

## Transcript Day 1 Charlton and procedural unfairness.

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MR JUSTICE BLAKE: You have helpfully put in a clip which says that, although I think the general position in tribunals is that everything goes in, it's all a matter of weight and relevance, and I am conscious of the fact that there is some statement to that even about expert evidence in the handbook, or the Bench Book of the issue for the War Pensions and Armed Services Compensation Tribunal, and I think in fairness to Dr Busby I will read this next paragraph out. This is the starting point but it may not be the finishing point:

"Opinion evidence can be given by any person, whether he is recognised or qualified as an expert or not and so should not be dismissed out of hand by a tribunal but clearly, if given by a non-expert, will carry less weight than if given by an expert." - paragraph 12 of the Bench Book 2015 that I was supplied as part of my training into this when I took on this role.

However, you've pointed out that the Tribunal rules permit the individual constitution to give directions to restrict evidence so that it complies with the principles of CPR 35 and the practice directions made

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thereunder. You cite Chandanmal where the Tax Chamber, First Tier, reached that. You didn't in fact cite that in the division of the Tribunal which I am more familiar with, Immigration and Asylum, there was from its constitution a practice direction issued by the Senior President of Tribunals in February 2010 incorporating all the provisions of CPR 35.

MR HEPPINSTALL: No, I didn't put it in front of you but I'm aware of that.

MR JUSTICE BLAKE: Yes. Often in asylum appeals a question of medical evidence as to whether the Istanbul Protocol has been complied with becomes a not inconsiderable issue, but anyway, it's there and clearly that's a strong indicator that in immigration and asylum, when you have expert evidence -- when you have opinion evidence it ought to meet the standards of CPR.

MR HEPPINSTALL: Yes.

MR JUSTICE BLAKE: The standards of CPR themselves reflect, as you tell us in your skeleton, *Ikarian Reefer*, as endorsed in *Meadows*, *Ikarian Reefer* being a civil case and then *Meadows* was disciplinary about use of expert evidence in criminal, and therefore you have to have appropriate experience before it should be admitted. Now it seems to me that despite the general steer of tribunals that everything goes in and then it's up to the unfortunate tribunal to see what weight there is, in this particular appeal I think there may be a case to limit expert evidence, opinion evidence, to opinions from recognised experts. That seems to be what Mr Justice Charles was doing, although I don't -- was that the outcome of a process? Was there argument with these authorities being put before them?

MR HEPPINSTALL: Yes, the authorities *Ikarian Reefer*, *Meadows* --

MR JUSTICE BLAKE: There was a debate.

MR HEPPINSTALL: The speed of delivery of these submissions belies the fact that they have been made before, both before the FTT and the Upper Tribunal.

MR JUSTICE BLAKE: Were they made in writing or orally?

MR HEPPINSTALL: Writing definitely in front of the Upper Tribunal. In fact there was a submission along these lines also in respect of Dr Busby before the first First Tier Tribunal.

MR JUSTICE BLAKE: Well, I am not going to go back into the other --

MR HEPPINSTALL: No, no. There is no need to.

MR JUSTICE BLAKE: I thought we needed to bring some of these principles up into being. There we are. You would say this is an appropriate case for the Tribunal to exercise its case management powers to

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restrict opinion evidence to opinions from recognised experts --

MR HEPPINSTALL: Yes.

MR JUSTICE BLAKE: -- who must explain their qualifications.

MR HEPPINSTALL: Yes, yes.

MR JUSTICE BLAKE: And you have Meadows in the bundle but I have extracted the relevant paragraph from it adopting what Mr Justice Cresswell said in the Ikarian Reefer, and just in case Mr Busby wants to be reminded or whoever is dealing with the matter:

"(1) expert evidence should be an independent product of the expert, uninfluenced as to the form or content by the exigencies of litigation;

(2) provide independent assistance by way of objective unbiased opinion in relation to matters within his expertise ... should never assume the role of an advocate. An expert witness should state the facts or assumptions upon which his opinion is based."

This is where part 2 may come in as to the nature of the articles. It seems to me that when we come to Professor – I don't know how you pronounce the name --

DR BUSBY: Schmitz Feuerhake, my Lord.

