

Reliable expert evidence: lessons from the courts

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Introduction: reliable expert evidence

- Expert evidence crucial for many construction disputes
- Instructing the right expert
- Expert duties:
 - *Ikarian Reefer*
 - CPR Part 35
- Recent court judgments
- Common pitfalls
- Expert shopping

Instructing the right expert

Expert advisor v expert witness:

- an expert adviser owes duties to the party instructing him not to the court
 - However, it will likely be to the client's benefit that the adviser complies with expert duties so as to provide a realistic assessment of the strength of the client's position
- instructions to an expert adviser are generally privileged
- an expert advisor's opinion may attract legal advice privilege
- the fees incurred in instructing an expert advisor are not generally recoverable from the other party in the event that the party wins
- if at some stage in the proceedings it is deemed necessary to instruct the expert advisor as the expert witness then it is prudent to send new instructions to the expert at that stage.

Instructing the right expert

- Expertise
- Ability to write well
- Experience of cross examination / hot tubbing
- Reputation
- Understanding of expert duties
- Cost / Junior resource?
- Availability
- Conflict?

Instructing the expert

- Why is compliance with experts' duties important?
 - Weight given to expert's opinion
 - Admissibility of evidence
- Importance of asking the right question:
 - What is the issue on which the Court will require expert assistance?

Expert duties: The Ikarian Reefer [1992] **FENWICK ELLIOTT**

“The duties and responsibilities of expert witnesses in civil cases include the following:

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** (*Whitehouse v. Jordan*, [1981] 1 W.L.R. 246 at p. 256, per Lord Wilberforce).

2. An expert witness should **provide independent assistance** to the Court by way of **objective unbiased opinion** in relation to **matters within his expertise** (see *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.*, [1987] 1 Lloyd’s Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should **never assume the role of an advocate**.

3. An expert witness should **state the facts or assumption upon which his opinion is based**. He should not omit to consider material facts which could detract from his concluded opinion (*Re J sup.*).

Expert duties: The Ikarian Reefer [1992] **FENWICK ELLIOTT** cont'd...

4. An expert witness should **make it clear when a particular question or issue falls outside his expertise.**

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an **indication that the opinion is no more than a provisional one** (*Re J sup.*). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that **qualification should be stated in the report** (*Derby & Co. Ltd. and Others v. Weldon and Others, The Times, Nov. 9, 1990 per Lord Justice Staughton*).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such **change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.**

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar **documents, these must be provided to the opposite party at the same time** as the exchange of reports (see 15.5 of the *Guide to Commercial Court Practice*)."

Experts – CPR 35: key requirements

- 35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings
- 35.3 Overriding duty to the court
- 35.4 Court permission required; court may specify the issues that the expert should address
- 35.9 Court can direct that information be provided to another party

See also TCC Court Guide:

“it is imperative that, wherever possible, the parties’ experts cooperate fully with one another.”

Experts' duties: CPR PD 35

Expert Evidence – General Requirements

- 2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
- 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
- 2.3 Experts should consider all material facts, including those which might detract from their opinions.
- 2.4 Experts should make it clear –
 - (a) when a question or issue falls outside their expertise; and
 - (b) when they are not able to reach a definite opinion, for example because they have insufficient information.
- 2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

Form and Content of an Expert's Report

3.2 An expert's report must:

(6) where there is a range of opinion on the matters dealt with in the report –

(a) summarise the range of opinions; and

(b) give reasons for the expert's own opinion;

3.3 Statement of truth

Insight from Sir Robert Akenhead (2014)

Key attributes for an expert

- Relevant expertise.
 - Jack of all trades?
 - No longer practising?
- Independence and impartiality.
 - The courts can spot a “hired gun”
- Willingness to concede.
- Getting the basics right:
 - get the facts right

What makes an expert independent?

Guidance for the Instruction of Experts in Civil Claims 2014 (referenced in PD 35, para 1):

*“11. Experts must provide opinions that are independent, regardless of the pressures of litigation. **A useful test of independence is that the expert would express the same opinion if given the same instructions by another party.** Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators.”*

Fraser J in *Beattie Passive Norse Ltd & Anr -v Canham Consulting Limited* [2021] EWHC 1116 (TCC):

“Mr Owain Evans gave me the impression that his evidence would have been exactly the same had he been instructed by the claimants. Mr Hughes, regrettably, did not, and in my judgment, he constantly sought to advance the claimants’ case at the expense of expert objectivity.”

The Governor & Company of the Bank of Ireland -v- Watts Group PLC [2017] EWHC 1667 (TCC)

1. The Bank's expert was not a "properly independent" witness.
2. The Bank was his principal client, providing the vast majority of his work (and fees).
3. His close relationship with the bank was evidenced in a number of ways including:
 - a. His unrealistic approach to the allegations;
 - b. His attempt to mislead the Court;
 - c. He applied the wrong test;**
 - d. His approach was thoroughly unreasonable; and
 - e. Many of his criticisms were so unpersuasive that the Bank declined to even plead them as allegations of professional negligence.

