



# How to find the perfect expert witness to win your case

During Paris Arbitration Week (PAW), I was invited to join a panel of lawyers and dispute resolvers to discuss “*Le Mouton à cinq pattes: How to find the perfect expert to win your case.*” The panel explored a range of topics, including the process of how to select an expert witness (referred to in this article as expert) in arbitration proceedings, the qualities of a good expert, and other considerations to bear in mind when selecting experts.

This article is based on notes made before and after the panel discussion. I hope it is of benefit to anyone trying to choose the right expert for their case. Let me start by touching on the role of the expert.

## What is the role of an expert witness?

The role of an expert witness is to provide impartial, expert opinions to the court on specific matters within their field of expertise. Their duty is to assist the court or tribunal by offering objective opinions that override any obligation to the instructing party.

A good expert witness should have sound opinions but should not be opinionated. The dispute resolver, rightly, should be able to trust and rely on the soundness, honesty, integrity, and objectivity of the expert. If they do, they will likely reflect the expert’s opinions in their decision; if they do not, the expert’s opinions may simply be ignored.


An English Court of Appeal Judge, Dame Elizabeth Butler-Sloss, writing extra-judicially in 2002 (about medical expert witnesses), described them as “*a crucial resource.*”, adding, “*Without them, we [the Judges] could not do our job.*” Whatever their discipline, it is well understood that the expert is there for the benefit of the judge or tribunal.

## The duties and responsibilities of expert witnesses

The guiding principles for experts were clearly laid down in the landmark *Ikarian Reefer*<sup>1</sup> case, in which Mr. Justice Creswell of the Commercial Court listed seven duties and responsibilities of expert witnesses in civil cases, emphasising that:

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<sup>1</sup> *Compania Naviera S.A. v. Prudential Assurance Co. Ltd (The "Ikarian Reefer")* [1993] 2 Lloyd's Rep. 68

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1. The expert's evidence should be independent.
  2. The expert's opinion should be unbiased and related to matters within his/her expertise.
  3. The expert should state the facts or assumptions on which his/her opinion is based and consider facts which could detract from his/her opinion.
  4. The expert should state when a question falls outside his/her expertise.
  5. The expert should state if insufficient data is available.
  6. If the expert changes his/her view after exchanging reports, this should be communicated to the other side and the tribunal/court.
  7. Where the expert refers to any documents, these must be provided when exchanging reports.

## Expert witness failures of duty

There are many reported cases in which it was held that the expert has fallen short of these necessary requirements.

In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC), Mr Justice Fraser (as he then was) made the following comments about the expert:

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"118. There are a number of other respects in which I found Mr K's approach to what was supposed to be an independent exercise wholly unsatisfactory.

199. I do not consider that Mr K prepared his valuation evidence in this case with sufficient attention to his duty to the court as an independent expert..... overall his expert evidence favoured ICI at the expense not only of ICI's pleaded case (which he did not support) but also at the expense of providing any impartial assistance."

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In *Riva Properties Limited v Foster + Partners Limited* [2017] EWHC 2574 (TCC), the same judge said, at [191] that the expert's approach had "*no intellectual justification whatsoever*" and was "*wholly flawed ... verging on nonsense*". The judge went on to say he could not avoid reaching the conclusion that the Defendant's expert refused to make certain assumptions "*because he feared the answer to the exercise would harm the case being advanced by Fosters.*"

In *Bank of Ireland v Watts Group plc* [2017] EWHC 1667 (TCC). Mr Justice Coulson (as he then was) stated the following, at [69 – 70]:

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"69...In my view, this was yet further evidence of unreasonableness, an expert insisting on making criticisms which the Bank have deliberately chosen not to plead.

70. The duties of an independent expert are set out in the well-known passages of the judgment in *The Ikarian Reefer* [2000] 1 WLR 603. Mr V did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that *The Ikarian Reefer* was a ship that passed in the night."

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In *Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited* [2015] EWHC 3074 (TCC), the same judge commented:

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"80... I endeavoured to give Mr L the benefit of the doubt ..... But I regret to say that I came to the conclusion that his evidence was entirely worthless.



and

“93. I consider that Mr L allowed himself to be used, whether wittingly or otherwise, by OSR and Dal Sterling (those with the most to gain in this litigation) to act as their mouthpiece. It made a mockery of the oath which Mr L had taken at the outset of his evidence.

94. For all these reasons, I am bound to find that Mr L was not independent, and his evaluations were neither appropriate nor reliable.”

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## Write and wrong

On a different note, but relevant to this review of expert performance, an expert should always be careful what they write during their career.

In *Cala Homes (South) Limited v Alfred McAlpine Homes East Ltd* (1995) CILL 1083, the expert was challenged about an article he had written in the *Journal of the Chartered Institute of Arbitrators*. In it he wrote “*If... an expert witness is able to present the data... 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.*”

Asked when giving evidence whether he stood by that view, and the expert confirmed that he did. The Court was, unsurprisingly, not impressed by this and stated: “*The whole basis of Mr G’s approach to the drafting of an expert’s report is wrong.*”

In *Anglo Group plc v Winther Brown & Co Ltd* (2000) 72 ConLR 118, the expert had previously written in the *Journal of the Academy of Experts* “*...an expert witness appointed under current procedure is under no duty to the court... My duty as an expert was simply to help my client win his case on the facts as defined in the statement of claim...*”

HHJ John Toulmin CMG QC said at [124], having also considered the witness’s evidence in the case; “*I find that...Dr S (did not conduct (himself) as (an) independent expert witness or in a manner acceptable to the court. I am unable to rely on (his) evidence in support of WB as independent expert evidence.*”

## Points to consider when choosing an expert witness


### What questions should counsel ask an expert being considered for an expert role?

In my view, in addition to the obvious ones around requisite expertise in the relevant field and availability, there are some points which bring into focus an expert’s suitability for a particular matter.