MR JUSTICE BLAKE: -- Schmitz Feuerhake, thank you very much, which we are going to get to later on, obviously she will give her opinion about what her opinion is.

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Then the Ikarian Reefer requires her to identify what sources, I think outside her opinion, that she bases her opinion on. If she has co-authored an article with Mr Busby, then insofar as she is the co-author, well, it's what she is telling us rather than what she wrote in an article that is important.

MR HEPPINSTALL: Yes, my Lord.

MR JUSTICE BLAKE: If she relies upon support for her opinion by Mr Busby's evidence then that directly hits the conflict with Mr Justice Charles' direction, as I see it, which was in fairly broad terms, although I was doing it from memory, we have it down there by any other means. I think we just need to maintain this discipline of what is legitimate support for an opinion expressed orally by a witness.

MR HEPPINSTALL: Well, I don't think there's much between us, my Lord, because my inelegant description of the Secretary of State's position is not very far off what you have just set out.

MR JUSTICE BLAKE: Well, I just think we should play it out at the beginning of this case because we may have to re-visit it from time to time.

MR HEPPINSTALL: Establishing the ground rules and making them clear is extremely important, my Lord, and indeed

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the lack of such a strong position at the beginning of the first tribunal led to confusion and complications later on, so I think without doubt. My submission on the principles is that the Ikarian Reefer rules which were reproduced in Meadows are there just to protect the administration of justice from bad evidence. It doesn't matter what jurisdiction you are sitting in, whether it be crime, civil or administrative justice, such as this Tribunal, bad evidence has a place in none of those jurisdictions. That's what the Tax Chamber is saying: why wouldn't you want CPR 35 to apply? We don't want to receive bad expert evidence. Someone who couldn't sign up to part 35 is not going to be able to assist the Tribunal.

MR JUSTICE BLAKE: In principle this issue opens up the distinction between admissibility and weight and --

MR HEPPINSTALL: Yes.

MR JUSTICE BLAKE: -- I'm sure Mr Justice Charles, in saying at 110, "Dr Busby may not give expert evidence (whether in writing, orally or otherwise)" is making a ruling on admissibility, which is what you would expect in a CPR 35 type of case, rather than simply of weight.

MR HEPPINSTALL: Indeed, my Lord. The problem is that the effect of the rule, the CPR rule -- sorry, the Tribunal rules -- is that "admissibility" is not a language that you can use in this Tribunal because everything is admissible. That's really what the three man or three judge Upper Tribunal in the Hampshire case is saying. If a Tribunal is going to attempt to rely on evidence outside of an expert's expertise or a witness' expertise, it need to be very careful, it needs to explain itself and it is an exercise fraught with danger. So technically admissible, but highly dangerous, for the reasons set out in Ikarian Reefer and Meadows and so forth.

MR JUSTICE BLAKE: But are you saying that we cannot say that evidence which is not from an expert we propose to exclude?

MR HEPPINSTALL: Well, Mr Justice Charles has given that direction. His direction in tribunal language is: no weight can be given to evidence from Dr Busby and therefore the Tribunal should not receive it --

MR JUSTICE BLAKE: You think that's a direction on weight or admissibility?

MR HEPPINSTALL: Well, we were very careful in the Upper Tribunal only to use the language of weight because whether something is admissible or not is not a question which arises before a First Tier Tribunal because it receives day in and day out inadmissible evidence by the civil standard.

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MR JUSTICE BLAKE: I appreciate there are no rules of evidence and hence I read the citation I did from the Bench Book.

MR HEPPINSTALL: Which reflects my personal experience --

MR JUSTICE BLAKE: I am well aware and there are decisions of myself in another chamber which say that in terms of hearsay evidence and matters of that sort.

MR HEPPINSTALL: Yes.

MR JUSTICE BLAKE: But we're dealing here with opinion evidence.

MR HEPPINSTALL: Indeed, my Lord.

MR JUSTICE BLAKE: And it seems to me that in this particular case we can require CPR 35 criteria to apply.

MR HEPPINSTALL: Indeed, my Lord. I agree.

MR JUSTICE BLAKE: But if someone cannot sign up to a report because they do not have the requisite qualifications to make it, then what is the consequence?

MR HEPPINSTALL: I agree, and save in some extreme circumstance that I find it very hard to imagine what it would be, I don't think a tribunal should ever receive evidence otherwise than in accordance with part 35.

