



Surveyors acting as Expert Witnesses

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The Expert Witness

Introduction

So, you want to be an expert witness:

WELL, you must be mad!!

Nevertheless, we will plough on



What is an expert?

"An expert is one who knows more and more about less and less."

It is for the tribunal before whom the witness appears to decide whether or not the witness is an expert. This is NO time to be a shrinking violet! Show off your expertise.

A party's employee can give evidence as an expert witness so long as he has the relevant expertise and is aware to whom his duty is owed when giving his expert evidence.



The Expert Witness

First, concerns have been and continue to be expressed as to whether an expert witness can give his/her professional view untainted by the case of the party instructing them.

Expert witnesses **MUST** understand to whom their duty is owed and the role they have undertaken. Their duty is to the tribunal before whom they appear.



The Expert Witness

INDEPENDENT

- It is the duty of an expert to help the tribunal on matters within his expertise.
- This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.



Difference between expert witness and witness of fact

General rule of evidence = a witness can only state facts within his own knowledge. He cannot express an opinion.

An expert witness *can* express an opinion so long as the witness has the relevant expertise and the tribunal before whom he appears has given leave for the expert witness to be called.



Differences in roles of expert and advocate

RICS Practice and Professional Statements and Guidance:

Surveyors acting as expert witnesses (4th edition)

- o There is also a Client Guide

Surveyors acting as advocates (2nd edition) N.B. surveyors do not have rights of audience in the courts



When is evidence of an expert witness sought?

- In court (with consent of the courts)
 - o see part 35 of civil procedure rules and
 - o the Civil Justice Council protocol and new guidance
 - o court assessor / single joint expert / expert appointed by party.
- Before arbitrator (with consent of the arbitrator)
 - o see s34 Arbitration Act 1996 and
 - o either by agreement of the parties or arbitrator's directions.



Expert MUST comply with directions

Whether it is the court or arbitrator or another tribunal which gives directions, the expert witness must comply because

- failure may lead to witness being barred from giving evidence and
- costs may be ordered against the expert.



The duties and responsibilities of the expert witness

Set out originally in 1993 by Cresswell J in the *Ikarian Reefer* case. The up dated in 2000 by Toumlin J in order to give effect to the cpr in the case of *Anglo Group plc v Wither Brown & Co Ltd* and *BML (Office Computers) Limited*

Applies in Scotland *Kennedy v Cordia (Services) LLP* [2016]

Now, effectively encapsulated in Part 35 of cpr and practice statement



Principles of expert evidence

As set out by His Hon Judge Toumlin, an expert should

1. Provide independent assistance to the court and the parties;
2. Confine evidence to technical matters or common professional practice;
3. Co-operate with experts appointed by other parties in an attempt to narrow the technical issues in dispute;
4. Give evidence uninfluenced by the exigencies of the litigation;



Principles of expert evidence

5. State the facts and assumptions upon which opinion is based;
6. Make it clear when question or issue falls outside his expertise;
7. If of the opinion that his/her conclusions are based on inadequate factual information, he/she should say so;
8. Always be ready to reconsider his opinion, if appropriate, when in receipt of new information or the opinion of expert on other side.



Selecting an expert witness

Civil Justice Council guidance:

- Have appropriate expertise and experience
- Be familiar with general duties of an expert
- Be able to produce report, deal with questions etc within reasonable time at a cost proportionate to the matters in issue
- Be available to attend trial
- Have no potential conflict of interest



Have no potential conflict of interest

Remember:

Rules of Conduct: *“Act with integrity and avoid conflicts of interest”*

There is recent RICS Professional Statements and Guidance (came into force 1 January 2018)

Whilst still not to be compared with lawyers’ very strict conflict of interest rules, surveyors must now take conflicts seriously.



Instructing an expert witness

- Instructed early in the case.
- Instructions should be unequivocal and fall within expert's area of expertise.
- Initially given a core bundle to acquaint him with case but must be later given all papers he is likely to be shown in court.
- Make him aware of part 35 of the cpr, its practice direction and the Civil Justice Council Protocol and guidance.
- Everyone should be clear about costs.



Terms of engagement

Terms are such as you agree with those instructing you. Always receive instructions in writing and clarify points which are not clear.

With regards to your fee, don't underestimate the time you will spend on the case and remember that these days, the courts have to be told the costs of the litigation up front before the case is heard (*including fees payable to expert witnesses*) and they have the power to limit fees recoverable from other side.

If not recoverable, the party instructing you may not agree a higher fee



Terms of engagement

Clarify with those instructing you:

Court has ordered an expert witness with your particular expertise may be called. A party can only call an expert witness and present expert evidence with permission of court or tribunal before whom the party is appearing (Part 35 cpr)

Whether court has given any directions re the expert witness e.g. a time table, approval or limitation re fees?

Expert witness must comply with directions. To fail to do so could mean the instructing party cannot produce expert witness's evidence or even that expert pay costs thrown away.



Terms of engagement

Clarify *precisely* to what your report should be directed? And remember an expert witness can only give opinion evidence within the narrow confines of his/her expertise.

Finally, have you received core documentation re the litigation (eventually all court bundle documents), a copy of Part 35 of the civil procedure rules and of the Civil Justice Council protocol re expert witness? Have you also consulted with RICS practice statement and guidance re surveyors acting as expert witnesses? If not, you must!



The expert's report

Just that i.e.

THE EXPERT'S REPORT

And not the lawyers'!



The expert's report

Each report will vary BUT it must

- Comply with the rules of the tribunal before whom the expert appears (e.g. CPR, its practice statement, Protocol and new guidance)
- Comply with the rules of the expert's professional body (e.g. 3rd edition of the RICS Practice Statement and Guidance Note (effective from 1 January 2009)). (Look out for 4th edition)



Hearsay and Comparable Evidence

Expert CAN say *“from my own experience of recent transactions, the rent for the relevant premises is X”*. Best, first hand evidence.

Expert can also say *“because I have been told by someone else that premises next door have recently let at £Y, the rent for the relevant premises is X”*. BUT that is hearsay.

Hearsay evidence can be admitted BUT does not have weight of first hand evidence.



Disclosure

Every document in existence that is relevant must be disclosed and listed.

However, not every disclosed document need be made available for inspection.

Privileged documents (including those properly marked without prejudice) are protected from inspection.



Meeting of the Experts

- Prepare
- Limit the issues
- Leave the lawyers and the client behind and
- Record anything that is agreed.



The expert in court

- Prepare
- Evidence in chief
- Cross Examination
- Re-examination
- ALWAYS give your own and honest view and opinion.



Immunity from suit?

- As the law previously stood, a lay client could not sue an expert witness – the witness was immune from suit.
- This changed following the 2011 Supreme Court case of *Paul Wynne Jones v Sue Kaney*
- Loss of immunity seems not to have led to lack of expert witnesses willing to give their expert view



Fees

- Court can limit fees.
- Who is paying?
- What is being paid?
- Taxation of fees.
- NO conditional fees for expert witness.



Insurance

- Check
- And remember, you are holding yourself out as an expert.



The expert witness

AND

in

Conclusion

INDEPENDENT



The Expert Witness

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