Editorial

Acting Beyond Their Purview: Independent Experts in the Dock

Expert witnesses; Independent experts; Landlord and tenant

Many landlord and tenant cases involve expert evidence and the majority of independent experts act impeccably. In a recent case involving a business lease renewal and another involving dilapidations, judges have, however, found significant cause to criticise experts for their failure to understand the scope of their duties and role. The consequences were serious for those concerned. A salutary reminder of the critical importance of compliance with CPR Pt 35 for all those instructing and instructed.

It is somewhat surprising that such failures to comply with CPR Pt 35 continue to occur. As the editors of the *White Book* put it, prior to the introduction of the Civil Procedure Rules in 1999, a fundamental problem was that expert evidence was not viewed, in many cases, to be sufficiently independent and impartial. Experts were viewed as partisan advocates for the parties instructing them. The introduction of CPR Pt 35 was intended to remedy this state of affairs. As matters stand, the CPR has now long codified the case law as to the duties and responsibilities of experts, the classic exposition of which was previously set out by Mr Justice Creswell in *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68, at 81–82:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation: *Whitehouse v Jordan* [1981] 1 W.L.R. 246, at 256, per Lord Wilberforce.
- An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise: see *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep. 379, at 386, per Garland J. An expert witness should never assume the role of an advocate.
- An expert witness should state the facts or assumptions on which their opinion is based. They should not admit to consider material facts which could detract from their concluded opinion: *Re J* [1991] F.C.R. 193, per Cazelet J.
- An expert witness should make it clear when a particular question or issue falls outside their expertise.
- If an expert's opinion is not properly researched because they consider that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the reports contained the truth, the whole truth and nothing but the truth without some qualification that qualification should be stated in the report: *Derby & Co Ltd v Weldon (No.9), The Times*, 9 November 1990, per Staughton LJ.
- If, after exchange of reports, an expert witness changes their view on the material having read the other side's experts' report or for any other reason, such change

of view should be communicated (through legal representative) to the other side without delay and when appropriate to the court.
- Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

At the core of CPR Pt 35 is CPR Pt 35.3, "Experts—Overriding Duty to the Court". This provides: (1) it is the duty of experts to help the court on matters within their expertise; and (2) this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. This cardinal rule emphasises that the expert's overriding duty is owed to the court irrespective of who instructed or called the expert. It is the expert's role to help the court come to a decision. As such, an expert's evidence must be independent, impartial, honest and objective. All those giving expert evidence are expected to be fully familiar with Pt 35.

Clipper Logistics Plc v Scottish Equitable Plc (Claim No.G00SE930, 7 March 2022) was, however, an example of a case where an expert was criticised for their failure to comply with Pt 35. Although much of the commentary relating to the case has been devoted to the court's rejection of the landlord's proposal to include green lease clauses in the renewed lease, it is of equal interest, although very largely unmentioned in the case notes, that the court was wholly critical of the tenant's expert's approach to providing rental evidence for the purposes of the renewal under Pt II of the Landlord and Tenant Act 1954. The landlord had contended for a new annual rent of £852,000 to be set under s.34 of the Act. The tenant for an annual rent of £687,000 per annum. The judge found that it was apparent that the tenant's valuation expert had lost sight of the need to comply with their CPR 35 obligations because of:

- their repeated use of often tendentious and inaccurate language to characterise the landlord's expert's evidence in their written evidence. This was more akin to acting as advocate than to giving independent expert evidence;
- their lack of reasoning as to why the valuation for which they contended was lower than the passing rent and the rent the tenant had proposed in the claim form;
- their approach to the appropriate size of comparable properties. An approach conceded to be wrong after prolonged cross-examination on the point;
- their inability or unwillingness to engage with basic propositions put to them in questions in cross-examination;
- the fact they had no knowledge of works undertaken by their client and their exclusion from the valuation;
- their approach to valuation, ignoring certain of the tenant's obligations under the lease; and
- what the judge considered to be their unjustified and illogical conclusion that the property, less than four miles from the M1 motorway, was located in the M18 corridor, with the result that a premium for access to the M1 was excluded from their valuation (as set out in *Estates Gazette* on 18 May 2022).