MR JUSTICE BLAKE: "Ever" is a big word. This case today, these issues, this lengthy set of directions --

MR HEPPINSTALL: Yes.

MR JUSTICE BLAKE: -- and the peculiar nature of the standard of doubt are all factors which at the moment

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are in the back of my mind as to what we should do. But as I understand it, focusing upon Mr Williams' evidence what you are saying is that insofar as he produces an interesting, lovely diagram of winds and shapes he has derived from other data, that is an expression by him of an opinion on the expert science of meteorology. And no disrespect to him, whatever his skills are, they don't include expertise in meteorology.

MR HEPPINSTALL: No, my Lord.

MR JUSTICE BLAKE: Therefore he can't make a CPR 35 declaration. Therefore?

MR HEPPINSTALL: Therefore they can't be received into the evidence. You would be unable to give them any weight and therefore you shouldn't receive them.

MR JUSTICE BLAKE: Because it would be irrelevant?

MR HEPPINSTALL: Indeed.

MR JUSTICE BLAKE: Which rather sounds like admissibility.

MR HEPPINSTALL: Well, we are dancing on the head of a pin. It's just the way that the tribunals operate differently to a court.

MR JUSTICE BLAKE: Yes. Right, okay. Well, we've had that little exchange. Now what would you like to say?

MR CHARLTON: Yes. May it please you, my Lord.

MR JUSTICE BLAKE: If we focus on Williams first and then

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we'll see where we go.

MR CHARLTON: As you will see already, actually, my Lord, we've gone straight into the Busby question as well.

MR JUSTICE BLAKE: I'd like you to focus on Mr Williams first, then we'll deal with Busby.

MR CHARLTON: My Lord, yes, for the last time I am going to say this. I am appearing as a rule eleven representative. I'm not appearing as an instructed barrister for the purpose of these hearings. I have mentioned it to your Lordship before but I am not claiming a right as an audience as a qualified practising barrister.

MR JUSTICE BLAKE: No, no, but you don't need that.

MR CHARLTON: I don't need any of that but just for the record.

MR JUSTICE BLAKE: It only becomes tricky in the immigration, where those who are not qualified barristers who appear as representatives are guilty of a criminal offence unless they also happen to be regulated by the solicitor -- the regulating authority. Fortunately, we don't have that problem when it comes to war pensions appeals.

MR CHARLTON: I am grateful. Again, I don't think we need spend that long on Mr Williams who sits behind me.

MR JUSTICE BLAKE: The question is, it looks like he is being adduced for expert evidence, it doesn't look like he has expertise. Does that mean we shouldn't receive it? Question 1, 2 and 3.

MR CHARLTON: The first point, in any event, my Lord, the second document, it's at number 7 in Mr Heppinstall's initial submission, where the two documents in question are outlined, so in Mr Heppinstall's submissions where he says "No expertise which will enable him to present the evidence set out" and he mentions SB8/134 and SB10/158, the first point I make is that SB10/158 isn't an issue, wouldn't be relied upon in any event so we need only talk about SB8/134.

MR JUSTICE BLAKE: So SB10 -- I have it loose.

MR CHARLTON: SB10 we don't need to worry about.

MR JUSTICE BLAKE: You mean to say you are taking it out?

MR CHARLTON: Yes, my Lord, in any event.

MR JUSTICE BLAKE: Right. So you are not going to rely upon that.

MR CHARLTON: Exactly.

MR JUSTICE BLAKE: All right. So we can take it out of the bundle.

MR CHARLTON: Yes, my Lord.

MR JUSTICE BLAKE: Thank you.

MR CHARLTON: Now --

MR JUSTICE BLAKE: Right.

MR CHARLTON: The other one, SB8/134, the reality is,

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my Lord, that in fact things have moved on quite substantially and so again I'm not even sure whether -- I can't say we will definitely rely on that in any event because things have moved on since then so I don't want to spend too much time arguing about something which may not come up.

MR JUSTICE BLAKE: That's the topic I'm seeking to consider. If you are not going to rely upon it that's a very, very easy answer, I'll take it out. If you are going to rely upon it then we'll need to have the --

MR CHARLTON: We may wish to rely on it. For the sake of argument I will proceed as if we may.

