

Superyacht Paint Guidance

Paint Experts –observations on the legal regime

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Broad Overview

It is common practice for paint experts to be engaged by owners, applicators, yards and insurers both for new build and refit paint jobs. In the vast majority of cases they are brought in to provide a specialist and better informed view but sometimes they are jointly appointed with the agreement of more than one party in order to help narrow the differences. In other cases still they are brought in specifically for the purpose of presenting or defending the interests of their client. But what happens if the dispute escalates into full blown litigation ?

Expert Evidence – its purpose.

In all but the simplest dispute there are questions of fact and questions of law which have to be decided by the Judge or Arbitrator. Questions of fact usually fall to be determined by a mixture of factual witnesses and expert witnesses; the factual witnesses describe what happened and what they saw – the detail of the batch numbers, the mixing ratios, the temperature and dewpoint - while the experts provide the interpretation of the phenomena according to their experience and expertise – its thin, its bubbled, its fallen off. The judge or arbitrator then makes its decision as to how the law applies to the facts which have been established by the factual and expert witnesses.

You can see from this that Expert Evidence is very often based on the Expert's opinion as to what has happened. Because the expert is generally coming to the issue after it has already become contentious (if he was there any earlier it might have been his fault !) he cannot be completely certain what has occurred so the evidence he is giving is usually his opinion, based on what he considers to be the most likely set of facts, which again often involves a degree of opinion.

In general terms society tries to avoid opinion based justice; it is random, unpredictable and potentially entirely unjust. Similarly Court systems across the world control the way in which so-called Expert Evidence is allowed into the Court Room or arbitration chamber. The English Courts and other systems following the "common law" tradition have generally allowed the parties to appoint their own experts but have then controlled how the experts are to behave, the codes and standards to which they must adhere and the way in which they can give evidence. Other European Courts in the "Civil Law" or "Roman Law" mould have usually controlled the process even more tightly by permitting only Court Experts – that is experts enrolled with and actually appointed by the Court - to deal with that part of the case which involves opinion. One can see this as a means by which the Court expert's opinion is legitimated, emanating as it does from within the legal system.



English Court judgments

The decisions of the English Courts are, in all substantial cases, written and fully reasoned and made publicly available in hard copy and through the internet and various service providers. The careers of many Experts have been ended almost at a stroke by a single judgment, typically in circumstances where the Court has taken the view that the Expert failed to understand what his duties were. :

“ Mr X on the other hand was an unsatisfactory witness. He had difficulty explaining why he remained sure that the documents he had produced at trial had reached him only on [y date] rather than [five days earlier] as their fax line would suggest...I was not satisfied that Mr X had sufficiently taken to

heart his obligations as an independent expert. In the light of his evidence before this Court I would not be inclined to place any weight on his opinion.”

“ His expertise and experience are undoubted but I am not sure that he has appreciated what is now expected of expert witnesses by the Courts”

From the client’s perspective also such a view from the Judge is usually fatal to their case and the result is that having started with an expert’s report that looked supportive and favourable they are disappointed to discover that no attention is given to it and they are left to pay their own costs and those of their opponents.

What a Court is looking for is not the crushing putdown of a hired gun but rather the thoughtful and independent offering of genuine technical expertise.

Moving from initial investigation to litigation

At the moment that a party decides to instruct a paint expert it is very rarely known if the matter is going to be amicably resolved in a matter of months or if it will end in a Court room a year or so down the line. The great majority of problems are resolved without recourse to the Courts or any other formal dispute resolution process. In fact they are mostly resolved without any or only peripheral intervention by lawyers. This is undeniably “a good thing” because formal dispute resolution is expensive and it tends to leave scars on all the relationships that it touches.

But in some respects it seems to have created an expectation amongst some industry experts that their opinion will not be challenged by a Judge or subject to detailed and testing cross examination.

The fact is that in contracts subject to English law no expert will be able to give their evidence without the approval of the Court and if and when they do it will be subject to tough scrutiny, by a Judge who answers to no-one. And in the case of a contract subject to a Civil Law regime it is very likely that the expert will not be entitled to give evidence at all because the Court itself will appoint its own expert.

This raises big questions about the value and utility of paint reports and the extent to which any comment or opinion expressed in them – as opposed to pure noting of factual observations – is of any use at all.

Liability of Experts

There are some other big questions out there which have a bearing on the use of paint experts, notably from the point of view of the experts themselves. Chief amongst these is the question of their potential liabilities not just to the party who first instructed them (i.e. their client) but potentially also to a much wider circle.

Protection in the Court room (or preparing for it)

English law on the duties, responsibilities and privileges of factual and expert witnesses is quite complex. Behind it all there is an overarching public policy to encourage witnesses *“who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say.”*

For a long time barristers (or advocates) were also held to be immune from being sued by their clients for what was said or done in Court but in 2000 that immunity was removed which left only the judge and the factual and expert witnesses in a protected position. The factual witnesses are of course sworn to give true evidence and are at risk of being prosecuted for perjury if they give false evidence, which may mean prison. Experts' evidence, however perverse it may be, is less likely to lead to a perjury charge, since it is usually evidence of opinion and not of fact. Having said that one might imagine circumstances in which a paint expert might also be a witness of fact, for example about the state of the coatings prior to a repaint.

The immunity of expert witnesses in respect of their opinion evidence in the Court room and in preparation for Court (for example in joint meetings with the other parties' experts) has been under steady attack in the last decade but at the moment of writing the only real breach that has been made in it is one that relates to the costs of the litigation. On this front the English High Court has indicated that an expert witness could be ordered to pay the costs wasted by his conduct if he were to recklessly give evidence in flagrant disregard of his duties to the Court. In the case that was under review at the time of the decision the costs in issue were reportedly in the order of £400,000.

Protection in relation to initial advice

In the absence of an effective exclusion clause in the Expert's contract with his client there is nothing to stop a client from suing his expert for negligent work and bad advice, particularly where that work and advice has been done before formal legal proceedings have been launched. Such a claim might be based on the expert's assessment of the position and even on the expert's view as to whether he is an appropriate person to advise the client at all.

The expert's financial exposure to these types of claims based on negligence and misrepresentation is open ended, limited only by his ability to meet the amounts awarded against him. They are accordingly very serious liabilities.

Duties of Experts with the English Courts

The classic modern statement about expert's duties was given in a shipping case called the **IKARIAN REEFER** in 1993 as follows:

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 .*
2. *An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise . 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.*
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. 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.*
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*



This has been built on by procedural rules of Court and annexed to this note is a copy of the current protocol issued by the Court which Experts are expected to have regard to. Even a quick look through this will bring up some interesting strands. By way of example there is a mandatory requirement for an expert's report to summarise the full range of opinion that might be held by an expert in relation to each issue which the Expert is commenting upon and then to give reasons to support the

Expert's chosen opinion within that range. This is very far from much modern practice where a damaging fixation with the word "best" has been permitted to become commonplace.



Summary

Knocking out a quick report and opinion on a paint job may seem an innocuous process but the moment that it is released into the client's hands the consequences can be very far reaching. It is important to know what the rules are and where the limits of your own expertise lie. If you want to maintain credibility all your reports should be subjected to the same standard of scrutiny that you would adopt for Court use, otherwise they are worthless.

This note is a summary of some of the key principles and issues involved in this specialist area of law. It is not a substitute for full legal advice tailored to the particular facts of any given situation. Dorade Law are specialists in this area and generally in relation to the legal issues affecting the marine and yacht industry. You are welcome to copy, distribute or use material in this note on condition that you credit its source and on the understanding that we accept no responsibility for your editing.

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