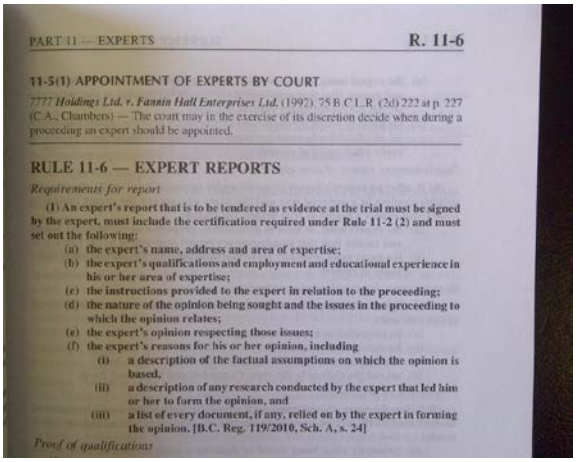

PART 11 — EXPERTS R. 11-6

11-5(1) APPOINTMENT OF EXPERTS BY COURT

7777 Holdings Ltd. v. Fannin Hall Enterprises Ltd. (1992), 75 B.C.L.R. (2d) 222 at p. 227 (C.A., Chambers) — The court may in the exercise of its discretion decide when during a proceeding an expert should be appointed.

RULE 11-6 — EXPERT REPORTS

Requirements for report

(1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:

(a) the expert's name, address and area of expertise;
(b) the expert's qualifications and employment and educational experience in his or her area of expertise;
(c) the instructions provided to the expert in relation to the proceeding;
(d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
(e) the expert's opinion respecting those issues;
(f) the expert's reasons for his or her opinion, including
(i) a description of the factual assumptions on which the opinion is based,
(ii) a description of any research conducted by the expert that led him or her to form the opinion, and
(iii) a list of every document, if any, relied on by the expert in forming the opinion. [B.C. Reg. 119/2010, Sch. A, s. 24]

Proof of qualifications

The Society of Construction Arbitrators Annual Conference 2014

Oxford

The short life of the jointly appointed expert

21 April 2014

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The short life of the jointly appointed expert

Why the short life? Well you must read on to find out.

The role of the expert – what is he?

It has been said that the role of an expert in an international construction dispute is to provide independent opinion evidence based on the facts.

The word "expert" is used in several ways in construction disputes, in addition to its ordinary meaning in the English language:

- A person "who has been instructed to give or prepare evidence for the purpose of court proceedings". This is definition for the purpose of the CPR,[1] and includes those appointed by one party only (a party appointed expert) and those instructed by more than one party (a single joint expert);
- A person fulfilling a like function in arbitration or other proceedings;
- A person called upon to advise upon some aspect of a case requiring expertise, but not to give or prepare evidence[2];
- A person called upon by an adjudicator to provide expertise[3];
- A person making an expert determination.

Common law countries have, of course, for years allowed the parties a great deal of freedom[4] to appoint their own experts[5].

In an adversarial system it is commonplace to see highly opposed legal arguments, and conflicting evidence submitted on behalf of the parties. Experts, who give evidence of opinion, are often appointed individually for each party, sometimes three or four disciplines can be called, sometimes more. There can be a tension between this duty to the client and an expert's overriding duty to the court or tribunal, and the use of experts for each party has contributed to perceptions that the English litigation system can be too expensive and time consuming for practical dispute resolution. Lord Justice Jackson has seen to attacking this sin. However, in reality in specialist courts such as the Technology & Construction Court, this was not a common perception unlike in other quarters of the civil justice system.

I think it is worth going back to basics. The duty of an expert witness is to give objective, unbiased opinion on matters within their expertise. It has to be opinion "independent of the parties and free from the pressures of litigation". As a strictly legal matter, the reason for the need for so-called expert evidence lies in the rules governing the admissibility of evidence in civil proceedings; in particular court proceedings. As a general rule, a witness can only speak to facts observed directly by him and he may not draw any inference or express any opinion which he may draw or form from those facts; in other words, evidence of opinion is excluded.

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[1] CPR 35.2.
[2] Such an expert is outside the scope of CPR 35, PD 35 and the CJC Protocol.
[3] See for example para.13 (f) of the Scheme for Construction Contracts.
[4] In 2002 the Court of Appeal Judge, Dame Elizabeth Butler-Sloss, writing about expert medical witnesses, described them as "*a crucial resource. Without them we [the Judges] could not do our job*".

[5] Given the Court may only substitute its own judgment and common sense in the most straightforward of cases. The Court is not in a position to provide a view on any matter in respect of which any special skill, training or expertise is required to make an informed assessment.

To understand the origin of this rule, it is necessary to understand the function of the tribunal before which the dispute is to be heard (be it the judge or jury in litigation proceedings or the arbitrator(s) in arbitral proceedings). Its function is to determine the facts, form *its* own opinion derived from those facts and reach *its* own conclusions on those facts. If an "ordinary" witness (as distinct, in this context, from an "expert" witness, qualified as such) were to express his own opinion, the perception is that he would be usurping the tribunal's function. Not only that, but there would also be the risk that the tribunal was seen to be adopting the witness's opinions rather than forming its own.

