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Stand Down If You Can't Deliver: The Trials and Tribulations of Experts

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Introduction

The deficiencies of expert witnesses are a recurring theme in many exasperated judgments by the courts. Most disputes lawyers will have experience of working with, or against, an expert witness who did more harm than good to their client's case. Given that cases are frequently decided on the strength of the expert evidence, guarding against those deficiencies is vital.

This article is not meant to tar all experts with the same brush, but intended as a salutatory tale. There are many good experts who assist the court or tribunal and take their duties of impartiality and independence very seriously. Nonetheless, the amount of judicial criticism in the reported cases suggests that for some, there is room for improvement. This article is in two parts. The first examines two recent decisions in the Technology and Construction Court that showcase the typical mistakes of experts, complete with judicial guidance on how to prevent them. The second tells the story of two experts who made extraordinary mistakes and the judicial chastisement they received.

Bank of Ireland

In *Bank of Ireland v Watts Group Plc* [2017] EWHC 1667, the claimant (the "Bank") sought damages for professional negligence against the defendant monitoring surveyors ("Watts") relating to a residential development in the centre of York. The developer, who had borrowed £1.4 million from the Bank, went into liquidation and could not repay the loan. The Bank subsequently sold the property but suffered a £750,000 loss. It was the Bank's case that Watts' initial appraisal report was negligent and that, if it had been properly prepared, the Bank would not have permitted the drawdown of the loan to the developer, and so would not have suffered any loss.

In assessing whether Watts had exercised the degree of skill and care to be expected of a surveyor of reasonable competence and experience, the court allowed the parties to adduce expert evidence. There was little dispute between the parties on the facts or the law, so the case would turn on which expert's evidence the court preferred. As it turned out, that was very unfortunate for the Bank. After setting out the facts in his judgment, Mr Justice Coulson (as he then was), devoted three full pages to explain why Mr V, the expert for the Bank, was "unreliable".

Lack of Realism

The first problem with Mr V's approach was his lack of realism. Watts were paid £1,500 to produce their appraisal report. That modest fee reflected the fact that they had not been expected to conduct their own detailed analysis of the cost, time or cash-flow of the project, but instead to check the calculations and proposals of the developer. By contrast, Mr V produced two detailed reports. Each, together with appendices, filled a lever arch file. Fees of £50,000 were incurred to produce the first report alone. Coulson J concluded:

> *"Thus, whilst Watts' report cost just £1,500, the report and associated work done to criticise it cost more than 30 times that amount. In my view, that is a clear indication that the criticisms which have been*

> *generated are based on an entirely unrealistic expectation of what it was that Watts were required to do."*

This should act as a reminder to experts (and their legal advisers) that, in cases involving an alleged breach of a contractual duty, throwing every available resource and the kitchen sink into an expert report will more often detract from the report than add to it. An expert's evidence will be more credible, and realistic, if they first ask themselves which resources the party who is alleged to have breached the duty would reasonably have been expected to use, bearing in mind the nature of the duty. Although it is important to be thorough, excessive industry might give the impression that the expert will go to any lengths to reach the 'right' answer for their client.

Applying the Wrong Test

The test that Mr V should have been applying was: what would a reasonably competent monitoring surveyor have done in the circumstances? Instead, Mr V fell into the common trap of explaining what he would have done in the circumstances, line-by-line, and figure-by-figure. His evidence was that was what he did, so that is what Watts should have done too. The problem with this analysis was that there were no margins of error. He ignored the broader parameters against which a monitoring surveyor's performance should have been judged, if the correct test had been applied. So, for example, he neglected to mention the plus or minus 10% metric habitually used in negligent valuation cases. Where the duty is one of reasonableness, an expert must take care to undertake their exercise from the position of a reasonable party, giving a range of reasonable results. A failure to do so will lead a judge to conclude that the expert has applied the wrong test, greatly reducing the value of their evidence.

