

Take heed

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Laurence Cobb and Aine McCartney look at two recent cases that offer lessons for giving expert evidence on the Building Regulations

Disputes in construction projects may involve failure to comply with the Building Regulations. Where a claim is to be made, it may be necessary to establish what standards should have been met; if a party finds itself in this position, it will have to consider whether formal expert evidence is required and, if so, who should be appointed.

Two recent cases provided useful guidance about the role of expert evidence, both for experts and those looking for experts.

Expert duties

[Van Oord Ltd v Allseas UK Ltd \[2015\] EWHC 3074 \(TCC\)](#) makes uncomfortable reading for would-be experts, due to the court's severe criticism of an expert instructed by the claimants. The key duties and responsibilities of the expert witness are set out in the [Civil Procedure Rules \(CPR 35\)](#) and the landmark case of the *Ikarian Reefer* in 1993, as well as in guidance published by professional bodies such as RICS. Experts are required to maintain their integrity, objectivity and independence to help the court, a duty that overrides any obligation to the person instructing the expert.

In *Van Oord*, the expert had effectively allowed himself to become the claimant's mouthpiece, and the court described his evidence as 'entirely worthless' since he was not independent and his evaluations were neither appropriate nor reliable. The case sets out that an expert should:

- not take the pleaded claims on face value and should check the underlying documents that supported or undermined these claims
- consider all of the witness statements produced by both parties
- critically analyse points raised by opposing experts and address them at an early stage
- be prepared to stand by their expert report, and be sure that all parts of it can be substantiated
- ensure that reports are drafted clearly so that they do not confuse or mislead
- check the accuracy and detail of all documents referred to in and appended to the expert report
- ensure that all views expressed are their own and not based on the views of others, or, where necessary, attributed to others
- be clear whether documents and analysis on which they are relying have been prepared by others, and the extent to which their accuracy has been checked
- check the claims made, rather than reciting information provided by others
- cross-reference the value of the claims with those derived from alternative methods of calculation such as reasonable rates to ensure that figures are fair and reasonable.

Is expert evidence necessary?

In many cases, expert evidence is crucial to the outcome of a case. The message here is to follow the requirements of CPR 35 as well as published guidance for experts. There is little point in an expert wholeheartedly supporting a case if a court subsequently finds that this expert's views are little more than a try-on or subterfuge.

Expert evidence can only be presented with the court's permission on the basis that it is reasonably required to resolve the proceedings. This may be the situation when dealing with Building Regulations issues, to establish whether a building has complied with the necessary standards.

The recent case of [Wattret v Thomas Sands Consulting Ltd \[2015\] EWHC 3455 \(TCC\)](#) is a reminder that there is no automatic right to use expert evidence. This case concerned the alleged negligence of a quantity surveyor, who was used both before and in an arbitration matter relating to a final account dispute.

The arbitration resulted in an award being made in favour of the builders and against the claimants, who subsequently brought an action against the quantity surveyor for negligence. The surveyor in turn wanted to rely on expert evidence, so as to be judged against the standard of a reasonable quantity surveyor providing dispute resolution services rather than a qualified legal professional.

The court agreed that expert evidence was necessary, since a court should generally be slow to find a professional guilty of a breach of duty 'without evidence from those within the same profession'. But the expert evidence needed to be closely controlled to avoid the 'real risk that experts will provide swathes of commentary on each communication ... giving their own slant or interpretation of what happened and what ought or ought not to have been advised'.

Van Oord and *Wattret* both provide useful examples of the need for expert evidence in resolving issues that arise in construction disputes, and set out some of the traps to avoid.

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Further information

- See related case law features:
 - [Construction case law: importance of checking contract details](#)
 - [Construction case law: meaning of ?construction operations?](#)
 - [Construction case law: terms of work](#)
 - [Construction case law: payment notices](#)
 - [Construction case law: liabilities of project monitors and construction professionals](#)
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