

PREPARING TO GIVE EXPERT EVIDENCE

Introduction to Giving Expert Evidence

This paper is based upon my experience in giving expert evidence of quantum issues to an Arbitration Tribunal and my ideas on how best to prepare in order to provide such evidence effectively as possible. This includes understanding the Expert's role, how to build an Expert Report, the need for a Joint Report and preparing for cross examination.

The Expert, is a specialist in his own particular field, may be required to provide both written and oral evidence in a number of different legal forums that may include litigation in Courts, Arbitrations, Adjudication and also other legal forums. In all forums it will be very important for the Expert to prepare thoroughly by familiarizing himself with the facts of the case so that his opinion on the matters in dispute is given with confidence and credibility.

To assist preparation of evidence it is important to consider the role of the Expert which is to provide impartial and independent evidence based upon his expertise to assist a judge or other decision maker with his judgement or award.

The evidence of the Expert may be a major element of the dispute or a very small part. Either way it is very important for a Judge or Arbitration Tribunal to understand the technical features of a case and therefore the Expert's role is very important and the Expert will need to prepare well to undertake his duties.

All experts should be suitably qualified in their particular field and based on the evidence provided to him the Expert should be able to form an opinion effectively and with credibility, within a written Expert's Report, which will be submitted as evidence in the Arbitration. However, this is only part of the role and in accordance with Arbitration Rules each Expert must be available to provide oral evidence at the Arbitration Hearing.

The Hearing is the most important element of the Expert's duties and it will be vitally important to prepare well in order to be proficient in explaining the report and addressing questions for the Tribunal and not least to confront an opposing lawyer or legal counsel in cross examination; who will be searching for every opportunity to discredit the experts evidence and destroy it in order to support its own case. For the expert, it will be critical to survive and maintain credibility during the cross examination by Counsel.

In a recent case in the UK: Van Ord UK Limited and SCIM Roadbridge Limited v Allseas UK Limited 2015, in the Judge provided a guide as to what is required by an Expert and these points should be considered in the Experts preparation to give evidence:

1. Experts should check the underlying documents
2. Witness Statements produced by both parties should be considered
3. Experts should be prepared to value Claims on an alternative basis
4. Actual costs should be considered rather than calculated rates



5. Points by an opposing expert should be considered
6. The Expert should be able to stand by all parts of the Report
7. Reports should be drafted in a clear way with no misunderstandings
8. All documents referred to should be appended to the Report
9. All views expressed should be the Experts own views – i.e. not others.
10. It should be clear what Documents and analysis have been produced by others and the extent to which they have been verified and relied upon by the Expert.
11. Statements by others should be challenged.

Therefore, the role of Expert should not be taken lightly and if the Expert is to be effective and avoid criticism thorough preparation will be required.

Preparation to give evidence starts from the inception of the commission and follows through to the completion of the Arbitration.

Commencement

As part of the Expert's preparation at the commencement of his work, it is vitally important to ensure that the Lawyer's instructions to provide expert services provide a clear basis on what is to be done and that if necessary can be submitted as evidence to demonstrate what the Expert has been instructed to do.

The Tribunal may encourage the Parties at the outset to agree a common brief for both Experts in order to ensure that both Experts provide opinion on the same basis and instructions. This will avoid the possibility of ships passing in the night where Experts could provide opinion on different sets of criteria or issues which may produce differing results and would be time wasting for the Tribunal.

The Instructions should therefore set the scene going forward and in particular the following will need to be addressed:

- The scope of duties clearly set out the extent of the commission and the work that the Expert is required to provide an opinion on and when this is required.
- The duties align with the Expert area of specialist experience.
- The Expert should have no conflict of interest with one or both of the parties.
- The documents relating to the case should all be recorded in order to show the extent of the documents to which an opinion is based.
- Confirmation of fees, method payment and fee estimate. For obvious administration reasons the mode of payment is required to be confirmed but also the Expert may be required to show that he has complied with Professional Practices (e.g. RICS "Surveyor acting as an Expert Witness")

At the commencement of the commission, it is important to manage Client expectations and explain to the Client the role of the Expert, how the Expert intends to conduct his work and what the Arbitration Tribunal will expect from the Expert.

