

Advocacy, Ethics and the Role of the Expert

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Introduction

1. Ladies and Gentlemen, it is a great privilege to be asked to sit as an NPJ in the CFA. In my case, this is the third time of asking and I am being especially nice to the Chief Justice in the hope that it will not be the last. It is also a pleasure to speak to you this evening. But before I start I must concede that I am very old. I was called to the Bar as recently as 1965, nearly 51 years ago and I am the oldest member of the Supreme Court. So if you are looking for a young man's vision of the future, you will be sadly disappointed,
2. I chose the topic 'Advocacy, Ethics and the role of the Expert – some English reflections' because it has struck me how similar the principles adopted in Hong Kong on these aspects of the judicial process are to those adopted in England. Sitting in the CFA is in essence no different from sitting in the Supreme Court in London. In both cases the standard of advocacy is very high, the cases are put with clarity and concision and everyone is very

courteous to each other. Court dress is in many ways (if not all ways) the same.

3. We have all learned many things over the years. One is that both advocacy and ethics can be taught. When I started all those years ago, no-one appreciated that. We thought that experience was everything. It is not, although one is bound to pick a few things up over the years.
4. I have not of course come here to teach you ethics, although it is central to everything that the lawyer does, or should be. However I recently came across a brilliant passage from a piece written by one of the greatest advocates of the 20th century, Norman Birkett QC. He later became Birkett J and then Birkett LJ, and indeed was one of the UK judges at the Nuremburg war crimes trials, although it is as an advocate that he is principally remembered. He said this:

“The court must be able to rely on the advocate’s word; his word must indeed be his bond and when he asserts to the court those matters which are within his personal knowledge the court must know for a surety that those things are as represented. The advocate has a duty to his client, a duty to the court and a duty to the state but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity.

No profession calls for a higher standard of honour and uprightness and no profession perhaps offers greater temptation to

forsake them, but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest standard.”

I am indebted to a fairly recently retired Recorder of London, Peter Beaumont QC, for drawing my attention to these stirring words. They underline the principle that it is of the utmost importance that judges should be able to trust counsel.

5. These principles are not unique to England and Wales. Not long ago I went to a conference in Washington organised by the American Inns of Court on professionalism and ethics. One of the papers included this contribution on integrity:

"Loss of reputation is the greatest loss you can suffer. If you lose it, you will never recover it. Whether other lawyers or judges or clerks ... trust you and take your word, whether you are straight with your clients ... whether principles and people matter to you, whether your adversaries respect you as honest, fair and civil, whether you have the guts to stand up for what you believe -these are some of the hallmarks of integrity. Personal integrity is at the heart of every law career. You can't get it out of a computer -or from a law book -or from a commencement speaker. You have to live it and practice it every day with every client, with every other lawyer, with every judge and with every public and private body.

And if your reputation for integrity is alive and well so will your career [be] and so will your well being. ¹

I agree and, as they say in the Court of Appeal, there is nothing I can usefully add.

6. I have just two examples from my own experience over the years which I think exemplify the importance of this principle in action. They both involve people who have close connections in Hong Kong. They are Nicholas Phillips QC (later of course MR, LCJ, President of the Supreme Court and an NPJ) and Michael Thomas QC (later of course the Attorney General here in Hong Kong).
7. In the first example, Nicholas and I were counsel on opposite sides in a maritime case. I handed him a document in the course of the trial which I intended him to have. Unfortunately, like a fool, I also gave him at the same time a number of my client's witness statements, which were privileged and which I certainly did not intend him to see. What should he do? Should he return them to me without looking at them? Would that be a breach of his duty to his clients? Should he disclose them to his clients on the basis that they were plainly relevant to the issues in the action and use them as appropriate in cross-examination of my witnesses? Should he return them to me but read them first and, either with or without making copies, then use their contents at the trial? At the time this happened, there was as I recall no learning on the

¹ James A George, The "Rambo" problem: Is Mandatory CLE the Way Back to Atticus? 62. La. L. Rev 467, 505(2002), George (quoting Jerome P Facher, Washington Lee Law School Commencement Speech, May 14 2000)

correct approach. Now there is. In fact he immediately returned them to me without looking at them. He did it instinctively without looking at the documents. He did it because it was the right thing to do in circumstances when he knew that I had disclosed them to him by mistake. The subsequent authorities show that his decision was correct.

