EXPERTS AND EXPERT EVIDENCE IN INTERNATIONAL ARBITRATION: USE, DUTIES AND OBLIGATIONS, AND THE BASIS OF THEIR APPOINTMENT

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Abstract

The three-part paper analyzes important issues in the field of experts and expert evidence in the arbitration process in particular

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problems — both in common and civil law jurisdictions. It covers legal proceedings and arbitrations as well as the limits to the use of expert evidence.
The key point here is that it is an opinion — what the expert thinks — which is of evidentiary value. Ordinarily, evidence is fact based, not opinion based. Such opinions, therefore, have to reach a very high standard in proceedings where they are used. If judgments and decisions are to be used, and be based upon such opinions, they have to be sound, and be anchored in a real expertise. Interesting and exciting new directions in case management of such evidence are discussed
The overall objective of this paper is to provide the reader with an appreciation of expert evidence, some of the current debates on its use, and how to challenge it when it is used. The paper also contributes to the current debates on expert evidence with some observations on how t might be improved.

Keywords
Arbitration process, common law jurisdiction, civil law jurisdiction, evidence, expert

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I. INTRODUCTION

The first part of this three part paper explored the basis of duties and obligations of experts and their evidence through the prism of the notable judgements in the two principal hearings in the case of the *"Ikarian Reefer"*. A more recent case highlights the adverse impact upon a party's case if the expert deviates from the accepted duties and obligations, as well as the immense personal reputation damage which

can follow. Following this, and developing the theme of expert evidence in international arbitration, a number of practical points of guidance on such evidence and its use are presented. The third and final part of this paper will extend the discussion of UK courts and practice into the international dimension, with particular attitude to arbitration. It will also look at two recent developments and contribute to the ongoing debate as to how to improve the case management of expert evidence.

II. A SAD STORY

The case of *Van Oord LTD and SICIM Roadbridge UK Ltd v Allseas UK*[3] is a most memorable example of a failing by an expert witness. The case involved delays to contract works for the laying of a 30 inch gas export pipeline off the coast of Shetland. Allseas UK Ltd was the lead contractor for Total, and the Claimants were subcontractors to Allseas. A large part of the dispute involved quantum analysis — "how much is it worth" type of expert evidence of a form often seen in construction and engineering disputes, very often in conjunction with assessment of delays to the contracted programme.

The Judge gave no less than twelve detailed reasons why the evidence of the Claimant's expert was, in his view, "wholly worthless". His reasons are reproduced verbatim because they show so clearly the matrix within which the failings took place. (The numbering of the paragraphs is from the original judgement). OSR is the abbreviation for Oord SICIM Roadbridge, the Claimant. AUK is the abbreviation for Allseas UK, the Defendant. Some comments, not part of the original judgement, are appended in square brackets in the following extract from the judgment.

> *80. "Each side called a quantum expert: .....I found that the difference in approach between the.....factual witnesses was even more marked when it came to the expert evidence. I endeavoured to give Mr Lester the benefit of the doubt, particularly given his frank admission that he had not previously prepared a written expert's report or given evidence in the High Court, and because*

[3] *Van Oord UK Ltd & Anor v Allseas UK Ltd* [2015] EWHC 3074 (TCC).

I was aware that he was dealing with a serious illness in his family. His abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the undoubted stress he was under. But I regret to say that I came to the conclusions that his evidence was entirely worthless. There were a total of twelve different reasons for that conclusion.

81. First, I find that Mr Lester repeatedly took OSR's pleaded claims at face value and did not check the underlying documents that supported or undermined them. He uniformly utilised the rates which had been claimed by OSR, not on the basis of any quantity surveying or expert opinion he might have had as to their applicability, but because he had been told that those rates had been agreed by the parties in other contexts, in respect of different Change Order Requests ("COR's"). On analysis, for many of the disputed Line Items, there was often no quantity surveying input from him at all. [The Expert simply took his party's pleadings or claim documentation unquestioningly. He exercised no independence in reviewing or using them.]