Attempt to Mislead

More seriously, Coulson J found that Mr V had misled the court. As mentioned above, Mr V had conducted his own detailed analysis of the costs of development, rather than simply check the calculations of the developer. He justified this approach by referring to guidance published by the Royal Institution of Chartered Surveyors, which he quoted as saying:

> *"the Project Monitor … may have to develop his or her own elemental breakdown of construction costs to prove or disprove the Developer's figures."*

Now see if you can spot the difference in the full quotation:

> *"When involved with smaller developments and inexperienced Clients and Contractors, the Project Monitor, whilst strictly responsible to the Client, may also be asked to perform a hand-holding exercise with the Client and may have to develop his or her own elemental breakdown of construction costs to prove or disprove the Developer's figures."*

The words Mr V omitted were exactly the words which would have shown that this part of the RICS guidance was irrelevant. The Bank was not inexperienced. Neither was the developer. It was not a small development. Watts were not being asked to perform a *"hand-holding exercise."* Coulson J did not mince his words, and called this a *"blatant misuse of a source document, in order to present a criticism on a false basis."* Few experts may be as blatant as this, but they should be reminded that any attempt to 'creatively' quote from documents is likely to backfire. One of the first things that opposing lawyers will do on receipt of an expert report is check if any quotations harmful to their case have been taken out of context. Indeed that exercise should be carried out by competent lawyers on their own experts' reports.

Unreasonableness

Coulson J considered that Mr V's overall approach was *"thoroughly unreasonable."* Mr V made no concessions in his oral evidence nor in the experts' joint statement and had instead, as noted in that report, used the experts' meetings to raise entirely new matters. Indeed the experienced TCC judge went so far as to say *"I have never seen a Joint Statement between experts that contained no agreement at all."*

Another example of Mr V's unreasonableness was his criticism of Watts' subsequent monitoring reports, which formed no part of the Bank's pleaded case. This only served to add to the impression that the expert was prepared to go to any lengths to criticise the opposing party and shore up the Bank's case. It would be wrong to think that what will help the client the most is an unwavering defence of the client's case and an undiscerning attack on the behaviour of the opposing parties. Taking either of these stances will, in all likelihood, be counter-productive.

Independence

Coulson J concluded that Mr V was not a properly independent witness. On the facts, this conclusion came as no surprise; the Bank had been Mr V's principle client over the last few years, and had given Mr V numerous instructions to act as an expert witness in actions against monitoring surveyors arising out of the 2008 financial crash. Until this case, every dispute had been settled out of court. Coulson J said that he suspected Mr V was unaware of the difference between acting as the Bank's advocate in, say, a mediation, and his duties to the court when giving expert evidence.

Guidance for Experts

Mr V's lack of independence contributed to each of the deficiencies in his evidence. The judge noted that the duties of an independent expert were long established, and were set out in the well-known judgment of *The Ikarian Reefer* [2000] 1 WLR 603.

That case concerned the loss at sea of the Ikarian Reefer, which had run aground and then caught fire, causing it to be abandoned off the coast of Sierra Leone. The question was whether those acts were deliberate or accidental, and much depended on the expert evidence. Mr Justice Cresswell believed that a misunderstanding on the part of some of the eight expert witnesses in the case as to their duties and responsibilities contributed to the length of court proceedings. He therefore set out the following guidance, which should be brought to any prospective expert witness's attention:

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

- 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.

Mr V did not comply with these duties, and was likely not aware of them or had had them explained. Coulson J wryly concluded: *"For him, it might be said that The Ikarian Reefer was a ship that passed in the night."*

Imperial Chemical Industries

The case of *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC) involved a long running dispute concerning an employer's repudiatory breach of contract relating to works at a paint processing plant in Northumberland. A trial on liability had already taken place, finding a balance due to the contractor. This was the trial on quantum, heard by Mr Justice Fraser.

Mr K was the expert quantity surveyor appointed by the employer ("ICI"). He was instructed to consider the correct valuation of the works carried out by the contractor ("MMT"). The contract between the parties was an amended NEC3 form option A with payments of lump sums to be made against identified activities. Compensation events (variations to the contract) were to be valued by reference to a schedule of rates.

Although that was the clear contractual division for valuing the works, Mr K proceeded to value the whole of the works using the actual cost to MMT as the basis of the valuation. There was no contractual basis for this method of valuation whatsoever. Mr K justified his approach by saying that a valuation on any other basis would result in a windfall to MMT. He explained:

> *"Whilst interpretation of the Contract is a matter for the Court to decide, I am of the view that the rates that I propose to use, representing what I believe to be MMT's actual costs, are more reflective of the true cost to MMT, whereas the rates proposed by MMT would, in my opinion, provide MMT with a windfall."*

Fraser J listed a multitude of reasons why this was not the type of evidence that an independent expert, complying with their duty to the court, should be giving. ICI, Mr K's instructing party, had not even pleaded that MMT was to be paid based on its actual costs. He had therefore failed to consider the pleaded issues and was attempting to rewrite the parties' bargain.

