# THE RIGHTS AND WRONGS OF EXPERT EVIDENCE

**OLIVER RADLEY-GARDNER K.C.**

**FALCON CHAMBERS**

> *"Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."*
>
> *Whitehouse v Jordan* [1981] 1 WLR 246

> *"The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR part 35, practice direction 35. Every expert should read it."*
>
> *Imperial Chemical Industries Ltd v Merit Merrill Technology Ltd* [2018] EWHC 1577 (TCC)

## Two Examples Where Evidence Came Up Short

*XX of Expert*

Counsel: "Would your answer be the same if you were expert for the tenant?"

Expert: "Of course not"

*Comment from the Bench*

"I have never heard of a case in which the tenant has filed a report contending for rent which is higher than that contended for by the landlord"[1]

[1] I suppose one answer to that is that in a case where that has happened, it will have settled before the judge saw it.

## Introduction

1. This paper is about the use of experts in litigation appointing by one party, as opposed to single joint experts. As property litigators, we deal with such experts all the time. My sense is that the role of experts is coming under increasing scrutiny in the Courts generally.[2] One has the strong sense that the Courts are losing patience with partisan experts, with badly-prepared or unhelpful reports, and with experts who don't pay attention to their duties to the Court. This can lead to lost cases, bad outcomes, wasted legal costs, and (as we shall see at the end of the paper) real professional trouble for the expert. It will not escape the reader's notice that many of the cases I refer to are from the past 24 months. A huge number of reported cases are focused on this issue, and professional organisations – like RICS – are quite rightly taking notice.

2. In this paper I wanted to consider (briefly) why we have experts in the first place, how their functions are circumscribed by the CPR, and (most importantly) how those rules are understood and applied by the Courts. For many this will, no doubt, all be old news, but a short refresher can't hurt. I then wanted to consider some common pitfalls in expert evidence that have come up in recent cases (though not all of them reported cases). Finally, we are seeing more cases in recent years where experts (or their clients) are facing sanctions for breaches of experts' duties to the Court. I look at those sanctions in the last section, to show how a body of caselaw is giving CPR Part 35 teeth, but also to gather together the cases as an *aide memoire*.

3. Giving expert evidence is difficult. Every step an expert takes is scrutinised and called into question, by their clients and lawyers, by their opposite number, and then in Court by an advocate whose job it is to find a way of discrediting their opinion in the eyes of the Court. Under heavy fire, they must put out of their minds commercial relationships and all other matters that, when they are doing their day jobs in the real world, are of huge importance to them and their employers. They must have the courage to be uninfluenced by whoever is instructing them, and be prepared to be unpopular with their clients and legal team - if they are doing their job.

[2] See the recent cases of *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs)* [2021] EWHC 1414 (TCC) and *Bitar v Bank of Beirut SAL* [2022] EWHC 2163 (QB), in which the recent tendency for experts to advocate or fail to comply with their duties was noted.

4. Compared to that, we have it pretty easy.

**Why Do We Have Expert Evidence?**

5. Why do we have expert opinion evidence? Factual witnesses are there to tell the Court the story of what happened. The lawyers are there to fit the law to the facts that the factual witnesses establish, and to establish a remedy, or a defence, or defeat a remedy or defence. What do the experts do?

6. Expert evidence has been admitted in the Courts for hundreds of years. The rationale for it has not changed. The Court, or, as it was, the civil jury, might need help from what Scottish lawyers call a "skilled witness" to help them come to a conclusion on a factual issue. The factual issue might, for example, need scientific input, or perhaps a specialist source of knowledge like valuation, that could not be expected of the average member of a civil jury. This opinion evidence therefore formed part of an essential part of the judicial process, the resolution of factual matters by reference to opinion evidence, and the expert was there to help the jury (and later the judge, when they came to decide both facts and law) in reaching the decision. The expert was therefore primarily there to assist the Court, and it is for this reason that experts' duties are addressed to the Court. It is also because the Court is being helped to decide by the expert that expert evidence was circumscribed, and limited.

7. Those restrictions imposed have been fairly consistent over time. We can summarise them as follows:

    a. Opinion evidence was and is the exception, not the rule. A Court needs to be persuaded that it is necessary. Although the modern reason for that is often said to be costs, historically it was more to do with the fact that experts should intrude into the factual decision making process as little as possible;
    b. The expert witness was there to provide the jury (later, the judge) with specially authoritative knowledge on some art, science or trade which required particular training and expertise (which a jury comprised of laypersons could not be expected to have);

c. Expertise is not determined by paper qualifications, but can be derived from particular real-world experience. Indeed, paper qualifications will not always do, where relevant experience is lacking: *De Sena v Notaro* [2020] EWHC 1031 (Ch).

