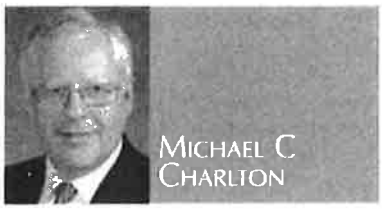
Expert Witnesses: Are Courts and Arbitral Tribunals Asking too much from Them?

This article stems from a series of recent lectures entitled *The Quantity Surveyor as Expert Witness* delivered in Hong Kong and Singapore and a talk given at the 39th Convention of the International Federation of Asian and Western Pacific Contractors' Associations (IFAWPCA) held in Hong Kong in November 2011. It also builds upon a previous article published in *Asian Dispute Review* in January 2010[1]. It is written in the context of increasingly vociferous complaints about experts and recent changes and demands in the expectations of courts and arbitral tribunals in the UK and in Asia.



MICHAEL C CHARLTON

Introduction

The writer has acted as a quantum expert on many occasions since establishing business as a construction contracts consultant in Hong Kong in 1985. The experience has always been demanding, satisfying and interesting but cannot always be said to have been enjoyable. This is to be expected in an adversarial procedure. In the writer's early days as an expert, the role commanded some respect amongst one's peers. The roar of criticism which, by contrast, experts are currently meeting from all sides, particularly the legal fraternity, raises doubts both about whether such respect still exists and, indeed, the wisdom of carrying out such a role.

Historical context

The public probably became aware of the difficulties associated with the role of the expert witness in the high profile case of *Meadow v General Medical Council*[2]. Sir Roy Meadow was a very well respected expert witness who had given evidence on matters concerning his expertise as a paediatrician. He strayed into making comments in a criminal trial on statistics which were outside his area of expertise, an opinion which contributed to the conviction of a mother for murder in a cot death case. The mother was imprisoned but subsequently released on appeal. Sir Roy's evidence was considered to have been an important factor in the original guilty verdict. He was severely castigated for his evidence and struck off the General Medical Council's List of Registered Medical Practitioners, with a resulting loss of professional reputation. He was subsequently reinstated, but no doubt his reputation in the medical profession was left permanently damaged.

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The courts have said much about the requirements of experts to recognise and serve the court or tribunal and not their paying client. The scene was set by well known dicta in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer*[3]. The obligations of the expert enunciated in that case were enshrined in 1999 in the Civil Procedure Rules (England & Wales) and more recently in Asia in the rules of court of Singapore and Hong Kong. The underlying *Ikarian Reefer* principles (though not, of course, the rules of court) apply equally to arbitration.

There are numerous cases where judges have lambasted experts who have appeared before them. Coupled with this have been (i) increasing demands placed upon experts as to the procedures they must follow, (ii) the need to meet their opposite number in a case and to produce joint reports setting out what they can agree and why they cannot agree on issues before them, and (iii) the UK decision in *Jones v Kaney*[4] to the effect that experts are not to be considered immune from actions for negligence.

The writer has no difficulty with the demands placed upon experts to act wholly in the interests and service of the court or tribunal. The more recent expectations in regard to joint reports and the removal of immunity are, however, causes for concern.

Joint reports: practical implications

When the writer commenced practice as an arbitrator and expert in 1985, an expert was required simply to provide his opinion and probably to provide a reply to that of his opposite number. Whilst he would meet the other side's expert, there was no requirement to provide a joint report. Expert reports were produced as firm opinions

rather than as 'without prejudice' documents. It was normal at that time to provide a reply report.

Whilst there are obvious issues arising from this process, the reluctance to change one's position before a judge or arbitrator may favour a 'without prejudice' opinion first. Furthermore, whilst the production of a joint report may remove much that is in issue between experts, the increased demands imposed upon them appear to the writer to go too far.

Typically, an order by an arbitral tribunal may now require:

(1) production of preliminary 'without prejudice' reports;
(2) experts to meet on a 'without prejudice' basis and attempt to reach agreement as to their opinion on issues in dispute;
(3) experts to sign a joint report setting out the questions on which they reached agreement expressing their agreed opinion;
(4) the joint report to identify the questions on which the experts have been unable to reach agreement, stating their reasons for disagreement;
(5) information about the number of meetings and the duration of same;
(6) production of final reports.

In Hong Kong, the requirements to be observed by experts in litigation are generally set out in the Rules of the High Court (RHC) at Order 38, rr 35, 37B and 37C and in Appendix D to the RHC (Code of conduct for expert witnesses). Paragraph 12 of the Appendix (Experts' conference) governs the requirements as to meetings of experts.