8. My second example is this. I was involved as a junior to Michael Thomas in a substantial piece of commercial litigation. It was the afternoon before the trial. We were in his room in the Middle Temple discussing the case. We thought that our clients' case was probably correct but the evidence in support of it was thin. A brown envelope appeared addressed to my leader. He opened it. It was from Michael Mustill QC, who was counsel on the other side and who later of course became Lord Mustill. It said, in effect: 'Dear Michael, You might be interested in the enclosed document. Yours ever, Michael'. In the envelope there was a document which showed that our clients' case was correct and that they would almost certainly win if it was put before the court. The other side had to capitulate. The disclosure was of course an example of the operation of the English rules of disclosure. I am sure that the same would happen in Hong Kong, but I have often wondered in how many other jurisdictions round the world this would have occurred.

9. I turn to expert evidence. I do so because expert witnesses play a critical role in both courts and arbitration. You may also wonder what I know about the subject. You may indeed conclude after hearing this talk that the answer is 'not much'. What then is my qualification for speaking about expert

witnesses?. Well, over the years I have come across quite a number. In many different disciplines.

10. I spent most of my career at the Bar, and initially as a judge, doing maritime and commercial cases. These cases did not involve much, if any, psychiatric expert evidence, but they did involve a significant amount of expert evidence in many different disciplines. That evidence caused much amusement but also provided a good deal of food for thought, both then and now.

11. My experiences have taught me a number of lessons. Many of them are relevant to all kinds of expert evidence, whether technical or medical or whatever. Such experience as I have has convinced me (as is perhaps self-evident) that the expert plays a crucial role in the administration of justice, both civil and criminal. Recent cases have shown that the role and status of experts within criminal and civil trials remain contentious. It sometimes seems that there is little public appreciation of their role. Indeed the problems of public disquiet with expert witnesses and expert evidence show that the public is sometimes seriously concerned that flawed expert evidence can lead to serious miscarriages of justice.

12. The primary duty and role of a court – whether civil or criminal – is, I am sure we would all agree, to do justice in the particular case. To paraphrase a famous 19th Century Lord Chancellor, Lord Brougham, courts exist to do justice between man and man. They do so in order to not only ensure that the individual's private rights are upheld as between themselves or as against an organ of the state, but also to further the rule of law.
13. This involves a court doing two things; first, it must ascertain the true facts, and secondly, it must apply the relevant principles of law to those facts so as to provide a judgment which is both correct in fact and law. By that method, assuming law and justice to coincide, the court hopes to arrive at a just result.
14. I will return to the differences between the approach in England and that in Hong Kong in a moment, but in England, rules 1.1 of both of the Civil Procedure Rules and of the Criminal Procedure Rules provide that the overriding objective is to deal with cases justly. Rule 1.1(2)(a) of the Criminal Procedure Rules provides in ringing tones that dealing with a criminal case justly includes acquitting the innocent and convicting the guilty.
15. Since it is obvious, even to the most confident (or dim-witted) member of the judiciary, that he or she cannot be versed in every sphere of human activity, it

can readily be seen that in very many cases the court needs expert assistance in order to discharge the first part of its responsibility, namely to ascertain the facts. That expert assistance could in principle come from a court expert or assessor. Indeed the court has power to appoint such a person and a system of court assessors has grown up (and indeed been of considerable assistance) in some areas. My own experience of it was as a practitioner and later judge in shipping collision cases, where the Admiralty judge is traditionally assisted in matters of navigation by two Elder Brethren of Trinity House. In that context the system has I think worked well but there are potential difficulties. In the case of Elder Brethren, the traditional rule was that they simply advised the judge and could not be cross-examined on behalf of the parties. That is not of course the position in the case of a single joint expert under the CPR.

16. Far more widespread is, of course, the use of experts as witnesses in order to assist the court in arriving at the true facts and determining civil or criminal responsibility. Expert evidence plays an important, and in many cases, crucial part in the court's endeavours to achieve a just result. In recent years the role of expert witnesses in our criminal justice system has for the first time come under intense public scrutiny. For example the roles played by expert witness in cot death cases have given rise to a great deal of public disquiet over the part played

by expert witnesses and the status of their evidence. Public disquiet with any part of the civil or criminal justice system is inimical to the existence of a healthy society. It undermines the rule of law. I express no view on the particular circumstances of any of those cases but, whether such public disquiet is justified or not it is something which must be addressed. It is to my mind difficult to underestimate the importance of the expert in the fair administration of justice.

