To be or not to be an expert witness

Anne Wright of **Lawrence Stephens** and barrister **James Davison** of **3PB** provide practical guidance on selecting an expert witness, and advise witnesses how to behave once appointed.

KEY POINTS

- The practical side of retaining an expert witness
- Who to appoint as an expert
- If you want your expert analysis to be taken seriously by an adjudicator, it pays to work to the highest standards
- CPR 35 practice notes and guidelines

'The expert witness's primary duty is to help the court and this duty overrides any duty which experts may have to those who are instructing or paying them' (see the Civil Procedure Rules 1998 (CPR) r 35.3 – 'An Expert's Duties'). The expert witness is not the decision maker – the role is to provide information to assist a third party – judge, arbitrator, and adjudicator – to decide a case before them. The danger of conflating the two roles has been well aired in case law.

Similarly, case law on what constitutes expert evidence and what does not, and commentary on where expert evidence has gone awry, is rather too plentiful. This article however is not intended to dig and delve into evidence of fault but rather to give some background as to the use of experts in construction, and provide practical pointers to both the appointment of an expert and to the expert, once retained.

Experts in adjudication

In the construction industry the dominant form of dispute resolution remains adjudication under the Construction Acts. In that forum experts are regularly appointed by the parties to support and add weight to their positions and often form part of a referral. The response of adjudicators to that evidence is as varied as the adjudicators themselves.

How to get the expert analysis to be taken seriously

Some adjudicators more or less dismiss the 'expert' evidence as little more than representations or submissions from a 'technical advocate'.

More often however, adjudicators treat an expert's report with just a degree of healthy skepticism, on the grounds that there is a limited opportunity to test the evidence, and the report may not have been prepared with the protections CPR Pt 35 has in mind.

If you wish for your expert analysis to be taken seriously by an adjudicator therefore, it pays to work to the highest standards. This means the standard you would expect to be held in litigation, both in terms of the quality and completeness of the work, and the detachment and independence of the assessments, calculations and conclusions.

This will also depend on how the party is represented. If the representations are being provided by the same person, or same business as the 'independent' expert report, then this is likely to reduce the weight that is to be given to the evidence, on the grounds that the report will tend to be argument – with a good command of the technical details – rather than independent expert evidence.

Remember that most adjudicators have been working in the area of construction for a long time and many have provided their own expert reports – this means they are savvy and understand the tricks of the game – fortunately this also means they are not easily fooled!

Time pressures in adjudication

Time pressures really tell in construction adjudication, the process is very rapid, and is frequently concluded within 28 days. When responding to a referral notice success can depend on finding an expert who is available, who understands the constraints of the process, and the standard to which they have to work.

Collaborative working is likely to be required between the expert team, the lawyers and client team, when assembling any reply. For that reason, finding competent expert resources at short notice will require a degree of 'expert witness shopping' – frequently of the 'clerking' kind where availability and ability are the issue.

Experience shows that only limited results can be achieved in a limited time, and generally the better experienced experts recognise this and define their deliverables accordingly.

Experts in arbitration

Arbitration in the construction industry still remains the most flexible method of dispute resolution in comparison to adjudication and litigation. The parties can (and indeed should) adapt the process to the dispute, and this can result in a process which actually suits the dispute.

Managing costs

Although arbitration is certainly not a cheap option, it remains an innovative and innovating process that can enable the resolution process to be shaped by the dispute so that costs can be managed and adequately limited in that way.

The classic way this can be achieved is by splitting liability and quantum so that the costs of preparing quantum reports only get incurred once the liability for the types or heads of loss is settled.

The privacy of the arbitral process has merits, but like adjudication it means that any failings of individual experts stay behind closed doors.

Experts in litigation

The experience for the experts

Giving evidence in the High Court and being cross-examined remains the single most significant step for those that wish to become experts take in order to establish their credentials and show that they can do the job. This is because the Technology and Construction Court (TCC) is the most public, exacting and daunting forum for construction dispute resolution.

One suspects that the experts tend to put their rates up after they have had a few trips to court, but perhaps the nature of the experience they gain means they have earned the right to do so. This is because the expert who has been tested in court, is likely to apply the lessons learned to the next report, and gain an even greater appreciation of the circumspection and clarity required to discharge the duty to the court. It is however something of a miserable experience being cross-examined and answering questions from a judge, and then waiting months for judgment.