If experts are unable to provide the joint report requested by the court or tribunal, including lucid explanations not only as to what they agree but also what they do not agree, then woe betide them. They are likely to attract stinging criticism from the judge. In the recent case of *Chevalier (Construction) Co Ltd v Tak Cheong Development Ltd*[5], the judge had to deal with issues involving the valuation of numerous variation orders. In adopting what he termed his case management powers, Lam J appointed an assessor to deal with the evidence of two quantum experts who had been unable to provide him with a joint report that satisfactorily explained why they disagreed. The judge had previously asked counsel for both sides to explain the duties of the experts to them, but was still unable to understand what the experts had produced and criticised them for failing to engage on the matters before them.

Whilst the writer was not privy to the opinions or joint report produced by the experts in the *Chevalier* case, the events in question appear to raise a number of relevant issues.

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It is, in the writer's experience – and notwithstanding the requirements of para 15(4) of and Appendix A (para 7(3) and (4)) to Practice Direction 6.1: *Construction and Arbitration List* (Hong Kong) - rare for experts to be provided with an agreed list of questions which they must answer. Solicitors are occasionally asked to agree upon such a list (at least in trials) but they may fail to do so. This is not surprising, as it is by no means easy to reduce a pleaded case to a selection of questions which experts must answer. More frequently, experts are expected to read the pleadings and witness statements and then to offer their opinion in the absence of specific questions. This inevitably results in reports approaching the pleaded case from different angles. This can be of major significance when the experts meet and try to agree on common opinions and even more of a problem in agreeing upon why they do not agree upon various matters.

Real problems can arise in planning and engineering matters, where different methodologies may be adopted by each expert, possibly using differing information. Quantum experts will hopefully reach a large measure of agreement, though this may not happen where they are valuing delay and disruption.

In the absence of an agreed list of questions to be answered, courts and tribunals should not be surprised if, like the parties' solicitors, they have difficulties in reaching agreement on their opinions.

It should be borne in mind that individuals who have expressed their views on the pleaded case, probably without being asked specific questions, are then thrust together and expected to do two things: (i) reach agreement on common areas of opinion (which opinions may not be expressed in terms that overlap sufficiently to permit agreement to be readily reached), and (ii) agree on exactly why they do not agree on other issues. The latter causes more trouble than the former.

The unfortunate fact is that, in the absence of a narrow set of agreed questions to be answered, agreement between experts and production of a useful joint report may be difficult. This being the case, the sort of criticism meted out in the *Chevalier* case may be too harsh. It is also possible that a technical arbitrator may have a better understanding of

what the construction issues are about and may not be unduly troubled by the experts' opinions or the lack of a suitable joint report.

The crux of the matter is that arbitrators were in the past appointed from the technical professions or were lawyers who were dually qualified or had long experience in construction. Problems now seem to arise where an arbitral tribunal has no real experience in construction and flounders amongst the mass of detail and esoteric issues before it. This problem cannot be resolved by making ever-increasing demands on experts. The answer is to select an appropriate tribunal rather than placing so much reliance upon the experts providing agreed answers to the issues.

Expert immunity

Adding to the problems which hamper experts in carrying out their ever more demanding role is the possible disappearance of the ancient immunity of experts if the UK decision in *Jones v Kaney* is followed in other jurisdictions.

The first point to make is that courts and tribunals are, with justification, critical of the 'professional expert', ie a person who earns his living not by practising his primary profession but by acting only as an expert. At the same time, however, ever more complex legal demands placed upon experts make it difficult for them to offer opinions unless they fall into the category of the professional expert. Nevertheless, there certainly are - and must be - those who act as experts occasionally (and, indeed, for the first time) who may not be expected to have a full grasp of all the legal ramifications of what is expected of them. They do, however, have that most important attribute, which is expertise in their profession.

Such was the case in *Jones v Kaney*[6], where an apparently inexperienced expert was inveigled by her opposite number into signing a joint report in which she did not really believe. Her client sought to replace her, since she had agreed to the other side's criticism of him in a medical case arising from an accident in which he had been involved. The court refused permission to replace the expert, thus obliging her client to settle at a significant reduction in expected recovery. He then sued the expert who, in her defence, successfully pleaded immunity at first instance. This defence was, however, overturned on appeal. The UK Supreme Court took the view that the expert's position was analogous to that of the advocate, whose immunity had been removed some years before. Furthermore, the Court took the view that experts were not likely to be deterred from acting or giving full and frank evidence if their immunity were removed. In any event there were already a number of cases where an expert was not immune and could be held liable for wasted costs in appropriate circumstances[7].

> **"... "[W]hat the court wishes to hear is the expert's own independent professional opinion on the topic instead of a biased view construed and put forward for the purpose of advancing a party's position." - *Chinachem Charitable Foundation v Chan Chun Chuen* (2010), per Lam J. "**

Two judges gave minority opinions in *Jones v Kaney*. Lady Hale said that it was wrong to make such changes to the immunity rule on an experimental basis, while Lord Hope said that it was not right to proceed by way of assumption only. There was no evidence that experts would not be deterred from taking up such a role and it was an assumption so to assert. The premise should be properly investigated by a body capable of researching and dealing with such a matter, such as the Academy of Experts.

