

Permission to speak?

Recent Wembley litigation sheds new light on the old question of whether a litigant can safely rely upon the expert evidence of an employee rather than engaging independent experts, says Jonathan Raynes

THE DISTINCTION BETWEEN factual and expert witnesses in civil proceedings is well known. Factual witnesses are supposed to give evidence on matters of fact, avoiding opinion, comment, or speculation. Expert witnesses, on the other hand, should assist the court by providing their specialist opinion on the facts and of course the court's permission is required if expert evidence is to be called.

But how far can a factual witness stray into matters of opinion into the territory, arguably at least, of an expert witness? Is that witness's evidence at risk of being struck out as inadmissible? How vulnerable is a party who relies entirely on the evidence of his own personnel, avoiding the cost and time of instructing external independent experts? The recent case arising out of the construction of the new Wembley Stadium, *Multiplex v Cleveland Bridge* [2008] EWHC 2220 (TCC) offers valuable assistance.

There are a number of well established situations in which an ordinary factual witness can express his opinion on matters. A witness of fact may express an opinion as to the speed of a vehicle, essentially as a way of conveying the facts as he perceived them. Equally, he may express an opinion on the apparent authenticity of a family member's signature on documents, based on familiarity with the appearance of the same rather than any special graphological skill.

However, a more difficult situation arises when the witness goes further and enters the territory of a true expert witness but there are countless situations in which witnesses of fact may wish to do so. Think, for example, of the professional valuer whose valuation is attacked as negligent; his insurers may well have an expert to assist in his defence, but he himself is likely to have strong views of his own as to whether or not his behaviour fell short



of the standards expected. Equally, the a purchaser of allegedly defective equipment may wish to include in his evidence details of what, in his opinion, is a fundamental flaw in the design of that equipment. Can he give such evidence?

Sufficient expertise

First, of course, the court must be satisfied that the individual has sufficient knowledge or expertise to qualify as an expert (*R v Silverlock* [1894] 2 QB 766). This is often the case with those who become involved in disputes arising from their work. Second, the permission of the court is needed to adduce expert evidence (see *CPR* 35.4(1)). In practice with factual witnesses, their 'expert' evidence will generally form part of their factual statement and so the issue generally turns on whether or not the court will strike such evidence out or disregard it. That is precisely what happened in *Multiplex v Cleveland Bridge*.

Multiplex was the main contractor for the construction of the new stadium at Wembley, and Cleveland Bridge was its steelwork subcontractor. Their relationship descended into acrimony, as was widely reported, with Cleveland Bridge's scope of work on the famous Wembley arch being diminished until eventually the contract came to an end with both parties accusing the other of being in repudiatory breach. The final round of the ensuing litigation reached Mr Justice Jackson in the *Technology & Construction Court* ('the TCC') last year. Both parties required the court

to determine the amounts owed between them, effectively the final account on the works.

As part of the evidence in those proceedings, *Cleveland Bridge* produced a statement from Mr David Taylor, a principal engineer employed by a subsidiary of Cleveland Bridge. He had worked on the project on Cleveland Bridge's behalf, leading a design team and latterly liaising with Cleveland Bridge's replacement, Hollandia. Mr Taylor's evidence was submitted as that of a factual witness, not an expert witness, but nevertheless contained many statements of his opinion on matters of design, together with comments, speculation and argument.

Multiplex objected to that evidence, rightly pointing out that Mr Taylor was not in any sense independent of Cleveland Bridge, having worked for them for 11 years. Moreover, Mr Taylor had not been made aware of the requirements of *CPR* PD35 or his overriding duty to the court; he was giving evidence on behalf of his employer.

The Civil Procedure Rules set out in PD35 a number of well known principles applicable to expert evidence, stipulating that:

- the duty of an expert to help the court is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom he is paid;
- expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation;
- an expert should assist the court by providing objective, unbiased opinion on matters within his expertise.

Unbiased opinion

Like any witness employed by one of the parties however eminent an expert he may be Mr Taylor was vulnerable to the criticism that he

faced a conflict between helping the court and helping his career, that he cannot be regarded as giving an “independent” view, and that he cannot easily give an “objective, unbiased” opinion. Unlike a neutral and independent expert engaged to assist on one piece of litigation, an employee is much more vulnerable to pressure to toe the party line.

Multiplex therefore asked the court to disregard Mr Taylor’s evidence to the extent that it went beyond the facts into opinion, comment, or speculation. They wanted his evidence confined to the facts alone.