17. Over the years a critical problem that has faced the courts is the partiality of the expert witness. It is a problem which has faced courts over the centuries. It is not confined to any particular century or any particular type of litigation. Someone once told me that there is (or was) a well known dictum at the Parliamentary Bar that counsel give the evidence and experts do the advocacy.
18. From an early date the courts realised that expert evidence was desirable if not essential. In *Buckley v Rice Thomas* (1554) 1 Plowden 118 Mr Justice Saunders said (at p 124):

“If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears we do

not dismiss all their sciences but our own, but we approve of them and encourage them as things worthy of consideration.”

Nearly 250 years later, in 1782 Lord Mansfield said that “in matters of science the reasoning of men of science can only be answered by men of science”: see *Folkes v Chadd* (1782) 3 Doug 157.

19. Sir George Jessel put the problem thus in *Thorne v Worthing Skating Rink* (1877) 6 Ch D 415, which was a patent case:

“Now in the present instance, I have the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained, since I have had the honour of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert, also honestly obtained. *But the mode in which evidence is obtained is such as not to give the fair result of scientific opinion to the court.* A man may go, and does, sometimes to half a dozen experts. He takes their honest opinion: he finds three in his favour and three against him; he says to the three in his favour: ‘Will you be kind enough to give evidence?’ He pays the ones against him their fees and leaves them alone; the other side does the same.

It may not be three out of six; it may be three out of fifty....I am sorry to say the result is that the court does not get the assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.”

20. Nearly 120 years later, in *Abbey Mortgages plc v Key Surgeons Nationwide Ltd* [1996] 3 All ER 184 Sir Thomas Bingham MR said much the same, while comparing the expert appointed by the parties and by the Court:

“We feel bound to say that in our opinion the argument (that the appointment of a court expert only by agreement of the parties, under Rule 40 of the Rules of the Supreme Court (now defunct) was “pointless”, since it only added an opinion whose evidence carried no more weight than any other) ignores the experience of the courts for many years. For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as a witness at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but clear obligation to make a careful and objective evaluation, may provide a reliable source of expert opinion. If so, there must be a reasonable chance that such an opinion may lead to settlement of a number of valuation cases.”

21. Does the problem still exist today? I will be interested in your views but the answer is I think yes, if only because of the vagaries of human nature, but things have very greatly improved in recent years, partly because of the Woolf reforms and the CPR (or here in Hong Kong the Rules of the High Court or the “RHC”) and partly because of professional bodies of which there now quite a few. The good faith and honesty of the expert are critical to the rule of law.

22. I would like to focus on just two cases with which I was concerned, partly because old judges like me tend to be fixated by their old cases and partly because they are I think of some forensic interest. They are both known by the name of a ship, as Admiralty cases historically are. They are *The Good Helmsman* and *The Ikarian Reefer*. *The Ikarian Reefer* is perhaps the more significant case because it led to the present provisions of the CPR, the Civil Procedure Rules, which deal expressly with expert evidence – and also I think partly to the RHC here in Hong Kong. But first a word about *The Good Helmsman*, which was one of the most entertaining cases I was involved in at the Bar. It was a long time ago, in 1979, which was the year I took silk.

23. The case is relevant to today's discussion because it is Court of Appeal authority for the proposition that there is no property in a witness, including an expert witness. The case gave rise to an internecine dispute between brothers in law. Our client was a Saudi Arabian, who was married to a very striking Greek lady. Her brother was on the other side. The parties had fallen out. One of the issues in the case was whether a charterparty was a genuine document which evidenced a genuine commercial transaction, as they said, or whether it was a fraudulent sham which had come into existence to defraud their bank, as we said. It was a long time ago, as evidenced by the fact that

Lord Denning presided in the Court of Appeal. The case had some unusual features.

24. The other side relied upon a letter to the master of the vessel which purported to enclose a copy of the charterparty. If the letter was genuine, as Lord Denning put it in the Court of Appeal, it went far to show that the charterparty was genuine. After a bit it occurred to us that we should ask a handwriting expert to check the handwriting on the letter against a genuine signature which we had in our possession. We got hold of an expert who expressed the view over the telephone that the signature on the letter was not genuine.