MR JUSTICE BLAKE: Yes, right.

MR CHARLTON: The only short point I will make there, my Lord, is that as we see it he's not purporting to be an expert in meteorology; it is on the whole merely a compilation. It is what you might call a librarian's exercise. Where he does express an opinion on meteorology, if that's thought that is what he is doing, then I agree with your Lordship he does not qualify as an expert although he does have meteorological knowledge which is required for a UK and Canadian pilot's licence. So he has --

MR JUSTICE BLAKE: Is this his compilation?

MR CHARLTON: My understanding is that put together. Yes, my Lord.

MR JUSTICE BLAKE: I thought that was -- Mr Heppinstall can -- this is the particular focus of your submissions, is it?

MR CHARLTON: Yes, my Lord.

MR JUSTICE BLAKE: We have that. I mean, there it is, it's putting together data that he has obtained from somewhere into a plan.

MR CHARLTON: Yes.

MR JUSTICE BLAKE: As I understand it, if I'm wrong you'll let me know, my present understanding is that that is him trying to interpret some primary factual data to give an opinion as to where the winds were blowing at the relevant time.

MR CHARLTON: Yes. It's supporting Joe Pasquini's witness statement. Now --

MR JUSTICE BLAKE: It's a piece of opinion evidence? That's what I'm trying to ascertain. Yes or no?

MR CHARLTON: Well, in the sense that he is putting together -- it's a good point, my Lord. Whether it's a satisfactory compilation, I don't know if it's said to be, but the more important point -- I'm sorry, my Lord, the best point is that this evidence has in any event been put before the First Tier Tribunal, was adduced in the First Tier Tribunal and Mr Johnson was

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cross-examined on it at the First Tier Tribunal.

MR JUSTICE BLAKE: I am running this one and I am setting the ground rules now.

MR CHARLTON: I appreciate that, my Lord, but what Mr Heppinstall didn't say in his submission to you, he has not made that clear to you.

MR JUSTICE BLAKE: There is a question I was going to ask about when did it first emerge, but at the moment I am trying to deal with an issue of principle.

MR CHARLTON: I appreciate that, my Lord, but I am hoping -- my Lord, I am trying to go one behind that and saying in any event what is happening here is that Mr Heppinstall having -- the Secretary of State having failed to get it excluded in the first tier is having a second bite at the cherry. I see him rising. My understanding is that what happened at the first tier is it was raised, Mr Justice Stubbs said, well, he must produce a CV which would explain it. That was the end of the matter. At which point Mr Williams' evidence was apparently accepted and used and put to witnesses.

So our objection, my Lord, is that it's too late now for Mr Heppinstall to raise this particular issue, especially bearing in mind, my Lord, that one of your first directions was that all the evidence that was before the first tribunal is evidence in these proceedings. But the real point, and I think my best point, because I understand the expert point which does go rather against me, is that this has already been argued, has already gone in in the first tier and what the SSD is trying to do is have a second bite at an argument he has already lost. That's my best point, I think, my Lord because I agree I'm on weak ground on expertise. In other words, so even if I concede the expertise point it's already gone in and been cross-examined on.

MR JUSTICE BLAKE: I've got that. I'll hear from Mr Heppinstall on that point. Now, moving further, if I may, I infer from the way you've just argued that point that you don't take issue with the proposition that in this appeal, whatever else one can do, that we ought to have the rigour of CPR 35 in expert evidence.

MR CHARLTON: I submit at this stage, my Lord, that would be over-rigorous in this particular --

MR JUSTICE BLAKE: Right, that's where maybe the wind is blowing a little bit against you. We don't need meteorology but you just need some smart submissions.

MR CHARLTON: Perhaps I am waiting for a little entrainment or rain on top of it. If I can now address the Dr Busby point?

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MR JUSTICE BLAKE: Yes.

MR CHARLTON: My Lord, it seems to me it's absolutely clear from the Charles judgment that what he is talking about at 239 and 240, "The reason I've concluded ..."

MR JUSTICE BLAKE: The judgment or the order?

MR CHARLTON: I have both but your Lordship will need the judgment.

MR JUSTICE BLAKE: Where do I find that? Is it 17?