82. Secondly, as he made plain in his cross-examination, he prepared his report by only looking at the witness statements prepared on behalf of OSR. He did not look at the witness statements prepared on behalf of AUK. In some instances, this process culminated in Mr Lester cutting and pasting controversial parts of the OSR statements into his report as if they were in some way a contemporaneous record of events. His report and his evidence were therefore inevitably biased in favour of OSR. [The Expert, in preparing his evidence, only used his Party's witness statements, nothing else. His use even of these statements was careless and unprofessional.]

83. Thirdly, in contrast to Mr Kitt, Mr Lester refused to value these claims on any basis, or on any assumption, other than the full basis of the OSR claim (which had been prepared by Dal Sterling, claims consultants who did not give evidence). This was despite my exhortations to the experts, noted in the transcripts of the early days of the trial, that they were to agree figures based on both their own and the other side's case. Thus Mr Lester's figures

were all skewed in favour of OSR, and there was nothing the other way. This was, of course, a very dangerous stance: if one of the disputed assumptions on which OSR's claim was based was found to be wrong (and, as we shall see, Mr Lester repeatedly accepted that many of them were), there were no alternative figures, save for those put forward by Mr Kitt. [The Expert made assumptions which failed to consider alternatives, and failed to follow very clear directions and oral guidance from the Judge. It should be noted that where a Court rejects an Expert's evidence, it may be left only with the alternative view of the other party. In this case, a number of line items were valued by AUK's expert as being zero, which may or may not have their true value had there been proper expert evidence on behalf of the Claimant.]

84. Fourthly, not only did Mr Lester base his promotion of the OSR claims on made-up or calculated rates, but he never once considered, let alone formulated, claims based upon the actual costs incurred by OSR. On that basis alone, of course, the alternative claim for damages for breach of contract could never get off the ground. But it also created the overwhelming impression that the OSR claim (as supported by Mr Lester, at least until he came to be cross-examined) was potentially a "try-on", relying as it did on calculated rates and all manner of assumptions said to have been made in the tender, but not credibly evidenced. Mr Lester resolutely refused to address the issue as to whether or not OSR had suffered any actual loss at all as a result of the events now complained of. [The expert simply took his Party's statement as to what their costs were, rather than independently calculating them himself.]

85. Fifthly, throughout his cross-examination, Mr Lester was caught out on numerous matters, most of which were (with respect to Mr Lofthouse QC) relatively obvious, because so many of them had been pointed out months earlier by Mr Kitt in his first report. Mr Lester originally said that these were typing errors or examples of poor presentation, but, as his cross-examination wore on, he could not escape from the truth that many were much more fundamental than that, and went to the heart of his

wholly uncritical approach to the OSR/Dal Sterling claim. By the end of his cross-examination, he was accepting every criticism or error being put to him by Mr Lofthouse QC; on occasions, he even conceded points before they had even been suggested. The admitted errors fatally undermined both his credibility and the credibility of the OSR/Dal Sterling claim as a whole. [The Expert made basic and fundamental mistakes — including not critically reviewing and assessing OSR's claims. As a result, he clearly suffered a difficult cross-examination, which eroded his evidence, leading to a damning conclusion from the Judge].

86. Sixthly, the widespread and important elements of the claim, which he admitted he could no longer support, drove him to say in cross-examination that he was not happy with any of his reports, not even with the one provided during the last week of the trial, just before he gave his oral evidence. If an expert disowns his own reports in this way, the court cannot sensibly have any regard to them. [A Court will not consider an Expert's evidence to be of any weight if the Expert himself says he is unhappy with it under cross-examination].

87. Seventhly, he repeatedly accepted that parts of his reports were confusing and accepted on more than one occasion that they were positively misleading. For example, he calculated various rates in his report because he said that it was necessary to do so, but then he did not use the rates that he had calculated, and used instead rates which OSR said that they had been paid for other work, and which he did not calculate at all. [A Court will consider Expert evidence which is admitted by the expert to be confusing, and at worst misleading, to be evidence which is worthless.]

88. Eighthly, he appended documents to his original report which he had either not looked at all, or had certainly not checked in any detail. There was a clear inference that many of them had been put together by OSR themselves, or by Dal Sterling. On occasion, Mr Lester admitted in cross-examination that certain schedules had indeed prepared by either OSR or Dal Sterling, despite the fact that the reports themselves did not attribute authorship to anyone other than himself. He also accepted that, at least for

some of these documents, he had appended them but had not checked the accuracy or reliability of their contents. [The expert had attached a number of documents to his report — but had read them only cursorily or not at all. He was therefore unfamiliar with their contents.]