The principal relevant exception to this general rule is that the opinion of a witness who possesses particular skill and expertise in relation to the issue or issues under investigation in the dispute is admissible, subject to one important qualification. That qualification is that the evidence to be adduced must be necessary in order to assist the tribunal of fact to interpret issues which are outside its own knowledge and experience. If the tribunal considers itself able to form its own opinion without such evidence, then the evidence may be inadmissible.

Why the spotlight?

Expert witnesses have been in the political and judicial spotlight for years. As a matter of public policy, from Lord Woolf's review of civil justice in the 1990s[6] to Sir Rupert Jackson's reforms enacted last year, the role and cost of experts has come under increased scrutiny. Reforming ministers, too, have appeared intent on turning down the volume of background noise created by experts who (as they see it), despite being schooled in the same area and subject to the same systems of profession-specific peer review, manage to disagree[7].

On the flip side, notwithstanding concerns over liability and costs, other developments have not only changed, but in some ways augmented, the role that experts play in disputes[8]. 'Hot-tubbing'[9]

[6] Lord Woolf, "Access to Justice": Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (June 1995) and Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996).

[7] It is not surprising that experts often disagree, precisely because (as *Bolam* confirms) there is often a spectrum of acceptable practice or opinion on a particular question. It is rather surprising that some judges do not seem to see that.

[8] See the Civil Justice Council's "*Protocol for the Instruction of Experts to give evidence in civil claims*", published in June 2005, amended October 2009 and applying to any steps taken for the purpose of civil proceedings, by experts or those who instruct them, on or after 5th September 2005. At about the same time (22nd June 2005) a Code of Practice for Experts was produced by the Academy of Experts and others like Chartered Institute of Arbitrators Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration. Civil Justice Council's *Protocol* sets out the "*minimum standards of practice that should be maintained by all Experts*". It is a very short document which emphasises that experts must keep their knowledge up to date, remain independent, and be aware of their duty to the Court or Tribunal. Item 2 of the Code specifically states that an expert may not "*make his fee dependent on the outcome of the case*".

[9] An amendment in April 2013 to the practice direction to Civil Procedure Rule 35 (PD 35) means that a court now has the power to order expert witnesses to give their evidence concurrently. Paragraph 13.8.2 (d) of the current TCC Guide in relation to the way in which expert evidence says, "*For the experts for all parties to be called to give concurrent evidence, colloquially referred to as "hot-tubbing". When this method is adopted there is generally a need for experts to be cross-examined on general matters and key issues before they are invited to give evidence concurrently on particular issues. Procedures vary but, for instance, a party may ask its expert to explain his or her view on an issue, then ask the other party's expert for his or her view on that issue and then return to that party's expert for a comment on that view. Alternatively, or in addition, questions may be asked by the judge or the experts themselves may each ask the other questions. The process is often most useful where there are a large number of items to be dealt with and the procedure allows the*

(witness conferencing to use its more formal label)[10], promoted by Jackson LJ, involves experts, independent of advocates, reviewing each others' testimony. In practical terms, it can be particularly difficult for a tribunal to assess the differing views of experts if they do not share the same set of assumptions. The focus of cross-examination of an expert witness is often on developing the opposing counsel's arguments. A judge's questions may differ in focus in that they are more neutral and balanced, which represents an opportunity for the expert to put more of their own views forward. Yet the increasing use of "hot tubbing" of experts at trial has caused some trial advocates concern that they are losing control of the course they wish to adopt in presenting the evidence and in exploring the same. From the instructing solicitor's perspective the loss of control over the direction of the expert's testimony is an issue. The power to lead the discussion is taken away from the lawyers and, to a large degree, placed in the hands of the judge. The skills that an expert needs are different, because the dynamic of the discussion taking place is less defensive than cross-examination[11].

Yet we can see the overarching policy of reducing[12] the number of experts has been one consistent imperative of public policy[13], hence the advocation of the single joint expert instructed to prepare a report for the Court/tribunal on behalf of two or more of the parties (including the claimant) to the proceedings and just like a Party Appointed Expert, the SJE's duty is to help the tribunal on matters within their expertise and this overrides any obligation to the person from whom the expert has received instructions or by whom he is ultimately paid.

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court to have the evidence on each item dealt with on the same occasion rather than having the evidence divided with the inability to have each expert's views expressed clearly. Frequently, it allows the extent of agreement and reason for disagreement to be seen more clearly…"

[10] An amendment to the practice direction to Civil Procedure Rule 35 (PD 35) means that a court now has the power to order expert witnesses to give their evidence concurrently, by means of a discussion chaired by the judge – aka 'hot tubbing', or, more formally, witness conferencing.

[11] Many may fear that this reform is just a case of 're-arranging the deckchairs' because, as Jackson himself stated, "it is doubtful whether either lawyers or litigants or experts will welcome yet another raft of rules about expert evidence".

