

# How to get the best out of your expert witnesses

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# How to get the best out of your expert witnesses

- The Tribunal must believe them
- Authoritative
- Independent
- Properly researched
- Conclusions follow the analysis
- Expert understands duties and has served those duties

# Selection – a good process

- Make sure client understands importance
  - Not just in professional negligence cases
- Interview
  - Relationships
  - “*yes - men/women*”
  - Hypothetical questions
  - Past experiences – best/worst
  - Testing for cross-examination
    - Robust
    - Communication skills
  - Interviewee’s questions
  - Beware The Salesperson

# Selection – good criteria

- Peer recommendation (inc. cross examination)
- Past judgments
- Published works *Cala Homes v Alfred McAlpine* [1995] FSR 818  
“... (the expert witness)...will with appropriate subtlety be ‘a hired gun’”
- Check the CV
- Conflicts checking
- Availability *Skanska Construction UK Ltd v Egger (Barony)* [2004] EWHC 1748 (TCC)
- Support team:
  - Expedition & cost; vrs
  - Quality and familiarity

# Selection – good characteristics

- “*Gravitas and intellect*”
- Knowledge
- Understanding
- Expression
- Clarity
- Flexibility
- Professionalism
- Thoroughness *Skanska v Eggar; Great Eastern Hotel Company Ltd v John Laing Construction Ltd [2005],*
- Resilience
- Team Player

# Selection – bad criteria

- Does the client understand importance?
- Does client understand the duties?
- *“Ticking the box”*
- Cheap vrs value for money?
- Contingency fees
- Partisan – “hired gun”
- The consultant who prepared the claim!
- Existing personal relationships???

# Check those qualifications

*BSkyB v HP Enterprise Services* [2010] EWHC 86 (TCC)

- Witness of fact:

- MBA from Concordia College, St John, US Virgin Islands
- Studied there for 2 years
- Flew to the island for lectures
- Could provide 5 to 10 old course text books to prove it

- **Facts:**

- There never had been a Concordia College, St Johns
- There was no airport on St John
- Concordia College was a website awarding degrees for a fee
- Including Counsel's dog Lulu
- Presented 1 text book, recently borrowed from his local library in Missouri

# Instructions

- Scope
  - Sufficiently wide?
  - Too wide?
  - Flexibility
- Use of Expert Briefs
  - Common to both experts
  - What the tribunal needs
  - Get the expert's input
- Provision of documents
- Lines of communication
- Applicable Rules
- Duties
- Timetable
- Expert's duty to ensure properly instructed



# Early Instruction

- The *Expert Advisor*
  - Separate consultant
  - Precursor to expert witness role?
  - Before the claim is prepared
  - At pleadings stage
- Is the claim or defence supportable?
- Professional negligence (*Pantelli v Corporate City Developments* [2010] EWHC 3189 (TCC))
- Avoid wasting costs
- Improve settlement prospects
- Timetable savings?
- Subject to retaining independence

# The report(s)

- Early skeletons:
  - Issues
  - Methods
  - Alternatives
  - Required evidence or instructions
  - Feedback
- Updated drafts on the above
  - Progress against timetable
- *“Would you write that if instructed by the other side?”*
- Does the expert know his/her report?

# Report structure

- Background
  - The expert
  - Instructions
  - Documents provided
  - Underlying contractual and factual understandings
- Executive summary
- Body
  - Analyses fully set out
  - Conclusions follow the analysis
- Documents relied on indexed or attached?

# Report Body

- Section for each topic – (easy to digest)
- What each party says on topic
- Resulting differences addressed
- Analysis
- Including alternatives
- Conclusions on topic that follow the analysis
- Confirmation bias
- Next topic

# Report style

- An easy read?
- Over-complex?
- Over-long?
- Focussed on the relevant issues?
- A balanced view
- Will it help the hearing – agenda/issues?
- “*Less is more*”

# The facts relied upon

- Are they clearly stated?
- Are their sources stated?
- Are facts and opinions clearly separated?
- Do opinions address alternative facts?

# Thoroughness

- Eg AoE Model: “.. exercised reasonable skill and care in order to be accurate and complete..”
- Tension with time/fee/instructions/scope limits
- Experts must clearly qualify opinions
- Examples:
  - Not checking underlying documents:  
*Marlow v Exile Productions* [2003] EWHC 2631 (QB)
  - Not visiting site:  
*Pearce v Ove Arup* [2001] EWHC Ch 455
- Causes of lack of thoroughness:
  - Sloppy approach?
  - Hiding something?
  - Limited time/fee/instructions/scope ?