His use of the term 'windfall' made it clear that he had adopted a different method of valuation because he felt MMT would be paid more than it ought to have been if the correct contractual approach was used. That was *"diametrically opposed"* to the exercise he should have done, as it suggested that he had worked towards a figure he thought was fair, rather than doing a proper valuation in accordance with the contract and ascertaining the correct figure. It also suggested that he had carried out some valuations using the schedule of rates, was unhappy with the result, and so decided to use a different method.

Mr K committed another cardinal sin amongst experts that is guaranteed to annoy a judge, namely taking positions on matters of fact in dispute which were outside his area of expertise. So, for example, there was factual evidence from MMT's witnesses that the majority of the steelwork was outside the main building under construction. Mr K refused to accept this, calling it a *"common misconception."* Fraser J was surprised that Mr K

believed himself to be in a better position than any of the contemporaneous witnesses to evaluate these matters of fact, or that he saw fit not to agree with their factual evidence.

Finally, Fraser J admonished Mr K for providing two witness statements in support of a disclosure application in which he identified documents he said were required in order for him *"to perform his expert function."* This was highly unusual and should be discouraged – it was a matter to be left to the parties. Involving an expert in a fiercely contested application could only weaken their independence.

In the trial on liability, Fraser J had also been the judge, and had found each of ICI's experts on that part of the case to be partisan. He remarked that it was unfortunate that in a case with sums in excess of £10 million in issue, he felt able to rely on the expert evidence of only one party. He said:

> *"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 Part 35, Practice Direction 35. Every expert should read it."*

Fraser J then referred approvingly to the principles set out in *The Ikarian Reefer*. However, he went further and added a few more principles of his own, targeted at the deficiencies he had encountered with the expert evidence in this later case:

- 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.
- 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.
- 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.
- 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.
- 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.

The Bank of Ireland and *ICI* decisions showcase the most common flaws in expert evidence, and the guidance provided by the judges should be drawn to the attention of any prospective expert witness. The next two decisions, on the other hand, involve experts that have made rather extraordinary mistakes. The resulting guidance for any prospective expert is narrower, but simpler: "Don't do what they did."

Castle Trustee

In *Castle Trustee Ltd v Bombay Palace Restaurant Ltd* [2018] EWHC 1602 the claimant ("Castle") and the defendant ("BP") were in dispute over the costs of refurbishing BP's restaurant, Bombay Palace. An adjudication took place in which Castle obtained the report of a delay expert. BP did not call a delay expert but in any event succeeded in the adjudication.

Some time passed and Castle, unhappy with the result of the adjudication, commenced litigation against BP. Castle again sought to instruct a delay expert but the previous expert was now unavailable. They instead instructed Mr B, who began to familiarise himself with the documents. Mr B had been instructed late in the day and thus rushed to produce his report.

After spending 41.5 hours reviewing the case he was made aware of a draft of the report produced by the previous expert in the adjudication. This led to Mr B including the following introductory paragraph in his final report:

> *"I have considered [the previous expert's] report, the document he has referred to, the methodology he has adopted and the conclusions he has reached. I agree with [the previous expert's] approach and have independently reached the same conclusions in respect of cause(s) of delay to the Building Programme and the extent of such delays. Severe limitations of time, the requirement for me to submit my report by Friday 23 June [2017] and as a proportionate response I have adopted the findings of [the previous expert] ...".*

What Mr B then did was reproduce the previous expert's report in its entirety without any material amendment. He simply copied and pasted the report with no attempt to hide what he had done. Counsel for Castle objected to that approach as a matter of principle, but the judge, Mrs Justice Jefford, disagreed. There was nothing wrong *in principle* with adopting another expert's report. This was most commonly observed, she said, in doctors agreeing as to a diagnosis or prognosis.

However, where there was pressure of time the court would adopt a healthy scepticism and call into question the extent of the expert's investigations and the care taken in forming their opinions. The second expert would have to be as familiar with the relevant material as the first, otherwise how could he purport to have reached the same conclusions?

