

Know Your Expert Witness - But Don't Know Him Too Well

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Expert witnesses are often required in arbitration and litigation proceedings. Their role is to provide independent, objective and unbiased evidence of their opinions in respect of specialist or highly technical matters. Their evidence is given to assist the arbitrator or the judge to arrive at a decision in respect of such matters that may well be outside their area of expertise.

Quantity Surveyors are often called to give expert evidence in respect of the quantum of construction disputes.

When a party, be they a contractor or an employer is involved in arbitration or litigation of a construction dispute they will generally enter into discussions with their solicitors or representatives as to who would be the most appropriate person or persons for them to appoint as their expert witnesses.

Quite naturally people will look to choose an expert with whom they feel comfortable, and this will often be someone whom they either know personally or have worked with in the past.

Well, in future, following the recent case of **Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC** (6 July 2001), parties and their solicitors or representatives may now have to consider more carefully the identity of the particular expert that they appoint, and, in particular, consider all past or existing relationships that the potential expert may have with the party concerned.

The case concerned a claim by the Corporate Trustees of the Roman Catholic Archdiocesan of Liverpool against a barrister, Mr. David Goldberg QC, for damages for negligence in respect of advice he had given to the diocese in relation to its

tax affairs between November 1989 and October 1996.

In the course of the proceedings the defendant, Mr. Goldberg, instructed an expert witness to give evidence on his behalf. The expert witness, Mr. Flesch QC, was also a barrister.

An issue arose as to the admissibility of the expert evidence of Mr. Flesch, because Mr. Flesch and the defendant, Mr. Goldberg, not only practiced as barristers out of the same set of chambers, but they were also good friends having known each other for over twenty five years.

Mr. Flesch had quite rightly drawn attention to the relationship in his report, but concluded that the relationship would not affect his evidence. He said (with remarkable frankness):

I do not believe that this (i.e. the relationship) will affect my evidence. I certainly accept that it should not do so but it is right that I should say that my personal sympathies are engaged to a greater degree than would probably be normal with an expert witness".

Whilst Evans-Lombe J accepted that Mr. Flesch's evidence qualified as that of an expert witness in accordance with Section 3 of the (United Kingdom) Civil Evidence Act 1972, but should nevertheless be declared inadmissible by reason of the witness's close friendship with the defendant.

The court considered that it was inappropriate as a matter of public policy that a person should act as an expert witness in a case where it was demonstrated that there existed a relationship between the proposed expert and the party calling him, which a reasonable observer might think

was capable of affecting the views of the expert, however unbiased the conclusions of the expert might be.

The judge considered that the question of the admissibility of the expert evidence of Mr. Flesch was a matter of general importance. Public policy, he said, required that justice must be seen to be done, as well as done, because the role of an expert witness was special, owing duties to the court, which must be discharged notwithstanding the interest of the party calling him, and in this respect he cited the case of *Whitehouse v Jordan* [1981] 1 WLR 246:

Whilst some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the Court should be, and should be seen to be the independent product of the expert un-influenced as to form or content by the exigencies of litigation."

The importance of this is that the test is not whether the conclusions of the expert were biased or not. Indeed in this case there was no suggestion that Mr. Flesch had been biased in his evidence. The test is that the evidence should be seen to be the independent product of the expert. In this case this translates into a test as to whether there existed a relationship between the expert and the party calling him which a

reasonable observer might think was capable of affecting the views of the expert.

The court held that if a reasonable observer might consider the relationship capable of affecting the expert's views then as a matter of public policy the evidence is inadmissible.

This case could have significant repercussions for contractors and employers when choosing their expert witnesses. A person who is a personal friend of one of the parties, or who is working for, or has worked for one of the parties in other matters may now not be appropriate as a choice because a reasonable observer might think that the existing relationship was capable of affecting the views of the expert.

Members of the Hong Kong Institute of Surveyors who receive appointments as expert witnesses would be well advised to report to solicitors or representatives of parties wishing to instruct them in very detailed terms any present or past dealings that they have, or have had, with the party wishing to instruct them, and consider very carefully whether they should accept the appointment if they feel that the relationship may fall foul of the decision in this case.

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