The Trials of being an Expert Witness
by
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This article follows a seminar given by the author to the CIArb (EAB) Young Members' Group in Hong Kong on 26 April 2017. The seminar is a sequence to various seminars given in the past by the author and two articles which he wrote and were published in Asia DR in 2010 (The Quantity Surveyor as Expert Witness) and 2012 (Expert Witnesses: Are Courts and Arbitral Tribunals Asking too much from Them?).

The intention of the seminar and this article is to explore how things have changed in the last 5 years or so, since the introduction of the various protocols following changes in the Rules of High Court in Hong Kong and the adoption of the Code of Conduct for Expert Witnesses Appendix D therein.

The Ikarian Reefer[1] had produced guidelines which were at the time forming the basis of emerging protocols but this case had been heard in 1993, and the protocols were not developed until much later (2009 under the changes to RHC Hong Kong and somewhat earlier in UK following the Woolf Report published in 2002).

Notwithstanding the guidelines in *Ikarian Reefer*[1], there were still cases which caused much difficulty, and I referred to some of them in my articles. In particular, *Meadow v General Medical Council*[2], which was perhaps the most damaging where an eminent pediatrician had strayed outside his medical expertise into the realm of statistics arguably influencing a jury to convict a woman of murder in regard to a tragic second cot death in her family. This caused much concern and of course was very serious. Other cases were referred to including *Jones v Kaney*[3] which changed the previous ruling that an expert could rely (generally but with significant exceptions) on immunity from action for negligence.

The RHC Amendments 2009 in particular Order 38 and Appendix D introduced the new requirements for dealing with experts.

In cases which come before an arbitrator, there is likely to be a similar regime in the mandatory requirement of a professional man to follow the Practice Note which his professional institute may impose.

All of this then provides a much clearer framework in which the expert now has to

act as compared with that obtaining some 7 or 8 years ago.

What are the practical effects?

First of all it is now (in my experience) commonplace to receive a list of questions which the expert is required to answer in his report. This list is agreed between the parties and set by the tribunal. Potentially a great improvement. However it is usually drafted by solicitors or counsel with no input from experts. The questions are often complex and multi-tiered with little appreciation of the effect of such questions on the time required by the experts to address them, and more significantly the ambiguity the questions pose. Very often the questions invite alternative answers such that there is a likelihood that the experts will interpret them differently, giving rise to real problems when it comes to joint meetings and reports.

Experts often see fit to go beyond the listed questions which again poses difficulty once the provisional reports are disclosed and the other side realizes what must now be considered if a joint report is to narrow the issues.

Arbitrators are unlikely to impose limitations on experts notwithstanding the obvious intention of doing so in the list of issues agreed for the experts. This can have a dire effect on the workload at the time of finalizing the provisional report and trying to agree a joint report.

Judges may be more exacting.

Provisional without prejudice reports are now the norm. Experts may change their opinions without the knowledge of the tribunal when they have had time to consider their opposite number's views and discussed matters at joint meetings.

This is good in theory but may be abused by experts who do minimal amounts of work for the provisional report and only seriously address matters when they have had chance to see what the opposition have to say. They may even borrow large tracts of their opposite number's analyses and calculations and add their spin to it. This is frustrating and pointless. This could be avoided by going directly to the Final Report. Joint meetings and reports can then be more productive and soundly based, and if necessary a Reply Report can be added based upon more certain knowledge of the expert's views.

Joint meetings are also now the norm. This is a good development but there seems to be a view that it is only a matter of direction and the experts will meet and agree a joint report setting out what they do agree, what they do not and why not.

Whilst this is usually what happens it is by no means always the case, with some experts being unable to compromise or agree even on a format for a joint report.

The move towards joint reports has given tribunals the opportunity to delegate the onerous task of deciding between expert reports by coercing them to reach agreement or providing a tick list where they do not agree. If the experts are unable to do this then they risk the wrath of the tribunal. In the case of *Chevalier (Construction) Co Ltd v Tak Cheong Development Ltd*[4], the judge expressed his ire at the inability of the experts to provide the joint report he expected, criticized them heavily and appointed an assessor. The real problem may have been that he was challenged in dealing with an extensive list of valuations in a final account which he found too difficult to manage. This raises the underlying issue which is that technical disputes of this nature are better dealt with by a technical tribunal in arbitration, and there has been a significant departure in Hong Kong from such appointments, with legal tribunals being the norm in arbitration notwithstanding the obvious limitations they face when trying to address long and complex construction cases which are largely about cost and delay.