It was in this area that Mr B's evidence was seriously deficient. It became apparent in cross-examination that Mr B could not explain many of the assumptions in his own report, in part because he had not seen much of the relevant material the previous expert had. One can almost hear the disbelief in the judge's voice as she describes just how incredible it was for Mr B to claim this report as his own:

> *"In fact, in this case, it seemed to me that [Mr B] had formed no independent view at all. I am frankly at a loss to understand on what basis he could possibly have formed such a view. Quite extraordinarily, [Mr B] had not even seen, and had apparently not thought it relevant to see, the parties' pleaded cases or any disclosure. He had, therefore, paid scant regard to BP's case – indeed he did not have BP's pleaded case or evidence before him. He had however been provided with (and to some extent relied upon) [Castle's] witness statements in the adjudication – or at least [the previous expert] had – even though no statements from these witnesses had been served in the litigation and their evidence was not before me. I fail to see how, in those circumstances, [Mr B] can have thought that he was providing the court with an independent view."*

Naturally Jefford J. found that she could place no reliance on Mr B's report. The adjudicator's award was largely upheld.

Cala Homes

Finally, while doing research for this article I came across many cases with many bad experts. But my favourite, containing perhaps the worst expert and the most excoriating remarks from a judge, is *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch). The case involved an action for copyright infringement. The claimant ("Cala") and the defendant ("McAlpine") were both companies that designed and built houses. Cala alleged that a number of McAlpine's design drawings for their range of houses were substantially reproduced from Cala's own drawings. McAlpine denied this. Each side adduced expert evidence from an architect to explain the extent of the similarities between the drawings.

McAlpine's expert was Mr G. At some point in their preparations for the trial Cala's lawyers struck gold in the form of an article written by Mr G in the Journal of the Chartered Institute of Arbitrators. The article had been written in 1990, only a few years previously, and was titled *"The Expert Witness: Partisan with a Conscience."* Presumably McAlpine's lawyers had missed this article when doing their due diligence.

The article set out what Mr G believed was the appropriate approach an expert should adopt when preparing a report for use in litigation. He confirmed in court that the report he had produced for McAlpine followed the principles set out in the article. Some of the highlights of the article include:

> *"How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?"*
>
> *"... the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game.'*
>
> *If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them."*
>
> *"Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun', so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?" The third phase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.*
>
> *Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the*

> *'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon on him."*

Summarising Mr Justice Laddie's scathing response would not do it justice. I will leave you with the lion's share of the judge's comments which, one expects, ended Mr G's career as an expert witness:

> *"No doubt it is currently fashionable to say that our legal system makes no pretence to determining the truth. I accept that some people not only say it but also believe it. If it were true then [Mr G] would be right in thinking that anything short of outright misrepresentation is permissible in an expert's report and that not only the other party but also the person trying to decide the issue, the 'rustics', are fair game. On reflection, if [Mr G] were right, I am not sure that even outright misrepresentation should be avoided. If litigation is to be conducted as if it were a game of Three Card Trick, what is wrong with having a couple of aces up your sleeve?"*
>
> *…*
>
> *"The whole basis of [Mr G]'s approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth."*
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> *"An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by [Mr G] is a euphemism for 'misleading selectivity'. According to this approach the flexibility will give place to something closer to the true and balanced view of the expert only when he is being cross-examined and is faced with the possibility of being 'found out'. The reality, of course, will be somewhat different. An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined. Most witnesses would not be prepared to admit at the beginning of cross examination, as [Mr G] effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert's report and then his oral evidence will be contaminated by this attempted sleight of mind."*
>
> *"Near the beginning of his report, [Mr G] says the following:*
>
> > *'I believe that the inspections I have made and the graphic and other material that I have seen are sufficient to enable me to reach an informed opinion on the matters in dispute in the present action that fall within my discipline.*
> >
> > *I have no connexion with either of the parties in this action, nor have I any prior acquaintance with instructing solicitors or Counsel. I have no pecuniary or other interest in the outcome of the current litigation.'*
>
> *The clear purpose of these statements was to convey the impression to the plaintiffs and the court that the report was the independent unbiased product of the expert. Some may characterise this as pragmatic flexibility. In my view that impression is simply false.*
>
> *In the light of the matters set out above, during the preparation of this judgment I re-read [Mr G]'s report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's*

case to the court and ignoring virtually everything which could harm that objective. I did not find it of significant assistance in deciding the issues."