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Expert Witnesses: Recent Development in Hong Kong

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Expert Witnesses: Recent Development in Hong Kong

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Abstract

The Final Report on Civil Justice Reform was published in March 2004. Proposal 39 (measures aimed at countering lack of independence and impartiality among expert witnesses) and Proposal 40 (the rights, duties and functions of single joint experts), contained in the Final Report, deal with expert evidence. In relation to the issues of expert evidence, the Working Party had this to say:

“"The Interim Report identified two major problems concerning expert evidence in the existing civil justice system:-

(a) The inappropriate or excessive use of experts, which increases costs, the duration of proceedings and their complexity; and

(b) Partisanship and a lack of independence amongst experts, devaluing their role in the judicial process."\(^3\)

As expert witness has become one of the major services provided by construction professionals. It is imperative to have a good understanding of the legal developments leading to the recommendation of Proposal 39 and Proposal 40. In so doing, the authors revisit the important cases in expert evidence, with a view to examine the principles and problems of expert evidence. These cases summarise the sentiments of the courts in handling the problems of partisanship and lack of independence among expert witnesses. Recommendations made by the Working Party, in particular Order 38, rules 4A, 35A, 37B-C of the Rules of the High Court (Amendment) Rules 2007, are examined in detail.

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\(^3\) CJR-Final Report, p.313
Introduction

An expert witness is a witness of opinion based on his/her knowledge or skill. The principal function of expert witness is to assist the court by explaining technical or scientific matters so that the court can fully understand the essential facts and matters in issue. In the case is *Folkes v Chard*, in which Lord Mansfield said, ‘the opinion of scientific men upon proven facts may be given by men of science within their own science’. The duties and responsibilities of expert witness were clearly summarised by Cresswell J. in the case of *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd.* (famously known as “The Ikarian Reefer”):

“(i) 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.

(ii) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

(iii) An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

(iv) An expert witness should make it clear when a particular question or issue falls outside his expertise.

(v) If an expert’s opinion is not properly researched because he considers 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 report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

(vi) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side’s experts’ report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

(vii) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports…”

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4 Supra note 11, at p.2
5 [1782] 2 Doug KB
6 Supra note 12, at p.157
7 Supra note 7, at paras. 81 and 82
The Ikarian Reefer provides a useful roadmap to both counsels and expert witnesses on how to prepare expert evidence.

However, the summarised duties established by Cresswell J. have been overlooked or deliberately ignored by expert witnesses.8 As the Court of Appeal in Abbey National Mortgages plc v Key Surveyors Nationwide Limited and Others9 pointed out:

“For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend... to espouse the cause of those instructing them to a greater or lesser extend, on occasion becoming more partisan than the parties. There must be at least a reasonable change that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion.”10

Hired Guns and Partisanship

Expert witnesses are often regarded as “hired guns”11- that is, an “expert” whose opinion is not independent and impartial but is easily adapted to the expectations of the party who pays for their services. The editor of Counsel Magazine had the following statement:

“Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients. The disclosure of expert reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy…”12

The concern over partisanship can be illustrated in the following cases:

Cala Homes (South) Ltd. and Others v Alfred McAlphine Homes East Ltd. (“Cala Homes”)13

The plaintiffs’case (Cala) was that the defendants (McAlphine) willfully and blatantly copied Cala’s designs of houses. The plaintiffs alleged that the defendants knew that Cala considered the designs to be their exclusive property. Mr. Goodall was the defendants’ expert witness. He prepared an expert report which was served. Laddie J. in Cala Homes discussed Mr. Goodall’s approach to the drafting of an

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9 [1996] 1 WLR 1534
10 Supra note 17, at para. 1542
12 Council Magazine, November/December 1994, at p. 183
13 [1995] FSR 818 (Ch)
expert’s report in great detail. Laddie J. cited an article written by Mr. Goodall in which he dealt with this question: How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other? In his answer, Mr. Goodall drew an analogy between a man who works a Three Card Trick and an expert witness:

“…the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is “fair game”. If by an analogous “sleight of mind” an expert witness is able to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration…”  

In support of his view, Mr. Goodall relied on a quotation from the Official Referee in a publication called *Construction Disputes: Liability and the Expert Witness* as follows:

“...since the procedure in both courts and arbitrations is adversarial, an expert is not obliged to speak out, or write in his report, about matters concerning which he has not been asked at all, either by his client’s opponent’s counsel or by the Official Referee or arbitrator.”