89. Ninthly, he made repeated assertions in his reports that appeared to be expressions of his own views. They were certainly not attributed to anybody else. But in cross-examination it was revealed that these assertions came straight from discussions he had had with OSR witnesses, Mr Mulcair and Mr O'Rourke. Even more alarmingly, some of these assertions, in particular those in Mr Lester's report provided at the start of the last week of the trial, related to matters on which both men had already been cross-examined and (in many instances) on which they had had no credible answer to the points being put to them. In this way, Mr Lester was used to try and plug the gaps in OSR's evidence which had been exposed by Mr Lofthouse QC's cross-examination of OSR's witnesses of fact, without any input from Mr Lester himself. That is the complete opposite of what a responsible, independent expert is obliged to do. This subterfuge (for that is what it was) only became apparent during Mr Lester's cross-examination. It reflected very badly on him, as well as on Mr Mulcair and Mr O'Rourke. [The Court considered that the expert's evidence was based totally on OSR's views on their claim, not his own. In particular, his evidence was being used to fill gaps in their claim — a filling which was unreliable.]

90. Tenthly, this process reached its logical conclusion when a schedule was identified by Mr Lester in the third joint statement (produced just before Day 9 of the trial), following "Without Prejudice" meetings with Mr Kitt. The statement said that he had prepared the schedule. In fact, it turned out that the schedule had been produced by Mr O'Rourke and Mr Mulcair. Mr Lester, having accepted in cross-examination that he had not prepared it, continued to maintain that he had checked and approved it. However, further cross-examination revealed that what he meant by that was that he had discussed the schedule with Mr

Mulcair, and had accepted what Mr Mulcair had said about it. In fact the cross-examination revealed that the schedule contained important errors and must be discounted in its entirety. [An expert should not claim authorship of documents which he has not prepared himself, nor should he compound his error by pretending a level of supervision and approval which would have required an independent appraisal which was not in fact carried out.]

91. Eleventhly, following on from Mr Lester's uncritical passing on of the OSR claims and the Dal Sterling claim documents, he accepted, as he was bound to do, that instead of checking the claims himself, he had preferred to recite what others had told him, even though what he had been told could be shown to be obviously wrong. [The expert failed to check OSR's claims, instead merely regurgitating what he was given as information. There was no independence of thought or action.]

92. Finally, Mr Lester confirmed to me that he had never considered valuing these Line Items by reference to fair and reasonable rates. Remarkably, he seemed almost proud that he had not embarked on that exercise. In my view, this omission made the entirety of the valuation exercise he had carried out of no value, because he had not, even as a cross-check, investigated whether the figures he was so carelessly promoting were actually fair or reasonable, or instead represented some kind of windfall for OSR. It became apparent in his cross-examination that many of the rates he had adopted were far from fair or reasonable. [The concept of "fair and reasonable" is a very common one — and an absolute failure to consider this in the course of one's evidence is clearly something which does not find favour with a Court.]

93. For these reasons, therefore, I consider that Mr Lester 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 was almost as if they were trying to see how much of their claim they could get past Mr Lester, and then Mr Kitt, and ultimately the Court. It made a mockery of the oath which Mr Lester had taken at the outset of his evidence, even though, as I have said, there were some extenuating circumstances.

> *94. For all these reasons, I am bound to find that Mr Lester was not independent and his evaluations (to the extent that he did any independent valuations which were relevant) were neither appropriate nor reliable. I am obliged to disregard his evidence in full.* [It is hard to imagine a more complete and damning discrediting of an expert and his evidence.]
> *95. My adverse views about Mr Lester's performance will come as no surprise to OSR's legal team. As I would have expected from leading counsel of Ms O'Farrell QC's integrity and acumen, at paragraph 26 of her closing submissions, she expressly accepted that Mr Lester "...did not meet the standards that are expected for an independent expert giving evidence in court. He did not appear to have checked the claims adequately or carried out a comprehensive analysis of the documentary records so as to provide an independent valuation against each claim."*

The Judge's comments may easily be regarded as an extension of the Ikarian Guidelines.