MR HEPPINSTALL: SB18, tab 4. (Pause)

MR CHARLTON: Someone is saying SB110.

MR JUSTICE BLAKE: 110?

MR CHARLTON: 1.10.

MR HEPPINSTALL: Are we after the order or the judgment?

MR JUSTICE BLAKE: The order, I can tell you --

MR CHARLTON: We've agreed --

MR JUSTICE BLAKE: -- is in volume 1, SB1. The judgment I'm not sure --

MR HEPPINSTALL: Tab 4, SB18.

MR JUSTICE BLAKE: SB18, tab 4. Thank you very much, Mr Heppinstall.

MR HEPPINSTALL: Paragraph 237 onwards.

MR CHARLTON: That's right. Can I just remind ourselves, as your Lordship has just done, "may not give expert evidence, whether in writing or otherwise, at the remitted hearings

MR JUSTICE BLAKE: Yes.

MR CHARLTON: We say, my Lord, basically this is anticipating the fact that he will not become a witness.

MR JUSTICE BLAKE: No, he can't give expert evidence. Yes.

MR CHARLTON: Well, and again it's -- again, if you look at the reasons, in particular at 240, the reason is that when he gives evidence in a case -- when he preparing a report for a case, which of course don't forget there were six reports that he had been commissioned by I think the court to write at the first tier, the point was being made there that his reports might have been tainted by his enthusiasm. That's what he is saying.

MR JUSTICE BLAKE: It's because of the matters set out there that he doesn't meet the test of objectivity in the Ikarian Reefer, 241.

MR CHARLTON: Yes.

MR JUSTICE BLAKE: So that's the reason for the exclusion.

MR CHARLTON: Yes.

MR JUSTICE BLAKE: So that means his views, no doubt honestly, passionately held, are not going to enter the difficult arena of this case, either orally by giving witness evidence viva voce, or in writing or otherwise. That means, I think, therefore, that we should not base any conclusion as to the reasonable doubt case on Mr Busby's views on the issues in this case, including

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the views he has put into his articles, and I also think that when you look at the other limbs of the Ikarian Reefer, namely Professor Sawada and Professor Schmitz Feuerhake, they have got to explain what materials they identify as supporting their opinions. If the answer is, "Well, it's an article by Dr Busby," that is a breach of the "or otherwise" limb of the direction.

MR CHARLTON: If I could take your Lordship to two points on that. One, I simply say that's far too broad an interpretation of the "or otherwise" direction.

MR JUSTICE BLAKE: "Otherwise" is quite a broad word, isn't it?

MR CHARLTON: Not if taken in the context of purporting to be a witness. I don't think Judge Charles is to say anything that Dr Busby has ever said even where it's peer reviewed and agreed with other people cannot --

MR JUSTICE BLAKE: You can tell us about peer review in a moment but I don't read it that way.

MR CHARLTON: If I can make my first more simple point, which again the wind seems to be against me, but it seems to me it's absolutely clear he is talking about evidence prepared with a view to litigation. The Ikarian Reefer case is all about experts giving evidence in the box, and the problem is that if -- the phraseology is that -- it's particularly in an Ikarian reference at 241:

"The evidence should be seen ... independent product of the expert uninfluenced as to the form or content by the exigencies of litigation."

MR JUSTICE BLAKE: Quite, but pause there. If you are running a campaign for recalibration of the protective principles of radiation and you are saying that the conventional wisdom is wrong and you reason that consistently and thoroughly in a number of tribunals where the issue comes up, you are seeking a result and you are committed to a result. That means that when you give information or expertise to the case there is a real risk that the expertise is influenced by the fact that you are seeking a result, and you are seeking a result before you became involved. And that is why we don't in the CPR and Ikarian Reefer, or the Ikarian Reefer first and the CPR later says: no, courts don't want to receive that kind of evidence because there's too much of a risk.

MR CHARLTON: So if Dr Busby has written a report with a view for proceedings as he has done then that applies. So I'm not disputing the fact that where Dr Busby on his own has written a report for proceedings, and these were the ones that were explicitly excluded at the first hearing, that we are stuck with that. But to go on and

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say everything that Dr Busby has ever written on the subject, even though it wasn't with a view to proceedings, it was with a view to participating in the scientific debate, to say that all that has to go I respectfully say, my Lord, is positively Orwellian particularly when we bear in mind he has been one of the leading lights in challenging the conventional model and in effect we are going into court with our hands tied behind our back.