Judges in any event are likely to face this problem, hence the movement towards reliance on experts when a technical tribunal would have no such need.

The programme for the proceedings is directed by the tribunal and is now monitored in case management conferences. Once a judge has fixed a timetable it is unlikely that he will be amenable to changing it. Arbitrators are more amenable, but in either event, the needs of the experts in this respect are unlikely to be realistically represented. The time required as between exchange of provisional reports and serving of final reports is frequently quite unrealistic. It is this period when experts need to meet, discuss their provisional reports, prepare joint reports and agree them. This can be a very time consuming period on a large complex case and the results of the discussions and further documents produced can imply significant changes to provisional reports and subsequent reports.

The upshot is that it is very likely that the meetings between experts must continue well past the service of final reports with supplementary joint reports being served

right up to and into the hearing. This puts great stress on the experts and the parties, and can create much confusion.

The programme for experts is often fixed without regard to the provision of statements from witnesses of fact. Without those the expert can hardly conclude his own report, but he often must at least complete his provisional report without sufficient time after access to statements from these witnesses. Of course they may equally wish to see the expert reports and frequently rely on them in their own evidence, but factual witness statements are essential to the expert and this is often not adequately factored into the programme. Experts may also need to see reports from experts of other disciplines, for example the quantum expert may need to see the report from the planning expert in determining delay costs, but this is again seldom factored in satisfactorily.

Confining himself to matters within his expertise is a requirement for all experts (see the Meadow case) but the reality may not make this so easy. Construction cases are wide ranging and all disciplines are likely to touch upon matters in which they varying amounts of expertise. A quantum expert will be required to address matters concerning mechanical and electrical installations, civil and marine engineering, railway work, highway work, general building work, renovation and alteration works, fitting-out, specialist finishing works (stone, ceramic etc), insurance and the like. These are everyday matters to a quantity surveyor at one level but there are short cuts he takes to manage things outside his expertise which are not available to him in a trial or arbitration. At what point does he flag up his limited expertise, and will his opposite number who is similarly handicapped do likewise. These pose matters of common sense and judgement. Pointing out his limitations which have only become apparent during the course of a trial will not go down well with his client or solicitor, who then face the task of seeking permission for a further expert at a late date in the proceedings. Keeping quiet about it may not result in any problem but if picked up will discredit him in the eyes of the tribunal.

In recent years, it has become the norm for experts particularly on construction cases which are large, to have a team of assistants. This raises a whole list of issues in itself. It is all too easy to just leave the matter in the hands of the team and hope to catch up later. This is a temptation given the huge amount of documentation which must be assimilated and processed, a daunting task for any one person, the demands of economy from the client and indeed tribunal (it is cheaper to use assistants) and the overarching requirement of most clients that the expert is the most senior and

experienced person available, which means that he will be the most expensive and the least available. Experts can be easily caught out not knowing what is in their own reports)(*Skanska Construction UK Limited v Egger (Barony) Ltd*[5]).

The complications experts face seem to be never ending. There has been in recent years a number of cases concerning "expert shopping". The courts take an adverse view of solicitors and their clients shopping around for experts who offer views which best support their case. Whatever the reason for this, the impact on the expert is such that if he expresses an early view and is then obliged to withdraw from the matter, there is a danger that his opinion may be ordered to be disclosed even though seemingly protected by intended privilege.

There is no property in a witness and that is not a problem, but is it difficult for the expert who takes an appointment but then finds that he cannot support his client and must withdraw. If the only basis on which his client can then seek another expert is on condition imposed by the tribunal that his own without prejudice report is disclosed to the other side, then this could present his client with an embarrassing situation for which he as expert may be in the firing line. The rule on expert shopping and changing witnesses does not make for a simple life (*Coyne v Morgan and Another [2016]* BLR 491, and *Allen Todd Architecture Ltd (In Liquidation) v Capita Property and Infrastructure Ltd (Previously known as Capita Symons Ltd) [2016]* BLR 592).

