



EXPECT THE BEST

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# Why Court is still an Option The Importance of Experts in Construction Disputes

Presented by :

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- ▶ *“I was only ruined but twice... once when I lost a lawsuit...*
  - ▶ *... and once when I won!”*
  - ▶ *Mark Twain*

## ▶ Introduction

- ▶ Making dispute resolution work for you
  - ▶ litigation, its not such a bad thing?
  - ▶ alternatives to litigation
    - ▶ why sue?
    - ▶ you have a lien – USE IT OR LOSE IT
    - ▶ no salvaging the relationship

- ▶ **either a good relationship or a bad relationship**
  - ▶ good relationship
    - ▶ common goal to complete
  - ▶ bad relationship
    - ▶ resort to court
    - ▶ no longer performing/paying

- ▶ **Exchanging Offers Before Process Starts**
  - ▶ when to do it and when not to
  - ▶ first reasonable offer anchors the settlement range
  - ▶ reasonable offer may attract positive costs consequences
  - ▶ warning – IT MAY BE ACCEPTED!

- ▶ **What are the Expectations?**
  - ▶ have you been through the process before?
  - ▶ prepare with a discussion
  - ▶ mock mediation or arbitration
  - ▶ costs/time expectations (convert it from metric)

- ▶ **Court has a great deal of suffering on both sides**
  - ▶ damaged reputations (disputes are all public)
  - ▶ damaged relationships
  - ▶ alternative?
    - ▶ “compromise for completion”
    - ▶ “is there life after a failed project?”

- ▶ **CCDC Part 8 Dispute Resolution clauses**
  - ▶ anyone used their project mediator?
    - ▶ appointed in advance within the time contemplated by the agreement
  - ▶ Use CCDC 40 – Rules for Mediation and Arbitration of Construction Disputes (2005)



## ▶ Experts

- ▶ Usurp the role of the judge by giving opinions
- ▶ Rule 53 must be impartial and unbiased
- ▶ formal acknowledgment duty first to the court
- ▶ can't be an advocate/champion for the client

important trends and issues surrounding  
the use of expert evidence

- ▶ **court plays a gatekeeper function  
(try to avoid battle of the experts)**
- ▶ **changing roles for expert witnesses**
- ▶ **new Rules of Civil Procedure**

- ▶ “The use and misuse of experts reports is in part a by product of the adversarial system. The theory has always been that a trial of fiercely contending positions will ultimately reveal the truth, a theory not unlike Adam Smith’s vision of the Invisible Hand, which guides its warring participants towards production of the optimal result. In courtrooms, as well as in the investment banking business the thought has belatedly occurred to people that the Invisible Hand has its limitations as a control mechanism. As a result, a number of reforms have been tried, with mixed success.”

## ▶ Conclusions

- ▶ always always always use contract to control risk
  - ▶ draft the contract with possibility of disputes in mind
  - ▶ KYC - KNOW YOUR CONTRACT
- ▶ include dispute resolution mechanisms as part of your risk management regime
- ▶ *“dispute resolution can be good, fast and cheap... pick any two”*