The Expert Witness, "Reporting for Duty, to Whom?"

By Timothy Ridley

Many an experienced construction professional would view the opportunity to give expert evidence in an arbitration, litigation or ADR as a pinnacle in their career. However before accepting an appointment an expert must fully understand what an appointment actually requires.

There is growing concern worldwide as to the role and proliferation of expert evidence. Is it right that particular experts can be sought for their known penchant for a certain methodology in assessing an issue, or that the experts themselves feel indebted to the party by whom they were appointed and remunerated? In an attempt to overcome these concerns many jurisdictions (not yet Hong Kong) are introducing guidelines and protocols for experts.

So what is the purpose of the expert, and his expert opinion (be it verbal, written, or both). It was put to me a long time ago that "as an expert you are the most important member of the hearing". The expert is present to serve the tribunal (for tribunal also read court or ADR hearing). An expert's opinion provides the tribunal with technical information which is outside the experience of the tribunal. Therefore the opinion is required to be objective, independent and thus capable of affecting the assessment of the probability of a fact in issue in the proceedings.

But as well as serving a tribunal an expert owe a duty to exercise reasonable skill and care upon those instructing them.

To help an expert meet their responsibilities professional bodies' have code of ethics pertaining to expert witness work which they hope their members will comply with. However such codes are general in their content and violations are rarely followed up in the form of any sanctions.

Nonetheless it is hard for an expert to ignore the basic premise that they have an overriding duty to help the tribunal on matters within their expertise, and this duty overrides any duty to their instructing party. Experts must not serve the exclusive interest of the party who has retained them. As mentioned earlier, the opinion must be independent, a good test being, would the evidence be the same if instructed by the other party. The evidence must be confined to matters relevant to the dispute and within the ambit of the expert's expertise. The opinion should only be given based upon the facts available and should be qualified if necessary where an expert's opinion has not been based on fact.

An expert may change his opinion during the course of the proceedings but should such an application be made to the tribunal then the tribunal will have to consider the nature and

costs to the arbitration arising from the change.

The party appointed expert has it's own particular issues to consider. Any consideration of a conditional fee must be rejected by the expert **(Sesa v Goa v A/S Bulk of Slimna 1997)**, as this would be in contravention of the overriding duty to the tribunal, compromising their independence (as indeed would having previously been employed as a claims consultant for either party). On this matter in relatively straightforward cases an expert could be an employee of one of the parties **(Field v Leeds City Council 2000)** provided they have sufficient understanding of their duty to the tribunal. In preparing the expert report itself, professional objectivity and impartiality must be maintained at all times, model forms being available from bodies such as the Academy of Experts verified by a statement of truth. In **Stevens v Gullis (1999)** an expert was found to have failed in his duty to act impartially where the expert refused to sign a joint memo of points agreed at a joint meeting between experts. If a party does not agree with a concession made by his expert there may become a problem where the parties only recourse is to ask the tribunal if they may appoint another expert, but the tribunal may not show to much sympathy. In **Stanton v Callaghan 1999** an expert agreed in a joint meeting that a less expensive remedial scheme was appropriate and his party claimed he was negligent. The Court of Appeal struck out the claim on the grounds of public policy requiring expert witnesses being immune from negligence whilst arriving at agreements. Any aspects of the evidence prepared by others or the opinion of others must be highlighted and verified. Experts should keep fact and opinion separate, it must be highlighted as to whether the facts were known or assumed and whether they were used as the basis for the opinion. It has always been a requirement that the expert should express his own independent view **(Cala Homes v Alfred McAlpine Homes 1995 and The Ikarian Reefer 1993)** In the UK new Civil Procedure Rules express this even more tightly thereby inhibiting parties from putting pressure on their experts, the "hired gun" scenario. The risks of the expert not employing his independent view are, amongst others, the conceding of points in discussions or cross examination, evidence being rejected, the effect upon their other independent evidence, and being named by a judge in the case of litigation or arbitral appeal.

Judges in Hong Kong and the UK have recently taken to naming errant experts, for amongst other things, not putting both sides of the argument, particularly in the programming field where the "black art" of critical path analysis and the "cherrypicking" of causes of delay can result in potentially very partisan evidence. If there are material facts in dispute then alternative hypothesis on each should be put forward. If one or other fact is more or less likely, a view should be given with reasons for holding it. Where issues involve a range of opinion or a differing school of thought, the party appointed expert option comes into its own, with the sources of schools of thought and opinions as to which one best suits the issue in question, need to be addressed. Scope has to be allowed for experts to amend their reports as a result of an exchange of questions and answers, meetings between experts or further/inconsistent evidence coming to light; this may result in a change of opinion. Alternatively experts may agree upon a joint report leaving unresolved matters to their respective reports if necessary.

What are the alternatives?

Single joint experts are a relatively new phenomena and are gaining popularity with arbitrators, indeed there have been fears expressed that single experts would be imposed

even in situations where they are perhaps not best suited . They can be used when issues are not felt to be contentious or complex, and therefore may be used to agree or narrow issues.

With a single joint expert there is a danger that the arbitration will be conducted by expert rather than by the arbitrator, the dispute should remain a dispute to be arbitrated by the tribunal. There is a traditional body of thought that will say that in complex and strongly contested cases the full inquisitorial or adversarial system is the best way of achieving a just result. I consider that if the knowledge and law relevant to the issue in mind is established, then the single expert system is more tenable. Perhaps then matters of valuation, cost or as-built programmes are best addressed by single joint experts. What could be seen as one disadvantage of a single joint expert isthat parties hire their own expert advisor to advise in turn the joint expert in the most beneficial way to his client, thereby incurring additional cost, unrecoverable in the hearing, and negating the potential cost advantage of the joint expert in the first place.

The single joint expert needs to conduct himself in a particularly unique way, i.e. he must keep all instructing parties informed of the steps he is taking, copying them in on correspondence and all meetings they attend must be joint ones. They owe an equal duty to the parties and an overriding duty to the tribunal. They should provide the same single report to both parties and the tribunal and it is then for the tribunal to determine the facts. Oral evidence is not normally required but they are available for parties to cross examine.

So what are the problems of a single joint expert, selection for one, agreement between the parties of the scope of the report and his obtaining of necessary information from one or both potentially stubborn parties. More importantly in my experience, in all but the most simple of construction disputes there is ample scope for disagreement between two experienced practitioners, and whether a single expert will be objective enough to consider all possible views is doubtful, sacrificing the strength of the adversarial system. Indeed it may be possible that the tribunal become biased by the views of their selected expert.

So how prevalent is the “hired gun”. Judges have long been dissatisfied in the UK with this approach, and the problem does not rest with the experts. Lawyers will search for the expert most likely to take their clients view, or they will “expert shop” to get one that gives the right opinion that they want to hear. Care needs to be taken here though, two experts in the same field arriving at different views does not necessarily mean bias, it could simply be a complex issue in a developing area of technical or legal knowledge. Australia has led the way in trying to address these concerns by making use of concurrent expert evidence or “hot tubbing” and using the single joint expert. Judges and experts seem to prefer the concurrent evidence approach, experts not being used to a world of examination and cross examination, prefer academic discussion between themselves and the arbitrators and certainly judges will find it easier to understand the concepts.

Perhaps the answer lies in educating and training of prospective experts to prevent them falling, or being pushed into the pitfalls that exist, in undertaking this most highly respected role within their profession.

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