



CPD Foundation
 The Expert Witness
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What do we mean by an expert?

The dictionary definition:

“a person with a high level of knowledge or skill relating to a particular subject or activity”

(Cambridge Dictionary)

The legal approach:

Whether *“the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court”*: King CJ in *R v Bonython*.



What is expert evidence?

It derives from a negative: Ordinary witnesses can only give evidence of what they have seen, read, heard, smelt or touched, or been told by another person.

By comparison the expert can express opinions or draw inferences from material that he has access to.



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How do the courts recognise whether there a relevant expert discipline?

Whether “there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the court’s decision on any issue”: Evans-Lombe J in Barings plc v Coopers & Lybrand



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How does the court establish that the person giving evidence is an expert?

“No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people” : Vaughan Williams J in *R v Silverlock*. In practice, however, *“the modern view is to regulate matter of expert evidence by way of weight rather than admissibility”*: the case of *Re M & R Minors*.



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When will expert evidence arise?

In proceedings before

- a court
- a statutory tribunal
- an arbitration
- an expert determination

The way the evidence may be presented and the way in which it is given will depend to some extent on the decision-making body to whom the expert is presenting their evidence.



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The core responsibilities of the expert

1. Recognition that their overriding duty is to the tribunal in question, not their client
2. Appreciation of the importance of impartiality and avoidance of bias
3. Recognition of the limitations of their expertise.



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The Statement of Truth

The statement of truth in RICS Practice Statement 5.4 follows precisely the prescribed Statement of Truth in Practice Direction 35 paragraph 3.3 of the Civil Procedure Rules:

“I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.”



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The RICS Declaration

RICS Practice Statement 5.4 also contains detailed mandatory provisions as to the Declaration to be contained in an expert report. Too frequently that declaration is not followed. Consider for example the following:

“I understand my duty to the expert and have complied with that duty. I believe in the accuracy and truth of the matters contained in this document. The document contains all the facts I regard as being relevant to the opinion which I have expressed and I have drawn attention to any matter which would affect that opinion.”



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The Civil Procedure Rules Equivalent

The CPR does not contain an equivalent to the RICS declaration. However Practice Direction 35 paragraph 3.2 requires an expert's report to contain the following statements:

the expert understands their duty to the court and has complied with that duty; and

is aware of the requirements of (CPR) Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

The Guidance can be found on-line at the Civil Justice Council website.



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The joint single expert and the retained expert: similarities and differences



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Key similarities

The duty to help the tribunal on matters within their expertise

This duty overrides any other obligation the expert may bear or feel

Expert evidence is to be given in a written report unless otherwise directed

Any decision as to which party's wallet shall ultimately be responsible for the expert's fees will normally turn on the tribunal's award of costs, if any, at the conclusion of the case

The expert's report must comply with the requirements of Rules and Practice Directions (e.g. CPR 35).



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Key differences

Unless the court otherwise directs, the parties are jointly and severally liable for the fees of the single joint expert. In practice the court often directs that the fees are to be paid in equal proportions by the parties involved in the dispute to which the expert's evidence is directed and at the time the report is presented.

The fees of a party's own expert will be paid by that party in accordance with the payment structure agreed.

The retained expert receives only one set of instructions. The joint expert may receive different instructions from each party.



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Expert discussions

The court has extensive powers to order expert discussions in order to identify and discuss issues and attempt to reach agreement. It may direct the experts to prepare a statement of those matters agreed and those not agreed, with a summary of the reasons for disagreement.

However, such agreement does not bind the parties unless they have agreed to be bound, and, unless otherwise agreed, the contents of those discussions cannot be referred to at the trial.



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Advocacy by expert witnesses

The First Tier Property Tribunal Rules permit a surveyor to appear as an advocate. Whether an expert witness should also act as an advocate is the subject of RICS Practice Statement 9. However, a surveyor considering doing so should think very carefully about the terms of PS9 before doing so. If in doubt it is good practice to decline. It may be sensible to ask colleagues for their experience.



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Conditional Fees

The Practice Statement confirms that an expert witness must not act under a conditional fee agreement.

Whilst the Practice Statement acknowledges the propriety of a dual expert witness and advocate acting on a conditional fee basis provided the tribunal is told, the tribunal may decline to give any weight to an expert so acting.



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Some practical problems for experts

Double booking or clashes

The demanding client

Unexpected developments in the extent and nature of the expert issues to be addressed

Dealing with unreasonable cross-examination

Dealing with the judge or tribunal.



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