Laddie J. cited Mr. Goodall’s view with disapproval. His Lordship said that the whole basis of Mr. Goodall’s view to the drafting of an expert report was wrong. He stated that the function of the court is to discover the truth relating to the issues before it. The position of his Lordship was best reflected in his judgment:

“The judge is not a rustic who has chosen to play a game of Three Card Trick. ……An expert who has committed himself in writing to a report which is selectively misleading may feel obliged to stick to the views he expressed there when he is cross-examined, as Mr. Goodall effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert’s report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence of much of its value…”

(underline added)

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14 Supra note 22, at para. 841
16 Supra note 22, at para. 842
17 Supra note 22, at para. 843
Needless to say, Mr. Goodall’s expert evidence was found inadmissible by his Lordship on the ground that it was “a partisan tract” with the objective of “selling the defendant’s case to the court”. His Lordship went on to say, ‘I did not find it of significant assistance in deciding the issues’.\(^\text{18}\)

*Pearce v. Ove Arup Partnership Ltd. (“The Pearce”)\(^\text{19}\)*

Mr. Gareth Pearce (the plaintiff) claimed that world-renowned Dutch architect Rem Koolhaas and his project architect, Mr. Fuminori Hoshino, had plagiarised and misappropriated concepts he had developed for a town hall in the London Docklands. Mr. Pearce alleged that Mr. Koolhaas (the defendant) used his concept when he designed the much-celebrated Kunsthall in Rotterdam. *Mr. Pearce said in his evidence, ‘I happened, by chance, to have sight of the Kunsthall and was immediately struck by the striking similarities between it and my Docklands Project. What particularly struck me was the use of the slab as a vertical element on a horizontal podium...’*\(^\text{20}\) In essence Mr. Pearce was agreeing that with such similarities between the Kunsthall designs and the Dockland Projects, Mr. Koolhaas’s and Mr. Hoshino’s account of independent design is so incredible as not to be believed.” Mr. Pearce’s legal position rested heavily upon the expert opinion of his architectural expert witness, Mr. Michael Wilkey (“Mr. Wilkey”). Mr. Wilkey summarised the key points in his expert report, which was heavily criticised by Jacob J. As his Lordship pointed out in the judgment:

> “At no point did Mr. Wilkey begin to consider, as an architect (emphasis added), how, supposing use of the DTH plans, the copying could happen.”\(^\text{21}\)

His Lordship was of the view that Mr. Wilkey’s expert evidence ‘fell far short of the standards of objectivity required of an expert witness’.\(^\text{22}\) His Lordship supported his view by listing the shortcomings of Mr. Wilkey’s evidence:

> (a) Notwithstanding the seriousness of the allegation, he did not visit the Kunsthall before making his report yet did not mention that fact in his report.

> (b) He never really considered how an architect could actually have carried out the copying alleged.

> (c) He made errors…and yet maintained his position thereafter.

> (d) He never properly read an important document exhibited to his report.

\(^{18}\) Supra note 22, at para. 844  
^{19}\) [2001] WL 1251820 (Ch)  
^{20}\) Supra note 28, at para. 30  
^{21}\) Supra note 28, at para. 55  
^{22}\) Supra note 28, at para. 58
(e) He showed his biased attitude by looking for triangles in the early stages of the Kunsthaldesign (“keen to find the triangle” as it was “an element alleged to have been copied”).

(f) He appeared to think that almost any triangle (or cut-off triangle) shape in the Kunsthaldesign must be the result of copying…….I do not go on.”

