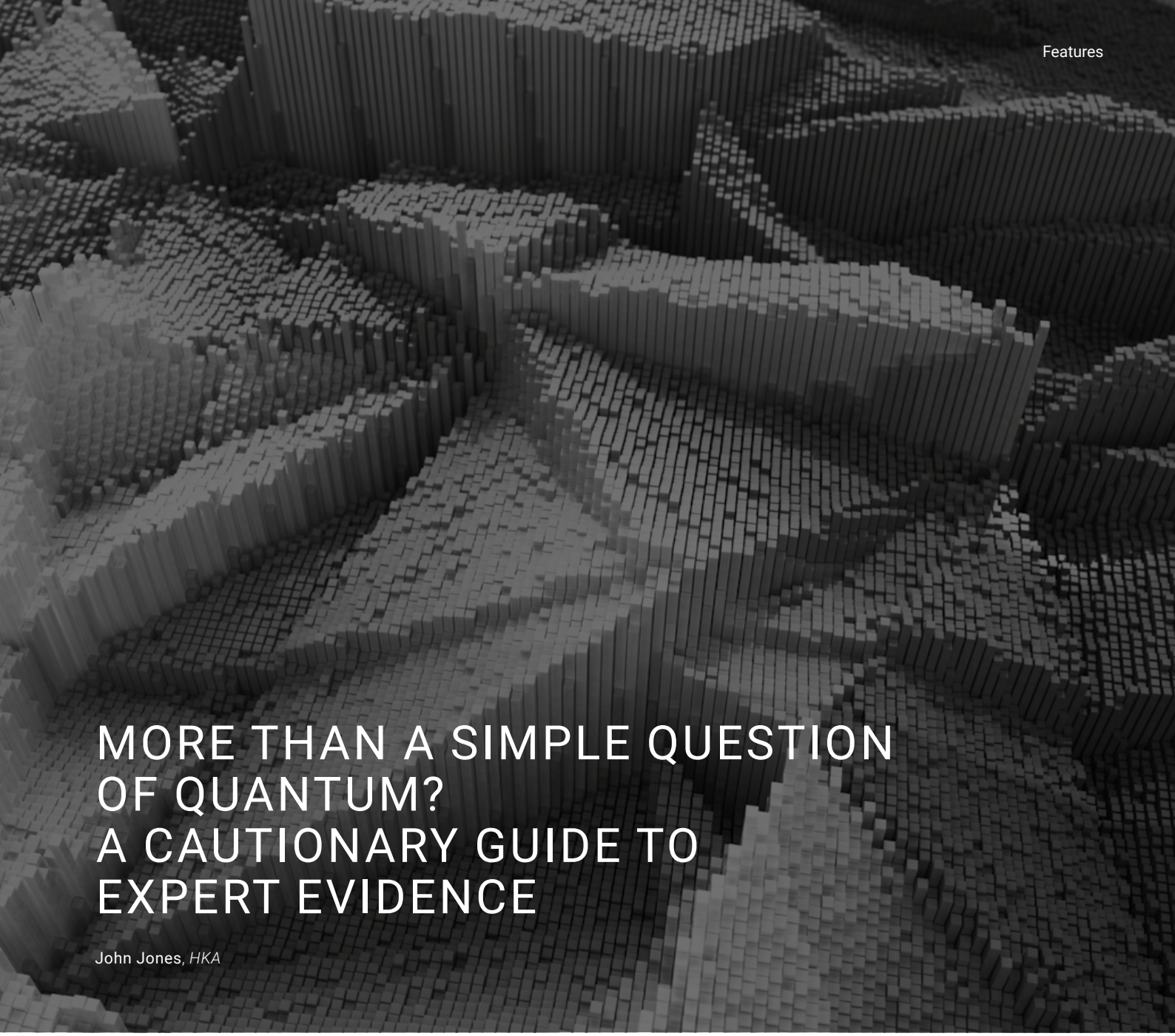

MORE THAN A SIMPLE QUESTION OF QUANTUM? A CAUTIONARY GUIDE TO EXPERT EVIDENCE

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The origins of the quantity surveyor can be traced back in history to the late 17th century during which the restoration of London gathered momentum, following the Great Fire of 1666. Prior to this date, tradespeople were typically paid by the day; but, mindful of the extent of the restoration after the fire, it was decided that each trade would only be paid for the quantity of work completed. This meant that one had to measure the works, either from drawings or as works progressed, and that payment would be directly commensurate with the quantity completed. This development would directly lead to the evolution of the quantity surveying profession.