However, there are good grounds for expecting that hot tubbing will save both time and money following a review of the use of this method in Australia – where hot tubbing was developed and has proved successful – and a pilot scheme undertaken in the Manchester Technology and Construction Court and Mercantile Court.

The arrangement is likely to be particularly cost-effective in disputes where experts have reached a high degree of consensus but disagree about a limited number of issues. On the other hand, it is, perhaps, less likely to be the first choice for a litigant who is in the unfortunate position of having to rely on an expert witness whose credibility or independence is at issue.

[12] Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert. This discretionary power may be exercised at any time. There is a presumption in favour of the appointment of a single joint expert in cases allocated to the fast track. In multi-track cases it may be anticipated that the court is likely to direct that the evidence on a particular issue is to be given by a single joint expert where it appears to the court, on the information then available, that the issue falls within a substantially established area of knowledge and where it is not necessary for the court to sample a range of opinion. The object is to do away with the calling of multiple experts where, given the nature of the issue over which the parties are at odds, that is not justified. This has the advantages of reducing costs and delays and of strengthening the impartial role of experts.

[13] And in publicly funded cases, the fees for many experts have been reduced by the Legal Aid Agency, while parties who use experts without prior agreement are warned that experts cannot be paid from public funds. Parties in Legally Aided cases should use a single expert jointly instructed where this is appropriate to the circumstances of the case. If the legally aided client unreasonably refuses to do so, then this should be reported by the provider as incurring an unjustifiable expense on legal aid (Regulation 42(j) of the Civil Legal Aid (Procedure) Regulations 2012).

My accent in this paper is on privately funded cases.

What is a single joint expert?

The principle of the single joint expert (SJE) is not new[14] and has been in existence for a number of years, but the current creature comes from the Woolf reforms invoked on 26 April 1999. A straw poll in my firm conducted amongst my colleagues, shows it has seldom been adopted by our clients, in fact in just one of my cases before the TCC and then long ago. It is more commonly used in the types and/or sizes of cases where we are not usually appointed, so our experience may not reflect the wider picture. That aside, the categories of case where SJEs are deployed include:

- Commercial litigation - where liability is the key issue and the Court is of the opinion that quantum can be dealt with by a single expert
- Divorce ancillary relief - where there is a requirement to value a family business in order to quantify the divorcing couple's assets.
- Personal injury - where a loss of earnings claim needs to be calculated.

In Lord Justice Jackson's *Review of Civil Litigation Costs: Preliminary Report* published in May 2009[15], he set out a proposal for the 'presumption that all quantum experts will be instructed on a "single joint" basis, *unless* the Court decides that there is good reason for individual experts to be permitted'. This proposal was not carried through to his final report. This is not surprising as, in my experience, there are a good number of cases where key issues are quantum-related and therefore parties do need their own quantum expert.

CPR Part 35.7 deals with the court's power to direct that evidence be given by a single joint expert. But now fully 15 years on from the Woolf reforms if we look at privately funded civil cases the use of a single joint expert is far from in general application, in part due to the user perception of poor service results as many single joint experts are seen as mostly 'pedestrian' (unfair generalisation I know) and/or potentially lose cannons, in for the ride, suitable usually only in smallest of cases and then on short ropes, for some lawyers preferably around their necks! Hence short life's for some! Single joint experts are not usually appropriate for the principal liability disputes in a large case. (The *TCC Guide* expressly recognises this reality).

The last client's want is – in effect – to place liability in the hands of an expert over whom they have no "influence". This does not mean the client will tell the expert what to say (any expert facing such instructions should properly recuse), but in my experience I would want to try and "get ahead" of the Claimant in information from the expert if it looked to me that we were going to be liable. That means "control" of when the information comes out, which is not improper. If you have a report from an expert saying that the insured is "dead in the water", (and possibly dead in the water on more than the claimant has spotted to date) the last thing you need is to have that in the hands of the other side. Any prospect of negotiating a settlement based on "litigation risk" is seriously diminished. These are the realities of litigating whatever anyone may say to the contrary.

[14] SJE's have been used ad hoc pre action in expert determination roles where parties have decided to use a joint expert to give them an independent and impartial opinion on the technical facts of their case in order to arrive at a solution.

[15] Although the TCC chapter of the Report did not deal with expert evidence, under the discussion of general expert evidence in chapter 42 suggestions were made advocating SJEs.

This is particularly the case where expert opinions would be affected substantially by the specific instructions given or there is a potentially wide range of legitimate expert opinion.

Indeed the results of UK Register of Expert Witnesses Survey 2013[16] revealed expert witnesses are wary of, or may even shun, joint instruction work due to concerns that "disgruntled" parties may sue. The number of single joint experts instructed jointly by all of the parties only rose in number around the Millennium as a result of the Woolf reforms but have since tailed away. Now only 57% of experts have been SJEs, compared to 73% in 2011, and on average they receive eight SJE instructions per year, less than half the average in 2009. Another reason for the short life!