25. However, as luck would have it, it turned out that the other side had already instructed the same expert. Somewhat belatedly it might be thought, after expressing his opinion to us, the expert told our instructing solicitor that he had already advised the other side and that he ought to stand down. We advised our client that the best way forward was to find another expert. However, being a bloody minded soul, our client was adamant that we should call him as a witness. So we sub-poenaed the expert. The other side were very cross. It then turned out that any contract between them and the expert had been made by their counsel in the corridor one lunch time while the solicitor was out buying the sandwiches. They sought an injunction against the witness in an attempt to

stop him giving evidence for us. However, we said that there was no property in a witness and that there was no reason why we should not call him. The trial judge, Lloyd J, agreed. The other side appealed to the Court of Appeal. But the appeal failed: see *Harmony Shipping Co SA v Saudi Europe Line* [1979] 1 WLR 1380. The Court of Appeal held that there was no property in a witness including an expert witness and that we could call him. We dithered about whether we should ask him in the witness box whether he had always held the same opinion. Although the temptation to embarrass the other side was considerable, we decided not to do so – largely because it was self-evident that he had held the same view throughout. In the event it was not necessary to call the witness because the other side failed to find an expert to support their case.

26. As an aside, there was one moment in the trial which I particularly remember.

Our client and the prime mover on the other side were married to sisters. We called our client's wife, who was a very striking lady, to give evidence. When she was cross-examined by leading counsel on the other side, who I may say is still going and whom I know very well indeed, he passed a document to her and asked her if she recognised it. It was about the time when the principle that all parties should put their cards on the table was beginning to be accepted.

27. The judge, Mr Justice Lloyd, later Lloyd LJ and then Lord Lloyd of Berwick, said to counsel. "I do not seem to have a copy of this document, please can I have a copy?" Counsel said, as was then the practice, "only once the document is recognised by the witness". The judge was not amused. Counsel then said: "My Lord, I think I should tell your Lordship that I have a number of other documents in the same vein." "How are they identified", asked the judge. Oh, said counsel, they are numbered "SW nos 1 to 10". What is meant by SW, asked the judge. "Secret Weapon 1 to 10" came the reply. The judge was very cross but we enjoyed every minute of it. You would certainly not get away with that approach today.

28. So much for *the Good Helmsman*. Let me say something about *The Ikarian Reefer*, which is reported at first instance at [1994] 2 Lloyd's Rep 68.

The Ikarian Reefer

29. I refer to it because it set out some principles which have I think since been accepted as generally valid and it seems to me to highlight similar problems to those in other areas of expert evidence. I also refer to because it was my last case at the Bar and it is etched in my memory for a number of reasons. Expert evidence played an important part in the case. In particular it highlights the

problems caused by experts who cannot resist giving evidence outside their true areas of expertise, which my experience suggests is a temptation which many experts find it hard to resist.

30. I represented plaintiff shipowners who were alleged by underwriters to have deliberately cast their vessel away. In short it was said that they scuttled her by conniving at her grounding off Sierra Leone and, when that did not do the trick, after refloating her, by setting her on fire in the hope that she would sink. In the event she did not sink and was available to be inspected by the parties' experts. The trial lasted some 80 days and many experts of every kind were called by both sides. The expert evidence ranged widely but was principally made up of fire experts, engineers and metallurgists.

31. The trial judge was Mr Justice Cresswell, who was (indeed is) a distinguished commercial lawyer, but he did not have extensive experience of scuttling cases. I can't resist mentioning by way of an aside an odd feature which occurred early in the trial. Before the trial I read some of the old cases and came across a decision of the House of Lords involving an alleged scuttling.

32. The principal speech in the House in that case was that of Lord Birkenhead (who had formerly been the famous advocate FE Smith QC). His speech began

something like this. ‘My Lords, this case came before Mr Justice Bailhache in the Commercial Court. He rejected the underwriters’ case that the vessel had been wilfully cast away. He did so because he relied in particular in the evidence of Mr Felipe Ybarro, the officer of the watch, whom he said had sworn an affidavit and had given evidence before him. He said that he had found Mr Ybarro a witness of honesty and truth and therefore accepted that the casualty was an accident and the vessel had not been deliberately cast away. (I confess that I reproduce this from memory since I no longer have the Lloyd’s Law Reports at hand).

33. Lord Birkenhead continued by saying that the difficulty with the learned judge’s view was that, by the time the matter reached their Lordships House, it was common ground between the parties that Mr Felipe Ybarro had not given evidence before the court so that the learned judge had scant opportunity to judge whether or not he was a witness of honesty and truth.