8. Things changed with the abolition of juries in most civil matters. From then, the decision make on matters of fact and law was the trial judge. Such a judge might be expected to have greater experience than the average member of a jury. That is certainly true in recent times, because that trial judge will often sit in a specialist jurisdiction (nowadays Courts like the TCC) where a higher degree of expertise can be assumed, or in specialist tribunals (like the Upper Tribunal (Lands Chamber)) where the tribunal comprises not just a legal, but also a specialist and highly experienced valuation member. The fact that the addressee of the expert evidence became experienced trial judges reduced the need for expert opinion evidence to bridge gaps in the knowledge of the ultimate decision maker, because there were fewer gaps to bridge. If the decision maker (i.e. in our case, the judge) feels they are able to reach a view, expert evidence is unnecessary: *R v Turner* [1975] Q.B. 834; *United Bank of Kuwait Plc v Prudential Property Services Ltd* [1995] E.G. 190 (CS).

9. The above potted history reveals why expert opinion evidence is (i) the exception, not the rule, and (ii) closely supervised by the Courts. That evidence is intended to be assist the Court is reaching its decision: (“'objective unbiased opinion in relation to matters within his expertise.', in the words of the Court in *The Ikarian Reefer* [1993] 2 Lloyds Rep 81). At the point of agreeing that an expert can be appointed, a judge is entitled – indeed meant – to ask whether that opinion evidence is necessary in order for the Court to resolve the issue between the parties. When hearing the evidence, the Court will want to know that the expert it trying to help the Court to get to the right answer. The expert is not the advocate, and is not supposed to be “putting a case.

**The Expert under the CPR**[3]

*Legislative Provisions and Guidance About Experts: Sources.*

10. Expert evidence is admissible in our Courts under section 3 of the Civil Evidence Act 1972 (subject to any rules of court, i.e. the CPR, the PDs and the specialist guides).

11. Apart from the cases, considered below, the sources of law covering expert evidence are of course first or all CPR 35 and the attached PD, and also the Civil Justice Council's "Guidance for the Instruction of Experts in Civil Claims", which is intended to foster best practice. I will refer to this document as the "Guidance".[4] Reference should be made to the Guidance, paragraphs 16 – 19 (selection and qualifications) and 20 – 26 (instructions and acceptance of instructions for an expert).

12. Additionally, as is the way these days, the various specialist courts have decided to add their own additional rules into the mix. These are summarised in the White Book, Volume One, Introduction to CPR Part 35. Most relevant for us are the following:

    a. Chancery Guide, Chapter 9 (pp 65 – 71): https://www.judiciary.uk/wp-content/uploads/2022/07/Chancery-Guide-2022-28-7-22.pdf
    b. TCC Guide, Section 13 (pp. 49 – 54): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819807/technology-and-construction-court-guide.pdf

*CPR Leans Against Expert Evidence; Permission is Needed*

13. The starting point – as we have seen above - is that expert evidence is restricted to what is reasonably required to revolve the proceedings: CPR 35.1, subject to further strictures on appointment contained in CPR 35.4. We know also that in an appropriate case a Court can direct a single joint expert is appointed under CPR 35.7; 35.8; PD35 paragraph 7. In our world, it is pretty common for parties to have their own expert on valuation matters, though it has sometimes been argued that this does little more than entrench positions from the outset.

[3] There are special rules in some pre-action protocols, and in CPR 49 "Specialist Proceedings" (company/LLP matters). Rules differ in the Upper Tribunal, but the core is the same.
[4] https://www.judiciary.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-2014-amended-dec-8.pdf

*Experts Without Permission*

14. The parties can of course instruct whoever they like, whenever they like. But the ability to rely on that evidence in Court, and to recover the fees incurred as litigation costs, requires the permission of the Court. It may be perfectly sensible, and even essential, to use an expert before permission is given.[5] There is also another risk – that an expert engaged to give earlier advice might find that their earlier work is disclosable because the Courts actively pursue a policy against real or perceived "expert shopping" – a topic too large for this paper but again a subject that has been the subject of a great deal of judicial attention.

15. Parties who need expert input to give an early assessment of the viability of a claim are not helped by a lack of clarity as to how far they can safely go. Should they instruct an expert before issuing to get an idea as to what the claim is worth and what its prospects are (and to allow for settlement without bothering the Court), but run the risk of an "expert shopping" application, or should they wait for permission (which seems risky where expert evidence is needed to quantify a claim, for instance)? The White Book notes the conundrum but doesn't really seek to help to resolve it. Nor do we get much help from the pre-action protocols.