The Governor & Company of the Bank of Ireland -v- Watts Group PLC [2017] EWHC 1667 (TCC)

He applied the wrong test

1. He wasn't looking to see what a reasonably competent monitoring surveyor would have done in the circumstances, and to test Watt's performance against that benchmark.
2. He set out what he claimed he would have done, line-by-line, figure-by-figure.
3. That is what he did, so this is what Watts should have done too.
4. There was never any margin of error in his analysis, and no broader parameters within which a monitoring surveyor's performance was to be judged.

“The written and oral evidence of Mr Vosser adduced on behalf of the Bank was unreliable. So, whenever he disagreed with Mr Whitehead, the expert called on behalf of Watts, I have concluded that I should prefer Mr Whitehead's evidence.”

Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

1. Previous judgment on liability held that:
 - a. ICI's parent company decided that the best way to bring the project cost down was to push MMT towards insolvency; and
 - b. ICI had repudiated the contract with MMT by purporting to accept non-existent repudiatory breaches on MMT's part and dismissing MMT from site.
2. This judgment concerned the valuation of the account at the time of the repudiation, and of MMT's counterclaim against ICI for damages flowing from wrongful termination.
3. The correct approach for the quantum experts to value MMT's works should have been:
 - a. To consider the liability judgment and take express note of the relevant findings;
 - b. To consider contemporaneous agreements reached between the parties; and
 - c. To consider factual evidence and conduct at least alternative valuations on the basis that the court may accept such evidence.

Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

Criticism of ICI's Quantity Surveying Expert

1. He chose to ignore the contemporaneous agreements that had been reached.
2. He chose to ignore factual evidence advanced by the Claimant.
3. He preferred ICI's valuations.
4. Passages of his report demonstrated a failure to grasp the essential requirement of his task, namely perform an independent valuation of the works, and not argue the case for ICI, or adopt points in a partisan fashion.
5. He gave witness statements in support of an interim application for disclosure.

“There was a remarkable contrast between the quality of the expert valuation evidence from the two quantum experts in this case.”

Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

Criticism of ICI's Accounting Expert

1. He was instructed to opine, and did opine, on causation (whether costs incurred by MMT switching banking facilities were caused by the repudiation) – which was an issue for the court, not the expert.
2. His report was peppered with statements demonstrating him taking a partisan stance.
3. When faced with two versions of the facts, experts should consider them both. They should not choose which version is correct - that is the function of the Court.
4. He made factually inaccurate statements about his opposite number.
5. He had been subject to criticism before.

“I also prefer the expert evidence of Mrs Barker to that of Mr Thompson. Her evidence did not suffer from any of the structural defects of her opposite number, was not given from a partisan standpoint, and appeared to be entirely in keeping with the principles of expert evidence and the fulfilment of her duties to the court.”

Imperial Chemical Industries Ltd -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

“The principles that govern expert evidence must be carefully adhered to, both by the experts themselves and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR 35, Practice Direction 35. Every expert should read it.” [emphasis added]

“It is hoped that expert evidence such as that called by ICI in this case, and also in Bank of Ireland -v- Watts Group plc, does not become part of a worrying trend in this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them.” [emphasis added]

Dana UK Axle Ltd -v- Freudenberg FST GmbH [2021] EWHC 1413 (TCC)

1. Dana previously complained of various defects in the expert reports, including:
 - a. None of the reports identified the documents on which the experts had relied;
 - b. FST's experts had undertaken site visits, without putting Dana on notice and without affording Dana's experts a similar opportunity; and
 - c. When referring to data/information, FTSs experts did not always provide reference for the document/source data.
2. At the Pre-trial review, the Court ordered FST to:
 - a. provide full details of all materials provided to the experts;
 - b. provide all documents produced by or provided to each expert during any site visit, including notes taken by the expert; and
 - c. Identify and provide the source and details of the data and other information relied on.

Dana UK Axle Ltd -v- Freudenberg FST GmbH [2021] EWHC 1413 (TCC)

1. Criticisms of FST and its experts included:
 - a. Unsupervised provision of information to experts.
 - b. There had been contact between FST and its experts during the negotiation of the experts' joint statement.
 - c. FST's experts had undertaken site visits, without putting Dana on notice and without affording Dana's experts a similar opportunity.
 - d. FST's experts' analyses and opinions appeared to have been directly influenced by FST.

*“The provision of expert evidence is a matter of permission from the Court, not an absolute right...and such permission presupposes compliance in all material respects with the Rules...**the use of experts only works when everyone plays by the same rules.** If those rules are flouted, the level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk.”*

Patricia Andrews & Ors -v- Kronospan Ltd [2022] EWHC 479 (QB)

1. Practice Direction 35, Paragraph 9.4

“Unless ordered by the court or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts’ discussions.”

2. Practice Direction 35, Paragraph 9.7

“Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement.”

3. The Civil Justice Council Guidance for the Instructions of Experts in Civil Claims 2014, paragraphs 89-92, Sanctions for non-compliance include:

- a. Sanctions for misconduct by their professional body/regulator;
- b. Cost penalties against those instructing the expert;
- c. That an expert’s report/evidence be inadmissible.