Having stressed the need for experts to approach their task impartially, the judge found that only the landlord's expert had done so. As a result, where any of the tenant's expert's opinions differed from the landlord's expert's views, the court wholly disregarded those opinions, the consequence being that the rent for the new lease was set at the landlord's figure of £852,000 per annum.

Coldunell Ltd v Hotel Management International Ltd [2022] EWHC 1290 (TCC), provides another example of default. In the context of a terminal dilapidations claim for disrepair to an

hotel, the tenant's surveyor's expert evidence was roundly criticised by the Deputy High Court Judge. She said at [50]–[52] and [54]:

> "Unfortunately, it was plain, throughout the course of the oral evidence given … and from various paragraphs of his report (such as paragraphs 5.50, 5.55 and 5.56) that he was arguing the Defendant's case. A case to which [he] repeatedly referred as 'our case'. This was illustrated time and time again by … not answering counsel's questions, challenging the veracity of the underlying factual evidence presented by the Claimant, relying on argument rather than expert opinion and totally disregarding the merits of the argument being advanced by him. The [tenant's expert's] expert report suffered from many of the shortcomings that were evident during his oral evidence.
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> 51. The situation was made worse by the obvious lack of credibility in relation to several of the opinions [he] expressed … despite the substantial body of evidence to the contrary. … Similarly, many of [his] costings lacked all credibility, as was illustrated by his allocating £15 for outside redecoration works to the windows of certain bedrooms and by his evidence that a Contract Administrator's fee of £7,750 was appropriate for both £20,000 of works and £350,000 of works i.e. regardless of the scope of work.
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> 52. Further, unlike [the landlord's expert], [the tenant's expert] had not carried out any inspection of the Property in relation to key items … Instead, his opinion was based on his view of the photographs included in the Verismart Report and to a limited extent on the Audit Pro Report. He ignored the photographs taken by [the landlord's expert] and the video evidence despite these providing contemporaneous evidence of the condition of the Property in September 2016. … The impression given to the Court was that he had taken a very slap dash approach even to the limited evidence of condition that he considered relevant. …
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> It was also unfortunate that [he] misstated to the Court the evidence provided by the Forensic Flooring expert, … [Their] report concluded that a new Ege carpet must have been 'an improvement and preferable choice, over a much older Axminster' not that the Ege carpet was the equivalent of the original Axminster, as [the tenant's expert] stated when giving evidence. [His] allegations to the effect that the Claimant had undertaken unnecessary works in anticipation that they could recharge these to the Claimant, and that they "wished to lay the costs at the door of the Defendant" were unfounded and inappropriate allegations for an independent expert to make.
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> 54. In short, I fully accept the Claimant's submission that the exercise [the tenant's expert] undertook was that of advocate for 'his client' and not that of an independent expert. It follows from the above that I have not been able to place any reliance on [his] evidence."

In addition to disregarding the tenant's expert's evidence on the substantive issues determined at trial, the expert's failures were also subsequently reflected in an adverse costs judgment: [2022] EWHC 3084 (TCC). On being asked to consider the CPR Pt 36 offers to settle which had been made by the parties, the Deputy High Court Judge held, at [41] and [49]:

> "41. One factor which I think is relevant to take into account in the present case is that the Defendant's expert quantity surveyor's evidence was so partisan and so poor that I was unable to rely on any of it. As a result the Defendant made several bad points at trial. Further, [the expert] was involved in assessing the Claimant's claim

from the outset and his misguided approach likely significantly contributed to the costs that were incurred by the Parties and the Defendant's failure properly to assess the merits of its defence."

"49. Several of the factors I have referred to at paragraph [41] above in the context of determining the applicable rate of interest are in my judgment also relevant to determining the appropriate amount of the additional sum that should be awarded in this case. I think it is relevant to take into account the fact that evidence of [the expert], to which I have already referred, failed to comply with the obligations of an independent expert appearing in this Court and that almost everything was denied by the Defendant."

These are cautionary tales. The courts will have no compunction in identifying default when it comes to compliance with Pt 35.

Janet Bignell KC
Editorial Board Member