These two cases present the most comprehensive guidance from judges to the prospective expert, and his supporting Legal Team. The full judgements are instructive. The potential expert will find therein a wealth of wisdom on the practicalities of what to do, and more importantly, how not to do it.

III. PRACTICAL GUIDANCE ON THE APPOINTMENT AND USE OF EXPERT EVIDENCE

In order to understand a little deeper the notions of experts and their evidence, it is useful to look in detail at them through the lens of the United Kingdom system for their appointment and use. The relevance to international arbitration is, as mentioned in the first part, even those parties from a civil law tradition prefer their own party appointed experts rather than tribunal appointed experts. This fully adversarial approach, so often seen in the UK legal framework, indicates that UK practice and guidelines may be helpful to those in the field of international arbitration when considering expert appointments.

UK Court practice.

Central to the appointment and use of experts are the provisions of The Civil Procedure Rules (CPR)[4]. These are a unified system of Rules for Civil cases used in the UK Court of Appeal, High Courts, and County Courts. The UK Supreme Court has its own Rules[5]. The CPR replaced the old Supreme Court Rules (a different "Supreme" to that which now exists in the UK).

There were the product of Lord Woolff, (then Master of the Rolls[6]), who was instructed by the Lord Chancellor to consolidate the then existing rules. Lord Woolf's Report, "Access to Justice", published 26 July 1999, was founded on certain principles which the UK Civil Justice system should meet in order to ensure "access to justice". They are principles which act as overriding guidance to Courts in UK — and therefore should be familiar to all those who come before Courts — and to experts who prepare and submit evidence to such Courts. In other words, to have these in mind can assist in curtailing the worst excesses of such evidence. It is submitted that every person acting as an expert should have these in mind. The overriding principles of Lord Woolf are now contained in the CPR itself, Parts 1.1 and 1.2:

> *(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*
> *(2) Dealing with a case justly includes, so far as is practicable —*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate —*
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*

[4] SI 1998 No, 3132 (l.17), as subsequently amended.

[5] Rules of the Supreme Court, SI 2009 No.1606 (L.17). Interestingly, these make no reference to Experts or their evidence. The general position is that the Supreme Court considers evidence previously considered, and the appeal arguments of Counsel. These may of course bring previous Expert evidence into question.

[6] Head of the UK Court of Appeal.

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
1.2
The court must seek to give effect to the overriding objective when it —
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

They are a masterpiece of clarity — deliberately written to be intelligible to ordinary people appearing as litigants in person, as well as seasoned lawyers. Practically speaking, the principles of the clarity of text should also be understood by experts, and the content of their evidence should be understandable not only by their peers in their field of specialty, but also the educated layman in the form of the learned Judge or Arbitrator who has to use the evidence to decide the dispute.

CPR Part 35 deals with Experts and Assessors. Firstly, there is an overriding requirement upon the Court to restrict the expert evidence to that which is reasonably required to resolve the proceedings.[7] The overriding duty of an expert providing such evidence is to assist the Court as regards matters within their expertise is explicitly stated[8], clearly stating that it overrides any obligation to a person from whom they have received instructions or from whom they have received payment.[9]

Expert evidence cannot be introduced without the Court's permission[10] and when applying for that permission an indication of the likely costs is required[11]. The Rules also state the requirement to identify the field of expertise which is needed and what the issues are that will be addressed by such evidence — and if possible, the name of the expert. Permission for such an expert and his evidence is personal, which means that the expert cannot be substituted without the permission of the Court.

[7] Rule 35.1.

[8] Rule 35.3.

[9] It is not unknown for legal teams to try to influence the content of an Expert Report.

[10] Rule 35.4(1).

[11] Rule 35.4(2).

Normally, expert evidence is to be provided in the form of a written report, and there are explicit provisions for putting questions to the expert.[12] A Court can, if it so desires, issue Directions for expert evidence to be provided by a Single Joint Expert[13] but this generally requires agreement between the parties as to the identity of the single joint expert — although the Rules provide that in the event of a failure to agree, the Court may select an Expert in any other manner as it decides.

Courts have a power to direct a party to provide information which is not reasonably available to another party.[14] In such cases, Directions are given to the party who has access to such information to submit copies to the Court and the other party.

