

The Difficulties of being an Expert Witness

By John B Molloy, LLB(Hons), BSc(Hons), FHKIS, FRICS, ACI Arb, Director of James R Knowles (Hong Kong) Limited

Surveyors of all disciplines are often called to give expert evidence in either arbitration or court proceedings. Yet it can be an extremely difficult and demanding role.

An expert witness is primarily under a duty to the judicial body to whom his evidence is to be given to provide independent, objective and unbiased evidence. However the pressures imposed on an expert from the party employing him, (and thus paying his fees) to lean towards them in giving his evidence, and not to be too fair to the other side, can make this a difficult task indeed.

The problem has been recognised for many years. As early as 1874, in Lord Abinger v. Ashton WR582, Sir George Jessel said:

“In matters of opinion I very much distrust expert evidence..... An expert is not like an ordinary witness, who hoped to get his expense, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias....?”

Experts over the years have generally recognised the problems with their appointment but have nonetheless endeavoured to do their best to remain unbiased.

However a number of recent cases indicate that some experts appear to have forgotten their primary duty and consider it inevitable, even acceptable that they will be biased towards their clients.

In particular, in Cala Homes and Another v. Sir Alfred McAlpine Homes East Ltd, (1995) 13-CLD-10-24, the expert witness was a Mr Goodall, an architect with considerable

experience of acting as an expert. He had in fact had over 120 appointments in such a capacity, and was additionally a member of the Committee of Construction Arbitrators. All in all a man who should have needed no reminders as to his role as expert witness.

However, in 1990 Mr Goodall had written a paper entitled The Expert Witness: Partisan with a Conscience. In this extraordinary article he had said:

“How should the expert avoid becoming partisan in a process which makes no pretence of determining the truth but seeks only to weigh the persuasive effects of arguments deployed by one adversary or the other..... If an expert witness is able to so present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration?”

The court took a very dim view of these comments which they clearly thought completely discredited his evidence. The judge, Mr. Justice Laddie commented:

“The whole basis of Mr Goodalls approach to drafting of an experts report is wrong. The function of a court of law is to discover the truth relating to the issues before it.....Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill?”

So in this case the courts have sent out a very clear message to expert witnesses, a reminder that their primary duty is to the court, and is a duty to provide independent unbiased evidence.

To avoid difficulties a Surveyor who is appointed as an expert witness would do well to read the guidelines on the duties of an expert set down by Cresswell J in the *Ikarian Reefer* 1993 FSR 563 which are:

- 1 Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- 2 An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise.

- 3 An expert witness should never assume the role of an advocate.
- 4 An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could not detract from his concluded opinion.

These guidelines have been included in the Practice Statement for Surveyors Acting as Expert Witnesses published in January 1997, by the Royal Institution of Chartered Surveyors, and members of that Institution are required to follow such Practice Note.

Members of the Hong Kong Institute of Surveyors who receive appointments as expert witnesses would be well advised to follow suit.

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