Writing in *NLJ* in October 2013, Dr Chris Pamplin, editor of the *UK Register*, says: "Since the removal of expert witness immunity in January 2011, the role of the SJE has become even more fraught. "Working for both parties in a dispute may well lead to a disgruntled instructing party, and that party can sue the instructed expert! Indeed, we have heard from experts – even those who until now have been very supportive of the SJE approach – who say that they will no longer undertake such instructions… the decline in SJE instructions is beginning to look more like a trend than a blip."

Yet the phrase 'exceptional circumstances' is often used in the published material in the context of permission to call experts at all in civil cases[17] to explain this new reality, no one has the right to call expert evidence per se[18]. However cases are funded, the Jackson reforms now place so much emphasis on predicting costs, that even allowing for inconsistent judicial application of the costs regime, recovery for unexpected items has become unreliable. As Solicitors we have to exercise more control over experts in ensuring that timetables are complied with and that accurate costs estimates are provided by the experts at an early stage for the purposes of costs budgeting.

To add insult to injury, one might observe, in the case of *Jones v Kaney*[19] the Supreme Court stripped expert witnesses of their assumed immunity from suit[20].

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[16] Since 1995, the Register has regularly conducted surveys of its members.

[17] CPR 35 r1 says indeed: "Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by only one expert. Experts and those instructing them are expected to have regard to the guidance contained in the Protocol for the Instruction of Experts to give Evidence in Civil Claims."

[18] Courts now have the power to exclude expert evidence, even though it would otherwise be admissible. On the face of it, this conflicts with the right of individual litigants to present their case under conditions that do not place them at a disadvantage vis-a-vis their opponents, a right secured to them by the Human Rights Act 1998. Thus far, however, attempts to challenge, on human rights grounds, a court's refusal to allow parties to call the evidence they wish have met with no success. It is interesting to note, however, that the Criminal Procedure Rules contain a specific recognition of the rights of a defendant under Article 6 of the European Convention on Human Rights. This right is said to be fundamental in defining whether the case is dealt with 'justly', as required by the Criminal Procedure Rules overriding objective. This could lead to some interesting arguments should attempts be made to limit the availability or choice of experts in criminal trials. Ditto lack of advocates, http://www.bbc.co.uk/news/uk-27238201 where Solicitors acting for the men in this case approached 70 sets of barristers' chambers - and only found one QC willing to act - before he pulled out the very next day. Only yesterday (1/5/14) Judge Anthony Leonard at Southwark crown court warned that the system of fair trials was in jeopardy.

[19] [2011] UKSC 13.

[20] One might ask post *Mitchell v News Group Newspapers Ltd* what if a single joint expert has failed to comply with the court's timetable for filing their report? What sanctions can the court impose? If the client is not happy about making an application to amend the timetable, in light of *Mitchell*, there is no other option. Unless the default of the expert is so significant that it amounts to a contempt of court, or provides you with justification to seek the expert's dismissal, the most likely sanction would be an award against the expert of the costs incurred because of the delay. However, seeking costs may cause you concerns about

The more cynical may say the role of an expert in an a construction dispute is to provide independent opinion evidence based on the facts[21] this reality is often less convincing and senior legal birds[22] like LJ Jackson, Lords Dyson and Neuberger know this can be so, because most experts are in reality appointed and paid by one party and so experts may tend to view the dispute from that party's perspective. We have all seen cases where TCC Judges have not[23] held back with their criticism[24]. An unbiased and careful review of the facts may well lead to a truly independent view,

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the subsequent independence of the expert. You might consider reserving the position to ensure no specific costs order is made now in relation to those costs, and make an application against the expert after the trial.

[21] '*…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'* – Civil Evidence Act 1972, Section 3.

[22] See the Judgment of Mr Justice Edwards-Stuart in the case of *West & Anr v Ian Finlay Associates* [2013] EWHC 868 (TCC) which provides an excellent example of the scrutiny given by Judges in the TCC to the quality and type of expert evidence that comes before them.

[23] In *Pickard Finlason Partnership Ltd v Mr and Mrs Lock,* [2014] EWHC 25 (TCC) the Judge felt that both of the architectural experts were "guilty of descending into the arena and arguing the case for their respective clients from a very early stage". Interestingly the court also highlighted that both experts' experience was more related to acting as an expert rather than practising as an architect.

[24] If an expert fails to show the proper degree of independence, the tribunal will sometimes quietly downgrade in its own mind the importance to be attached to that evidence. On other occasions, the tribunal will make an express finding. Thus, for example, in *Mukenbank and Marshall v Kensington Hotel* (1999) 15 Const. LJ 231 Judge Wilcox said:

> Mr Green badly lost sight of the proper role of an expert assisting the court in the determination of issues such as these. He adopted the stance of an advocate. The value of his evidence was thus very greatly diminished. I was wholly satisfied with the evidence of Mr Melvin; an impressive witness and a fair and objective witness.

