ANDREW AGATHANGELOU – DIALES EXPERT EXPOSES THE VARIED OUTCOMES OF ALTERNATIVE DELAY ANALYSIS METHODOLOGIES, HOW TWO EXPERTS CAN REACH SUCH DEFINITIVE, YET OPPOSITE CONCLUSIONS, AND HOW TO ADDRESS THIS PHENOMENON.

"Alternative Facts"

'Alternative Facts'. So said Kellyanne Conway, Counselor to the US President, during a 'Meet the Press' interview on 22 January 2017, in which she defended the then White House Press Secretary, Sean Spicer's, false statement about attendance levels at Donald Trump's inauguration as President of the United States.

In a recent adjudication, where Diales represented the employer, the contractor's delay expert intimated that we had provided 'Alternative Facts' when interrogating the programme and preparing our expert report.

He essentially stated that we should have reached the same conclusions as him during our assessment, on the basis that both experts used the same baseline programme. He further intimated that, as Diales' conclusions were different from his own, they must be factually inaccurate.

It is a curious position to take, because both parties in any dispute could, in all likelihood, argue that the other expert's report is factually inaccurate, on the basis that the findings are different to their own, despite having access to the same factual evidence. Such arguments are not particularly helpful to the tribunal, because such a statement could apply equally to both experts.

The fact that experts arrive at different conclusions, despite having access to the same contemporaneous information, is a common one. This particularly arises with regard to assessments of delay, because the delay experts are interpreting the factual evidence provided, not producing factual evidence in itself. Moreover, the interpretation of that factual evidence can vary, depending on a range of factors, not least the delay analysis methodology used and the experience of the expert in question.

In such circumstances, delay experts should consider outlining a range of possible answers as to both the cause of delay, and to the extent of delay associated with particular events, rather than being singular and definitive in their stance. Indeed, such an approach could potentially be viewed more favourably by adjudicators and arbitrators because it gives them flexibility in deciding the case in hand, rather than being forced to decide between polar opposite opinions.

That said, providing a range of possible outcomes might be difficult for the instructing lawyer or client to accept, and this would need to be carefully explained. With significant sums of money reliant upon the outcome of the results of the analysis, both parties in dispute will have strongly held views that are definitive, rather than based upon probabilities. Of course, in all of this, the expert should bear in mind that it is their over-riding obligation to be independent and impartial, regardless of who they have been appointed by. An expert's duty is to the court or tribunal, and not to their client.

Back to our case. As the adjudication progressed, it transpired that the contractor's delay expert had not undertaken any independent analysis of his own. Instead he had relied entirely on the programme analysis provided by the contractor who had appointed him.

He had assumed that the programme analysis provided was 'factual evidence', and fully adopted this version of the facts without undertaking any sense checks as to the results or findings. He had relied (either knowingly or unwittingly) on the contractor's 'Alternative Facts' to reach his conclusions.

One would expect that two experts on opposing sides, following the guidance above and working to the same set of factual evidence, would come to broadly the same conclusions. This does not often appear to be the case. This was highlighted in the Society for Construction Law 'Great Debate' held on the 18 October 2005. Four different experts conducted four different types of analysis and, unsurprisingly, arrived at four different conclusions. Having attended this event, the differences appeared to be a result of their respective analyses, rather than differing interpretation of the factual evidence.

This raises the question of whether the courts and tribunals should be more prescriptive regarding the method of analysis and approach to be adopted by both experts. At a recent event held at the London office of Diales, a leading QC stated that in his experience, "it is better for the two opposing experts to meet privately before exchanging their respective reports, without the pressure of their clients and lawyers being present". In the QC's experience, this frequently considerably reduced the differences between the experts, and made the job of the tribunal easier by doing so.

Perhaps the way forward is for meetings between the experts to be more prescriptive in adjudications. Currently, adjudication is not subject to CPR 35. ■

GUIDANCE FOR EXPERTS

Guidance as to the way that independent experts should behave was set out in Ikerian Reefer [1993], in which Judge Creswell stated:

"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate."

Guidance is also found within Civil Procedure Rules (CPR) published by the Ministry of Justice. Part 35.3 of these rules state:

(1) It is the duty of experts to help the court on matters within their expertise.
(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.