew my fees already and after some haggling between them they set a timescale for me to produce my report, and the parties agreed to pay me 50/50 and for which they were jointly and severally liable .

The parties in dispute were an electrical subcontractor and a main contractor working on a major retail store refurbishment, and I understand this was a role out programme nationally for this high street brand. Although my report was for one store in particular but references were made to standard rates and outputs such that the inference I made was this being a '*test case*'.

Once I got into the process and detail, my communications with the parties had similarities with my Arbitrator and Adjudicator experiences in the past, and in what became more like making a decision in a '*documents only*' Arbitration or Expert Determination – although both of which would have been binding not like here.

So although the process was along these lines, like Mediation the outcome would be subject to agreement by the parties or voluntary. One can only conclude that the parties failed at Mediation and were advised to try the Single Joint Expert route in view of the likely costs should that not suit, although interestingly the Judge's order made reference to separate ones for each party.

Despite the apparent *'truce'* between the parties to allow me to do my job, the lawyers representing them were trying to trip me up as to *'bias or perceived bias'* and the *'natural justice'* challenges were made throughout and the added pressure of a *'pre-trial'* review being imminent too.

Then once my report had been issued on time both sides then tried to *'de-rail'* it to their parties' advantage, and which reminded me of an Arbitration under Scots Law where the parties are given the opportunity to comment on the draft before the Final [decision in that case] one.

There were certain procedural matters to comply with for the Court after I had produced my report for compliance, and again which the lawyers tried to influence although eventually good sense prevailed and the judge issued a consent order based on my report further to the parties' agreement.

Both parties paid promptly and interestingly the Defendants thanked me for my report and as it's usually the Claimants that come out on top in my experience certainly in Adjudication, maybe I had come to an equitable decision as was my quest.

Surprisingly no meetings held or requested, and which might have been a development that could have been interesting although in essence the dispute mainly revolved around *'rates and prices'*.

Clearly, if this were a taster for other similar disputes between the same parties my fee of 7% of that in dispute to decide it, becomes very efficient when rolled out across several schemes and a third of that likely should the case not have settled before court.

How would this case have fared in Adjudication I wonder, as the process was very similar and most likely would have resulted in necessary enforcement by the Defendants, and so again SJEW is probably cheaper and certainly quicker in the right circumstances – although the introduction here was protracted for reasons unknown.

John K Daly – Director of John K Daly & Co Ltd

Chartered Arbitrator CI Arb Panel Member, Panel Registered Adjudicator and Expert Witness

Email: info@johnkdaly.co.uk

Tel: 0117 911 6283

www.johnkdaly.co.uk