It is important to consider that the Expert is not a hired gun, and advocate of the Client's claims, and whilst the Expert is paid by the Client he should present the Client's case in an objective and unbiased manner.



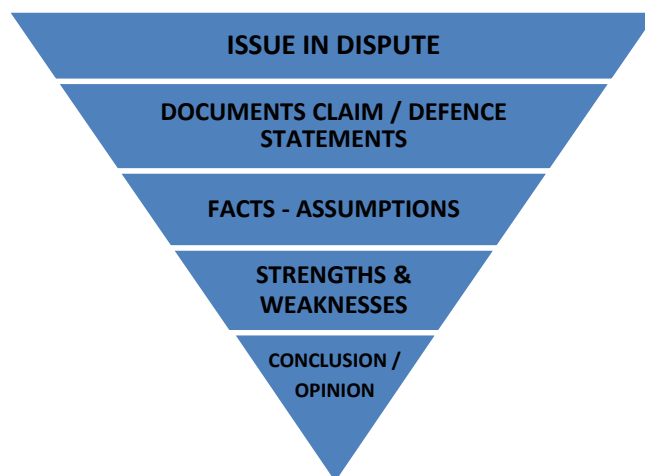
Expert Report

The Expert will spend most of his time preparing his expert report for submission as evidence and this will form the main part of the Expert's duties.

In preparing the Expert Report, the Expert should:

- Understand the issues;
- Define the parameters between the issues;
- Identify Evidence;
- Review and weight the importance of the evidence; and
- Distinguish what is relevant to the issues.
- Identify facts relied upon to form the Experts opinion which must be clearly stated and its source.
- State assumptions made and these should be differentiated from the facts.

All evidence must be considered and that relevant to the subject matter identified and referenced. The funnel approach to giving evidence shows a system of collating all evidence including identifying all relevant evidence, analysing and sifting this down to key issues, analysing the strengths and weaknesses, and forming an opinion after all issues have been considered.



Joint Report

The Joint Report stage is where the respective Experts meet together and discuss each other's opinions and attempt to agree upon the issues in order to narrow differences between the respective Expert Report of the Claimant and Defence.

An important factor in the joint meetings is that the discussions are privileged and/or without prejudice so the Experts should be prepared to discuss issues freely without the fear of statements made at the meeting being used against them

later in the Arbitration. The Expert should prepare for the meetings to explore options in order to try and reach agreement. For Example, this may involve considering alternative methods of evaluation in order to find a middle ground as a basis for agreement. Prior to the meeting the Expert should consider alternatives and how these maybe supported by the evidence so that discussions can be meaningful.



The joint meetings are an important part of the preparation for giving evidence to the Tribunal as they represent an opportunity to understand the other experts case and the documents that it has relied upon to form its opinion. In undertaking the exercise it is important to understand the opposing Expert's position and in doing so this may reinforce its opinion or even change the Expert's mind.

It is sometimes evident at the Joint Meeting that the respective Experts instructions differ and the Experts are providing an opinion based upon differing sets of evidence or even issues. In this respect the opinions of each expert may substantially differ and as a result it is important to identify the differences, the reasons for this, and report back to the instructing lawyers for clarification and further direction. In preparing to provide expert evidence it would not be wise to stray beyond instructions as this would leave the Expert open to criticism.

The danger of the Joint Meetings is that they may prove to be a time wasting exercise and is merely used by the respective Experts as fishing expeditions to reinforce their case or find out more information about the other sides case. In order to avoid this the Experts should be required to enter into discussions with a positive attitude with a view to understanding respective parties' arguments, discuss options, and to facilitate agreement.

An Agenda for the discussions will need to be prepared to allow the experts to prepare for the meeting. It will also allow for the input of Counsel and lawyers to discuss strategy and ensure all issues are addressed.

Agreements and disagreements should be recorded at the meeting and, if there are many issues, a schedule of issues will be very useful to show what was agreed, disagreed and respective positions of the Experts. This will be an important part of the meeting and will allow for the Expert to prepare for the subsequent Hearing in the knowledge of likely attacks.