It is also important that an expert does not rely on the information provided to him by those instructing him without subjecting it to careful examination. In my own case of *Great Eastern Hotel Limited v John Laing Construction Ltd*, [2005] EWHC 181 (TCC) Judge Wilcox said of one of the experts that he:

> …ultimately, in cross-examination, as he had to, revised his opinion as to the criticality of the protection of the Railtrack services to the project. His failure to consider the contemporary documentary evidence photographs and his preference to accept uncritically Laing's untested accounts has led me to the conclusion that little weight can be attached to his evidence save where it coincides with that of Mr France. I sadly conclude that he has no concept of his duty to the court as an independent expert. Despite seeing the photographs and material contained in Mr France's two reports received and read by him in May, totalling undermining credit and accuracy of [the] account upon which he relied, he chose not to revisit his earlier expressed views in accordance with his clear duty to the Court.

The case of *Mengiste & Anr v Endowment Fund For The Rehabilitation of Tigray & Others* [2013] EWHC 599 (Ch) provides an extreme example of what can go wrong. Here Mr Justice Peter Smith noted the following problems with the Claimant's expert evidence:

(i) He had very little by way of appropriate qualification to give expert evidence on these matters.
(ii) He did not understand his duties as an expert to the court.
(iii) These duties and his potential exposure if his evidence was given recklessly or negligently were not explained to him before he signed his experts report (contrary to the Expert Witness Protocol).

The Judge noted that the expert repeatedly strayed into the argumentative and also made strongly worded criticisms which were simply not sustainable on the thought processes in his report. This led to the "thorough and comprehensive destruction" of the expert during that cross-examination. What was particularly difficult for the expert, and more significantly for those instructing him, was that the Judge noted the following:

> "The difficulty was that [the expert] clearly had something of worth to say. He was honest in his evidence, but his answers were coloured by his clear desire to argue the case on behalf of the Claimants and his lack of training as an expert."

while at the other end of the scale, an expert may advocate a party's case and even be criticised as a "hired gun"[25]. Loan rangers are to be avoided!

If I may digress a moment, I was one of those who attended a Society of Construction Law lecture given by Francis Goodall at King's College in April 1988 titled "Supervision: An Architects view"[26] in which Mr Goodall expressed an altogether too frank a view on expert evidence in which to my surprise as a young lawyer he said something akin to what he wrote in his later paper with the following:

> "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?" "…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 so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, its seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. '*Celatio veri'* is, as the maxim has it, '*suggestio falsi*', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them"
>
> "Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun', so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet. Shall I strike at it with my partisan? The third phase which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.
>
> "Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert, like the 'virtuous youth' in Mikado, to tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon him."

As bad luck would have it for Mr Goodall he was called a few years later as an expert in *Cala Homes (South) Ltd and Others v Alfred McAlpine Homes East Ltd*[27]. This was a dispute over copyright in drawings, Mr Francis Goodall gave expert evidence. Those on the other side had, however, had done their homework and had found the paper to which I refer above.

Whilst the Judge laid the blame squarely at the door of those instructing the expert, noting that he had been "thrown to the wolves without any proper protection or advice as to the nature of his role and his duties and his potential liabilities", the case does stand as a stark reminder of the importance of ensuring that the expert is truly an expert in the field you need and that the expert remembers above all else to bear in mind their duties to the court and not the party paying them.

[25] To wit see Peter Rees QC's paper to CIArb: "*From Hired Gun to Lone Ranger*".
[26] Later the subject of a paper Mr Goodall had written in the Journal of the Chartered Institute of Arbitrators called "*The Expert Witness: Partisan with a Conscience*".
[27] [1995] EWHC 7 (Ch) (06 July 1995).

The judge, Mr Justice Laddie clearly did not enjoy being considered a "rustic". His response to this was to say: "The whole basis of Mr Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life…An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill. 'Pragmatic flexibility' as used by Mr Goodall is a euphemism for 'misleading selectivity'"

The judge then read from the beginning of Mr Goodall's report where Mr Goodall had said, "I believe that the inspection I have made and the graphic and other material that I have seen are sufficient to enable me to reach an informed opinion on the matters in dispute in the present action that fall within my discipline. I have no connection with either of the parties in this action, nor have I any prior acquaintance with instructing solicitors or Counsel. I have no pecuniary or other interest in the outcome of the current litigation."

The judge concluded with words probably ending Mr Goodall's expert witness career saying:

" In the light of the matters set out above, during the preparation of this judgment I re-read Mr Goodall's report on the understanding that it was drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective I did not find it of significant assistance in deciding the issues I should point out that there is no material before me which suggests that defendants' solicitors or counsel, or the defendants themselves, were aware of Mr Goodall's attitude to-the drafting of his report."

The morale is obvious, it was a black day for experts'.

Certainly, we can see when an expert is perceived to have behaved inappropriately the consequences for him can be devastating. In mid-2005 Sir Roy Meadows, who had given evidence in the Sally Clark trial, was castigated by the media and punished by his own professional body. He was the paediatrician whose evidence apparently contributed to the wrongful conviction of a mother for the murder of her two babies. In a subsequent disciplinary hearing by the General Medical Council, although it was accepted that Professor Meadows did not intend to mislead the court, he was found guilty of serious professional misconduct for giving erroneous and misleading evidence, and he was struck off the register. It was said that statistical evidence he gave in court was outwith his expertise as a consultant paediatrician. As we shall see below, the penalties for experts who do behave inappropriately can be draconian, including stringent costs penalties, through to severe punishments imposed by the expert's own professional body, effectively rendering him unemployable.