All this tends to focus the individual's mind on the duty of being an expert – and if they are ever going to consider going into court again, perhaps makes for a better expert report on those subsequent occasions.

Experts at mediation

It is not uncommon for an expert to attend part or all of a mediation session. The point of practice we would flag on this area is the need to avoid compromising the expert's ability to give independent expert evidence if the matter does not reach a successful conclusion. Be aware that the expert is not simply co-opted on to the client team for the day to address technical issues or matters of quantum – they are still to remain independent of view.

It is not uncommon for the experts to be put in caucus during a mediation which they attend. It is also not uncommon to need to send them out of the room when instructions are being taken on factual or tactical considerations.

In short whilst you plan to settle the case with the experts' assistance, their status as independent persons need to be respected and preserved. This can be difficult after the first four hours when the biscuits are all gone and you are on to your fourth coffee.

Common features

Codes of practice

Irrespective of the dispute resolution forum, experts will probably still need to adhere to their professional codes of conduct for working in the field of giving expert evidence.

RICS produces a very helpful and practical set of practice notes which we would fully recommend reading, available at *www.rics.org/uk/upholding-professional-standards/sector-standards/dispute-resolution/surveyors-acting-as-expert-witnesses/*

Changes of mind?

The golden rule for any expert is to let the instructing solicitor know as soon as a conclusion has been reached which is different to that that which was originally given – that is, it is an actual change of mind, and not just had a wobble! The RICS practice notes say that this is a requirement and the reasons behind the requirement are good ones: the advice may change as the evidence unfolds and the commercial approach may change as a result.

Even if the appointing party is disappointed by finding out about the weakness of the case, an apparent disaster can be avoided if such knowledge leads to a settlement, which saves costs or enables a better pitched Pt 36 offer – all which is an argument for getting the best expert advice as soon as possible.

The 'worst' time (from the client's point of view) is when the expert's opinion changes during the course of giving evidence, as it leaves the appointing party with a limited range of options after the costs of an expensive trial have already been incurred. Not wanting to be seen to change your mind (for whatever reason) is one of the reasons for the stresses of being an expert, and one of the reasons they can be too slow to do so.

The expert has skin in the game

The reputation of the expert is always in issue in contested proceedings. No matter what the process, the experts conduct could be revealed as having been given in a manner which does not comply with professional standards – whether on enforcement of the decision, or in a complaint to a professional body.

Quite simply, the expert should not be an interested party by being offered, or accepting, a fee which depends on the success of the appointing party's case – this is an obvious incentive which may place them at odds with their duty to the court.

What are you expert in?

In each of the processes considered, the person in the role of expert is likely to be criticised if they are offering an opinion on matters that should be left for the tribunal, or which they are not really expert in.

There is always the question, as to the extent to which a person who does nothing but compile expert reports, can give informed expert evidence about the relevant field of practice if that is not what they do.

This issue is probably worse if the person has a split practice between 'Claims Consultancy' and 'Expert Report Writing,' but the criticism can also be legitimately levelled at an engineer who no longer does any engineering, or a project manager who has not managed a project since the days when JCT '98 roamed the earth.

Conclusion: why do it?

When in court, in an arbitration or adjudication hearing, one cannot help but think 'why does this smart person get involved in giving evidence?' – especially if they have done it lots of times. The answers tend to be:

- a desire to work at a higher level of complexity and responsibility;
- a wish to break out of or not be limited only to the area of professional practice chosen;
- for some a desire to work in what is perceived as a higher status area of practice;
- for others a chance to earn a higher fee – the dream of first class lounges and trips to Dubai which more than likely are nightmares getting to a hearing on the Northern Line or King's Lynn.

Many speak of wanting to be tested, and they can be sure that if they accept instructions for expert witness work they are signing up to deliver a high wire act.

There is a great line from Groucho Marx which reads:

> 'The secret of life is honesty and integrity ... if you can fake those you got it made.'

But ultimately when we go looking for experts that is the last thing we want – we are looking for someone who knows their business, and gives the evidence to you as early as possible, and in a form which is completely straight, so you can advise the client and run the case as well as it can be run.

You want someone who won't croak or crack in the box and who really does have the knowledge that the parties and the court need. Part 35 requirements, and the judges of courts like the TCC, holding experts to that standard, have made it more likely that we will get work produced to the right standard. **CL**