#### 1. Make your enquiry as clear as possible

I would encourage Counsel to make their enquiries for experts as clear as possible. For example, if a technical expert is required on a dispute involving a power plant, clarity on which aspect of the plant or system the expert should have experience is critical. If the expertise required is of a relatively generalist nature, then you should consider whether specific experience in that particular type of project or sector is really necessary.

Having been part of many expert interviews, I find often that conversations can be somewhat cryptic. Questions are asked (and an expert’s response is given) based on very limited information and no real facts. Subject to a confidentiality agreement being signed by the parties, I suggest that briefing notes could be shared in advance with experts due to be considered for selection. This would enable Counsel to get a real feel for the expert’s thoughts on the matters at hand. Also, the expert may add value to the interview, especially where



they can have insights on issues or approaches which they believe deserve consideration, based on prior experience.

## **2. Expertise and tools can also matter**

The strength of an expert's evidence does not depend solely on their expertise and experience. For any matter of scale, it is also worth Counsel asking an expert about their "team and tools". With the volume of data that typically needs to be reviewed in many cases, it is worth keeping in mind that an expert can only base their opinion on the documents or data they have seen and been able to analyse. If, without the necessary team, and tools, only a small percentage of the data can be analysed, their opinion is likely to be less robust.

## **3. Time is critical**

Similarly, it is important to note that experts need sufficient time to prepare their report and, if necessary, establish and test the facts upon which their opinion is to be based. Ultimately, only the expert can give evidence, and there are limits to which the expert can delegate their investigation to others within their own organisation. Counsel should be aware of the potential conflict between the complexity of the matter on which an expert is being asked to opine and the time available for that opinion to be formed.

## **4. The instructing party's responsibility**

The instructing party also has an important duty. Many cases turn on the quality of the expert evidence, but experts do not appoint themselves. Experts representing the parties (as opposed to court or tribunal-appointed experts) are always instructed either by those parties or by the lawyers representing them. Experts can only do what they are qualified to do, what they are instructed to do and what the rules allow them to do. The rest is in the hands of those who select and instruct experts.

Whilst some individuals may misrepresent themselves or over-state the extent of their expertise, there should be little excuse for appointing the wrong expert (i.e. one who is not appropriately qualified), for not checking credentials or for not making sure that your expert knows what is expected of him/ her. In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC), Fraser J (as then was) noted, at [237]:

*"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."*

In *SPE International Ltd v PPC (UK) Ltd and John Glew* [2002] EWHC 881, Mr Justice Rimer noted, at [71]:  
*"There is no record of any instructions he was ever given, and he said he did not make one because no-one told him he should do so. He wrote letters seeking information supposedly relevant to his report, but did not think to keep copies of them - since no-one told him to..."*


*"It is probably because Mr D is wholly inexperienced in Court procedure, and received insufficient guidance from the legal advisers..."*

*"Beyond being told that he had should try to be impartial and fair, he received no guidance from anyone as to what was required or expected of him as an expert."*

## **5. Delivering and receiving the evidence**

The PAW panel discussed expert examination at hearings.

One challenge with the effectiveness of the process of receiving expert witness evidence is that there is no singular professional body that regulates expert evidence. So, different expert witnesses (despite sharing the same areas of expertise) may have a different understanding as to how to deliver expert witness evidence.



Experts should not be ‘coached’ but experts can at least be properly vetted, instructed and familiarised with procedures and the governing rules. An expert’s opinion will be worthless if the facts upon which it is based are not established either by the expert or by other witnesses, no matter how sophisticated the analysis carried out by the expert.

On occasion, it also seems that the “right” questions don’t get asked. Some parties have sought to use a Shadow Expert to assist with this, whereby the parties employ an expert/advisor to assist with case strategy but not to give evidence in the proceedings.

### **Who can act as an expert? Can former employees act as an expert?**

This also led to a discussion as to who could be an expert. The fact of employment by a party involved in a dispute does not necessarily prevent an individual from acting as an expert on behalf of that party. For example, in the case of *Alstom Ltd v Yokogawa Australia Proprietary Ltd and Another (No.7)* [2012] SASC 49, the parties both appointed technical experts (combustion engineers) who were or had been employees. There was a sharp contrast in how their evidence was judged:

Mr H

- Was employed by Alstom
- Was a witness of fact and an expert
- Did not understand practice directions (but said he did)
- Was involved with the project for years
- Was part of the team “...*investigating, advising, preparing, and advancing Alstom’s case*”

His evidence was found to be “...*inconsistent, incomplete, factually incorrect and biased towards Alstom*”

Whereas Mr I

- Resigned from Yokogawa before the case
- Was recalled for his specialist knowledge
- Was closely involved with the project - but all was disclosed in the expert report
- Complied “...in every respect” with practice directions
- Was not involved with the legal team
- Was not a witness of fact

Based on his evidence, the court found him to be “...*a witness of integrity who gave clear and plausible explanations for what he did, of the reasons for what he did, and of his opinion.*”

### **6. The duty is to the court or tribunal**

It is clear that even in this situation, the expert must be aware that their overriding duty is to the court or tribunal. He/she must be aware of any applicable rules and practice directions (which must also be complied with) and must acknowledge an understanding of their requirements. The expert must declare and explain in their report every aspect of involvement and must be prepared, when giving oral evidence, to make concessions where it is appropriate to do so, even if they are damaging to his/her employer’s case.

Finding the perfect expert witness to help win your case requires research, vetting, and a thorough briefing process to ensure the expert can adequately prepare their report and deliver their opinions.

The points outlined help clarify the role and duties of expert witnesses and some of the factors that should be borne in mind when trying to find an expert witness.

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