A spate of recent decisions by the Technology and Construction Court (TCC) have featured harsh criticism of expert witnesses. The landmark case of Compania Naviera SA vs Prudential Assurance Company Ltd (Ikarian Reefer) in 1993 set out clearly an expert’s duties, and recent case law will hopefully remind experts what it means to act as an expert witness.

The principles set out in the Ikarian Reefer decision are enshrined in Part 35 of the Civil Procedure Rules (CPR), yet it seems that experts pay scant regard to the rules governing their participation in the litigation process. The Supreme Court in Jones vs Kaney (2011) abolished a 400-year-old immunity from liability for experts. This means experts can now be sued in negligence. The court, no longer convinced that experts would become unwilling to act for fear of being sued, held that the removal of immunity “would tend to ensure a greater degree of care”. Unfortunately, recent decisions suggest standards, rather than improving, have continued to slip, with a seeming lack of knowledge among experts as to what their role entails.

An expert’s duty is to help the court on matters within their expertise. This duty overrides any obligations to the client who has instructed or paid the expert. This makes it particularly important that expert evidence is, and is seen to be, independent, objective and uninfluenced by the demands of litigation. Under the Civil Justice Council Protocol (2014), a useful test as to whether this duty is met is whether the expert would express the same opinion if instructed by the opposing party.

In a number of recent cases criticism of experts’ independence has been such that their evidence has been discarded in its entirety. For example, in Van Oord Ltd and Another vs Allseas UK Ltd [2015], the TCC delivered a damning judgment.
for the claimant’s expert who had allowed himself to become the claimant’s “mouthpiece”. Similarly, in Riva Properties Ltd & Ors vs Foster Partners Ltd [2017], Mr Justice Fraser was very critical of the defendant’s expert for “simply changing his mind” and providing “no satisfactory explanation”. The expert was also considered to be “somewhat obstinate” and it appeared that his evidence was influenced because “he feared the answer to the exercise would harm the case being advanced by Fosters”. The expert was rounded criticised for being “wholly unhelpful”.

The TCC was also heavily critical of ICI’s expert in the recent case of Imperial Chemical Industries Ltd vs Merit Merrell Technology Ltd [2017], saying the expert’s approach was “wholly illogical” and “a clear demonstration of [the expert] adopting a partisan […] unsustainable, position in ICI’s favour. No independent expert should do this.”

Finally, in 125 OBS (Nominees 1) vs Lend Lease Construction (Europe) Ltd & Others [2017], Mr Justice Stuart-Smith criticised the defendant’s expert for “the failure to follow the implications of what he knew […] It remained quite unclear how he could, consistent with his duties to the court, have failed to make plain his clear understanding that some of the documentation was fabricated and that […] the documentation as a whole (on which he commented extensively) did not support his client’s case.”

Such judgments demonstrate a growing trend of the court’s willingness to take aim at experts who they believe are not acting completely independently and in accordance with their duties (for example by producing illogical opinions or ignoring key documents or facts).

An expert who acts outside their duties under CPR Part 35 is arguably in breach of their duty of care to their client. Proving a loss arising from such a breach may be difficult for a party in litigation, as it would involve speculation on how the case would have proceeded had the expert acted differently. However, the risk of negligence claims against experts is plain.

There is also a risk of an adverse costs order being awarded against a party to litigation as a result of an expert’s conduct, as happened in Igloo Regeneration (General Partner) Ltd vs Powell Williams Partnership [2013]. A partial indemnity costs award was made against the claimant due to the conduct of its inexperienced expert engineer, who made concessions in the joint statement which undermined the claimant’s case on liability. When this was noticed by the judge, the expert sought to resile from the concessions and filed a revised statement.

 Experts must understand and act in accordance with their duties under CPR Part 35. Equally, solicitors instructing experts should take care not to compromise the expert’s overriding duty to the court. The appointment of an expert should be seen as just that – obtaining an unbiased view from an expert in the relevant field such that a proper assessment of the risks of litigation can be made by the lawyers and appropriate advice given. To seek to use the process to advocate a claim or a defence through the expert, or to seek to influence that expert’s views, risks credibility being lost and most likely an adverse decision and potential cost sanctions. Far better to obtain an expert’s impartial, balanced view and to use those opinions to steer the case to the best outcome for your client. These recent decisions will hopefully have the welcome effect of reducing the use of experts as a “hired gun”.

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appropriate quantity would have materially increased cost, so JNP devised an alternative design – but one that needed a higher degree of workmanship than would have been required using Hydroguard, and which used a cheaper product that was not industry-certified.

The cheaper solution failed, an outcome predominantly caused by the contractor’s defective workmanship but compounded by a lack of adequate supervision by JNP. Critically, JNP also failed to obtain Radius’ consent to the change in design, contrary to an express clause in an appointment. The court found that “a deliberate decision was made to keep Radius in the dark”.

Radius sued and JNP sought to rely on the net contribution clause in defence. Radius countered that the clause only applied to negligent design by JNP so did not apply to JNP’s obligation to obtain consent to a change in design, and that such failure to obtain consent therefore made JNP wholly responsible for the problems that followed, regardless of any fault of the contractor. The court disagreed. The net contribution clause was drafted widely and applied to “any actions or proceedings brought against [JNP] under or in connection with the [appointment]”. It therefore covered all of JNP’s obligations under the appointment – not just in relation to the design.

The court said the parties could not have intended that some obligations would fall within the clause and others outside it, and therefore all liability for breach of these obligations was subject to the net contribution clause: “JNP were to be held only responsible for their share of the responsibility”.

Conclusion and implications

This decision follows previous cases upholding the operation of net contribution clauses and emphasises the width that these clauses can have – albeit that the court ultimately just gave effect to the words used. If you agree a net contribution clause, expect the court to uphold it.

No doubt Radius will ponder on this. It now faces the prospect of making only a partial recovery, notwithstanding JNP’s “high risk design”, which – in a breach of contract by JNP – it was not given the opportunity to consider or to reject. Some commentators believe this case may encourage employers to seek to limit the effect and scope of net contribution clauses so that, for example, they apply only to liability arising from negligent performance of services, and not to ancillary obligations – such as a requirement to obtain consent for changes in design or to act in accordance with the employer’s instructions.

That may be so, but consultants – and more particularly their professional indemnity insurers – tend to be pretty savvy on these points, so be careful what you wish for.

After all, the first rule of contract negotiation is much like Newton’s Third Law of Motion: just as every action has an equal and opposite reaction, any attempt to limit the scope of a limitation clause is likely to be met by an attempt to limit the extent of the obligation in the first place.

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