MR JUSTICE BLAKE: Well, I think you are.

MR CHARLTON: That, with the greatest of respect, is not something that one wants these courts to do.

MR JUSTICE BLAKE: I think one does if one starts off with the principle that we are not to hear Dr Busby's views, he can present the views of others and that's what we're going to be doing this afternoon. If it turns out that the others in fact rely significantly on his views, then one is actually relying upon his views in this case.

MR CHARLTON: I --

MR JUSTICE BLAKE: And that's where I am drawing the line.

MR CHARLTON: There is some force in that, my Lord, but if in fact they are relying on empirical data that he has referred to, then that would be admissible, even under your Lordship's current rather harsh ruling, wouldn't it?

MR JUSTICE BLAKE: It's not harsh, it's logical. Empirical data is empirical data but if he has devised it all and it requires expertise to devise it -- I appreciate I am only now, after being involved in this case for a year, beginning to see the various threads, and "beginning to" is the highest I put it, because there is a lot I have to learn in the course of this case as to all the intricate elements, but it seems to me that if, for the reasons set out in Mr Justice Charles' judgment, based upon argument and well known principles, that view is taken and the consequential order is whether it's orally, in writing or otherwise, that is the ground rules which have governed the hearing of this appeal. Nothing is intended to be said to disrespect anyone's views, which I am sure are genuinely held but those are the ground rules. Therefore, if others are going to tell us about their opinions -- I mean we can see, for example, that this afternoon Professor Sawada is going to refer to the other witness about her work on Chernobyl. Obviously we don't need hearsay from Professor Sawada on that, we are going to hear from the horse's mouth. That is the way we do it. If it turns out that she or someone else is saying "Well, actually the real core piece of material that I rely upon for this view is an opinion of  
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Dr Busby's," then, unless there's something about that opinion and its age or its status which would exempt it from the general provision which I've kept open, it seems to me it shouldn't be there because otherwise one's just getting round, circumventing the direction.

MR CHARLTON: Your Lordship appears to be against me --

MR JUSTICE BLAKE: I am trying to unpack -- that is why I wanted to go through first of all what are our powers. (2) what are the principles, (3) how do we apply the principles particularly now on the subtopic of Dr Busby's articles?

MR CHARLTON: My Lord, you are relying on the Charles ruling and I think your Lordship currently hasn't been terribly persuaded yet that I don't think Judge Charles was making anything like the broad ruling that is now being interpreted. "Or otherwise" -- I mean if Judge Charles had said, you know, "Well, I don't think that anything that Busby has ever said should ever be relied upon by anybody." He didn't say that, my Lord. The other point is again as Judge Charles observes, having been in the witness box for three days -- quite why that happened I don't know, it is a separate story, my Lord -- but there is virtually no criticism of Busby's scientific work at all. No one is suggesting that he is not a good, competent scientist who does his sums properly --

MR JUSTICE BLAKE: Well, I think there are people; not me, but others have but we've got that elsewhere --

MR CHARLTON: My Lord, you can go through the transcript but for three days I don't believe there was a single scientific point made against him during the three days' hearing, my Lord, and I had to sit through it. So it's not his science that's at risk, it's his enthusiasm and that may mean that it's been decided that therefore he will taint his reports for litigation. I repeat, my Lord, the Ikarian Reefer talks about the exigencies of litigation. If I can move on, but I'm only repeating myself on that point, my Lord. The point being the litigation point is important because otherwise you have a court saying: what is the point of peer review? I am sure your Lordship is familiar with the peer review process.

MR JUSTICE BLAKE: Yes.

MR CHARLTON: If needs be I was going to ask someone else -- as I'm not a scientist -- but as I understand it peer review, it is submitted to editors and looked at by other people.