Small wonder the likes of Andrew Bartlett QC has argued that the "*chief unsustainable myth is the complete independence of the expert*". The late Alan Shilston has pointed out that the role of expert witnesses in common-law jurisdictions is "ambiguous". Anthony Speaight QC, when considering litigation and the role of expert witnesses, refers to "*unresolved contradictions*"[28].

[28] In his article "A Bonfire of the Paper Mountain", *Counsel*, November/December 1994, Anthony Speaight QC characterised the matter thus: 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 conceal anything that might be to the disadvantage of their clients. The disclosure of experts' reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy… See also CILL 1008. Similarly, Lord Woolf referred in his report *Access to Justice* to the point that "experts sometimes take on the role of partisan advocates

As Lord Woolf noted and advocated:

> *"A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up."*[29]

One of the more controversial, or at least most widely discussed, of the reforms introduced by CPR in 1999 were the changes in relation to expert evidence[30].

Thus the appointment of a single joint expert (CPR 35.7) was one of the major innovations of the Woolf reforms. It is intended to mark a new era. CPR 35 states that the spirit and letter of CPR 35.7 and 35.8 call upon parties to consider the appointment of a single joint expert from the outset.

Official Guidance on expert evidence by the single joint expert

In October 2009 the Civil Procedure Rules Committee adopted a proposal made by the Civil Justice Council after consultation that it would be helpful for Part 35 to give more guidance to parties on when the court might order expert evidence to be given by a single joint expert. The guidance is in a new para.7 of the practice direction which lists (non-exhaustively) the factors that the court will take into account as follows: Whether,

> *(a) "it is proportionate to have separate experts for each party on a particular issue with reference to:*
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> *(i) the amount in dispute;*
> *(ii) the importance to the parties; and*
> *(iii) the complexity of the issue;*
>
> *(b) the instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts;*
>
> *(c) expert evidence is to be given on the issue of liability, causation or quantum;*
>
> *(d) the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion;*
>
> *(e) a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol;*
>
> *(f) questions put in accordance with rule 35.6 are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;*

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instead of neutral fact finders or opinion givers" (p.137) and suggested that "A single expert is much more likely to be impartial than a party's expert can be" (p.142).

[29] Lord Woolf, Access to Justice: Final Report 1996 [13.21].

[30] See *Owners of the Ship "Pelopidas" v Owners of the Ship "TRSL Concord"* [1999] 2 Lloyd's Reports, Judge David Steel QC reiterated that expert evidence was not admissible without leave of the Court. If parties sought advice without an Order, those costs would not be recoverable. He also noted the potential advantages of a single joint expert to run the software necessary to plot the course of ships. Something specific to those courts maybe, but a useful pointer to judicial thinking in general from then on.

(g) questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;

(h) a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and

(i) a claim to privilege (GL) makes the instruction of any expert as a single joint expert inappropriate"

The changes set out in CPR 35 suggested that its use was expected to become far more widespread. Yet it has not been.

I am fortunate to have an advance draft copy of the 2014 TCC Guide it says as below on SJEs:

13.4 Single joint experts

13.4.1 An order may be made, at the first CMC or thereafter, that a single joint expert should address particular issues between the parties. Such an order would be made pursuant to CPR Parts 35.7 and 35.8.

13.4.2 Single joint experts are not usually appropriate for the principal liability disputes in a large case, or in a case where considerable sums have been spent on an expert in the pre-action stage. They are generally inappropriate where the issue involves questions of risk assessment or professional competence.

13.4.3 On the other hand, single joint experts can often be appropriate:
(a) in low value cases, where technical evidence is required but the cost of adversarial expert evidence may be prohibitive;
(b) where the topic with which the single joint expert's report deals is a separate and self-contained part of the case, such as the valuation of particular heads of claim;
(c) where there is a subsidiary issue, which requires particular expertise of a relatively uncontroversial nature to resolve;
(d) where testing or analysis is required, and this can conveniently be done by one laboratory or firm on behalf of all parties.

13.4.4 Where a single joint expert is to be appointed or is to be directed by the court, the parties should attempt to devise a protocol covering all relevant aspects of the appointment (save for those matters specifically provided for by CPR rules 35.6, 35.7 and 35.8).

13.4.5 The matters to be considered should include: any ceiling on fees and disbursements that are to be charged and payable by the parties; how, when and by whom fees will be paid to the expert on an interim basis pending any costs order in the proceedings; how the expert's fees will be secured; how the terms of reference are to be agreed; what is to happen if terms of reference cannot be agreed; how and to whom the jointly appointed expert may address further enquiries and from whom he should seek further information and documents; the timetable for preparing any report or for undertaking any other preparatory step; the possible effect on such timetable of any supplementary or further instructions. Where these matters cannot be agreed, an application to the court, which may often be capable of being dealt with as a paper application, will be necessary.

