FENWICK ELLIOTT

The construction & energy law specialists

Issue 74 - October 2017

Insight

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Independent Experts: Lessons from the Courts

Over the past few years there have been a number of cases in the TCC, and the courts generally, which provide useful guidance for those seeking to deploy expert evidence in TCC proceedings.[1] Some of them provide a devastating critique of what an expert should not do when he finally takes the stand. Others provide some useful lessons learned that can be taken into account from the early stages of proceedings, including when you are first deciding whether to instruct an expert.

In this *Insight* we review some of these key cases on experts in recent years and ask what lessons can be learned from them. Before doing this we first look at the rules as to when expert evidence will be allowed in TCC proceedings.

When will expert evidence be allowed?

The Civil Procedural Rules provide that the Court's permission is required for expert evidence to be adduced in proceedings.[2] Expert evidence must also be restricted to that which is "*reasonably required to resolve proceedings*".[3] The TCC Guide underlines the requirement for the "*effective and proportionate*" use of experts. At pre-action protocol stage and throughout court proceedings, it is therefore important to have in mind whether the Court will allow expert evidence to be adduced in the first place.

The case of *British Airways v Spencer*[4] provides for a three-stage test as follows:

1. Is expert evidence **necessary** to resolve an issue?

2. If not necessary, would it **assist** the court in resolving an issue?

3. In the context of proceedings as a whole, **is it reasonably required**?

It is worth thinking through how to justify your answers to these questions at an early stage in proceedings. Whilst the TCC generally has a more pragmatic approach to expert evidence than some other courts, permission can still be refused.

Whilst not a TCC case, *Darby Properties Limited v Lloyds Bank Plc*[5] provides a useful example of when permission for expert evidence may be refused. That case involved complex interest rate derivative products. Whilst the Judge considered a tutorial from an expert as to how these products worked would be useful, he ultimately considered the questions in the case were factual. Accordingly the questions at the heart of the claims could be dealt with by factual evidence rather than expert evidence itself.

Expert Shopping

Expert shopping (where a party decides to change to an expert with a viewpoint more favourable to their position) is prohibited by the courts. In *Vasiliou v Hajigeorgiou*[6] the Court stated:

> *"Expert shopping is undesirable and wherever possible, the court will exercise its powers to prevent it . . . if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so."* [Emphasis added]

A number of recent cases have provided a reminder of the consequences of "*expert shopping*" and, indeed, simply having to swap experts because they prove unable to perform their duties as required.

In *Allen Tod Architecture Ltd (in liquidation) v Capita Property & Infrastructure Limited*,[7] the Court held that permission to call a second, replacement expert at trial was conditional on the disclosure of documents containing the first expert's report. This was despite the fact that there was not a strong case of expert shopping. The expert in question was apparently unable to deal with the documentation as required. In *BMG (Mansfield) Limited v Galliford Try Construction Limited*[8] it was noted that *if* there was a "*strong case*" of expert shopping, *then* disclosure of solicitors' attendance notes may in some cases be justifiable.

The moral of the story is clear – make sure that you are happy your expert can cope with the process at the outset. The consequences of swapping later may be serious.

Conflicts of interest - apply common sense!

Experts must be independent and their overriding duty is to the court rather than the person paying their bills.[9] Practice Direction 35 further provides that expert evidence has to be the independent product of that expert uninfluenced by the pressures of litigation. Crucially the expert should not assume the role of an advocate.[10] The *Guidance for the Instruction of Experts in Civil Claims* by the Civil Justice Council provides a useful test of independence which is worth bearing in mind. This is, namely, whether the expert would express the same opinion if given the same instructions by the other party.

The starting point for ensuring independence is that they are not conflicted in any way.

One question that is worth asking is whether the expert in question has worked for the same client before and, if so, how many times. In the recent case of *The Bank of Ireland UK Plc v Watts Group Plc*,[11] the expert quantity surveyor instructed by the Bank of Ireland had, it emerged, worked closely

with the bank on similar negligence claims for a number of years. He was also heavily reliant on them for a large percentage of his fee income.

The Judge held that:

> *"[the expert] was not a properly independent witness.* **It was clear that the Bank was his principal client, providing the vast majority of his work (and fees), and that he had spent most of the last few years acting for the Bank as an expert witness** *in actions against monitoring quantity surveyors arising out of the 2008-2009 financial crash. He told me that, until now, these had all been resolved by ADR, so this was the first of those disputes which had come to court. He was, I think,* **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**."[12] [Emphasis added]

In another case, *EXP v Barker*,[13] it emerged during the trial that the doctor hired as an independent expert by the Claimant had in fact been their colleague and even trained with them for many years. This had not been declared and only emerged at trial.

If these cases demonstrate anything, it is that asking seemingly common sense questions at the beginning can prevent embarrassing, and costly, consequences further down the line.