The judge had to ask himself whether, in addition to giving evidence of fact, it was open to Mr Taylor to include statements of professional opinion or “comment based on facts within his knowledge. The judge remarked how little authority there was on this topic, despite it being common (particularly in relation to TCC matters) for many factual witnesses to have significant expertise themselves and to share the benefit of that expertise with the court as a ‘gloss’ on the facts.

One example was *Lusty v Finsbury Securities* [1992] 58 BLR 66. Lusty, an architect, brought an action to recover fees, and the reasonableness of those fees was in issue. The court expressed the view that it would be intolerable if an architect – a professional with expertise in what fees were reasonable – were to be prevented from expressing an opinion on the level of his own fees because of his obvious interest in the outcome. The court could take that ‘vested interest’ into account when deciding how credible the evidence was and what weight to attach to it.

Another illustration to which Mr Justice Jackson had regard was *ES v Chesterfield* [2003] EWCA Civ 1284. ES was suing two doctors for negligence, alleging that their conduct during her birth led to her suffering from cerebral palsy. She had an expert obstetrician to advance her claim of negligence against the two doctors, and in turn they had an expert to offer evidence in their defence. ES argued, however, that the two doctors she was suing would inevitably offer their own professional opinions as part of their factual evidence and sought permission to call a second expert obstetrician to even up the fight – so that she had two experts

to offset the three doctors who would offer evidence for the defence. As Mr Justice Holman succinctly put it: “When a court is considering what practices may be adopted by a responsible body of medical opinion, it seems to me impossible to exclude evidence given by two doctors, now both of consultant status, of their own experience, however much they may be labelled and confined as ‘witnesses of fact’. The reality is that they have and profess expertise and, if credible, their evidence based on their experience and expertise cannot be ignored.” The Court of Appeal therefore allowed the claimant a second expert to balance against the opinions which would inevitably be offered by the two defendants.

Rejecting Multiplex’s challenge, Mr Justice Jackson concluded that in construction litigation, an engineer who is giving factual evidence may also include statements of opinion which are reasonably related to the facts within his knowledge and relevant comments based upon his own experience. He therefore found that not only was Mr Taylor’s account of the facts admissible, but also his relevant comments based on experience should be admitted.

So, can a party rely on the evidence of an in-house expert? The answer is plainly yes, provided that the court is satisfied that the individual has the appropriate degree of specialist knowledge or expertise for his views to be regarded as those of an expert. The fact that the witness may not be impartial is not in itself a bar to his expert evidence being admitted.

Cost savings?

Is it wise to rely on such an expert, using in-house expertise as a cost saving alternative to engaging costly independent experts? Probably not in isolation. The lack of independence will inevitably have an impact on the credibility that such a witness will have. If the court has to choose between believing an impartial expert and someone with similar knowledge and experience but an axe to grind, the former has an obvious headstart.

However in some situations, it may be that there simply are no independent experts, or that those who are independent lack the specialist skills of the in-house personnel. In an appropriate

case, one may therefore proceed on the basis of using an in-house expert. The key in such a situation is not only to make sure the expert is aware of his duties of impartiality, but also to take great care to ensure the expert avoids the slightest appearance of bias, which would undermine his credibility.

Multiplex offers lessons in that regard too. Mr Justice Jackson commented that Mr Taylor’s statement had been drafted in an “unfortunate and partisan manner” which “tends to reduce the credibility of his evidence”, but attributed the blame for that not on Mr Taylor but Multiplex’s lawyers. In the witness box, Mr Taylor came across well and was described by the judge as fair and candid, despite his close links with one party. The views he expressed on behalf of Cleveland Bridge were often accepted as correct by Multiplex’s witnesses, and so the judge gave weight to the “underlying content” of his statement, whilst chastising the lawyers for unduly influencing its presentation. Those practitioners who are inclined to use the witness statements as a way of presenting a distorted case or matters better put in legal argument, risk undermining the very credibility of their clients’ evidence by so doing.

The judge included a specific chapter in his judgement on a further lesson to be drawn from the litigation. When the gains and losses were tallied up, the net outcome of the various claims and counterclaims was that Cleveland Bridge was found liable to pay just over £6m to Multiplex. That figure was dwarfed by the legal costs the parties had incurred to get to judgment, however, which were around £22m, including some £1m spent on photocopying alone. Both parties were understandably criticised for failing to have adopted a more commercial approach to resolving the final account, which the judge plainly felt could and should have been resolved by agreement on the basis of points of principle with a degree of pragmatism.

Wembley has, however, always inspired those who play there to fight with every drop of energy they have until the final whistle; perhaps those who built the stadium are not so different from those who play on the turf

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