

CIArb EA Branch Annual Summer Seminar

**Expert evidence
The tribunal's perspective**

Peter Aeberli

Barrister, Chartered Arbitrator
Adjudicator, Mediator

Before the hearing

When are experts required?

Is expert evidence necessary

- Is the tribunal unable to draw its own inferences from the facts alleged and found by it?

Much expert evidence in construction disputes is fact management and presentation

- “When it becomes apparent that a dispute on detailed questions of fact is inevitable, each party should at an early stage select the main expert witness on whom he intends to rely” Keating para. 18-037.

Much expert evidence in construction disputes is little more than personal, hopefully informed opinion

Before the hearing

Managing experts

What issues require expert evidence?

§ How should they be defined?

How many experts?

What disciplines?

Party experts or tribunal experts?

- Advantages and disadvantages

When to decide?

- At the outset
- After exchange of case statements

Cost capping experts

Before the hearing

house experts (are they allowed)

Toth v Jarman [2006] EWCA Civ 1028

A conflict of interest does not automatically disqualify an expert from giving evidence. The key question is whether the expert's opinion is independent of the parties and the pressures of the litigation.

However, where an expert has a material or significant conflict of interest, the court is likely to refuse permission for his evidence to be adduced or to decline to act on his evidence (depending on the stage reached). So a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict as early a stage in the proceedings as possible. The other party and the court can then properly assess the conflict of interest.

Field v Leeds CC,(200) 17 EG 165 (CA)

A party's in-house surveyor could give expert evidence at trial, but the trial judge would have to see and decide for himself whether the expert understood the need for objectivity.

Before the hearing

Arbitrator assessors and experts

- Assessors and experts contrasted
- When, if ever, are they necessary?
- Inform parties if appointing
- Agree remuneration and ensure payment
- Set a clear brief (what to be considered/what to be done)
- Obtaining party input
- Provide parties with copies of expert/assessors' reports/opinions or details of such opinions if not written
- Give parties opportunity to consider & comment on expert/assessors' opinions/report
- Status of expert/assessor's opinion

Before the hearing

Directions for experts

Disciplines and issues to be addressed

Evidence conditional on providing reports

Formalities for reports (duty to tribunal)

- Civil Justice Council's Protocol for the instruction of experts

Timing of reports

- With or after Case Statements

Timing of meetings

- Before or after reports

Timing of joint statements

- With or after reports

At the hearing

Status of expert's reports

- Generally stand as evidence in chief subject to corrections
- Is it preferable for an expert to address the other expert's views in chief or in cross examination?
- The joint or tribunal expert
- The assessor

Timing of expert evidence

- After party's evidence of fact
- Back to back after all evidence of fact
- Together in witness conference

Witness conferencing

Minimum requirements

- Professional (non antagonistic) witnesses
- A clear written agenda for the evidence (tribunal/ witness prepared?)
- Well prepared tribunal

Procedure

- Tribunal chairs topic by topic discussion between witnesses
- Parties' representatives have limited opportunity to question witnesses at end of each topic.

Consequences

- Quicker than sequential evidence
- Greater tribunal insight into witnesses' evidence
- Some loss of party control over witnesses

Evaluating expert evidence

Is the expert's evidence sufficient to discharge the burden of proof in respect of the material allegation to which it relates: Taken alone, or taken together with other relevant evidence? Ask:

Is the expert competent to express the opinions they profess. Are they impartial or advocates (on this or all issues)?

Has the expert impartially addressed both party's cases, not just their own?

Has the expert produced any support for the opinions they profess, or are they just expressing personal opinions.

Is there any common ground between the experts?

Does the expert support aspects of the other party's case (in reports, when questioned)?

Are differences between experts due to the experts starting from different assumed facts? What, if any, are the genuine differences of expert opinion?

Evaluating expert evidence

it all or nothing, or can the tribunal pick and choose

Multiplex v. Mott Macdonald [2007] EWHC 20 (TCC).

“40. ... It is a common place of dispute resolution that the judge, arbitrator or adjudicator may come to a decision which is somewhat different from that advanced by any individual party.”

JD Weatherspoon v. Jay Mar Estates [2007] BLR 285 (TCC)

An arbitrator can use his own experience IN reaching his conclusion if it is of a kind and range which one would reasonably expect the arbitrator to have and it is used to evaluate evidence not to introduce new and different evidence. He cannot use his expertise to introduce new evidence, which he fails to allow the parties to address. He cannot make an award based on evidence or argument not presented to him or on a basis contrary to the common assumption of the parties as represented to him. He is entitled to arrive at his award by deploying the presented evidence in a materially different way to that which the parties' experts deployed it, provided the point was put into the arena by them or is a point with which they had an opportunity to deal.

Evaluating expert evidence

What tribunals look for (two examples of sudden death)

Skanska Construction v Thomas Egger [2004] EWHC 1748 (TCC)

Mr ... produced a report of some hundreds of pages supported by 240 charts. It was a work of great industry incorporating the efforts of a team of assistants in his practice. It was evident that the report ... was largely based upon factual matters digested for Mr by his assistants There were times when the impression was created that Mr ... was not entirely familiar with the details of the report, which he signed and presented. ... There were pressures of time upon him. This and the extent of reliance upon the untested judgment of others in selecting and characterising the data for input into the computer programme however impeccable the logic of that programme, adversely affects the authority of the opinion based upon such an exercise.

Evaluating expert evidence

Skanska Construction v Thomas Egger (continued)

... It is evident that the reliability of Mr ...'s sophisticated impact analysis is only as good as the data put in. The court cannot have confidence as to the completeness and quality of the input into this complex and rushed computer project. I preferred the evidence of Mr Simpson [who was a former employee of Skanska] as to programming and planning matters to that of Mr

Great Eastern Hotel v John Laing Construction [2005] EWHC 181 (TCC)

“I reject the expert evidence of ... as to the performance of Lain as contract manager. 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 Laings.”

Other proceedings

In mediation

- Expert as advocate (?) or advisor
- Expert as risk assessor
- Expert as predicator of outcome

In adjudication

- Are there any differences from arbitration?
- Need for reports
- Timing of reports
- Witness conferencing, if hearing