

**The Quantity Surveyor as Expert Witness**

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## What is an Expert Witness?

### Definition (Black's Law Dictionary)

- A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder (the judge or arbitrator)
- A witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialised opinion about the evidence or a fact issue

## **What is an Expert witness?**

- Professional training or mere qualifications are immaterial and not a prerequisite to giving evidence
- Mere academic qualifications may not be sufficient
- The court or arbitrator decides whether the witness has sufficient skill to qualify as an expert
- An expert is quite different from other witnesses who give factual evidence. Only an expert is normally allowed to give opinion evidence (although a factual expert may be adjudged competent to give expert evidence also).

## Qualities

- Analytical mind
- Objective judgment
- Recognition of the merits in alternative approaches
- Concise reporting
- An interest in researching
- Patience
- Tact
- Ability to resolve issues capable of resolution during the process
- Coolness under pressure
- Realism
- Honesty, integrity and credibility
- Thorough technical knowledge (acknowledged and cutting edge)

## **The Expert Witness in the spotlight**

- Courts concerned about the performance of experts
- National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (1993)
- Pearce v Ove Arup partnership (2001)
- Skanska Construction UK Limited v Egger (Barony) Ltd (2004)
- Sir Roy Meadow and the Cot Death cases (2005)
- The Civil Procedure Rules in the UK
- The Civil Justice Reform in HK

You should only act as expert if you have

- The ability to act impartially
- The experience, knowledge and expertise appropriate for the assignment
- The resources to complete the assignment within the timescales and to the required standard

## Impartiality

- Conflicts of interest?
- Prior involvement with either party?
- Existing commitment with either party?
- Dual role, have you given advice to either party?
- Have you assisted with preparation or defence of claims?

## Duties to tribunal

- The rules set down in the *Ikarian Reefer*
- The requirement to sign a Statement of Truth (UK Civil Procedure Rules and now Civil Justice Reform (a April 2009) in HK) – not applicable to arbitration
- Declarations
- Overwhelming need to note that duty is to tribunal and not to paying client

## The Ikarian Reefer

- Independent product of the expert, uninfluenced as to form or content by exigencies of litigation
- Unbiased opinion in relation to matters within expertise
- State facts or assumptions relied upon
- Identify what falls outside expertise
- Indicate provisional opinions
- Communicate change of views
- Provide copies of evidence to other side

## Statement of Truth

“I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion”.

## Declaration

- Report includes all facts relevant to opinions, attention drawn to any matter affecting validity
- Duty to tribunal overrides duty to those instructing or paying me, understood duty and complied giving evidence impartially and objectively, will continue to do so
- Not instructed under conditional fee arrangement
- No conflicts of interest other than those disclosed
- Report complies with requirements of RICS practice statement

Rules of High Court (Amendment) Rules 2008 (applicable to litigation)

Cap 4A, O38, Evidence

Rules 35

- (1) It is the duty of and expert witness to help the Court on matters within his expertise
- (2) The duty overrides any obligation to the person from whom the expert witness has received instructions or by whom he is paid

See Code of Conduct at Appendix D to Rules of High Court (Cap 4A)

## **See Code of Conduct at Appendix D to Rules of High Court (Cap 4A)**

Application of Code

General duty to Court

Declaration of Duty to Court

Expert report to be verified

Form of Expert Report

- General requirements
- Completeness
- Insufficient research
- Changes of opinion

Expert's conference

Proceedings for contempt of court

## The appointment

- Obtaining clear instructions
- Incorporating instructions in report
- Changing instructions
- Adopting report as statement of case by party
- Terms of appointment
- Fees and getting paid
- The expert as a distressed purchase

## Preparing the report

- Meeting the timetable, the problem with constant changes
- Necessary resources, using assistants, declaring their involvement, ensuring no conflict, expert to stay in control
- Producing draft reports, consulting client and solicitors, preserving independence

## Preparing the report

- What constitutes an opinion?
- Must be supported, simply “I consider the rate should be \$x per m<sup>2</sup>” without explaining where obtained is unacceptable - proper analysis of rates and prices with full supporting information
- Not acceptable to rely on what others have told you without applying your own opinion and reasons
- If further research is required then state the enquiries made, to whom and what the outcome was. Express reservations.
- Sunbond Engineering v Konwall Construction (2004)