If the opinion of the respective experts is wide ranging, it is important for the experts to consider what evidence that the opposing expert has relied upon in forming that opinion and it may well be that there is additional evidence that has not been considered which could change the Expert's opinion. This process will allow an Expert to consider the other Expert's case and either fine tune its opinion or change it's mind to take into consideration the new evidence. If the Expert has prepared sufficiently, by considering all evidence and options, the Expert's opinion should be robust and should not need to change. However, the Expert's credibility may be called into question if there has been a change of mind without reason, which may then expose weaknesses later in the hearing in which opposing Counsel will seek to exploit in cross examination. But on the other hand it is equally important for the Expert not to be dogmatic and show the Tribunal that an objective approach is being taken and is always be prepared to consider new evidence. Therefore, thorough preparation and proper consideration of the facts should be undertaken in order to present a consistent approach from the outset.

Tribunal Hearing

The Hearing is a critical part of the Expert's duties and is the culmination of months of preparation that has included the preparation of the Expert Report and Joint Report that has been submitted as evidence. The outcome of the Hearing could result in success or failure of the Expert in his duties to the Arbitration Tribunal and therefore preparation is fundamental.



In preparing to give evidence the strengths and weaknesses of the Expert report should be known and the Expert should familiarise himself with the case evidence again especially if the Hearing is a long time after the Report has been drafted which is often the case.

A lingering concern is always that the opposing advocate will produce a silver bullet of new evidence that will destroy the opinion of an Expert as a worst case scenario. However, in reality a silver bullet should not exist if the Expert has prepared well throughout the process as all relevant evidence should have surfaced and been considered by the Expert and thereby reducing the risk of a silver bullet.

At all times the Expert's overriding duty to the Tribunal should be considered. Again and despite pressure to do so, the Expert should not act as his Client's advocate but should always maintain its overriding duty to present impartial opinion to the Tribunal. In doing so the Expert should maintain his opinion and emphasise the strengths of the case whilst addressing the weaknesses as best as possible so that the evidence is presented objectively and without bias.

Prior to the Hearing, the Expert's Instructions should be reviewed to ensure that the Expert's work is consistent and that the report has not strayed outside the expert's expertise or instructions. This may be an area where the opposing sides advocate will seek to discredit the expert's area of expertise and it is therefore important to be prepared for such questioning.

It is at this stage the Expert's credibility does not want to be brought into question due to an alleged conflict of interest and if there is an undisclosed conflict then this could be very embarrassing for the Expert. The Expert's preparation at the commencement stage will therefore prove invaluable.

Perhaps the most difficult and feared area of the Expert's role is to be cross-examined by Counsel who is out to expose the Expert's credibility in order to reduce the value of the Expert evidence and therefore being well prepared should provide the necessary protection.

The Expert must maintain a consistent approach to his opinion in answering questions about his Report. In cross examination an advocate will highlight apparent inconsistencies in the Report and the Expert's oral answers in an attempt to discredit the Expert.

The key points in preparing for cross examination include:

- A thorough understanding and navigational expertise of the Expert Report and evidence should be demonstrated to show that the Report has been drafted by the Expert (not an assistant) and that the case evidence has been reviewed.
- Evidence should be given in a clear and helpful manner and should always follow a logical manner so that it can be easily followed and understood by the Tribunal.
- Honesty should be maintained and the Expert should stay within the area of evidence and expertise. If mistakes are made then these should be corrected stating the reasoning behind the correction.
- Speculation should be avoided and if pressurised to do so the basis of speculation to support an answer should be clearly stated.
- Evidence should be given objectively which means that strengths of the evidence should be emphasised and weaknesses should not be ignored.



Conclusion:

The role of the Expert in Arbitration should not be taken lightly and thorough preparation will be required not only for the Hearing but for each stage of the Expert process including:

- Commencement and Lawyers Instructions
- Preparation of the Expert Report
- Participation in Joint Expert Meetings and the Joint Report
- The Hearing and most crucially cross-examination

Effective preparation will:

- Demonstrate knowledge and expertise in the matter in dispute
- Maintain credibility
- Ensure consistency
- And in conclusion provide convincing Expert Opinion