16. The PD for Pre-Action Conduct and Protocols reminds us that the experts may be used only if the Court gives permission and that fees *may be* irrecoverable (paragraph 7). Any departure from that position must usually be founded on a provision in an applicable pre-action protocol (in our case, those are confined to the construction and engineering,[6] professional negligence,[7] housing conditions (England)[8] or disrepair (Wales),[9] possession by social landlords, mortgage arrears and dilapidations for

[5] As to the potential obligation to disclose a report obtained otherwise than pursuant to Part 35, see the recent decision in *Pickett v Balkind* [2022] EWHC 2226 (TCC). Ordinarily, an earlier report is protected by privilege: *Jackson v Marley Davenport Ltd* [2004] 1 W.L.R. 2926. The latter position appears to me to be being steadily eroded by the cases, which appear to contemplate that earlier reports might be disclosable even if there is no strong evidence of expert shopping. The law is in an unpredictable mess.
[6] Envisaging experts already instructed by the time of the letter of claim and the response; paragraph 7&8.
[7] Paragraph 11 recognises that expert evidence, even possibly before permission is given, might be needed, but that reliance on experts does then require permission to be given by the Court.
[8] The parties are again reminded at paragraph 7 that expert evidence requires permission and fees are restricted.
[9] Ditto.

commercial premises protocols).[10] It would be better for the rules to be clearer on the use of experts pre-action and pre-permission.

*Permission Is Needed Even if Everyone Agrees*

17. One obvious point flows from the fact that the expert is there for the benefit of the Court and not the parties. Even where the parties agree that there is a need for experts, we all know that the Court may still disagree: *RBS Rights Issue Litigation* [2015] EWHC 3433.

18. Evans-Lombe J in *Barings Plc v Coopers & Lybrand* [2001] PNLR 22, [45] stated as follows:

> *"In my judgment the authorities […] establish the following propositions: 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 on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues."*

19. If the Court sees no benefit, it does not need an expert. A complicated case may not need experts if the complex subject is something that the Court is familiar with: *Siemens Mobility Ltd v High Speed Two (HS2) Ltd* [2022] EWHC 2190 (TCC). Modern specialist courts need less help than the layperson on the jury did.

**The CPR Duties of an Expert**

*In General*

20. Experts are told in no uncertain terms by the CPR that they have an overriding duty to the Court. This is expressed in CPR 35.2 as follows:

> *(1) It is the duty of experts to help the court on matters within their expertise.*
> *(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.*

[10] The word "expert" is not mentioned, but it is envisaged that a valuer is engaged at the point of providing diminution in value (paragraph 9.2); in relating the common law damages estimate (at paragraph 9.1) will have involved an expert too.

21. This is expanded by PD35 – the experts are to be independent and are not to be influenced by the pressures of litigation, nor are they permitted to depart from providing objective, unbiased opinions, and nor are they to engage in advocacy (PD35, 2.1 – 2.2). This is slightly further fleshed out in the Guidance, paragraphs 9 – 13, and is dealt with in detail in, for example, the RICS guidance on surveyors and valuers acting as experts.

22. This leads to the further point that an expert who is a member of a professional body may be under regulatory obligations as a member of that body. So, for instance, the RICS prescribes standards for surveyors giving evidence, and a failure to meet those standards can lead to disciplinary proceedings by RICS.

*Qualifications and Report*

23. An expert must give a report in writing unless directed otherwise (CPR 35.5). The addressee of the report is the Court, for the reasons we have seen above (PD35, paragraph 3.1). The report **must** comply with PD35 (and again the Guidance at paragraphs 48 – 60 (though the statement of truth in that guidance is now out of date)), set out an understanding of the expert's duty to the Court, the give the **substance** of instructions given (written or oral; PD35 para 5 governs when there might be cross-examination on instructions). Further

    a. PD 35 2.4 requires that:
        i. The expert identifies any issues outside their expertise; and
        ii. Any issue on which their opinion cannot be definite is identified.
    b. PD 35 3.1 and 3.2 require that report:
        i. Is addressed to the Court;
        ii. Gives the expert's qualifications;
        iii. Sets out the literature relied upon;
        iv. Sets out the factual basis (or, it is suggested, alternative bases) on which the opinion is based;
        v. Sets out what facts the expert knows from their own knowledge;

vi. Identifies who has carried out what tests feeding into the report, and whether the expert was involved;

vii. In cases where a range of opinion is available, sets out that range and gives reasons for the opinion given in the report.

viii. Summarises the conclusions;

ix. Qualifies any opinion that requires qualification.

c. It appears (see below) that any disclosure of any conflict of interest must also feature prominently, though the rules don't say so in terms.

24. The report must state that the duties to the Court and under CPR 35 are understood and have been complied with (PD35 at 3.2(9)), and contain the following statement:

*I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.*

*I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.*

25. A failure to disclose a report can lead to a debarment from the use of expert evidence (CPR 35.13) – or worse.[11]

26. It is an often overlooked fact that an expert is under an ongoing duty, after the report stating his or her opinion is filed and served, to communicate change of view (PD35 paragraph 2.5).