# Thoroughness and Sampling

- General benefits of proportionality
- Express rules eg CPR “*that which is reasonably required*”
- Examples:
  - Variations
  - Defects *Carlisle Investments Ltd v Wimpey* [1980] 15 BLR 109
- The 80/20 rule
- Sample both large and small items?
- Agree sample with counterpart expert?
- Random / representative sample?



# Sampling -Dangers

- Tribunal:
  - Is the sample representative?
  - Is the sample large enough?
- Must convince the Tribunal - or evidence may be ignored

- See:

*Associated British Ports v Hydro Soil Services* [2006] EWHC 1187 (TCC)

*Amey LG v Cumbria County Council* [2016] EWHC 2856 (TCC)

- Sampling was acceptable
- But it was not random, so Council had to prove it representative
- Council failed to prove sample not infected with bias

# Range of Opinions

- Some issues are not capable of definitive answers
- Is a precise number false precision?
- Eg where alternative sources have different outputs
- See CJC Protocol (amended 2009) articles 13.12 and 13.13

# Report methods

- Credible?
- Transparent?
- Address opposing expert's approach? *UPL Europe Ltd & Anor v Agchemaccess Chemicals Ltd and Ors* [2016] EWHC 2889 (Ch)

# Methods – credible and transparent?

## *Trebor Bassett v ADT Fire [2011] EWHC 1936 (TCC)*

- Expert 1:
  - Tests by the expert's students, unwitnessed by the expert
  - One student's internet blog "*Today, We Have Been Mostly Burning Popcorn*"
  - The tests we videoed, but the video not made available
  - Tests were carried out unilaterally
- Expert 2:
  - Contained modelling carried out by a colleague
  - The report did not fully explain the modelling carried out
- Judge's conclusion:

*"dubious about the reliability of all of the expert evidence presented to me"*

# Methods – credible and transparent?

*Double D Communications v News Group [2011] EWHC 961 (QB)*

- Expert 1:
  - Evidence from an internet discussion board
  - “total strangers via Google – who do not consider themselves qualified to answer his queries”*
- Expert 2:
  - Conclusions? Yes
  - Reasoning? No (*“confidentiality”*)
- Judge’s conclusion:
  - “I was left, in effect to evaluate two competing stabs in the dark”*

# Methods – Judge left with only 1 option

- *Riva Properties v Foster and Partners* [2017] EWHC 2574 (TCC)

*“no intellectual justification whatsoever”*

*“verging on nonsense”*

# Methods – Sensible?

*SABIC v Punji Lloyd* [2013] EWHC 2916 (QB)

*“His approach to what was critical was idiosyncratic in the extreme”*

*“... so artificial as to be effectively valueless”*

*“... his analysis ignored actual progress ...”*

# Methods – Sensible?

*ICI v Merit Merrell* [2018] EWHC 1577 (TCC)

ICI's quantum expert:

- Applied a costs based method of valuation that:
  - Was different to the contract rates used by the parties throughout the project
  - Had no contractual basis whatsoever
  - Was a wholesale departure from the contract terms
- Set out no alternative valuation at contract rates

The judge:

*“not the type of evidence that an independent expert, complying with their duty to the court, should be giving”*



# Methods – Balanced?

## *Great Eastern v John Laing*

*“..... failure to consider the contemporary documentary evidence photographs and his preference to accept uncritically Laing's untested accounts....”*

*“I sadly conclude that he has no concept of his duty to the court”*

# Methods

*Castle Trustee v Bombay Palace Restaurant* [2018] EWHC 1602 (TCC)

The expert:

- Late replacement of a colleague
- Instructed to carry out limited work
- Given limited documents
- Adopted his processor's draft report, agreed the method and adopted his conclusions

The Judge:

- The expert's report:
  - *"was not expert evidence"*
  - *"did not comply with the Court's Order"*
- The expert:
  - *"had not acted in accordance with CPR Part 35"*

# Report – Over-complex?

*Skanska v Eggar* hundreds of pages and 240 charts

*“... was not entirely familiar with the details of the report, which he signed and presented”*

*“..... inadequate research and checking”.*

*“It was not thorough. It was not complete.”*

*“..... neither supported by the pleadings nor the evidence”*

# Report – Helps the Tribunal?

*Compania Sud America v Sinochem Tianjin* [2009] EWHC 1880 (Comm)

