THE GAMES EXPERTS PLAY?

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No professional in the construction industry who undertakes expert witness work can be excused for not understanding his role and duties.

In recent years, much attention has been focused upon the performance of the expert. His role and duties are set out clearly in the case of National Justice Compania Navira SA v Prudential Assurance Co Ltd [The Ikarian Reefer] 1993. The single most important point for any expert to remember is that his duty is to assist the court or tribunal. That is the only purpose in his employment.

The difficulty in achieving true neutrality and independence is transparent, given our system of each party engaging its own expert.

This difficulty has been addressed in numerous forms, not least by Lord Woolf who devoted significant attention to the matter in his report "Access to Justice", adopting entirely the views expressed by the judge in the Ikarian Reefer. The English "Civil Procedure Rules" sets out radical changes in the use of Experts (Part 35), reflecting the views expressed by Lord Woolf in his report. These rules are yet to be adopted in Hong Kong.

Professional institutions are attempting to address the problems and to adopt the findings of the Ikarian Reefer, the Woolf Report and the English Civil Procedure rules in their guidance to members. The Royal Institution of Chartered Surveyors has produced a Practice Statement and Guidance Notes, stating clearly that "it is the duty of every Member to comply with the contents of the Practice Statements issued by the Institution from time to time", and "when an allegation of professional negligence is made against a surveyor, the Court is likely to take account of any relevant Practice Statement published by the RICS in deciding whether or not the surveyor has acted with reasonable competence. Failure to comply with the Practice Statement is likely to be adjudged negligent".

The Practice Statement adopts in full the findings and recommendations of the Ikarian Reefer, Lord Woolf's Report and the Civil Procedure Rules.

The Academy of Experts provides training and guidance on these matters.

Given the above, it is surprising that with monotonous regularity, one encounters experts who are in breach of the clear guidelines which are now widely known and publicised.

I would go so far as to say that it is unusual to find an expert who behaves neutrally, and appreciates his primary duty to assist the court or tribunal. Still, experts attempt to act as advocates, particularly in arbitration where they may be able to act with more latitude, in front of inexperienced or uncertain technical arbitrators, than may be the case in court.

There are of course occasions when a novice may genuinely be unaware of his duties, and unwisely ventures into the role of an expert witness. This is generally transparently obvious to all concerned.

Typically, such individuals feel that they need only give an opinion for it to be accepted by the tribunal. Architects may simply declare that an extension of time of 'x' weeks is appropriate, quantity surveyors may give the opinion that $ 'y' is a correct valuation for a rate, with no supporting calculation, facts or evidence. They misjudge entirely the degree to which their views will be probed in cross-examination, and emerge from the hearing much chastened. What is surprising is that their instructing solicitor/client representative has not drawn the matter to the expert's attention at an early stage.

No doubt, those representing a client may be reluctant to interfere with the expert and his opinion, but it must be sensible, and right, to test the expert's opinions before he gives evidence, especially where those opinions are clearly offered without support or are obviously biased.

Experts will often make no serious attempt to reach agreement with their exposing colleagues, engaging instead in acrimonious and unproductive argument.

Professionals attempt to act as experts in areas where they have no expertise, for example, one often finds quantity surveyors giving evidence on planning matters, an area of increasing specialisation and complexity.

In Hong Kong, it has become the fashion for judges and arbitrators to direct experts to provide provisional "without prejudice" reports which are exchanged, with experts then meeting and attempting to reach agreement, thereafter issuing final reports. I can only assume that the logic for this procedure is to allow experts the opportunity to change their minds before finalising their reports, without any loss of face or prejudicing the judge or arbitrator as a result of such changes.

One can only marvel at the alacrity with which opportunities are taken to gain advantages. Experts frequently use this procedure to test opposing experts by including in their provisional reports opinions they cannot really hold, knowing that they can withdraw them with impunity before finalising their report. This may aid their clients in parallel negotiations. Experts frequently make no serious attempt at providing an opinion, or give opinions unsupported by facts or evidence, and subsequently attempt to glean information from the opposing expert's reports and at meetings.

The use of provisional reports has become a game of tactics, used by experts and their clients.

Even where the procedure is not deliberately abused, confusion arises with experts quoting at hearings from provisional without prejudice reports (or without prejudice meetings), or unwittingly using privileged information in their final reports.

I question the procedure of producing provisional without prejudice reports. It is time wasting, encourages inappropriate behaviour from all concerned, and gives rise to mistakes.

Even without the complication of without prejudice reports, opportunities for error and confusion abound, especially amongst inexperienced experts. Experts' Meetings are particularly prone to confusion. One finds experts working from documents which have not been included in the trial bundle or discovered. These documents may be exchanged between experts in support of their various positions and find their way into their final reports. This inevitably causes confusion and disruption at the hearing when the documents cannot be found in the trial bundle.

Notwithstanding the ongoing and widespread publicity directed at experts, and the growth of specialist interest groups which deal with the expert and his role, one continually encounters experts who either do not know, or disregard what they know to be their duty, and who also attempt to frustrate the real intentions of the court or tribunal by taking tactical advantage of the directions.

It seems to me inevitable that the time will come, probably sooner rather than later, when court or tribunal appointed experts will become the rule in Hong Kong. This is a pity, because it is equally clear that clients and their representatives needs experts (even before a technical arbitrator) to advise them and to allow the flexibility offered by their own choice of expert. It probably means that they will continue to employ their own experts in any event, with a consequent increase in costs.

My observation is that whatever rules are developed and however well intentioned, parties will with ingenuity subvert them to their own ends.