27. The report can be used by either side, once disclosed (CPR 35.11). Written questions can be put to the expert by the other side (or to a single joint expert): CPR 35.6; PD35 paragraph 6.

*Meetings After the Report*

28. Thereafter, the experts can be directed to meet to discuss the issues between them (CPR 35.12), resulting in the production of a joint statement of agreed and disagreed matters. The agreed matters are (at least in theory) not to be treated as binding unless

[11] *North Yorkshire Clinical Commissioning Group v E (Covid Vaccination) (Rev1)* [2022] EWCOP 15

the parties agree that this is to be the case. This seems a highly unrealistic provision to me. It seems to me to be unlikely to the point of being fanciful that a Court will allow the agreement between two experts to be rowed back on by the (non-expert) parties. This mis-match between the rules and the reality of litigation can place pressure on the joint statement, and temptation in the way of the parties and their representatives, as we shall see below. PD35 contains further rules about meetings at paragraph 9. The most eye-catching part of that is paragraph 9.5:

*If the legal representatives do attend [a meeting between experts] –*
*(i) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and*
*(ii) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.*

**The Expert in Practice**

29. The Courts have put flesh on the bones of those procedural rules.

*The Expert is Not the Court*

30. First, the expert is not a decision-maker displacing the role of the judge. As the Board explained in *Pora v R* [2015] UKPC 9:[12]

*It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance an individual suffered from a particular condition or vulnerability. <u>The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case</u>.*

31. The boundary between an expert expressing an opinion to help the Court in reaching a conclusion on the one hand, and the expert usurping the role of the judge on the other, is a fuzzy one.

[12] This has been a particular problem in cases involving accident reconstruction: *Liddell v Middleton* [1996] PIQR P 36; *Stewart v Glaze* [2009] EWHC 704 (Civ); *Sinclair v Joyner* [2015] EWHC Civ 1800 (QB)

*Show Your Working*

32. There is also an obligation to make sure that experts "show their working" (in other words ensures that the reasons for the stated opinion are given, and can be followed). A mere statement of a conclusion is a worthless "*ipse dixit*". In *Kennedy v Cordia LLP* [2016] 1 W.L.R. 597, paragraph 48, the Supreme Court explained that:

> "48. *An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or bare ipse dixit carries little weight, as the Lord President (Cooper) famously stated in Davie v Magistrates of Edinburgh 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA352, 371:*
>
> *"An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.*"

*The Expert Report is Not Holy Writ*

33. An attempt was made to develop from the above dictum from *Kenndy* the proposition that a CPR Part 35-compliant expert report that is "uncontroverted" has to be accepted by the Court unless it is a mere *ipse dixit*. That has been held to be wrong. In *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, the majority of the Court of Appeal explained that

> [40] […] *There is no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge. It all depends upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim.*

34. A credibility challenge to the experts would be required to be put to the expert in cross-examination. However, it is open to a party to challenge the adequacy of a report on its own terms, even if unchallenged during the course of evidence. This is because the burden rests on the person giving the report to ensure that all relevant matters are covered. There seems to me to be an obvious potential tension between,

on the one hand, the burden being on the parties to ensure that the expert covers what needs to be covered, and on the other the principle that the parties shouldn't interfere with their expert.

35. This is said to be a facet of the trial judge's obligation to analyse the expert evidence themselves, and not take it at face value: *Woolley v Essex County Council* [2006] EWCA Civ 753.

*The Duty of an Expert is Non-Delegable*

36. The role of the expert was expanded on further in *Neurim Pharmaceuticals v Generics UK Ltd* [2020] EWHC 3270 (Pat), by Marcus Smith J:

    a. *An expert is responsible for his or her evidence, including the precise wording of any report submitted to the court under the name of that expert. In many cases, the expert will be in need of, and will receive, assistance from the solicitors (or other lawyers) who have retained that expert. That is entirely understandable, but only serves to enhance the importance of the expert being entirely satisfied that his or her opinion is properly reflected in the report(s) submitted in that expert's name. This is the duty of the expert, and it is not one that can be delegated.*
    b. *An expert will be giving opinion evidence in relation to a subject-matter with which a lay person – specifically, in this case, the judge – will be unfamiliar. That is why the evidence is needed. It is incumbent on the expert not merely to present evidence that is technically correct, but that makes a fair presentation of the expert's opinion. If the expert does not do that, then criticism is liable to follow.*

**Expert Evidence: Trip-Wires and Traps**

37. There have been many cases in which common traps for experts have been identified. Some are to do with experts giving evidence in the property field; others arise outside our area of practice but are nonetheless salutary tales. We have seen examples of what happens when CPR Part 35 is not adhered to above. I set out the most common, or attention-grabbing, other examples below that have emerged from the recent cases, many reported in sometimes gruesome detail.