14 expert reports, several without permission of the Court

*“It was not always apparent what message was to be derived from or proposition supported by the data”*

# Report – Helps the Tribunal?

*Pride Valley Foods v Hall* [2000] EWHC 106

*“deals with a number of questions which appear to have been posed by his own solicitors. Many of these are questions for the court and not questions for the experts.”*

*“purports to make many findings of fact on questions which are matters for the Judge.”*

*“offends against the established basis on which experts should give evidence.”*

# Information

- Accuracy will be essential
- Provision balance between:
  - Over-burdening with irrelevancies
  - Making sure experts have all they need
- Requests balance between
  - Providing what is necessary rather than just interesting
  - Making sure experts have all they need
- Unnecessary costs
- Unnecessary complexity
- Superficiality
- Ease of access
- Instruction/assistance on finding documents

# Team interactions

- Lines of communication - through you
- Timely payment of fees
- Client limits on time and fees
- Influence on the expert's drafting of:
  - Client
  - Lawyers

# Assistants

- Benefits:
  - Cost saving
  - Time saving
- The danger of over-reliance:
  - Not the expert's views
  - Cross examination *Skanska v Eggar*
- Use of the party's staff *Regina v Balfour Beatty* [1999] 68 ConLR 180
- *SPE International v PCC (UK)* [2002] EWHC 881 (Ch)



# The Party's involvement

- Many clients need educating as to the dangers
- *Van Oord & Anor v Allseas UK* [2015] EWHC 074 (TCC) :

*The expert “.... allowed himself to be used, whether wittingly or otherwise, by [his appointing party and their claims consultants] (those with the most to gain in this litigation) to act as their mouthpiece.”*

# Expert meetings

- Relative seniority/experience
- Timing:
  - Before or after Reports? *UPL v Agchemaccess*
- Objectives:
  - What issues
  - What methods
  - Narrowing issues
  - Crystallising differences
  - Wider context
- Is your expert acting reasonably? *Bank of Ireland v Watts Group* [2017]  
EWHC 1667 TCC; *ICI v Merit Merrell*

# Joint Statements

- What is agreed
- What is not agreed
- Including “WP” alternatives for:
  - Contract
  - Fact
  - Other expert disciplines
  - Methods
- What the Tribunal needs to decide
- What parts of expert evidence arise from those decisions
- An agenda for the hearing
- Narrowing what the hearing needs to address
- *Riva Properties v Foster*

# The hearing

- Preparation for cross examination
- Scope of attendance:
  - Rules
  - (false) Economy; vrs
  - Familiarity
- Opening presentation
  - Who I am
  - What the differences are
  - Why you should believe me
- ‘Hot tubbing’ – pros and cons

# The Oscar Pistorius Trial

Pistorius's chief witness:

- Audio and visual tests
  - Used no equipment, only his own senses
- Recording of gun shots and a cricket bat striking a door
  - Was not there when the tests were carried out
  - Didn't know what sound equipment was used
  - Did not consider Pistorius's height
- blood spatters and ballistics
  - Was an expert in neither
- Fibres found in a door that matched Pistorius's socks
  - Had only seen photographs of the socks
  - Never looked at the fibres under a microscope
- Did not write a formal report; passed his computer notes to the defence

# The Oscar Pistorius Trial

## Pistorius's second witness:

- On the sound of gun shots and a cricket bat striking a door
  - He was not an expert in any of these fields
  - In particular, he was not a Sound Expert
  - He had a hearing defect
  - His gun jammed on first test
  - He was unable to record rapid gun fire
  - The quality of his recordings were affected by frog sounds in the background
  - Could not repeat the recordings, as the door he had used had been broken.

# The Oscar Pistorius Sentencing Trial

Social Worker and Registered Probation Officer:

- on the unsuitability of South African jails
  - evidence was based on statistics published 9 years previously
  - Contrasted with UK courts extraditing Shien Diwani to South Africa for trial
  - *“Slapdash, disappointing”*

# Main points – How to get the best out of your expert witnesses

- Consider early instruction
- Educate client as to role, duties and importance of experts
- Select carefully
- Get draft reports, including an early skeleton
- Read judgments critical of experts and consider the role of those instructing them
- Remember that you get nothing out of an expert the Tribunal ignores



ROBERT HORNE & JOHN MULLEN



The Expert  
Witness in  
Construction

WILEY Blackwell

JOHN MULLEN  
R. PETER DAVISON



EVALUATING  
CONTRACT  
CLAIMS

THIRD EDITION

WILEY Blackwell

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