

Construction & Engineering Update

Spring 2016



Instructing Experts After Van Oord: Reasons to Be Careful

Every once in a while a case comes along which, although perhaps somewhat extreme in its circumstances, causes all those involved in the contentious domain to sit up and take notice.

Unfortunately for one party and their quantum expert witness, the Technology and Construction Court case of *Van Oord UK Limited and Sicim Roadbridge Limited v Allseas UK Limited* [2015] EWHC 3074 provides a sobering yet salutary lesson not only for experts but also for clients and lawyers.

Need to Know

The case concerned three disruption and prolongation claims brought by Van Oord UK Limited and Sicim Roadbridge Limited (OSR) against Allseas UK Limited (AUK) arising from the onshore laying of a 30-inch gas export pipeline between mainland Scotland and the Shetland Islands.

Both sides appointed quantum expert witnesses to give evidence to the Court on the value of the claims. Notwithstanding the fact that this was the first occasion that OSR's quantum expert had prepared an expert report (and the fact that this expert had extenuating personal circumstances), Mr Justice Coulson was not deterred from stating during the course of his judgment that OSR's expert's evidence was "entirely worthless". He also provided a number of reminders as to the role and obligations of an expert witness. Mr Justice Coulson delivered these reminders in 12 condemnatory examples of "what not to do".

A summary of the reminders and a review of the Court rules and accompanying guidance governing the basis upon which an expert performs their duty to the Court are provided below.

Key Points

Taking claims at "face value"

The Court criticised the expert for taking the claims at face value without checking whether underlying documents acted to support or undermine that position. In fact, the expert admitted to including sections in his report which, despite having been attributed only to him, had in fact been prepared by OSR. As a result, the Court accused the expert of fabricating his conclusions (as they could not plausibly be verified) and held that the expert's evidence must be "discounted in its entirety".

An expert witness needs to be able to demonstrate that their opinion or conclusions have been properly reached. *The Civil Justice Council Guidance 2014* (CJC Guidance) states that an expert opinion should

only be reached once all the material facts put before an expert have been taken into account. Any reports produced by an expert should indicate the facts and any supporting materials that they have relied on in formulating their conclusions. If the expert is unable to satisfy themselves in order to give a final (or unqualified) opinion, or they believe that further information is required to be able to do so, this should be clearly indicated. Should any questions or issues be raised which fall outside an expert's expertise this equally needs to be made clear. The guidance goes on to state that any failure by the expert to comply with the Court's rules may result in the instructing party being excluded from relying on the expert's evidence.

Bias

The Court condemned the expert's report as being "inevitably biased". This is a very serious criticism. The Court stated that the expert had considered only one side of the arguments put to him and had even "cut and pasted" sections of OSR's witness statements as though this represented an accurate contemporaneous record of events.

Demonstrating a true degree of independence is a prerequisite for an expert witness. The CJC Guidance states that the opinions of an expert must be independent, regardless of the pressures of litigation. Although the expert will be instructed by one of the parties, they are not to take it upon themselves to promote their view or assume the role of an advocate or mediator. Independence, it states, can be tested by considering whether an expert would express the same opinion if they had been given the same instructions by the opposing party.

Incorrectly assessing claims

The expert ignored the Court's request that both party's experts agree figures for the purposes of valuation based on the claims of both parties. The Court stated that the expert only valuing the claims on one basis represented "a very dangerous stance". In addition, the Court stated that in trying to "plug the gaps" in OSR's case (which had been exposed during cross examination), the expert had achieved the "complete opposite of what a reasonable independent expert" was obliged to do.

Further, the Court suggested that the expert seemed almost “proud” that he did not assess the claims against what could be considered to be fair and reasonable rates, concluding that his valuation had been conducted “carelessly” and in consequence was of “no value”.

As set out in rule 35.3 of the Civil Procedure Rules (CPR), the overriding duty of experts is to help the court on matters within their expertise, which overrides any obligation that the expert has to the instructing party or the party paying for their services.

Acceptance of criticisms

The expert initially blamed typographical and presentational errors for the shortcomings in his report, yet by the end of his cross examination he was conceding points before AUK’s barrister had even put them to him. In doing so, the Court found that the expert was accepting of every criticism made or error highlighted to him. These admitted errors, the Court held, “fatally undermined” both his own credibility and that of OSR.

The CJC Guidance states that experts should, as soon as possible, inform their instructing party of any change in their opinions in relation to any of the material matters, ensuring that the reasons for doing so are also cited.

Points to Note

Mr Justice Coulson’s damning comments in *Van Oord* in relation to OSR’s quantum expert give rise to a number of points to note which highlight the need for clients and instructing lawyers to carefully select their expert witness.

Mr Justice Coulson clearly used this case to sound a warning and remind expert witnesses of their general duties when it comes to both oral and written expert evidence in formal proceedings.

While the judgment serves as a useful reminder for those who have appointed and those who have been appointed as expert witnesses in the past, the Court also made it clear (in no uncertain terms) that the same level of responsibility applies to all expert witnesses, including first time expert witnesses.

Preparation by an expert witness is vital. This case clearly shows that any attempts at shortcutting or sidestepping the Court’s processes will be strongly criticised and may lead to evidence being given less weight, or as in this case, discredited and disregarded in its entirety.

Despite the sad surrounding circumstances the expert was working under (he was said to be dealing with a serious illness in his family), he seemingly did little to help the situation when giving evidence to the Court. His manner during giving evidence, his going against the Court’s instructions, his attempts to cover up errors, his changing views whilst under examination, and (perhaps most worryingly) his resolute refusal to consider any position other than his instructing client’s, all drew severe criticism from the Court.

Only those who had involvement in the OSR case will know for sure the real reasons behind the expert’s shortcomings, but this case makes very clear that even the slightest hint of an expert appearing to be a “hired gun”, i.e. totally aligned to the instructing party and not complying with the duty to the Court, carries a great risk that the expert’s evidence could be inadmissible.

Whilst the right expert can often sway the outcome of a case, it should be a given that experts must fully understand their duty to the Court. It is, therefore, prudent to ensure that an expert has sufficient experience of the field in question, the Court rules, and is committed (and organised) in a way to devote the required amount of time and resources to enable them to properly fulfil their duties. This requires careful vetting by clients and their lawyers.

It is also important to remember that giving oral evidence at trial will invariably be a stressful experience, and will be amplified under cross examination. The CPR and CJC Guidance provide the principles for the appointment of expert witnesses with which experts should be familiar. Some professional bodies, such as RICS, also publish their own codes of practice for experts.

The point vehemently reaffirmed by this case is that the duty of the expert witness is to the Court, not to those instructing them. It is therefore in the interests of lawyers instructing expert witnesses, and of course the clients whose case outcome may depend on their evidence, to ensure that their chosen expert is fully equipped not only to be independent and well prepared but also to give evidence transparently and objectively.

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