*Number One: Trespassing Outside One's Area of Expertise*

38. It can be very difficult to determine what the limits of an expert's opinion should be at an early stage in the proceedings. Sometimes, it is only when an expert has opined, or begun to opine, or when the case has worked its way through the directions, that it becomes clear that opinion evidence is required as to the likelihood of (say) a planning permission being granted for an alternative development, or as to the potential residential value of a (presently) commercial building. Those sorts of "surprise" issues are often a matter of judgment, and ultimately may require an application to the Court to be made, to be sage. Worse, however, is if the expert does not consider whether an issue is within their expertise, or instructions, or role as expert, and this matter only comes to light in the course of giving evidence.

39. The starting point is that an expert must comply with their instructions (*Davies-Gilbert v Goacher* [2022] EWHC 969 (Ch)). So, in *Hertfordshire County Council v Mother* [2022] EWFC 106, an expert came in for trenchant criticism for not reading their instructions, or the underlying medical reports, that formed the bedrock of the case under consideration. They had approached the case with pre-conceived ideas and had not done their homework. Without being properly informed, the expert is, for the purposes of a hearing, not an expert at all, and a Court cannot set store by anything that they have to say. Once the expert is acting outside the scope of their duties to the Court, their report is not worth the paper it is written on, with the inevitable consequences for the party concerned (see *Hertfordshire* at [131] – [132], in which the long charge sheet of the expert's failings in the case is set out; these are to be avoided, and apply to property cases as much as to cases with medical expertise).

40. No should, as we have discussed, the expert, in the guise of a report, be seeking to resolve factual issues for the Court. That is easier stated than applied. There is no longer a principle (if there ever was one) that an expert could not be called upon to opine on the main issue in the dispute – sometimes called "the ultimate question" in the cases (see *Pora*, above). If there ever was such a rule, it was abrogated by section 3(3) of the Civil Evidence Act 1972. So, for example, an expert may be required to assist in giving opinion evidence on banking practice to assist the Court in making its

"ultimate" finding of whether something a banker did was negligent: *Barings Plc and ANR v. Coopers & Lybrand and Ors* [2001] EWHC Ch 17.

41. It all appears to depend on the case. The determining principle was (I think helpfully) put like this in *M & R (Minors*) [1996] All E.R. 239, at 253: is the expert matter not merely an evaluation of the facts, but rather "*going to a matter on which a layman would require instruction on the essentials of the necessary field of expertise to make a properly informed decision*". The expert is there to assist the Court in *the Court* making the informed decision.

42. A more obvious point is that the Court does not need assistance from an expert on questions of law (unless it is foreign law), any more than it appreciates experts resolving questions of fact. This point has repeatedly been made by the Courts.[13]

43. If the expert is also going to be giving factual evidence, then that factual evidence ought to be in a separate witness statement of fact, provided when those statements are to be filed and served: see Chancery Guide at paragraph 9.12. Trespassing into findings of fact can lead to accusations of advocacy: see, by way of example: *Garcia v Associated Newspapers* [2014] EWHC 3137; *Mohidin v Commission of Police for the Metropolis* [2015] EWHC 2740 (QB); *Saunderson v Sonae Industria (UK) Ltd* [2015] EWCA 2264 (QB)

44. If, as it often the case in property litigation, either

    a. a matter of fact (e.g. has an improvement been carried out by the tenant), or
    b. a matter of law (e.g. what does the term of a lease mean, or what the meaning and effect of a valuation assumption is which the valuer is directed to apply, or what the impact some terms of a renewal tenancy might have on rent),

    is controversial between the parties, and remains unresolved at the point at which the expert is being asked to express an opinion, then it would be most unwise for the expert to write a report (as is encountered surprisingly often) on the basis that those issues will be resolved in favour of the party who is calling the expert in question.

[13] *Liddell v Middleton* [1996] PIQR P36; *Armstrong v First York* [2005] 1 W.L.R. 2751; *Stewart v Glaze* [2009] EWHC 704 (QB); *Sinclair v Joyner* [2015] EWHC Civ 1800 (QB).

45. This is for two reasons: first, it means that if the Court decides those points the other way, then the report has not dealt with that eventuality at all and the client is left exposed, and, secondly, it lays the expert open to the criticism that they have not acted impartially. “An expert should not assume the role of an advocate” says the RICS Guidance, paragraph 5.2. Better, then, to note the difference between the parties and express a view on each, but not a preference between them.