## Normal rules of procedure

- Preparing without prejudice reports
- Meeting of experts
- Joint reports
- Changing views and consultation with clients
- Final reports
- Rebuttal reports
- Supplemental reports

## The other side's expert

- The joint report and its format
- What you have agreed and why you have not agreed
- What to include in the report – differences of view
- Relationship with other expert
- Should solicitors attend the joint meeting
- Ongoing need to discuss and amend joint reports
- QS experts normally reach large measure of agreement
- Compromise settlements with client's agreement

## Inspections

- Important to view site and carefully record what is found
- Photographs incorporated in report
- Gaining access – often difficult especially housing developments or private areas
- Meeting other experts on site, agreeing measurements or records

## Sharing information

- Ensuring each side has the same information
- Other side's expert based on information not disclosed
- Need to draw to attention of instructing solicitor
- Requesting further information
- Ensure that further information passed by other side's expert to you has been discovered

## The hearing

- Preparation for cross examination
- Interviews with counsel and solicitors
- Giving evidence – know your report
- Know the other side’s report and anticipate the questions to be asked
- Be prepared to make concessions – you will be judged on how you deal with your weakest point in cross examination, and how you deal with your own mistakes
- Don’t be smart with counsel
- Beware of re-examination by your own counsel
- Out of communication during evidence – difficulty if assistance is required
- Hot Tubbing – each expert cross examine one another before the judge or arbitrator

## Assisting counsel

- Advising cross examination points on other side's expert report – how far do you go?
- Amending your own report
- Acceptance of errors and need to correct, advise counsel
- Assisting counsel at the hearing
- Beware of getting too involved in your party's case

## Single Joint Experts

- See RHC Cap 4A, Order 38 on Evidence
- Economical in small disputes
- Problematical in large disputes where each side wants his own expert
- Problems in making appointment
- Difficult to agree on instructions
- Danger of having case presented to both JSE and to arbitrator
- Difficult to contain questions and limit them – problem for arbitrator
- Difficulties for counsel if SJE views unacceptable
- Sounds OK but does it really work?

## Dual roles

- QS often engaged during contract to provide advice
- Problems if advice conflicts with opinion as expert, difficulties with client who bases his case on prior advice
- Potential for bias where prior advice conflicts with duties of expert (*London Fire and Emergency Planning Authority (LFEPA) v Halcrow Gilbert Associates Ltd and Others, TCC, 2007*)
- Contingency fees either for advice given or for acting as expert are inadmissible – evidence stands to be disregarded due to lack of impartiality
- What if the expert's company is engaged by client and has contingency fee arrangement? (*Tang Ping Choir & Ano v Secretary for Transport (2004)*)

## Immunity

- Experts are immune from action in giving opinion evidence
- This does not extend to the provision of advice which is separate and not part of their opinion evidence
- Immunity extends to preliminary conduct pursuant to expert services
- Does not extend to criminal prosecution for perjury, perverting the course of justice or contempt of court
- Does not extend to action by professional body (Sir Roy Meadow v General Medical Council (2006))
- Does not extend to libelling other side, or malicious evidence
- Does not cover breach of confidence where expert report disclosed to others without their consent
- Assume immunity may not apply
- Wasted costs

## Getting paid

- Ensure terms of appointment are clear and permit for proper payment during the course of the appointment and do not depend on the outcome
- Include terms which allow for withholding reports pending payment of fees
- Allow for increases in fees over period of time, some appointments last for years
- Cancellation fees
- Solicitors and client jointly and severally liable?
- Taxation by tribunal on expert fees not to be relevant to fees payable to the expert
- Interest for late payment

## Disputes on fees

- Be aware that there may be a genuine disagreement on fees
- Refusing to serve reports or attend hearings may have serious financial implications on expert if unjustified
- Allow for payment of undisputed amount and make provision for dealing with disputed fees (mediation etc)
- Disputes on fees are commonplace, paying party often short of funds and/or wants to await the award or judgment
- Parties frequently run their case on the credit provided by their solicitors, counsel and consultants – technically they may be insolvent