Finding the true experts

Opinion differs on how to make the most of expert evidence but **Peter Collie** believes there are a few points which are critical to success

Four main areas for expert evidence in construction litigation

- Design issues
- Planning and progress of works
- Defective works
- Quantum

Those who put themselves forward as experts might not be experts in the issue you require to be addressed, but ascertaining from their CV that they might not be the right person for your case is not always easy. I have seen and heard stories of experts putting themselves forward for matters that they are not even acquainted with, let alone an expert in the field. For example, in *SPE International Ltd v PPC (UK) Ltd and John Glew* [2002] EWHC 881 (Ch), a case about shot blasting, the judge found: "Mr D's main difficulty is that he has no relevant expertise. He is an ex-RAF officer, who no doubt has a specialised knowledge and experience of many fields of human endeavour, but they do not include the field of shot blasting."

If that were the extent of the judge's concerns about D's evidence, it would clearly be sufficient to disqualify him from being an expert, however the judge went on to catalogue numerous problems with the evidence D had given. It is one of many cases where the judge has felt compelled to comment on one of the expert's evidence.

It is important not only that you select an expert with the correct qualifications to make him an expert in the field under consideration, but you must also make sure he has the right experience as well. In a matter involving the site welding of steel, the single joint expert had no experience of post-contract valuation, let alone how you would approach a dispute over the cost of welding on site. He had not visited the site and relied upon one party's engineer to ascertain how long the work should take.

It is then necessary to ascertain if your chosen expert has published any material that may help or hinder your case. For instance, it is little use obtaining expert evidence about a matter only to find during cross-examination that your chosen expert has published papers stating the exact opposite of his conclusion in your case.

Times have changed such that it is necessary to obtain the judge's approval before appointing experts. The days of telling the judge that you intend to have several experts are well and truly over; the CPR actually makes it the judge's duty to restrict expert evidence (CPR 35.1). This creates a tension between the need to have an expert in place in order to plead a case that will ultimately be made good by the expert evidence, and cost issues if the judge refuses to sanction the use of experts. This is not a theoretical risk. I recently had a case where both parties thought expert evidence on programming the works would assist the court and were surprised when the court stated that as matters were straight forward and the amount in dispute was not great, the court would use its experience and manage without an expert.

Maximising expert evidence

The quality of instructions given to an expert are important in setting out the requirements that you and the court have for the expert to advise. The litigator needs to appreciate that the instructions given to an expert are disclosable to the other side and so drafting instructions that seek to further your client's case but do not give away important issues is vital. Given that the litigator is not an expert in the field that he is seeking expert advice, this can feel the wrong way round.

I recently attended a seminar about the

use of a technical expert to act purely as a consultant to the litigator to shape the pleadings and then produce well prepared instructions to the expert. The thinking being that you can test the case with your consultant expert and when, between the two, you have identified the best case, you can then draft the instructions for the expert witness together.

The advantage is that the consultant expert is a hired gun rather than an expert witness, therefore any discussion between litigator and consultant expert is privileged. Whereas, the same discussion between litigator and an expert witness, would be likely to be disclosable.

It is often a very lonely job being an expert and it may be thought that there is little help and assistance for the expert. The reality is that there is a wealth of guidance available to the expert. The Royal Institution of Chartered Surveyors publishes guidance to surveyors which is essential reading for all surveyors acting as experts. The CPR includes a Practice Direction and Protocol – both are invaluable. Other institutions, such as the Expert Witness Institute and Institute of Expert Witnesses, offer advice and guidance. If one of the experts is a surveyor, it is important that they have a copy of the guidance. It is more important that they have actually read and understand the RICS guidance.

Good quality expert reports can make a large difference to the prospects of litigation; the problem is spotting the difference between a good report and a bad report. There is no substitute for experience when it comes to reports and what they cover.

A major criticism I have of many expert reports is that they do not deal with both parties' cases and they do not state that there is a range of opinion. For example, in construction cases it is not unusual for an expert instructed by the claimant to prepare a report that deals with the claimant's case only and ignores the defendant's case entirely. This would be fine if the claimant won hands down or lost hands down, but the more usual outcome is that the facts found to exist support some of each party's case. The tribunal is then left with two polarised views which are of no assistance when the facts are in the middle. An expert should assist the court by giving evidence on both parties' cases then the tribunal can pick and choose between the expert evidence depending on the finding of fact.

There seems to be reluctance from both expert and litigator to grasp this issue. Yet as a litigator it is about managing the downside risks of a tribunal finding a fact against you. If your expert has dealt with the contrary argument, then you can submit that the consequences are not as severe as the other party would have you believe.

Honest, thorough, reliable

Experts now have to meet and try to agree as much as possible and then prepare a report that deals with the areas of difference. This is one of the main tools for the experts to narrow the issues between the parties. A common misconception is that the experts are to meet and settle the case; nothing could be further from the true requirement of experts.

The object is for the experts to see if they can agree on their evidence. So, if the claimant is advancing a claim that a cubic metre of concrete should be valued at £140 metre cubed, then the quantum experts should seek to agree that if the claimant

succeeds on liability as per its case then the price for concrete is whatever figure the experts agree. If they do not agree, then the experts should explain why they could not agree. It may be because they take a different view on the facts (a matter for the judge). In those circumstances, it would assist the tribunal if the experts said that if the facts are as the claimant alleges then we agree X is the value, and if the facts are as the defendant alleges then Y is the value. It is unhelpful to simply say the parties have a difference of opinion on the facts, therefore cannot agree the value to be applied.

Experienced experts will tell you that being cross-examined is not a pleasant experience. It is a function of the adversarial process that one side will lose. That does not have to mean that the expert loses. The expert must be honest, assist the tribunal, and not be afraid to change his evidence if the facts change.

The simple fact is that expert evidence is built upon a bed of facts; if those facts are found to be different to the assumptions that the expert relied upon, then his evidence could well change. The tribunal will be looking for honest, independent assistance. In *Great Eastern Hotel Co Ltd v John Laing Construction Ltd and Others* [2005] EWHC 181 the judge found: "I reject the expert evidence of Mr C as to the performance of Laing as contract manager in relation to periods one and two.

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He has demonstrated himself to be lacking in thoroughness in his research and unreliable by reason of his uncritical acceptance of the favourable accounts put forward by Laing. I prefer the evidence of Mr W who was an impressive and conscientious witness who showed that he approached his role as an expert in an independent way and was prepared to make concessions when his independent view of the evidence warranted it."

Lord Justice Jackson has promised us all the prospect of hot tubs in the technology and construction courts.

The thought is that rather than dealing with expert evidence sequentially, both experts of a particular expertise, such as quantum, will be sworn in together and the judge will in effect run the examination of the experts with counsel watching from the side.

You never know, you may be asked how you feel about hot tubbing at the next CMC.

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