The real meat of expert evidence is the Report which the expert prepares and submits. This is covered by Rule 35.10, and CPR Practice Direction 35. For example, as regards format, it must contain a signed Declaration by the expert that he has understood and complied with their duty to the Court. It must contain details of all instructions (written and oral). Such Reports can be disclosed voluntarily by a party to the other side, or the Court if it sees fit can order such Disclosure. The normal position is that such Reports are shared, simply because their contents are fundamental to the dispute to be resolved.

Vitally, the Court has the power to issue Directions for discussions and meetings between experts to agree their evidence as much as possible, and when not possible to identify clearly for the Court what is not agreed and why. Interestingly, an expert's overriding Duty to the Court is mirrored by the Court's supportive powers to the expert — for example, he can apply to the Court for Directions for the purposes of assistance to carry out his functions.

Practice Direction 35, which is expressly stated as it "supplements CPR Part 35" gives explicit Directions on expert evidence. It covers general requirements, form and content of report, information, instructions, questions to experts, discussions between experts and much more. General requirements are covered in Paragraph 2.1 et seq.

[12] Rules 35.5 and 35.6.

[13] Rule 35.7.

[14] Rule 35.9.

2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
2.3 Experts should consider all material facts, including those which might detract from their opinions.
2.4 Experts should make it clear —
(a) when a question or issue falls outside their expertise; and
(b) when they are not able to reach a definite opinion, for example because they have insufficient information.
2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

The imprint of the Ikarian Reefer guidelines are clear. As to form and content — one notable inclusion is the Direction in paragraph 3.6, which deals with the situation where a range of opinion exists on matters in the Report. An expert, faced with this situation is obliged to summarise the range of opinions, and give reasons for the opinion which he holds.

An interesting field of discussion must be on what are reasonable limits in such circumstances when discussing range of opinions — especially as it will relate to issues of time and cost. In the case of the "Ikarian Reefer" one of the possibilities for the open diesel line tap was vibration from gears and engine — surely reasonable in the case of a maritime engine room. Finally there is a requirement for a signed Statement of Truth[15].

Both CPR Rule 25 and its associated Practice Direction make interesting reading, and are arguably mandatory for any person seeking to act as an expert in the UK Courts, or the sphere of Arbitration practice.

[15] Para 3.3 "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer." Note the inclusion of the word "complete" as regards professional opinion.

Indeed, they form part of the Professional Practice syllabus for the final Chartership examinations of a number of UK Professional Institutions, members of which may reasonably expect to find themselves at some point in their career being asked to provide expert evidence.

Crucially, it should be noted that there is an absence of information, for example guidelines, on when an expert is justified as being necessary, or when the appointment of a Single Joint Expert as opposed to Party Appointed Expert is indicated. This is a fruitful areas for future research.

The way the CPR is written tends to suggest that Party Appointed Experts are the default position, with the Court having the power to direct for a Single Expert — including being able to completely override the parties to do so, and even as to their identity. It would be interesting research to examine, since the new CPR came into effect, the circumstances in which Courts have exercised their power to appoint Single Joint Experts.

Before leaving United Kingdom Court practice, special mention should be made of the Technology and Construction Court (TCC). It is part of the Queen's Bench Division of the United Kingdom High Court, and thus one of the Senior Courts of the land. Historically, it had been known as the Official Referee's Court (OR) — reflecting that it used to be a Tribunal of great expertise, reporting findings on complex issues to other courts and judges. It was re-created in its current form in 1998, under an experienced Judge, then Mr Justice Dyson.

Historically, the OR heard many construction and engineering disputes, and by virtue of a highly technically adept judiciary, became the de facto place where disputes of this nature were heard. As the TCC, this tradition has both continued and flourished — encompassing disputes with the widest possible range of technologies. It regularly hears the most complex and heavyweight technical cases, and its judges remain at the very pinnacle of judicial ability to assess mountains of technical evidence to decide the issues which come before it. These judges do not shy away from new technologies and their impact — with significant legal impact[16]. The TCC is no stranger to technical expert evidence at its most complex and experts in the most complicated of

[16] See for example *AMP v Persons Unknown* [2011] EWHC 3464 (TCC).

procedural and dispute related activities. If there is such a thing as a Judicial rock star, a TCC Judge would be a good candidate.