Given the rich history of this profession, it is unsurprising that a firm body of expertise has since developed with established principles and rules of conduct. That being so, it is perhaps even less surprising that quantity surveyors and quantity surveying experts play an important role in the resolution of construction disputes. Consequently, the selection and appointment of an independent quantum expert is a well-trodden path for instructing solicitors tasked with resolving disputes.

Against this backdrop, it is therefore quite understandable that when an expert, particularly a quantity surveyor, fails to adequately perform their duties to the court or tribunal, it will cause consternation among their peers.

To the aspiring quantum expert, it is of paramount importance that they are technically proficient, which may be demonstrable by the membership of a professional body such as the Royal Institution of Chartered Surveyors (RICS) or from experience in the field. However, often it is not the technical capabilities that draw criticism, but rather the failure of the expert to act in accordance with the principles and duties of an independent witness.

THE DUTIES OF AN EXPERT

In essence, the rules or guidelines for expert witnesses are laid down in part 35 of the Civil Procedure Rules (CPR); the corresponding practice direction; and the guidance for the instruction of experts in civil claims. The rules are influenced to a significant degree by the seminal

statements of Justice Cresswell in the now-familiar *Ikarian Reefer* case. There, the judge summarised the duty of an expert as "impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any party".

In addition, the RICS publishes its own guidance for members who act as expert witnesses. The document provides helpful assistance, advice and clearly defined standards. Its principal message for the many quantity surveyors acting as experts is a reminder that the primary duty of an expert witness is not to the client, but to the tribunal where the expert report and evidence is given.

In view of the above, it is evident that while an expert assumes a responsibility to its own client to exercise reasonable skill and care, its overriding duty will always be to the court or tribunal. In that respect, the report should always be addressed to the tribunal where the evidence is heard, and not to the party from whom the expert has received instructions.

The role of the expert is to provide independent, objective and unbiased opinion, and to demonstrate that they are assisting the courts in an authentic, ethical and transparent manner.

THE CONDUCT OF AN EXPERT

The CPR does not expressly lay down guidelines in relation to the conduct of the expert, but seemingly this is captured by the principle that the expert is there to provide independent assistance to the court by way of objective and unbiased opinion. Accordingly, there are numerous instances where judges have been highly critical of an expert's lack of cooperation, personal animosity and failure to give clear unbiased evidence.

An expert who demonstrates that they are doing their best to help the tribunal in a fair, transparent and independent way, and not by demeaning the opponent, is much more likely to be a compelling witness. Of course, the expert is expected to cooperate with the opposing expert as far as possible. An expert who treats cross-examination questions personally, or indicates that there is animosity with the opposing expert, is much less likely to be persuasive to the judge.

There may be situations where the experts are unable to agree and, while this is not unusual, it may give rise to a substantial disparity in their respective opinions. Where this occurs, the court will expect that experts continue to act in a professional and helpful manner. In practice, it has been pointed out that experts appointed in civil litigation should have no reason to fall out, and if matters of personal disagreement result in failing to comply with the orders of the court, it may have damaging repercussions for the experts and/or the clients.

Experts should not lose focus on the purpose of the expert report – its intention is to provide comprehensive impartial evidence to assist the court in making their decision

THE EXPERT REPORT

Expert evidence is normally given in a written report unless the court or tribunal directs otherwise. Coupled with the fact that oral evidence may not always be permitted, a well-presented and coherent expert report is vital to ensure that the opinions formed, and the supporting facts, are easily followed and understood.

On complex cases, the volume of evidence for the court or tribunal to consider may be considerable, and therefore an expert report, which is poorly presented or inadequately referenced, may find that it is granted little weight as evidence. Where appendices are necessary, as they often are, the expert should ensure that the report remains free-standing or self-contained. Failure to adhere to these principles may lead to a report that becomes a presentational nightmare to put before the court in evidence.

Experts should not lose focus on the purpose of the expert report – its intention is to provide comprehensive impartial evidence to assist the court in making their decision.

