

EXPERT WITNESS EVIDENCE IN CONSTRUCTION DISPUTES



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The importance of the correct utilisation of experts

The construction industry brings together a diverse range of professional disciplines to deliver construction projects. As a result, disputes frequently involve overlapping technical issues across multiple disciplines. Given this complexity, tribunals rely heavily on the independent opinion of the experts in these fields. This article examines the role of expert witnesses in construction disputes, focusing on practical challenges faced by experts, lawyers and instructing parties and how to overcome them.

The role of expert evidence will be familiar territory for those involved in resolving construction disputes and experienced practitioners will recognise the critical role that expert witnesses play within this. The traditional role of the expert witness is to provide the tribunal with specialist, independent and unbiased evidence in fields that lie within their area of expertise. In the United Kingdom, the civil procedural rules govern the use of experts in the Technology and Construction Courts. CPR 35.2.1 defines experts as follows:

(1) A reference to an 'expert' in this part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings.

CPR 35.3.1 and 35.3.2 set out the duties of experts as follows:

1. It is the duty of experts to help the court on matters within their expertise.
2. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Variations on the above definitions can be found in the guidance notes relating to international arbitration, the Royal Institution of Chartered Surveyors, the Academy of Experts and many others. However, most of these definitions are derived from the well-established *Ikarian Reefer* case, which further emphasises the following:

- Independence: Expert evidence must be the independent product of the expert, uninfluenced by the pressures of the case.
- Objectivity and bias: Experts must provide objective, unbiased opinions on matters within their expertise.

Parties now frequently seek expert opinion at an early stage to inform their choice of dispute resolution route. As a result, experts can find themselves appointed in various stages throughout the dispute resolution process, such as:

- I. Pre-dispute/preliminary opinion.
- II. Mediation.
- III. Conciliation, expert determination and dispute panels.
- IV. Adjudication.
- V. Arbitration.
- VI. Court proceedings.

Irrespective of the forum, there are four recurring challenges of expert witnesses: Timing of appointment, quality of the supporting information, opposing expert conduct and managing instructing party expectations, for which I provide practical guidance below.

Common challenges for the construction expert and how to overcome them

Timing and scope of the appointment

Experts are often appointed once dispute proceedings are underway, when the tribunal or the parties have already agreed on the timetable.

This is seen often in UK statutory adjudications, which can involve incredibly short timescales in which an expert is required to provide an opinion on complex matters, often involving the examination of extensive volumes of documents.

In this scenario, the expert appointed by the responding party often feels vulnerable due to the limited time available to assist the adjudicator and the expert's instructing party. Conversely, the opposing expert may have had months to prepare their analysis and to conclude upon their findings. This creates a degree of misalignment between the time each expert has had to conduct their analysis and form their opinion. In this situation, experts need to think dynamically and consider what value they can deliver within the time available rather than what the ideal circumstances would have been. This often involves

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identifying and distilling the key issues into manageable portions and establishing a reasonable, efficient and proportionate approach to the matters at hand. An expert's duty is ultimately owed to the adjudicator as it would be in arbitration or litigation. The expert's thought process should always be anchored in determining how they can assist the tribunal, even when faced with challenging constraints. Despite facing challenges, experts can still provide valuable insights to the tribunal by:

- I. Agreeing or disagreeing with certain approaches that the opposing party or expert has adopted.
- II. Distilling and identifying where the heart of the dispute lies and addressing these key issues.

In doing so, the expert needs to consider whether their views actually help the tribunal. For example, if the expert sets out everything that is wrong with the other side's position (often referred to as the 'negative case') but is unable to offer a tangible alternative to the decision maker (often referred to as the 'positive case'), then this may not necessarily be helpful to the tribunal. Ultimately, if what the expert has provided the tribunal is not helpful, they have arguably not performed their role, their findings may be ignored, their client will have incurred cost with no tangible benefit and their position may be disadvantaged. However, if the expert's opinion is fundamental to the validity of the opposing party's position, then it may still assist the tribunal for the expert to provide an opinion on these matters. Clearly, each situation will depend upon its own particular circumstances.