“Dr Gibson’s approach strongly suggests that he regards himself as an advocate for the claimant...the Court has no confidence in Dr Gibson’s ability to act in accordance with his obligations as an expert witness...it is appropriate, and not disproportionate, to revoke the Claimant’s permission to rely on his evidence.”

Expert shopping: changing experts for tactical reasons

Permission is required to call an expert – CPR 35.4

Three Court of Appeal judgments:

Beck v Ministry of Defence [2005] – CA held that the “price” for instructing a new expert should be disclosure of the report of the previous expert.

Vailiou v Hajigeorgiou [2005] – CA held that the waiver of privilege extends not to any report disclosing the substance of the previous expert’s opinion

Edwards Tubb v JD Wetherspoon plc – Hughes LJ: the need to waive privilege applied equally to experts instructed pre-issue of proceedings:

An expert who has prepared a report for court is different from another witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him...

..... An expert consulted at that time and not instructed to write a report for the court is in a different position, and outside CPR 35.2.

Matthew Rogerson v Eco Top Heat v Power Limited [2021]

How far back can disclosure of reports be ordered?

- 11 June 2018: Fire at a hotel; 13 June 2018: Contractor confirms it is *“taking steps for the involvement of an expert forensic fire engineer”*
- 21 June 2018: Dr A C Nagalingam named as the *“instructed expert for the fire investigation”*. Note: the terms of these instructions were never shared.
- 4 July 2018: joint expert meeting, Dr Nagalingam allegedly said it was hard to see that anything other than a cigarette was the cause of the fire.
- 2 October 2018: Dr Nagalingam provides his views on causation to Defendant’s solicitors at a meeting. No written report was produced.
- October 2018: Further email exchanges with the Claimant’s experts
- 13 February 2020: Pre-Action letter of response did not identify any instructed expert
- 12 March 2021: In advance of CMC, Defendant draft directions seeks permission to call Ms Wilson

Matthew Rogerson v Eco Top Heat v Power Limited [2021]

Disclosure of Dr Nagalingam's opinion ordered

- Dr Nagalingam had engaged in early pre-action exchanges with the Claimant's experts at a time when it was assumed litigation would occur.
- Joint inspections – and meetings with witnesses - occurred with the claimant's experts, as opposed to inspections by Dr Nagalingam on his own.
- Judge satisfied that, at the very least, Dr Nagalingam was instructed with a view to being appointed as a CPR expert.
- Failure to provide instructions or evidence as to those instructions.
- Expert shopping for tactical reasons.

Concluding remarks: Experts' Duties

- Recent cases add detail to existing Guidance in CPR and other sources, including dealing with the following issues:
 - Control of information provided to experts.
 - Experts must not usurp the court on issues of fact or law:
 - don't contradict the court's prior findings of fact;
 - don't prefer one set of facts over another: consider both sets of facts.
 - Equality of arms:
 - Disclosure of documents;
 - Site visits.

Concluding remarks: Fraser J ICI -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)

*In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in *The Ikarian Reefer* . They are examples of the application of those principles in practice.*

*1. Experts of like discipline should have **access to the same material**. No party should provide its own independent expert with material which is not made available to his or her opposite number.*

*2. Where there is an issue, or are issues, of fact which are relevant to the opinion of an independent expert on any particular matter upon which they will be giving their opinion, **it is not the place of an independent expert to identify which version of the facts they prefer**. That is a matter for the court.*

*3. Experts **should not take a partisan stance on interlocutory applications** to the court by a particular party (almost invariably the party who has instructed them). This is not to say that a party cannot apply for disclosure of documents which its expert has said he or she requires. However, the CPR provides a comprehensive code and it may be that disclosure is not ordered for reasons of disproportionality. However, if documents are considered to be necessary, and they are not available (for whatever reason), then an opinion in a report can be qualified to that extent.*

Concluding remarks: Fraser J ICI -v- Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC) cont'd...

4. *The process of experts meeting under CPR Part 35.12 , discussing the case and producing an agreement (where possible) is an important one. It is meant to be a **constructive and co-operative process**. It is governed by the CPR , which means that the Overriding Objective should be considered to apply. This requires the parties (and their experts) to save expense and deal with the case in a proportionate way.*

5. *Where late material emerges close to a trial, and if any expert considers that is going to lead to further analysis, consideration or testing, **notice of this should be given** to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, **no expert should produce a further report actually during a trial** that takes the opposing party completely by surprise.*

6. *No expert should allow the necessary adherence to the principles in *The Ikarian Reefer* to be loosened.*

Concluding remarks: Expert evidence: top tips

- What are the issues requiring expert evidence from this expert?
- What is the test the Court will need to apply? How can the expert address this?
- Demonstrate how conclusions have been reached
- Consider the other party's case, and provide a view of the outcome if the other party is right on the facts
- Preparation of the report and preparation for cross examination
- Be wary of broad statements regarding documents considered
- Make concessions when appropriate

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Thank you.
Questions?



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