34. I read that to Mr Justice Cresswell when I was opening the case, largely for fun. However, he was obviously somewhat concerned that he might fall into the same error as Mr Justice Bailhache because the next morning he said: “Mr Clarke, please could you produce a photograph of each of your witnesses.” I must say that I do not blame him because we had a number of Greek witnesses

who had been greasers or oilers in the engine room of the *Ikarian Reefer* and it would have been very easy to get them confused. So we took a rather unsatisfactory polaroid photograph of each of our witness before he gave evidence and handed it to the judge. He did not make the same mistake as Mr Justice Bailhache.

35. All that is irrelevant but I could not resist including it. The reason why Mr Justice Cresswell gave detailed guidance to expert witnesses arose I think because one of the underwriters' experts (no names no pack drill) made the mistake of expressing views in areas in which he had no relevant expertise. He was a true expert in metal fatigue but not in fire. But he could not resist ranging into areas outside his expertise. We naturally relied upon that as a reason why the court should not accept his evidence in any part of the case. This was I think part of the reason why the judge rejected the underwriters' case and why the shipowners (who were my clients) succeeded at first instance.

36. I suppose that I should add by way of postscript that in *The Ikarian Reefer* the plaintiffs lost in the Court of Appeal, which I have naturally put down to the fact that by then I was on the bench and was not therefore representing them.

37. However I like to think that we had some input into the principles laid down by Mr Justice Cresswell. He said this (at p 81):

“The Duties and Responsibilities of Expert Witnesses

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 WLR 246 at p 256, per Lord Wilberforce).

2. An expert witness should be provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co. Plc.* [1987] 1 Lloyd’s Rep. 379 at p 386 per Mr Justice Garland and *Re J* [1990] FCR 193 per Mr Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J sup.*) In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (*Derby & Co Ltd. And Others v Weldon and Others*, *The Times*, Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

38. Those principles broadly still apply today and are set out in extenso in the notes to CPR 35.3, which is entitled "Overriding duty to the court" and provides:

- i. It is the duty of an expert to help the court on the matters within his expertise.
- ii. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

This is a very important provision because it underlines the fact that the expert owes an independent duty to assist the court, regardless of the interests of his client. The CPR, or Civil Procedure Rules, now contain in Part 35 very detailed rules about all aspects of the role of an expert. They include rule 35.10 which provides by rule 35.10(2) that, at the end of an expert's report there must be a statement that (a) the expert understands his duty to the court and (b) that he has complied with that duty. As I am sure you all know, the advocate's bible in England is the White Book. Part 35, which is entitled "Experts and Assessors", including the rules, the Practice Direction and the Protocol and detailed notes to each, which now run to approaching 50 pages in the White Book.

39. Mr Justice Cresswell's principles led to the Civil Justice Council's "Protocol for the Instruction of Experts to give evidence in civil claims" dated June 2005, which was based on advice and assistance provided by both the EWI (the Expert Witnesses Institute) and the Academy of Experts, as well as by the Clinical Dispute Forum. Sub-paragraphs 4.1 to 4.6 set out the duties of experts in some detail. I will not reproduce them here, although they are to my mind of critical importance. So far as I can see they essentially reproduce (or at least stem from) the principles in *The Ikarian Reefer*.

40. The second point to which I would refer in the Protocol is sub-paragraph 4.7, which refers to the court's power under section 51 of the Supreme Court Act 1981 to impose costs orders on experts where their evidence has caused significant expense to be incurred and has been tendered in '*flagrant and reckless disregard*' of their duty to the Court. Sub-paragraph 4.7 sets this out with direct reference to Peter Smith J's decision in *Phillips v Symes* [2005] 1 WLR 2043, which established for the first time that costs orders could be made against experts. There is also a decision of Jacob J in *Pearce v Ove Arup* (2001), which established that the Court can refer an expert to his professional association, eg the GMC, if he is in breach of his or her duty to the court.

41. By referring to sub-paragraph 4.7 and to those cases, I do not intend to suggest that experts are regularly or frequently in breach of their duty to the court. I only wish to emphasize that in recent years the courts have taken the duties of experts more seriously than perhaps they did in the past and that there are potential sanctions available for use if necessary. I naturally hope that the provisions of the Protocol taken individually and together will lead to good practice throughout the system.