It is prudent to engage with experts at the earliest opportunity. Experts can provide valuable insights by providing a preliminary 'independent' opinion on pertinent aspects of the dispute without the inherent bias from the project history. This can often lead to the instructing party reassessing their position, allowing them to potentially engage in settlement negotiations on a firmer footing and recalibrate their expectations.

Whilst the experts' audience at this stage is not the tribunal, the duty of impartiality and independence ought to remain the same. In my experience, it is not uncommon for the instructing

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party to be displeased with the preliminary opinion of the expert if it does not align with their own expectations. However, by receiving this preliminary opinion early in the process, the instructing party has the opportunity to scrutinise the conclusions of the expert and will be in a much better place to understand the relative strengths and weaknesses of their position. They will also be better informed to decide on whether to advance to formal proceedings, to collect further evidence to strengthen the position or to re-engage in negotiations with the other party. In any case, as a result of this early engagement, should proceedings be raised by the other party, they are better prepared to defend their position. Additionally, if the expert is appointed early in the process, then this appointment need not be costly as the scope of the appointment can be initially limited to key issues and incrementally increased depending on the expert's preliminary opinion.

Quality and completeness of supporting information

An expert's opinion is significantly influenced by the data that is available to them. The data gives the expert a foundation on which to base their opinion. This is essentially the 'known knowns'. Thereafter, the expert must wrestle with gaps or deficiencies in the data, which can be referred to as the 'known unknowns'. Experts will often use assumptions or experience to circumvent this issue. There are also the 'unknown unknowns' which can take many forms. A common complaint from experts is that the quality of the

data provided to them can vary considerably. This often results in:

- I. Inefficiencies relating to information requests.
- II. Overreliance on assumptions, qualifications, and witness evidence.
- III. Provisional assessments, sampling and uncertainty.

It is highly advantageous if the instructing party can identify, as quickly and efficiently as possible, the information that exists which is relevant and which can be used by the expert to support their opinion. Experts are often asked by the instructing party to provide a Request for Information, and whilst, based on industry experience, experts are capable of providing a comprehensive list of what types of information may exist, the process can be greatly expedited if the instructing party can provide this information in an orderly and accessible manner.

It is often the case that much time, money and effort are expended on the collation of this information. It can also be costly and inefficient for an expert to base their opinion on a set of project records, only to find out later that there were other relevant records which significantly impact their opinion. If there are gaps or inconsistencies in the data provided to the expert, then they must ensure that they are transparent about any assumptions made, the gaps in the information and the potential limitations of their analysis. This approach ensures that the expert's credibility is retained. Again, when thinking about how experts can best assist the tribunal, it is essential to ensure that the expert has the best platform possible to enable them to perform their duties.

Approach of the opposing party and their expert

Most construction disputes that proceed to a dispute forum will involve an opposing expert. Whilst many of the opposing experts will understand the duties of an expert and operate in good faith, there may also be occasions where they don't, or the basis of their instructions is not conducive to cooperation. When situations like this arise, it can be challenging for the expert, especially if the opposing expert is operating under different instructions or their instructing party has limited the scope to prevent them from considering fundamental matters. Furthermore, it is not uncommon for opposing experts to adopt an adversarial approach and act as an advocate. In situations like this, it is key to reflect on the expert's overriding duty, which is to provide an unbiased, independent professional opinion that will assist the tribunal. The expert's role is not to help a client win a case, nor to be obstructive and make life difficult

for the experts on the other side. Indeed, paragraph 11 of the Civil Justice Council (CJC) states:

“A useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators”.

Consequently, experts ought to approach expert meetings collaboratively and seek to establish common ground and areas of agreement. Expert witness interactions needn't be adversarial. Robust professional disagreement is fine; it is advocacy or obstruction that can cause problems.