The role of experts in different tribunals is somewhat different. In court proceedings, the expert is likely to encounter a judge who is not a technical man and has no understanding of technical matters. He may have even less interest in them and wish to dispose of them as easily as possible via the experts and their joint reports etc. Arbitrators nowadays are likely to be legally qualified but may be dual qualified and may have a better appreciation of the issues. They are less likely to be so inflexible generally, particularly on the content of reports going beyond listed issues and the need for further time for the proceedings. However that flexibility can in turn create difficulties and additional work for the experts.

It is now commonplace in Hong Kong to use "experts" in mediations. The duties of such an expert are not clear as compared with a court or arbitration. If the intention is to use those experts in any subsequent arbitration then the same conduct may be observed as would be demanded in the later tribunal. If not then it seems likely that the expert is there merely to impress the other side as to what it

may face if there is no settlement. If the mediation is facilitative rather than evaluative, then the expert would have no duty to the mediator who would make no decision, and he would be there to present a plausible and persuasive case for his client.

Experts are also now normal in adjudications under the various security of payment acts used around the region, a process which is likely to be brought into legislation in Hong Kong in the near future. It seems that in Singapore and Malaysia, the expert reports are submitted but normally there would be no examination of witnesses. Again it is assumed that the role would be as for any other tribunal in that the adjudicator is making a decision and duties should be to that decision making tribunal.

Finally it is now often considered desirable that a single joint expert be used rather than each party appointing its own. There is provision for this in Order 38 of RHC (O38r4A). This would appear a perfect solution for judges since it would remove from them the need to consider what each side says and make a decision, they can simply take the expert's opinion and use it.

In the recent case of *Chun Wo Building Construction Limited and Metta Resources Limited* (HCCT 29 of 2013, main judgment released in 2016) the judge said *"there was an unusually large number of expert witnesses in this case. Their evidence took up a significant portion of the trial. The number of such witnesses would have been halved if single joint experts were instructed on every discipline. This would result in shorter trial, which normally means earlier hearing date and swifter resolution, and considerable cost reduction"*.

This, with respect, is a very single minded view. It may make life easier for the judge but it does not assist the parties who would still need their own experts. It is impossible in a large construction case (as this was) for the parties to rely only on a single joint expert. Solicitors must have the freedom to take advice from their own experts and to present opinion evidence as part of their case. If a single joint expert were appointed say for quantum, then each party would still need its own quantum expert to give opinion on the myriad valuations and calculations and the single joint expert would then have to form his own view as between them. This does not shorten the proceedings, it lengthens them. Each party would have not one decision maker to confront but two, the single joint expert and then the judge or arbitrator. At some point, one of the parties would have to decide whether to treat

the single joint expert as "hostile" and to attack him, not an easy scenario. The judge may equally have the doubly onerous task of deciding that he cannot rely upon the single joint expert. Moreover, the single joint expert may preclude objectiveness for example, he may already have preferred schools of thought and the judge/arbitrator will have no opportunity to consider them

In short, single joint experts may work for small simple cases but not for huge construction cases.

The above set out my observation on various issues which continue to confront experts. They are still criticized, not to say mocked, very often by those they try to assist but their task is not simple. Courts dislike the professional expert, but it is not likely that a novice would find it easy to enter the fray and keep the courts happy that he knows what he is doing.

Finally, I refer to an article given by the Rt Hon Lord Clarke of Stone-cum-Ebony (NPJ in the Hong Kong Court of Final Appeal) who spoke about the role of the expert witness. *"It is important that the expert should be trusted by the court, which after all has no alternative but to trust the expert to give his or her evidence honestly and openly. The reputation of the expert is everything. Once he or she has lost the confidence of the court in one case, it is very difficult to recover it"*. If that is borne in mind by the expert, he cannot go far wrong.

[1] National Justice Compania Naviera SA v Prudential Assurance Co Ltd [1993] 2 Lloyd's Rep 68 per Cresswell J (High Court, England & Wales).
[2] Meadow v General Medical Council [2007] QB 462, Court of Appeal (England & Wales)
[3] [2011] UKSC 13, 30 March 2011, unreported (Supreme Court, United Kingdom)
[4] [2011] 2 HKLRD 463 (Court of First Instance, Hong Kong)
[5] [2004] EWHC 1748 (Technology and Construction Court (TCC), England & Wales)