42. I also hope that they will support a culture within the system which will help to encourage experts to put their duty to the court above the interests of their client when a potential conflict arises. For example, when, as sometimes happens, an expert is asked a question which in his heart he knows should be answered in a particular way, but where he also knows that such an answer may be fatal to his client's case, he will nevertheless answer it in that way. Hope springs eternal.

43. I have listened to many experts giving oral evidence, both as counsel and as arbitrator or judge. I have sometimes wondered what the expert would say if he had been instructed on the other side. I have also wondered whether we should have a rule that no expert can give evidence of opinion unless he was unaware on whose behalf he had been instructed when he was first asked to express an opinion. I appreciate, however, that that is almost certainly not practicable.

44. I would like to add three points by way of postscript. The first is to refer to CPR rule 35.10, which provides by paragraph (3) that an expert's report must state the substance of all material instructions, whether written or oral and by paragraph (4) that those instructions are not privileged. That is a considerable change from when I was still in practice. I think some of the discussions I had

with experts over the years would have been much more circumspect if the rule had been in force then.

45. The second is that I sometimes wonder whether the adversarial process is a sensible way of putting expert evidence before the court. Fortunately one of the most important improvements in recent years seems to me to be the requirement, pursuant to the power in CPR 35.12, that in every (or almost every) case that the experts are required to meet in order to identify the real issues between them. I hope that that has reduced the amount of oral evidence required and put an end to the almost endless cross-examination which used to go on. I once had a Korean witness in a shipbuilding arbitration whom we called Sea Water Lee. When his cross examination had lasted three days we had a sweep on when it would end. When it had lasted three more days than the most pessimistic forecast, we had another sweep. I shall not identify the cross-examiner. I hope that that could not happen today.

46. The third is to wonder how juries cope with expert evidence. I had a criminal case as a judge which involved a considerable amount of metallurgical evidence. When I asked how this was going to be put before the jury and, in particular which parts of the experts' reports were going to be put before them,

I was told that all the evidence would be oral and that none of the experts' reports would be put before the jury. I was astonished, but I was assured that experts' reports were never put before juries. That was despite section 30(1) of the Criminal Justice Act 1988, which provides:

“An expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.”

In the end it was agreed that the reports should be put before the jury, very little of the reports was referred to and all was well.

47. My conclusion is that, although I recognize that many problems have emerged in recent years, the present position is light years better than it was when I last conducted a case in 1992. I like to think that our efforts in the *Ikarian Reefer* played at least some part in this. I think we can look forward with confidence to the future. As ever, hope springs eternal but, in my opinion the future is bright for the expert.

48. When I was asked to give this talk I had the effrontery (albeit with the permission of the Chief Justice) to ask two of the judicial assistants at the CFA to write me a short note identifying the differences between the system in

England and that here in Hong Kong. I would like to thank Jacquelyn Ng and Benjamin Lam very much for their assistance. What follows is their work not mine.

49. They explain that section 20 of the Final Report of the Chief Justice's Working Party on Civil Justice Reform formed the basis of the current rules in Hong Kong, which are now contained in the Rules of the High Court ("RHC"). I am pleased to say that, like the CPR in England, the RHC too are based on the principles in *The Ikarian Reefer*. I only have time here to highlight the slight differences between our two systems. The authors identified 6 areas of differences between UK's and HK's approach to expert evidence. They are these. First, the power to restrict expert evidence. In England there is power to refuse to permit expert evidence even if the parties agree, whereas in Hong Kong there is no such power. However, on analysis the other powers conferred upon the court in Hong Kong come very close to such a power. Second, in England there is a power to cap the parties' recovery of expert's expenses, whereas in Hong Kong there is no such power. I doubt whether this will make a difference in the vast majority of cases. Third, CPR 35.10(3) and (4) provide that that expert reports should contain the substance of the instructions they were given and that legal professional privilege could be abrogated so far as is necessary. There are no equivalent rules in the RHC. This a potentially more

significant difference because it seems to me that it is a valuable rule. However, I understand that the Working Party was concerned that the abrogation of legal professional privilege raised concerns over the provision's constitutionality. Fortunately (or some might think unfortunately) in England we are not troubled with the problems caused by a written constitution.

50. Fourth, under CPR 35.14, an expert has the right to approach the court independently, whereas the RHC contain no such provision. I doubt if this is a difference of real significance. The present rule in England is that an expert contemplating this route, unless the court otherwise directs, must first serve a copy of his proposed request for directions on the parties. In any event the Academy of Experts reports that this has not been widely used, that the measure is very much a last resort and that the better practice is for the solicitors to resolve any issues, and if necessary to apply to court for directions. So far as I am aware this has caused no problems.

