

Experts have lessons to learn

Expert witnesses attracted a fair amount of judicial comment over the past year. **Ann Levin** and **Patrick Stone** of **Herbert Smith Freehills** review the most recent cases providing guidance on a number of aspects of using expert witnesses.

KEY POINTS

- A court may exclude expert evidence where it is not reasonably required to resolve the proceedings
- Parties should be mindful of the cost and extent of that evidence in the context of the proceedings as a whole
- The court will want to be assured that the named expert is providing recognised expertise
- A party should only consider changing its expert where there is clear justification and should be prepared for the potential cost consequences
- Proper and impartial conduct of the expert is critical to the potential success of the case of the party he/she is representing

The role of experts in legal proceedings has, over the course of the last year, continued to attract comment in a number of judgments of the courts of England and Wales. The decisions provide guidance on a range of issues that arise during an expert's tenure – from the initial question as to whether expert evidence is, in fact, required to assist the court in reaching a decision, through to the conduct of the expert in providing his or her opinion and giving evidence at court.

In this article, we review four recent cases and consider the lessons learned for experts – and the parties and legal counsel instructing them.

When should expert evidence be allowed by the court?

The right of a party to submit expert evidence to support its case is limited, by the Civil Procedure Rules 1998, SI 1998/3132 (CPR) r 35.1, to circumstances where it is 'reasonably required to resolve the proceedings'. This does not mean that

expert evidence must be of 'absolute necessity' for it to be adduced, but a court may exclude expert evidence where it is not reasonably required to resolve the proceedings.

Of course, expert evidence may be necessary for some of the issues in dispute, but not for the proceedings as a whole. In such circumstances, it is established law that, where expert evidence is necessary for any of the issues in the proceedings, expert evidence should be allowed.

Equally, where expert evidence is helpful to an issue, and that issue is central to proceedings, then that evidence should be allowed.

In contrast, where expert evidence is helpful, but not necessary, to a peripheral issue in the case, then the court might take the view that the expert evidence is not reasonably required to resolve the proceedings.

The *British Airways Plc* case

In *British Airways Plc v Spencer and 11 others (present trustees of the British Airways Pension Scheme)* [2015] EWHC 2477 (Ch), the court explored further the situation where expert evidence may be helpful to some issues, but could not be said to be necessary, whether to some of the issues or the proceedings as a whole, and provided guidance on resolving the question of whether that expert evidence should be admitted.

In this case, British Airways had sought to adduce evidence from an actuary to support advice given by a professional actuarial advisor to members of its pension scheme. This evidence was excluded by the deputy master as he considered the elements of the case, on which British Airways argued expert evidence was necessary, were 'eminently capable of being determined by the judge at trial as issues of fact and law' – the key issues in dispute were the nature of the advice, how it changed, how that advice was understood and how it was used by those receiving it, but not the correctness of the advice itself.

On appeal, Warren J determined that the deputy master had failed to consider the specific pleaded issues in detail and whether or not the expert evidence was of assistance to resolving each of the issues. Instead, he had taken a ‘big picture’ approach that led to him incorrectly excluding that evidence.

On a closer consideration of the issues in dispute, Warren J concluded that the expert evidence was helpful to some of the issues in dispute and, on balance, the expert evidence should be allowed.

Warren J stated that where expert evidence on an issue would assist the court, but is not necessary, and the court is to determine whether or not that evidence is reasonably required in the context of the proceedings as a whole, the court should take account of factors such as the value of the claim, the likely impact of the judgment, where the costs will fall, and the possible impact on the conduct of the trial.

Therefore, while the expert evidence was allowed in this case, it is a reminder to parties that, where they seek to adduce expert evidence, they should carefully consider whether that expert evidence is actually going to provide assistance to the court in addressing the issues in dispute and they should be mindful of the cost and extent of that evidence in the context of the proceedings as a whole.

Expert evidence refused where novel method proposed

Where expert evidence may assist the court, the court will want to be assured that the named expert is providing recognised expertise.

The *Barings* ruling

In *Barings Plc (in liquidation) v Coopers & Lybrand (No 2) [2001] Lloyd’s Rep Bank 85*, the court stated:

‘... expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court’s decision’.

In *Barings*, the court determined that there was a recognised body of expertise with recognised standards in relation to the managers of investment banks conducting or administering the highly

technical and specialised business of futures and derivatives trading.

The *Balfour* case

This was given further consideration in *Various claimants v Sir Robert McAlpine (and Balfour Beatty Engineering Services Ltd and others, third parties) [2016] EWHC 45 (QB) (Balfour)*, where the court found the opposite.