13.4.6 The usual procedure for a single joint expert will involve:

(a) The preparation of the expert's instructions. These instructions should clearly identify those issues or matters where the parties are in conflict, whether on the facts or on matters of opinion. If the parties can agree joint instructions, then a single set of instructions should be delivered to the expert. However, rule 35.8 expressly permits separate instructions and these are necessary where joint instructions cannot be agreed
(b) The preparation of the agreed bundle, which is to be provided to the expert. This bundle must include CPR Part 35, the Practice Direction supplementing Part 35 and the section 13 of the TCC Guide.
(c) The preparation and production of the expert's report.
(d) The provision to the expert of any written questions from the parties, which the expert must answer in writing.

13.4.7 In most cases the single joint expert's report, supplemented by any written answers to questions from the parties, will be sufficient for the purposes of the trial. Sometimes, however, it is necessary for a single joint expert to be called to give oral evidence. In those circumstances, the usual practice is for the judge to call the expert and then allow each party the opportunity to cross-examine. Such cross-examination should be conducted with appropriate restraint, since the witness has been instructed by the parties. Where the expert's report is strongly in favour of one party's position, it may be appropriate to allow only the other party to cross-examine.

[Emphasis added]

The concept of the single joint expert is not unique to the UK or Hong Kong for that matter. It has been adopted in Western Australia (as a consequence of the Law Reform Commission of Western Australia 1999), Canada and in the USA.

The case for a Court or party appointed single expert therefore at first blush seems fairly convincing at first glance:

- there is a potential for the expert evidence to become less costly given the fewer experts involved and the
- avoidance of unnecessary competing expert reports;
- there is a potential for savings in time;
- there is a potential for eradicating the risk of bias and polarised expert opinions; and
- it can smooth the playing field between parties of unequal resources.

However, against these perceived benefits there are a number of potential problems which the Court or party appointed single expert brings to the dispute arena and which must be weighted against the perceived benefits outlined above. Again they are markers that promulgate a short life for the SJE.

One reason it has not really caught on is the suppression of alternative argument.

Suppression of alternative argument

The obvious disapproval that can be levied by adopting the single joint expert approach is that the Court or tribunal is presented with only one set of expert opinions concerning the matters in dispute. Different expert witnesses come to the witness box bringing with them what can be very different experiences and backgrounds, and in my opinion it is to the undoubted benefit of the system that adopts the two party appointed expert approach, that different legitimate opinions on

a matter can be fully explored by two individuals with what can often be legitimate differing conclusions. This is particularly so in construction disputes.

One quantum expert, for example, may have his background and experience rooted in private practice, whereas the experience of the other may be in general contracting. Both individuals are experienced in quantum issues. Both are experts in their own right. However, the two experts are adept at giving divergent opinions and can arrive at different conclusions on a given factual matrix. This is one of the strengths of adopting an approach that uses more than one expert.

Both the Courts and Arbitration tribunals are perfectly able to deal effectively with complicated technical issues and it is rare for cases to become bogged down in technical complexities. Different experts are, however, likely to have genuine differences of opinion on a given set of facts and confining the expert evidence to a single joint expert has the potential of suppressing that expert opinion evidence, given that one of the central concepts of the role of the Judge or Arbitrator is to hear both sides of an argument. With only one expert involved, there is always a danger that the findings might be stifled or unexplored to a degree.

Expert evidence in adversarial proceedings requires the Court or tribunal to decide which evidence it prefers, and, therefore, there has to be both a winner and a loser. It is to the strength of using the two party appointed expert approach that the Court or Arbitral tribunal can prefer one expert opinion over another – and with the oral cross examination of each expert the best way of producing the most just result.

The potential risk associated with adopting the single joint expert is that effective cross examination may not be capable of addressing the problem of an expert opinion that is perhaps too narrow and which might leave the Court or tribunal with a degree of uncertainty as regards whether the ex-opinion has really considered all of the relevant issues.

For complex matters of expert opinion the input of an expert is often needed to ensure that the opinion can be properly given. This can be an iterative process as the expert skills are adapted to a litigation/arbitral process. This is often impractical with an SJE. Again this leads to the prospect of three experts rather than two.

Hence an issue with single joint experts is the emergence of the ‘consultant’ or ‘shadow’ expert!

The development of the Shadow Expert

There is an important obvious distinction between instructing an expert to provide evidence in court or arbitral proceedings and instructing an expert solely in an advisory consulting capacity.

Implementation of the single joint expert procedure for expert opinion evidence has given rise to the concept of the consulting or “shadow expert” - an expert engaged to assist with the preparation of a party’s case but not on the basis that the shadow expert will give evidence at the trial, he or she is in effect a special advisor to the party.

However, retaining shadow experts would seem at odds with the very aim of reducing excessive cost in litigation and arbitration. It is easy to picture that in construction disputes, where significant sums might be at stake and where much may depend on quantum or planning and programming expert evidence, that parties would insist on a shadow expert to advise them of the validity of the single joint expert’s opinion and perhaps as is often the case assist with the cross examination of his single joint expert’s evidence. Such an approach, and, in particular, the evident

additional costs likely to be incurred in employing shadow experts would seem to reverse the cost effective intent of the single joint expert concept, since three different views as to what is the correct outcome could hardly be justified as an effective cost saving approach.