*Numbers Two and Three: The Risks of Selective Data Collection and Handling*

46. This trap, and next, are mainly about valuation evidence. Valuation evidence is supposed to reconstruct what would happen in a real market on the basis of the assumptions that a statute or contract tells the valuer to make in relation to a hypothetical transaction, which may be a highly artificial one. One must be careful with the data inputs (the comparables, adjustments to them, how they are devalued) to avoid the risk of a distorted, and hence worthless, picture. Worse still, a report which is distorted in favour of the commissioning party can give rise to all manner of problems for the parties, and their expert, and lead to findings of bias, with all that entails. The temptation of the *ipse dixit* at the point of adjustments should also be avoided.

47. First, valuation experts in particular have a function that is a little peculiar, in that they are involved at all stages in data gathering, selection and processing. To the uninitiated, it seems odd that the ordinary rules of evidence do not apply at this stage, in that no one is ever asked formally the prove their comparables. Witness Statements are not taken from the advisers to transactions on which reliance is being placed to ascertain what they thought they were agreeing to. Sometimes there is no evidence of that at all, and the Court (and the experts) are left to guess, and other times the parties are reconstruction the gestation and birth of a deal from partial emails, sometimes only from one side and contaminated by that side’s “wishful thinking”. Experts need to be alive to the fact that bias, real or imagined, may lurk in their selection and sources of data, its devaluation and adjustment.

48. Secondly, valuation experts might come to their role with pre-conceived ideas. There are some markets where valuers tend to act for the landlord's side more than the tenant's, for example. There might be commercial pressures on valuers when they are doing deals which unconsciously distort the reports they give in their very different role as experts giving a true and fair opinion for the benefit of the Court. Real-world experience is often regarded as desirable, but it can lead to distorted views. A cautionary tale is the decision in *S Franses v Cavendish Hotel* (County Court, 16th June 2021), where the expert was subjected to criticisms about data handling; see also *Clipper Logistics Plc v Scottish Equitable Plc* (County Court, 7th March 2022) to like effect. In the latter case, the expert was criticised for opting for a rental figure that sought to justify his opinion, and which furthered his client's case, and which therefore led to a rejection of his evidence and the acceptance of that of the other side. It did not help that the report itself was couched in tendentious language.[14]

49. Thirdly, there are many instances of markets – telecoms might be one – where there is no public database, formal or informal, of deals, and there is an inequality, or non-equivalence – of information between landlords and tenants. This can lead to the risk, noted by the Upper Tribunal, of selective and hence unrepresentative sampling of real world transactions, where such transactions shed light on the question at all.

50. This is therefore a stage where valuation experts can come a-cropper. An entire report can be tainted if the sample of transactions is not representative of the market as a it operates in the real world. An expert may not take an adequate sample of comparables, limiting themselves, perhaps, to the contents of their filing cabinet, or the filing cabinet of professional acquaintances, or (worse) of the client. The expert may not take into account the financial impact of inducements, rent free periods and so on in coming to a true reflection of the agreed rent.

51. Experts must therefore be scrupulous in their selection of comparables, Not to undertake the above step is dangerous. Confirmation bias might prompt an expert to disregard transactions that produce too high or too low a result for the client. The same unconscious bias may mean that the expert does not refer or disclose to the other

[14] A criticism also made of a medical expert in *Palmer v Mantas* [2022] EWHC 90 (QB)

side the existence of such a comparable, or that they do not disclose some particular feature of the transaction that explains why it is atypical.

52. As the Guidance explains, "your duty to the tribunal is to set out the facts fully and give truthful, impartial and independent opinions, covering all relevant matters, whether or not they favour your client".

53. Once comparables are gathered, a number of things need to be looked at, dispassionately and free from preconceptions:
    a. Is the transaction actually comparable? This breaks down into a number of issues:
        i. What is the nature of the transaction? Is it an open market transaction, or a renewal of an agreement, or a settlement, or a judicial determination? Does reliance need to be placed on non-open market transactions, and, if so, can adjustments be made?
        ii. Are there any special features of the transaction (such as that it included incentive payments, or that there was particular pressure to get it done, or that it forms part of a broader set of transaction) that need to be accounted for, and, if so, can the transaction be adjusted accordingly? If not, can the comparable be used?
        iii. Is the date of the transaction such that it is too old, or falls before a relevant legislative change?
        iv. Are there relevant features – terms, or features of the property – that require adjustments to render the transaction truly comparable?
        v. Have all adjustments been appropriately identified and explained in each case?
    b. Once those comparables have been obtained, and once the most relevant have been identified then it is sensible for the expert to make enquiries of both sides as to how the transaction came to be, and, if possible, to obtain an agreed transaction sheet signed by both agents. Again, a tenant's agent obtaining only an email from a tenant's agent for a particular transaction is not, for obvious reasons, as good as a tenant's expert obtaining the landlord's confirmation of the background to that transaction.

c. It will be sensible for the experts on both sides to meet and discuss the comparables, and agree a list of agreed comparables and reasons for not agreeing others, perhaps even before reports are exchanged, to avoid experts passing as ships in the night.