MR JUSTICE BLAKE: Quite, but we don't know in some of these journals who was doing the peer reviewing. If you'd like to -- over the intervening period, if there is some

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article that you think is critical to this appeal that has been co-authored by Dr Busby, I think I -- and I am only speaking for myself because we haven't had much chance to discuss it, we will retire in a moment -- we will hear who peer reviewed it and whether it commands support from other colleagues in the field. That's a process which we can engage upon. But at the moment, for example, I have Dr Busby's advocate's skeleton argument that a really critical document was published in January 2016. Well, I'm afraid that's precisely the kind of document which falls within the Ikarian Reefer. He is now writing about the very topic that he's an advocate in the litigation. No way, nothing doing.

MR CHARLTON: So be it. Well, then in that case, my Lord, it's just blowing a hole through the standard scientific peer review process and judges appear to know better than scientists.

MR JUSTICE BLAKE: No. You can tell me about the standard scientific process, if you ever need to rely upon a particular document if we get to that point. I think there are issues about that as well, but we --

MR CHARLTON: We are on notice -- well, the final point I'll make because I don't think your Lordship has made a definitive ruling --

MR JUSTICE BLAKE: We are having an argument but I am hoping to focus your mind upon the issues that are of concern to me, and they are me personally at this stage because having heard what you say we will then go and consider the position.

MR CHARLTON: I'm grateful, my Lord. The final point I make, of my three points, is that this comes to us at a very late stage. At the pleas and case management hearing your Lordship observed that, you know, Dr Busby appeared to be making statements in his statement of case that amounted to opinion and therefore we spent quite a lot of time rewriting the statement of case to take out what appeared to be Dr Busby's statement of opinion. But at no stage did anybody say "Oh and by the way you'd better make sure that nobody relies upon anything that Dr Busby's ever said or co-authored". So suddenly, the day before we come into court, not having an opportunity to argue our case at all, we're suddenly presented with, "Hang on, half your case you can't rely on" and this is the day -- if somebody had said this --

MR JUSTICE BLAKE: I don't know -- be careful of the forensic language you use. If it does turn out that half your case is relying upon the opinions of Dr Busby then frankly --

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MR CHARLTON: No, I dug a hole for myself, I appreciate that.

MR JUSTICE BLAKE: Get it back again. I'm not going to hold it against you. The point of principle is, insofar as your case does rely upon the opinions of Dr Busby, insofar, and I am not at all clear, that there are certain issues in cross-examination that we would like to hear Mr Hallard answer matters raised, but insofar as a positive case relies upon the evidence of Dr Busby then I'm afraid the reading of the directions is that that's not on. Australia maybe, Canada maybe, but this Tribunal not.

MR CHARLTON: All I am saying, my Lord, is that I hope when it comes to the various assessments you are going to make that the Tribunal will be sympathetic to the fact that this particular ruling comes to us the day we walk into court, my Lord, and I hope the court will be sympathetic to the fact that had we known this earlier --

MR JUSTICE BLAKE: Not entirely because it was there whenever Mr Justice Charles gave his direction, and I'm afraid the years are passing by at a rate now --

MR CHARLTON: I appreciate that, but the point is we've interpreted Judge Charles' direction differently. That's the problem, my Lord.

MR JUSTICE BLAKE: 2014, it's pretty broad. (b) we did touch upon the topic last time and I explained as best I could -- I haven't looked at the transcript -- that what we are going to conduct this time is that Dr Busby is here as a representative, he knows who the experts are that he is relying upon, and he is going to present those experts independently and we will value their evidence for what they tell us. If it turns out that an expert simply comes in the witness box and says, "Well, the critical document is the opinion of Dr Busby," I will say "Are you going to stand on your own two feet or are you just a surrogate for Dr Busby?" If it turns out to be the latter --

MR CHARLTON: Well, your Lordship is against me on the limiting it to, as it were, specific litigation orientated documents and your Lordship is against me and we're taken by surprise by that.

18 MR JUSTICE BLAKE: Just deal with the point I've made. I mean, fight your corner by all means. We haven't made a ruling, we're having a discussion. But the January 2016 article in your view was not written with a view to litigation therefore it's admissible?

(Pause)

MR CHARLTON: My Lord, apparently the January 16 article is not by Dr Busby. So now we are here -- that's right, my

Page 56 learned friend touches -- I mean my non-learned friend touches upon the point that -- I think -- and if I can dig myself back out of my half eye case hole that I have dug for myself -- I think it's the co-authored documents in particular that caused the problem, because Dr Busby participates to a greater or lesser extent on those and that's the one that really causes the problems.