The question then arises as to what happens if a party is unhappy with the expert report prepared by the single joint expert? In *Cosgrove & Anr v Pattison & Anr* (unreported, 27 November 2000), Mr. Justice Neuberger (as he then was) allowed an appeal by the Defendants that they be permitted to instruct an additional expert of their own given that they were dissatisfied with the report prepared by the single joint expert. Permission was given in view of the fact that the hearing was some way off but additional costs were expended on yet further expert evidence. Among the factors taken into account in allowing the additional expert was:

- the nature of the dispute;
- the amount in dispute;
- the number of disputes to which the expert evidence was relevant;
- the reason that the expert was needed;
- the effect on the conduct of the case of permitting the additional expert;
- the delay the appointment of a further expert might cause; and
- the overall justice to the parties in the context of the litigation.

The emergence of the shadow expert can therefore give rise to potential delay and additional cost.

There is then the potential for delay.

The potential for delay

Notwithstanding the potential that exists for the adoption of the single joint expert to reduce the time and costs involved in the preparation of expert evidence, and the time taken and costs involved in cross examination, there is a peril that the reverse is possible and that the approach could lead to significant delays, certainly my limited experience of adopting the process led that outcome. Given the importance of the identity of the individual acting in the capacity of the single joint expert, the agreement and selection of the individual would be a critical activity not simply in terms of timing but in terms of the identity of the individual himself. It is not difficult to perceive that the selection process of the expert could potentially be a long drawn-out process given the tendency for each party to attempt to secure the most suitable expert in order to maximise that party's chance of persuading the Court or tribunal to decide in its favour. Trust me it happens. Further, given the size and complexity of many construction disputes it is possible that the magnitude and extent of time and cost claims including counterclaims that might ultimately have to form part of the instructions to the single joint expert could give rise to difficulties in agreeing the scope and timeframe for the provision of the expert evidence which might therefore result in numerous court interventions, and with it delay.

Notwithstanding protracted disagreements between experts would be avoided by adopting the single joint expert approach, delay could nevertheless arise both during the preparation of the expert report and in the giving of evidence as a consequence of:

- appeals by a party who might be unhappy with the report prepared by the single joint expert;
- the use of single joint experts in multi-disciplinary matters which might lead to conflicting opinion evidence or
- disagreements between the lead expert disagreeing with other expert opinions;

- delays caused by the introduction of shadow experts who might have different opinions to those of the single joint expert and which might then ultimately lead to supplementary expert reports being required and prolonged, drawn out cross examination;
- possible deferment or prolongation of the hearing as a consequence of a party amending its case to reflect the opinions given by the single joint expert.

Conclusion

Albeit the adoption of a single joint expert in lieu of two party appointed experts appears at first sight to bring with it some obvious advantages in terms of both time and cost, the approach can bring with it many potential problems.

(i) It is lonely, often thankless for the expert and frequently neither party much likes what the single joint expert (SJE) says. Although the primary duty of all expert witnesses is to the court or tribunal, those appointed by one party alone may still have the sense of belonging to that party's team – and especially so if they have advised on technical aspects of the case prior to the issue of proceedings;

(ii) They may, for example, have played a part in formulating the client's statement of case, or the client's response to one, and once reports have been exchanged it is more than likely that they will be asked to comment on the expert evidence produced by the other side. They may also be involved in conferences with counsel, and if the case proceeds to trial, they may be in court to advise even when not required to give evidence from the witness box.

(iii) The situation of the SJE could not be more different. In the great majority of instances the SJE would have had no knowledge of the case before being appointed, and thereafter little or no influence in determining the course it takes.

(iv) Furthermore, throughout the SJEs involvement, he will be expected to maintain a position of strict neutrality vis-à-vis the parties, even to the extent that should one of them make contact for any reason, the SJE would be expected to ensure that the other party knows of it and has a copy of any response. Then again, if an SJE is required to give evidence in court, it is likely that the instructing parties avoid having any contact while there. It is probable that neither side will feel in the least obliged to tell the SJE how the case is going, when the evidence is likely to be called, how long the SJE should remain or, indeed, to inform the SJE subsequently of the case's outcome. Isolation, in a word, is a fact of life for SJEs, and not the least of its tribulations

The likelihood in my opinion is that a Court or Arbitrator(s) will continue to restrict the adoption of the single joint expert approach to instances where the sums at stake are relatively small and where the expert evidence that the Court or tribunal needs to have explained to it was not controversial or hugely disputable. Experience in the UK seems to suggest that the concept of the single joint expert witness works can work and that Judges, lawyers and parties to proceedings have displayed a willingness to use the approach albeit on matters that do not involve substantial amounts and where the issues are generally uncontroversial. For the construction industry, the approach has been be limited to the most simple of cases only. May it ever be thus.

For this reason say I tis a short life for the jointly appointed expert.

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