His Lordship found that Mr. Wilkey’s evidence was so biased and irrational that he failed his CPR Part 35
duty23 to the court, which provides:

CPR Part 35 rule 35.3-

(1) It is the duty of an expert to help the court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

What is most remarkable about The Pearce is his Lordship’s decision to invite the RIBA—the professionalbody that regulates the architectural profession in Britain—to censure Mr. Wilkey for the role he played in the case. With this judgment, the potential risk of acting as “hired guns” has risen considerably.24

Reform in Hong Kong

A work party with the terms of reference of reviewing the civil rules and procedures of the Hong Kong High Court and to recommend changes with a view to ensuring and improving access to justice at reasonable cost and speed,25 studied the relevant cases concerning the problems of expert witnesses and heard the comments made by the legal profession and other related bodies,26 concluded that the problems of partisanship and lack of independence among experts must be addressed without further delay. As the Working Party itself admitted in the Final Report, these problems “devalue the role of expert witnesses in the judicial process”.27 In response, the Working Party came up with a number of measures aimed at countering lack of independence and impartiality among expert witnesses, which were consolidated under Proposal 39 and Proposal 40, contained in the Civil Justice Reform – Final Report.28

Proposal 39 states:-

(a) Declaring the supremacy of the expert’s duty to assist the court over his duty to the client or the person paying his or her fees.

23 Civil Procedure Rules and Practice Directions Part 35
24 Supra note 19, at p. 5
25 CJR-Final Report at p. E1
26 The Bar Association, the BSCPI, the Law Society, the LAD, the DOI, the SCLHK, the AE, the HKIS, the HKIA, the APAA, and the HKMLA
27 CJR – Interim Report, at para. 489. The Working Party also stated that inappropriate use of experts was a source of excessive expense and delay in the judicial process. However, it is beyond the scope of this article to deal with this issue
28 Supra note 64, at paras. 606 and 624
(b) Emphasising the impartiality and independence of expert witnesses and the inappropriateness of experts acting as advocates for a particular party.

(c) Annexing a code of conduct for expert witnesses and requiring experts to acknowledge their paramount duty to the court and a willingness to adhere to the code of conduct as a condition for allowing expert reports or evidence to be received.

These three measures were well received by the legal profession.\textsuperscript{29} It was generally accepted that the principle that the expert owes an “overriding duty to the court” should be given more prominence and to be brought home individually to each expert every time an expert report is issued or expert testimony given.\textsuperscript{30} The Academy of Experts described the declaration required in Proposal 39(c) as “immensely important provision” which in effect would change the mind-set of expert witness.\textsuperscript{31} Proposal 39(c) is actually based on Part 39 of the NSW rules which provides that an expert report shall not be admitted into evidence unless it contains an acknowledgement by the expert that he or she has read and understood the relevant code of conduct and agreed to be bound by it. As to the relevant code of conduct, the Working Party agreed that the AE’s Code of Practice for Experts within Europe and its Expert’s Declaration would provide a useful framework.\textsuperscript{32}

Proposal 40 states:

That a procedure be adopted permitting the court to direct the parties to cause single joint experts to be engaged at the expense of the parties and that appropriate rules be adapted to govern the rights, duties and functions of such single joint experts.

Like Proposal 39, it was welcomed by the legal profession. However, some expressed concern about the use of a single joint expert (“SJE”) that it might be unsuitable in some cases, with highly counter-productive results. For example, where the SJE direction is made after a party has already instructed and had advice from his or her expert, that direction is likely to be very unwelcome. As the Academy of Experts put it:

“Generally the last thing that many parties want to do when they have had the involvement of their own expert is to appoint a new SJE. In addition to the perceived cost implications,

\textsuperscript{29} Supporters included the Bar Association, the BSCPI, the Law Society, the AE, the LAD, the DOI, the APAA...etc. See CJR-Final Report, at p. 322
\textsuperscript{30} CJR-Final Report, at para. 608
\textsuperscript{31} Supra note 66, at para. 608
\textsuperscript{32} Supra note 66, at para. 612
parties may feel that to do so gives them less control and reduces their ability to influence the result of the case in their favour."  

