

# Factual and expert evidence - tips and pitfalls

**Sarah Hannaford Q.C.**

## Issues:

- Expertise
- Report writing
- Independence
- Giving evidence

## *SPE International Ltd v PPC (UK) Ltd* [2002] EWHC 881 (Ch)

- Shot-blasting and accountancy:
  - No relevant expertise
  - No note of instructions
  - Had never heard of Part 35
  - Wife wrote much of report
  - Lack of independence
  - Evidence inadmissible

***Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020]***  
EWHC 1626

- Issue: the primary purpose of the plant
  
- Expert :
  - Not an engineer and no expertise in the waste management or energy from waste industries
  - Included information gleaned from Wikipedia and websites without referencing source of information, whether facts within his own knowledge, whether issue outside his expertise
  - Fell short of high standards expected

## Issues to consider:

- Clarity
- Paragraphing
- Length
- Role of appendices
- Need for executive summary
- Authorship

## ***Castle Trustee Ltd v Bombay Palace Restaurant Ltd*** [2018] EWHC 1602

*“In a case of fairly remarkable reports, this was the most extraordinary”*

- The delay expert:
  - Adopted another report
  - Did not see the pleadings or disclosure
  - Had not given a moment’s thought to a realistic baseline programme

Issues to consider:

- Approach to evidence of fact
- Partisan approach
- Conflicts of interest

## Approach to evidence of fact

- *ICI v Merit Merrell Technology Ltd* [2017] EWHC 1763
- *Bates v Post Office Ltd no 6* [2019] EWHC 3408
  - *“An expert’s role is not to decide issues of fact themselves and choose what facts to believe and what not to believe”*
  - *“Independence requires an objective consideration by an expert of both sides of the factual evidence. It is the court’s role, not that of an expert, to decide which evidence of fact is accepted and which is not”*
  - Obvious preference for own side’s evidence – a particularly egregious failure to maintain the necessary standard of impartiality



- **Partisan approach**
- *ICI v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC)

*“There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of doubt, this jurisdiction is not one of them”.*

- ***Ashley Wilde Group Ltd v BCPL Ltd*** [2019] EWHC 3166 (IPEC)
  - Copyright dispute
  - Expert initially instructed to identify evidence supporting AW's case and to look only at similarities
  - Then instructed as an expert – not asked to look at any differences between the designs or to carry out additional measurements

- Should have recognised difficulties of moving roles and started analysis afresh, highlighted differences as well as similarities and reconsidered opinions objectively and fairly in light of differences
- Did not amend approach, maintained a partial approach which caused him to identify too closely with his client's case
- Court placed no weight on his opinions

- ***Bank of Ireland v Watts Group Ltd*** [2017] EWHC 1667 TCC
  - Not independent
  - Attempted to mislead court by omitting part of quote
  - Thoroughly unreasonable approach at experts' meeting
  - *“For him, it might be said that The Ikarian Reefer was a ship that passed in the night”*

## Conflict of interest

- ***Essex County Council v UBB Waste (Essex) Ltd (No 2)*** [2020] EWHC 1581
  - Expert's company and expert had prior dealing with client
    - Pre-contract
    - Design advice
    - Consultancy input and advice
  - Pre-action letter to company asking to notify insurers – “*big worry*”
  - Prior to agreeing to give expert evidence, sought assurance that no firm claim on the table against the company
  - Wrote 8 reports before disclosing matter of the claim

- Obvious and serious conflicts of interest:
  - Should have recognised substantial role by company over time/£100,000s was a conflict
  - Failed to appreciate difficulty in both devising strategy and then offering expert evidence on strategy
  - Ought to have realised conflict even if no current claim – (a) link made between giving evidence and the claim and (b) continued possibility of claim

- Evidence not excluded as inadmissible but treated with caution
- Failed to distinguish between advocacy for client and rigour required when acting as independent expert

- Carry out pre-trial steps properly
- Know your report
- Identify difficult issues
- Listen to the questions
- No advocacy!



## ***Riva Properties Ltd v Foster and Partners Ltd [2017] EWHC 2574 (TCC) – architects***

- Expert QS:
  - Refused to carry out pricing exercise agreed in Joint Statement
  - Had fundamental misconception about scheme to be priced
  - Used price per room which was “*wildly out*”
  - Refused to make assumptions - approach had “*no intellectual justification whatsoever*”, “*verging on nonsense*”
  - Obstinacy meant the only evidence available on scheme was from C’s expert

- Fraser J in *ICI* – 6 points (examples of *Ikarian Reefer* in practice)
  - Experts should have access to same material
  - Experts should not identify version of facts they prefer
  - Experts should not take partisan stance on interim applications
  - Experts meets are to be constructive and co-operative
  - Notice of further analysis should be given to opposite number asap
  - No expert should allow adherence to *Ikarian Reefer* to be loosened

- Identify the issues
- Identify the right witnesses
- Ensure accuracy
- Correct errors before cross examination

## ***Riva Properties v Foster and Partners Ltd* [2017] EWHC 2574**

- Factual evidence:
  - Witnesses entirely shifted their position under moderate cross-examination and simply accepted the claimants' case (on budget)
  - Written evidence was entirely self-serving and seemed to have been drafted regardless of the facts
  - Lengthy, rambling answers, entirely off the point