Additionally, experts must ensure that they do not lose focus on the purpose of the report. All too often, experts are criticised for producing an overly complicated report, which is littered with technical jargon or convoluted calculations. An expert report should assist the court and the counsel relying on it by making complex issues easier to understand. This should be done by collating the relevant material in a comprehensive way that highlights its significance to the non-expert and which is persuasive both to the judge and to the other side.

The guidance from the courts suggests that many expert reports are simply too long, largely because they contain an excessive narrative of the history and the facts, rather than analysis and opinion. The message here is simple: expert reports should be succinct, focused and analytical, and based on all the evidence available.

THE JOINT STATEMENT

The court or tribunal will often direct that experts shall meet for the purposes of identifying and discussing the relevant

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issues in the proceedings, and where possible, reach agreed opinions on those issues. After the meeting, the experts will normally be required to prepare a written statement signed by each of them as to matters of opinion on which they are agreed, and on those which they are not agreed, with the reason for the disagreement.

There is a rising trend towards courts and tribunals seeking joint statements from the experts prior to the drafting of reports. While this is a positive step in terms of efficiency, it means the expert has to form their opinion without having completed a detailed review of the issues in question.

Given that the intention here is seemingly to prevent the experts spending unnecessary time compiling analyses and a narrative on matters that may already be agreed, it is often a positive step. The potential downside is that experts are being asked to form early opinions on the issues, possibly without having completed a detailed review, which of course would follow during the production of the expert report.

An expert who agrees in the joint statement to undertake a subsequent exercise to assist the court, but later changes their mind, notwithstanding the experts' agreement, should have very good reasons for doing so. Where no satisfactory explanation can be given, the courts have taken a dim view of such action, especially if there is any suggestion that such obstinance came about because it may harm its own client's case.

Additionally, there may be more serious ramifications for an expert who fails to ensure that the joint statement properly reflects their opinions. An explanation that an expert felt under pressure to sign the statement will be of little consolation.

THE OVER-ZEALOUS EXPERT!

There are numerous examples where experts, to put it mildly, have been a little "over-zealous" in forming or expressing opinions. Some might say that this is an inevitable consequence of the perceived conflict that exists between the impartiality and independence expected of an expert and the opposing objectives of the legal team, whose role is to advocate a party's case.

Faced with such conflict, an expert will do well to recall the principles set out in the *Ikarian Reefer* case. A competent expert witness must be capable of remaining unbiased and uninfluenced by the pressures of the dispute resolution process or by any party. Such characteristics are fundamental to the reliance placed by tribunals on expert witness evidence. The opinions expressed must remain objective, impartial and independent. If this does not occur, the evidence presented will be unreliable, which may impact on the tribunal's ability to correctly determine the dispute.

Lack of independence

The expert must disclose any details that indicate a lack of independence. In particular, the expert must remain independent of instructing solicitors and must not get too close to the client so that it starts to influence the expert's judgement. The expert must ensure that the opinions expressed in the report are their own. An expert who allows their reports to be substantively redrafted by lawyers will call into question not only their independence but also their professional integrity.

The expert who comes across as a "hired gun" will likely find that very little significance is attached to the evidence presented.

Acting as an advocate

The expert must not lose sight of the proper role of an expert, which is to assist the court, and to ensure that the role does not become one of an advocate for the client's case. A key sense-check is whether the expert would form the same opinion had they been appointed by the opposing party.

Selectively presented facts

The expert must consider all the facts and evidence available. The courts have been highly critical, and rightly so, of experts who have ignored or selectively presented evidence that was averse to their client's interests. Additionally, experts must not accept facts by lay witnesses or accept the client's case at face value without interrogation.

Unreasonableness

It is hugely important that the expert remains flexible, especially when delivering evidence in the witness box. A refusal to concede, even when new information or facts are presented will lead to the inevitable conclusion that the witness is unreliable. Conversely, a willingness to concede, if it is appropriate to do so, will likely be seen by the judge as a positive move and demonstrative of the expert's integrity.

The sound quantum expert is undoubtedly one who has acquired, by study and experience, the professional expertise or knowledge needed to be able to take complex issues and provide opinions that are easy to understand. However, it shall also be incumbent upon the expert that they adhere to the duties and responsibilities expected of an independent expert witness. The courts have shown that they are highly adept at detecting when experts stray from this duty. Consequently, an expert who gains a reputation as a "hired-gun" is highly likely to see that career short-lived.