In its simplest form, the role of the experts is to help the tribunal to decide on an area outside of their expertise. To this end, the experts should carefully consider the items of difference that remain between them, as these are the issues that will ultimately require the tribunal to decide upon. In situations where there is a disconnect between the respective expert instructions, it is incumbent on the experts to bring these to the attention of their own instructing party in an attempt to minimise the impact of this. This disconnect often arises due to the instructing parties' position on matters of liability. Where possible, it is useful to provide an opinion on both positions of liability to provide the tribunal with options, depending on what they end up deciding. However, in situations where the opposing expert is not cooperating, it is important that the expert remains calm and operates in accordance with the duties of an expert. They must also remember that it is their job to make the tribunals' lives easier, and to provide their own instructing party with an unbiased and independent

opinion, which should result in a narrowing of the issues or lead towards potential settlements.

There are many instances in which experts have received heavy criticism in a judge's decision due to their behaviour. This is not surprising given that they are expecting the experts to make their life easier, not harder.

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Expectations and approach of instructing parties

Whilst some forums will involve single joint experts or tribunal appointed experts, in most construction disputes, the tribunal does not instruct the expert. Therefore, the expert has to navigate the competing interests of maintaining their own professional integrity and reputation against the desire of the instructing party to win its case. In such situations, it is not unheard of for instructing parties to:

- I. Encourage the expert to adopt its position.
- II. Withhold information from the expert which may be detrimental to its position.
- III. Restrict the scope of the expert's instruction to prevent them from considering alternative positions.

These are essentially the same behaviours which are challenging when adopted by the opposing party. In this scenario, experts have an onus to push back if instructions compromise independence. When this type of situation occurs, it is useful to pause and remember why experts are appointed in the first place. One of the key benefits of appointing an expert is that expert opinion carries greater evidentiary weight than arguments presented by the parties directly. The reason for this is that the tribunal will expect the expert to carry out its role diligently, independently and without inappropriate interference from those who instruct it. Consequently, for an instructing party to benefit from the higher standard of evidence that it provides, they must also accept that the expert's conclusions may differ from their own position and that the expert must be provided with the reasonable tools to carry out their role.

Lawyers play a crucial role in this situation; they are the interface between the instructing party and

the expert. Thankfully, most lawyers understand this and are highly skilled at managing the instructing parties' expectations and behaviour. However, there are examples where instructing parties will take every opportunity to place undue pressure on the experts. It is worth remembering that whilst expert opinion is a higher weight of evidence, if the tribunal decides that the expert is simply advocating their client's position, they will likely disregard the expert's evidence, defeating the purpose of appointing an expert in the first place and leading to unnecessary expense.

Using experts to achieve better outcomes

In conclusion, the early engagement of experts can assist parties in understanding the strengths and weaknesses of their positions, to refine their strategies and therefore to make better-informed decisions regarding potential settlement/ escalation discussions. They should also be provided with all of the relevant information in an accessible manner to help avoid inefficient and costly exchanges. Whilst experts may face challenging constraints, they do so being mindful of their duties of independence and impartiality, and their overriding duty, which is to assist the tribunal should the matter proceed to formal dispute resolution.

By focusing on the key issues, highlighting areas of agreement and disagreement and presenting reasoned alternative positions, the experts can assist parties in informing decision makers in deciding their strategies for resolving disputes. Instructing parties must remember that maintaining the impartiality and independence of the expert evidence is essential to maximising its effectiveness and value. Given the duties of an

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expert, the relationship between opposing experts should not be adversarial. Moreover, a more collaborative approach can narrow the areas of disagreement, helping to streamline the issues to be considered, in line with the overarching requirement for the expert to assist the tribunal in narrowing issues and agreeing facts. Ultimately, the correct utilisation of experts with early engagement, clear instructions and access to all of the required information can lead to more efficient dispute resolution processes, reducing costs overall and increasing the likelihood of successful outcomes based on better-informed decision making.

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