51. Fifth, single joint experts. Both the English and Hong Kong Courts have power to appoint single joint experts. The rules are not quite the same but the general approach is very similar. In England, they are rare in complex litigation but fairly common in the simpler type of case. I suspect that the same is true in Hong Kong.

52. Finally, sixth, in England, under CPR 35.6, parties may pose questions in written form to the experts on the other side, whereas there is no similar provision in Hong Kong. I doubt if this is a significant difference. The problem is now in practice dealt with by the widespread use of without prejudice experts' meetings in order to narrow the issues between the experts.

53. All in all, although the systems are not identical, they are very similar and are a vast improvement over the system which obtained when *The Ikarian Reefer* was tried in late 1992. I am still secretly quite pleased that the principles developed from that case (my last at the Bar) have played an important part in the approach to expert evidence both in England and Hong Kong.

54. After I had prepared what I have said so far, I came across what was called a Special Case Report in the Winter 2015 edition of a magazine called "The Expert and Dispute Resolver" published by the Academy of Experts. It shows that problems do still sometimes exist. The Report describes the case, which was a decision of Mr Justice Coulson at first instance as "The intriguing case of the Expert's Report being disowned by the Expert who was disowned by Counsel". The Report added that "the case makes the reader feel that the Ikarian Reefer never sank and that the lifeboat it spawned in the shape of the Ikarian Reefer Rules never happened." It was a case called *Van Oord UK*

Limited & Scim Roadbridge Limited v All Seas UK Limited [2015] EWHC 3074 (TCC) and is remarkable primarily because of the performance of one party appointed expert.

55. The judge spent no less than 13 paragraphs in which he criticised the expert.

He said this:

“I endeavoured to give X 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 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.”

[In my oral presentation of this paper I included only the above introductory paragraph but the judge’s reasons are so remarkable I thought that I would include them here.] He continued in substance as follows.

“First, I find that X repeatedly took OSR’s pleaded claims at face value and did not check the underlying documents that supported or undermined them.

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. ... His report and his evidence were therefore inevitably biased in favour of OSR.

Thirdly, in contrast to [the expert on the other side] X 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). ... X’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, X repeatedly accepted that many of them were),

there were no alternative figures, save for those put forward by the expert on the other side.

Fourthly, ... X 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.

Fifthly, throughout his cross-examination, X was caught out on numerous matters, most of which were ... relatively obvious, because so many of them had been pointed out months earlier By the end of his cross-examination, he was accepting every criticism or error being put to him ...; 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 ... claim as a whole.

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.

Seventhly, he repeatedly accepted that parts of his reports were confusing and accepted on more than one occasion that they were positively misleading. ...

Eighthly, he appended documents to his original report which he had either not looked at all, or had certainly not checked in any detail. ... 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.

Ninthly, ...

Tenthly, [he relied on a particular schedule] In fact the cross-examination revealed that the schedule contained important errors and must be discounted in its entirety.

Eleventhly, ... 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.

Finally, X confirmed to me that he had never considered valuing [specific] 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 judge added: For these reasons, therefore, I consider that he allowed himself to be used, whether wittingly or otherwise, by ... 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 X, and then the expert on the other side, and ultimately the Court. It made a mockery of the oath which X had taken at the outset of his evidence, even though, as I have said, there were some extenuating circumstances. For all these reasons, I am bound to find that X 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.

My adverse views about X's performance will come as no surprise to OSR's legal team. As I would have expected from leading counsel, she expressly accepted that X "...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." (End of quote)

Speaking for myself, I had hoped that examples of this kind were a thing of the past. I am sure that they are now very rare. I mention them today only as a warning for the future.

56. Finally, I would like to say a word about ethics in the context of experts. It is very important that the expert should be trusted by the court, which after all has no alternative but to trust the expert to give his or her evidence honestly and openly. The reputation of the expert is everything. Once he or she has lost the confidence of the court in one case, it is very difficult to recover it. The

position is much the same as in the case of the advocate, whether barrister or solicitor, as described in the two passages, one from Birkett QC and one from America, which I quoted at the outset. The second concluded: “And if your reputation for integrity is alive and well so will your career [be] and so will your well being.” Wise words. The same applies to experts.

57. Finally, thank you very much for asking me this evening.