In the writer's view, the role of the expert and that of the advocate are not sufficiently similar as to justify the adoption of the same rules as to immunity. Advocates owe a duty to the court and the tribunal, but this duty is not of the same nature as that of an expert. Indeed, this point was made by Lam J in *Chinachem Charitable Foundation v Chan Chun Chuen*[8]. With regard to an expert's overriding duty to the court to use his professional expertise to assist the court without regard to the exigencies of litigation, Lam J said:

"Here lies the crucial distinction between an advocate and an expert witness. Even though counsel and solicitor also owes an overriding duty to the court in certain respects, the court understands that as advocates they are not impartial as they also have a duty to present the case of their respective clients. But the position of an expert witness is different. His evidence is admitted to assist the court on a subject which requires expertise he has acquired (but not the court). Therefore, what the court wishes to hear is the expert's own independent professional opinion on the topic instead of a biased view construed and put forward for the purpose of advancing a party's position. ... "[9]

This is well put, no doubt, but few clients will understand this. Indeed one American client, when told of his expert's duty, stated that if his expert were neutral in such a way, he would consider that he had wasted his money.

Here lies the nub of this issue. Whilst clients may have been unhappy about their expert's less than partisan attitude regarding concessions made during joint meetings, they would have been smartly told by even the most aggressive solicitor that there

was little they could do about it, given the immunity bestowed upon experts. This may, however, no longer be the case.

It is doubtful that the UK Supreme Court gave much thought to the realities facing many experts when appointed. Their clients do not wish to be directly involved in the legal process confronting them, including the appointment of experts. It is, however, a matter of necessity. The client may be a reluctant respondent who has no choice but to appoint an expert, or a claimant who is faced with no alternative but to do so in supporting his claim to an entitlement if he is to be recompensed. Moreover, an expert is frequently employed by an impecunious client. All too often, an expert finds that he is in effect funding a client who may be technically insolvent but who is running his case on the unpaid bills of his team. The expert therefore often struggles to be paid. If a client fails in his action or defence, there is now a real possibility that any fees due to the expert at the time of trial will not be paid or a reduction will be demanded.

Prior to *Jones v Kaney*, an expert could sue for his fees or put pressure on his client, prior to the trial, by insisting on payment if reports were to be served or before he gave evidence. Now, however, it is open to the client to commence a spurious action against the expert for negligence which the expert must defend. He cannot simply plead immunity.

It is in this area that an expert will struggle with the judgment in *Jones v Kaney*. It does not matter that the case raised against him is entirely without merit, as he must defend it and this will involve time and costs. It offers an unscrupulous and disgruntled client the perfect opportunity to avoid payment of fees or insist on their reduction.

The writer respectfully disagrees with the majority views expressed by the court in *Jones v Kaney* and believes it may have a very serious effect upon the willingness of professionals contemplating the role of expert, particularly a person who is not a 'professional expert'. The case has not yet been followed in Hong Kong, but it may just be a matter of time.

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Conclusion

A number of experts have been justly criticised in the past for their 'hired gun' approach. One must question, however, whether courts and tribunals are expecting too much when they demand that experts meet, agree on common matters, agree upon why they do not agree on other matters, and maintain their independence and commitment to the tribunal. All of this applies notwithstanding the opportunity now offered to unscrupulous clients to threaten or commence spurious proceedings against experts for negligence because they have allegedly disappointed their clients by maintaining that neutrality.

It is submitted that much of the difficulty experienced by courts and tribunals, at least when considering expert evidence in construction disputes, may be removed if (i) it were a matter of routine procedure that agreed questions be put to the experts (as required by Practice Direction 6.1), (ii) arbitral tribunals could be drawn from experienced construction professionals or lawyers, and perhaps (iii) instructing solicitors could, as a matter of course, be put in funds to meet the fees of their experts, so that this issue at least could be taken out of the arena.

Michael C Charlton
Charlton Martin Group
Hong Kong

1 Michael C Charlton, *The Quantity Surveyor as Expert Witness* [2010] Asian DR 15.
2 [2007] QB 462, Court of Appeal (England & Wales).
3 [1993] 2 Lloyd's Rep 68 at 81-82, per Cresswell J (High Court, England & Wales).
4 [2011] UKSC 13, 30 March 2011, unreported (Supreme Court, United Kingdom).
5 [2011] 2 HKLRD 463 (Court of First Instance, Hong Kong).
6 Note 4 above.
7 *Editorial note*: For a detailed discussion of *Jones v Kaney*, see Philip Boulding QC, *Expert Immunity and the Impact of Jones v Kaney* [2011] Asian DR 109.
8 HKCP 8/2007, 2 February 2010, unreported (Court of First Instance, Hong Kong). *Editorial note*: An appeal to the Court of Appeal was dismissed: CACV 62/2010, 14 February 2011.
9 Paragraph 485.