In a typical construction dispute sufficient tribunal would dismiss the case. If there is insufficient evidence, then adduce sufficient evidence to persuade either party. The first hurdle in any contested claim is to meet the burden of proof. So what then is the difference?

Burden of Adducing Evidence

The first hurdle in any contested claim is to adduce sufficient evidence to persuade either the court or arbitral tribunal that there is a case to answer. If there is insufficient evidence, then there is no case to answer and the court or tribunal will dismiss the case.

In a typical construction dispute sufficient evidence might include:

- oral evidence of statements made by the parties and their witnesses, including technical experts in quantum, programming and the like;
- documentary evidence produced for inspection by the court or arbitral tribunal such as correspondence, minutes of meetings, photographs, drawings, plans, instructions, labour returns, invoices and other contemporaneous records; and
- real evidence such as samples and other material objects produced for inspection by the court or arbitral tribunal.

The burden of adducing such evidence in a civil case is generally borne by the party making a statement or bearing the burden of proof.

Burden of Proof

The burden of proof in a civil case will normally lie with the party making the claim or defence to adduce sufficient evidence for the court or tribunal to find in their favour. In a criminal trial, the burden of proof is borne by the prosecution. If a party or the prosecution does not adduce sufficient evidence to support their case then they will lose the issue. Success, therefore, depends on evidence or proof.

What then is an appropriate standard of proof that a party has to satisfy?

Standard of Proof

In a criminal case, the prosecution is required to satisfy the jury that the defendant’s guilt is “beyond reasonable doubt.”

However, in civil cases, the standard of proof is much lower as a court or tribunal makes its decision on a “balance of probabilities”.

The difference between the two standards was summarised by Denning J in the English case of Miller v Minister of Pensions [1947] 2 All ER 372.

Taking first the standard of proof to convict in a criminal case, Denning had this to say: “That degree is well settled. It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.”

Construction Disputes

Applying these principles to a construction dispute, a court or arbitral tribunal is left with having heard the evidence presented before them to weigh up, on a balance of probabilities, the rival arguments on the facts, or law, and decide which argument is preferred. This is essentially a case of finding one version of the facts more likely than the other versions.

When deciding issues of fact, the outcome will likely be influenced by the probate value or weight attached by the court or arbitral tribunal to the evidence adduced by the parties. Some types of evidence will bear more weight than others (e.g. first hand oral testimony is of higher weight than hearsay or second hand evidence).

In construction disputes, it is not uncommon to find witnesses of fact with conflicting accounts of events. These conflicts may be founded on honest statements that are confused by recollections that have faded over time or, alternatively, straightforward misunderstandings of the truth or mis-appreciation of a situation.

The same too can be said of experts who may develop different opinions arising out of genuine beliefs or because the expert has lost sight of objectivity. Either way, it is all too common for complex issues to become clouded by conflicting accounts of events and opinions.

So where does this leave the litigants. Well, a court or arbitral tribunal is far more likely to rely on contemporaneous documents recorded by people at the time of an event than on recollections made in oral evidence some years after the event. The more contemporaneous records that support a party’s case, the more reliable it is likely to appear before a court or arbitral tribunal.

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