The TCC has its own book of detailed guidance[17], running to some 90 or so pages. The Guide is

> *"...intended to provide straightforward, practical guidance on the conduct of litigation in the TCC...(it) does not, and cannot, add to or amend the CPR or the relevant practice directions. The purpose and function of the Guide is to explain how the substantive law, rules and practice directions are applied in the TCC..."*

It does so admirably. Expert evidence is considered in Section 13, pp49 et seq. It specifically says that the quality and reliability of the evidence with depend upon the experience and their technical or scientific qualifications, and the accuracy of the factual material which is used.

It is submitted that this is a remarkable document, which deserves the widest possible readership. For example, in section 13.3.1

> *"There is an unresolved tension arising from the need for parties to instruct and rely on expert opinions from an early pre-action stage, and the need for a court to seek, wherever possible, to reduce the cost of expert evidence by dispensing with it altogether or by encouraging the appointment of jointly instructed experts. This tension arises because the Court can only consider directing joint appointments or limiting expert evidence long after a party may have incurred the cost of obtaining expert evidence and have already relied on it. Parties should be aware of this tension".*

In this context, the paragraph 13.2.3 might easily be overlooked, sitting innocuously as it does at the bottom of page 49. It is very short.

> *"The parties should also be aware that the court has the power to limit the amount of the expert's fees that a party may recover pursuant to CPR 35.4(4)".*

[17] The Technology and Construction Court Guide, 2nd edition October 2005, 3rd revision with effect from 3 March 2014, published by HM Courts and Tribunals Service, Crown Copyright.

There is a very strong emphasis on case management running through the entirety of the CPR, and this Guide follows this too. Sections 13.3 and 13.6 detail a number of practical measure as part of case management on the part of the Court as regards expert evidence — meetings, agreeing issues, exchange of documents etc.

The expert's Report, and the presentation of expert evidence are dealt with in sections 13.7 and 13.8 respectively. The need for the expert's report to be independent and unbiased is referred to again, and certain applicable documents are referred to.[18] It gives excellent guidance to instructing solicitors — and therefore also to experts writing reports, and notes that any such Report should be as short as reasonably possible, should not contain copious extracts from other documents, should give all sources of opinion or data which is relied upon, and finally should not annex or exhibit more than is reasonably necessary to support the expert opinions in the Report. It also suggests that legal advisors can invite experts to "consider amendments" to their reports to ensure

> *"accuracy, internal consistency, completeness, relevance to the issues or clarity of reports".*

The presentation of the expert evidence is similarly treated. Experts are told it is often helpful to outline, at the beginning of their evidence, a summary of their views — including a specific reference to the use of PowerPoint or similar presentations. The method of presentation is considered at the pre-trial review (PTR), but there are guidelines on what are the normally encountered possibilities.

A rather exotically named process called "hot-tubbing" is also referred to, where experts for all parties are called to give concurrent evidence. Again, there are a number of possibilities — but the essence is that an expert may be challenged in real time by another expert or experts as well as the Court or Tribunal. The process is reminiscent of

[18] Paragraphs 3(viii), 3,3,1(vi) and 5.5(i) of the Pre-Action Protocol for Construction and Engineering Disputes are referred to as containing relevant provisions, and therefore Annex C to the Practice Direction – Pre Action Conduct is referred to as NOT applying.

the best seminars and tutorials at Law School — understanding and analysis of an issue or issues, directed by and towards a leading person, with managed and focussed interplay between the participants. As might be expected, there are advantages to the Court, noted as follows:

> *"The process is often most useful where there are a large number of items to be dealt with and the procedure allows the court to have the evidence on each item dealt with on the same occasion rather than having 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…it allows the extent of agreement and reasons for disagreement to be seen more clearly."*

IV. CONCLUSION

Van Oord, a veritable horror story of the failure of expert evidence on the side of one party, helps the future expert to understand their duties and obligations rather better. The practical documentation covered in the remainder of this paper, based on UK court practice, gives an excellent foundation of the principles which, it is submitted, are generally applicable for the provision of expert evidence. The third part of this tri-partite paper extends this review of experts, their appointment and form of evidence into the international sphere. It then goes on to cover some exciting new developments, and finishes with a small practical exercise on the analysis of a set of facts.

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