**New Sections added to the Rules of the High Court (Cap.4)**

To turn *Proposals 39 and 40* into law, the Steering Committee[^34], which was appointed by the Chief Justice in March 2004 to oversee the implementation of the recommendations of the Final Report on civil justice reform[^35], proposed to amend Order 38 of the Rules of the High Court (“RHC”), which governs the use of expert evidence. Before turning to Order 38, it is worthy to note that the court’s jurisdiction in handling expert evidence is currently governed by section 58(1) of the Evidence Ordinance, which states:-

“subject to any rules, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.”

It is clear from section 58(1) that the admissibility of expert evidence shall be “subject to any rules”. Two rules, including Order 38, r.4 and Order 38 r.36, are often relied upon by the court to restrict a party from introducing expert evidence.

Order 38 r.4 provides that the court may, at or before the trial of any action, order the number of expert witnesses who may be called at the trial shall be limited as specified by the court. Order 38, r.36 provides that, except with the court’s leave or the consent of all parties, no expert evidence may be adduced at the trial or hearing unless the party seeking to adduce the evidence has first sought and complied with directions of the court concerning pre-trial disclosure[^36] of the substance of the expert evidence sought to be relied on. Obviously, Order 38 r.4 is a “useful weapon deploy against attempts to call several experts where one would do”.[^37] And, Order 38 r.36 is provided to “prevent surprise and to enable cross-examining counsel to be properly prepared at the trial”.[^38] It does not take long for one to recognise the fact that Order 38 rules 4 and 36 are not intended to deal with the problems of partisanship and lack of independence among expert witnesses. To fill up this loophole, the Steering Committee has proposed 4 new rules, which are contained in the Rules of the High Court (Amendment) Rules 2007 in Hong Kong.[^39] The 4 new rules are as follows:-

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[^33]: Supra note 66, at para. 626  
[^34]: It is chaired by the Hon Mr. Justice Ma, Chief Judge of the High Court  
[^35]: CJR-Final Report, p.1  
[^36]: Such disclosure is generally ordered by means of disclosing or exchanging expert reports  
[^37]: CJR-Final Report, at para. 601  
[^38]: CJF-Final Report, at para. 601  
Rule 4A - Evidence by a single joint expert (O.38, r.4A)

(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, order that two or more parties to the action shall appoint one expert witness only to give evidence on that question.

(2) An appointment pursuant to an order made under paragraph (1) may be subject to such terms and conditions as the Court thinks fit.

(3) The Court shall not make an order under paragraph (1) unless at least one of those parties applies for such an order.

(4) Notwithstanding that a party to the action disagrees with the appointment of one expert witness only to give evidence, the Court may make an order under paragraph (1) if, having taken into account such matters as are specified in a practice direction issued for the purpose of this rule, it is satisfied that the disagreement is unreasonable in all the circumstances of the case.

(5) Where the Court is satisfied that an order made under paragraph (1) is inappropriate, it may rescind the order and allow the parties concerned to appoint their own expert witnesses to give evidence.

In essence the court is given power to order the parties to appoint a single joint expert upon application by at least one of the parties, subject to the court being satisfied that the other party’s refusal to agree to a SJE is unreasonable in the circumstances. It is worth mentioning that subsection (5), “Where the Court is satisfied that an order…is inappropriate…it may rescind the order and allow the parties concerned to appoint their own expert witnesses to give evidence”, is included to avoid the counter-productive effects of SJE orders made inappropriately, as occurred in the Daniels v Walker\(^{40}\) case.

Rule 35A - Expert witness’s overriding duty to Court (O.38, r.35A)

(1) It is the duty of an expert witness to help the Court on the matters within his expertise.

(2) The duty under paragraph (1) overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid.

Obviously, this section is added to remind expert witnesses that their duty is to assist the court, and that duty overrides any obligation to their instructing solicitors or paying clients. This section is perfectly in line with CPR Pt. 35.3.

\(^{40}\) [2000] 1 WLR 1382
Rule 37B - Duty to provide expert witness with a copy of code of conduct (O.38, r.37B)

A party who instructs an expert witness shall as soon as practicable provide the expert witness with a copy of the code of conduct set out in Appendix D.

Appendix D is now added to the RHC, to serve this purpose.

