Facts not favours: the importance of impartiality for expert witnesses in construction disputes

Getting the right answer from the right person is important, not just the answer you want to hear

Expert witnesses can be decisive in construction disputes. However, it is a common misconception that an expert who strongly advocates a party's position will make a case stronger. The reality is that experts are more persuasive when they are impartial.

The duty of an expert

The High Court Rules contain a code of conduct for expert witnesses with two essential requirements:

- An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
- An expert witness is not an advocate for the party who engages the witness.

Experts should avoid getting out of their depth

In *Cridge v Studorp Ltd*, the claimant alleged that the defendant's product was not fit for purpose, leading to water ingress and damage. The defendant countered that the product was fine, the problem was installation.

The New Zealand High Court's decision aligned with its view on the credibility of the experts:

- the defendant's expert witnesses were reputable, and their evidence was clear, well-reasoned, impartial, and within their field of expertise; whereas
- the claimant's expert witnesses were unreliable and strayed into areas outside of their expertise. One witness faced criticism for citing literature that actually contradicted their position, while another witness cited articles as supporting their view but had not actually read those articles beyond the synopsis.

An expert's analysis needs to be watertight

Similarly, *Jones and Anor v Rutch Constructions Pty Ltd* (a tribunal case in Queensland) involved a home that suffered water ingress shortly after construction.

In this instance the claimants were successful, and again the issue turned on the expert evidence. The Tribunal noted the defensive and insufficient nature of the expert witness's report for the defence, finding that:

- claims were often simply denied by the defendant's expert; and
- the defendant's expert criticised the claimants' reliance on moisture meters, but the defendant did not provide any alternative evidence or data.

Unsurprisingly, the Tribunal found the submissions of the claimants' expert witnesses more convincing.

Key takeaways

- **Seek impartiality over advocacy**: courts will typically favour an expert who understands and follows their overriding duty to the court.
- **Check they know their stuff**: if an expert goes beyond their expertise, their opinion will lack credibility.
- **Ensure the expert is thorough**: a well-prepared and well-reasoned response is more persuasive than bare denial.
- **Check the data supports the expert's opinion**: an expert's view that is not supported by data, or that is contradicted by the only available data, will invite criticism.

Want to know more?

If you have any questions about construction experts, please contact our specialists in Construction and Dispute Resolution.

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