Experts on Trial

Chris Bryden and Georgia Whiting, barristers at 4 King's Bench Walk, examine case law surrounding the role of expert witnesses, which suggests a worrying trend towards a loosening of the established principles of how experts should behave, and are instructed.

KEY POINTS

- In construction claims, experts can play a central role, shedding light on the core dispute by unpicking complex technical issues and explaining them to the court and parties.
- They can also give opinion evidence based on specialist knowledge.
- The extent and limits of the expert's role and duties have been well traversed by the courts over the years.
- The seminal case of ***National Justice Compania Naviera SA v Prudential Assurance Co (the 'Ikarian Reefer') [1993] 2 Lloyds Rep 68***, provides a summary of the role and duties of an expert.
- Recent case law has arguably suggested a worrying trend in terms of the loosening of such principles.
- This article reminds experts (and lawyers) of the importance of such principles, and the potential consequences if they are not adhered to.

Expert evidence has been utilised in construction disputes as a matter of routine since at least the mid-eighteenth century. As long ago as 1553, in the ***Buckley v Rice-Thomas (1554) 1 Plowd 118***, Saunders J said:

> 'If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.'

In construction claims, experts may play a central role, as they are often the only people able to shed light on the core dispute, by unpicking complex technical issues and explaining them to the court and parties, or giving opinion evidence based on specialist knowledge.

Given the importance of the role of the expert, it is no surprise that the extent and limits of their role and duties has been well traversed by the courts over the years.

The *Ikarian Reefer*

An apt starting point is the well-known case of ***National Justice Compania Naviera SA v Prudential Assurance Co (the 'Ikarian Reefer') [1993] 2 Lloyds Rep 68***, which provides a summary of the role and duties of an expert.

There, Cresswell, J set out that the duties of experts in civil cases included:

- expert evidence should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of litigation;
- an expert should provide independent assistance to the court by an objective unbiased opinion in relation to matters within his expertise;
- an expert should never take on the role of an advocate;
- an expert should state the facts or assumptions upon which his opinion was based without omitting any consideration or material fact which could detract from his concluded opinion;
- an expert should make clear when a question or issue falls outside the scope of his expertise;
- if an expert's opinion is not properly researched because he considers insufficient data is available, then this must be stated, with an indication that the opinion is thus no more than provisional;
- if an expert changes his view, then this should be communicated, through legal representatives, to the other side without delay and, where appropriate, to the court;
- all materials referred to in an expert's report,

such as photographs, plans, calculations, and analyses, must be provided to the opposite party at the same time as the exchange of the report.

These principles have remained valid since they were set down. They were endorsed by the Supreme Court are recently as 2016 in ***Kennedy v Cordia (Services) LLP [2016] UKSC 6***, and underpin much of CPR Part 35 (such as the expert's overriding duty to the Court) and the Civil Justice Council Guidance. However recent case law shows that nevertheless, the principles are still at times overlooked.

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

MMT had been appointed as contractor by ICI under an NEC3 Engineering and Construction Contract, to carry out works at a new paint manufacturing facility. A dispute arose regarding the quality of the welding undertaken by MMT, and ICI sought to terminate the contract pursuant to a number of alleged defects. A split trial was ordered in respect of liability and quantum.

At the trial on quantum, the court made several criticisms of ICI's quantum expert, including that he valued work at actual cost rather than using the agreed rates, despite there being no contractual basis for this; opined on causation (which was a matter for the court) and did not take account of specific findings made in the liability judgment.

Furthermore, the Court was concerned with the partisan nature of the experts called, stressing the need for the ***Ikarian Reefer*** guiding principles to be borne in mind by experts. The Court in particular noted six principles to be borne in mind regarding an expert's duties including the warning that 'no expert should allow the necessary adherence to the principles in the ***Ikarian Reefer*** to be loosened.'

The message was (seemingly) clear:

> 'It is to be 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. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence.'

But was it heeded?

Dana UK Axle Ltd v Freudenberg FST GMBH [2021] EWHC 1412 (TCC) ("Dana")

This case involved an application made by the claimant, on day 7 of trial, to debar the defendant from relying upon any of its three expert reports and to debar those experts from giving evidence. The mid-trial application was preceded by a successful application at pre-trial review, requiring the defendant to re-serve each of the reports with, amongst other things, a full list of all materials provided to each of those experts. The claimant subsequently put the defendant on notice that it did not consider that the re-served reports complied with the terms of the order.

On the first day of trial, the defendant's solicitors were directed to provide a witness statement explaining the extent of any contact between the defendant and its experts, and details of all information and documents passed to them. This led to the disclosure of 175 documents evidencing such communications. It became apparent that there had not been full disclosure of all information relating to site visits by the defendant's experts to the defendant's factories, effectively giving them 'unfettered and unsupervised' access, of which the claimant had not been made aware.

The claimant succeeded in its application for debarral on all grounds contended for, namely, a breach of the order made by the court at the PTR, a breach of Part 35 and relevant guidance, and that the court could have no confidence that all information and instructions from the defendants to the experts had been disclosed.

The Court held that the defendant's failure to provide a list of all materials sent to each expert was 'not just a technical or unimportant breach. It is essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field. Experts should be focussed on the need to ensure that information received by them has also been made available to their opposite numbers.'

The Judge went on:

> 'The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts; all the more so in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in this jurisdiction. For

reasons which have not been explained, there has been no such oversight or control over the Experts in this case.

The provision of expert evidence is a matter of permission from the Court, not an absolute right (see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules. I agree with Mr Webb's submission that 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.'

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs) [2021] EWHC 1414 (TCC)

In the final case considered in this article, Fraser J referred to the aforementioned cases, noting that:

'There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties. [PD35] makes the position very clear:

'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.'

CPR 35.3 makes clear that the expert's overriding duty is to the court and that this overrides any duty to his or her client. This has been reinforced by numerous decisions in the authorities since then. Concentrating solely on more recent ones, in ***Bank of Ireland v Watts [2017] EWHC 1667 (TCC)***, Coulson J (as he then was) stated:

"The duties of an independent expert are set out in the well-known passages of the judgment in ***The Ikarian Reefer [1993] 2 Lloyds LR 68***. For the reasons set out above, Mr Vosser did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that ***The Ikarian Reefer*** was a ship that passed in the night."

I made certain similar observations in ***ICI***. In another very recent case,[***Dana***] Joanna Smith J excluded, during the trial itself, the entirety of the defendant's technical expert evidence due to "the full and startling extent of the Experts' breaches of CPR 35". Parties to litigation who rely upon expert evidence that fails to comply with the rules should not be encouraged by my finding that in this case the approach of the claimants' expert was not sufficient, alone and of itself, to justify an award of indemnity costs.'

Conclusion

The principles proffered in ***The Ikarian Reefer*** remain the underpinning of the duties and obligations of experts, and are ignored at the peril of the expert and their client. Criticism directed at experts and those instructing them resonates given that judgments of the High Court (of which the TCC is part) are inevitably reported and are likely to be the subject of articles such as this. The reputational damage involved in a finding that an expert has failed in their duty to the court, or that those Instructing them have failed to ensure compliance, can be significant. The courts have shown that they will not tolerate bias or a partisan approach and the consequences of failing to comply with the obligations placed upon an expert are not merely reputational but potentially financial. All experts, and all those instructing them, must keep the principles explored above firmly in mind. **CL**