12. An expert witness shall abide by any direction of the Court to-
   (a) confer with any other expert witness;
   (b) endeavour to reach agreement on material matters for expert opinion; and
   (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non-agreement.

13. An expert witness shall exercise his independent, professional judgment in relation to such a conference and joint report, and shall not act on any instruction or request to withhold or avoid agreement.

Rule 37C - Expert witness’s declaration of duty to Court (O.38, r.37C)

(1) A report disclosed under rule 37 is not admissible in evidence unless the report contains a declaration by the expert witness that-
   (a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;
   (b) he understands his duty to the Court; and
   (c) he has complied with and will continue to comply with that duty.

(2) Oral expert evidence is not admissible unless the expert witness has declared in writing, whether in a report disclosed under rule 37 or otherwise in relation to the proceedings, that-
   (a) he has read the code of conduct set out in Appendix D and agrees to be bound by it;
   (b) he understands his duty to the Court; and
   (c) he has complied with and will continue to comply with that duty.

(3) This rule does not apply in relation to an expert witness who was instructed before the commencement of this rule.

This rule is directed to ensuring that the contents of the report represent the independent and unvarnished opinion of the expert making the report.
Conclusion

At the time of writing, the above-mentioned 4 new rules are still under review by the High Court Rules Committee\(^{41}\). It is anticipated that these rules will be further refined before they are brought into the Legislative Council for debate. The authors are of the view that the new rules are on the right track to tackle the problems of “hired guns” and lack of independence among expert witnesses. However, the authors believe that there are still rooms for improvements, particularly for Order 38, r. 4A and Order 38, r.37C.

Firstly, for Order 38, r.4A-Evidence by a single joint expert, the authors suggest that the factors to be taken into account when considering a single joint expert shall be included. The list of factors provided by Neuberger J. in *Cosgrove v Pattison*\(^{42}\) is a good reference:  

(i) the nature of the issue or issues;  
(ii) the number of issues between the parties;  
(iii) the reason the new expert is wanted;  
(iv) the amount at stake;  
(v) the effect of permitting a party to call further expert evidence on the trial;  
(vi) any delay that the instructing and calling of the new expert will cause; and  
(vii) the overall justice to the parties.

Secondly, for Order 38, r.37C-Expert witness’s declaration of duty to Court, the authors are of the view that this rule may be improved by adding the following lines after subsection (c)\(^{43}\):

(i) he has no conflict of interest of any kind other than any which he has disclosed in his report;  
and  
(ii) he does not consider that any interest which he has disclosed affects his suitability as an expert witness on any issue on which he has given evidence.

Thirdly, the end note of Appendix D states:-

*Note:* Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false declaration or a false statement in a document verified by a statement of truth without an honest belief in his truth.

The authors agree that it would be quite right of the court to make costs orders in appropriate circumstances against an expert who has breached his or her duties (i.e. has disregarded his or her overriding duty to the court). The authors are of the view that a “costs order” warning shall be added to the end note.

Given the fact that Hong Kong has a relatively small pool of construction professionals serving as expert witnesses, they may know each other and practice, it is essential that they are asked to disregard any

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41 It is set up pursuant to section 55 of the High Court Ordinance (Cap.4) to make rules of court relating and prescribing the procedure and the practice to be followed in the High Court
42 Cosgrove v Pattison [2000] All ER (D) 2007, pages 1387H-1388A
43 See Toth v Jarman, per Sir Mark Potter, at para. 120
personal or professional relationship which may arise in giving expert evidence. Although the fact that an expert witness is a close friend or colleague of a litigant would not automatically bar him or her from giving evidence for that litigant. One must not forget that the court has unfettered discretion to exclude an expert’s opinion, if it is of the view that the expert has not properly understood his or her duty towards the court. It is therefore extremely important that the expert witnesses shall be well versed in the “Cresswell” points summarised in the *Ikarian Reefer* case and the newly drafted “Appendix D-Code of Conduct for Expert Witnesses”. Moreover, with the introduction of *Code of Conduct for Expert Witness*, “hired guns” now have to think twice before they “shut their eyes for the obvious” or perform “sleight of hand” to deceive the eye of the innocent rustic (or judges).
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