54. The gathering, selection and treatment of comparables needs to be explained in the Report, because it will be asked about in cross-examination. Such explanations are important:

    a. An unconvincing table of comparables will open up the expert to the charge of being selective;
    b. An unexplained adjustment in favour of the party calling the expert who has made it will excite interest, and may be dismissed as a mere *ipse dixit*.

55. If two experts cannot agree on whether a comparable is relevant, or how it is to be analysed, that will reveal something about their approaches and furnish material that allows submissions to be made on the quality and impartiality of the opinions provided to the Court. A recent case showing the important of dispassionate analysis of property transactional data is *Ahuja Investments Ltd v Victorygame Ltd & Anor* [2021] EWHC 2382 (Ch).

*Number Four: Inflexibility (AKA Fear of Changing One's Mind)*

56. John Maynard Keynes has attributed to him the following quote: "when the facts change, I change my mind". Experts must remain flexible in their analysis of the case which they are being asked to opine on. The fact that experts might change their minds is, as we have seen, baked into the CPR: PD35 paragraph 2.5 states in terms:

> *If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.*

57. I interpret that provision as a positive obligation on the expert to the Court (where appropriate), but certainly to the parties, to communicate a change of mind as a soon

as possible. An expert who has a change of mind cannot, under the rules, ignore that. That should be comfort enough to an expert who sees a case differently on more mature reflection, or after learning of additional material. If more comfort is needed, it can be found in the recent decision of the Family Division in *A Local Authority v AA* [2022] EWHC 2321 (Fam). That case concerned an injury to a child, and the question was whether that injury had been caused by the parents, or by an accident. One of the experts changed here mind on two occasions, and this was adversely commented upon at trial. The judge rejected that criticism – it was the role of an expert to keep an open mind during the proceedings, and a change of mind was, if anything, a sign that the expert was doing their job. That must, however, be contrasted with the expert in the *Hertfordshire* case, who did a "*quick about turn*" in his evidence once he was confronted with the fact that he had not complied with his duties properly. Again, it will turn on the facts. Mature reflection is acceptable. An unseemly dash from an indefensible position is not.

*Number Five: The Contaminated Joint Meeting*

58. It is often forgotten that the Joint Meeting is a creature of CPR 35, and has special rules. In particular, the temptation for the legal team to stick their oar in is to be resisted. We have seen that the rules proscribe legal involvement at this stage of the process

59. In the *Pickett* case (already referred to in relation to the waiver of privilege point, above), a joint meeting between two structural experts, concerning tree root nuisance. An adjournment of the trial was applied for, as one expert required medical treatment. Attached to the application was a letter in which it was obvious that the legal team had had input into the joint statement, making suggestions and seeing if the expert would frame his opinions in a particular way.

60. The position in PD35 is as follows:

> ***9.4*** *Unless ordered by the court, or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts discussions.*
> ***9.5*** *If the legal representatives do attend –*

*(i) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and*
*(ii) the experts may if they so wish hold part of their discussions in the absence of the legal representatives*

61. The TCC Guide further provides:

*"13.6.3. Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement."*

62. For reference, the Chancery Guide is expressed as follows:

*9.32 The joint statement is to be the work of the experts alone. Whilst the parties' legal advisers may assist in identifying issues which the statement should address, they must not be involved in either negotiating or drafting the statement.*

*9.33 The experts may provide a draft of the joint statement to the parties' legal advisers, but the legal advisers should not suggest amendments to the draft statement save in exceptional circumstances, for example where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement, where a party has sought to introduce new issues into a statement which were not in the agreed list of issues to be addressed by the experts or were not in their report, or where issues have been overlooked by the experts.*

63. As regards the TCC, it was explained in *BDW Trading Limited v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC). There, one expert had supplied a draft joint statement to his solicitors for comment. The Court strongly deprecated that. It stated at paragraph 18 that:

*"What happened here was, I agree, a serious transgression and it is important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is*

*consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means."*

64. In *Pickett*, the inclusion of the letter with the application was treated as waiving privilege. Further, as it raised concerns about the independence of the expert, cross-examination was allowed on the basis of it. There was however no further disclosure ordered. The evidence was not excluded (see too *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWCH 1915 (TCC)) .