MR JUSTICE BLAKE: If you want to look at it in order to tease out this -- I mean I've read it and maybe we don't have to. Look, answer my problem: we have the direction, we have the principle, we have an article that's come into existence since this litigation and the issues have been raised. It is co-authored by X and Y. X is giving evidence and therefore on the general principle you don't bootstrap, you don't say, "My opinion is good because I said so", and what else do you have to support your opinion if it's controversial? "Well," you say, "it's not just X, it's Y." But Y you've already said is not going to form part of the expertise in the case and if it's only X or Y then one route or the other, that article simply can't form part of the reasoning.

MR CHARLTON: I haven't read any of the articles and I wouldn't understand them if I did, so I am at a slight disadvantage but the point as I understand it is --

MR JUSTICE BLAKE: Oh dear, I've read them --

MR CHARLTON: I tried to.

MR JUSTICE BLAKE: I tried to read the ones which Dr Busby told me were the most important because I've taken his word for it.

MR CHARLTON: I think the point as I understand it, though, if the expert says "Well, actually no this is my conclusions based on my research, original material that I have looked at and formed my opinion," that would in any event be admissible. I am reluctantly conceding that even though it's for a scientific journal -- I'm not conceding, but I'm conceding your Lordship's --

MR JUSTICE BLAKE: There are scientific journals and scientific journals. Some are well known, some are online, I don't know who the editors are, I don't know about the process. If you want to dig out -- in the course of your case if there's some particularly important co-authored article which precedes this litigation as opposed to being generated during it, that you say has been peer reviewed and therefore has a degree of credibility beyond the assertion of the authors, my direction leaves open that possibility if you tell us something about it.

MR CHARLTON: Well, I think as long as your Lordship is leaving something open then I'll be grateful. I know

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Dr Busby --

MR JUSTICE BLAKE: That's what it says, the paragraph, without varying the directions. You've made a general variation. You are not going to get far at the moment --

MR CHARLTON: I see, my Lord. I hadn't understood that part either that when it comes up we may now as it were reapply --

MR JUSTICE BLAKE: I think you have to reflect on this. You will have some time because the first witness isn't concerned with this topic. But it may come up I think by Wednesday. I think you should see which articles which are co-authored you think are really important that you want to put to the witness as the supportive evidence, and if it precedes, i.e. is not created during the course of this litigation or it has been generally endorsed by a respectable body of academic opinion, in which case we'd like to know when, who and how, we can take it as a case by case issue.

MR CHARLTON: I think the respectable body of academic opinion is the respondents. But, my Lord, I know Dr Busby is reluctant to say something but he feels he does want to deal with the one issue because I am not --

DR BUSBY: If I may, my Lord, with regard to this document that I suggested was on your reading list which was important, this is the important one, which was co-authored by Professor Schmitz Feuerhake and myself and another German scientist, Dr Pflugbeil, we could of course make a separate application for a relaxation of your direction for this particular paper, but before I do that I should just say that this was not written for these proceedings, it was actually written by Professor Schmitz Feuerhake, whose English is not terribly good, and so she sent it to me to just turn it into better English and then it was submitted to quite a --

MR JUSTICE BLAKE: Well, she no doubt can talk about it but generally speaking you would not -- forget you, take you out of the picture altogether. I am going to depersonalise it to explain it. We have an expert X who is presenting a proposition for this Tribunal. The Ikarian Reefer tests requires expert X to identify all the sources of facts or information or scientific indications on which the opinion is based. The reason for that is so the factual basis for the opinion can be tested and clarified. If the factual basis for the opinion is the opinion of another then you can see why one then is drawn to the focus from expert A to the subordinate expert. But if it's not, and if the expert X simply relies upon their own previous writings, well

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generally speaking that's stand on one hand clapping save insofar as that intervention into the academic discourse has received general approbation. Who is it receiving approbation from? Well, Mr Y. I hope you can see the mechanics of where this goes?

DR BUSBY: I do have some difficulty -- similar ones, I won't go into them, I have much the same concerns as Mr Charlton advanced in this regard. It seems to me to be a sort of lese majeste relating to the whole concept of scientific peer review and what is accepted as scientific fact.

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