Proportionality in costs - sampling

The Overriding Objective in CPR 1.1 is to enable the court "to deal with cases justly and at proportionate costs". This is also emphasised in the TCC Guide[14] which states that:

> *"The parties should also be aware that the court has the* **power to limit the amount of the expert's fees** *that a party may recover pursuant to CPR 35.4 (4)."* [Emphasis added]

There is an obvious tension, which legal advisors constantly struggle with, between: (1) the need to rely on expert opinions at an early pre-action stage and try and reach a resolution before starting proceedings; and (2) the court's desire to seek, where possible, to reduce the cost of expert evidence.[15]

In this sense, the recent case of *Amey v Cumbria County Council*[16] is a reminder of one of the ways in which it may be possible to reduce the amount of work required to produce an expert report. This case confirms that:

> *"there is no principle of law nor a statistical theory that a claim or proposition can only be established by statistically random sampling.* **I accept that it is perfectly open to a claim to seek to establish a claim by reference to representative sampling...**" [Emphasis added]

Representative sampling could, if used properly, provide significant savings, particularly where there are large numbers of potential samples involved. However, two key conditions must be met if a court is to hold that a claim is established. These are:

1. The sample must be sufficiently representative to enable a court to place reliance on it; and

2. Bias must be avoided in the selection process.

Picking the worst examples to suit your case will not fit these criteria and it is important to have a clear protocol or methodology for selection of any samples relied on.

Unfortunately for Cumbria County Council, it was held in that case that:

> *"Cumbria has failed to demonstrate that the sampling exercise undertaken on its behalf in this case is a sufficiently reliable exercise to justify the court in making the finding against Amey that there was a systemic and endemic failure in its performance which has led to a situation where Cumbria has either already undertaken, or will reasonably need to undertake, substantial remedial works to a large proportion of the patches laid by Amey so that it is entitled to recover as damages the very substantial sums which are claimed."*

The Judge also noted that Cumbria's expert had failed to proactively consider the bias in the samples taken.

When should an expert become involved?

The recent case of *Lalana Hans Place Ltd v Michael Barclay Partnership*[17] touched on the difficulties that can be encountered where an expert is brought in to advise on how to proceed early on before proceedings. The claim related to an engineer's negligence.

The Claimant's expert was involved in the remedial works' design at an early stage. The other side made requests for information about the expert's involvement in that decision-making process. The Judge held that the Claimant must answer the Request for Information about the expert's involvement.

Coulson J noted:

> *"It is not uncommon for a litigation expert, who is involved early in the relevant decision-making process, to give advice as to what should be done or not done. That advice may then be a matter of fact relevant to, for example, a decision to demolish or, as in this case, a decision to carry out costly remedial works."*

The question of privilege would be decided later if raised by the Claimant's answers. The case nevertheless provides a reminder of the reasons for keeping an expert insulated from decision making, especially early on in proceedings.

The ultimate example of what not to do!

Finally, but by no means least, it is worth looking briefly at the case of *Van Oord v Allseas*.[18] In that case, Mr Justice Coulson provided a devastating twelve point critique of the quantum expert's performance. These are summarised below and provide a useful checklist of what not to do:

1. He repeatedly took pleaded claims at face value and did not check the underlying documents that supported or undermined them.

2. He prepared his report by only looking at the witness statements prepared on behalf of OSR (the party who appointed him).

3. He refused to value these claims on any basis, or on any assumption, other than the full basis of the claim prepared by OSR.

4. He based his promotion of the OSR claims on made-up or calculated rates, but he never once considered, let alone formulated, claims based upon the actual costs incurred by OSR.

5. He was caught out on numerous matters during cross-examination due to his wholly uncritical approach to OSR's claim.

6. He said under cross-examination that he was not happy with any of his reports, not even with the one provided during the last week of the trial, just before he gave his oral evidence.

7. He repeatedly accepted that parts of his reports were confusing and accepted on more than one occasion that they were positively misleading.

8. He appended documents to his original report which he had either not looked at all, or had certainly not checked in any detail.

9. He made repeated assertions in his reports that appeared to be expressions of his own views. They were certainly not attributed to anybody else. But in cross-examination it was revealed that these assertions came straight from discussions he had had with witnesses.

10. He did not prepare a statement attached to a joint statement which was prepared by witnesses and contained major errors.

11. He preferred to recite what others had told him, even though what he had been told could be shown to be obviously wrong.

12. He had not, *even as a cross-check*, investigated whether the figures he was so carelessly promoting were actually fair or reasonable, or instead represented some kind of windfall for OSR.

The result was that the expert in question's evidence was discounted in its entirety. As Mr Justice Coulson stated:

> *"[the expert's] abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the stress he was under. But* **I regret to say that I came to the conclusion that his evidence was entirely worthless.**" [Emphasis added]

This is, perhaps, the ultimate example of how not to present expert evidence.

Claire King
Fenwick Elliott LLP
October 2017

Footnotes

1. By Claire King.
2. See CPR 35.4 (1).
3. See CPR 35.1.
4. [2015] EWHC 2477 (Ch).
5. [2016] EWHC 2494.
6. [2005] EWCA Civ 236.
7. [2016] EWHC 2171 (TCC).
8. [2015] EWHC 3183 (TCC).
9. CPR 35.3 which provides: "*(1) It is a duty of experts to help the court on matters within their expertise. (2) This duty overrides any obligation to the person from whom the expert received instructions or by whom they are paid for.*"
10. See PD 35 paragraphs 2.1 and 2.2.
11. [2017] EWHC 1667 (TCC).
12. See paragraphs 59 and 60 of *Bank of Ireland v Watts Group Plc* – per Mr Justice Coulson.
13. [2017] EWCA Civ 63.
14. See section 13.2.3.
15. See paragraph 13.3.1 of the TCC Guide.
16. [2016] EWHC 2856 (TCC).
17. [2017] EWHC 29 (TCC).
18. [2015] EWHC 3074 (TCC).

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact:

Claire King
Partner
cking@fenwickelliott.com.
Tel +44 (0)20 7421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

www.fenwickelliott.com