65. However, similar breaches occurred in *Andrews & Ors v Kronospan Ltd* [2022] EWHC 479 (QB), and the offending expert had to be replaced. It is not therefore only experts who need to remind themselves of their duties. We, the lawyers, must also pay attention to the rules controlling what we can and cannot do.

*Trap Number Six: The Big B: Bias*

66. Those four traps are all preludes to the big one: bias. If there is bias, then the expert's value is shot to pieces. The Court or Tribunal will not trust the opinions expressed.

67. There are a number of examples of biases that impugn an expert's independence. Traps one to five cumulatively are the building blocks to making a devastating submission in closing. Sometimes, however, facts emerge that one does not need to go the "scenic route": one is fast-tracked straight to the finish line. The two most common are:

    a. A connection with the instructing party; or
    b. Some form of win-based fee structure.

68. In a small world, a connection to an instructing party might be unavoidable. If the instructing party is large, it is likely that an expert may have come into contact with them before, either directly or through their employer. It might also be that the field of expertise is so narrow that the only meaningful expert evidence can come from someone within the instructing party's own employment.

69. The basic point here is that ideally one's expert will of course be independent and whiter than white. We live in the real world, however. If an expert with an affiliation with the instructing party is need for good and unavoidable reasons, then the right approach is: be open, and confess and avoid. There is a duty to disclose conflicts, and waiting for them to be discovered is both a breach of the duty to the Court and a dangerous path to take: *Bux v The General Medical Council* [2021] EWHC 762 (Admin), at [21] referring to *Toth v Jarman* [2006] EWCA Civ 1028). This duty is not stated in the CPR, but (the Courts say) flows from its rules.

70. The fact of their relationship will of course be taken into account and go to the weight to be given to the evidence, but it is not a reason for excluding it: see *Field v Leeds City Council* [2003] EWHC.

71. The principles were distilled in *Armchair Passenger Transport Ltd v Helical Bar Plc & Anor* [2003] EWHC 367 (QB), at paragraph [29]:

*i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.*
*ii) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.*
*iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*
*iv) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.*
*v) The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.*

*vi) The Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.*
*vii) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.*

72. Of a different order is an expert with a pecuniary interest in the outcome of the litigation. The starkest examples are cases where experts are paid on a contingent fee basis. In the Upper Tribunal, a failure to disclose such fees has led to regulatory referrals (see below, paragraph 80). The White Book, as a general authority, still refers to *Factortame & Ors, R (on the application of) v Secretary of State for Transport* [2002] EWCA Civ 932, explaining:

*[70] […] Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.*
*[…]*

*[73] To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the Court will be prepared to consent to an expert being instructed under a contingency fee agreement.*

**The Effect of Non-Compliance**

73. There have been several recent cases concerning the effect of non-compliance with the general principles and the specific rules applicable to the Court in question. This has been emphasised in the Chancery Guide, p. 65.

74. At the lowest end of the scale of consequences is, of course, that the evidence of the expert is not taken into account at all, with the effect that that part of the party's case is not believed. That can result in the loss of the case, and in adverse costs orders (including against the expert: *Robinson -v- Liverpool University Hospital NHS Foundation Trust & Dr Chris Mercier*[15]).

75. It has also been held by the Supreme Court that tainted expert evidence may be inadmissible: *Kennedy v Cordia* [2016] UKSC 6; the same is true of England and Wales: *Toth v Jarman* [2006] EWCA Civ 1028; [2006] 4 All ER 1276; *Field v Leeds City Council* [2000] 1 EGLR 54; *Senova Ltd v Sykes (VO)* (RATING - EXEMPTION) [2019] UKUT 275 (LC). Where failure to comply is uncovered in the trial process, that may lead to the revocation of permission to rely on that evidence: *Dana UK AXLE Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC).

76. Moving to the more serious end of the scale, an infringement of the principles contained in the civil procedure rules can lead to prosecution for contempt of court, as the newly revised declaration in the CPR shows. If, for instance, an undisclosed conditional n fee comes to light, then the expert may find themselves referred to their relevant supervisory body by the Court for regulatory attention, in addition to any of the consequences set out above: *Gardner & Theobald LLP v Jackson* (RATING – procedure) [2018] UKUT 253 (LC); *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 406 (LC).

77. Finally, it is to be remembered that the partial immunity from suit in negligence for expert witnesses giving Court evidence has been removed by *Jones v Kaney* [2011] UKSC 13. If the evidence is negligently tainted (for example if it is over-stated outside the bracket of what is acceptable), then there is now a potential for a professional negligence claim to be brought.

**Oliver Radley-Gardner KC**

**Falcon Chambers**

[15] https://4alc5n2h7cjn2dmbej18mwl7-wpengine.netdna-ssl.com/london/wp-content/uploads/sites/2/2021/10/R-v-Liverpool-v-Mercier-Judgment.pdf