The claimants had sought to adduce evidence from an expert to quantify their potential future earnings following their alleged ‘black-listing’ from potential construction jobs. The expert had estimated the potential earnings of a hypothetical comparator who had not been blacklisted and who shared the key earnings-related characteristics of each claimant to produce ‘benchmarks’, which subsequently could be adjusted for individual black-listed workers.

However, the court determined that this methodology was, in the words of the claimant’s expert, ‘research’ and was not ‘recognised expertise governed by recognised standards and rules of conduct’ as required by *Barings*.

Experts, and their instructing clients and counsel, therefore need to be cautious about adducing expert evidence which, rather than adopting recognised practices and standards, adopts novel methods to support a claim.

The court also noted that the time and expense required to conduct further analysis was disproportionate to the value of the litigation and that part of the report included the views of a separate expert in actuarial science and statistics, which did not comply with the requirements of Practice Direction 35 of the CPR (CPR PD 35) or the Guidance for the Instruction of Experts, as it did not set out properly the facts, the modelling or the methodology used.

Will the court allow parties to change experts during the proceedings?

The *Cintas* case

Once appointed, an expert’s conduct is under scrutiny throughout proceedings. In *Cintas Corp (No 2) v Rhino Enterprises [2015] EWCA Civ 731*, the court allowed the claimant to change its expert late in the proceedings, but before trial, where the conduct of the expert had been ‘inappropriate and indeed improper’.

The claimant’s expert’s conduct was such that he had signed a report, following a meeting with the

defendant's expert, in which the experts had agreed a number of previously outstanding issues in the defendant's favour.

The claimant's expert subsequently claimed that he had signed the wrong version of the report and that he had provided an amended version which he had intended the experts would sign. However, it transpired that the amended version was prepared after the experts had signed the report.

In the circumstances, the court allowed the claimant to instruct a new expert to address the 30 issues which had been agreed in the signed report, but the court did not allow the new expert to reconsider items that had been agreed prior to the signed report in question.

While the court allowed a new expert to be appointed, and adjourned the trial, there were significant cost consequences for the claimant as a result. Therefore, while a party may have the opportunity to change its expert, even late in the proceedings, a party should only consider doing so where there is clear justification – for example, where there has been obvious inappropriate and improper conduct and, even then, should be prepared for the potential cost consequences that may follow.

Quantum expert evidence disregarded in full *Van Oord* ruling

Even where the expert's evidence makes it to trial, the proper and impartial conduct of the expert in carrying out his/her analysis is critical to the potential success of the case of the party he/she is representing, a point which was brought into sharp focus by the Technology and Construction Court decision (TCC) in *Van Oord UK Ltd v Allseas UK Ltd [2015] EWHC 3074 (TCC)*, in November 2015.

In *Van Oord*, the evidence of the claimant's quantum expert was excluded in full. Notwithstanding that Coulson J endeavoured to give the claimant's expert the

'...benefit of the doubt, particularly given his frank admission that he had not previously prepared a written expert's report or given evidence in the High Court',

he ultimately came to the conclusion that the claimant's expert's evidence was 'entirely worthless'.

Coulson J cited 12 reasons for reaching this conclusion, which highlighted the patently

improper conduct of the claimant's expert. During the course of carrying out his expert duties the claimant's expert:

- ♦ took a number of the claimant's claims 'at face value', failing to check the underlying documents that supported or undermined the claims which, as Coulson J observed, meant that, on many of the line items, 'there was often no quantity surveying input from him at all';
- ♦ ignored the witness statements prepared on behalf of the defendant, focussing only on the witness statements prepared on behalf of the claimant, meaning that 'his report and his evidence were therefore inevitably biased in favour of the claimant';
- ♦ failed to value the claims on any basis other than that put forward by the claimant, despite the judge requesting that both experts consider the approach taken by the other;
- ♦ failed to consider the actual costs incurred by the claimant, or even address the question as to whether any actual loss had been suffered by the claimant, nor had he considered valuing certain line items by reference to fair and reasonable rates; and
- ♦ on cross-examination, admitted that he was not happy with any of his reports, that parts of his reports were confusing and misleading, that he had attached documents to his report that he had not checked in any detail and included assertions in his report that appeared to be expressions of his own views, but were in fact assertions that had come straight from the claimant's witnesses during discussions with them.

This case provides a helpful reminder of the perils of providing expert evidence to support a case where that expert fails to give proper consideration to the factual evidence, and fails properly to exercise the recognised standards and expertise expected of an expert giving evidence to the court.

Ultimately, Coulson J concluded that the expert had 'allowed himself to be used' by the claimant and its claims consultant 'to act as their mouthpiece', which ultimately led Coulson J to find that the expert

'... was not independent and his evaluations ... were neither appropriate nor reliable'. **CL**